IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 23-0958
Franklin County Case No: CVCV501944

MARABELLE ANN 'LE' ABBAS, MARABELLE ABBAS TRUST, MATTHEW ABBAS, HARLAND DUANE ABBAS TRUST, PATRICIA F. HANSON, PATRICIA HANSON, TEN-K FARMS, INC., BRUCE D. REID and LYNETTE MEYER, ROY AND NEVA STOVER TRUST,
Plaintiffs-Appellants,
vs.

FRANKLIN COUNTY BOARD OF SUPERVISORS, MIKE NOLTE, GARY McVICKER, CHRIST VANNESS, as Trustees of Drainage District Number 48, and FRANKLIN COUNTY DRAINAGE DISTRICT NUMBER 48,
Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR FRANKLIN COUNTY
THE HONORABLE RUSTIN DAVENPORT
DISTRICT COURT JUDGE, PRESIDING

DEFENDANTS-APPELLEES BRIEF AND ARGUMENT

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Statement of the Case

This is an Appeal by Plaintiffs of the District Court finding and determining damages to the various Plaintiffs as a result of a Drainage District improvement to Drainage District 48 which commenced in 2017. The District Court's ruling was filed March 30, 2023. Both Plaintiffs and Defendants filed a Motion to Enlarge and Amend Findings. Plaintiff's Motion was denied. Defendant's Motion was granted in part which required Plaintiffs, Reid and Meyer, to convey approximately 4.01 acres to Defendant, Drainage District 48.

Notice of Appeal was then filed by Plaintiffs on June 14, 2023, and Notice of Cross-Appeal by Defendants was filed June 16, 2023.

Statement of Facts

Franklin County Drainage District 1 was created October 3, 1905, by the Franklin County Board of Supervisors serving as Trustees. The District was created to address the wetlands and to create a drainage ditch. A. 174, 137. The District at the time created a 5-mile long ditch which included land now owned by

the Plaintiffs. This ditch was deep enough and steep enough that traversing the ditch was impossible without the construction of a crossing or bridge. Ruling Pg. 2, A. 174-175. The drainage ditch when constructed had a 5-foot bottom and a 1-to-1.5-foot side slope. A. 137.

In 1916, the landowners wanted tile lines to drain their water to the ditch and petitioned to establish a new district which would have been Drainage District 48. The request was for a main line and tile laterals. In 1916, a new tile was put in the ditch which had different sizes. It had a 32-inch diameter at the outlet, and a 14-inch tile at the beginning, upstream 3 miles. The tile had a minimum of 2 feet of filler over the tile. The 32-inch tile would have 5 feet of dirt in the ditch bottom to encase the tile and cover it. A. 175. It was at this time that the Drainage District changed the number of the District from District 1 to Drainage District 48. It is not disputed that the land that was in Drainage District 1 is the same land in Drainage District 48. Ruling Pg. 3.

After installing the tile in 1917 the water was being drained from the land by the tile line and the shallow ditch above. However, landowners in the area began filling the ditch and eventually the ground above the tile line was raised close to the surface level.

In 1937, the ditch was basically filled, and the farmers were using the land above the tile line to farm. Prior to that time the farmers did not have to pay property taxes as to the area of the ditch. However in 1937 the Board of Supervisors voted to return this area to the tax levy rolls and required the farmers to begin paying real estate taxes on the land located over where the deep ditch and tile line had been previously constructed.

The landowners were able to use the land above the tile as they had filled in the ditch, for that reason returning the land to the tax rolls was appropriate because the landowner got the use of the land while the District's tile remained under said land.

Plaintiffs' witnesses testified that the land above the ditch had been farmable prior to 1990 acknowledging that the area of the drainage tile could be wet but that generally the entire field

could be farmed and there was no interruption in the tract by the ditch. Ruling Pg. 4.

In 1990, the Drainage District attempted to again make repairs to its drainage system and had decided to recreate a shallower ditch above the tile line similar to the condition that would have existed following the 1917 construction of the tile line. The natural waterway was again excavated to a point approximately 2 feet above the tile line with the expectation that with the shallower ditch the excess water would have an opportunity to run along the shallower ditch and provide a separate way for the water to drain from the land. Ruling Pgs. 4-5.

