IN THE SUPREME COURT OF IOWA

NO. 19-1681

WILLARD B. MCNAUGHTON,

Plaintiff/Appellant,

vs.

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

Defendants/Appellees

DEFENDANTS/APPELLEES' APPLICATION FOR FURTHER REVIEW

FROM THE IOWA COURT OF APPEALS' JUNE 16, 2021 DECISION; ON APPEAL FROM THE DISTRICT COURT FOR WOODBURY COUNTY THE HONORABLE JEFFREY A. NEARY

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals commit error in determining that McNaughton, after the City of Lawton installed a public street on his property, did not dedicate that portion of his property as a public street?

2. Did the Court of Appeals commit error in determining that the concrete portion of the easement area was not an easement appurtenant to Defendants-Appellee AbiliT's property?

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STATEMENT SUPPORTING FURTHER REVIEW

The City of Lawton constructed, at the cost of the taxpayers, a city street on a 13'x80' area of McNaughton's property. McNaughton was aware the City constructed the street on his property and he did not object to the street construction. After the street was constructed, McNaughton did nothing to restrict the public from using the 13'x80' area of his property for almost two decades. The District Court held that McNaughton dedicated the 13'x80' area of his property as a public street.

The Court of Appeals held that McNaughton did not dedicate the 13'x80' area of his property as a public street. The Court of Appeals found that the easement agreement entered into between Defendant-Appellee Chartier and McNaughton was a private easement and was not to be construed as an easement for the public. (Decision at 9) The Court of Appeals ultimately held the "evidence insufficient to support the District Court's conclusion that McNaughton publicly dedicated the 13'x80' area." (Decision 10).

Further review is warranted under Rule 6.1103(1)(b)(1) because the Court of Appeals has entered a decision in conflict with a decision of the Supreme Court. The Court of Appeals' decision is in direct conflict with the *Henry Walker Park Association v. Mathews*, 249 Iowa 1246 (Iowa 1958) and *Kinsinger v. Hunter*, 195 Iowa 651, 192 N.W. 264 (Iowa 1923).

On September 17, 1999, Chartiers and McNaughton entered into a written Easement Agreement ("Easement") concerning the easement area depicted by the red rectangle on Joint Exhibit 2. App. P. 336-346. The Easement was "for ingress and egress across a portion of McNaughton's real estate to provide Chartiers with an access between their real estate and U.S. Highway 20." App. P. 339. The Easement provided in part: "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 Chartiers' property . . . It is specifically understood that this Agreement creates a "private" easement granted for the used and benefit of the parties identified in this paragraph and is not to be construed as an easement for the use

and benefit of the general public." App. P. 339. The Easement remained unrecorded from its creation in 1999 until 2018 when a copy of it was unilaterally recorded by McNaughton. App. P. 133, 336-344. The original Easement cannot be located. App. P. 71.

Since the time the easement agreement was entered into, McNaughton testified that:

a. He never placed any restriction on who could use the concrete portion of the easement area over the past approximately 20 years. App. P. 92.
b. Any member of the public had unrestricted use of the concrete portion of the easement area for the past approximately 20 years. App. P. 77, 92-93.
c. That the paved portion of the street is located on his property. App. P. 76.
d. That he does not object to members of the public crossing the concrete portion of the easement area. App. P. 77.
e. There is no reasonable alternative for access the care facility from U.S. Highway 20. App. P. 99.

The Court of Appeals determined that the "plain reading of the easement agreement, the clear intent of the of the partiers was to create a private, personal, and non-transferable easement, which is not appurtenant to [AbiliT's] property." (Decision 11). The Court of Appeals further held "[a]lthough accessing McNaughton's side of the driveway is more convenient and creates a more reasonable driveway entrance, use of his property is unquestionably not necessary to allow ingress and egress to the east property." (Decision 12).

Further review is warranted under Rule 6.1103(1)(b)(1) because the Court of Appeals has entered a decision in conflict with a decision of the Supreme Court. The Court of Appeals' decision is in direct conflict with the *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008), *Sherwood v. Greater Mammoth Vein Coal Co et al.*, 185 N.W. 279, 283 (Iowa 1921), and *Wiegmann v. Baieri*, 203 N.W.2d 204, 208 (1972).

BRIEF

Facts

McNaughton and Jeanine Chartier are siblings. App. P. 27.

On August 18, 1998, McNaughton purchased the property located at 2156 Highway 20, Lawton, Iowa, which is located south of Highway 20. App. P. 25, 27, 370.

On December 3, 1998, Chartiers (Jeanine and Stanley) purchased on contract approximately 15.97 acres of real estate located directly to the east of McNaughton's property and directly south of Highway 20. App. P. 28, 347, 371. Chartiers purchased the property with the intent of constructing a care facility to be utilized as an assisted living facility. App. P. 164. Chartiers eventually received title to the property via warranty deed recorded on October 4, 1999. App. P. 371.

In order to obtain SBA financing for the construction of the care facility, Chartiers needed to have a public street installed to access the care facility from Highway 20. App. P. 179. Prior to installing a public street, Chartiers needed to obtain a permit from the Iowa Department of Transportation to gain access off of

Highway 20. App. P. 180. In January of 1999, McNaughton and Chartiers submitted an application for a special access connection to the DOT to obtain access to Highway 20 and the application was approved by the DOT on January 25, 1999. App. P. 349. One-third of the access area is located on McNaughton's property and two-thirds of the access area is located on Chartiers' property. App. P. 181, 345. The access area is depicted by the blue rectangle area on Joint Exhibit 2. App. P. 345.

After acquiring the access permit, Chartiers approached the City of Lawton concerning the construction of the public street and other public improvements. App. P. 182. Beginning in July of 1999, the City of Lawton then proceeded to: (1) hire an engineer to prepare plans and specifications for the public street and related public improvements; (2) prepare the site plan; (3) conduct the necessary council proceedings to publicly bid the project; (4) hire a contractor for the project and approve the construction contract; (5) adopt the Char-Mac Addition Urban Renewal Plan; and (6) enact a Tax Increment Financing ordinance to capture the increase in the real estate taxes for Chartiers' property and use

those public funds to pay for the public street and related public improvements. App. P. 182-186, 353-368, 573-581. Construction of the public street and related public improvements was completed in late 1999 or early 2000. App. P. 188, 352. The public street and related public improvements were partially constructed on McNaughton's property. App. P. 75-76, 345-346. The City of Lawton named the public street East Char-Mac Drive. App. P. 188, 347.

On September 17, 1999, Chartiers and McNaughton entered into a written Easement Agreement ("Easement") concerning the easement area depicted by the red rectangle on Joint Exhibit 2. App. P. 336-346. The Easement was "for ingress and egress across a portion of McNaughton's real estate to provide Chartiers with an access between their real estate and U.S. Highway 20." App. P. 339. The Easement remained unrecorded from its creation in 1999 until 2018 when a copy of it was unilaterally recorded by McNaughton. App. P. 133, 336-344. The original Easement cannot be located. App. P. 71.

