IN THE SUPREME COURT OF IOWA

No. 16-2015

ISRAEL MERLOS,
Plaintiff-Appellee

v.

BANEGAS CONTRACTING, LLC,
Defendant,

and

SFM INSURANCE,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HONORABLE DAVID PORTER
NO. CVCV046325

APPELLEE'S BRIEF AND REQUEST FOR ORAL SUBMISSION

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CERTIFICATE OF SERVICE

I certify that on April 6, 2017, I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following persons:

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This constitutes service of the document under Iowa Ct. Rule 16.315(1)(b).

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ROUTING STATEMENT

Retention by the Supreme Court is appropriate because this case presents a substantial issue of first impression. *See* Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE and STATEMENT OF FACTS

SFM Insurance ("SFM") appeals the district court's denial of its motion to vacate a default judgment based on a default arbitration decision of the Iowa Workers' Compensation Commissioner ("Commissioner").

The following is a timetable of the relevant facts in this matter:

4/12/2012	Israel Merlos filed an arbitration petition with the Commissioner. (App. 30).
4/16/2012	Merlos' attorney served the original notice and petition on SFM through certified mail. (App. 31–32).
4/16/1012	SFM acknowledged service of the original notice and petition. (*Id.*)
5/14/2012	Susan Kleiter, an SFM claims representative, sent a letter to Merlos at his attorney's office, acknowledging that it had received a first report of injury and advising him of his rights related to the work injury. (App. 42).
5/20/2012	Merlos's attorney wrote to Ms. Kleiter acknowledging her letter, confirming that she had already filed a petition, enclosed a copy of the petition, and asked how long SFM would need to file an answer. Merlos's attorney stated she would postpone seeking a default judgment for 2 weeks and asked that Ms. Kleiter contact her if she needed more time than that. (App. 43).
5/2012	Attorney Eric Westphal spoke with Merlos's attorney (App. 15). Mr. Westphal informed her that he represented SFM only, not Banegas, and that Banegas's insurance policy did not cover work injuries outside of Minnesota. (*Id.*).
8/31/2012	Merlos's attorney wrote to Mr. Westphal, informing him that she intended to pursue the workers' compensation claim in Iowa

and asked him to inform SFM that she would seek a default judgment if no answer was received within 30 days. (App. 17). A similar letter was sent to Banegas on 10/21/12.

9/13/2012 Mr. Westphal wrote a letter to Merlos' attorney stating 1) he represented only SFM, not Banegas, and 2) his understanding that Banegas did not have workers' compensation insurance coverage in Iowa (App. 18).

11/9/2012 Merlos' attorney sent a Notice of Intent to File Written Application for Default to SFM's attorney, Eric Westphal. (App. 34).[1] A separate copy of the Notice of Intent was not sent to SFM directly. SFM did not file an answer.

12/10/2012 Merlos filed a Motion for Default with the Commissioner. (App. 35–36).

4/12/2013 The Commissioner entered a default arbitration decision against SFM and Banegas, in favor of Israel Merlos. (Arb. Dec.).

9/12/2013 Merlos filed an application for entry of default in Polk County District Court. (App. 37).

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[1] Mr. Westphal stated in his affidavit that he did not receive the Notice of Intent to File for Default dated 11/9/2012. (App. 15). However, SFM does not dispute Attorney Hoefer's affidavit that it was mailed. Mailing of notice of a default to the defendant's address is sufficient to satisfy due process, even if the defendant never receives it. *Johnson v. Mitchell*, 489 N.W.2d 411, 414 (Iowa Ct. App. 1992); *see also* Iowa R. Civ. P 1.442(2) ("Service by mail is complete upon mailing").

Furthermore, Mr. Westphal admits to receiving Ms. Hoefer's letter of August 31, 2012 (App. 15), which also notified him of Plaintiff's intent to file a Motion for Default.

1/29/2014 The district court entered an Amended Judgment against both SFM Insurance and Banegas Contracting. (App. 7–10).

5/19/2016 SFM filed a Motion to Vacate the Judgment on the grounds that Merlos had sent copies of the Notice of Intent to File Written Application for Default to SFM's attorney, but did not also send the Notice to SFM directly. (App. 11–14).

11/4/2016 The district court denied SFM's Motion to Vacate Judgment. (App. 22–27).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT IOWA RULE OF CIVIL PROCEDURE 1.972(3) DOES NOT REQUIRE DUAL NOTIFICATION OF BOTH A PARTY AND THE PARTY'S ATTORNEY.

Preservation of Error

SFM raised the issue of the proper interpretation of Iowa Rule of Civil Procedure 1.972(3) in its motion to vacate below. (App. 11–14). The district court based its decision on this ground. (App. 22–27). SFM properly preserved this issue for review.

