IN THE SUPREME COURT OF IOWA

SUPREME COURT APPEAL NO. 19-1681

WOODBURY COUNTY CASE NO. EQCV180496

WILLARD B. MCNAUGHTON,
Plaintiff-Appellant,

v.

STANLEY E. CHARTIER, JEANINE K. CHARTIER, CHAR-MAC, INC., CITY OF LAWTON and ABILIT HOLDINGS (LAWTON), LLC,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
FOR WOODBURY COUNTY
THE HONORABLE JEFFREY A. NEARY

APPELLANT'S FINAL BRIEF

Angie J. Schneiderman AT0006997
MOORE, CORBETT, HEFFERNAN, MOELLER & MEIS, L.L.P.
501 Pierce Street, Suite 300
P.O. Box 3207
Sioux City, Iowa 51102-3207
PHONE: (712) 252-0020
FAX: (712) 252-0656
ASchneiderman@MooreCorbett.com
ATTORNEYS FOR PLAINTIFF/APPELLANT
WILLARD B. MCNAUGHTON

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2. Defendants-Appellees failed to show an unequivocal act by Plaintiff-Appellant to publicly dedicate the property.

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3. The City of Lawton never accepted any dedication by McNaughton.

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Sherwood v Greater Mammoth Vein Coal Co., 185 N.W. 279, 283 (Iowa 1921)

1. Feasible access options beyond the easement exist.

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2. The Agreement expressly limits ingress and egress to certain members of the public.

Rank v. Frame, 522 N.W.2d 848, 852 (Iowa Ct. App. 1994)

a) The Agreement's language is internally consistent.

b) The Agreement's restrictions on assignment and use are specific.

D. Plaintiff-Appellant had no reason to object to the use of the easement prior to the proposed sale because the use complied with the intent of the Agreement.

ROUTING STATEMENT

Pursuant to Rule 6.1101(2)(f) of the Iowa Rules of Appellate Procedure, this Court should retain this appeal. Appellant presents three issues: (1) whether when one litigant, in the context of negotiations, finds another's offer of settlement to be excessive and unreasonable, that those negotiating tactics rise to the level of malice and tyranny requiring an award of common law attorney fees, (2) whether Appellant can be deemed to have publicly dedicated his property notwithstanding repeated refusals to do so, and (3) whether the recorded easement is appurtenant.

This appeal involves substantial questions of whether established legal principles in the area of common law attorney fees are subject to expansion and change. The District Court's ruling expands existing interpretations on common law attorney fees to include situations where one litigant, in the context of negotiations, finds another's offer of settlement to be excessive and unreasonable. This Court should retain authority to clarify the breadth of the common law and determine whether such an expansion is appropriate.

In addition, this Court should retain authority because substantial questions relate to the legal principle that a person's property should not be taken without proper process and just compensation. The District Court ruled that Appellant publicly dedicated his property despite repeated refusals

to do so. A ruling of this nature creates an expansion of the law on public dedication.

REFERENCES

For purposes of this brief, Appellant shall be referred to as "McNaughton," Appellees Stanley E. Chartier and Jeanine K. Chartier shall be referred to as "the Chartiers," Jeanine K. Chartier shall be referred to individually as "Jeanine Chartier," Char-Mac, Inc., shall be referred to as "Char-Mac," AbiliT Holdings, LLC, shall be referred to as "AbiliT," and the City of Lawton shall be referred to as the "City of Lawton" or "the City."

STATEMENT OF THE CASE

This case involves a dispute about the interpretation of a written easement agreement. McNaughton granted an easement in favor of his sister, Jeanine Chartier, and the residents, guests, and invitees of an assisted living facility owned by Jeanine Chartier and her husband on their land. (App. 336; App. 31-32 (Tr. p. 17, L. 16 – p. 18, L. 18); App. 34-35 (Tr. p. 20, L. 19 – p. 21, L. 21)). The easement prohibited assignment by the Chartiers without the express, written consent of McNaughton. (App. 336; App. 36 (Tr. p. 22, Ll. 22-24)). When McNaughton discovered the Chartiers were selling the assisted living facility to a new owner, he refused to sign a clarification of the easement, which would have effectively assigned access

rights to the new owners. (App. 378; App. 36-37 (Tr. p. 22, L. 2 – p. 23, L. 4)). He attempted to negotiate a deal to transfer the easement rights, but the Chartiers refused to accept any of his offers finding them unreasonable. (App. 198-201 (Tr. p. 184, L. 13 – p. 187, L. 12); App. 202-203 (Tr. p. 188, L. 18 – p. 189, L. 6); App. 233-234 (Tr. p. 219, L. 2 – p. 220, L. 14)). Because access to the new owners remained in doubt, McNaughton filed a declaration action with the District Court seeking guidance on the rights related to the easement. (App. 378; App. 9; App. 35-37 (Tr. p. 21, L. 13 – p. 23, L. 4); App. 62-63 (Tr. p. 48, L. 22 – p. 49, L. 24)). The District Court concluded that McNaughton had publicly dedicated the concrete portion of the easement area to the City of Lawton and that he no longer has rights to the land. (App. 418). The District Court further opined that, even if there was no public dedication, the easement was appurtenant to the property with the assisted living facility. (App. 418-20). Finally, the District Court concluded that McNaughton's negotiating tactics regarding access and his excessive monetary demands constituted behavior that required the imposition of common law attorney fees. (App. 422).

STATEMENT OF THE FACTS

In 1998, McNaughton purchased property commonly known as 2156 Highway 20, Lawton, Iowa. At the time of purchase, there was a house and

garage located on the property. (App. 370; App. 25 (Tr. p. 11, Ll. 16-18); App. 27 (Tr. p. 13, Ll. 16-21)). The garage was a one-stall garage with the garage door facing north toward Highway 20. The property had direct access from Highway 20 by virtue of a driveway that led from Highway 20 south to the garage. McNaughton purchased the property, in part, because he placed value on the access the property provided to Highway 20. (App. 28 (Tr. p. 14, Ll. 1-9); App. 29 (Tr. p. 15, Ll. 16-23)).

McNaughton and Jeanine Chartier are siblings. (App. 27 (Tr. p. 13, L. 1)). In 1999, Jeanine Chartier and her husband purchased property that is directly east of McNaughton's property. The Chartiers' property was approximately fifteen acres in size and, prior to their purchase, had been primarily used for agricultural purposes. (App. 371; App. 114-116 (Tr. p. 100, L. 21 – p. 112, L. 13)).

After the Chartiers purchased their tract of land, they began the process for constructing an assisted living facility on the property. That process included seeking involvement from the City of Lawton for purposes of obtaining tax increment financing for various improvements needed to build the facility. Those needed improvements included the installation of water and sewer as well as the development of a street to provide access to the facility. (App. 354; App. 356; App. 357; App. 360; App. 361; App. 363;

App. 364; App. 186 (Tr. p. 172, Ll. 4-12); App. 171-172 (Tr. p. 157, L. 24 – p. 158, L. 15)).

For the street to have access from the facility to Highway 20, the Chartiers sought McNaughton's cooperation in applying for access to Highway 20 through the Iowa Department of Transportation ("IDOT"). The access the parties jointly applied for was slightly different than the access McNaughton originally had to Highway 20. In particular, the original Highway 20 access from McNaughton's driveway had to be moved to the east and partially onto the Chartiers' property. Moving the Highway 20 access east effectively divided the access point between the two parcels. The access was required to straddle the parcels because the IDOT wanted their access off Highway 20 to mirror the access across the highway to Cedar Street. (App. 347; App. 180-181 (Tr. p. 166, L. 15 – p. 167, L. 19)). Application to the IDOT occurred in 1999. (App. 349; App. 352).

In addition to jointly applying for a Special Access Connection to the IDOT, McNaughton and the Chartiers entered into an Easement Agreement ("Agreement") dated September 17, 1999. (App. 336). In that Agreement, an easement area 23 feet by 80 feet on McNaughton's property is described. The easement area includes a portion of the access to Highway 20 and