The easement area consists of a 13-foot wide by 80-foot long concrete area of the "stub" or "T" at the west end of East Char-Mac Drive. App. P. 345-346. The concrete "stub" or "T" is 36 feet wide. App. P. 345-346. There is an unpaved portion of the easement area which is 10 feet by 80 feet in McNaughton's yard. App. P. 89. The portion of the easement area at issue in this case is the area that is 13 feet wide by 80 feet long in the concrete "stub" or "T" on East Char-Mac Drive.

In January of 2018, Chartiers and Char-Mac began the process of selling the care facility and a letter of intent was executed by Chartiers, Char-Mac and AbiliT for the sale of the care facility to AbiliT. App. P. 154. Jeanine Chartier disclosed to AbiliT the existence of the Easement, however, the Easement did not show up on the title search performed by AbiliT. App. P. 155.

In February of 2018, with the deadline to enter in the contract approaching, Jeanine Chartier, at the request of AbiliT, approached McNaughton about clarifying paragraph 6 of the Easement. App. P. 157, 378. McNaughton didn't even have a copy of the Easement so Jeanine Chartier provided him a copy of the

document. App. P. 133. McNaughton assured Jeanine Chartier that he was not going to disrupt the sale of the care facility and that there were no problems with the Easement and that the Easement goes with the care facility. App. P. 136-137.

After McNaughton provided the easement clarification to his attorney, it was discovered that the Easement contained the incorrect legal description concerning Chartiers' property. App. P. 35. McNaughton then approached Jeanine Chartier with an offer in exchange for McNaughton executing the easement clarification. App. P. 198. McNaughton requested that Chartiers pay him $100,000 and Jeanine Chartier, as executor of her sister's estate, allow him to purchase 50 acres from the estate, and the Chartiers pay all the expenses related to the transaction. App. P. 198, 201; Tr. 184:16-21, 187:10-12. Jeanine Chartier, due to her fiduciary duty as an executor, refused to comply with McNaughton's demands because allowing him to purchase 50 acres from the estate would have devalued the remaining 30 acres of real estate at the detriment of the estate's beneficiaries. App. P. 198, 200. After Chartiers declined this offer, McNaughton wouldn't sign the

easement clarification. App. P. 136. On March 7, 2018 McNaughton unilaterally recorded a copy of the Easement by attaching the Easement to an Affidavit Explanatory of Title to Real Estate. App. P. 336-344.

On April 19, 2018 McNaughton filed this lawsuit and a Lis Pendens notice. App. P. 243. Due to the pending lawsuit, AbiliT required that Chartiers and Char-Mac indemnify AbiliT for all costs, including attorney fees, incurred by AbiliT should they be named a defendant in the lawsuit. App. P. 202, 595.

On May 24, 2018, McNaughton, via a letter, made the three following proposals to resolve the issue concerning the concrete portion of the easement area:

a. Chartiers purchase McNaughton's property located at 2156 Highway 20, Lawton, Iowa for $410,000;
b. Chartiers pay McNaughton $160,000 and McNaughton retain his property; and
c. Chartiers transfer to McNaughton the 12 acres of farm real estate located just south of the care facility.

App. P. 202, 219. Chartiers declined all three offers. App. P. 203.

Trial in this matter was held on July 16, 2019. App. P. 406. The significant issue presented to the trial court was whether the 13-foot wide by 80-foot long concrete portion of the easement area is considered a public street. App. P. 345-346.

At trial, McNaughton testified:

a. He never placed any restriction on who could use the concrete portion of the easement area over the past approximately 20 years. App. P. 92.

b. Any member of the public had unrestricted use of the concrete portion of the easement area for the past approximately 20 years. App. P. 77, 92-93.

c. The public street was partially constructed on his property; the concrete portion of easement area. App. P. 75.

d. He never placed a sign indicating there was a private easement on the public street. App. P. 77-78.

e. That a lot of people believe the concrete portion of the easement area is a public street. App. P. 98.

f. If he attempts to interfere with the use of the public street by installing a barrier to disrupt access across the concrete portion of the easement area, the City of Lawton would cite him. App. P. 97.

g. There is no reasonable alternative for access the care facility from U.S. Highway 20. App. P. 99.

h. That he was not concerned about the Easement until he learned of the pending sale of the Char-Mac facility. App. P. 79.

i. That he wanted to profit from the pending sale of the Char-Mac facility. App. P. 79.

j. That the paved portion of the street is located on his property. App. P. 76.

k. That he does not object to members of the public crossing the concrete portion of the easement area. App. P. 77.

McNaughton did try to disrupt the sale of Char-Mac assisted living facility by filing this lawsuit during the final months during which the sale was set to close. As a result of this lawsuit,

Chartiers have incurred expenses totaling $70,604.14 to date. App. P. 397-404, 480-484, 496-497.

The District Court held that McNaughton "has dedicated the concrete portion of the easement to the City of Lawton and the City of Lawton has accepted the same area as a public street (public improvement). Any rights created under the easement at issue here have been extinguished and McNaughton's rights to the 13-foot by 80-foot easement area covered by the concrete street are terminated and extinguished." (District Court Decision 13). Further, the District Court held "the easement has always been treated as a public easement, despite the language to the contrary. In light of that fact, there have been no restrictions on use for almost two decades, the only reasonable conclusion is that the 13-foot by 80-foot area in the public street is an appurtenant easement. The appurtenant easement was however later dedicated as a public street as noted above thereby extinguishing the easement." (District Court Decision 15). In regards to the award of common law attorney fees, the District Court held that the actions of McNaughton in an attempt to "cash in" from the

sale of the assisted living facility were vexatious and wanton, and constitute bad faith supporting an award of attorney fees. (District Court Decision 17).

The Court of Appeals reversed and remanded the District Court's decision. In analyzing the issue of common law dedication, the Court of Appeals found "the evidence insufficient to support the district court's conclusion McNaughton publicly dedicated the easement area." (Decision 10). In reaching this conclusion, the Court of Appeals seemed to focus on the Easement entered into between McNaughton and Chartier (which was unrecorded up until 2018), as opposed to focusing on the facts surrounding the installation and use of the public street and McNaughton's testimony.

In determining whether the easement was appurtenant to McNaughton's property, the Court of Appeals found "the language allowing for ingress and egress was general, and the language restricting use to the benefit of the parties and not of the general public was more specific." (Decision 11). "Upon our plain reading of the easement agreement, the clear intent of the parties was to

create a private, personal, and non-transferable easement, which is not appurtenant to the east property." (Decision 11). In reaching this conclusion, the Court of Appeals seemed to ignore McNaughton's testimony that "absent use of the easement, there is simply no other way to access the care facility." (District Court Decision 15). Further, the Court of Appeals determined that the entrance off of Highway 20 is thirty-five feet wide, with twenty-two feet being a public street, so the use of McNaughton's 13-foot strip of property is not necessary to access the care facility. (Decision 12).