Scope and Standard of Review

Resolution of this case turns on the meaning of Iowa Rule of Civil Procedure 1.972(3). This court reviews the district court's interpretation of a statute or court rule for correction of errors at law. *In re Marriage of Eklofe*, 586 N.W.2d 357, 359 (Iowa 1998); Iowa R. App. P. 6.907. This court is

bound by the district court's findings of fact if they are supported by substantial evidence. *Fuller v. Iowa Dep't of Human Servs.*, 576 N.W.2d 324, 328 (Iowa 1998); Iowa R. App. P. 6.904(3)(a). "Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion." *Fuller*, 576 N.W.2d at 328 (quoting *Cole v. Staff Temps*, 554 N.W.2d 699, 702 (Iowa 1996)). This court is not bound by the district court's application of legal principles or conclusions of law. *Id.*

A. The district court properly found that Merlos's attorney followed the unambiguous requirements of IRCP 1.972(3)

Before a default may be entered, the party seeking default must certify that it sent written notice of the intention to apply for a default at least ten days prior to the filing of the application. Iowa R. Civ. P. 1.972(2). The party seeking default must comply with the following notice requirements:

> Notice. a. To the party. A copy of the notice of intent to file written application for default shall be sent by ordinary mail to the last known address of the party claimed to be in default. No other notice to a party claimed to be in default is required.
>
> b. Represented party. When a party claimed to be in default is known by the party requesting the entry of default to be represented by an attorney, whether or not that attorney has formally appeared, a copy of notice of intent to file written application for default shall be sent by ordinary mail to the attorney for the party claimed to be in default. This rule shall not be construed to create any obligation to undertake any affirmative effort to determine the existence or identity of counsel representing the party claimed to be in default.

Iowa R. Civ. P. 1.972(3). The notice must be substantially as set forth in Form 10 of Iowa Rule of Civil Procedure 1.1901, but no particular format or language is required. Iowa R. Civ. P. 1.972(3)(d).

It is not clear whether SFM contends (1) that rule 1.972(3) is unambiguous or (2) that it is ambiguous and canons of construction point to dual notification. Either way, SFM argues that the rule contains two separate requirements for proper service of the notice of intent: one notice to the party claimed to be in default, and if the party is represented, a second notice to the party's attorney—i.e., that the rule should be interpreted conjunctively.

The district court concluded that the rule unambiguously provides two mutually exclusive processes depending on whether the party in default is represented or not—i.e., that the rule should be interpreted disjunctively. (App. 24–27). The district court found that in sending a copy of the notice of intent to SFM's attorney by ordinary mail, Merlos's attorney did all that rule 1.972(3) requires in the circumstances. (App. 25). Merlos agrees with the well-reasoned decision of the district court and would urge this court to affirm the conclusion that rule 1.972(3) on its face does not require dual notification of represented parties.

When the meaning of the language is clear, the court will not search for meaning beyond the express terms of the statute or rule. *State v. Tesch*, 704 N.W.2d 440, 451 (Iowa 2005).

B. Even if Rule 1.972(3) is ambiguous, the rules of statutory construction resolve that ambiguity against a dual notification requirement.

In *State v. Luckett*, 387 N.W.2d 298, 301 (Iowa 1986), the court held that court rules are subject to the same rules of statutory construction as legislation. *See also Fisher v. Davis*, 601 N.W.2d 54, 60 (Iowa 1999). In interpreting statutes, "the primary goal is to give effect to the legislature's intent, as expressed by the language used in the statute." *Lange v. Iowa Dep't of Revenue*, 710 N.W.2d 242, 247 (Iowa 2006). In doing so the court considers the object sought to be attained; the circumstances surrounding enactment; the legislative history; the common law or former statutory provisions, including laws upon the same of similar subjects; the consequences of a particular construction; any administrative construction of the statute; and any preamble or statement of policy. *See* Iowa Code § 4.6; *see also IBP, Inc. v. Harker*, 633 N.W.2d 322, 325 (Iowa 2001). In construing statutes, the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said. Iowa R. App. P. 6.904(3)(m); *Harker*, 633 N.W.2d at 325. The court will not,

under the pretext of construction, extend, expand, or change the meaning of a statute. *Bank of America, N.A. v. Schulte*, 843 N.W.2d 876, 880 (Iowa 2014).

This case presents an issue of first impression in Iowa. Essentially the same argument was recently presented to the Court of Appeals, but the court determined that the appellant had not preserved the issue for review. *In re Marriage of Healey & O'Hare*, ____ N.W.2d ____, 2016 WL 6902324, at *3 (Iowa Ct. App. Nov. 23, 2016). Nevertheless, even though it did not decide the issue on the merits, the Court of Appeals suggested that it disagreed with SFM's argument in a footnote with the signal "*But see*" followed by the full text of Iowa Rule of Civil Procedure 1.972(3)(b). *Id.* at *3 n.2.

The Supreme Court addressed the inverse situation in *Wilson v. Liberty Mutual Group*, 666 N.W.2d 163 (Iowa 2003). In *Wilson*, the plaintiff sent a Notice of Intent to File for Default to the Defendant but not the Defendant's attorney. This fact, along with other circumstances, persuaded the court to uphold the district court's decision to set aside the default. *Id.* This finding is consistent with the plain language of Rule 1.972(3) which specifically requires that, when a party is represented, the attorney for the represented party should be served with the Notice of Intent.

It is also consistent with Judge Lavorato's dicta in *Central National Insurance Co. v. Insurance Company of North America*, 513 N.W.2d 750, 753 (Iowa 1994), discussed *infra* in Part I.B(3), which also emphasized the importance of service on the attorney of a represented party.

