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IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 24-0298
LINN COUNTY CASE NO. EQCV100043

MARTIN ROBINSON, THOMAS ROBINSON, LAURA ROBINSON AND PAULA ROBINSON

v.

CENTRAL IOWA POWER COOPERATIVE, COGGON SOLAR, LLC, AND KENNETH M. LUDOLPH AND DEANICE R. LUDOLPH, DEFENDANTS

Appeal from the Iowa District Court for Linn County
The Honorable Ian Thornhill, Judge

APPELLANTS' BRIEF
AND
REQUEST FOR ORAL ARGUMENT

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I certify that on the 24th day of May, 2024 I electronically filed this document with the Clerk of the Supreme Court of Iowa. I certify that all participants in this appeal are registered electronic filing users and that service will be accomplished by this electronic filing.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The Robinsons Have a Dominant Easement Right to Drain Their Property Through Existing Tile Over Their Servient Neighbor's Property and This Servient Tenant Cannot Unilaterally Cut or Divert This Tile.

II. The Robinsons Have a Right to Enter a Servient Neighbor's Property to Repair the Tile Which Drains Their Properties.

III. CIPCO Has Created a Nuisance on Its Property.

IV. The Trial Court Erred When It Ruled that The Robinsons Have Not Adequately Proven Their Damages.

V. CIPCO Cannot Escape Responsibility for the Damage It Caused to The Robinsons' Tile and Drainage by Blaming its Contractors.

VI. The Fee Award Should be Reversed.

NATURE OF THE CASE

A. Statement of What is Being Appealed. On appeal in this matter are two summary judgment decisions, a ruling on a motion to expand, a quiet title judgment and an attorney fee award, all of which were adverse to Appellants/Plaintiffs. (D0077, Ruling Re: Motion for Summary Judgment and Motion to Compel, 9/13/2023); (D0145, Ruling (on Motion to Reconsider), 10/11/2023); (D0157, Ruling (Re: Second MSJ), 12/28/2023); (D0158, Judgment Quieting Title, 1/3/2024); (D0175, Ruling and Order on Defendants' Fee Application, 3/6/2024)

B. Type of Case Being Appealed. This is a drainage dispute. The central issue is whether Martin and Paula Robinson as the owners of "uphill" properties may continue to drain their properties through a tile along the route historically used to drain their properties or whether the owner of a "downhill" property may instead order the cutting and diversion of this well-functioning tile system to a location where Martin and Paula's drainage is impaired. Further, this rerouting was done even though the "downhill" property owner, Central Iowa Power Cooperative, one year earlier agreed in a subdivision document to "perpetually maintain" this tile system. (D0002, Petition, 6/24/2022)

C. Disposition of the Case Below. The trial court by summary judgment ruled that Central Iowa Power Cooperative, the "downhill" property owner, properly ordered the cutting and diversion of the tile, that The Robinsons have no right to

repair or maintain this tile, that The Robinsons have no right to retain their drain route under the relevant subdivision documents and made other rulings adverse to them, including the assessment of over $200,000 in attorney fees. This appeal followed. (D0077, First MSJ Ruling, 9/13/2023); (D0145, 1.904 Ruling, 10/11/2023); (D0157, Second MSJ Ruling, 12/28/2023); (D0175, Ruling re: Fee Application, 3/6/2024)

D. Course of Proceedings.

1. Martin, Thomas, Laura, and Paula Robinson ("The Robinsons") filed their petition alleging violation of their drainage rights, the existence of a nuisance and other claims on June 24, 2022. (D0002, Petition, 6/24/2022). Defendants Central Iowa Power Cooperative and Coggon Solar, LLC (jointly "CIPCO") and Defendants Kenneth Ludolph and Deanice Ludolph ("The Ludolphs") filed answers. (D0011, CIPCO Answer, 7/18/2022); (D0015, Ludolph Answer, 8/15/2022)

2. On July 8, 2022 CIPCO pursuant to Iowa Code §649.5 sent a request for a purported quitclaim deed to The Robinsons. By this requested deed The Robinsons would convey to CIPCO:

> **…all our right, title, interest, estate, claim and demand, including but not limited to any easement for a particular route of drainage tile, in the following tract of real estate in Linn County, Iowa, subject only to the reservation of the Fenceline and Drainage Deed Restriction at Book 8910 Page 400, extending any natural surface waterway or tile drainage**

> **system for adjoining properties to be perpetually maintained and protected from any obstruction or any type of blockage which would cause damage to adjoining properties and providing other enumerated restrictions… in or to the CIPCO substation property.**

(D0160, Defendants' Fee Application Ex. 3, 1/19/2024)

3. On November 4, 2022 CIPCO filed a Motion to Amend their Answer to assert counterclaims against The Robinsons. (D0020, Motion to Amend, 11/4/2022)

4. On November 18, 2022 this Motion to Amend was granted. (D0022, Order, 11/18/2022)

5. On August 15, 2023 CIPCO filed their Motion for Partial Summary Judgment. This motion sought summary judgment on the issue of whether The Robinsons have the right to drain their properties along a particular path. (D0046, CIPCO MSJ, 8/15/2023). The Ludolphs filed a similar motion, also on August 15, 2023. (D0042, Ludolph MSJ, 8/15/2023). These motions were timely resisted by The Robinsons. (D0068, Resistance to Ludolph MSJ, 8/29/2023); (D0065, Resistance to CIPCO MSJ, 8/29/2023)

6. On September 13, 2023 the trial court granted both Motions for Partial Summary Judgment. (D0076, Order, 9/13/2023)

7. On September 18, 2023 The Robinsons filed a Rule 1.904 Motion to Expand and Reconsider the court's summary judgment ruling. (D0087, 1.904 Motion, 9/18/2023)

8. On October 11, 2023 the trial court denied The Robinsons' 1.904 Motion. (D0145, 1.904 Ruling, 10/11/2023)

9. Also on October 11, 2023 CIPCO filed a second Motion for Summary Judgment on the issues of whether CIPCO could escape liability because it was its hired contractor who cut and diverted The Robinsons' tile and not CIPCO itself and that The Robinsons could not prove their damages. This motion was timely resisted by The Robinsons. (D0148, CIPCO Second MSJ, 10/11/2023); (D0152, Resistance to Second MSJ, 10/26/2023)

10. On December 28, 2023 the court granted this second Motion for Summary Judgment. This ruling had the effect of dismissing all of The Robinsons' claims. (D0157, Order Granting Second MSJ, 12/28/2023)

11. On January 3, 2024 a quiet title judgment was entered by the district court. (D0158, Judgment Quieting Title, 1/3/2024)

12. On January 19, 2024 CIPCO filed its Application for Attorney Fees. (D0160, Fee Application, 1/19/2024)

13. On February 1, 2024 The Robinsons resisted this fee application. (D0163, Fee Resistance, 2/1/2024)

14. Following the denial of The Robinsons' request for an interlocutory appeal CIPCO filed a dismissal of its counterclaim on February 14, 2024. This

dismissal constituted a final order in this case. (D0166, Dismissal; 2/14/2024) *See*, Valles v. Mueting, 956 NW2d 479, 484-485 (Iowa 2021).

15. On February 21, 2024 The Robinsons timely filed their first Notice of Appeal. (D0169, Notice of Appeal, 2/21/2024). This appeal was designated as Appeal No. 24-0298.

16. On March 6, 2024 the court granted CIPCO's fee application and assessed fees in excess of $200,000 against The Robinsons. (D0175, Ruling Re, Fees; 3/6/2024)

17. On March 8, 2024 a second notice of appeal was filed by The Robinsons. This second appeal was primarily directed to the fee award and was designated as Appeal No. 24-0421. (D0176, Notice of Appeal, 3/8/2024)

18. On March 18, 2024 The Robinsons filed in the Supreme Court a motion to consolidate these two appeals. (Motion to Consolidate, 3/18/2024)

19. On March 29, 2024 this motion to consolidate was granted and it was ordered that future filings be made in Appeal No. 24-0298. (Order, 3/29/2024)