Because there was a widening of the previous area of the ditch, the 1990 construction resulted in various Plaintiffs losing additional land for which they sought and obtained compensation. This case was litigated in and eventually appealed with the decision being rendered in *Hicks v. Franklin County Auditor 514 NW2d 431 (Iowa 1994)*. The District paid for the additional easement area given at that time to Plaintiffs,

Reid and Meyer, however no claims were filed for the additional easement from Abbas or Hanson as they did not file a damage claim. However, by virtue of its power pursuant to Iowa law the District did expand the width of its easement as to the Abbas and Hanson properties. Ruling Pg. 5.

The repairs in 1990 were not successful. The creation of the shallow ditch caused the tile line to be closer to the air and lessen the amount of warming blanket of soil on top of the tile line. Operation of farm equipment across the tile line over the years also probably did damage to the line. Ruling Pg. 5. Furthermore, the tile line had been in place for over 70 years and was reaching the end of its expected utility. After 1990 there were multiple areas where the tile line could not withstand the water pressure inside the line creating blowouts and breakage of the line. Ruling Pg. 5.

In 2017, the Drainage District gave up on the tile line and returned to an open ditch project similar to what was in place in 1906. The new drainage ditch was not crossable in the tracts of

land owned by the Plaintiffs. Ruling Pg. 6. Just as it was not crossable in 1906.

The Plaintiffs sought damages for this new construction, appraisers were appointed, and reported back to the Trustees. The Trustees determined that the work did not create severance of the land requiring payment of damages with the small exception of a parcel owned by Reid and Meyer, which as a result of the new construction was landlocked. The Drainage District Trustees approved the recommendation of the Commissioner's for payment.

Plaintiffs then appealed to the Drainage District Trustees in the determination of damages to the District Court. Claiming that the creation of Drainage District 48 abolished Drainage District 1, that Drainage District 48 abandoned the drainage ditch from 1917 through 1990 and claimed damages.

The District Court found that the creation of Drainage District 48 did not abolish Drainage District 1 but rather Drainage District 1 was merely renumbered to Drainage District

48 (Ruling Pg. 12, Citing *Hicks v. Franklin County Auditor 514 NW2d 431 (Iowa 1994)).*

The Court further found that the Drainage District did not abandon the drainage ditch from 1917 through 1990. Ruling pgs. 14-16.

The Court found that the action of the Board of Supervisors in 1937 returning the land above the drainage ditch to the tax rolls was not an action of the Drainage Ditch Trustees abandoning but was rather the Board of Supervisors determining a property tax matter. Ruling Pg. 14. The Court found that restoration of the property to the tax rolls was not by itself a relinquishment or abandonment of the Drainage District's rights of the drainage ditch. The Court concluded that there was never a formal action by Drainage District 48 to abandon its rights concerning the area of land that was used for drainage. Ruling Pg. 15.

The Court did however award Plaintiffs damages. The Court found that the Plaintiffs had suffered damages in that previous to the 2017 improvement they had the benefit of using

all the land including the land above the old tile line/drainage ditch. Further determining that the 2017-19 repair decreased the value of Plaintiffs land by taking additional acres in excess of the 1990 repair and by creating a severance of their land. Ruling Pg. 17.

The Court then analyzed the Plaintiff's damage claim and awarded the various Plaintiffs damages as a result of the 2017/2019 improvement. Ruling Pgs. 18-20.

In making this determination the Court agreed with the Commissioner that 4.01 acres of the Reid/Meyer land had been isolated by the ditch and that Plaintiffs, Reid and Meyer, had suffered damages for loss of the land of $36,915.26. According to the Commissioner that was the total value of land.

In its Ruling on Post Trial Motions, the Court ordered that since the 4.01 acres of land on the Reid/Meyer property was isolated and that since the Defendants were ordered to pay the value of the land to Plaintiffs, Reid and Meyer, that the Plaintiffs, Reid and Meyer, should deed the land to the District

by Warranty Deed free and clear of all liens and encumbrances. Post Trial Ruling Pg. 2.

ISSUE I

The Trial Court correctly ruled that Drainage District 48 had an easement for a ditch right-of-way.

