IN THE SUPREME COURT OF IOWA

NO. 19–0657

COMMUNITY BANK & TRUST COMPANY,

Defendant–Appellant,

vs.

BLUE GRASS SAVINGS BANK,

Plaintiff–Appellee,

APPEAL FROM THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY, CASE NO. EQCV024741 THE HONORABLE JOHN D. TELLEEN

APPELLEE'S FINAL BRIEF

RICHARD A. DAVIDSON AT0001937
LANE & WATERMAN LLP
220 North Main Street, Suite 600
Davenport, IA 52801
Telephone: (563) 324-3246
Facsimile: (563) 324-1616
Email: rdavidson@l-wlaw.com

ATTORNEYS FOR PLAINTIFF–APPELLEE, BLUE GRASS SAVINGS BANK

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ROUTING STATEMENT

The Supreme Court should transfer this case to the Court of Appeals because the issues involve application of existing legal principles and the case is appropriate for summary disposition. IOWA R. APP. P. 6.1101(3). The Court of Appeals has already decided that the "Notice" clause required by Iowa Code § 654.12A does not limit a senior mortgagee's mortgage securing "all debts." *Wells Fargo Bank, N.A. v. Valley Bank & Trust*, No. 12–2031, 2013 WL 4767889 (Iowa Ct. App. Sept. 5, 2012).

STATEMENT OF THE CASE

This appeal arises out of Blue Grass Savings Bank's ("Blue Grass") senior mortgage on borrower Joseph Stecher's ("Stecher") real estate recorded on June 23, 2014. (App. at 170). On August 10, 2018, Blue Grass filed a foreclosure petition against Stecher, also naming junior lienholders Community Bank & Trust Company ("Community Bank"), Twin State, Inc., Lou Ann Christofferson, and Catherine A. Mack. (App. at 55).

On February 13, 2019, Blue Grass moved for summary judgment for a decree of foreclosure. (App. at 108–11). Community Bank resisted Blue

Grass' motion for summary judgment. (App. at 112–25). Blue Grass filed a Reply to Community Bank's Resistance, arguing that the "all debts" clause controlled, despite the presence of the Iowa Code § 654.12A notice under the holding of *Wells Fargo Bank, N.A. v. Valley Bank & Trust*, No. 12–2031, 2013 WL 4767889 (Iowa Ct. App. Sept. 5, 2012). (App. at 142–45.)

The District Court held a hearing on March 20, 2019 and granted Blue Grass' Motion for Summary Judgment. (App. at 213–14). Counsel for Blue Grass drafted a Proposed Order for Summary Judgment and a Proposed Decree of Foreclosure and submitted them to counsel for Community Bank prior to submission to Judge Telleen. (*See* App. at 168–79, 214–17). The District Court entered the Order for Summary Judgment and the Decree of Foreclosure on April 8, 2019. (App. at 168–79). Community Bank filed a notice of appeal on April 22, 2019. (App. at 180–90).

STATEMENT OF FACTS

Between April 29, 2011 and December 14, 2016, Stecher executed and delivered several promissory notes (the "Notes") to Blue Grass having a total balance due of $592,579.24, plus interest. (App. at 175). Each promissory note signed by Stecher authorized Blue Grass to charge a "default rate" of interest:

> **A. Interest After Default.** If you declare a default under the terms of the Loan, including for failure to pay in full at maturity, *you may increase the Interest Rate otherwise payable as described in this section*. In such

> event, interest will accrue on the unpaid Principal balance of this Note at the Interest Rate in effect from time to time under the terms of the Loan, until paid in full.
>
> **B. Maximum Interest Amount**. Any amount assessed or collected as interest under the terms of this Note will be limited to the maximum lawful amount of interest allowed by state or federal law, whichever is greater. Amounts collected in excess of the maximum lawful amount will be applied first to the unpaid Principal balance. Any remainder will be refunded to me.
>
> **C. Statutory Authority**. The amount assessed or collected on this Note is authorized by the Iowa usury laws under Iowa Code §§ 537.2601 and 535.2 et. seq.