Similarly, in *Dolezal v. Bockes*, 602 N.W.2d 348, 350 (Iowa 1999), the Defendants were served with the original notice and petition, but neither the defendants nor defense counsel received notice of the intent to apply for default. On those grounds, the court reversed the trial court's entry of default judgment. *Id.* at 352.[2]

Both of these cases found that a default should be set aside if the represented Defendant's *attorney* is not served with Notice of Intent to File Default. Neither addresses the situation here, where the Defendant's attorney was admittedly notified, but did not pass that information on to his client. Nonetheless, the established rules of statutory construction point to the disjunctive interpretation put forth by the district court. In particular, this interpretation is supported by (1) other Rules of Civil Procedure on the same subject, (2) the ethical obligations of attorneys, (3) the object sought to be obtained by the rule and its "legislative" history, and (4) public policy.

[2] Notably, both *Wilson* and *Dolezal* were direct appeals of the default decision, not motions to set aside or vacate a default judgment, and neither decided whether the notice defects would render a default judgment void.

1. Rule 1.972(3)'s context within the Rules of Civil Procedure.

In construing statutes and court rules, courts may take into account "laws upon the same or similar subjects." Iowa Code § 4.6(4). If two statutes or rules pertain to the same subject, "each must be considered and the concept of *pari materia*, that statutes dealing with the same subject must be reconciled with one another, comes into play." *State v. Harrison*, 325 N.W.2d 770, 772 (Iowa Ct. App. 1982). Likewise, "the entire act must be considered and each section construed with the act as a whole and all parts thereof construed together." *Id.*; *see also State v. Boggs*, 741 N.W.2d 492, 503 (Iowa 2007) ("In construing statutes, it is also important to read the text of the statute in light of its overall context."). A presumption exists that the entire statute is effective, and courts must not attribute undue importance to any single or isolated portion. *See Iowa S. Utilities Co. v. Iowa State Commerce Comm'n*, 372 N.W.2d 274, 278 (Iowa 1985) (citing Iowa Code § 4.4(2), (3)).

In this regard, rule 1.972(3) must be reconciled with a separate provision of the Iowa Rules of Civil Procedure. Rule 1.442(1) provides that, absent a court order to the contrary, "*everything* required to be filed by the rules in this chapter . . . shall be served upon each of the parties." Iowa R. Civ. P. 1.442(1) (emphasis added). This includes "*every written notice*,

appearance, demand, offer of judgment, and similar paper." *Id.* (emphasis added). The rule also spells out a particular procedure for parties represented by an attorney. "Service upon a party represented by an attorney shall be made upon the attorney unless service upon the party is ordered by the court." Iowa R. Civ. P. 1.442(2). Rule 1.442 appears under the general heading, "Time, Filing, and Notice Requirements."

By its explicit terms, rule 1.442 applies to every notice, filing, or other document required by any other Rule of Civil Procedure, including notice of intent to file a written application for default under rule 1.972(3). The use of the term "shall" in rule 1.442(2) indicates a mandatory, not discretionary, requirement. *See* Iowa Code § 4.1(30)(a). Nothing in either rule qualifies the requirement to serve a party's attorney in the context of sending notice of intent to file for default. When read in conjunction with the overarching rule regarding service of notice, rule 1.972(3) is properly understood as providing one method for serving notice on unrepresented parties and another method for represented parties. Reading conjunctive language into rule 1.972(3) would contradict the directive in rule 1.442(2) that "[s]ervice upon a party *shall* be made upon the attorney unless service upon the party is ordered by the court." Iowa R. Civ. P. 1.442(2) (emphasis added). Such a

reading attributes undue importance to one isolated provision of the Iowa Rules of Civil Procedure. *Cf. Iowa S. Utilities Co.*, 372 N.W.2d at 278.

A fair reading of the Iowa Rules of Civil Procedure in their entirety makes clear that rule 1.972(3) does not require dual service of a notice of intent to file default on both the party in default and its attorney. By serving valid notice on the attorney for SFM Insurance, Merlos complied with rules 1.972(3) and 1.442.

2. The ethical obligations of attorneys.

Yet another consideration in statutory construction is the consequences of a particular construction. Iowa Code § 4.6(5). "Normally we read statutory language so it makes sense." *State v. Hoyman*, 863 N.W.2d 1, 14 (Iowa 2015). Imposing a requirement that attorneys be served, rather than the parties they represent, is a construction that makes intuitive sense. As members of a tightly regulated service profession, attorneys are subject to a high standard of professional responsibility.

Several ethical rules governing attorney conduct are relevant. Most notably, Iowa Rule of Professional Conduct 32:4.2 provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Iowa R. of Prof'l Conduct 32:4.2. The commentary to this rule makes clear that it applies to communications "with any person who is represented by counsel concerning the matter to which the communication relates." *Id.* cmt. 1.