Preservation of Error

This issue is preserved for Appellate review by Plaintiff's Notice of Appeal and Defendant's Notice of Cross-Appeal.

Standard of Review

The Standard of Review is for correction of errors at law. 468.81 Code of Iowa, 468.91 Code of Iowa, *Chi. Cent. Pac. RR v. Calhoun County Board of Supervisors 816 NW2d 367, 370 (Iowa 2012)*. The matter was tried as an ordinary proceeding §468.91 Iowa Code.

Argument

This action was tried as an ordinary proceeding. §468.91 Code of Iowa. The Trial Court findings of fact are binding on the Appellate Court if supported by substantial evidence.

The Plaintiffs do not argue there was a lack of substantial evidence to support the finding of no abandonment. Rather the Plaintiffs continue to make the same argument of abandonment that they made at the Trial Court level, rearguing facts.

The Defendants position is that the Trial Court's finding of fact that the Defendant did not abandon its drainage easement is such a finding of fact that is binding upon this Court. The Trial Court found that in 1916 the former Drainage District 1 was renumbered as Drainage District 48. The Court found that the disputed land in the original Drainage District 1 was the same land that is now in Drainage District 48. Ruling Pg. 3.

The easement area that the Drainage District acquired in 1906 for the open ditch was always used for drainage purposes up until the present day. T. 12, Lines 8-15.

The Court in *Hicks v. Franklin County Auditor 514 NW2d 431 (Iowa 1994)* specifically made a finding that the District was merely renumbered in 1916 from Drainage District 1 to Drainage District 48 (*Hicks* at 434).

The drainage law at the time allowed for this process. §1989-a25 Code of Iowa 1907 which provides:

> "If any levy direct, drainage district, or improvement heretofore established shall prove insufficient to drain all the lands necessarily tributary thereto, the Board of Supervisors upon petition, therefore as for the establishment with an original levy or drainage district; shall have the power and authority to establish a new levy or drainage district covering and including such old district or improvement; together with any additional lands deemed necessary..."

That is precisely what occurred in this case in 1916. A new Drainage District was established i.e., Drainage District 48 which included the lands in the old Drainage District 1. There was no abandonment or termination of Drainage District 1's original ditch easement. The easement continued on in Drainage District 48. The use of the easement area was changed slightly from an open ditch to a tile line with a shallow open ditch above.

The Plaintiffs argue that since §468.27 Code of Iowa did not exist prior to 1985 that the original easement rights acquired by Drainage District 1 in 1906 were somehow lost or abandoned. There is no evidence in the record whatsoever that

the easement for the original drainage ditch was in any way abandoned or that the District even intended to abandon its original easement when the ditch was constructed in 1906.

Again, this precise issue was dealt with extensively in *Hicks supra*. Under the same facts as presented, the Plaintiff's argued that the Drainage District lost its easement rights in the Drainage District easement area by allowing the Plaintiff's to fill in the trench coupled with the 1937 action by the Board of Supervisors returning the land to the tax rolls. This Court determined that the actions complained of by the Plaintiffs did not cause the Drainage District to lose any rights in the original easement area. The Plaintiffs were only allowed to recover damages for the expansion of the easement area that occurred as a result of the 1990 repair.

The same scenario is present in this case. Plaintiffs are allowed to recover for the additional land taken for the expansion due to the 2017 work, but not for any additional "taking."

In *Johnson v. Drainage District No. 80 of Palo Alto County, 184 Iowa 346, 168 NW2d 888 (1918).* A new Drainage District was created incorporating a right-of-way of the old district with a new right-of-way including both a portion of the old original drainage ditch and following the line of a previous ditch privately constructed.

This Court concluded that:

> "As far as the right-of-way for the improvement in question included a portion of the right-of-way of a former drainage improvement, for which the owner had received compensation, no additional sums should be allowed for the land thus taken and occupied thereby."

The Court went on to conclude that:

> "... the land taken for a ditch right-of-way is simply burdened with an easement, and... the owner retains the right to use the property in any way not inconsistent with the carrying out of the plans of the Drainage District, yet this does no mean that the owner may in all cases enter upon the right-of-way and level the waste banks so as to reclaim the land for cultivation."