(*See, e.g.*, App. at 60 ¶ 3) (emphasis added).

On June 23, 2014, Stecher executed and delivered a mortgage to Blue Grass securing payment of the Notes (the "BGSB Mortgage"). (App. at 170). The BGSB Mortgage encumbered Lot 1 of Stecher Farms Subdivision in Muscatine County, Iowa, commonly known as 3502 150th Street, Muscatine Iowa 52761 (the "Real Estate"). *Id.* The BGSB Mortgage was filed on May 27, 2014 in the Muscatine County Recorder's Office as Document No. 2014–01773. *Id.* The BGSB Mortgage states it secures "A Promissory Note or other agreement dated May 23, 2014 from Mortgagor to Lender with a loan amount of $48,000 maturing on May 23, 2017." (App. at 81). The BGSB Mortgage also states that it secures "*[a]ll present and future debts from Mortgagor to Lender, even if this Security Instrument is not specifically referenced, or if the*

future debt is unrelated to or of a different type than this debt." (App. at 81). The BGSB Mortgage contains a "NOTICE" provision under Iowa Code § 654.12A:

> NOTICE. THIS MORTGAGE SECURES CREDIT IN THE AMOUNT OF $148,000.00. LOANS AND ADVANCES UP TO THIS AMOUNT, TOGETHER WITH INTEREST, ARE SENIOR TO INDEBTEDNESS TO OTHER CREDITORS UNDER SUBSEQUENTLY RECORDED OR FILED MORTGAGES AND LIENS.

(*Id.*) (hereinafter referred to as the "Notice").

Long after Blue Grass made the loans to Stecher, on March 18, 2017, Community Bank loaned $193,485 to Stecher. (App. at 170). Community Bank secured its loan by filing a junior mortgage on the Real Estate. *Id.* In 2018, Stecher defaulted on the BGSB Mortgage and Blue Grass commenced this foreclosure proceeding by filing its Petition on August 10, 2018. (App. at 13).

I. THE DISTRICT COURT PROPERLY HELD THAT THE MORTGAGE SECURED ALL DEBTS DUE FROM STECHER TO BLUE GRASS SAVINGS BANK

A. ERROR PRESERVATION

Error was preserved only on the § 654.12A Notice issue and statutory interpretation issue, as more specifically set forth below in Part I.C.1 and I.C.2.

B. STANDARD OF REVIEW

The standard of review is for errors at law. *Freedom Financial Bank v. Estate of Boesen*, 805 N.W.2d 802, 806 (Iowa 2011) (ruling that appeals from orders granting summary judgment are for correction of errors at law despite the fact that foreclosure proceedings are typically tried in equity).

C. ARGUMENT

This case is about whether the "all debts" clause in the BGSB Mortgage controls over the "Notice" provision under Iowa Code § 654.12A if the loans are made by the senior lender before a junior mortgage is recorded. Mortgages are not required to state an amount secured to be effective. Iowa Code § 654.12A provides that if a senior mortgage includes a provision for a future advance and the Notice required by the statute, then the senior mortgage has priority over subsequently recorded junior mortgages up to the amount stated in the Notice. However, the statute does not address what happens if the senior mortgagee made loans in excess of the Notice amount before a junior mortgage is recorded. Therefore, § 654.12A does not limit Blue Grass' priority over Community Bank, because the statute is not applicable under the factual circumstances in this case.

All of the loans were advanced by Blue Grass to Stecher before Community Bank recorded its junior mortgage. Even so, Community Bank

argues that Blue Grass' priority is limited by the amount stated in its Notice clause—$148,000 plus interest. However, the District Court correctly applied *Wells Fargo Bank, N.A. v. Valley Bank & Trust*, No. 12–2031, 2013 WL 4767889 (Iowa App. 2013) to the facts of this case, and held that the "all debts" clause controls over the Notice clause. The BGSB Mortgage secures all of Stecher's debts, not just $148,000. As in *Wells Fargo*, Blue Grass and Stecher clearly intended "all debts" to be secured by the BGSB Mortgage. Thus, the District Court did not err when it applied *Wells Fargo* to this case.