C. Facts

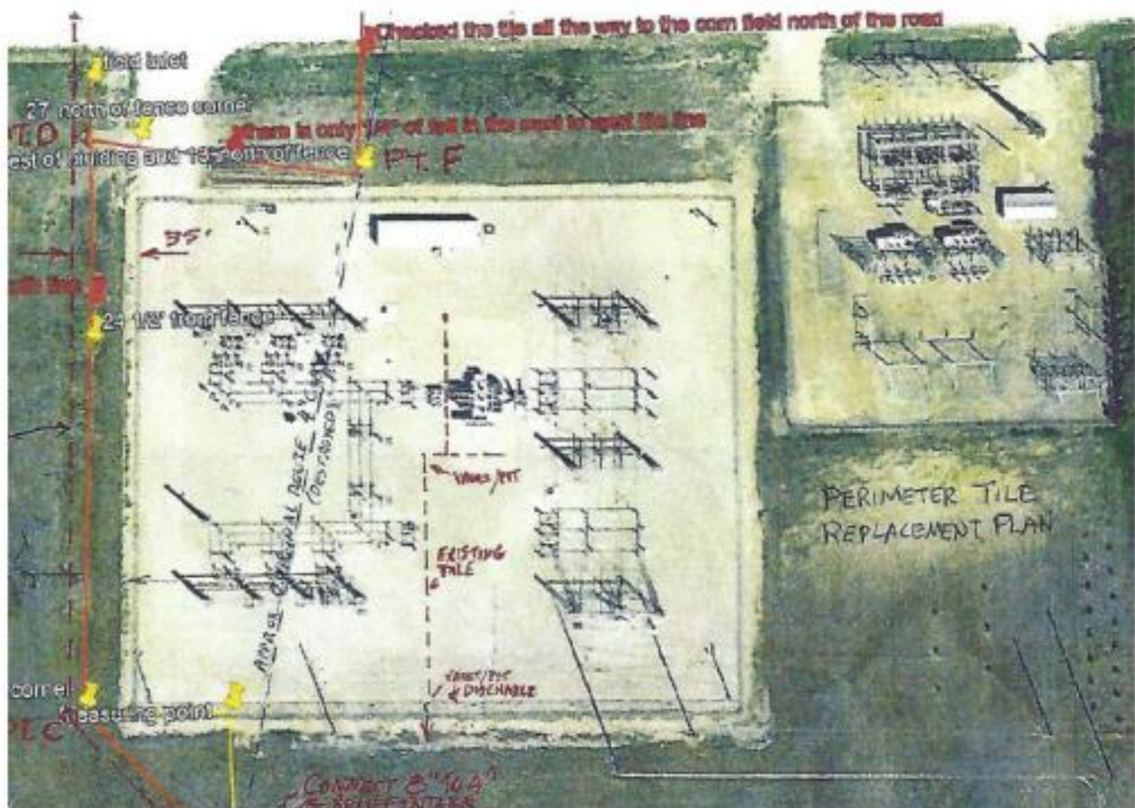
1. The properties and tile line at issue in this matter are shown on the following photograph:

- Plaintiff Martin Robinson's land ("R"), owned by Mary Lu until 2018
- Plaintiff Paula Robinson's land ("PR") and her home, previously owned and occupied by their mother, Mary Lu Robinson, until her death in 2018
- Defendant Ludolphs' land is marked ("L"), which surrounds their home
- Defendant CIPCO's property and the 2014 substation (red outline)
- Tom and Laura Robinson's land and home ("TR")

CIPCO owns property on which it has built a substation. This substation is located in the top center of the above photograph and has a lighter background. Paula and Martin Robinson own the farmland which is across a public highway and north of the CIPCO property. The short red line which enters CIPCO's substation from the top or north represents the approximate

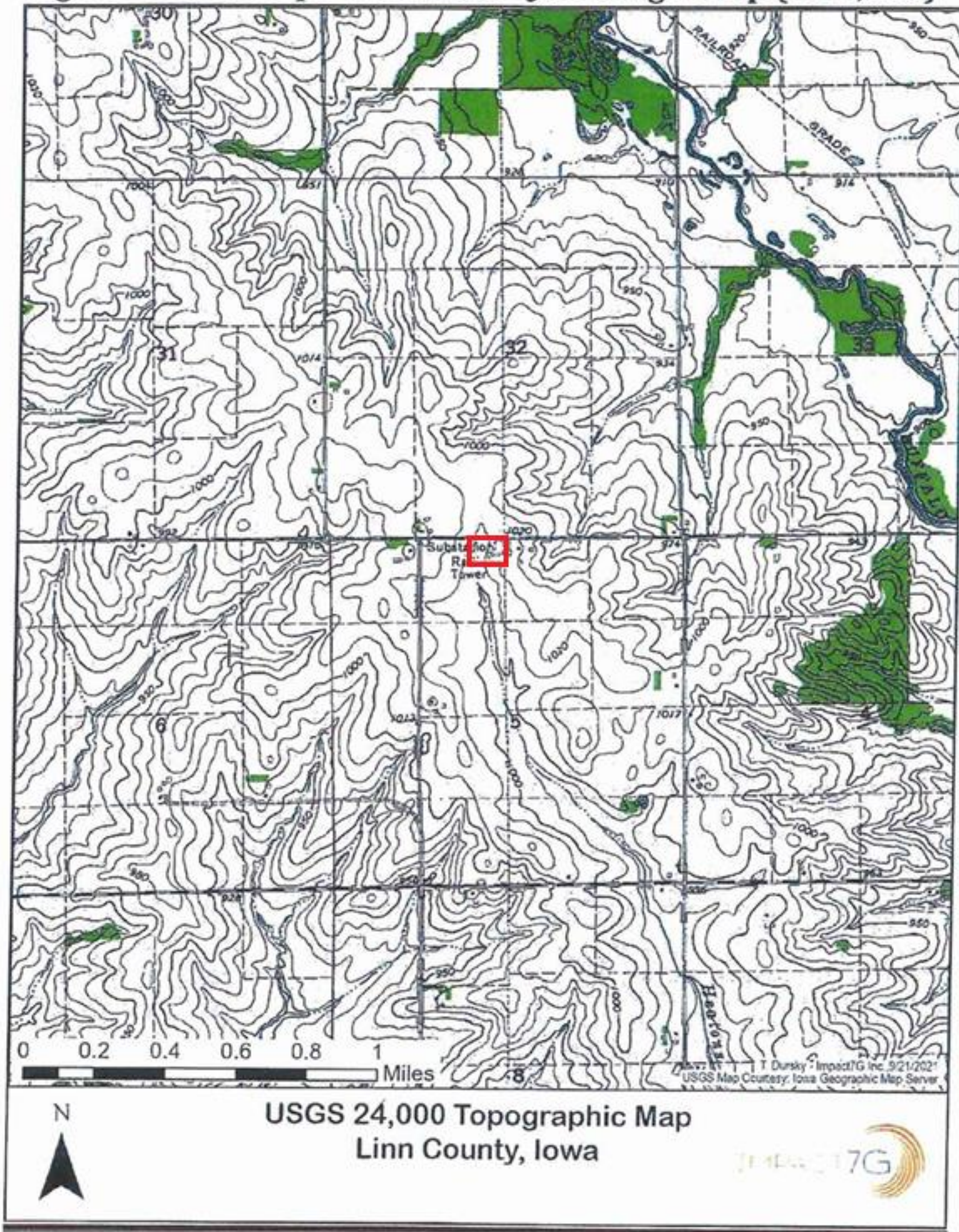
point where Martin and Paula Robinson's tile line runs under the public road and then enters CIPCO's property. The green line represents where this tile exits the substation and then proceeds southerly towards Heaton's Creek. (D0041, Defendants' (Ludolphs' Appendix re: MSJ at p. 18, 8/15/2023)

2. In the below photograph the dashed line marked "Approx. Original Route (Destroyed)" depicts the original direct route of Martin and Paula Robinson's tile under CIPCO's substation. The location of their now-diverted line is shown by the yellow "pushpins" on the left edge of the CIPCO property.



(D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 6, 8/29/2023)

3. In the center of the following photo the CIPCO substation is outlined in red. The elevations near the substation are shown. The elevation to the right or east of the substation and the elevation to the left or west of the substation is 1020 feet. The elevation of the depression where The Robinsons' drain is installed varies between 1000 and 996 feet and declines as one approaches Heaton's Creek, which is shown and labelled in the lower right of the map.



(D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 19, 8/29/2023)

4. As shown on the first photo above Martin and Paula Robinson own separate parcels of farmland immediately across a road and north of CIPCO's property. Thomas and Laura Robinson own farmland to the east of CIPCO's property. (D0041, Defendants' (Ludolphs') Appendix re: MSJ at p. 18, 8/15/2023)

5. Also as shown on the first photo above The Ludolphs own the property which adjoins the CIPCO property on the west and south. (D0041, Defendants' (Ludolphs') Appendix re: MSJ at p. 18, 8/15/2023). They acquired this property in 1971. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 85, 8/29/2023)

6. The natural flow of drainage from a portion of Thomas and Laura Robinson's property is through a tile from the northeast to the southwest and across the Ludolphs' property. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 5, ¶ 1, 8/29/2023)

7. The natural drainage from portions of Martin and Paula Robinson's properties is generally from the north to the south through a buried tile installed in the natural depression described in paragraph 3, above. This depression originates on The Robinsons' properties, continues under the road, crosses the CIPCO substation and The Ludolphs' property and eventually drains into Heaton's Creek further downhill. (D0064, Response to Facts and Statement of Additional Facts at p. 5, ¶ 3, 8/29/2023). Martin Robinson testified that this

downward sloping natural depression is the "perfect location" for tile. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 70, 8/29/2023)

8. Approximately 40 acres of Martin and Paula Robinson's properties drain through the tile across CIPCO's property as described in the preceding paragraph seven. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 2, 8/29/2023)

9. The natural flow of drainage from The Ludolphs' land located immediately west of the CIPCO substation is from the west to the east. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 5, ¶ 2, 8/29/2023)

10. The tile which drained Paula and Martin Robinson's properties and directly crossed the CIPCO property was in existence and used since at least 1962. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 9, ¶ 20, 8/29/2023)