In 1937, the ditch was basically filled, and the farmers were using the land above the tile to farm. This went on until approximately 1990 when the District again attempted to make repairs to the system. They attempted to recreate a shallower

ditch above the tile line similar to the one that would have existed following the 1917 construction. The tile arrangement remained in place until 2017 when the District gave up on the tile line and returned to the open ditch similar to what had been in place in 1906. Ruling Pg. 6. Throughout the period of 1906 to the present date the easement area that was originally acquired in 1906 was continuously used to provide drainage for Drainage District 48. There was no interruption in the use of the property by the Drainage District and the use for the drainage area was continuous. The Drainage District was entirely within its rights in changing the nature of the drainage mechanism from an open ditch in 1906 to a combination of open ditch and tile in 1917 and back to an open ditch in 2017.

In order to establish abandonment, the easement holder must relinquish the easement with the intent of never again resuming or claiming a right, title, or interest in it. The easement holder must surrender it absolutely or forsake it entirely and to relinquish all connection or concern with the easement. Intent to abandon is the threshold in finding

abandonment. Nonuse alone will not establish such an intent. *25 Am Jur 2d Easements and Licenses §112.*

An express or implied intention to abandon an easement must be shown clearly. That is there must be clear and convincing proof of the easement holder's intention to abandon the easement. *Harrington v. Kessler 77 NW2d 633 (Iowa 1956).*

There was substantial evidence in the record that the Drainage District never intended to abandon its easement rights acquired in 1906.

There was no loss by the District of its easement rights in the area taken originally in 1906 by the drainage ditch construction.

ISSUE II

The Trial Court erred in its calculation of its damages.

Preservation of Error

The Issue is preserved for Appellate review by Plaintiff's Notice of Appeal and Defendant's Notice of Cross-Appeal.

Standard of Review

The Standard of Review is for correction of errors at law. 468.81 Code of Iowa, 468.91 Code of Iowa, *Chi. Cent. Pac. RR v. Calhoun County Board of Supervisors 816 NW2d 367, 370 (Iowa 2012)*. The matter was tried as an ordinary proceeding §468.91 Iowa Code.

Argument

Plaintiffs claim that the Trial Court erred by not awarding Plaintiffs sufficient damages. Defendants have cross-appealed on this issue and assert that the Trial Court erred in awarding Plaintiffs excessive damages, to which as a matter of law the Plaintiffs were not entitled.

The Trial Court properly concluded that there was an existing easement for a ditch right-of-way. However, the Trial Court went on and concluded that since the landowners had the benefit of being able to farm the land along the tile line for the last 80 years, that they were entitled to additional severance damages. Ruling pg. 17. The Trial Court determined that the Plaintiffs were entitled to severance damages due to the fact

that the improved ditch will impede their ability to farm their land and that the fair market value of their land has thus decreased. Ruling pg. 19.

For Plaintiff, Abbas, the Court calculated Abbas's damages to be $91,189.00. For Plaintiff Hanson, the Court calculated Hanson's damages to be $162,003.00.

For Plaintiffs, Reid and Meyer, the Court calculated severance damages (separate from the effect of the ditch as to the 4.01 acres) to be $41,541.80. Ruling pgs. 19-20.

It is these damages that are the subject of the Defendants cross-appeal. The Defendants assert that the Court made an error of law when it determined Plaintiffs were entitled to any additional severance damages.

In the present case the record clearly shows that the Drainage District acquired an Easement in 1906 to construct a drainage ditch across the current Plaintiffs land. Damages were paid. Exhibit A was admitted into the record being the original proceedings establishing Drainage District 1 starting back in 1904. The proceedings indicate that notice was mailed to the

landowners on September 13, 1905, of the improvements to be made and notification that claims for damage must be filed in the office of the Auditor not less than 5 days before the date of hearing, which was October 3, 1905, at 10:00 a.m. The record further shows that claims for damage were filed with the Auditor and duly paid. It must be remembered that at that time the District proposed construction of a drainage ditch which was deep enough and steep enough that it would not have been possible to traverse other than through construction of a crossing or bridge. A. 174-175. The drainage ditch when constructed at a 5-foot bottom and 1.5-foot side slope.