Interestingly, Community Bank could have avoided its entire situation by making a "diligent inquiry" as to the amount owed to Blue Grass before it loaned $193,485. Because it made no inquiry, Community Bank took its junior mortgage subject to all of the facts a diligent inquiry would have revealed, as discussed below.

1. Section 654.12A Only Applies When There is a Subsequently Recorded Mortgage at the Time a Future Advance is Made

a. Error Preservation

Error was preserved on this issue, to the extent Community Bank argues the § 654.12A Notice section is applicable.

b. Argument

Iowa Code § 654.12A only establishes priority between lenders as to future loan advances made when there is an existing "subsequently recorded" (junior) mortgage on file at the time the senior lender advances new money.

Iowa Code § 654.12A provides:

> Priority of advances under mortgages. Subject to Section 572.18, if a prior recorded mortgage contains the notice prescribed in this section and identifies the maximum credit available to the borrower, then loans and advances made under the mortgage, up to the maximum amount of credit together with interest thereon, are senior to the indebtedness to other creditors *under subsequently recorded mortgages* and other subsequently recorded or filed liens even though the holder of the prior recorded mortgage has actual notice of indebtedness under a subsequently recorded mortgage or other subsequently recorded or filed lien. The notice prescribed by this section for the prior recorded mortgage is as follows:
>
> NOTICE: This mortgage secures credit in the amount of ……. Loans and advances up to this amount, together with interest, are senior to indebtedness to other creditors under subsequently recorded or filed mortgages or liens.

IOWA CODE § 654.12A(1) (emphasis added).

Iowa Code § 654.12A says nothing about a limitation on advances made before there is a junior mortgage recorded. This section is not intended to be an overall cap on a senior mortgage, but rather to set priorities when a senior lender advances new money after a junior mortgage is recorded. If the plain language of a statute is clear, the court must not search for meaning beyond the statute's express terms. *Exceptional Persons, Inc. v. Iowa Dept. of*

Human Servs., 878 N.W.2d 247, 251 (Iowa 2016). When construing a statute, the court first seeks to understand legislative intent. *Id.* The court considers the statute's "'subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, . . . and the consequences of various interpretations' alongside the words of the statute." *Id.* (quoting *State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003)). The court examines the context in which relevant words and phrases are used, and gives "plain, ordinary meaning to words, phrases, and punctuation," assuming "no part of an act is intended to be superfluous." *Id.*

By its plain language, § 654.12A only governs priority between lenders as to future advances made by a senior mortgagee *after* a junior mortgagee is of record. The text of the statute provides that "if a prior recorded mortgage contains" the notice, loans and advances made are "senior to indebtedness to other creditors *under subsequently recorded mortgages*, even though the holder of the prior recorded mortgage has actual notice of indebtedness under a subsequently recorded mortgage." IOWA CODE § 654.12A (emphasis added). Thus, to benefit from the priority in § 654.12A there must be (1) a senior mortgage; (2) a junior recorded mortgage and (3) new debt owed to the senior lender after the senior lender has notice of the junior mortgage. This statute was intended to modify the common law rule that new future advances on a

senior mortgage lost their priority after the senior mortgagee had notice of a junior mortgage. *See National Bank of Waterloo v. Moeller*, 434 N.W.2d 887, 890 (Iowa 1989). These facts are not present in this case.

Blue Grass made all of its loans to Stecher before Community Bank made its loan or recorded its junior mortgage in 2017. At the time of Blue Grass' loans, there was no "subsequently recorded mortgage" to Community Bank.[1] Thus, the priority of § 654.12A does not come into play.