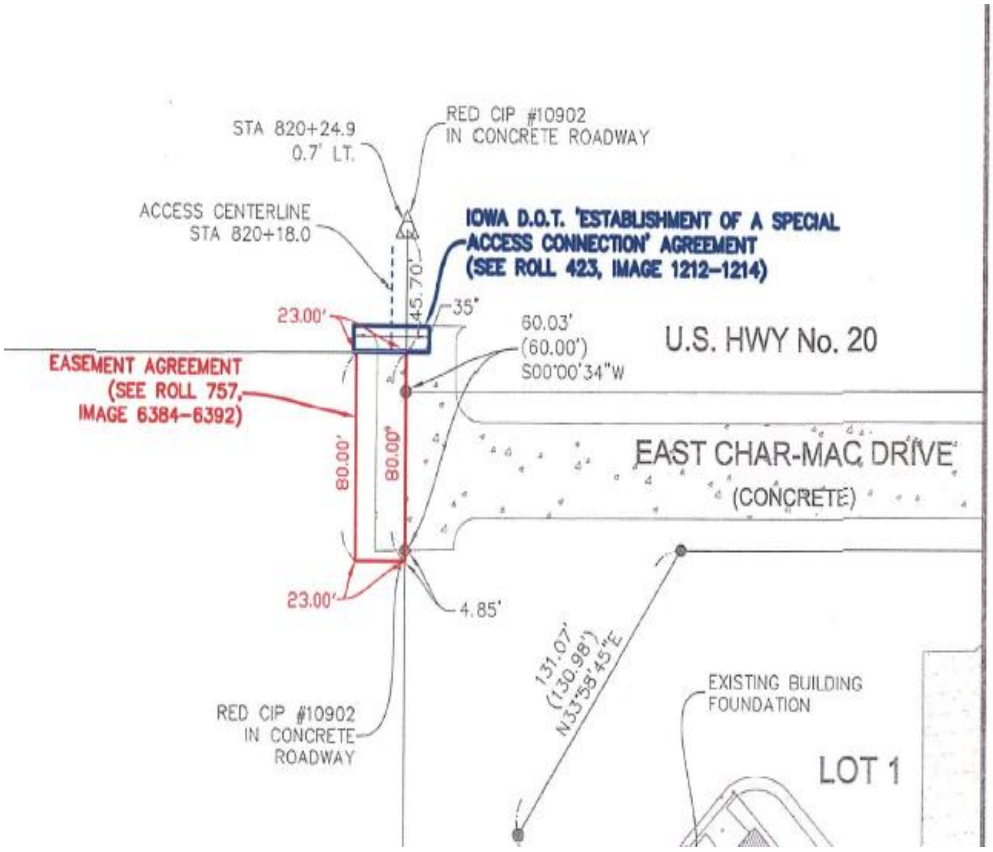
extends south along McNaughton's private driveway. (App. 336). In that Agreement, the parties stated as follows:

> 6. The easement rights granted herein are for the exclusive use and benefit of Chartier and the residents, guests and other invitees of the assisted living facility located on Chartier's property. The easement rights granted herein may not be assigned by Chartier to any other party or parties without the express written consent of McNaughton or his successors or assigns. It is specifically understood that this Agreement creates a "private" easement granted for the use and benefit of the parties identified in this paragraph and it is not to be construed as an easement for the use and benefit of the general public.
> …
> 8. This instrument may not be modified except by written instrument executed by all of the parties hereto or by their legal successors and/or assigns.

(App. 336). McNaughton provided the easement to Jeanine Chartier primarily because she was family and he wanted to help her out. (App. 32 (Tr. p. 18, Ll. 10-12)). When creating the easement, McNaughton specifically restricted assignment so that, if the use was to change, the parties would have to renegotiate and agree to any change in ownership or use. (App. 36-37 (Tr. p. 22, L. 21 – p. 23, L. 41)).

In August 1999, the City of Lawton contracted with a construction company to build a street on the Chartiers' property. (App. 360; App. 361; App. 363). Access to the street was via concrete that was placed on both the Chartiers' property and a portion of the easement area on McNaughton's

property. (App. 186-187 (Tr. p. 172, L. 18 – p. 173, L. 9)). The street runs in an east-west direction parallel to Highway 20. Access to Highway 20 from the road is via the Chartiers' property and the paved portion of the easement area on McNaughton's property. (App. 345). The street is commonly known as East Char-Mac Drive and has no outlet because the street dead ends into the parking lot at the assisted living facility. (App. 347). An engineer's rendering of East Char-Mac Drive and the easement area depicts the following:



(App. 345).

An aerial view depicts the following:

(App. 347).

Traffic turning off Highway 20 regularly uses the easement on McNaughton's property, especially when following the normal driving procedure of treating it like a south-bound lane before turning east onto East Char-Mac Drive. (App. 36-37 (Tr. p. 22, L. 25 – p. 23, L. 4)). When they

created the easement, McNaughton anticipated the easement would only be used by one business and not for further development. (App. 51-52 (Tr. p. 37, L. 24 – p. 38, L. 7)).

Although the Chartiers intended from the outset to dedicate East Char-Mac Drive to the City of Lawton, actual dedication to the City did not occur until 2012. (App. 393; App. 395; App. 130 (Tr. p. 116, Ll. 6-11)). The City of Lawton approached McNaughton at least three times about publicly dedicating the easement area of the paved road to the City. McNaughton consistently refused to publicly dedicate his property because he did not want to give up ownership or control of it. (App. 40-41 (Tr. p. 26, L. 20 – p. 27, L. 27); App. 42 (Tr. p. 28, Ll. 6-18)).

The City of Lawton is not a party to the Agreement at issue, and the City has stated it does not have any claim of ownership to the easement located on McNaughton's property. (App. 17 (Tr. p. 3, Ll. 19-25)). In its Trial Brief, the City stated: "The City is not a party to the easement agreement at issue in this case. The City does not own any portion of the property covered by the agreement." (App. 306). When the parties entered into the Agreement, the property was not within the City of Lawton's limits. It was not until sometime in 2010 that the City annexed the property. (App. 46 (Tr. p. 32, Ll. 6-14)).

McNaughton did not want to be responsible for maintaining the easement area. Therefore, in the Agreement, the Chartiers agreed to "take all action necessary to [e]nsure that the town of Lawton, Iowa, becomes contractually obligated to maintain the easement area for use consistent with the easement rights granted hereunder." (App. 336). To that end, the City Attorney provided McNaughton with a letter promising the City would provide snow removal, necessary maintenance, and any repairs required to the paved area on McNaughton's property. (App. 353). Notwithstanding its promise, the City removed snow only a few times and generally failed to maintain the easement area. (App. 38-39 (Tr. p. 24, L. 19 – p. 25, L. 13; App. 41 (Tr. p. 27, L. 18 – p. 28, L. 5)).

Following construction of East Char-Mac Drive, McNaughton removed the existing garage from his property and replaced it with a larger garage. He also changed the orientation of the building so that the garage door faces east toward the easement area. For many years, up until he filed this suit, McNaughton would back over the property line between his and the Chartiers' property to exit the premises. (App. 46-48 (Tr. p. 32, L. 16 – p. 34, L. 4)).

In 2012, the Chartiers sought to refinance the assisted living facility. As part of that process, the Chartiers had an ALTA/ACSM Land Title

Survey completed for the parcel on which the assisted living facility sits. In October 2012, the Chartiers separated that parcel from the remaining land they owned and conveyed the parcel by quit claim deed to Char-Mac. (App. 369; App. 130-132 (Tr. p. 116, L. 12 – p. 118, L. 16)). Char-Mac was wholly owned by the Chartiers. (App. 38 (Tr. p. 24, Ll. 8-11)). McNaughton was unaware this transfer took place until much later. (App. 68-69 (Tr. p. 54, L. 23 – p. 55, L. 8)).

Sometime after splitting off the parcel for the assisted living facility, the Chartiers built a shed on the property owned by Char-Mac. (App. 50 (Tr. p. 36, L. 23 – p. 37, L. 1)). They hired McNaughton to provide the HVAC work on the shed. (App. 104 (Tr. p. 90, Ll. 10-23)). Char-Mac used the shed for record storage and additional office space. (App. 149-150 (Tr. p. 135, L. 9 – p. 136, L. 4)). Employees of Char-Mac accessed the shed by using the easement area, much like they would for access to East Char-Mac Drive, but instead of turning east onto the road, they would continue south via a gravel road onto McNaughton's property before heading further east onto the Chartiers' property to the shed. (App. 51 (Tr. p. 37, Ll. 14-19)).

In 2017, McNaughton sought legal counsel regarding his concerns about road access and future expansion plans for Char-Mac and the

surrounding land. (App. 65-66 (Tr. p. 51, L. 6 – p. 52, L. 2)). The Chartiers had discussed various expansion plans for the property surrounding the assisted living facility, but they never settled on a particular plan because Jeanine Chartier began experiencing health issues. (App. 203 (Tr. p. 189, Ll. 7-19)). The potential remains for additional development south with access via the easement. Additional development would substantially increase the traffic along the easement and McNaughton's property thereby expanding the use beyond the intent of the Agreement. (App. 64 (Tr. p. 50, Ll. 7-13); App. 142-143 (Tr. p. 128, L. 7 – p. 129, L. 20)). Because of Jeanine Chartier's health issues, she and her husband decided to sell the assisted living facility in Lawton, along with two other assisted living facilities they owned.[1] (App. 203 (Tr. p. 189, Ll. 7-19).

The Chartiers eventually found a buyer, AbiliT, for the assisted living facility and they entered into a letter of intent. During the due diligence period of this transaction, Jeanine Chartier disclosed the existence of the easement to AbiliT. (App. 135 (Tr. p. 121, Ll. 10-19); App. 136 (Tr. p. 122, Ll. 8-12)). However, during its investigation, AbiliT discovered the

[1] Jeanine Chartier has a background in occupational therapy in nursing homes and that experience led to her developing the three assisted living facilities. (Transcript p. 109, Line 21 – p. 110, Line 1).

easement had not been properly recorded. (App. 135 (Tr. p. 121, Ll. 20-23); App. 71-73 (Tr. p. 57, L. 14 – p. 59, L. 3)).