The prohibition of communication with represented parties accords with other ethical obligations imposed on attorneys. Attorneys have a duty of communication with their clients. *See* Iowa R. of Prof'l Conduct 32:1.4. This duty includes the responsibility to inform clients and explain matters relating to the representation. *See id.* Iowa attorneys are also charged with duties of competence and diligence. *See* Iowa R. of Prof'l Conduct 32:1.1 (imposing a duty of competence, including maintenance of the legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation); Iowa R. of Prof'l Conduct 32:1.3 (requiring an attorney to "act with reasonable diligence and promptness in representing a client").

All of these ethical obligations make attorneys better recipients of service than their clients. When an attorney receive a pleading, notice, or other communication regarding a case, these duties exist to ensure that the client is promptly informed, receives a reasonable explanation from a competent legal advisor, and avoids taking action (or inaction) against his or

her best interests. These ethical directives, moreover, are in harmony with rule 1.442's requirement that service be on a party's attorney.

In light of attorneys' ethical obligations, service on a party's attorney provides a much more effective safeguard of a party's rights and interests than direct service on the party. A layperson may not fully understand the substance of a particular notice that he or she receives or the consequences of failing to take certain actions. The party may fail to inform his or her attorney of the notice or may assume the attorney received the notice and has taken the necessary action. *Cf. Central Nat'l Ins. Co. v. Ins. Co. of N. Am.*, 513 N.W.2d 750, 753 (Iowa 1994). By contrast, service on a party's attorney ensures that notice is given to the individual whose job it is to understand the legal implications of the notice, provide explanation to his or her client, advise the client of potential courses of action, and ensure compliance with deadlines and substantive requirements. Requiring additional service on the party does little or nothing to advance these interests.

3. Object sought to be obtained by Rule 1.972(3) and its "legislative" history.

In construing statutes and court rules, courts may take into account the object sought to be attained, the circumstances of enactment, and the legislative history. Iowa Code § 4.6(4). In determining legislative intent,

however, the key consideration is "the words chosen by the legislature, not what it should or might have said." *State v. Tarbox*, 739 N.W.2d 850, 853 (Iowa 2007).

The current version of rule 1.972 has its origins in a case decided in 1994 by the Iowa Supreme Court. In *Central National Insurance Co. v. Insurance Company of North America*, the court addressed a plaintiff's failure to provide any notice of its intent to seek a default. *Central Nat'l Ins. Co. v. Ins. Co. of N. Am.*, 513 N.W.2d at 753. At the time of *Central National*, no rule required plaintiffs to provide notice of their intent to seek default. *Id.* However, a local custom among the members of the bar in Polk County provided that a plaintiff's attorney ought to provide notice of intent to take default to an attorney or law firm known to regularly represent the defendant. *Id.* at 754. The plaintiff's attorney in the case did not provide such notice before obtaining a default, and the defendant later moved to set aside the default. *Id.* The court concluded that the undisputed facts of the case, as a matter of law, did not meet the definition of "unavoidable casualty" so as to justify setting aside the default under Iowa Rule of Civil Procedure 1.977 (formerly rule 236). *Id.* at 755.

In dicta, Justice Lavorato highlighted the ethical quandary plaintiff's attorneys faced in providing notice of intent to seek default—was it a

common courtesy that one ought to extend, or was it contrary to the client's interest? *Id.* at 756. Justice Lavorato suggested, "Perhaps it is time for this court to take the lead in this state and . . . make our default rule more fair and consistent by requiring notice before default is taken. This can be done by amendment to rule 236." *Id.* Justice Lavorato noted that Pennsylvania had already promulgated a rule requiring ten days' notice of intent to take default. *Id.*

The Pennsylvania rule to which Justice Lavorato alluded provides the following procedure for notice of intent:

> (2) No judgment of non pros for failure to file a complaint or by default for failure to plead shall be entered by the prothonotary unless the praecipe for entry includes a certification that a written notice of intention to file the praecipe was mailed or delivered
>
> > (i) in the case of a judgment of non pros, after the failure to file a complaint and at least ten days prior to the date of the filing of the praecipe to the party's attorney of record *or* to the party if unrepresented, or
> >
> > (ii) in the case of a judgment by default, after the failure to plead to a complaint and at least ten days prior to the date of the filing of the praecipe to the party against whom judgment is to be entered *and* to the party's attorney of record, if any.

Pa. R. Civ. P. 237.1 (emphasis added). Notably, the Pennsylvania provision for judgment by default—unlike Iowa's—explicitly requires notice to both the party in default and, if represented, the party's attorney.

Central National recommended requiring a notice of intent before default is taken, and Justice Lavorato cited the Pennsylvania rule as an example. Three and a half years later, on October 31, 1997, the Supreme Court promulgated the current rule 1.972(3) (formerly numbered rule 231(c)). *See In the Matter of Amendments to the Iowa Rules of Civil Procedure*, Report of the Supreme Court, at 145–46 (October 31, 1997). The sole commentary accompanying the new rule stated, "The purpose of this rule is to implement the 10-day notice provisions as suggested by" *Central National*. *Id.*

SFM contends that by "embracing *Central National*'s recommendation to adopt a notification rule *similar* to Pennsylvania's Rule 237.1 . . . rule makers clearly appear to have similarly intended to require dual notification to a party and its attorney." (Appellant's Br. at 16) (emphasis added). SFM is correct that Iowa rule makers intended to adopt a ten-day notice provision, "similar" to the Pennsylvania provision. However, the Iowa Supreme Court did not implement the *same* provision, instead adopting a rule with no clear conjunctive language to suggest that both subparagraphs are operative in the case of a represented party.