The text of the statute does not give Community Bank priority over amounts loaned by Blue Grass before Community Bank filed its junior mortgage. Iowa Code § 654.12A does not limit the priority of mortgages executed by the senior mortgagee (here, Blue Grass) prior to the subsequent mortgage loan being made. Section 654.12A says nothing about the priority of senior loans made before the junior mortgage is recorded. The reason for this omission is simple. Section 654.12A is not the only way that a senior mortgage obtains priority over a junior mortgage.

It has been the law of the State of Iowa for more than 125 years that a party taking a second mortgage is on constructive notice of the balance due on the first mortgage, even though the amount is not stated in the senior

[1] Blue Grass does not claim priority for any amounts loaned *after* Community Bank recorded its junior mortgage. All amounts loaned thereafter in excess of the Notice amount are junior to the "subsequently recorded mortgage."

mortgage itself. *Jordan v. Wimer*, 45 Iowa 65 (1876) (holding that knowledge of a senior lien put the junior lienholder on inquiry notice to determine the amount actually owed); *Lowden Savings Bank v. Zeller*, 194 N.W. 966, 969 (Iowa 1923) (holding that reference to mortgage including "other indebtedness" was sufficient "to put appellant bank upon inquiry and to enable it to ascertain the exact amount of the indebtedness secured thereby"). In Iowa, a mortgage is not even required to state an amount to place third parties on notice of the senior debt. *Fetes v. O'Laughlin*, 17 N.W. 764, 765 (Iowa 1883) (holding that a reference in the mortgage to a note without stating the amount was sufficient to place third parties on notice of the senior secured debt).

Iowa law presumes that the first recorded mortgage has priority. *Miller v. Miller*, 232 N.W. 498, 499 (Iowa 1930). If there is an outstanding, recorded mortgage encumbering a property that a new junior mortgagee is considering taking as collateral for a loan, the new junior mortgagee has a duty to make inquiry to determine the amount of outstanding senior mortgage. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 638 (Iowa 1996); *Miller & Chaney Bank v. Collis*, 234 N.W. 550, 553 (Iowa 1931) (holding constructive notice given by recording of senior mortgage imparted a duty on the purchaser to make inquiry to determine the amount due on the senior lien); *Jordan v. Wimer*, 45 Iowa 665, 69 (Iowa 1876) (establishing that having knowledge that

a lien was unpaid imparts a duty to inquire and ascertain how much was unpaid). Failure to make an inquiry precludes a purchaser or mortgagee from claiming the protections given to a bona fide purchaser under the recording statutes. *Id.* (quoting *Raub v. General Income Sponsors*, 176 N.W.2d 216 (Iowa 1970)). A mortgagee who fails to make inquiry will be charged "with knowledge of what it would have learned" had inquiry been made. *Sun Valley*, 551 N.W.2d at 639; *Rance v. Gaddis*, 284 N.W. 468, 475 (Iowa 1939); *National Properties Corp. v. Polk County*, 351 N.W.2d 509, 511 (Iowa 1984) ("One who purchases land [or takes a mortgage] with knowledge of such facts as would put a prudent person upon inquiry which, if prosecuted with ordinary diligence, would lead to actual notice of the rights claimed adversely by another, is chargeable with the actual notice he or she would have received."). A diligent inquiry by a junior lender (here, Community Bank) to a senior lender (here, Blue Grass) was all that was necessary to verify the outstanding amount under the "all debts" clause of the mortgage. *See National Bank of Waterloo v. Moeller*, 434 N.W.2d 887, 891 (Iowa 1989) (equity does not protect a junior lender who loaned "a substantial sum to [the borrower] in exchange for a deed of trust known to be junior to [the senior mortgagee's] lien").