The Court of Appeals further held that McNaughton actions in using the transferability of the unrecorded easement as a bargaining chip to profit from the Chartiers' sale of the care facility did not raise to the level of bad faith, and were not vexatiously, wantonly or for oppressive reasons. (Decision 13). For that reason and because the Court of Appeals rendered him the successful party, the Court of Appeals reversed the award of attorney fees. (Decision 13).

A. McNaughton publicly dedicated the 13'x80' concrete portion of the easement area as a public street

"Dedication is 'the setting aside of land for public use.'" *Barz v. State*, No. 11-2071, 2012 WL 5356106, at *3 (Iowa App. 2012)(citation omitted). "Three elements are required to show dedication: (1) an intent to dedicate, (2) dedication, and (3) acceptance by the public or the party to whom the dedication is made. *Barz*, 2012 WL 5356106, at *3. "A dedication must be proven by clear, satisfactory, and convincing evidence. *Id.* (citing *Merritt v. Peet*, 24 N.W.2d 757, 762 (Iowa 1946)). "Dedication is a question of fact, and must be proven by the party relying upon it." *Marksbury v. State*, 332 N.W.2d 281, 284 (Iowa 1982)(citations omitted).

"A dedication may be either express or implied." *Barz*, 2012 WL 5356106, at *3 (citing *Sons of the Union Veterans of the Civil War v. Griswold Am. Legion Post 508*, 641 N.W.2d 729, 734 (Iowa 2002)). "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.

"Whether a dedication is express or implied, the intent to dedicate 'must be unmistakable in its purpose.'" *Id.* (quoting *Merritt v. Peet*, 24 N.W.2d 757, 762 (Iowa 1946). "'There can be no dedication unless there is a present intent to appropriate the land to public use.'" *Id.* (quoting *De Castello v. City of Cedar Rapids*, 153 N.W. 353, 356 (Iowa 1915)).

"There must be a parting with the use of the property to the public, made in praesenti, manifested by some unequivocal act, indicating clearing an intent that it be so devoted." *Id.* 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. 834, 835 (Iowa 1929). "Furthermore, 'the acts proved must not be consistent with any other construction than that of dedication." Id.

In their analysis of whether McNaughton dedicated the 13'x80' concrete portion of the easement area, the Court of Appeals focused on the language of the Easement (which was not

recorded until McNaughton recorded a copy of it in 2018) instead of focusing on the actions and inactions of McNaughton since the City of Lawton constructed the public street on his property. The Court of Appeals specifically noted that the Easement "creates a 'private' easement granted for the use and benefit of the parties . . . and it is not to be construed as an easement for the use and benefit of the general public." (Decision 9). The terms of the Easement are not relevant to the discussion of whether McNaughton publicly dedicated his property as a public street because the Easement was between McNaughton and Chartier, and the City of Lawton was not a party to the Easement. Further, the Easement was not of record until 2018, so there was no way formally for the general public or the City of Lawton to know the existence of the Easement. Chartier asserts the terms of the Easement should not be included in the discussion of whether McNaughton publicly dedicated his property as a city street.

The Court of Appeals further notes that "while McNaughton did not restrict public use, 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." (Decision 9-10). The Court of Appeals went on to state "[M]ere permissive use of way, no matter how long continued, will not amount to a dedication. The user is presumed to permissive, and not adverse." (citing *Sons of the Union Veterans v. Griswold Am. Legion Post 508*, 641 N.W.2d 729, 734 (Iowa 2002). However, the Court's analysis needed to further explore the case law in Iowa.

"Mere permissive use of the way, no matter how long continued, will not amount to a dedication; but if, in addition to the long-continued use, it be shown it has been so used with the knowledge and consent of the proprietor, in other words, if his conduct is reasonably explainable only on the theory of his consent or upon the theory of his waiver, or abandonment of his right for the benefit of the public, he will not thereafter be permitted to repudiate or deny its legal effect." *Kinsinger v. Hunter* 195 Iowa 651, 192 N.W. 264, 265 (Iowa 1923)(*See Henry Walker Park Ass'n v. Mathews*, 249 Iowa 1246, 1256, 91 N.W.2d 703, 710 (Iowa 1958).

In this case, McNaughton was knew the public street was constructed on his property and, since the construction of the

street in 2000, McNaughton knew the general public was using the street and he has not ever objected to the general public crossing the concrete portion of the easement area. App. 76- 77, 90, 92-93. Additionally, "[n]otorious public recognition, long continued, especially where such public use has continued for 10 years of more, supplies the place of a formal record." *Kinsinger*, 192 N.W. at 265 (citations omitted). "User by the public at large such is generally known, which is continuous, . . . will establish the owner's intention to dedicate." *Mathews*, 91 N.W.2d at 710 (citation omitted). "We are of the opinion that if the owner of the land in question knew for a series of years that the public were using and treating the road as a highway, and [the public is] expending funds in its improvement, and that he acquiesced in what they were doing, such facts might well be considered evidence tending to prove actual dedication. *State v. Birmingham et al.*, 74 Iowa 407, 38 N.W. 121, 123 (Iowa 1888).

Additionally, "[p]ayment or non-payment of taxes is not conclusive, but the matter has some bearing upon the intent to dedicate." *Mathews*, 91 N.W.2d at 710. McNaughton is not paying

real estate taxes on the concrete portion of the easement area, further supporting his intent to publicly dedicate his property as a city street. App. 215-216, 582-583.

The Court of Appeals also noted that the city approached McNaughton at least three times to formally dedicate the concrete portion of the easement area, but McNaughton refused to do so. (citing 4 Tiffany Real Property § 1102 (3d ed. Sept. 2020 update)("Tacit dedication does not result where active opposition is directly communicated by the landowner to the governing body.")) (Decision 10). In reviewing the citation to the treatise, the quote is from a Louisiana Court of Appeals case, that involves the interpretation of a Louisiana statute concerning tacit dedication. *See generally Vaughn v. Williams*, 345 So.2d 1195, 1198 (La. App.2d Cir. 1977). The Court of Appeals improperly relied upon the treatise because it is quoting Louisiana law.