These proceedings were a condemnation of the land taken for the Drainage District's improvements. The damages paid in 1905, at the time of the taking, are conclusively presumed to include all damages present and future which may be sustained by the owner by reason of the proper use of the condemned portion of the property so long as it was used for the purpose for which it was taken. *Hammer v. Ida County 231 NW2d 896 (Iowa 1975)*. This is consistent with the law in effect at the time of the taking. See *Hileman v. Chicago G.W.R.Y. Co. 113 Iowa*

591, 85 NW 800 (1901). Which held that it is presumed that payment for damages due to condemnation includes all damages. See also *Wheatley v. City of Fairfield 213 Iowa 1187, 240 NW 628 (1931)*.

The only damages to which the Plaintiffs are entitled presently are for the damages sustained as a result of any additional land taken due to the 2017 expansion of the ditch, not for the ditch itself.

This is consistent with the Commissioner's Report. Exhibit 23. The Commissioners recommended no severance damages be paid and that the only compensation which should be paid to the Plaintiffs is for additional right-of-way taken. The only exception was for Plaintiff's Reid and Meyer where the Commissioners did conclude that a portion of the Reid/Meyer land was severed. This conclusion of the Commissioners however ignored the fact that the land had originally been severed in 1906 and damages paid and may be therefore contrary to the law articulated in *Hammer, Johnson, and Hicks supra*.

Otherwise, the Commissioners only recommended payment to Hanson for additional right-of-way taken of 1.46 acres ($13,072.79), payment to Abbas for additional right-of-way taken 1.80 acres ($13,846.64), and Reid and Meyer, was for additional right-of-way taken 1.80 acres ($13,846.64). Defendants do not appeal this finding.

Plaintiffs argue extensively that the Trial Court should have adopted the opinion of their appraiser Fransden which supports a much higher award. As to the damages, Fransden's opinion was premised upon the assumption that severance damages were payable to the Plaintiffs. Fransden admitted on cross examination that his conclusions were all premised upon the assumption that the Drainage District did not have an easement for an open ditch and that the severance occurred in 2017 not 1906. T. 108, Line 17 – T. 112, Line 25.

If this Court concludes as Defendants believe as it must, that the Drainage District did not abandon its original easement obtained in 1906, then the Plaintiffs argument that the Trial Court should have adopted the Fransden conclusion as to value

has no basis in fact. The record shows the Plaintiffs were paid for all damages including severance damage at the time the original ditch was constructed in 1906 (*Hammer supra).* The Trial Court's award of additional severance damages is erroneous and without any legal basis.

ISSUE III

The Trial Court properly directed Reid and Meyer to convey the 4.01 acers taken to the District upon payment of the damages award.

Preservation of Error

The Issue is preserved for Appellate review by Plaintiff's Notice of Appeal and Defendants Notice of Cross-Appeal.

Standard of Review

The Standard of Review is for correction of errors at law. 468.81 Code of Iowa, 468.91 Code of Iowa, *Chi. Cent. Pac. RR v. Calhoun County Board of Supervisors 816 NW2d 367, 370 (Iowa 2012).* The matter was tried as an ordinary proceeding §468.91 Iowa Code.

Argument

The Court in its original ruling found that there was a loss of 4.01 acres of land on the Reid/Meyer property. The Court concluded and agreed with the Commissioners that the 4.01 acres of the Reid/Meyer land had been isolated by the ditch and that they were entitled to payment for damages for loss of that land due to the severance. The Court agreed with the Commissioners that the land had a value of $36,915.26 which represented the entire value of the parcel, as it was landlocked and had no access by easement or otherwise.

The Defendant filed a Post-Trial Motion to Amend and Enlarge the findings with the Court. The Drainage District requested that since the District was required to pay Reid and Meyer for the 4.01 acres the full market value of the property that the District should upon payment of that amount own the land taken. The Trial Court agreed and directed the owners to convey the land to the Drainage District by warranty deed.

The Plaintiffs argue that Plaintiff, Reid and Meyer, should be allowed to be paid for the full value of the 4.01 acres and still

retain the acres which they assert they may rent or sell to an adjoining landowner. This would result in an unfair and unjust enrichment to Plaintiffs, Reid and Meyer, whereby having received the full value of the 4.01 acres they would still be allowed to retain it and either rent it out or sell it.