Blue Grass' first mortgage of record on the Stecher acreage clearly and unambiguously states it covers "all debts." (App. at 81). Community Bank was therefore charged with the knowledge that a diligent inquiry to determine how much was outstanding on the Blue Grass mortgage would have revealed. Community Bank failed to make any inquiry at all and cannot now claim lack of knowledge as protection from its own failure to inquire. Community Bank must be charged with the results of what a diligent inquiry would have revealed: that $572,000 remained outstanding on the BGSB Mortgage. Community Bank cannot be allowed to leapfrog Blue Grass because it failed to make a diligent inquiry.

2. Applying Section 654.12A to Existing, not Hypothetical, *Recorded* Junior Mortgages Gives Effect to the Statute as Written

a. Error Preservation

Error was preserved on this issue.

b. Argument

The District Court's ruling followed the holdings of *Wells Fargo* and *McMahon* in a manner that gives effect to § 654.12A. Before § 654.12A was enacted, this Court held that"[a]dvances to a borrower by a lender holding a senior mortgage after that lender has actual knowledge of the existence of a junior mortgage, are junior to the intervening rights of the junior mortgagee

unless the senior mortgagee's mortgage makes such advances obligatory." *National Bank of Waterloo v. Moeller*, 434 N.W.2d 887, 890 (Iowa 1989) (emphasis added).

Section 654.12A was enacted to modify this rule. *Id.* Section 654.12A altered the common law rule by granting a senior mortgagee priority in the amount stated in the Notice upon the recording of a subsequent mortgage, even in the face of actual knowledge of the junior mortgage.[2] IOWA CODE § 654.12A; *Moeller*, 434 N.W.2d at 890–91. Section 654.12A "clearly favors senior mortgagees." *Moeller*, 434 N.W.2d at 891.[3]

In *Wells Fargo*, the facts were similar to this case. The Lewins executed two promissory notes in favor of Valley Bank on June 29, 2004. *Wells Fargo*, 2013 WL 4767889, at *1. The first promissory note was in the amount of $46,500 and was secured by real property specifically described on a mortgage executed the same day. *Id.* The same day, the Lewins also executed a second promissory note for $111,357.58, which was secured by corporate stock of Cars, Inc. *Id.*

[2] Contrary to Community Bank's assertion, the plain language of § 654.12A does not give junior mortgagees any affirmative rights.

[3] In dicta, the *Moeller* court stated that a senior mortgagee who had constructive notice of a later mortgage would still have priority for future advances made. *Id.*

The mortgage the Lewins gave Valley Bank contained a future advances clause and secured all future loans between Valley Bank and the Lewins. *Id.* The mortgage stated that it secured:

> All future advances from Lender to Mortgagor or other future obligations of Mortgagor to Lender under any promissory note, contract, guaranty, or other evidence of debt existing now or executed after this Mortgage whether or not this Mortgage is specifically referred to in the evidence of debt and whether or not such future advances or obligations are incurred for any purpose that was related or unrelated to the purpose of the Evidence of Debt.

Id. at *2. Like this case, Valley Bank's mortgage contained the § 654.12A Notice provision, which stated that the mortgage secured credit in the amount of $46,500. *Id.*

Wells Fargo Bank subsequently brought a foreclosure action against the Lewins for default (Valley Bank held a second mortgage and Primebank held a third mortgage). *Id.* Valley Bank and Primebank, as junior mortgagees, were also named as defendants. *Id.* at *1. The district court held that Wells Fargo was the senior lienholder on the real estate at issue, followed by Valley Bank and then Primebank. *Id.*

Primebank argued that the Valley Bank mortgage did not secure the second note for $111,357.58 because the "Notice" was limited to $46,500. *Id.* The Iowa Court of Appeals held that the "future loans" clause "applies to any future advances under any promissory note," and that the parties intended to

include both debts to be secured under the "any future loans" clause in the mortgage. *Id.* at *2. The Court of Appeals awarded priority to Valley Bank even though its debt exceeded the "NOTICE" amount under § 654.12A. *Id.* at *3.