11. In 2013-14 CIPCO acquired more land from the Ludolphs to expand its substation. Linn County required that a subdivision proceeding take place regarding this acquisition. As part of this proceeding CIPCO and The Ludolphs signed and/or provided the following documents:

    a. A Fenceline and Drainage Deed Restriction which states:

    > **<u>The owners of said Lot 1 shall agree to extend any natural surface waterway or tile drainage system for adjoining properties and shall also agree to perpetually maintain said drainage system and protect from any obstruction or any type</u>**

of blockage which would cause damage to adjoining properties. (emphasis added)

b. A plat map which states that no construction will take place on the existing drainage and other easements.

c. An "Acknowledgment of Responsibility" document which states:

We will be responsible for not adversely affecting drainage of adjoining properties; and ensure that we fully comply with all state and local drainage and flood control laws, ordinances, and regulations. (emphasis added)

(D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 5-6, ¶ 4, 8/29/2023)

12. CIPCO sent an email to a Linn County Supervisor admitting that the purpose of the above-described Fenceline and Drainage Deed Restriction was to provide "…that the neighbors have a right to use **existing** tile to drain their property and CIPCO has an obligation to not prevent such use…" (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 8, ¶ 19, 8/29/2023) (emphasis added)

13. The land acquired for CIPCO's substation expansion is now designated as Lot 1 of CIPCO's Second Addition, was originally owned by The Ludolphs and is now owned by CIPCO. The Robinsons' tile crossed this Lot 1. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 56, 6, 8/29/2023)

14. In 2014 a contractor hired by CIPCO uncovered on CIPCO's property the tile line which historically drained the Martin and Paula Robinson properties north of the substation. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 6, ¶ 5, 8/29/2023)

15. This contractor then contacted CIPCO and asked CIPCO what it wanted done with this tile. In response CIPCO directed its contractor to cut and disconnect this tile line. When the contractor did so water was observed leaving the cut portion of the tile indicating that the tile was at that time actively draining Martin and Paula Robinson's properties. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 6, ¶ 6, 8/29/2023)

16. CIPCO did not repair this tile. Instead, later in 2014 it hired another contractor to divert this previously cut tile approximately 100 feet to the west. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 6, ¶ 8, 8/29/2023)

17. This 2014 diversion began near CIPCO's north property line, ran uphill to the west and was of poor quality. Donald Etler, an independent engineer hired by CIPCO, later inspected this tile and determined that it was neither installed nor functioning properly. Engineer Etler noted:

> **The video cable was passed through the entire perimeter drain and I was able to view parts of the video on the monitor. The drain was fully open to pass water, but the video revealed that there were sags and humps in the grade. The video and**

> **direct observations also revealed that the tubing was deflected and out of round, sagged into a generally flatter elliptical shape. These observations inform me that the drain was not properly installed and that its capacity is less than what it could be…**
>
> **However, the tile is poorly installed, capacity impaired…**
>
> **Considering the poor condition of the (diverted tile) I estimate that it provides no more than 50% of the capacity that the original 4-inch clay tile would have provided.**

(D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 6 and 7, 8/29/2023)

18. The 2014 diverting of the tile line which drained Martin and Paula Robinson's properties took it outside the natural depression and drainage route. Instead, it went uphill about 100 feet to the west even though this land naturally drains downhill to the east. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 6, ¶ 8, 8/29/2023); (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 6, 8/29/2023)

19. After the 2014 cutting and uphill diversion of the tile, drainage backed up inside this diverted tile and caused water ponding, decreased yields, and other drainage problems. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 7, ¶ 11, 8/29/2023). Tom Robinson specifically testified that beginning in the "teens" (2013-2019) the property north of the highway no longer drained as well as it did previously, that the crops grown there did

not look healthy, that the crop yields on this property were decreased, and that it was not as efficient as it once was. Martin Robinson testified likewise. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 64, 69-74, 8/29/2023)

20. CIPCO admits that this 2014 diversion resulted in "a long history of CIPCO being contacted by The Robinsons' land tenant to the north of the substation about water drainage issue." CIPCO then began to consider making repairs to this diverted and faulty drainage tile but did not attempt to do so until 2021. (D0069, Plaintiffs' Combined MSJ Resistance Appendix p. 44, 8/29/2023)

21. The Robinsons were not aware that CIPCO ordered their drainage tile to be cut and diverted until 2018. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 6, ¶ 7, 8/29/2023)

22. In approximately 2021 Coggon Solar, LLC desired to build a solar farm which would generate electricity by solar panels on approximately 750 acres of land, including The Ludolphs' property. CIPCO desired to further expand its substation in connection with this solar farm project. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 42, 47-48, 8/29/2023)

23. By 2021 CIPCO had still not corrected the drainage problems which arose after its 2014 decision and order to cut and divert Martin and Paula Robinson's tile. To avoid any interference with the proposed solar farm development The

Robinsons expressed a desire to settle this drainage dispute by having CIPCO make properly engineered and constructed repairs to their cut, diverted and poorly functioning drainage system. CIPCO, with The Robinsons' permission, then hired and paid for independent engineer Donald Etler to design a properly working tile drainage system. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 7, ¶ 12, 8/29/2023)

24. Engineer Etler investigated the existing system and prepared an extensive report. As described in paragraph 17, above, Etler documented serious flaws in the existing system. In addition to the numerous faults detailed in his report, he also noted that the diverted tile line was crushed in several spots. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 44, 8/29/2023). Consequently, he recommended that repairs and modifications be made including the following:

    a) That the consent of the Robinsons be obtained prior to any implementation of the plan.

    b) That a repair route be kept open and free of structures across the tile line so that any future needed tile repairs could be completed.

    c) That the existing four inch tile line be replaced with a five inch tile line from the south side of the utility substation to where the tile historically

drained into Heaton's Creek. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 7, ¶ 13-14, 8/29/2023)

25. CIPCO failed to inform The Robinsons and Engineer Etler, prior to the preparation of his report, that it also intended to install a "rain garden" on its substation property. This "rain garden" is in reality a storm water detention basin which would accumulate storm water on the CIPCO substation property and drain it through the same tile that drains Martin and Paula Robinson's properties. After the discovery of this previously undisclosed storm water storage facility, further drainage concerns arose including:

    a. Because the storm water detention basin would drain through the same tile used by Martin and Paula Robinson, Mr. Etler advised that the effect of the rain garden on the Robinsons' drainage be analyzed. He further warned CIPCO that drainage from this storm water detention basin should not have priority over The Robinsons' drainage. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 47-48, 8/29/2023)

    b. Several tiling contractors expressed concern to CIPCO that there were problems with the design plan. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 41-42, 8/29/2023)

    c. Engineer Etler advised that a five inch tile should be installed south of the substation to drain away the additional flow from the storm water

detention basin. This would replace or supplement the existing four inch tile line. Etler stated that "it made no sense" to not install this new five inch tile line. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 41, 8/29/2023)

d. CIPCO refused to authorize the work which was necessary to construct an adequate drain. This caused Engineer Etler to resign. In documenting CIPCO's lack of cooperation Etler bluntly stated, "I refuse to waste your time in doing an analysis using the parameters you have provided." (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 41, 8/29/2023)

e. Etler warned CIPCO that the drainage system he designed may be inadequate unless the existing four inch tile line south of the substation was replaced and that doing so was the "better solution" in light of the undisclosed storm water detention pond. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 46, 41, 8/29/2023). Etler also noted that the existing four inch tile would likely have frequent "blowouts" because of its inadequate size. He further warned that the existing line would "reveal its limitations" for draining the Robinson properties. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 45, 8/29/2023)

f. Mr. Etler also advised CIPCO that installing an entirely separate tile line to drain the storm water basin, as proposed by the Robinsons, was "not without merit." (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 48, 8/29/2023)

26. CIPCO refused to follow Mr. Etler's recommendations, which, as stated above, led to Mr. Etler's resignation. Instead, in 2021 CIPCO hired a contractor, without the consent of The Robinsons, to partially address some of the drainage problems. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 8, ¶ 15, 8/29/2023); (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 46, 65, 8/29/2023)

27. This 2021 contractor failed to implement Mr. Etler's recommendations. There is no repair corridor on either the CIPCO or The Ludolphs' property. Instead, either a second substation or solar panels affixed on steel pilings will be built on top of the tile line which drains the Martin and Paula Robinson properties. Further, the existing line south of the substation has not been replaced with a larger five inch line and The Robinsons' approval for any of the work was never obtained. And the storm water detention "garden" has been installed without the design approval of Engineer Etler. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 8, ¶ 15, 8/29/2023); (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 46, 65, 8/29/2023)

28. Drainage problems have persisted on The Robinsons' property north of the public road subsequent to CIPCO's 2021 refusal to implement Engineer Etler's recommendations. These include ponding water and a reduced crop yield estimated at 50 bushels per acre. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 8, ¶ 19, 8/29/2023); (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 74, 8/29/2023)

29. It was not necessary for CIPCO to construct its substation on the tile used by The Robinsons. CIPCO instead designed an alternative substation to be built on higher ground east of The Robinsons' historic tile line. This different location would have satisfied CIPCO's needs and would not impair Martin and Paula Robinson's drainage. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 8, ¶ 18, 8/29/2023); (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 80, 8/29/2023)

ROUTING STATEMENT

Should a downhill property owner be allowed to escape liability for cutting and diverting his uphill neighbor's drainage tile, thereby damaging this neighbor's drainage, by hiring a contractor to do this work instead of doing so himself? This question is central to this appeal and is an important issue of first impression in Iowa.