On February 2, 2018, Jeanine Chartier's attorney, Chad Thompson, advised various representatives of AbiliT that if Jeanine Chartier was unable to produce an assignment or new easement within 20 days after signing the purchase agreement, then AbiliT could rescind the purchase agreement. (App. 383). On February 15, 2018, Jeanine Chartier visited McNaughton and asked him to sign an amendment to the Agreement allowing AbiliT access via the easement. She presented him with a document entitled "Clarification of Easement." (App. 378). The document attempted to clarify that the assisted living facility retained access via the easement, regardless of apparent ownership. Jeanine Chartier offered McNaughton $15,000 to sign the clarification. McNaughton was concerned about the wording and the possibility he was giving up control of his property. Therefore, he told Jeanine Chartier that he wanted to have his legal counsel review the matter before signing the clarification. (App. 228-229 (Tr. p. 214, L. 5 – p. 215, L. 3)). This was the first notice McNaughton had that the Chartiers were selling the property to an unrelated party. (App. 229 (Tr. p. 215, Ll. 4-9)). Up until this point, McNaughton had no reason to question the use of the easement. (App. 79 (Tr. p. 65, Ll. 6-16)).

On February 19, 2018, Mr. Thompson disclosed to AbiliT that Jeanine Chartier had been unable to reach an agreement with McNaughton regarding the easement and proposed allowing her up to forty-five days after the effective date of the transaction to have a signed easement in place granting AbiliT's users access. Mr. Thompson further stated that AbiliT could terminate the purchase agreement if the Chartiers could not produce an easement agreement providing such access. (App. 385).

On February 21, 2018, Jeanine Chartier sent McNaughton's counsel, Robert Meis, a letter advising him of the potential sale and the failure of the original easement to be recorded. She requested that Mr. Meis record the easement. (App. 372). On March 5, 2018, Mr. Thompson disclosed to AbiliT that McNaughton's attorney intended to record the easement in its original form and that Jeanine Chartier was still attempting to work out an agreement with McNaughton "to modify the easement so the terms of the easement are more definite." (App. 387). He further opined that it was "plausible" for AbiliT to interpret the easement as being written to extend the right and privilege of use to AbiliT. (App. 387).

As part of the negotiating process, McNaughton offered to extend the easement rights to AbiliT in exchange for $100,000 and the rights to purchase fifty acres from another sister's estate, for which Jeanine Chartier

was the executor. He also offered to sell his entire property to Jeanine Chartier for $410,000. McNaughton then suggested Jeanine Chartier purchase the assignment of the easement for $160,000. Finally, he offered to extend the easement to AbiliT in exchange for the Chartiers transferring him twelve acres of farmland they own just south of the AbiliT property. Jeanine Chartier declined all the offers finding them unreasonable. (App. 198 (Tr. p. 184, Ll. 13-24); App. 202-203 (Tr. p. 188, L. 20 – p. 189, L. 6); App. 233-234 (Tr. p. 219, L. 2 – p. 220, L. 14)).[2] Therefore, McNaughton did not sign the Clarification of Easement presented to him or any other amendments to the easement. Instead, he had the easement agreement properly recorded in the property records on March 7, 2018, and, on April 19, 2018, he filed suit with the District Court seeking a declaration of the parties' rights surrounding the easement area. (App. 336; App. 9). McNaughton also filed a Lis Pendens notice when he filed the action. (App. 243-245; App. 62 (Tr. p. 48, L. 22 – p. 50, L. 13)). He did not pursue an injunction to block the sale of the Char-Mac property to AbiliT.[3]

[2] It is important to note that, after Jeanine Chartier's initial offer of $15,000, she never resubmitted her offer or otherwise counter offered in response to McNaughton's settlement proposals. (App. 35 (Tr. p. 21, Ll. 13-20); App. 218 (Tr. p. 204, Ll. 1-16); App. 228 (Tr. p. 214, L. 15 – p. 215, L. 3)).

[3] On May 18, 2018, the Chartiers and Char-Mac filed a third-party claim against the City of Lawton, alleging the City has an interest in the easement.

On March 13, 2018, Jeanine Chartier disclosed to AbiliT that she was unable to reach an agreement with McNaughton stating: "He will not agree to change the wording of the body of easement, nor write a clarification." (App. 389). She also stated:

> "**We are open to suggestions to remedy this.**
> The buyers and I are going to have to be creative on a solution or decide if this is a deal breaker
>
> …
>
> Solutions I can think of:
>
> 1. Sign the current affidavit and record it again.
>
> 2. We could get a court ruling which we have been advised that we would win, but that will take a long time, as our county is severely backlogged in the courts due to numerous open judge positions/retirements. He cannot land lock our property.
>
> 5. [sic] Or the City could take action."

(App. 389-91) (emphasis in original). Ultimately, the Chartiers closed the transaction with AbiliT, providing a Warranty Deed to the Char-Mac property on April 30, 2018, and recording it May 22, 2018. (App. 380). Due to the pending declaration action, the Chartiers agreed to indemnify

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(Am. Answer, Countercl., and Third-Party Claim). On August 23, 2018, McNaughton moved to amend his Petition to include AbiliT as a party to these proceedings. (App. 247).

AbiliT for any expenses associated with litigation regarding the easement agreement. (App. 202 (Tr. p. 188, Ll. 7-15)).[4]

Subsequent to the filing of this action, Jeanine Chartier installed a rock landscaping wall on the property line between hers and McNaughton's property to prevent him from backing onto her property. This wall has effectively stopped McNaughton from backing onto the Chartiers' property. It also has had the effect of directing employees of AbiliT to drive onto the Chartiers' property in order to park by the shed. AbiliT employees still use the easement when turning off Highway 20. (App. 348-349 (Tr. p. 43, L. 9 – p. 44, L. 5); App. 106 (Tr. p. 92, Ll. 12-16)).

Although the easement makes it easier to access East Char-Mac Drive, the parties generally agree that access to the AbiliT property is possible on the Chartiers' portion of the road because it is large enough to allow traffic and, therefore, access via the easement is not necessary. (App. 385; App. 60-61 (Tr. p. 46, L. 23 – p. 47, L. 16); App. 90 (Tr. p. 76, Ll. 1-9)). McNaughton generally does not object to AbiliT using the easement area as originally intended. He and the representatives for AbiliT have a

[4] The Chartiers never offered the purported indemnification agreement into evidence nor has McNaughton ever been afforded an opportunity to see the agreement for himself. The first notice McNaughton had of any indemnification agreement was in the Pretrial Brief filed by the Chartiers. (App. 309).

cordial relationship. McNaughton's main concern in filing this action was to maintain his right to limit any assignment should additional development south occur. (App. 64 (Tr. p. 50, Ll. 7-13); App. 87-88 (Tr. p. 73, L. 11 – p. 74, L. 2)).

ARGUMENT

I. WHETHER THE TRIAL COURT ERRED IN DETERMINING DEFENDANTS-APPELLEES CHARTIERS WERE ENTITLED TO COMMON LAW ATTORNEY FEES.

A. Error Preservation

On October 10, 2018, the Chartiers filed their Second Amended Answer, Counterclaim, and Third-Party Claim adding a counterclaim against McNaughton for attorney fees. (App. 277-78). On November 9, 2018, McNaughton filed his Amended Reply to Chartiers' and Char-Mac, Inc.'s Second Amended Counterclaim and Third-Party Claim denying their right to attorney fees. (App. 301-02; App. 302).

In their pretrial brief filed July 9, 2019, the Chartiers briefed their alleged entitlement to common law attorney fees and, for the first time, mentioned an indemnification agreement they had with AbiliT wherein they were contractually responsible for paying AbiliT's attorney fees. (App. 319-22). McNaughton refuted the Chartiers' entitlement to attorney fees in his pretrial brief filed July 9, 2019. (App. 333-34).

During trial, when the Chartiers introduced Exhibit C-2, relating to legal fees charged by AbiliT to the Chartiers, counsel for McNaughton raised a relevancy objection arguing there was no statute or contractual obligation by McNaughton to pay the expense. Counsel further urged that the Chartiers failed to adequately prove their entitlement to reimbursement for their payment of AbiliT's fees. (App. 206 (Tr. p. 192, Ll. 4-23)). The trial court overruled counsel's objection and admitted the fee information. (App. 207 (Tr. p. 193, L. 12)).

In its written ruling, the trial court concluded that the Chartiers were entitled to common law attorney fees incurred by both their own lawyers and AbiliT's lawyers. The court requested the Chartiers submit an affidavit of attorney fees. (App. 420-22). On September 10, 2019, McNaughton filed a Rule 1.904(2) Motion to Reconsider, Enlarge, or Amend Findings of Fact and Conclusions of Law and to Modify Ruling. In that motion and brief, McNaughton requested the trial court expand its factual findings, based on the evidence provided, to support a finding that McNaughton's actions in filing the suit were not vexatious or wanton. (App. 426; App. 462-71).

On September 17, 2019, Chad Thompson, Attorney for the Chartiers, filed his Affidavit of Attorney's Fees. (App. 480). On September 18, 2019, Kevin H. Collins, Attorney for AbiliT, filed his Affidavit of Attorney's Fees.

(App. 496). On September 20, 2019, McNaughton filed his Resistance to Application for Attorney Fees. In his resistance, McNaughton incorporated his Rule 1.904 Motion to Reconsider, Enlarge or Amend Findings of Fact and Conclusions of Law and to Modify Ruling. McNaughton further argued that no details of the indemnification agreement were presented regarding liability or the amounts to be indemnified and that the parties submitted insufficient evidence to support the amounts requested. Finally, McNaughton noted that the amounts requested were excessive for the nature of the action.