In *In re McMahon*, the Bankruptcy Court for the Northern District of Iowa also applied *Wells Fargo*. In *McMahon*, Joseph and Tamara McMahon borrowed over $2 million from Great Western Bank for a business loan. *In re McMahon*, Bankr. No. 18–00443, 2018 WL 3014067, at *1 (Bankr. N.D. Iowa June 8, 2018). In 2011, the McMahons executed Note 2538 in the amount of $127,266. *Id.* Each mortgage had a future advances clause which secured:

> All future advances from Lender to mortgagor or other future obligations of Mortgagor to Lender under any promissory note, contract, guaranty, or other evidence of debt existing now or executed after this Mortgage whether or not this Mortgage is specifically referred to in the evidence of debt and whether or not such future advances or obligations are incurred for any purpose that was related or unrelated to the purpose of the Evidence of Debt.

Id. In 2013, the McMahons borrowed an additional $1.8 million from Great Western Bank. *Id.* at *2. Great Western Bank argued that it should be allowed to pursue the total amount secured by all its loans, totaling $2 million. *Id.* at *1–4. The Debtors argued that the Maximum Obligation Clause in Great Western's mortgage limited the mortgage to the amount stated in the mortgage. *Id.* at *2.

The Bankruptcy Court, applying *Wells Fargo*, agreed with Great Western Bank, and held that the Great Western mortgage secured all loan amounts, and that the Bank was entitled to foreclose on all the properties for the total amount due on its $2 million of loans. *Id.* at *4.

Like in *Wells Fargo*, Blue Grass made its loans before Community Bank recorded its mortgage. (App. at 202). The District Court correctly held that *Wells Fargo* controlled and that "Blue Grass' mortgage secures all debts advanced before Community Bank filed its mortgage on March 21, 2017." (App. at 172).

Wells Fargo, McMahon, and the District Court's ruling here support Blue Grass' interpretation of § 654.12A. When a subsequent junior mortgage is recorded at the time the senior mortgagee advances new money, the Notice clause priority applies, as intended by the legislature. IOWA CODE § 654.12A. But when the loans are secured by an "all debts" clause before the junior mortgage loan is made, the priority under § 654.12A does not apply.

3. Iowa Future Advances Law Favors Enforcement of the "All Debts" Clause in Blue Grass' Mortgage

a. Error Preservation

In District Court, Community Bank did not argue that the "all debts" clause in the Blue Grass Mortgage should be strictly construed against Blue

Grass and the District Court did not rule on this point. Therefore, Community Bank has waived this argument for purposes of this appeal.

b. Argument

If the Court reaches this issue, dragnet/future advances "all debts" clauses such as the "all debts" clause here, are enforceable in Iowa. Future advances clauses are useful business tools in mortgages. Iowa law enforces provisions in mortgages that secure amounts advanced in the future. *Freese Leasing Inc. v. Union Trust & Savings Bank*, 253 N.W.2d 921, 925–26 (Iowa 1977).

Future advances clauses are not to be harshly restricted, and are enforced based "on what the parties intended to secure when executing the original security agreement." *Freese Leasing*, 253 N.W.2d at 925 ("The decisive issue is whether [borrower] and the bank intended the subsequent advances . . . to be covered by the dragnet clauses of the [mortgage]."). Future advances clauses will secure future advances that are of the same kind and quality or relate to the same transaction as the principal obligation. *Id.* at 891.

All amounts Blue Grass loaned to Stecher are of the same kind and quality and relate to the same type of transaction as the principal obligation. The $148,000 loan was for purchase of Stecher's acreage. (Appellee's Proof Brief at 16). The remaining loans are all related agricultural loans. (Appellee

Proof Brief at 18–19). Stecher and Blue Grass clearly intended to secure "[a]ll present and future debts from Mortgagor to Lender, even if this Security Instrument is not specifically referenced, or if the future debt is unrelated to or of a different type than this debt." (App. at 81). The BGSB Mortgage clearly defines what debts are secured. The "all debts" clause is enforceable in Iowa—Community Bank cites no contrary authority.