The Iowa Supreme Court could have made explicit its intention to require dual notification. Instead, after citing the Pennsylvania rules as a

model notice provision, and no doubt fully aware of the exact text of the Pennsylvania rule, the court deviated substantially from that rule in both substance and form, providing one rule for unrepresented parties and a distinct rule for represented parties. More telling than the court's reference to the Pennsylvania rule as a guide is its adoption of a notice-of-intent rule without the conjunctive connector utilized by Pennsylvania. As the district court correctly observed, "SFM's interpretation of the rule would require adding an 'and" between subparagraphs (a) and (b). In the alternative, SFM asks the Court to read into subparagraph (b) the following language: 'In addition to the requirements contained in subparagraph (a) . . . .'" (App. 26 n.11).

The decision of the district court properly recognized the canon of construction that "the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said." Iowa R. App. P. 6.904(3)(m); *see also Harker*, 633 N.W.2d at 325. This court should likewise refrain from reading into the rule words that do not appear on its face.

Defendants argue that, pursuant to *Central National*, dual notice to both the attorney and the client is required in order to "avoid windfalls to plaintiffs as a result of 'bungles.'" (Appellant's's Br. at 14). However, in

Central National, the "bungle" was that the Defendant's employees—*who were not attorneys*—misunderstood the significance of the petition, and therefore failed to notify their attorney of the lawsuit. *Central Nat'l Ins. Co. v. Ins. Co. of N. Am.*, 513 N.W.2d at 753. Attorneys, on the other hand, have both the knowledge of legal process and an ethical duty to protect their clients, and service on an attorney appropriately and adequately constitutes service on the party.

4. Public policy does not support a dual notification requirement.

SFM argues that public policy requires dual notification and hypothesizes that, without dual notification, plaintiffs may inadvertently notify an attorney who has been discharged. (Appellant's Br. at 16). SFM's argument fails for several reasons.

First, the hypothetical situation posed by SFM is not the situation in the present case. Attorney Westphal had specifically notified the plaintiff's attorney that he represented SFM in the Merlos case, and SFM does not argue that Westphal did not represent them in this matter. Unlike the situation in SFM's hypothetical, SFM had *not* discharged Westphal, and he continued to represent SFM. Indeed, if SFM *had* discharged Westphal, as hypothesized by SFM in its brief, Westphal would not be SFM's attorney,

and Rule 1.972(3)(b) would simply be inapplicable. SFM would be unrepresented, and service on SFM directly would be required.

Second, an equally strong public policy argument argues *against* allowing attorneys to contact the clients of represented parties directly. People hire lawyers in order to handle legal matters for them. Lawyers, in turn, have an expectation that opposing attorneys will *not* contact their clients directly, and that communications between opposing parties will be done through their attorneys. *Cf.* Iowa R. of Prof'l Conduct 32:4.2. This expectation protects all participants in the legal system from any concern about an appearance of over-reaching on the part of an opposing attorney. Requiring a notice of intent to file for default to be served directly on a represented party contravenes this prohibition against direct contact between a represented party and their attorney.

Finally, SFM's argument ignores the fact that attorneys owe their clients a duty to inform them of law suits filed against them, and to act in the best interests of their clients. *Cf.* Iowa R. of Prof'l Conduct 32:1.4. SFM's argument would excuse attorneys from this obligation, and place on *represented clients* the obligation to recognize the legal significance of papers filed against them, and to take appropriate action. This outcome is

contrary to the spirit of the rule and the problem which Justice Lavorato attempted to address in *Central National*'s dicta.

C. Both SFM and its attorney did have notice of Merlos's intent to file an application for default.

Merlos urges a different interpretation of Iowa Rule of Civil Procedure 1.972(3) than SFM, but even if SFM is correct, Merlos did provide dual notice prior to obtaining the default judgment. Rule 1.972(3)(d) requires the notice of intent to be "substantially as set forth in rule 1.1901, Form 10." This form provides the following notice to the party in default:

> You are in default because you have failed to take action required of you in this case. Unless you act within ten days from the date of this notice, a default judgment will be entered against you without a hearing and you may lose your property or other important rights. You should seek legal advice at once.

Iowa R. Civ. P. 1.1901, Form 10.

The notice that Merlos sent to Mr. Westphal on November 9, 2012, followed this form verbatim. (App. p. 34). Prior to this notice, Merlos's attorney had corresponded with Mr. Westphal on August 31, 2012, advising him that she intended to seek a default in Iowa if no answer was forthcoming within thirty days and asking him to inform SFM of this intent. (App. 17). Even prior to this, and before she had been contacted by Mr. Westphal, Merlos's attorney had corresponded directly with Ms. Kleiter, the SFM

representative who had contacted her about the matter. (App. 41–43). On May 20, 2012, Merlos's attorney sent a letter to Ms. Kleiter confirming that Merlos had filed a petition with the Commissioner, enclosing a copy of the petition, offering an additional two weeks for SFM to file an answer, and asking Ms. Kleiter to contact her if SFM required additional time to respond. (App. 43).