On September 30, 2019, the trial court entered an Order granting the Chartiers attorney fees in the amount they requested. In doing so, the court concluded the indemnification issue was not contested at trial and that the fee exhibits submitted at trial were admitted against a relevancy objection. McNaughton would argue he did in fact contest the sufficiency of evidence related to AbiliT's fees and the indemnification agreement when he objected to the admission of Exhibit C-2. Regardless, for purposes of this Court's review, Sundholm v. City of Bettendorf, 389 N.W.2d 849, 852 (Iowa 1986) provides that the "[s]ufficiency of evidence may be challenged on appeal from judgment following a bench trial even though the point was not raised in trial court." Further, Iowa Rules of Civil Procedure 1.904(1) provides that

"[a] party, on appeal, may challenge the sufficiency of the evidence to sustain any finding without have objected to it by motion or otherwise."

Based on the record, caselaw, and rules, McNaughton adequately preserved error in his claim that the Chartiers, Char-Mac, and AbiliT are not entitled to common law attorney fees. He further adequately preserved error in claiming he should not be responsible for the Chartiers' contractual obligation to pay AbiliT's fees and that the fees awarded were excessive and unreasonable.

B. Standard and Scope of Review

This court reviews de novo the trial court's decision to award common law attorney fees. See Williams v. Van Sickel, 659 N.W.2d 572, 579 (Iowa 2003) ("Whether to grant common law attorney fees rests in the court's equitable powers. Our review of this issue is therefore de novo." (citations omitted)); see also Thornton v. American Interstate Insurance Company, 897 N.W.2d 445, 475 (Iowa 2017); Fennelly v. A-1 Machine & Toole Co., 728 N.W.2d 163, 166 (Iowa 2006) (noting that normally the appellate courts review a district court's award of attorney fees for an abuse of discretion but that, when the award is for common law attorney fees, the review is de novo).

C. McNaughton had legitimate concerns regarding access and assignability of the easement; his actions were not vexatious and wanton.

Iowa follows the American rule for an award of attorney fees. The American rule requires that each party assume responsibility for their own legal fees. Stated another way, "the losing litigant does not normally pay the victor's attorney's fees." Thornton, 897 N.W.2d at 474 (quoting Rowedder v. Anderson, 814 N.W.2d 585, 589 (Iowa 1989)). Normally, attorney fees are recoverable only by statute or contract. However, there is a "rare" exception to this rule that permits the recovery of attorney fees when the party's "'conduct . . . rises to the level of oppression or connivance to harass or injure another.'" East Iowa Plastics, Inc. v. PI, Inc., 889 F.3d 454, 457 (8th Cir. 2018) (quoting Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc., 510 N.W.2d 153, 159-60 (Iowa 1993)).

In Hockenberg, the Iowa Supreme Court analyzed the legal standard for an award of punitive damages and an award for common law attorney fees. The court noted Iowa statutory law requires that a plaintiff seeking punitive damages demonstrate the defendant's conduct "amounted to a willful and wanton disregard for the rights of another." Hockenberg, 510 N.W.2d at 159. The court concluded that caselaw precedent on common law attorney fees requires a showing that "the defendant's culpability *exceeded*"

the statutory standard for punitive damages. Id. (emphasis added). The court observed that an award for common law attorney fees must find "oppressive conduct" "which denotes conduct that is difficult to bear, harsh, tyrannical, or cruel." Id. The court also mentioned the requirement that the common law attorney fee standard requires a showing of "connivance," noting connivance involves "'voluntary blindness [or] an intentional failure to discover or prevent the wrong.'" Id. (quoting Black's Law Dictionary 303 (6th ed. 1990)). The court found the terms "oppressive" and "connivance" "envision conduct that is intentional and likely to be aggravated by cruel and tyrannical motives." Hockenberg, 510 N.W.2d at 159.

The award of common law attorney fees is rare in Iowa. As observed by the Eighth Circuit in East Iowa Plastics: "The Supreme Court of Iowa has applied this standard [for common law attorney fees] on at least eight occasions[ ] and denied common law attorney's fees in all but one." East Iowa Plastics, 889 F.3d at 458.

The one time the Iowa Supreme Court upheld an award of common law attorney fees was in Williams v. Van Sickel, 659 N.W.2d 572 (Iowa 2003). That case involved the County Treasurer for Appanoose County filing suit against the defendants seeking payment of unpaid property taxes.

The case arose from a fact pattern wherein the Van Sickels' parents entered into a buy sell agreement with the defendant Wilson to sell the assets of a fertilizer business. Wilson agreed to pay them yearly payments and further agreed to pay all taxes and assessments. Upon the death of the father in 1984, the Van Sickels acquired the vendor's rights to the buy sell agreement. Wilson, as purchaser, continued to make payments until 1985. He subsequently abandoned the property and, in 1988, he filed for bankruptcy. Id. at 574.

In 1990, the Treasurer sent the Van Sickels notice that the property would be offered at the county's annual tax sale due to unpaid property taxes. The Treasurer, however, knew the county would not actually offer the property for sale because the county could not issue a tax sale deed for buildings on leased land. The Van Sickels notified the Treasurer that they had no rights in the property but, instead, only held rights to the contract seller's right to payment. Notwithstanding the fact the property was not offered or sold, the Treasurer signed a "certificate of tax sale" indicating the property had been sold. Id. at 574-75.

A year later, the Treasurer sent notice to the Van Sickels and Wilson stating the property had been sold the year prior and a certificate of purchase had issued. She further advised they had ninety days to redeem the property.

The Van Sickels felt they had two choices: redeem the property or allow the county to keep the property and eliminate the tax liability. They decided to take no further action. However, six years later, the Treasurer sued them for unpaid taxes. Id. at 575. During trial, to combat a counterclaim of estoppel, the Treasurer submitted two letters she claimed to have sent the Van Sickels in 1991 explaining (1) the tax sale never happened and (2) the county would not be taking the deed. Based on an abundance of evidence, the trial court found the Treasurer had fabricated those letters to counteract the claim of estoppel. Id. at 579-80.

Against that lengthy fact pattern, the Iowa Supreme Court found the Van Sickels were entitled to an award of common law attorney fees. In doing so, the court mentioned the Treasurer's actions in misleading the Van Sickels into believing a tax sale had occurred and signing a certificate of tax sale when no sale had in fact occurred. However, the court found that, notwithstanding those fraudulent actions, it was not until the Treasurer fabricated the letters and offered them into evidence at trial did her behavior surpass the standard required for an award of common law attorney fees. Id. at 580-81. The court stated:

> Obviously, [the Treasurer's] intent was to disprove the reliance element necessary for the estoppel defense and the fraud counterclaims, thereby establishing her case against the defendants and defeating their counterclaims against her. *At this*

> *point*, we think the treasurer crossed the line, causing her conduct to rise to a level above 'the willful and wanton disregard of the rights of another' standard required to prove punitive damages.

Id. at 581 (emphasis added). The court further observed that it could not "imagine behavior that would be more oppressive or conniving than a public official creating documents which benefit herself to the detriment of those she is elected to represent." Id. Adding to her "oppressive and conniving behavior was her attempt to defraud the district court in her scheme to protect herself from liability." Id.

The Treasurer sent the plaintiffs notice that the county was offering the property for sale, even though she knew they would not, then she signed a certificate of sale when none existed. That deceitful and fraudulent behavior was not enough to warrant common law attorney fees. Her behavior only exceeded the punitive damages standard when she chose to fabricate evidence and submit it to the court.

The Iowa Court of Appeals has awarded common law attorney fees in at least five cases. All five cases involved the defendant engaging in some form of heightened deceitful or fraudulent behavior. See Johnson v.Ventling, No. 13-0157, 2014 WL 1714966 (Iowa Ct. App. April 30, 2014) (finding the case involved a fraudulent conveyance and the trial court's detailed discussion of the badges of fraud supported an award of common

law attorney fees); Schaefer v. Putnam, No. 11-1437, 2013 WL 2368819 (Iowa Ct. App. May 30, 2013) (finding the case involved a creditor's claim of fraudulent nondisclosure and determining the father was liable to his sons for common law attorney fees because he had subjected them to financial liability, to mitigate his own loss, through fraud and deceitfulness); Olson v. Elsbernd, No. 10-0236, 2010 WL 5023241 (Iowa Ct. App. Dec. 8, 2010) (finding ex-mother-in-law liable for common law attorney fees because she participated in ongoing efforts to defraud the plaintiff, lied to the court about her son's interest in property when evidence showed otherwise, and created a sham debt to protect her son); Hoeppner v. Hollday, No. 06-1288, 2007 WL 2963662 (Iowa Ct. App. Oct. 12, 2007) (finding fees proper where defendant offered to help deceased friend's wife manage her real estate and, in doing so, seduced her, gained her trust, then engaged in a series of transactions to take her home away from her); Kline v. Keystar One, L.L.C., No. 99-1649, 2002 WL 681237 (Iowa Ct. App. Apr. 24, 2002) (finding common law attorney fees appropriate where general partner deeded partnership's only asset to another company without the consent of the limited partner because he knew the limited partner would not consent, and informed transferee company of such fact, and the transferee company did not contact the limited partner about the transfer, failed to provide any

consideration for the transfer, and knew general partner had no authority to transfer the property).