4. The District Court Correctly Applied *Wells Fargo* Because it is not Error for a District Court to Rely on an Unpublished Court of Appeals Case

a. Error Preservation

Community Bank did not argue that the District Court should not follow *Wells Fargo* because it was unpublished. Community Bank failed to preserve error on this argument.

b. Argument

If the Court reaches this argument, the District Court did not err in relying on *Wells Fargo* because rules of appellate procedure only apply to appeals. The applicable rule of *appellate* procedure provides: "An unpublished opinion . . . of a court . . . may be cited in a brief if the opinion . . . can be readily accessed electronically. Unpublished opinions . . . shall not constitute *controlling* legal authority." IOWA R. APP. P. 6.904(2)(c) (emphasis added). This rule simply provides that unreported decisions are not binding in

the appellate courts for purposes of appeal. *State v. Murray*, 796 N.W.2d 907, 910 (Iowa 2011). That does not mean that it is error for a trial court to rely on the application of law to similar facts, which is the standard and normal practice in our common law system. *See id.* (noting that unpublished court of appeals decisions are not controlling legal authority *for the Iowa Supreme Court*). There was no error by the District Court in following *Wells Fargo*.

5. Community Bank Waived Its Maximum Obligation Clause Argument

Community Bank failed to preserve error on its "maximum obligation clause" argument. The maximum obligation clause in the BGSB Mortgage is different from the § 654.12A Notice in the BGSB Mortgage. In District Court, Community Bank only made a § 654.12A Notice clause argument. Community Bank did not raise the "maximum obligation" argument and the District Court did rule on this argument. Nor did Community Bank file a motion to enlarge or amend the District Court's ruling. Therefore, Community Bank waived any argument related to the maximum obligation clause. *Bill Grunder's Sons Constr., Inc. v. Ganzer*, 686 N.W.2d 193, 197 (Iowa 2004) ("[I]t is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.").

II. THE DISTRICT COURT PROPERLY AWARDED 18% DEFAULT INTEREST AS ALLOWED BY THE BGSB MORTGAGE

A. ERROR PRESERVATION

Community Bank failed to preserve error on this issue. At the summary judgment hearing, counsel for Community Bank noted that "There's no explanation as to how the interest went from that alleged in the Amended Petition of $6,946.97 to a much greater sum a sum in excess of $30,000." (App. at 205). Counsel for Community Bank never objected to the award of default interest at 18% or argued that Blue Grass should be awarded a lesser amount. (App. at 205, 209–10). Counsel for Community Bank was concerned about how the 18% interest was calculated. *Id.* Community Bank never argued Blue Grass was not entitled to charge default interest as provided in the Notes. (App. at 205, 209–12). As a result, the District Court did not rule on whether Blue Grass was required to plead default interest.[4] (App. at 169). As a result, Community Bank waived error on this issue.

B. STANDARD OF REVIEW

The Standard of review is for correction of errors at law.

[4] Reaching this issue would be particularly prejudicial to Blue Grass because, had Community Bank actually objected at the summary judgment hearing, Blue Grass could have moved to amend the pleadings to conform to the proof presented to the trial court in the form of the Bank President's Declaration. (App. at 156–58).

C. ARGUMENT

If the Court reaches this issue, the District Court properly awarded default interest because the promissory notes specifically permit Blue Grass to increase the interest in the event of default. Persons borrowing money for the purpose of acquiring real property or obtaining credit for business or agricultural purposes "may agree in writing to pay any rate of interest." IOWA CODE § 535.2(2). The Notes provide that "[i]f you declare a default under the terms of the Loan, including for failure to pay in full at maturity, *you may increase the Interest Rate otherwise payable as described in this section*." (*E.g.*, App. at 62). The Notes further provide that the default rate "will be limited to the maximum lawful amount of interest allowed by state or federal law, whichever is greater." *Id.* Blue Grass' loans to Stecher are all for agricultural purposes or for the purchase of real estate, and clearly fall under the categories set forth in Section 535.2(2). (*See* Appellee Proof Brief at 17–19). Stecher agreed in writing to pay the maximum lawful amount of interest allowed by state law, which provides no limit. Thus, imposing a default rate of interest of 18% is within Blue Grass' authority.