These letters contain clear notice of the intention to file an application for default. Each notice contained substantially the same information as the Form 10 notice. Both letters were sent "after the default occurred," which was twenty days after service of the original notice and petition on SFM on April 16, 2012. (Proof of Service); *see also* Iowa R. Civ. P. 1.972(2); Iowa R. Civ. P. 1.303(1). Both letters were also sent "at least ten days prior to the filing of the written application for default." Iowa R. Civ. P. 1.972(2). Merlos ultimately filed his application for default on December 10, 2012, nearly eight months after service of the original notice and petition.

As this court has recognized:

> Under current practice any defendant who is given a notice which actually is sufficient to apprise of those matters described in the rules, and who is not prejudiced by any technical flaws in the form of notice, has nothing to gain and much to lose by challenging it. The question in considering flaws or technical defects in form is whether the defendant has been misled.

Jontz v. Mahedy, 293 N.W.2d 1, 4 (Iowa 1980). This correspondence, together with the form notice of intent sent to Mr. Westphal, refutes any notion that SFM or its attorney was misled, or was not aware of Merlos's intent to file an application for default, or lacked adequate time to respond. Therefore, Merlos complied with rule 1.972(3), even under the interpretation SFM urges.

II. ANY ALLEGED DEFECT IN THE DEFAULT PROCEDURE DID NOT RENDER THE JUDGMENT VOID SO AS TO PERMIT A MOTION TO VACATE OUTSIDE THE ONE-YEAR LIMITATIONS PERIOD.

Preservation of Error.

In resistance to SFM's motion to vacate the judgment, Merlos argued that even if Iowa Rule of Civil Procedure 1.972(3) required dual notification to both a party and the party's attorney, the failure to send notice to SFM directly was not so severe a defect as to void the judgment. In rejecting the SFM's motion to vacate, the district court did not have occasion to rule on this question, having concluded that no procedural defect existed at all in the default proceedings. (App. 24–25).

Although the district court did not take up this issue, Merlos properly preserved it for review by arguing the issue in his resistance to SFM's motion. "The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the

court was aware of the claim or issue and litigated it." *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002). A prevailing party is not required to cross-appeal to preserve error on a ground urged but ignored or rejected by the district court. *Venard v. Winter*, 524 N.W.2d 163, 165 (Iowa 1994); *see also Hastings v. Espinosa*, 340 N.W.2d 603, 608 (Iowa Ct. App. 1983) (holding that even if the trial court hearing the motion to vacate "makes no findings of fact or bases its ruling on a different ground, we will uphold the ruling if any proper ground appears in the record").

Scope and Standard of Review.

An action to vacate a judgment is at law. *In re Marriage of Cutler*, 588 N.W.2d 425, 429 (Iowa 1999). The district court's findings of fact have the force of a jury verdict and are binding on a reviewing court if supported by substantial evidence. *Id.*; *In re Marriage of Kinnard*, 512 N.W.2d 821, 823 (Iowa Ct. App. 1993). The district court has "wide discretion" in ruling on the motion to vacate, and its ruling should be disturbed on appeal only if it abused that discretion. *Hastings*, 340 N.W.2d at 608; *Kreft v. Fisher Aviation, Inc.*, 264 N.W.2d 297, 303 (Iowa 1978).

The movant carries the burden to plead and prove good cause for vacating the judgment and to establish a valid cause of action or defense to the action in which the judgment was rendered. *Hastings*, 340 N.W.2d at

608; The quantum of evidence necessary to support a motion to vacate a judgment is greater than that necessary to set aside a default under Iowa Rule of Civil Procedure 1.977 and its sixty-day time frame. *Home Fed. Sav. & Loan Ass'n of Harlan v. Robinson*, 464 N.W.2d 894, 895 (Iowa Ct. App. 1990).

Defendant's Motion to Vacate was not Timely.

SFM filed its Motion to Vacate the judgment on May 18, 2016, over two years from the date of the Amended Judgment. However, Iowa Code § 624A.1 provides that an action to vacate or modify a judgment "must be commenced within one year after the judgment or order was made, unless the party entitled thereto is a minor or person of unsound mind, and then within one year after the removal of such disability." Iowa Code § 624A.1; *see also* Iowa R. Civ. P. 1.1013(1).

A limited exception exists to the one-year-from-judgment deadline for motions to vacate. Iowa courts have recognized that compliance with the one-year time period is not necessary if the judgment is void, as opposed to merely voidable. *See Rosenberg v. Jackson*, 247 N.W.2d 216, 218 (Iowa 1976). A merely voidable judgment may not be challenged outside the one-year timeframe. *Holmes v. Polk City Sav. Bank*, 278 N.W.2d 32, 35 (Iowa 1979).