In order to show that the concrete portion of the easement area was publicly dedicated, Chartiers must show an actual acceptance of the property by the public. *Marksbury*, 332 N.W.2d at 284. Chartiers do not need to show the acceptance be by the

City of Lawton or any other public authority. *See Marksbury*, 332 N.W.2d at 285. "It may be by the general public." *Id.*

"Very slight evidence is required to establish acceptance by the public . . . The acceptance may be so worked by the public, entering upon the land and enjoying the privileges offered, - briefly, by user. And when the use is relied on to raise a presumption of dedication, the duration of the use is wholly immaterial. And such acceptance may be manifested, among other methods, by long and uninterrupted use on part of the public without objection." *Id.*

In this case, the evidence shows that the general public has been using the concrete portion of the easement area as a public street for almost two decades without uninterrupted use. App. 77, 92-93.

The evidence in this case, as noted above, supports the District Court ruling that McNaughton dedicated the concrete portion of the easement area as a public street and such dedication was accepted by the City of Lawton. Therefore, Chartier respectfully requests that the Supreme Court reverse the

Court of Appeal's decision and affirm the decision of the District Court.

B. The Easement at Issue is an Appurtenant Easement in favor Defendant-Appellee AbiliT's property.

An easement is appurtenant if it is necessary for ingress and egress. *Rank v. Frame*, 522 N.W.2d 848, 852 (Iowa Ct. App. 1994). "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. It is incapable of existence separate and apart from the particular land to which it is annexed." *Rank*, 522 N.W.2d at 853 (quoting *Wymer v. Dagnillo*, 162 N.W.2d 514 (Iowa 1968)).

"Easements appurtenant pass with the description of the property to which they are appurtenant without specific designation, and the purchaser of the servient property takes subject to the easement without express reservation." *Id.* "The right to the easement is attached to and belongs with the property and is not merely personal." *Id.*

The Court of Appeals held that the easement was personal, private, non-transferable, not appurtenant, and does not run with the land. (Decision 11). In reaching this conclusion, the noted that "the easement is granted for the use and benefit of the parties . . . and it is not construed as an easement for the use and benefit of the public." (Decision 11). The Court of Appeals determined that the language of the easement "allowing for ingress and egress was general, and the language restricting use to the benefit of the parties and not of the general public was more specific . . .[s]o that restrictive language trumps the general language allowing 'ingress and egress' to the general public." (Decision 11).

The Court of Appeals then analyzed the appurtenancy of the easement based on necessity. The Court of Appeals determined that even though "Highway 20 is the only reasonable accommodating access point, the evidence also shows the inlet is thirty-five feet wide, with thirteen feet falling on McNaughton's property, and the remaining twenty-two feet falling on the east property. Although accessing McNaughton's side of the driveway is more convenient and creates a more reasonable driveway

entrance, use of this property is unquestionably not necessary to allow ingress and egress to the east property." (Decision 12).

The Easement at issue provides in part: "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 Chartiers' property . . . It is specifically understood that this Agreement creates a "private" easement granted for the used and benefit of the parties identified in this paragraph and is not to be construed as an easement for the use and benefit of the general public." App. P. 339. In analyzing the specific language of the easement, the phrase "use and benefit of Chartier, and the residents, guests, and other invitees of the assisted living facility," which is the general public, is in direct conflict with the phrase "[i]t is specifically understood that this Agreement creates a "private" easement granted for the used and benefit of the parties identified in this paragraph and is not to be construed as an easement for the use and benefit of the general public." Chartier asserts that the Court should find the

Easement ambiguous based upon the foregoing language utilized in the Easement.

"The overarching goal of contract interpretation is to 'determine what the intent of the parties was at the time they entered into the contract.'" *Kersey v. Babich*, 780 N.W.2d 248, 2010 WL 446995 * 1 (Iowa Ct. App. 2010)(quoting *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008)). "'Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.'" *Kersey*, 2010 WL 446995 *1 (quoting *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008)). "All of the cases agree that if the language in the instrument is ambiguous it is proper, in aid of its interpretation, to take into consideration the setting, the circumstances surrounding the parties at the time tending to show what was within the contemplation of the parties." *Sherwood v. Greater Mammoth Vein Coal Co et al.*, 185 N.W. 279, 283 (Iowa 1921). "Assuming, arguendo, ambiguity exists by the terms of the easement agreement, the manner in which the parties themselves

have construed them is persuasive evidence of their intention." *Wiegmann v. Baieri*, 203 N.W.2d 204, 208 (Iowa 1972)(*citing McDonnell v. Sheets*, 234 Iowa 1148, 1154, 15 N.W.2d 252, 255 (Iowa 1944)(other citations omitted).

The Court of Appeals's decision did not take into account the actions of the parties since the Easement was signed in 1999. McNaughton allowed the City of Lawton to construct the street and other public improvements across the concrete portion of the easement area without objection. App. P. 75. Since that time, the parties have treated the concrete portion of the easement area as a public street. App. P. 76-77. For almost two decades, the public has had unfettered access to use, without objection by McNaughton, the concrete portion of the easement area as a public street. App. P. 77.

Additionally, the Court of Appeals did not take into consideration McNaughton's testimony at trial. McNaughton testified that: (1) he never placed any restriction on who could use the concrete portion of the easement area over the past approximately 20 years (App. P. 92); (2) any member of the public

had unrestricted use of the concrete portion of the easement area for the past approximately 20 years (App. P. 77, 92-93); (3) he never placed a sign indicating there was a private easement on the public street (App. P. 77-78); (4) that he does not object to members of the public crossing the concrete portion of the easement area. App. P. 77 and (5) there is no practical or reasonable alternative for access the care facility from U.S. Highway 20. App. P. 99.

Further, the language contained in the agreement defining the easement as one for ingress and egress and, because the easement area is necessary for ingress and egress to the care facility, then by law the Easement is considered an easement appurtenant. *See generally Rank v. Frame*, 522 N.W.2d 848, 852 (Iowa Ct. App. 1994)(the easement is appurtenant since it is necessary for ingress and egress to and from the property). Additionally, the conduct of the parties for the past 20 years utilizing the easement to access the care facility and McNaughton's admission that he doesn't intend to interfere with AbiliT's use of the easement area to access the care facility also

support the District Court's conclusion that the Easement is an appurtenant easement.

Because the Easement is an appurtenant easement, the Easement runs with AbiliT's property and is binding upon McNaughton and AbiliT. *See Rank*, 522 N.W.2d at 852; *Bormann v. Board of Supervisors in and for Kossuth County,* 584 N.W.2d at 316 (Iowa 1998).

In the event the Court determines that McNaughton did not publicly dedicate the concrete portion of the easement area as a public street, the evidence in this case, as noted above, supports the District Court ruling that the Easement is an appurtenant easement. Therefore, Chartier respectfully requests that the Supreme Court reverse the Court of Appeal's decision and affirm the decision of the District Court.