Further, Iowa's longstanding drainage law and its agricultural production are threatened by the trial court's decision to allow a downhill landowner to impair an uphill neighbor's drainage rights to allow development on the downhill property.

Accordingly, this appeal should be retained by the Supreme Court as it involves an important question of first impression and issues that are of broad importance to this state and which will require ultimate determination by the Supreme Court. Iowa R. App. Proc. 6.1101 (c) and (d).

ARGUMENT

In order to appreciate the issues involved in this appeal one must understand the need for and the impact of tiling in this state. For example:

1. Approximately 14 million of Iowa's 24 million crop acres are tiled, the most of any state, and this amount is increasing.[1]
2. An effective tile system can increase crop yields by 25%.[2]
3. The Department of Materials Science and Engineering at Iowa State University was started in 1907 at the direction of the legislature to assist in the manufacture of ceramic drainage tile.[3]
4. By 1912 Iowa farmers had spent more money on drainage improvements than the United States did to build the Panama Canal.[4]
5. The Iowa Supreme Court has repeatedly recognized the historical and continued importance of drainage tile to this state.[5]

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[1] Schmidt, Michael, Modernizing Agricultural Drainage Law in Iowa, available at https://www.iaenvironment.org/webres/File/Modernizing%20Ag%20Drainage%20Law%20in%20Iowa.pdf

[2] Schilling, Megan, Tile Drainage 101, Successful Farming, available at https://www.agriculture.com/crops/soil-health/tile-drainage-101

[3] Department History, Iowa State University Department of Materials Science and Engineering, available at https://www.mse.iastate.edu/department-history/

[4] Maulsby, Darcy, The Untold Story of Iowa's Ag Drainage Systems, Iowa State University, Iowa Water Center, available at https://www.darcymaulsby.com/blog/the-untold-story-of-iowas-ag-drainage-systems/

[5] Wallis v. Bd. of Supervisors, 132 NW 850, 853 (Iowa 1911) (stating that poor drainage is a "menace to the health and comfort of the community"); Bd. Of Water

The Ludolphs and CIPCO claim that The Robinsons do not have the right to drain their property through a tile located along a particular path. The Robinsons disagree and claim that they (1) have a right to continue to use their existing tile at its original location and, alternatively, (2) have the right to drain their properties along a route which effectively drains their property in the general course of natural drainage.

I. The Robinsons Have a Dominant Easement Right to Drain Their Property Through Existing Tile Over Their Servient Neighbor's Property and This Servient Tenant Cannot Unilaterally Cut or Divert This Tile.

A. Standard of Review.

This issue was decided by an order granting summary judgment. Therefore, the standard of review is for corrections of errors at law. Johnson Propane Heating and Cooling Inc. v. Iowa Dept. of Transportation, 891 N.W.2d 220, 224 (Iowa 2017).

Statutes are applicable to this Issue and the review of the district court's interpretation of statutes is also for correction of errors at law. Struck v. Mercy Health Services-Iowa Corp., 973 N.W.2d 553, 538 (Iowa 2022). The court uses familiar principles of statutory interpretation and focuses on the words of the legislature. Copeland v. State, 986 N.W.2d 859, 865 (Iowa 2023). The court gives

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Works v. Sac Cnty. Bd. of Supervisors, 890 NW2d 50, 57-58 (Iowa 2017) (stating that "much of north central Iowa is too wet or swampy for growing crops without subsurface drain tile.")

undefined words in statutes "their common, ordinary meaning in the context which they are used." In re J.C., 857 N.W.2d 495, 500 (Iowa 2014).

Summary judgment is only appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A genuine issue of fact exists if reasonable minds can differ on how an issue should be resolved. A fact is material when it might affect the outcome of a lawsuit. Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and thereby reach different conclusions. All the evidence is viewed in the light most favorable to the nonmoving party. And all legitimate inferences the evidence bears will be drawn to establish a genuine issue of material fact. Banwart v. 50th Street Sports, 910 N.W.2d 540, 544-545 (Iowa 2018) (internal citations omitted).

Finally, the resolution of this issue involves consideration of written platting documents and an email which explains CIPCO's intent. When extrinsic evidence of intent such as these documents exist the trier of fact is to consider the same and summary judgment is not appropriate. Lyon v. Willie, 228 N.W.2d 884, 893 (1980).

B. Error Preservation.

The issue of the rightful existence and location of Plaintiffs' tile and its damage by CIPCO was raised by Plaintiffs in their petition. (D0002, Petition in

Divisions 1 through 4 at p. 1-8, 6/22/2022). Defendants' First Summary Judgment Motions then addressed this issue. (D0042, Ludolphs' MSJ at p. 1-2, 8/15/2023); (D0046, CIPCO's First Partial MSJ at p. 1-2, 8/15/2023). This was then resisted by Plaintiffs. (D0068, Plaintiffs' Resistance to Ludolphs' MSJ at p. 1, 8/29/2023); (D0065, Plaintiffs' Resistance to CIPCO's First Partial MSJ at p. 1-21, 8/29/2023). This issue was then decided adverse to Plaintiffs in the trial court's ruling on Defendants' first Motion for Summary Judgment. (D0077, Ruling at p. 12-15, 9/13/2023). Accordingly, this issue was raised and ruled on by the District Court and error has been preserved. Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002).

C. Argument.

1. *Iowa Drainage Law is Based on the Law of Easements*.

Iowa drainage law is largely based on the law of easements. An easement is "a liberty, privilege, or advantage in land without profit, existing distinct from ownership." Hawk v. Rice, 325 N.W.2d 97, 98 (Iowa 1982).

Easements may be either affirmative or negative. An affirmative easement allows a property owner, known as the "dominant" tenant, to make a particular use of another person's property. This other property is known as the "servient" property and its owner is the "servient" tenant. In contrast, a negative easement, more commonly known as a use restriction or restrictive covenant, prohibits a servient tenant from taking some action on or to his property. Shri Lambodara, Inc. v. Parco,

Ltd., 995 N.W.2d 505, 508-509 (Iowa App. 2023). This appeal involves both affirmative and restrictive drainage easements.

Under Iowa law an easement cannot be relocated without the consent of the dominant tenant. Bagley v. Petermeier, 10 N.W.2d 1 (Iowa 1943); Dawson v. McKinnon, 285 N.W. 258, 265 (Iowa 1939). This is true even if the relocation does not impair the function of the easement. Robbins v. Archer, 126 N.W. 937 (Iowa 1910).

In Iowa, drainage rights are determined by the elevations of the involved properties. An "uphill" landowner has a "legal and natural" drainage easement across his "downhill" neighbor's property. Ditch v. Hess, 212 N.W.2d 442, 448 (Iowa 1973). He may exercise this easement right by draining water across his downhill neighbor's property through a buried tile located in the general course of natural drainage. Cundiff v. Kopseiker, 61 N.W.2d 443, 445 (Iowa 1953).

Further, this legal and natural easement is located along natural depressions and other natural waterways. "…(T)he dominant estate has an easement for drainage through the natural water course across the servient estate and the owner of the servient estate has no right to prevent, by artificial means, the flow of surface water through the natural water course from the dominant estate." Heinse v. Thorborg, 230 N.W. 881, 882 (Iowa 1930).

The drainage easement rights and obligations of the dominant and servient tenants are appurtenant to the land, meaning that these rights and obligations run with the land and cannot be assigned, delegated, or otherwise transferred separate from the ownership of the underlying real estate. Maben v. Olson, 175 N.W. 512, 513 (Iowa 1919).

In the present appeal record facts show that the drainage from Martin and Paula Robinson's properties naturally flows in a depression from the north to the south through a tile. This tile runs underneath a public road, across the CIPCO property and then southerly across The Ludolphs' property to Heaton's Creek. Therefore, The Robinsons are dominant easement holders and CIPCO and The Ludolphs are the owners of servient properties. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 19, 8/29/2023); (D0064, Response to Facts and Statement of Additional Facts at p. 5, ¶ 3, 8/29/2023)

Further, many, if not most, of Iowa drainage cases involve an allegation by the servient tenant that he has been damaged by an increased or unnatural flow of water from his uphill neighbor. *See*, O'Tool v. Hathaway, 461 N.W.2d 161 (Iowa 1990); Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739 (Iowa 1977). But the servient tenants in this appeal do not claim that The Robinsons have in any way altered or increased the natural flow of drainage. Instead this is a case where a

servient tenant has damaged his uphill neighbors' drainage by cutting and diverting the tile used by these uphill property owners.