The Plaintiffs argue that the 4.01 acres are not necessary for Drainage District 48's open ditch project and there was no effort to condemn the 4.01 acres required under §468.126(6) Code of Iowa.

Article 1, Section 18 of the Iowa Constitution provides for Eminent Domain on the part of Drainage Districts. This is codified in §468.1 Iowa Code. This code section creates a presumption that protection of lands from overflow shall be presumed to be of public benefit and conducive to public health, convenience, and welfare. §468.2(2) of the Iowa Code provides that the Drainage District laws contained in §468 should be liberally construed to promote levying, ditching, draining, and reclamation of wet swamp and overflow lands.

The necessity for taking of the lands in Eminent Domain proceeding is a matter which the Drainage District Trustees alone can determine. *Barrett, et al v. Kemp, et al 91 Iowa 296; 59 NW 76 (1894).* The Court generally defers to the public body overseeing the acquisition to determine whether the land is being taken for public use and interference on part of the Courts will not be warranted except where there is presented a clear, plain, and palpable case of transgression. *Reter v. Davenport, R.I. & N.W. Ry, Co. 54 NW2d 863 (Iowa 1952).*

Plaintiff further argues that Defendant did not initiate any condemnation proceedings to acquire the 4.01 acres as required by §468.126(6). The Defendant did go through the procedure outlined in §468.126(6) the Code. However, upon the Commission recommending full payment to the Plaintiffs, Reid and Meyer, for the 4.01 acres and the District Court agreeing with the Commission that the Defendants should pay the full value of the land to the Plaintiffs the matter became one of Eminent Domain.

In the event the decision of the Trial Court is affirmed the District would acquire the 4.01 acres and even though the 4.01 acres is not directly required for the 2017 improvements the taking of the 4.01 acres would be for public use. The District upon acquiring the land would be able to use it as needed for Drainage District needs or sell the land and use the money to reduce the need for future assessments to the benefit of all owners in the District. The only reason that the Defendant has agreed to pay the Commissioners recommended amount of damages was the requirement that the District end up owning the 4.01 acres.

In the event the Court disagrees with the Defendants with respect to the Trial Courts order requiring the Plaintiffs to deed the 4.01 acres to Defendants. It is Defendant's position that as outlined previously under Issue II that the Plaintiffs have already been compensated for severance damages and that they would be entitled to nothing further. See *Hammer, Johnson, and Hicks supra.*

Conclusion

In conclusion, Defendants request that the Court affirm the Trial Court's ruling that Drainage District 48's easement for ditch right-of-way was not abandoned and that its use of the drainage easement area was continuous from its establishment in 1906 to the present date.

Defendant further requests that the Court reverse the Trial Court on its calculation of damages and award the Plaintiffs no severance damages, because any such severance damage claim would have accrued and been paid at the inception of the District in 1906 when the original ditch was constructed.

The Defendants also respectfully request that the Court affirm the Trial Courts order in so far as requiring Plaintiffs, Reid and Meyer, to deed the 4.01 acres to the Defendants. In the alternative in the event the Court determines that a deed is not appropriate that the Court find and determine that the Plaintiffs severance damages for the parcel for which they are now claiming be denied for the reason that the damages were

previously paid to the Plaintiff's predecessors and title upon the original ditch being installed in 1906.

Notice of Oral Argument

Notice is hereby given that upon submission of cause to the Supreme Court of Iowa the Appellee requests to be heard in oral argument.

Cost Certificate

I certify that the actual cost of producing the foregoing Appellee's Brief and Argument was in the sum of $0.00.

Certificate of Compliance

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2947 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
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 Georgia font and utilizing the Microsoft Office 365 Business in 14-point font plain style.

Certification of Filing

I hereby certify that on the 21st day of November 2023, I electronically filed the foregoing document with the Clerk of the Supreme Court of Iowa by using the Iowa Judicial Branch electronic filing system which will send a notice of electronic filing to the following:

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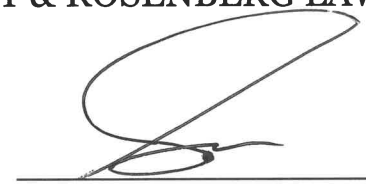
By: 

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