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[1] The Court of Appeals determined that "[w]e are unable to conclude [McNaughton] 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" (Decision 13). "Our disposition also renders him the successful party, and we see no real he should foot the bill for the losing side." (Decision 13). Even though Chartier has not put the issue of attorney fees in front of the

CONCLUSION

The Court of Appeals, in determining the issue of the publicly dedication of the easement area, did not properly take into consideration the appropriate Iowa law. The facts and circumstances of this case, when applying the law set forth in the cases of *Kinsinger v. Hunter* 195 Iowa 651, 192 N.W. 264, 265 (Iowa 1923)(*See Henry Walker Park Ass'n v. Mathews*, 249 Iowa 1246, 1256, 91 N.W.2d 703, 710 (Iowa 1958), show that McNaughton publicly dedicated the 13'x80' concrete portion of the easement area as a public street and the City of Lawton accepted that dedication.

Additionally, if the Supreme Court determines that McNaughton did not public dedicate the 13'x80' concrete portion of the easement area as a public street, the easement created by the

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Court, Chartier asserts that the District Court's decision of awarding Chartier common law attorney fees under *Hockenberg Equipment Co. v. Hockenberg's Equipment & Supply Company of Des Moines, Inc.*, 510 N.W.2d 153, 159 (Iowa 1993) was correct. (District Court Decision 16-17).

Easement is an appurtenant easement for ingress and egress in favor of the property owned by Defendant-Appellant AbiliT.

Finally, if the Supreme Court reverses the Court of Appeals' decision, the Supreme Court should affirm the District Court's ruling awarding Chartier common law attorney fees and the judgment for those attorney fees entered against McNaughton.

Respectfully submitted,

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DEFENDANTS/APPELLEES STANLEY E. CHARTIER, JEANINE K. CHARTIER & CHAR-MAC, INC.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 5,522 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa. R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Century Schoolbook 14 point font.

/s/ Chad Thompson

PROOF OF SERVICE AND CERTIFICATE OF FILING

I hereby certify that on July 2, 2021, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel of record.

/s/ Chad Thompson

IN THE COURT OF APPEALS OF IOWA

No. 19-1681
Filed June 16, 2021

WILLARD B. MCNAUGHTON,
Plaintiff-Appellant,

vs.

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

STANLEY E. CHARTIER, JEANINE K. CHARTIER and CHAR-MAC, INC.,
Counterclaim Plaintiffs,

vs.

CITY OF LAWTON,
Counterclaim Defendant.

Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge.

Willard McNaughton appeals an order declaring the parties' rights in an easement. **REVERSED AND REMANDED.**

Angie J. Schneiderman of Moore, Corbett, Heffernan, Moeller & Meis, L.L.P., Sioux City, for appellant.

Chad Thompson of Thompson, Phipps & Thompson LLP, Kingsley, for appellees Stanley E. Chartier, Jeanine K. Chartier, and Char-Mac, Inc.

Kevin H. Collins and Sarah J. Gayer of Nyemaster Goode, PC, Cedar Rapids, for appellee AbiliT Holdings, LLC.

Considered by Doyle, P.J., and Mullins and Greer, JJ.

MULLINS, Judge.

Willard McNaughton appeals an order declaring the parties' rights in an easement. He argues the trial court erred in (1) concluding he publicly dedicated a portion of the easement to the City of Lawton (city), (2) determining in the alternative that the easement was appurtenant to adjoining property, and (3) awarding common law attorney fees to the defendants.

I. Background Facts and Proceedings

McNaughton has lived off Highway 20 in Lawton, Iowa, since 1998. His home is situated south of Highway 20 and faces the east. When he purchased the home, its driveway was to the east of the house and ran north to Highway 20. The driveway proceeded to a one-stall garage located at the south of the driveway.[1] The property to the east was owned by another individual, and it was used for agricultural purposes.

The individual defendants, Jeanine and Stanley Chartier, who own Char-Mac, Inc. (collectively Chartiers), are McNaughton's sister and brother-in-law. At some point, McNaguhton and the Chartiers began discussing the possibility of the latter buying the property to the east, upon which they intended to construct an assisted-living facility, and McNaughton's driveway would be used as an access point to the property. In September 1999, the parties entered into an easement agreement in which McNaughton conveyed the Chartiers "an easement for ingress and egress over and across" McNaughton's property, said easement being "for the exclusive use and benefit of Chartier[s], and the residents, guests and other

[1] In 2001, McNaughton moved his garage to the south side of the house and situated it facing east.

invitees of the assisted living facility located on Chartier[s'] property." The agreement provided "[t]he easement rights granted herein may not be assigned by Chartier[s] to any other party or parties without the express written consent of McNaughton or his successors or assigns," and the agreement "creates a 'private' easement granted for the use and benefit of the parties . . . and it is not to be construed as an easement for the use and benefit of the general public." The agreement could "not be modified except by written instrument executed by all of the parties . . . or by their legal successors and/or assigns."[2]

The Chartiers purchased the east property around the same time the parties entered the easement agreement. Apparently pursuant to the wishes of the department of transportation, the driveway was reconstructed and moved slightly to the east. Ultimately, the easement allowed the Chartiers and their invitees to use an eighty by thirteen foot portion of the concrete portion of the driveway on McNaughton's property,[3] which attached to an adjacent frontage road on the Chartiers' property, East Char-Mac Drive, which runs parallel to Highway 20 and was constructed by the city. According to McNaughton's testimony, he only granted the Chartiers an easement because "they were never going to sell it and they were going to make sure [he] wasn't wronged." McNaughton never prevented anyone from using the easement. As the district court pointed out, "the easement has been subject to the free and generally unrestricted use by the public since the [assisted-living] facility was constructed and the East Char-Mac Drive was

[2] The easement documents were not properly recorded until 2018, when the issues precipitating this litigation began to arise.
[3] It appears the easement also extended ten feet to the west of the concrete.

installed" and "McNaughton did not take any steps to convey to the public the private nature of the easement or the separate identification of his property within the easement area to properly inform the public."

In 2003, the Chartiers attempted to publicly dedicate East Char-Mac Drive to the city, but the city declined. However, the city did accept East Char-Mac Drive as a public dedication in 2012. Also in 2012, the Chartiers conveyed the east property to Char-Mac, Inc., their jointly owned business entity. McNaughton testified he was approached by the city "[a]t least three times," about publicly dedicating the easement, but he declined because he "didn't want to give up ownership . . . or control of it." In 2013, an outbuilding was constructed on the Chartiers' property just southwest of the assisted-living facility. That building was accessed by continuing south beyond the easement and going across McNaughton's property. However, the building can be accessed without passing over McNaughton's property, and a boulder wall was installed near the property line after this litigation was initiated to apparently direct any traffic away from McNaughton's property. McNaughton agreed in his trial testimony there is no reasonable alternative to access the care facility other than by using the inlet from Highway 20.