A common theme amongst the one Supreme Court and five Court of Appeals cases awarding common law attorney fees is that the defendants engaged in a heightened degree of fraudulent, deceitful, and conniving behavior. In the subject case, the trial court determined McNaughton engaged in behavior that exceeded the standard for punitive damages because he wanted to profit from the sale of the Char-Mac facility. The court concluded his demands for transferring the easement were excessive and ill-timed as a result of the pending sale to AbiliT. (App. 422). Nothing McNaughton did, however, rose to the level of fraud or deceitfulness, and his behavior was not tyrannical or cruel.

McNaughton had an easement in place that he believed granted access to his sister and the residents, guests, and invitees of the assisted living facility owned by his sister. That belief was in good faith based on the language in the easement. The trial court took issue with the timing of his demands, but it was not until the proposed sale to AbiliT that McNaughton understood the easement may be compromised and at issue. It was his property right he was negotiating to sell. Assuming, arguendo, McNaughton's negotiating tactics were aggressive and demands excessive,

aggressive negotiations and excessive demands have never led to an award of attorney fees.

The trial court found McNaughton's motives for filing the suit were vexatious and wanton, constituting bad faith. (App. 422). McNaughton would submit, however, that the rights to the easement were in question, as evidenced by his sister's willingness to pay $15,000 for the expanded use and both the Chartiers and AbiliT's expressed concerns regarding assignment of the easement. (App. 228 (Tr. p. 214, Ll. 15-25); App. 218 (Tr. p. 204, Ll. 6-11); App. 383-393)). McNaughton concluded the best place to resolve the dispute would be in a court of equity; thus, he filed the declaratory action seeking a ruling from the trial court.

Iowa caselaw is filled with factual situations involving conduct much more nefarious than McNaughton's actions wherein courts have refused to award common law attorney fees. In Thornton, the plaintiff was paralyzed from the chest down in a driving accident while at work. 897 N.W.2d at 452. The insurance company denied his claim that he was permanently totally disabled (PTD) even though counsel advised there was not a strong argument against PTD. The parties pursued mediation but failed to reach a resolution. Counsel continued to advise the insurance company to settle based on the thought the commissioner could find their defense

unreasonable. The insurance company refused to settle, and, in fact, the workers compensations commission found the plaintiff was PTD. Id. at 454-55. The plaintiff then pursued a civil action against the insurer for pursuing a bad faith action. Id. at 457. At the trial level, the jury awarded him compensatory damages and $25 million in punitive damages. Id. at 459-60. The insurance company appealed the jury's verdict, and Thornton cross appealed seeking common law attorney fees. The Iowa Supreme Court declined Thornton's request for attorney fees in the bad faith civil action noting that, while the insurance company acted in bad faith in pursuing the action, its actions did not rise to the level of oppression or connivance. Id. at 475-76.

In Wolf v. Wolf, the Iowa Supreme Court concluded that the defendant ex-wife tortiously interfered with the ex-husband's custody rights when she took their child out of state after promising the court she would not leave Iowa. 690 N.W.2d 887 (Iowa 2005). The Iowa Supreme Court affirmed the trial court's award of $25,000 in punitive damages, but denied the ex-husband's request for common law attorney fees finding that, "[a]lthough the defendant's conduct in this case was clearly willful and demonstrated a wanton disregard for [the plaintiff's] rights, we do not

believe the evidence meets the heightened standard of oppression or connivance under the Hockenberg test." Id. at 896.

The Eighth Circuit Court of Appeals considered Iowa's American rule for attorney fees in East Iowa Plastics and found the plaintiff could not recover its fees. 889 F.3d at 458-59. In that case, the plaintiff and the defendant both did business with KenTech, a manufacturer of plastic goods in the poultry business. KenTech's products were branded with the registered trademark: PAKSTER. KenTech decided to get out of the business and transferred ownership of the PAKSTER mark to the plaintiff, but it retained a license to use the mark in connection with its production and sale of injection plastic molds. Id. at 456. Later, KenTech sold its injection molds to the defendant without assigning its PAKSTER license. Ten years passed and the plaintiff's registration lapsed. The defendant applied to register the PAKSTER mark with the U.S. Patent and Trade Office. In doing so, as part of its application, the defendant falsely certified that no other person or entity was using the PAKSTER mark. Id. at 456. The plaintiff brought suit seeking, among other things, cancellation of the defendant's trademark registration and common law attorney fees. The District Court granted the plaintiff's request for common law attorney fees. Id. at 457. On appeal, the Eighth Circuit reversed, stating:

> [The defendant's] misrepresentation to the PTO was certainly improper but its conduct did not rise to the level of being tyrranical, cruel, or harsh. It is difficult to analogize [the defendant's] actions to the county treasurer's misconduct in Van Sickel; [the defendant] may have lied to the PTO but it did not manufacture evidence to gain the upper hand in a judicial or administrative proceeding . . . The evidence before the district court suggests strongly that [the defendant] acted in bad faith, but bad faith is not enough to support an award of Iowa common law attorney's fees.

Id. at 458. See also Hockenberg, 510 N.W.2d at 159-60 (finding common law attorney fees not appropriate even though the defendant breached its agreement not to do business in Central Iowa using the words "Hockenberg" or Hockenberg's" and failing to include a disclaimer on all materials mailed to Iowa, causing great and irreparable harm to the plaintiff); T.Zenon Pharmaceuticals LLC v. Wellmark, Inc., No. 17-0966, 2018 WL 6131910, at *7 (Iowa Ct. App. Nov. 21, 2018) (reversing an award of attorney fees finding (1) shifting justifications by insurer for denying claims, involving mostly children, and (2) false claims, regarding reimbursement rates by insurer, displayed "bad faith, but [did] not exhibit an intentional gambit to harass or harm"); Xay Fong v All Lots, L.L.C., No. 07-0858, 2009 WL 1492561 (Iowa Ct. App. May 29, 2009) (finding the plaintiff proved fraudulent misrepresentation by the defendant, affirming an award of punitive damages, but denying an award of common law attorney fees, notwithstanding the fraud); In re Crister Testamentary Trust, No. 00-1299,

2002 WL 987638 (Iowa Ct. App. May 15, 2002) (finding punitive damages proper but not common law attorney fees even though trustee of a trust for the benefit of deceased friend's minor children mismanaged trust assets for her personal benefit, deluded boys into thinking she was personally paying for their expenses, failed to terminate trust at proper time, failed to disclose trust to boys, and tried to get the boys to sign "papers of silence" when they discovered the existence of the trust).

The above caselaw demonstrates that it is indeed a rare occurrence to award common law attorney fees in Iowa. As observed in Cooley v. Lincoln Elec. Co., 776 F.Supp. 511, 559 (N.D. Ohio 2011), the cases in Iowa awarding common law attorney fees represent a "small minority of Iowa cases; in the general majority of cases, Iowa courts held the high standard for awarding attorneys' fees was not met."

The trial court observed in its ruling that McNaughton admittedly wanted to profit from the sale of the property and his demands were excessive. (App. 422). Profit motive, however, is a basic tenet of business transactions, and the desire to profit should not be penalized. The Chartiers were profiting in a sale based on access granted by McNaughton. It is not outside the realm of reasoning to understand his desire to obtain some benefit from others who are profiting from his land. Further, a desire to

profit does not belong in the same category as oppressive and conniving behavior. If McNaughton's actions were in bad faith, an award of attorney fees still is not proper because "[m]ore than mere bad faith is required for this common law exception to the American rule" to apply. Thornton, 897 N.W.2d at 477.

For the American rule to maintain its force, the award of attorney fees must remain a rare occurrence. Awarding them under the current factual situation, where no fraudulent behavior, deceitfulness, or oppression is present, chisels away at the rule. Further, awarding attorney fees against a party with profit motives that are perceived to be unreasonable runs counter to a capitalistic system. Filing the suit seeking a declaration of rights seemed, to McNaughton, the proper course of action when there were concerns about the easement's access. Finding unreasonable negotiation demands exceeds the standard for an award of punitive damages opens the door to a variety of claims and perhaps causes attorneys to check their zealous representation of a client.

Of additional importance is the fact McNaughton filed the action seeking a declaration of rights. The Chartiers and AbiliT were not required to seek relief from the trial court from any bad faith action by McNaughton. Had he taken actions such as blocking access or harassing guests, then

perhaps his actions would begin to enter the realm of wanton and vexatious. Aggressively negotiating prior to seeking a declaration does not.

D. Even if this Court determines McNaughton's actions support an award for common law attorney fees, the award allowed by the trial court was excessive and lacked support.