Further, Blue Grass was not required to plead the default interest rate. Mortgage foreclosure proceedings are equitable proceedings. IOWA CODE § 654.1; *Freedom Financial Bank v. Estate of Boesen*, 805 N.W.2d 802, 826

(Iowa 2011). A request for general equitable relief justifies a court's decision to award relief beyond the specific requests in a petition. *Jorge Constr. Co. v. Weigel Excavating & Grading Co.*, 343 N.W.2d 439, 441 (Iowa 1984); *see also City of Okoboji v. Parks*, 830 N.W.2d 300, 309 (Iowa 2013) ("Under a prayer for general relief, a court may grant relief 'consistent with the pleadings and the evidence.'" (internal citation omitted)). Relief granted under a request for general relief will be upheld where the relief granted is consistent with the pleadings and evidence and will not surprise the opposing party. *Jorge Constr.*, 343 N.W.2d at 442. The Iowa Supreme Court has previously upheld an award of interest where the record is adequate to support the award of interest at issue. *Hook v. Trevino*, 839 N.W.2d 434, 452 (Iowa 2013).

Blue Grass' First Amended Petition also requested "such other and further relief as may be just and equitable in the circumstances." (App. at 59). The Notes clearly allow Blue Grass to collect default interest. (App. at 60–79). The Notes provide that in the event of default, Blue Grass may increase the interest rate to any lawful rate. *Id.* In an affidavit supporting its Motion for Summary Judgment, Blue Grass' President stated that Blue Grass elected to collect a default interest rate of 18%. (App. at 156–58). Thus, the pleadings, the proof, and the record supports the District Court's finding that Blue Grass is entitled to 18% default interest.

Moreover, Community Bank cannot claim that the award of default interest surprised it. The default rate was presented by affidavit before the summary judgment hearing and Community Bank never filed any counter-affidavits to contest the default rate of interest. Community Bank knew exactly what rate of interest Blue Grass was requesting and cannot now complain about the unopposed proof offered by Blue Grass. (*See generally* App. at 156–58).

Kuper v. Chicago and North Western Transportation Co., cited by Community Bank, stands for the proposition that a court may not award interest *where no interest is requested* (or where interest is not requested *for a particular period*, such as the date between the filing of the petition and the date of judgment). 290 N.W.2d 903, 910 (Iowa 1980); *Bosch v. Garcia*, 286 N.W.2d 26, 27 (Iowa 1979) ("[I]f not prayed for, an award of interest *from the time of the loss* cannot be made."). *Kuper* does not hold that it is reversible error for a trial court to award a rate of interest supported by the evidence (here, the Notes) under a general relief prayer in an equity case.

CONCLUSION

Blue Grass is the holder of the senior mortgage on the Stecher acreage. Community Bank failed to make a diligent inquiry before recording a junior mortgage on the Stecher acreage. By its plain language, § 654.12A does not

support Community Bank's argument that it should leapfrog the BGSB Mortgage because a diligent inquiry would have shown the amount owed to Blue Grass.

Respectfully submitted,

LANE & WATERMAN LLP

By */s/ Richard A. Davidson*

Richard A. Davidson, AT0001937
220 North Main Street, Suite 600
Davenport, IA 52801
Telephone: (563) 324-3246
Facsimile: (563) 324-1616
Email: rdavidson@l-wlaw.com

ATTORNEYS FOR APPELLEE,
BLUE GRASS SAVINGS BANK

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