2. ***Record Facts Show that CIPCO has Violated Iowa's Drainage Statutes, thereby Making Summary Judgment Inappropriate*.**

Given that much of this state historically was a swamp it is not surprising that beginning in approximately 1900 the Iowa legislature took up the drainage issue. The resulting statutes are very pro-drainage and provide The Robinsons and other uphill landowners with the ongoing right to drain their properties through tile located in the general course of natural drainage and across their downhill neighbor's property. These statutes also prohibit downhill property owners from diverting or otherwise damaging this tile. They provide as follows:

> **468.2 Presumption and construction of laws.**
> **1. The drainage of surface waters from agricultural lands… shall be presumed to be a public benefit and conducive to public health, convenience, or welfare.**
> **2. The provisions of this subchapter and all other laws for the drainage… of agricultural or overflow lands shall be liberally construed to promote leveeing, ditching, draining, and reclamation of wet, swampy, and overflow lands.**

Under the above §468.2 drainage statutes are to be liberally interpreted to protect the drainage of "uphill" properties such as The Robinsons. In enacting this section the legislature therefore made the clear policy choice to prioritize the drainage of farmland over the non-agricultural development of a servient property.

> **468.621 Drainage in course of natural drainage – reconstruction – damages.**
> **Owners of land may drain the land in the general course of natural drainage by constructing or reconstructing open or covered drains, discharging the drains in any natural watercourse or depression so the water will be carried into some other natural watercourse…**

§468.621 is the core of Iowa statutory drainage law and authorizes an "uphill" property owner to drain his property by installing a buried tile line in the general course of natural drainage across his own and his downhill neighbor's property. Cundiff, 61 N.W.2d at 445.

> **468.148 Injuring or diverting – damages.**
> **Any person who shall willfully… dam up, divert, obstruct, or willfully injure any ditch, drain, or other drainage improvement authorized by law shall be liable to the person or persons owning or possessing the lands for which such improvements were constructed in double the amount of damages sustained by such owner or person in possession…**

§468.148 protects tile and other substantial manmade drainage improvements. It does not prevent the grading or contouring of the earth's surface by a servient property owner in order to improve his own drainage. However, it does clearly prohibit and punish a person who diverts or injures an existing tile or other man-made drainage improvement used by his neighbor. And it is clear that the drainage improvements protected by this statute include all privately owned tile installed on servient properties and not just tile owned by public drainage districts. McKeon v. Brammer, 29 N.W.2d 518, 527 (Iowa 1947).

§468.149 goes even further and criminalizes the diverting and impeding of "any" drain tile by "any" person. Further, such an action is deemed to be a statutory nuisance:

> **468.149 Obstructing or damaging.**
> **1. A person is guilty of a serious misdemeanor if, without legal authority, the person willfully does any of the following:**
> ***a.* Diverts, obstructs, impedes, or fills up any ditch, drain, or watercourse…**
> **2. Any unlawful act described in subsection 1 is a nuisance and may be abated…**

Therefore, Code §468.148 and §468.149 are the "teeth" that the legislature put into Iowa's statutory drainage law to protect tile and to otherwise ensure that a dominant tenant's drainage improvements and rights are not damaged.

When these statutes are applied to the record facts in this matter it is clear that CIPCO has repeatedly violated them. First, it is undisputed that Martin and Paula Robinson are "uphill" property owners and that their properties drain across the CIPCO's property. Further, the tile which drains their properties was installed in a natural depression which carries this drainage downhill across the CIPCO and The Ludolphs' properties to Heaton's Creek. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 19, 8/29/2023). Accordingly, this tile was "authorized by law" because under Code §468.621 it is located in "the general course of natural drainage."

Further, since it was "authorized by law" the tile which drains Martin and Paula Robinson's drainage was protected by Code §468.148 and §468.149. Accordingly, CIPCO was prohibited from diverting or otherwise impeding this tile. To "divert" means to "turn from one course, direction, objective, or use to another." Webster's Third New International Dictionary of the English Language, Unabridged. CIPCO nevertheless did exactly that when it ordered its contractors to cut and to substantially change the course and direction of this tile by running it uphill.

The appropriate remedy when a downhill neighbor relocates, diverts or otherwise damages his uphill neighbor's drainage is an injunction. Blink v. McNabb, 287 N.W.2d 591, 601 (Iowa 1980). Accordingly, the trial court erred when it failed to recognize and enjoin CIPCO's blatant Code violations.

Notably, Code §468.149 also declares that CIPCO's diversion of the tile is a statutory nuisance. This nuisance is further discussed in Section III, below.

The trial court recognized that The Robinsons' drainage rights had been violated but ruled that The Robinsons must seek relief for these damages from CIPCO's contractors and that CIPCO has no responsibility for the same. This ruling is erroneous and is discussed in Section V, below.

In summary, under Code §468.621 The Robinsons have a right to install and use tile in "the general course of natural drainage." And this tile cannot be

unilaterally diverted or cut under Code §468.148 and §468.149. There are ample record facts which establish that CIPCO has violated these statutes and has thereby impaired Martin and Paula Robinson's drainage. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 64, 69-74, 8/29/2023). Accordingly, it was error for the trial court to grant summary judgment on this issue.

3. ***In Addition to Violating Iowa's Drainage Statutes, Record Facts Show that CIPCO has also Violated The Robinsons' Common Law Drainage Rights.***

Under Iowa common law a "downhill" servient tenant cannot redirect, obstruct, or otherwise impede the natural drainage of an "uphill" landowner if doing so injures this uphill neighbor's drainage. Witthauer v. City Council of Council Bluffs, 133 N.W.2d 71, 74-75 (Iowa 1965).

As stated above, in 2014 CIPCO directed its contractor to cut the tile which drained Martin and Paula Robinson's properties. CIPCO then hired another contractor to divert this tile uphill approximately 100 feet to the west. As detailed in Paragraphs 17 through 20 of the Facts portion of this brief, CIPCO's 2014 decision to cut and divert resulted in impaired drainage, a decline in crop yields, ponding water and frequent complaints to CIPCO regarding drainage problems.

Further, CIPCO's second reroute in 2021 was little better, as it was done contrary to Engineer Etler's advice and with so little regard for this engineer's opinion that he resigned. Not surprisingly, after this woefully inadequate 2021 repair

attempt Martin and Paula Robinson continued to experience drainage problems, including a loss in crop production. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 74, 8/29/2023)

These record facts therefore clearly show that the Robinsons' common law drainage rights have been and remain damaged. Accordingly, the trial court erred when it granted summary judgment to CIPCO on this issue.

4. ***Record Facts Show that Defendants have Violated the Easement Rights which Defendants Granted The Robinsons Under Platting Documents, Including the Right to Continue to Use Their Existing Tile.***

It is undisputed that in 2013 CIPCO and The Ludolphs provided multiple agreements and other subdivision documents regarding CIPCO's property. These include the following:

a. A Fenceline and Drainage Deed restriction which states:

> **The owners of said Lot 1 shall agree to extend any natural surface waterway or tile drainage system for adjoining properties and shall also agree to perpetually maintain said drainage system and protect from any obstruction or any type of blockage which would cause damage to adjoining properties**. (emphasis added)

b. A plat map which states that no construction will take place on the existing drainage and other easements.

c. An "Acknowledgment of Responsibility" document which states:

We will be responsible for not adversely affecting drainage of adjoining properties; and ensure that we fully comply with all state and local drainage and flood control laws, ordinances, and regulations. (emphasis added)

(D0064; Plaintiffs' Response to Facts and Statement of Additional Facts at p. 5-6, ¶ 4; 8/29/2023)

The Robinsons contend that the words "perpetually maintain" in the Fenceline and Drainage deed restriction require CIPCO to keep in existence the tile system which historically drained Martin and Paula Robinson's properties through the tile which ran directly under the CIPCO substation. This language is a negative easement or a restrictive covenant which prohibits CIPCO from removing or altering this tile. Shri Lambodara, Inc. v. Parco Ltd., 995 N.W.2d 505, 508-509 (Iowa 2023). Significantly, The Robinsons' interpretation of this agreement was at one time shared by CIPCO, as a senior engineer for CIPCO confirmed to the Linn County Board of Supervisors in an email that under this document "…the neighbors have a right to use existing tile to drain their property and CIPCO has an obligation to not prevent such use…" (Facts ¶ 11(a), above)

CIPCO has now reversed this position and claims that it only has an obligation to maintain a tile system which it has extended and that since it did not extend the Robinsons' drainage tile it has not violated the deed restriction. (D0047, CIPCO MSJ Memo of Authorities at p. 14, 8/15/2023)

In addition to being directly contrary to its own email, CIPCO's belabored interpretation of the deed restriction is contrary to plain English. The language at issue refers to "any" drainage system, not just ones that have been extended. Further, the definition of "maintain" is "to keep in a state of repair, efficiency, or validity: preserve from failure or decline." Webster's Third New International Dictionary of the English Language, Unabridged. Therefore, under this definition the then-existing state of the tile was to be kept and preserved. Instead, this tile was cut and diverted to a location where it is no longer effective.

Finally, the obvious purpose of paragraphs (a), (b) and (c) was to protect the neighbors' drainage rights and was not to benefit CIPCO.

It is well-settled that language in subdivision documents can create an easement. Gray v. Osborn, 739 N.W.2d 855, 861 (Iowa 2007). The language contained in the above excerpts clearly creates negative easements which prohibits CIPCO from diverting or damaging The Robinsons' tile. Therefore, it was error by the trial court to rule as it did.