1. McNaughton should not be responsible for AbiliT's attorney fees.

Jeanine Chartier testified at trial that she entered into an indemnification agreement with AbiliT to reimburse AbiliT for any attorney fees incurred as a result of an action brought by McNaughton. (App. 202 (Tr. p. 188, Ll. 7-10)). Neither the Chartiers nor AbiliT offered the indemnification agreement into evidence and, for that reason alone, their claim should be denied.[5]

[5] As mentioned earlier, the trial court concluded that "it was uncontested that the Chartiers had an indemnification agreement with AbiliT." (App. 508). First, even if McNaughton agreed there was an indemnification agreement, the details of the agreement were not made available. Further, McNaughton would strongly argue he did contest the issue. His first opportunity to object was when the Chartiers offered Exhibit C-2, relating to AbiliT's fees, into evidence. Counsel for McNaughton objected both on relevance and lack of proof regarding responsibility. (App. 206 (Tr. p. 192, Ll. 4-13)). Counsel followed that up by filing a Resistance to Application for Attorney Fees. (App. 498). See also Sundholm v. City of Bettendorf, 389 N.W.2d 849, 852 (Iowa 1986) (finding the "[s]ufficiency of evidence may be challenged on appeal from judgment following a bench trial even though the point was not raised in trial court").

Furthermore, McNaughton was not a party to the alleged indemnification agreement or the sale between Char-Mac and AbiliT. He did not have any knowledge of the contents or terms of any agreements. McNaughton should not be subject to attorney fees that are a contractual obligation negotiated by the Chartiers and/or Char-Mac; the fees should remain the responsibility of the parties to the contract.

2. The Chartiers offered insufficient proof of the amount of attorney fees.

Should this Court find that the Chartiers are entitled to an award of attorney fees, their claim should fail because they provided insufficient evidence to support the amount of their claimed fees. In Johnson v. Ventling, No. 13-0157, 2014 WL 1714966 (Iowa Ct. App. April 30, 2014), the Iowa Court of Appeals concluded that, although the facts supported an award of common law attorney fees, the court could not award attorney fees because the claimant failed to adequately prove the amount. The court found that the claimant offered only general information and failed to provide "detailed, itemized accounting of the work done or fees charged." Id. at *3.

Here, the only information offered to support the amount of AbiliT's fees is a document showing a total due with no itemization, rates, dates, or detail of the work performed. (App. 397; App. 482). The Chartiers/Char-

Mac submitted statements at trial to support their work performed prior to trial. Those statements included dates, time worked, and amount charged for each date. The rate, although not provided, can be determined based on the hours and amounts charged. (App. 400; App. 403). After trial, they submitted statements for apparent trial and post-trial work showing only date and amount charged. They did not provide the hours of work performed. Therefore, the rate is incapable of being computed. (App. 483). Finally, none of the statements provided by the Chartiers/Char-Mac provided an itemization of the work performed.[6] Due to the lack of information, the Chartiers' claim for attorney fees must fail.

3. The trial court's award of attorney fees was unreasonable and excessive.

When a court awards attorney fees under contract or statute, the court must consider whether the amount awarded is reasonable. See generally Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C., 728 N.W. 2d 832 (Iowa 2007). In doing so, the court considers the time spent on the case, the

[6] McNaughton objected to the statements because they lacked sufficient detail and itemization. (App. 498). The Chartiers/Char-Mac replied claiming the information was privileged and requested the trial court conduct an in camera review of itemized statements to confirm the relation of the fees charged to the work performed on the case. (App. 504). The trial court allowed the fees without performing any in camera review. (App. 508).

nature of the work performed, the difficulty of the work required, the responsibility assumed by the attorney and the result obtained, the experience of the attorney, and customary charges for similar service. See id. at 842. In Lee v. State, 906 N.W.2d 186, 196-96 (Iowa 2018), the court noted that "attorneys are generally required to submit detailed affidavits which itemize their fee claims" and "[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly."

Similarly, an award of common law attorney fees should be evaluated to determine whether the amount is appropriate. In Van Sickel, the Iowa Supreme Court determined common law attorney fees were appropriate, but limited the amount claimed to the period during which the fraudulent behavior occurred. Van Sickel, 659 N.W.2d at 581. In Hoeppner, the Iowa Court of Appeals upheld the trial court's determination of a "reasonable" attorney fee after determining de novo that the defendant's behavior justified a common law attorney fee award. Hoeppner, 2007 WL 2963662, at *5.

Furthermore, an award of common law attorney fees is punitive in nature and requires behavior exceeding that necessary for an award of punitive damages. As a result, courts should evaluate an award of common law attorney fees for excessiveness in the same manner that a punitive damages award is evaluated. Three "guideposts" are considered in

determining whether an award of punitive damages is excessive: 1) the degree of reprehensibility of the defendant's misconduct; 2) the disparity between the actual or potential harm suffered by the claimant; and 3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. See Wolf, 690 N.W.2d at 894 (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)).

In evaluating the reprehensibility of conduct, the following factors are considered: 1) whether the harm was physical or economic; 2) whether the conduct evinced an indifference to or reckless disregard to the health or safety of others; 3) whether the conduct involved repeated actions or was an isolated incident; and 4) the harm was the result of intentional malice, trickery or deceit, or mere accident. Wolf, 690 N.W.2d at 894. Here, regarding the Chartiers or Char-Mac's responsibility for AbiliT's fees, the Chartiers and Char-Mac appear to have only suffered an economic harm from an indemnification contract they negotiated, of which McNaughton had no knowledge. They provided no evidence of repeated efforts by McNaughton to interfere with or block usage of the easement in question and no evidence of trickery or deceit. In contrast, McNaughton reasonably

turned to the court for guidance in the interpretation of the Agreement and the parties' rights thereto.

As to the disparity factor, the Chartiers and Char-Mac offered no evidence to contrast any actual harm with potential harm in the event the court declared the easement limited to the use of McNaughton or the Chartiers. As to the difference between the civil penalties imposed and the award of fees, there is no other award of civil damages in this case; only a declaration of rights as to use of the area described in the Agreement.

This case was a declaratory action involving a one-day, nonjury trial. The trial did not involve large number of witnesses nor a particularly complicated set of facts. The court declared the rights of the parties without awarding damages. Awarding the Chartiers attorney fees in the amount of $70,604.14 is both unreasonable and incongruent with punitive damage principles.

II. WHETHER THE TRIAL COURT ERRED IN RULING THAT PLAINTIFF-APPELLANT PUBLICLY DEDICATED THE CONCRETE PORTION OF THE EASEMENT AREA TO THE CITY OF LAWTON.

A. Preservation of Error

The first time either the Chartiers, Char-Mac, or AbiliT alleged that McNaughton publicly dedicated the concrete portion of the easement area to

the City of Lawton was in the Chartiers' Trial Brief. (App. 316-19).[7] During trial, McNaughton specifically denied he publicly dedicated the property. (App. 40-42 (Tr. p. 26, L. 20 – p. 28, L. 18). The essence of McNaughton's claims is that he continues to maintain and control the easement area.

B. Standard and Scope of Review

This Court reviews de novo the trial court's ruling that McNaughton publicly dedicated the concrete portion of the easement area to the City of Lawton. In Lenz v. Hedrick, the plaintiffs filed an action in equity seeking declaratory rulings that adjacent streets had not been publicly dedicated and, therefore, were private in nature. No. 00-1258, 2002 WL 1766629 (Iowa Ct. App. July 31, 2002). The plaintiffs further sought an order to enjoin their neighbors from attempting construction of sanitary sewer in those private streets. The Court of Appeals, when considering its scope of review, concluded its review was de novo:

[7] In its Answer, AbiliT claimed as an affirmative defense that "McNaughton abandoned, surrendered and waived any rights of control to the alleged easement area" when he executed the IDOT access application and when he consented to the City maintaining the easement area. The allegation was not clear whether AbiliT believed McNaughton made a public dedication to the State of Iowa or the City of Lawton nor is it clear whether the allegation relates to a public dedication or simply allowing public use along the easement. (App. 281).

> We conclude the [appellants'] main objective was to obtain an injunction, with the declaratory rulings they sought being the means to secure the injunction. We therefore conclude our scope of review is de novo. See Marksbury v. State, 332 N.W.2d 281, 284 (Iowa 1982) (holding review was de novo where case was one of mixed law and equity and its main objective was to obtain an injunction). We give weight to the trial court's factual findings, especially when considering the credibility of witnesses but we are not bound by them.

Id. at *2.

C. Plaintiff-Appellant did not publicly dedicate his property to the City of Lawton.

The Chartiers claim, and the trial court agreed, that McNaughton publicly dedicated the concrete portion of the easement area to the City of Lawton. (App. 418). The Chartiers, as the party seeking a declaration of public dedication, had the burden of proving dedication "by clear, satisfactory, and convincing evidence." Barz v. State, No. 11-2071, 2012 WL 5356106, at *3 (Iowa Ct. App. Oct. 31, 2012); see also Marksbury v. State, 332 N.W.2d 281, 285 (Iowa 1982).

There are three elements necessary to establish an express dedication. They are:

> (1) an appropriation of the land by the owner for a public use, evidenced by a positive act or declaration manifesting an intent to surrender the land to the public; (2) an actual parting with the use of the property to the public; and (3) an actual acceptance of the property by the public.

Marksbury, 332 N.W.2d at 284.

1. Plaintiff-Appellant never expressly or impliedly demonstrated an intent to surrender his rights to the easement area or otherwise dedicate the property to the City of Lawton.