A judgment is void if it results from a failure to comply with procedural requirements that are conditions precedent to a proper exercise of jurisdiction by the court. *Halverson v. Hageman*, 92 N.W.2d 569, 573 (Iowa 1958). "A judgment is void when the court lacks jurisdiction of the parties or of the subject matter, lacks the inherent power to make or enter the particular order involved, or acts in a manner inconsistent with due process of law." *Opat v. Ludeking*, 666 N.W.2d 597, 606 (Iowa 2003) (quoting 46 Am.Jur.2d *Judgments* § 31, at 392 (1994)). To meet this standard, a notice defect must be so severe as to amount to no notice at all. *Halverson*, 92 N.W.2d at 573; *see also Rhodes v. Oxley*, 235 N.W. 919, 920 (Iowa 1931) (holding that "the question is not whether the notice is defective, but whether it is so defective as to be utterly void").

By contrast, a judgment is not void "if the defects in the notice are mere irregularities which do not prevent its constituting legal notice to defendant." *Halverson*, 92 N.W.2d at 573; *Opat*, 666 N.W.2d at 606. Such a judgment is voidable upon a showing of prejudice. *Holmes*, 278 N.W.2d at 34. This court has "adopted a rule of liberal construction to avoid defeating an action because of technical and formal defects, which could not reasonably have misled defendant." *Parkhurst v. White*, 118 N.W.2d 47, 49 (Iowa 1962). A motion to vacate a merely voidable judgment filed outside

the one-year period must be denied. *See Stewart v. Hall*, 130 N.W. 993, 994 (1911) .

No Iowa court has ever held that a failure to send a formal default notice of intent to a represented party in addition to its attorney—if a procedural defect at all—renders a default judgment void, as opposed to merely voidable. On the contrary, a survey of representative Iowa cases demonstrates that a finding that a judgment is void must be based on a defect in the *original* notice of the proceeding. For example, in *Halverson v. Hageman*, the plaintiff served an original notice without a copy of the petition, failed to file the petition in the time provided by rule, required the defendant to appear in less time than the rules afforded him, failed to provide the defendant with the address of the plaintiff's attorney, and took judgment before the rules allowed. *Halverson*, 92 N.W.2d at 573–74. Under these circumstances, the judgement was void—the errors in the original notice deprived Defendant of proper notice that there was a lawsuit and its basis. As a result, the Court never had jurisdiction over the Defendant. *Id.* at 574.

Similarly, in *Emery Transportation Co. vs. Baker*, 119 N.W.2d 272, 276–277 (Iowa 1963), service of the original notice was found insufficient when the notice was neither delivered nor rejected by the nonresident

addressee-defendant. The trial court therefore never acquired jurisdiction, and the judgment was void. In *Dimmitt v. Campbell*, 151 N.W.2d 562, 565 (Iowa 1967), the nonresident defendant never received the original notice. On that basis, the court found that the trial court lacked jurisdiction, and the judgment was void. In *Rosenberg v. Jackson*, 247 N.W.2d 216 (Iowa 1976), relied on by SFM, a recently married teenage defendant residing outside of Iowa was never served with the original notice, but a guardian ad litem accepted service and entered a general denial on her behalf. The court concluded that if the jurisdictional questions were resolved in the defendant's favor, the judgment would be void, and a motion to vacate could proceed outside the one-year limitations period. *Rosenberg*, 247 N.W.2d at 217–18.

By contrast, in *Claeys v. Moldenschardt*, 148 N.W.2d 479, 481–82 (Iowa 1967)—a case that mirrors the facts of this appeal—the court found "no merit" in the claim that the trial court lacked jurisdiction to enter a default judgment when the defendant was personally served with the original notice and petition, filed no appearance, and failed to move or plead in response. In *Holmes v. Polk City Savings Bank*, the defendants were served with an original notice with "obvious infirmities," including a failure to adequately advise the defendants when or where to appear and a "wholesale

failure" to include a directive to defend the suit. *Holmes*, 278 N.W.2d at 34. Despite these defects, the court found the judgment merely voidable and required any motion to vacate to be filed within one year of the judgment. *Id.* at 35. Similarly, a failure to join all proper parties did not render the judgment between the parties actually joined void for want of jurisdiction; the judgment was merely voidable and subject to the one-year limitations period. *Stewart*, 130 N.W. at 994.

These cases shed revealing light on the relative parameters of void and voidable judgments and the procedural defects that can produce them. Each case that has held a judgment to be void has done so on the basis of a defect in the *original* notice of the proceeding. *See Halverson*, 92 N.W.2d at 573–74 (litany of procedural errors surrounding original notice); *Emery Transp. Co.*, 119 N.W.2d at 276–277 (original notice not received); *Dimmitt*, 151 N.W.2d at 565 (same); *Rosenberg*, 247 N.W.2d at 217–18 (same). Even in cases with defective original notice, the defects were not sufficient to void the resulting judgment unless they were so substantial as to be fatal to the court's exercise of jurisdiction. *See Holmes*, 278 N.W.2d at 34. No Iowa case has found that a defect in the notice-of-intent procedure of rule 1.972(3) voids the resulting judgment.

The procedural history of this case reveals no jurisdictional deficiency. Merlos filed his petition with the Commissioner on April 12, 2012. (App. 30). Merlos served SFM with the original notice and petition by certified mail on April 13, 2012. (App. 32). An agent of SFM acknowledged receipt of the original notice and petition on April 16, 2012. (App. 31). No defect can be said to exist in the form of this notice, as it was printed on the form established by the Commissioner, informing SFM of the action against it, its duty to move or plead, and the consequences of failing to respond. (App. 30); *see also* Iowa Admin. Code r. 876-4.6.