5. ***Record Facts Show that Martin and Paula Robinson Have an Easement by Prescription.***

The district court ruled in its summary judgment ruling that The Robinsons could not establish that they have a prescriptive drainage easement. (D0077, First MSJ Ruling at p. 12, 9/13/2023). The court based this conclusion on its belief that

The Robinsons could not show either an open and notorious use or a hostile use. But this determination is in error.

First, it should be noted that one does not need to have a prescriptive easement in order to have common law drainage rights. These rights are provided by statute and are a matter of law. Ditch v. Hess, 212 N.W.2d at 448. Further, under Iowa law when a servient estate changes ownership, the continued use of the claimed easement by the dominant tenant becomes adverse as a matter of law. It is therefore the responsibility of the new servient tenant to stop the continued use within the ten year prescription period or else a prescriptive easement will be acquired. Loughman v. Couchman, 47 N.W.2d 152, 154 (Iowa 1951). Record facts show that The Ludolphs acquired the future CIPCO property on contract in 1972. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 41-42, 8/29/2023). However, there was no action taken to challenge The Robinsons' use of the existing tile line until it was cut and relocated in 2014 even though this tile had been in existence since 1962. (D0064 Plaintiffs' Response to Facts and Statement of Additional Facts at p. 9, ¶ 20, 8/29/2023). By 2014 the ten year time period for creating an easement by prescription had therefore long been satisfied. Accordingly, the court erred when it ruled that there was insufficient evidence of a prescriptive drainage easement.

Further, the open and obvious element of a prescriptive easement claim is satisfied when a person is on notice of the existence of the easement. Here, the tile

in question is installed in a visible and substantial natural depression. This obvious depression in the land was sufficient to put The Ludolphs on notice of its use as a drain. Anderson v. Yearous, 249 N.W.2d 855, 862 (Iowa 1977). Additionally, in evidence is a tile map which shows that The Ludolphs' property is also drained by tile which runs in this same depression. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 4, 8/2982023). This fact put The Ludolphs on notice that others were using this depression for the same purpose.

Accordingly, record facts exist showing that the Robinsons' easement was obvious and it was error for the district court to conclude otherwise.

II. The Robinsons Have a Right to Enter a Servient Neighbor's Property to Repair the Tile Which Drains Their Properties.

A. Standard of Review.

This issue was decided by an order granting summary judgment. Therefore, the standard of review is for corrections of errors at law. Johnson Propane Heating and Cooling Inc., 891 N.W.2d at 224. Additional standards for granting a motion for summary judgment and for reviewing statutory interpretations by a trial court are cited in Section A under Issue I and for brevity's sake are incorporated by this reference.

B. Error Preservation.

The issue of The Robinsons' right to access and maintain their drainage tile was raised by Plaintiffs in their Resistance to CIPCO's First/Partial MSJ. (D0063,

Plaintiffs' Resistance to CIPCO's Motion at p. 2, 8/29/2023). It was again raised in Plaintiffs' 1.904 Motion. (D0087, 1.904 Motion at p. 3-5, 9/18/2023). This issue was then decided adverse to Plaintiffs in the trial court's ruling on this motion. (D0145, 1.904 Ruling at p. 3, 10/11/2023). Accordingly, this issue was raised and ruled on in the district court and error has been preserved. Meier, 641 N.W.2d at 537.

C. Argument.

The Robinsons need to be able to access The Ludolphs' and CIPCO's properties to fix the tile which drains their properties. This tile is not functioning well now and needs attention. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 27, ¶ 28, 8/29/2023). Future problems may also occur. Therefore, there is a crucial need to recognize and enforce the right to enter and repair which the Robinsons have under Iowa statutory and common law.

1. *The Statutory Right to Enter and Repair*.

Iowa Code §468.621 states in pertinent part:

> **468.621 Drainage in course of natural drainage – reconstruction – damages.**
> **Owners of land may drain the land in the general course of natural drainage by constructing or reconstructing open or covered drains, discharging the drains in any natural watercourse or depression so the water will be carried into some other natural watercourse…** (emphasis added)

By its express terms §468.621 therefore gives a dominant landowner the right to construct and reconstruct tile which drains in the general course of natural

drainage across a downhill property. And, as established earlier, there is no dispute that the tile which drains the Martin and Paula Robinson properties has been installed in a depression which is the general course of natural drainage. Accordingly, The Robinsons have the statutory right to reconstruct the tile they use.

The term "reconstruct" means "to construct again, to build again, rebuild, to make over, repair…" Webster's Third New International Dictionary of the English Language, Unabridged (emphasis added). Accordingly, the right to access and repair is provided to The Robinsons by this statute.

Significantly, §468.621's express authorization to repair did not originally exist. Prior to 1966, this Code provision was limited to "constructing" and did not authorize "reconstructing." *See*, Laws of the 61st G.A Chapter 640, §21; Code §465.22 (1962); Code §465.22 (1966). This 1966 change therefore represents a legislative desire to guarantee a dominant estate's ongoing drainage rights. Indeed, the right of drainage would obviously be lost if a servient tenant, like in the present case, could cut his uphill owner's tile or otherwise harm his drainage and then deny him the right to repair this damage. That is why the legislature wisely determined and specifically provided that under Code §468.621 the dominant tenant has a right to enter a downhill property to repair his drain.

Accordingly, The Robinsons have the statutory right of repair, and it was error for the trial court to rule otherwise.

2. ***The Common Law Right to Enter and Repair*.**

A dominant tenant's common law right to enter a downhill servient property to repair his drain was extensively discussed and firmly established in Nixon v. Welch, 24 N.W.2d 476, 480-481 (Iowa 1947). This right of entry and repair is itself a property right known as a subeasement. SMB Investments v. Iowa-Illinois Gas and Electric Co., 329 N.W. 635, 637-638 (Iowa 1983).

Further, the right to enter and repair is an inherent part of the dominant tenants' common law "legal and natural" easement and exists even though there may not be an easement by prescription. Taylor v. Frevert, 66 N.W. 474, 475 (Iowa 1918).

Therefore, the trial court's failure to recognize that The Robinsons have a common law right of entry and repair is reversible error.

III. CIPCO Has Created a Nuisance on Its Property.

A. Standard of Review.

This issue was decided by an order granting summary judgment. Therefore, the standard of review is for corrections of errors at law. Johnson Propane Heating and Cooling Inc., 891 N.W.2d at 224. Additional standards for reviewing the grant of a motion for summary judgment and a trial court's interpretation of statutes are cited in Section A under Issue I and for brevity's sake are incorporated by this reference.

B. Error Preservation.

The issue of whether CIPCO has created a nuisance was raised by Plaintiffs in Division 5.0 of their petition. (D0002, Petition at p. 8-9, 6/22/2022). It was then raised by CIPCO's Second Motion for Summary Judgment. (D0148, CIPCO's Second MSJ at p. 2, 10/11/2022). It was then resisted by Plaintiffs in their Resistance to this Second Motion for Summary Judgment filed by CIPCO. (D0152, Resistance to Second MSJ at p. 1, 10/26/2023). This issue was then decided adverse to Plaintiffs in the trial court's ruling on CIPCO's Second Motion for Summary Judgment. (D0157, Ruling on CIPCO's Second MSJ at p. 2, 12/28/2023). Accordingly, this issue was raised and ruled on in the trial court and error has been preserved. Meier, 641 N.W.2d at 537.

C. Argument.

A nuisance is "(w)hatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere unreasonably with the comfortable enjoyment of the life on property." Code §657.1(c)

A nuisance does not require a negligent act. Martins v. Interstate Power Co., 652 N.W.2d 657, 660-661 (Iowa 2002). Instead, it is a condition which a landowner

has allowed to exist on his property. Sparks v. City of Pella, 137 N.W.2d 909, 911 (Iowa 1965).

Further, the legislature has the authority to declare by statute what constitutes a nuisance. Cedar Falls v. Flett, 330 N.W2.d 251, 255 (Iowa 1983). Statutory nuisances are nuisances per se and the parties aggrieved by the nuisance are entitled to an injunction prohibiting the continued existence of the same. Moreover, a statutory nuisance is to be enjoined even though it has caused no damage. This is because the legislature has determined that the condition is under all circumstances unacceptable. State v. Howard, 241 N.W. 682, 684-685 (Iowa 1932).

At issue in this appeal are both statutory and common law nuisances.

Iowa Code §468.149 declares a diverted tile and the obstruction or impediment of drainage to be an abatable nuisance. These conditions also constitute a nuisance under Code §657.2. As explained above, CIPCO concedes that it ordered the cutting of The Robinsons' drainage tile in 2014. It then in 2014 hired a contractor to divert this drain up a hill and approximately 100 feet outside the normal course of drainage. Not surprisingly, this uphill running drain resulted in ongoing drainage problems which at the current time remain uncorrected. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 64. 69-74, 8/29/2023).

These record facts are sufficient to establish a cause of action based on statutory nuisance. Accordingly, it was error for the trial court to rule otherwise.

In addition to being a statutory nuisance, the record facts explained in Paragraphs 17-28 of the Facts Section of this brief establish that under Iowa law a common law nuisance continues to exist on The CIPCO property as impaired or obstructed drains have been found to be a common law nuisance. Blink , 287 N.W.2d at 601. Accordingly, it was error for the trial court to rule that The Robinsons do not have a factual and legal basis to pursue a nuisance claim.