The court in Marksbury found that the intent of the offeror or dedicator determines the extent, scope, and character of the dedication. 322 N.W.2d at 284. A dedication may be express or implied. "An express dedication may be shown by an explicit or positive declaration, or manifestation of intent to dedicate the land to the public. An implied dedication is shown 'by some act or course of conduct on the part of the owner from which a reasonable inference of intent may be drawn.'" Barz, 2012 WL 5356106, at *3 (citations omitted). However, "[w]hether a dedication is express or implied, *the intent to dedicate 'must be unmistakable in its purpose.*" Barz, 2012 WL 5356106, at *3 (quoting Merritt v. Peet, 24 N.W.2d 757, 762 (Iowa 1946)) (emphasis added).

McNaughton never, not once, stated expressly or otherwise that he intended to abandon his rights to the easement area and dedicate the area to the City of Lawton. In fact, when asked if he wanted to dedicate the area, he expressly, on multiple occasions, said he did not want to publicly dedicate it. (App. 40-41 (Tr. p. 26, L. 20 – p. 27, L. 27); App. 42 (Tr. p. 28, Ll. 6-18)).

"Tacit dedication does not result where active opposition is directly communicated by the landowner to the governing body." 4 Tiffany Real Prop. § 1102 (3d ed. Nov. 2019 Update). Further, in the context of this case, the City of Lawton requested to be dismissed from this case claiming it has no interest in the easement area. As stated in its pretrial brief: "*The City does not own any portion of the property covered by the [easement] agreement*." (App. 306) (emphasis added).

In Barz, the court found that the intent to dedicate must be manifested by "some unequivocal act, indicating clearly an intent that it be so devoted." Barz, 2012 WL 5356106, at *3. When discussing the intent to dedicate, the court further stated: "A dedication 'may not be predicated on anything short of deliberate, unequivocal, and decisive acts and declarations of the owner, manifesting *a positive and unmistakable intention to permanently abandon his property to the specific public use*.'" Id. (quoting Culver v. Converse, 224 N.W.2d 834, 835 (Iowa 1929)) (emphasis added).

The trial court concluded McNaughton publicly dedicated the easement area by consenting to the City of Lawton pouring concrete over a portion of the easement. (App. 416). However, when doing so, McNaughton specifically declined to publicly dedicate the area. (App. 40 (Tr. p. 26, Ll. 20-25)). The trial court further found that, because

McNaughton never objected to the general public use of the easement area, he evidenced an intent of public dedication. (App. 416-17). However, McNaughton never objected to the use because he, via the Agreement, granted the residents, guests, and invitees of the Chartier facility permission to use the area. He would naturally assume those using the easement/roadway were of such a designation, particularly because the road dead ends into the facility's parking lot. Further, "evidence of public use without more is not sufficient to indicate such a clear and unequivocal act on the owner's part to establish the intent to dedicate." 3 Local Government Law § 17:3 (Oct. 2019 Update).

Finally, the trial court found that the language of the easement limits access "to those who are residents, guests, and invitees of the assisted living facility on Chartiers' property which in and of itself does not foreclose the same access to a new owner of the facility. Paragraph 6 is internally inconsistent in its language and its attempt to be both a 'private' easement and grant ingress and egress to the general public." (App. 418). However, the trial court's conclusion that the language is internally inconsistent is only the result of the court concluding the language does not foreclose access to a new owner of the facility. McNaughton would argue that is *exactly* what the language provides. McNaughton intended to grant access across his

property to his sister and the facility owned by his sister. He *never* intended it to be used by a third-party owner without his consent. Interpreting the language in this manner eliminates any inconsistency in the language of the Agreement.

McNaughton never intended to publicly dedicate the concrete portion of the easement area to the City of Lawton, and his express refusal to do so should weigh heavily against any perceived implied intent. Further, the Chartiers and AbiliT failed to mention the words "public dedication" in any filing until their pretrial brief. Surely, if the intent to dedicate was so "positive and unmistakable," they would have led with the claim in their initial Answers.[8] Finally, and of upmost relevance, is the fact the City of Lawton *expressly denied* any interest in the easement area. (App. 17 (Tr. p. 3, Ll. 19-25); App. 306)). Based on the above, it becomes clear that

[8] McNaughton mentions this purely to underscore the fact the issue of public dedication was not an obvious resolution in the minds of the parties. It weighs against any unequivocal act of dedication and supports the validity of McNaughton's decision to petition the trial court for relief. The Chartiers claimed they raised the issue in earlier pleadings, but those pleadings referred to the Chartier's portion being publicly dedicated and to the easement as being public, not publicly dedicated. They never claimed the City owns the property via public dedication until their trial brief. (App. 489; App. 272). McNaughton does not contest the trial court's decision to consider the issue, only that the late revelation works against any claim of an unequivocal intent.

McNaughton never displayed an unequivocal and unmistakable intent to dedicate the property.

2. Defendants-Appellees failed to show an unequivocal act by Plaintiff-Appellant to publicly dedicate the property.

In addition to proving a clear and unequivocal intent by McNaughton to dedicate the easement area, the Chartiers and AbiliT must also show "an unequivocal act by [McNaughton] to dedicate the property." Barz, 2012 WL 5356106, at *4. McNaughton's actions all along, however, suggest his decision and intent was *not* to abandon his rights to his property. The trial court found that, by allowing the City of Lawson to concrete a portion of the easement area to create a road, he manifested an intent to dedicate. (App. 416-17). McNaughton would argue that he simply agreed to allow the improvement to the easement area to provide his sister and her facility with better access. (App. 35 (Tr. p. 21, Ll. 6-10)).

3. The City of Lawton never accepted any dedication by McNaughton.

To establish property was publicly dedicated, the party claiming dedication must demonstrate actual acceptance of the property by the public. Marksbury, 332 N.W.2d at 284. Although it is generally agreed the public used the easement area and roadway, only those members of the public who "were residents, guests and other invitees" of the facility on the Chartiers'

property were using the roadway. Those were the individuals allowed to use the easement area pursuant to the express wording of the Agreement and, given the road dead ends into the facility's parking lot, no other member of the public would have reason to use the roadway. Using the road pursuant to the Agreement's language does not translate into a public dedication. Additionally, the City did not accept public dedication of the Chartiers portion of the road until 2012, ten years after creation of the road. (App. 130 (Tr. p. 116, Ll. 6-22)). It is unclear at what point the Chartiers or AbiliT claim the public acceptance occurred for McNaughton's portion, particularly given the City has maintained it has no interest in any of the easement area. (App. 17 (Tr. p. 3, Ll. 19-25); App. 306)).

At the core of public dedication is the idea that a property owner intends to give the general public the right of use to his property. The Iowa Supreme Court has stated:

> A common law dedication of land for a public purpose is well recognized in law. It is in no sense a *taking* of land for public purpose, for the public, as represented by the municipality, cannot *take* private property for a public purpose without paying for it. Dedication is just what the term signifies. It is the owner's *giving* the right or easement for public use – the devotion to the public by the owner.

Sioux City v. Tott, 60 N.W.2d 510, 515 (Iowa 1953) (emphasis in original).

Based on the above, McNaughton submits that the trial court erred in

concluding he publicly dedicated the concrete portion of the easement area to the City of Lawton.

III. WHETHER THE DISTRICT COURT ERRED IN RULING THAT, EVEN IF PLAINTIFF-APPELLANT DID NOT PUBLICLY DEDICATE THE PROPERTY, THE EASEMENT WAS APPURTENANT TO DEFENDANTS-APPELLEES' PROPERTY.

A. Error Preservation

McNaughton filed this action seeking review of the parties' rights to the easement area. In doing so, McNaughton maintained it was his right to consent or object to any assignment of the easement area's use because the easement remained a private, in gross easement. (App. 275; App. 299; App. 327. App. 62-63 (Tr. p. 48, L. 22-49, L. 24)).

B. Standard and Scope of Review

This Court reviews de novo the trial court's decision, tried in equity, that the easement is appurtenant to AbiliT's property. See Brede v. Koop, 706 N.W.2d 824, 826 (Iowa 2005); JAR Farms LTD v. Certified Materials, Inc., No. 18-1240, 2019 WL 2879937, *3 (Iowa Ct. App. July 3, 2019).

C. The easement at issue is a private easement in gross.

"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). An easement may be either appurtenant or in gross. "An appurtenant easement is an incorporeal right which is attached to, and belongs with, some greater or superior right-something annexed to another thing more worthy and which passes as an incident to it." Wymer v. Dagnillo, 162 N.W.2d 514, 517 (Iowa 1968). An easement in gross is an easement that, while "the use it authorizes is connected with the use of a particular tract of land in the possession of the owner, it was not intended by its creator or creators to be appurtenant to such land." Restatement (First) of Property § 434 cmt. a (1944; Oct. 2019 Update).

> The privileges of use authorized by an easement appurtenant are incidental to the possession of the dominant tenement. . . . In this respect they differ from the privileges of use authorized by easements in gross. The privileges of use authorized by an easement in gross are incidental to the ownership of the easement.

Restatement (First) of Property § 511 cmt. b (1944; Oct. 2019 Update). Whether an easement is appurtenant or in gross is determined primarily by the intention of the parties. See Sherwood v Greater Mammoth Vein Coal Co., 185 N.W. 279, 283 (Iowa 1921). [9]

[9] McNaughton acknowledges that, when an easement benefits another estate, the easement is typically considered appurtenant. See Restatement (Third)

Private easements are "limited to specific individuals and/or uses." 28A C.J.S. Easements § 11 (June 2019). A private easement "is not open to use by the general public[] but may be used by the easement holder's family members, guests, tenants, employees, and tradesmen or others whom he or she is transacting business." Id. A public easement is "open to all members of the public for any uses consistent with the dimensions, type of service, and location of the roadway." Id.