In late 2017 or early 2018, Jeanine began experiencing health issues and decided it was time to retire. The Chartiers hired a broker to assist in finding a buyer for their property and eventually entered discussions with AbiliT Holdings, LLC (AbiliT) about the latter purchasing the east property and assisted-living facility. The Chartiers advised AbiliT of the easement situation. Upon investigation, it was discovered the easement agreement had not been properly

recorded. Thereafter, in or about February 2018, Jeanine approached McNaughton with a document entitled "Clarification of Easement," requesting him to sign his agreement that the facility "and any heirs or successors or assigns" "retain[] the right to access Highway 20 through the . . . easement." Jeanine offered McNaughton $15,000.00 to sign off. McNaughton declined to sign the clarification, but he recorded the original easement agreement shortly thereafter. McNaughton also advised Jeanine he had no issue with the potential sale and would not stand in the way. However, McNaughton made various offers to Jeanine to secure his compliance. He requested Jeanine personally pay him $100,000.00 and, as Jeanine was the named executor to their sister's estate, McNaughton requested Jeanine to guarantee he could purchase fifty acres of the sister's farm. He also requested the Chartiers purchase his property for $410,000.00 or pay him $160,000.00 and he would retain his property. Lastly he requested the Chartiers to convey the remaining twelve acres of their property that they did not convey to AbiliT to McNaughton. The Chartier's found all of McNaughton's requests unreasonable and denied them.

Ultimately, in 2018, the Chartiers sold the east property to AbiliT. The warranty deed conveyed property described as "Lot One (1), Char-Mac First Addition to the City of Lawton, Woodbury County, Iowa" to AbiliT. The evidence shows that conveyance does not include the easement on McNaughton's property.

Prior to closing of the sale, McNaughton initiated the litigation precipitating this appeal. In his petition for declaratory judgment, injunctive relief, and damages, McNaughton stated he "has not provided express written consent to the assignment of the rights under the easement to Char-Mac, Inc. or anyone else"

and "Char-Mac, Inc.'s use of the easement . . . as well as McNaughton's property south of the easement, has caused, and continues to cause, damages to McNaughton." McNaughton requested a declaration as to the Chartiers' right to use the easement and area south of the easement, as well as injunctive relief and damages. In their answer, the Chartiers named the city as a third-party defendant. McNaughton subsequently amended his petition to name AbiliT as a defendant, also claiming he did not authorize assignment of the easement to AbiliT and the entity's use of the easement and property south thereof caused him damages. The Chartiers were required to indemnify AbiliT for costs incurred as a result of the litigation. The Chartiers requested an award of common law attorney fees and costs.

The matter proceeded to trial in July 2019. In its ruling, the court agreed with the defendants that the paved portion of the easement was publicly dedicated to the city and McNaughton's rights thereto were "terminated and extinguished." The court also agreed with the defendants that the easement was appurtenant in nature and therefore ran with the land. The court found McNaughton's motives in instituting this litigation constituted bad faith as "vexatious and wanton," as evidenced by his excessive demands and desire to cash in on the transaction between the Chartiers and AbiliT. The court ordered the Chartiers to submit an attorney-fee affidavit. McNaughton filed a motion to reconsider, enlarge, or amend, pursuant to Iowa Rule of Civil Procedure 1.904(2), which was denied. McNaughton resisted the Chartiers' application for attorney fees. Among other things, McNaughton argued he should not be obligated to pay fees attributable to AbiliT's representation, as he was not a party to the Chartiers' agreement to

indemnify the entity. He also complained of the lack of detail in the attorney fee itemizations and the requested award was excessive. The court granted the Chartiers' attorney fee request in its entirety, awarding $70,604.14 attributable to counsel for both the Chartiers and AbiliT.

McNaughton appeals.

II. Standard of Review

This matter was tried in equity, so our review is de novo.[4] Iowa R. App. P. 6.907; *Myers v. Myers*, 955 N.W.2d 223, 229 (Iowa Ct. App. 2020). Review of "an award of attorney fees allowed under the court's equitable powers" is also de novo. *In re Guardianship of Radda*, 955 N.W.2d 203, 208 (Iowa 2021); *accord Hockenberg Equip Co. v. Hockenberg's Equip. & Supply Co.*, 510 N.W.2d 153, 158 (Iowa 1993) ("The determination of a common law attorney fee award rests in the court's equitable powers."). Under a de novo standard of review, "[w]e examine the entire record and adjudicate rights anew on the issues properly presented." *Alcor Life Extension Found. v. Richardson*, 785 N.W.2d 717, 722 (Iowa Ct. App. 2010). We give weight to the district court's factual determinations, especially concerning witness credibility, but they do not bind us. *Myers*, 955 N.W.2d at 229.

III. Analysis

A. Public Dedication

McNaughton challenges the court's determination he publicly dedicated the easement area to the city. "Dedication is a question of fact and must be proven

[4] AbiliT asserts the matter was tried at law and should be reviewed for correction of errors at law. While the proceedings had both equitable and legal flavors, the taste of equity is more pungent, so we review de novo.

by the party relying upon it." *Marksbury v. State*, 322 N.W.2d 281, 284 (Iowa 1982) (citations omitted).

> The elements necessary to establish an express dedication 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.

Id.

The first element "turns on the intent of the offeror or dedicator." *Id.* A dedication for public use

> shall be for the use of the public at large, that is, the general, unorganized public, and not for one person or a limited number of persons, or for the exclusive use of restricted groups of individuals. There may be a dedication for special uses, but it must be for the benefit of the public. Properly speaking, there can be no dedication to private uses or for a purpose bearing an interest or profit in the land.

Id. at 285 (quoting 23 Am. Jur. 2d *Dedication* § 5 (1965)). A dedication may be either express or implied. *Sons of the Union Veterans of the Civil War v. Griswold Am. Legion Post 508*, 641 N.W.2d 729, 734 (Iowa 2002). An express dedication may be shown by an explicit or positive declaration or by a manifestation of intent to dedicate the land to the public. *Id.* "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.'" *Id.* (quoting *De Castello v. City of Cedar Rapids*, 153 N.W. 353, 355 (Iowa 1915)). Whether a dedication is express or implied, the intent to dedicate "must be unmistakable in its purpose." *Merritt v. Pete*, 24 N.W.2d 757, 762 (Iowa 1946) (quoting *Dugan v. Zurmuehlen*, 211 N.W.

986, 988 (Iowa 1927)). "There can be no dedication unless there is a present intent to appropriate the land to public use." *De Castello*, 153 N.W. at 356.