IV. The Trial Court Erred When It Ruled that The Robinsons Have Not Adequately Proven Their Damages.

A. Standard of Review.

This issue was decided by an order granting summary judgment. Therefore, the standard of review is for corrections of errors at law. Johnson Propane Heating and Cooling Inc., 891 N.W.2d at 224. Additional standards for reviewing the grant of a motion for summary judgment and a trial court's interpretation of statutes are cited in Section A under Issue I and for brevity's sake are incorporated by this reference.

B. Error Preservation.

The issue of damages was raised by Plaintiffs in their petition. (D0002, Petition, 6/22/2022). The sufficiency of the proof of these damages was then raised by CIPCO in their Second Summary Judgment Motion. (D0148, CIPCO's Second MSJ at p. 2-3, 10/11//2023). It was then resisted by Plaintiffs in their Resistance to

the Second Motion for Summary Judgment filed by Defendants. (D0152, Resistance to Second MSJ at p. 1, 10/26/2023). This issue was then decided adverse to Plaintiffs in the trial court's ruling on Defendants' Second Motion for Summary Judgment. (D0157, Ruling on Second MSJ at p. 5-6, 12/28/2023). Accordingly, this issue was raised and ruled on in the trial court and error has been preserved. Meier, 641 N.W.2d at 537.

C. Argument.

The trial court ruled by summary judgment that the damages claimed by The Robinsons were too speculative. (D0157, Second Ruling Re: MSJ at p. 5, 12/28/2023). This ruling was erroneous for multiple reasons. First, at the summary judgment stage a trial court is not to weigh the evidence. Further, all inferences are to be given to the party opposing the motion.

The rules regarding proving damages for loss of crop include the general rule that is not necessary to prove the exact value of the lost crop as long as it is shown that damage has occurred. Once this is done the amount of damage becomes a question for the trier of fact. Renze Hybrids, Inc. v. Shell Oil Co., 418 N.W.2d 634, 639 (Iowa 1988). In the present case Martin Robinson testified in his deposition that he had access to yield maps showing that he suffered a 50 bushel per acre loss in yield. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 72-74, 8/29/2023). Thomas Robinson provided similar evidence of crop damage. (D0069,

Plaintiffs' Combined MSJ Resistance Appendix at p. 64, 8/29/2023). And at the summary judgment stage Martin Robinson provided his affidavit which further discusses this loss and establishes a dollar value for the loss in value of his farmland because of the impaired drainage. (D0154, Affidavit of Martin Robinson at ¶ 8-10, 10/26/2023). As the owner of this property, the holder of an agricultural degree and having been born and raised on the property Martin is more than well-qualified to express his opinion of a decline in value. Indeed, as a landowner he is an expert witness on this issue. Rausch v. City of Marion, 974 N.W.2d 103, 111 (Iowa 2022). It is also settled that recoverable damages in a nuisance action may include a loss in property value. Valentine v. Widman, 135 N.W. 599, 602-603 (Iowa 1912).

Accordingly, it was error by the trial court to rule that The Robinsons' claimed damages were too speculative.

V. CIPCO Cannot Escape Responsibility for the Damage It Caused to The Robinsons' Tile and Drainage by Blaming Its Contractors.

A. Standard of Review.

This issue was decided by an order granting summary judgment. Therefore, the standard of review is for corrections of errors at law. Johnson Propane Heating and Cooling Inc., 891 N.W.2d at 224. Additional standards for granting a motion for summary judgment and the interpretation of statutes by a trial court are cited in Section A under Issue I and for brevity's sake are incorporated by this reference.

B. <u>Error Preservation</u>.

The issue of whether CIPCO is responsible for the damages done by its contractor was raised by CIPCO in its Second Motion for Summary Judgment. (D0148, CIPCO's Second MSJ at p. 1, 10/11/2023). Plaintiffs resisted CIPCO's position on this issue. (D0152, Resistance to Second MSJ at p. 1, 10/26/2023). This issue was then decided adverse to Plaintiffs in the trial court's ruling on Defendants' Second Motion for Summary Judgment. (D0157, Ruling re: CIPCO's Second MSJ at p. 5, 12/28/2023). Accordingly, this issue was raised and ruled on in the trial court and error has been preserved. <u>Meier v. Senecaut</u>, 641 N.W.2d at 537.

C. <u>Argument</u>.

1. *<u>CIPCO Cannot Escape Responsibility because Under the Law of Easements Its Obligations are Appurtenant to Its Property</u>*.

The trial court concluded that <u>Restatement (Second) of Torts</u> §424 applied to this case and that under this section CIPCO was not responsible for the actions of its contractors. As explained below, this <u>Restatement</u> section does not provide CIPCO with the "free pass" it is seeking. The initial question, however, needs to be whether this <u>Restatement</u> even applies to this dispute.

The Robinsons contend that this is a property dispute which should be decided by the law applicable to easements. Specifically, Iowa law provides that The Robinsons have a "legal and natural" easement to drain their properties across the

CIPCO and Ludolph properties because their properties are at a higher elevation. Ditch v. Hess, 212 N.W.2d at 448; (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 70, 8/29/2023)

Further, this easement is an appurtenant easement, meaning that the rights and responsibilities under this easement cannot be separated from the ownership of the dominant and servient properties. Maben, 175 N.W. at 513; Baker v. Kenney, 124 N.W. 901, 903 (Iowa 1910).

Accordingly, because CIPCO's duty as servient landowner to not impair The Robinsons' drainage is appurtenant, it by definition is non-delegable. Therefore, a torts Restatement analysis is not necessary or appropriate in this matter and this court should rule that CIPCO has violated the drainage rights that The Robinsons have as dominant tenants.

Indeed, a contrary holding would mean that easement rights in Iowa would be gutted, as by the simple act of hiring another person a servient tenant could escape his easement obligations. And, as a practical matter the dominant tenant would be without any remedy because frequently the proper remedy in drainage disputes is an injunction. Sloan v. Wallbaum, 447 N.W.2d 148, 149 (Iowa App. 1989). An outside contractor, however, is not in a position to provide an injunction as he is not the owner of the property on which the obstruction or other impairment of the easement exists, may be unable to access the property to correct the problem and may go

bankrupt or out of business, thereby leaving the aggrieved dominant tenant without recourse. Accordingly, the servient tenant and not just his contractor should be responsible for the impairment of easement rights.

2. Under the Restatement CIPCO Cannot Escape Responsibility for the Damage It Directed Its Contractor to Cause.

The record facts show that in 2014 CIPCO's contractor uncovered The Robinsons' tile and then contacted CIPCO and asked CIPCO what it wanted done with this tile. CIPCO in response directed the contractor to cut this tile. When the contractor did so water was seen draining from the tile, meaning that it was at that time draining Martin and Paula Robinson's properties. (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 6, ¶ 5-6, 8/29/2023)

These facts are crucially important because Restatement (Second) of Torts §410 provides:

> **An employer of an independent contractor is subject to the same liability for physical harm caused by an act or omission committed by the contractor pursuant to orders or directions negligently given by the employer as though the act or omission were that of the employer himself.**

The above record facts clearly show that CIPCO in 2014 ordered and directed its contractor to cut The Robinsons' tile. Accordingly, under §410 CIPCO is liable for the consequence of its order. It is also clear that since this 2014 cutting the Robinsons' drainage has been impaired. (D0064, Plaintiffs' Response to Facts and

Statement of Additional Facts at p. 7, ¶ 11, 8/29/2023); (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 64, 69-72.1, 8/29/2023). Therefore, under §410 CIPCO is responsible for the order it gave and the damage this order caused.

And later in 2014 CIPCO hired another contractor for the specific purpose of diverting the tile line around its substation. Because diverting a tile violates Code §648.149, under Restatement §410 CIPCO is therefore responsible for the damage caused because it directed (and specifically hired) its contractor for this purpose.

Further, even if §410 does not apply, the general common law rule is that a property owner who retains enough control to order its contractors to take a specific action is responsible for the order it gave. Downs v. A & H Construction, Ltd., 481 N.W.2d 520, 523-525 (Iowa 1992).

Finally, under Code §648.149 it is a crime to injure or divert a tile line. As a matter of policy society should hold responsible the person(s) who hired another to commit a crime on their behalf.

Therefore, for the above reasons CIPCO should be held responsible for its decision and order to cut and divert the tile.

3. CIPCO Cannot Escape Responsibility for the Nuisance Which Exists on Its Property.

The Robinsons argued in their summary judgment resistance materials that the cutting and diversion of their tile was a nuisance and that CIPCO cannot escape

responsibility for this nuisance. This view is supported by the Restatement (Second) of Torts §427B which states:

> **One who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve… the creation of a public or private nuisance, is subject to liability for harm resulting to others from such… nuisance.**

Under Iowa common law the responsibility for a nuisance is similar to the Restatement §427B approach. Specifically, a property owner is responsible for a nuisance caused by his contractor if it is likely that his contractor's work would result in a nuisance. Shannon v. Missouri Valley Limestone, 122 N.W.2d 278, 280 (Iowa 1963).