McNaughton has consistently maintained that the only reasonable reading of the entire Agreement is that the parties intended the easement to be exclusively used by the Chartiers and the residents, guests, and other invitees of the assisted living facility on the Chartiers' property. Once the Chartiers sold the assisted living facility and land to AbiliT, the assisted living facility no longer fell within the "exclusive use" provisions of the Agreement and, therefore, any continued use required the express permission of McNaughton.

1. Feasible access options beyond the easement exist.

The trial court found that the easement is the "only reasonable" way to the Char-Mac facility and is "necessary for such access." (App. 419). The

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of Property (Servitudes) § 4.5 cmt. d (2000). However, weighing against the benefit in this case is the expressed intent of the parties.

testimony and evidence at trial, however, demonstrated that the parties generally agree access to the AbiliT property is possible on the Chartiers' portion of the road because it is large enough to allow traffic and, therefore, access via the easement is not necessary. (App. 385; App. 60-61 (Tr. p. 46, L. 23 – p. 47, L. 6); App. 90 (Tr. p. 76, Ll. 1-9)).[10] Furthermore, the subject easement cannot be considered an easement by necessity because an easement by necessity must have "unity of title to the dominant and servient estates at some point prior to severance." Kroeze v. Scott, No. 07-0995, 2008 WL 680748, at *3 (Iowa Ct. App. Mar. 14, 2008). There was no unity of title between McNaughton's property and the property now owned by AbiliT.

2. The Agreement expressly limits ingress and egress to certain members of the public.

[10] McNaughton testified that the roadway is wide enough to allow a person to access the facility without crossing onto his easement portion. (App. 60-61 (Tr. p. 46, L. 23 – p. 47, L. 6); App. 90 (Tr. p. 76, Ll. 6-9)). Later, he testified there was no reasonable, alternative access to the facility than via the easement. (App. 98 (Tr. p. 84, Ll. 18-23)). The context of that testimony supports a conclusion that he was testifying to the Highway 20/roadway access generally and not to the width of the easement area, as he did specifically earlier. Further, the Chartiers' counsel opined in an email to AbiliT representatives that the Chartiers' portion of the roadway was sufficiently wide enough to allow independent access. (App. 385).

The trial court found that, because the subject easement provides for "ingress and egress," it is necessarily an appurtenant easement. (App. 419). The court relied on the Iowa Court of Appeals ruling in Rank v. Frame, 522 N.W.2d 848, 852 (Iowa Ct. App. 1994) for this proposition. However, the facts in the Rank case involved an *implied* easement, not an express easement. Thus, the Rank court was left to determine the intent of the parties based on the use of the property. Because the use involved ingress and egress, the court determined it should be appurtenant. McNaughton would propose that this general rule is not applicable to an easement that is *express* in the permitted uses because the intent is clear based on the language of the Agreement.

The trial court further concluded that the ingress/egress language in the Agreement is inconsistent with the language declaring the easement to be "private." Based on that declared inconsistency, the court dismissed the "generalized private easement statement" in favor of the "more specific" "ingress and egress." (App. 419-20). McNaughton maintains, however, that the two provisions are not inconsistent and that, in any case, the language regarding use is specific and not generalized in any manner.

a) The Agreement's language is internally consistent.

The trial court found that the ingress/egress provision of the Agreement is incompatible with the provisions (1) declaring it to be a private easement, (2) restricting who can use the easement, and (3) providing that McNaughton must approve of any assignment. (App. 419-420). McNaughton maintains, however, that the Agreement's provisions are entirely compatible. The Agreement *did* provide ingress and egress to the Chartier's facility, but that access was *limited* to his sister and the "residents, guests, and other invitees of the assisted living facility located on Chartier's property." (App. 336). Once the Chartiers sold the property, the Agreement no longer applied to the residents, guests, and other invitees of the assisted living facility because it was no longer on the Chartiers' property. It was at that point the provision permitting the Agreement to continue only with McNaughton's consent kicked in. The language is not either/or. Instead, all the provisions: (1) ingress/egress (2) exclusive use, (3) restriction on assignment, and (4) private easement declaration, may be read together to effectuate the original intent of the parties.

b) The Agreement's restrictions on assignment and use are specific.

The parties crafted the Agreement to meet their specific needs. The language was not boilerplate, and the parties wrote the Agreement with detail and specificity. For example, the Agreement clearly states it is a "private easement" for the parties designated and that the easement is *not* to be construed to be for the general public. (App. 336). The Agreement further states that the easement rights "are for the *exclusive* use and benefit of *Chartier*, and the residents, guest and other invitees of the assisted living facility located on the *Chartier's property.*" (App. 336) (emphasis added). The language is specific and intentional as to its exclusiveness and is not generalized in any manner. Regarding use by other individuals, the parties specifically agreed that the easement rights granted could "not be assigned by Chartier to any other party or parties without the express written consent of McNaughton or his successors or assigns." (App. 336). The language limiting assignment of the easement rights by the Chartiers demonstrates a strong intent that the easement granted was *not* for general, public use. The Agreement further protects McNaughton's interests by requiring his consent to any assignment. (App. 336). Again, this language is specific to the properties and not a mere generalized statement.

To find the easement is public in nature and appurtenant to the property now owned by AbiliT runs counter to the Agreement's detailed,

expressed intent that the use be limited to the Chartiers *and* that McNaughton agree to any assignment.

D. Plaintiff-Appellant had no reason to object to the use of the easement prior to the proposed sale because the use complied with the intent of the Agreement.

The trial court found that the easement had always been treated as public because McNaughton never provided restrictions on its use. (App. 420). As demonstrated earlier, however, the easement is not part of a through street and dead ends at the assisted living facility. McNaughton, for the past nearly 20 years, has never had reason to object to the use of the easement because he would naturally have believed it was being used by either his sister or the residents, guests, and invitees of the assisted living facility on his sister's property. It is certainly logical for him to assume that the general public would not be using the easement area because the road dead ends into the facility. No one, other than those designated in the easement, would have reason to venture onto the roadway. Therefore, McNaughton had no reason to object to any use.

Further, the easement was granted in 1999. Up until 2012, access to the facility was essentially a private driveway. In 2012, the City accepted the Chartiers' dedication of their portion of the road to the City. (App. 130 (Tr. p. 116, Ll. 6-11)). The easement language, anticipated use, and rights

conveyed should not change simply because a neighbor changes the nature of adjoining property.

CONCLUSION

The parties to this case have differing opinions as to the rights conveyed by the Agreement. Realizing the Chartiers were transferring ownership of their facility, McNaughton negotiated access to the easement. Whether his demands were excessive or not, McNaughton was entitled to negotiate the interests under the Agreement and attempt to obtain a profit thereunder. Similarly, the Chartiers and AbiliT were within their rights to decline his proposals, as they did. When negotiations failed, a dispute remained as to the use permitted under the Agreement. Rather than blocking access or blocking the sale, McNaughton took the reasonable step of requesting that the trial court determine the rights under the Agreement. His actions and behavior were not malicious, wanton, vexatious nor were his actions of the sort to justify the rare award of common law attorney fees.

Further, by seeking the declaration of rights, McNaughton ended in the unusual situation of having his rights to the property taken from him. A public dedication must involve some unequivocal act by the grantor to dedicate the property. The record provides evidence of no such action and, in fact, runs counter to an intent to dedicate.

Finally, the language of the Agreement controls, and the language supports a ruling that use of the easement cannot be assigned without McNaughton's consent. For these reasons, McNaughton respectfully requests that this Court overrule the trial court's ruling.

REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument.

MOORE, CORBETT, HEFFERNAN,
MOELLER & MEIS, L.L.P.

By: /s/ Angie J. Schneiderman
Angie J. Schneiderman AT0006997
501 Pierce Street, Suite 300
P.O. Box 3207
Sioux City, Iowa 51102
Phone: (712) 252-0020
Fax: (712) 252-0656
ASchneiderman@MooreCorbett.com
ATTORNEYS FOR PLAINTIFF/APPELLANT
WILLARD B. MCNAUGHTON

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Times New Roman typeface in 14 point font size and contains 12,770 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on February 19, 2020, I caused the foregoing Appellant's Final Brief to be filed with the Iowa Supreme Court Clerk using the Electronic Document Management System (EDMS) which, pursuant to Iowa R. Elec. P. 16.315(1) and Iowa R. App. P. 6.702(2), will send notification of such filing to the attorneys of record who are registered with EDMS.

MOORE, CORBETT, HEFFERNAN,
MOELLER & MEIS, L.L.P.

By: /s/ Angie J. Schneiderman
Angie J. Schneiderman AT0006997
501 Pierce Street, Suite 300
P.O. Box 3207
Sioux City, Iowa 51102
Phone: (712) 252-0020
Fax: (712) 252-0656
ASchneiderman@MooreCorbett.com
ATTORNEYS FOR PLAINTIFF/APPELLANT
WILLARD B. MCNAUGHTON