The intent alone, however, is not sufficient. *Schmidt v. Town of Battle Creek*, 175 N.W. 517, 519 (Iowa 1919). "There must be a parting with the use of the property to the public, made in praesenti, manifested by some unequivocal act, indicating clearly an intent that it be so devoted." *Id.* 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." *Culver v. Converse*, 224 N.W. 834, 835 (Iowa 1929). Furthermore, "the acts proved must not be consistent with any other construction than that of dedication." *Id.*

The district court seemed to base its appropriation finding on McNaughton consenting to the city installing a public street and improvements, McNaughton failing to restrict public use and suffering no damage from the same, and members of the public being able to reasonably conclude the easement was public. In our analysis, we first note the easement agreement only allows "for the exclusive use and benefit of Chartier[s], and the residents, guests and other invitees of the assisted living facility located on Chartier[s'] property"; states "[t]he easement rights granted herein may not be assigned by Chartier[s] to any other party or parties without the express written consent of McNaughton or his successors or assigns"; and "creates a '*private*' easement granted for the use and benefit of the parties . . . *and it is not to be construed as an easement for the use and benefit of the general public.*" (Emphasis added.) And, while McNaughton did not restrict public use, "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 John Martinez, Local Government Law § 17:3 (Oct. 2020 update). Further, "Mere permissive use of a way, no matter how long continued, will not amount to a dedication. The user is presumed to be permissive, and not adverse." *Sons of the Union Veterans*, 641 N.W.2d at 734 (quoting *Culver*, 224 N.W. at 836). And McNaughton was approached by the city at least three times about publicly dedicating the easement area, and he declined on each occasion. *See* 4 Tiffany Real Property § 1102 (3d ed. Sept. 2020 update) ("Tacit dedication does not result where active opposition is directly communicated by the landowner to the governing body.").

Upon our de novo review, we find the evidence insufficient to support the district court's conclusion McNaughton publicly dedicated the easement area.

B. Appurtenant Easement

Having found the evidence insufficient to show a public dedication, we turn to McNaughton's challenge to the court's determination the easement was appurtenant to the east property.

> 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. It is incapable of existence separate and apart from the particular land to which it is annexed.

Rank v. Frame, 522 N.W.2d 848, 852 (Iowa Ct. App. 1994) (quoting *Wymer v. Dagnillo*, 162 N.W.2d 514, 517 (Iowa 1968)). "Easements appurtenant pass with the description of the property to which they are appurtenant without specific designation, and the purchaser of the servient property takes subject to the easement without express reservation." *Id.* "A servitude should be interpreted to

give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." Restatement (Third) of Prop.: Servitudes § 4.1(1) (Am. L. Inst. Oct. 2020 update). The benefit of a servitude is not transferable if personal, and "[a] benefit is personal if the relationship of the parties, consideration paid, nature of the servitude, or other circumstances indicate that the parties should not reasonably have expected that the servitude benefit would pass to a successor to the original beneficiary." *Id.* § 4.6(2).

In determining the easement was not private, the district court identified the easement agreement allowed for "ingress and egress." The court recognized the agreement stated the easement is "granted for the use and benefit of the parties . . . and it is not construed as an easement for the use and benefit of the public." Citing *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, the court found the "ingress and egress" language "more specific and therefore trumps the generalized 'private' easement statement." *See* 648 N.W.2d 564, 573 (Iowa 2002) (noting specific contractual clauses trump general clauses). We are unable to agree with the district court's reasoning. The language allowing for ingress and egress was general, and the language restricting use to the benefit of the parties and not of the general public was more specific. The public's use was specifically for the benefit of the Chartiers. So that restrictive language trumps the general language allowing "ingress and egress" to the general public. Upon our plain reading of the easement agreement, the clear intent of the parties was to create a private, personal, and non-transferable easement, which is not appurtenant to the east property. *See* Restatement (Third) of Prop.: Servitudes § 4.6(2).

The court also seemed to base its finding of appurtenancy on necessity, which relates to easements by implication or necessity. *See Kane v. Templin*, 138 N.W. 901, 902 (Iowa 1912) ("It must be conceded that easements by implication are to be strictly limited to rights which in the very nature of the case must be presumed to have been in the minds of the parties concerned, appurtenant on the one hand and servient on the other; and the necessity of the use for the convenient enjoyment of the premises to which the easement is claimed as appurtenant is a material consideration in determining whether such easement is to be implied. Nevertheless, an easement by implication is a different thing from an easement by necessity, as the latter term is properly used. It must be conceded, also, that in some courts easements by implication have been limited to those existing strictly by necessity." (citations omitted)). While the evidence shows the inlet from Highway 20 is the only reasonably accommodating access point, the evidence also shows the inlet is thirty-five feet wide, with thirteen feet falling on McNaughton's property, and the remaining twenty-two feet falling on the east property. Although accessing McNaughton's side of the driveway is more convenient and creates a more reasonable driveway entrance, use of his property is unquestionably not necessary to allow ingress and egress to the east property.

Upon our de novo review, we find the easement was personal, private, non-transferable, not appurtenant, and does not run with the land.

C. Attorney Fees

McNaughton also challenges the court's award of common law attorney fees. While McNaughton was steadfast in trying to profit from the transaction, he was within his rights to use the transferability of the easement as a bargaining chip.

The district court's reliance on a "genuine dispute" is not on point. We are unable to conclude he "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Hockenberg*, 510 N.W.2d at 158. Furthermore, the easement language does not state any parameters to limit the reasonableness of his withholding consent. Our disposition also renders him the successful party, and we see no reason he should foot the bill for the losing side. We reverse the award of attorney fees.

IV. Conclusion

We conclude (1) the evidence was insufficient to support a finding of public dedication, (2) the easement is not appurtenant in nature, and (3) the defendants were not entitled to an award of common law attorney fees. We reverse the district court on each of those points, and we remand the matter to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	Case Title
19-1681	McNaughton v. Chartier

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IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

WILLARD B. MCNAUGHTON, **Plaintiff,** **vs.** **STANLEY E. CHARTIER, JEANINE K. CHARTIER, CHAR-MAC, INC., CITY OF LAWTON & ABILIT HOLDINGS (LAWTON) LLC,** **Defendants.**	**CASE NO. EQCV180496** **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RULING**
STANLEY E. CHARTIER, JEANINE K. CHARTIER & CHAR-MAC, INC., **Third-Party Plaintiffs,** **vs.** **CITY OF LAWTON,** **Third-Party Defendant.**	

Plaintiff's Petition for Declaratory Judgment, Injunctive Relief and for Damages filed April 19, 2018, came on for trial on July 16, 2019. The Plaintiff, Willard McNaughton, appeared and was represented by Angie J. Schneiderman. Stanley and Jeanine Chartier appeared and were represented by Chad Thompson. Chad Thompson represented Char-Mac, Inc. and it appeared through Stanley and Jeanine Chartier. AbiliT Holdings (Lawton), LLC, appeared through its corporate representative and was represented by Kevin Collins. The City of Lawton appeared through its legal counsel, Clifton Kephart. Cheryl S. Smith, CSR-RMR reported the trial. At the beginning of trial, AbiliT withdrew its counterclaims for abuse of process, slander of title,

and punitive damages. Once all of the evidence was presented, the Court closed the record and then permitted the parties to simultaneously submit proposed findings of fact and conclusions of law and to file them with the Clerk and send the same in Word format to the Court for the Court's use. The matter was then fully submitted for the Court to rule on the issues as of August 2, 2019. The Court now rules on the issues presented as follows.