After serving SFM with the original notice and petition, Merlos's attorney received a letter from SFM's representative, Ms. Kleiter, acknowledging the claim and enclosing a first report of injury. (App. 41–43). Merlos's attorney responded with another copy of the petition on which SFM was now in default. (App. 43). Although the twenty-day deadline of rule 1.303(1) had passed, Merlos's attorney offered to postpone the application for default for an additional two weeks and asked SFM to contact her if it needed more time than that. (*Id.*).

Sometime in May 2012, about the same time of the correspondence with Ms. Kleiter, Merlos's attorney spoke with Mr. Westphal about the

claim. (App. 15). By Mr. Westphal's own admission and affidavit, he was specifically retained by SFM Insurance to represent it "in a workers' compensation claim filed by Israel Merlos." (*Id.*). Three months later, after conferring with a Minnesota attorney, Merlos's attorney informed Mr. Westphal that she intended to pursue the claim in Iowa and asked him to "[p]lease let your client know that we will file a motion for default if we have not received an answer within thirty days." (App. 17). Mr. Westphal wrote in response and reiterated SFM's position that Banegas did not have workers' compensation insurance coverage in Iowa. (App. 18). Neither Mr. Westphal nor SFM ever filed an answer or dispositive motion alleging this lack-of-coverage defense. *Cf.* Iowa R. Civ. P. 1.971(1) (defining default to include a failure to file a timely answer or motion).

On November 9, 2012—well past the gratuitous deadlines offered to SFM for a response—Merlos's attorney sent a notice of intent to SFM's attorney as required by rule 1.972(3). (App. 34; App. 40). After affording SFM triple the required time to correct its default, and nearly eight months after filing the petition, Merlos's attorney filed a written application for default with the agency, certifying that the notice of intent had been mailed to SFM's attorney. (App. 35–36). After holding an evidentiary hearing, the

Commissioner issued an arbitration decision awarding benefits to Merlos. (Arb. Dec.).

As this case indicates, even if rule 1.972(3) does require dual notification of the intention to take default, and even if Merlos's attorney's extensive correspondence with both SFM's attorney and SFM's claims adjuster prior to taking a default does not satisfy any dual notification requirement, failure to serve a represented party in addition to the party's attorney is not a jurisdictionally fatal defect that would void a judgment more than two years after its entry. Unlike the defendants in *Emery Transportation*, *Dimmitt*, and *Rosenberg*, SFM received original notice. Unlike the notice in *Halverson*, the original notice was not riddled with fatal defects, but printed on the form established by the Commissioner. Unlike the *Dolezal* case, where neither the defendants nor their attorneys had *any* notice of the plaintiff's intention to file for default, both SFM and its attorney had several months' notice of Merlos's intent—through both the form notice of intent sent to Mr. Westphal in November 2012 and the letters to SFM and Mr. Westphal that included substantially the same notice. *Cf. Jontz*, 293 N.W.2d at 4 ("The question in considering flaws or technical defects in form is whether the defendant has been misled.").

This is not a case of a "self-evident total absence of jurisdiction" for which no additional showing is needed to vacate a judgment. *Dimmitt*, 151 N.W.2d at 565. As the district court noted, "In short, Mr. Westphal, on behalf of SFM, engaged in ongoing dialogue with Attorney Hoefer for the better part of seven (7) months before she filed a Notice of Intent to File Written Application for Default." (App. 25). Merlos provided notice to SFM, both directly and through its attorney, of his intent to seek a default judgment if no answer was forthcoming. After extensive correspondence and ample time to respond, SFM's specifically retained attorney elected not to respond with an answer or dispositive motion but to ignore the claim altogether. *Cf. Krugman v. Palmer Coll. of Chiropractic*, 422 N.W.2d 470, 475 (Iowa 1988) ("But '[a] litigant chooses counsel at his peril, and here, as in countless other contexts, counsel's disregard of his professional responsibilities can lead to extinction of his client's claim.'").

Based on this sequence of events, and the ample opportunity afforded to both SFM and its attorney to respond to the petition before Merlos filed an application for default, SFM has not carried its significant burden to establish good cause to vacate the judgment in the court below. Accordingly, the district court acted well within its "wide discretion" in

denying SFM's motion to vacate. *Cf. Hastings*, 340 N.W.2d at 608; *Kreft*, 264 N.W.2d at 303.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this court affirm the ruling of the district court that rule 1.972(3) does not require dual notification of a represented party and that party's attorney. If the court does find that dual notification is required, Appellee respectfully requests this court find that Appellee did provide adequate notice to Appellant and its attorney and that any deviation from a dual notification requirement in this case did not render the judgment void so as to permit vacation outside the one-year limitations period.

REQUEST FOR ORAL SUBMISSION

Appellee respectfully requests the opportunity to be heard in oral argument.

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CERTIFICATE OF COSTS

I hereby certify that the true and actual cost for printing the foregoing Proof Brief of Appellant was $0.

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2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(*e*) and the type-style requirements of Iowa R. App. P. 6.903(1)(*f*) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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