It is clear that CIPCO is responsible under both Restatement §427B and the test established in Shannon v. Missouri Valley Limestone. Specifically, it has long been the view of the Iowa Supreme Court that a cut or otherwise impaired drainage tile is a nuisance. Blink v. McNabb, 287 N.W.2d at 601. And the Iowa legislature has declared the same to be a statutory nuisance. Code §468.149. Therefore CIPCO was certainly on notice that the diversion of a tile would likely result in the creation of a nuisance. Accordingly, when CIPCO ordered its contractor to cut Martin and Paula Robinson's drainage tile and later hired a second contractor to divert it CIPCO certainly played a substantial part in the creation of this nuisance.

4. CIPCO is Liable for the Damages Caused to The Robinsons Because It Assumed Responsibility for these Damages.

In the present case CIPCO clearly assumed responsibility for the damage caused to The Robinsons' drainage. For example, in its subdivision platting documents it stated "(W)e will be responsible for not adversely affecting drainage of adjoining properties…" And, after years of receiving complaints about drainage problems it hired, at its expense, Engineer Don Etler to design a working drainage system which, unfortunately, it refused to implement. Further, CIPCO did hire a contractor to install a different system. Although CIPCO's efforts to resolve the Robinsons' drainage problems failed, CIPCO nevertheless assumed responsibility for fixing the damage it and its contractors caused. (D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 6, 44, 64, 69-74, 8/29/2023); (D0064, Plaintiffs' Response to Facts and Statement of Additional Facts at p. 6, ¶ 5-6, 8/29/2023). And, finally, CIPCO wrote an email to the Linn County Board of Supervisors in 2022 which admits that it has assumed this responsibility:

> **CIPCO is committed to ensuring the tile system is in working order. As was stated at the Board of Adjustment meeting, CIPCO has posted a surety bond that will cover the cost of tile replacement on CIPCO property. We are currently awaiting the 3rd party engineer's report to determine if any additional improvements can be made to the tile system on CIPCO's substation property and that the system is compatible with adjacent landowners.**

(D0069, Plaintiffs' Combined MSJ Resistance Appendix at p. 45, 8/29/2023)

Under Iowa law a party who assumes responsibility for correcting the error of another is liable if this "correction" is done negligently. Thomas v. Bohlken, 312 N.W.2d 501, 506-507 (Iowa 1981).

Restatement (Second) of Torts §323 has the same rule, and states:

> **One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if**
> **(a) his failure to exercise such care increases the risk of such harm, or**
> **(b) the harm is suffered because of the other's reliance upon the undertaking.**

Record facts therefore exist which establish that CIPCO assumed responsibility for correcting the damage to The Robinsons' tile. Because CIPCO has failed to do so it remains responsible for the damages caused by its continuing failure.

VI. The Fee Award Should be Reversed.

A. Standard of Review.

The review of an attorney fee award is for abuse of discretion. Boyle v. Alum-line, Inc., 773 N.W.2d 829, 832 (Iowa 2009). An abuse of discretion occurs when the trial court exercises its discretion on grounds or for reasons clearly unfavorable or to an extent clearly unreasonable. First American Bank. v. Fobian Farms, Inc.,

906 N.W.2d 736, 774 (Iowa 2018). Misapplication of a fee statute is an abuse of discretion. Gabelman v. NFO, Inc., 606 N.W.2d 339, 342 (Iowa 2000).

B. **Error Preservation.**

The fee award was raised by Defendants CIPCO in their fee application. (D0160, Defendants' Fee Application, 1/19/2024). This application was resisted by Plaintiffs. (D0163, Resistance to Fee Application, 2/1/2024). It was then decided adverse to Plaintiffs by the court in its fee award. (D0175, Ruling and Order on Fee Application, 3/6/2024). Accordingly, this issue was raised and ruled on in the trial court and error has been preserved. Meier v. Senecaut, 641 N.W.2d at 537.

C. **Argument.**

Iowa Code §649.5 states:

> **1. Before bringing suit to quiet a title to real estate, a party may make a written request to the person holding an apparent adverse interest or right in the property asking that such person, and that person's spouse if any, execute, have acknowledged, and deliver a quitclaim deed to the property to such requesting party.**
> **2. The written request described in subsection 1 shall include a draft quitclaim deed to the property, the street address of the property, a brief explanation of how the apparent adverse interest or right arose, if known, and why the party believes the interest or right is not a valid claim against title, a copy of this section, a self-addressed stamped envelope, and fifty dollars to cover the expense of the execution, acknowledgement, and delivery of the deed.**
> **3. If the person holding an apparent adverse interest or right in the property fails to comply within twenty days of receiving the written request, the filing of a disclaimer of interest or right shall not avoid the costs in an action afterwards brought, and the court may assess, in addition to the ordinary costs of court, a reasonable attorney fee for the requesting party's attorney.**

Relying on this Code section, the trial court assessed attorney fees in excess of $200,000 against the Robinsons. As explained below, this assessment is error.

1. *CIPCO should not be Considered the Successful Party in this Matter*.

As detailed in this brief there are numerous reasons why the decision of the trial court should be reversed. Therefore, once the underlying decisions of the trial court are reversed the trial court's fee award should likewise be reversed. It would otherwise be an abuse of discretion to permit CIPCO to recover attorney fees in a case where The Robinsons were required to litigate to protect their drainage against damage which CIPCO caused and would also be inconsistent with Code §649.5.

2. *The Quit Claim Deed Sent to The Robinsons Improperly Demanded that They Relinquish Their Easement Rights*.

The quitclaim deed sent to the Robinsons states:

> **…all our right, title, interest, estate, claim and demand, including but not limited to any easement for a particular route of drainage tile, in the following tract of real estate in Linn County, Iowa, subject only to the reservation of the Fenceline and Drainage Deed Restriction at Book 8910 Page 400, extending any natural surface waterway or tile drainage system for adjoining properties to be perpetually maintained and protected from any obstruction or any type of blockage which would cause damage to adjoining properties and providing other enumerated restrictions… in or to the CIPCO substation property.**

If the Robinsons would have signed and returned this requested deed they would have given up most of their drainage rights. For example, they would have

given up their right to locate tile in the "general course of natural drainage" as provided by Code §648.621. And they would be conveying away their common law legal and natural easement to drain in the natural course of drainage. Ditch v. Hess, 212 N.W.2d at 448. They would also be releasing their common law and statutory rights of entry and repair, as these rights are secondary easements. SMB Investments v. Iowa Illinois Gas and Electric, 329 N.W. at 637-638.

Further, by signing the quit claim deed they would be giving up their right to have their tile located where it would effectively drain their properties and their protection against diversion and interference given to them under Code §648.148 and §648.149. Therefore, it was fully within The Robinsons' right to refuse to sign this deed and it was error by the trial court to assess attorney fees against The Robinsons for insisting that their drainage rights be respected.

3. *The Purported Partial Quit Claim Deed Sent to the Robinsons Does Not Meet the Requirements of Code §649.5*.

By the quit claim deed language quoted above The Robinsons were to give up all of their rights except for their rights under a fenceline and drainage deed restriction. A quit claim deed, however, conveys all of the grantor's interest in a property. Mack v. Tredway, 56 N.W.2d 678, 681 (Iowa 1953). Therefore, the requested purported quit claim deed was not a quit claim deed at all, but just a partial release of some of The Robinsons' interests. Code §649.5, however, requires that a

quit claim deed be tendered. Therefore, because a proper quit claim deed was never tendered to The Robinsons the assessment of fees against them is therefore not permitted by Code §649.5.

4. *The Amount of the Fee Award is Excessive*.

A review of the itemization of fees submitted by CIPCO to the court reveals extremely excessive and inflated claimed attorney expenses. At least three attorneys worked on this case, and multiple attorneys attended hearings, depositions, etc. It was not necessary to overstaff a case such as this one in this manner. For example, the itemization reveals that much unnecessary time was spent in conferring amongst the involved attorneys on discovery, summary judgment and similar issues. Further, there is no explanation given as to the reason for much of the work that is claimed. For example, why were two summary judgment motions filed and not just one? Why were all of the claimed conferences actually needed? The record lacks all of these details.

It is axiomatic that a fee award must be reasonable. Sunrise Development Co. v. Iowa Department of Transportation, 540 N.W.2d 465, 467-469 (Iowa App. 1995). As explained above, the requested fee is well beyond what is reasonable and therefore the award should be reversed.

CONCLUSION AND REQUESTED RELIEF

It is requested that Appellants have the following relief:

1. That the two summary judgment decisions and quiet title judgment entered by the trial court be reversed and vacated.

2. That the fee award entered below be reversed and vacated.

3. That this matter be remanded for further proceedings.

4. That other relief as appropriate be entered.

REQUEST FOR ORAL ARGUMENT

Appellants requests to be heard at oral argument in this matter.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because this brief contains 12,025 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(*g)*(1).

This brief complies with the typeface requirements and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and (f) because this brief has been prepared in a proportionally space typeface using Microsoft Office Word 2013 in 14-point, Times New Roman Font.

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COST STATEMENT

The undersigned states that there were no costs associated with the preparation of this document.

Dated this 24th day of May, 2024

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