FINDINGS OF FACT

Plaintiff, Willard Brian McNaughton ("McNaughton"), is a resident of Lawton, Woodbury County, Iowa. Defendants, Stanley and Jeanine Chartier ("Chartiers"), are residents of Lawton, Woodbury County, Iowa. Defendant Char-Mac, Inc. ("Char-Mac") is an Iowa corporation with its offices located in Woodbury County, Iowa, and is wholly owned by Chartiers. Defendant AbiliT Holdings (Lawton), LLC ("AbiliT") is a Delaware limited liability company, owning land in Woodbury County, Iowa. The City of Lawton is an incorporated city in the State of Iowa.

There are four parcels of real property which are involved in this lawsuit and which will be affected by the matters before the Court. They are as follows:

Stanley Chartier and Jeanine Chartier Property

Part of the West Fractional One-half (W Frl. ½) of the North Fractional One-half (N Frl. ½) of the Northeast Fractional Quarter (NE Frl. ¼) of Section Three (3), Township Eighty-eight (88) North, Range Forty-six (46) West of the Fifth Principal Meridian, Woodbury County, Iowa described as follows: Beginning at the Northwest (NW) Corner of said Northeast Fractional Quarter (NE Frl. ¼); thence North Eighty-nine Degrees Seventeen Minutes Two Seconds (N 89°17'02") East along the North line of said Northeast Fraction Quarter (NE Frl. ¼) Six Hundred Eighty-five Feet (685.00'); thence South Zero Degrees Zero Minutes Zero Seconds (S 00°00'00") West for One Thousand Fifteen and Forty-seven Hundredths Feet (1,015.47'); thence South Eighty-nine Degrees Seventeen Minutes Two Seconds (S 89°17'02") West for Six Hundred Eighty-five Feet (685.00') to the West line of said Northeast Fraction Quarter (NE Frl. ¼); thence North Zero Degrees Zero

Minutes Zero Seconds (N 00°00'00") East along said West line for One Thousand Fifteen and Forty-seven Hundredths Feet (1,015.47') to the point of beginning, containing 15.97 acres including State Righty-of-Way and 15.02 acres excluding said Right-of-Way. Note: The West line of said Northeast Fractional Quarter (NE Frl. ¼) is assumed to bear North Zero Degrees Zero Minutes Zero Seconds (N 00°00'00") East;

EXCEPT

Lot 1, Char-Mac First Addition to the City of Lawton, Woodbury County, Iowa.

AbiliT Holdings (Lawton), LLC Property

Lot 1, Char-Mac First Addition to the City of Lawton, Woodbury County, Iowa.

Easement Area legal description

Commencing at the Northeast Corner of the NW ¼ of said section 3, thence south along the east line of the NW ¼ for 45.7 feet to a point on the south right of way of Highway No. 20 and the point of beginning; thence continuing south 80.00 feet; thence west 23.0 feet; thence north 80.00 feet to the south right of way line of Highway No. 20; thence south 89"31'30° east 18.1- feet along said south line; thence north 89"38'30° east 4.90 feet to the point of beginning, containing 0.04 acres.

and

Willard B. McNaughton property

All that part of the Northeast fractional quarter (NE fr. ¼) of the Northwest quarter (NW ¼) of Section three (3), described as follows: Beginning at a point thirty-three (33) feet South of the Northeast corner of said Northeast fractional quarter (NE fr. ¼) of the Northwest quarter (NW ¼), thence West on a line parallel to the North line of the Northeast fractional quarter (NE fr. ¼) of the of Northwest quarter (NW ¼), one hundred fifty (150) feet, thence South on a line parallel to the East line of said Northeast fractional quarter (NE fr. ¼) of the Northwest quarter (NW ¼), one hundred fifty (150) feet, thence East on a line parallel to the North line of said Northeast factional quarter (NE fr. ¼) of the Northwest quarter (NW ¼), one hundred fifty (150) feet to the East line of said Northeast fractional quarter (NE fr. ¼) of the Northwest quarter (NW ¼), thence North along the East line of said Northeast fractional quarter (NE fr. ¼) of the Northwest quarter (NW ¼), one hundred fifty (150) feet to the place of beginning, being otherwise known and described as lots five (5) and six (6), Auditor's Subdivision of the North fractional half (N fr. ½) of the Northwest quarter (NW ¼) of Section three (3), Township eighty-eight (88), Range forty-six (46), and a thirty (30) foot strip abutting said lot

six (6) on the East side thereof, in the County of Woodbury and State of Iowa. (Address is 2156 Highway 20, Lawton, Iowa)

At issue here is an easement, which is trial exhibit 1. The exhibit is inserted below.[1]

EASEMENT AGREEMENT

AGREEMENT made this 17th day of September, 1999, between Stanley Edward Chartier and Jeanine Kay Chartier, husband and wife (hereafter referred to as "Chartier") and Willard B. McNaughton, a single person, (hereafter referred to as "McNaughton").

1. Chartier is record titleholder of the following described real estate, known locally as 200 E. Char-Mac Drive, Lawton, Iowa, to wit:

SEE ATTACHED COPY OF LEGAL DESCRIPTION
MARKED EXHIBIT "A" AND FULLY INCORPORATED HEREIN

2. McNaughton is record titleholder to the following described real estate, known locally as 2156 Highway 20, Lawton, Iowa, Iowa, to wit:

SEE ATTACHED COPY OF LEGAL DESCRIPTION
MARKED EXHIBIT "B" AND FULLY INCORPORATED HEREIN

3. Chartier desires to acquire an easement for ingress and egress across a portion of McNaughton's real estate to provide Chartier with an access between their real estate and U. S. Highway 20.

4. McNaughton is willing to grant an easement to Chartier pursuant to the terms and conditions set forth in this Agreement.

5. For good and valuable consideration, receipt of which of is hereby acknowledged, McNaughton grants and conveys to Chartier an easement for ingress and egress over and across the property described on the Plat of Easement prepared by James C. Sailer, dated August 12, 1999, which instrument is attached hereto and marked Exhibit "C" for reference and fully incorporated herein.

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.

7. As additional consideration for the grant of easement herein, Chartier shall be obligated to take all action necessary to insure that the town of Lawton, Iowa, becomes contractually obligated to maintain the easement area for use consistent with the easement rights granted hereunder.

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.

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[1]. **The easement was first recorded in 2018 when it was discovered that it had not been recorded earlier. McNaughton did testify that he discovered that it was recorded earlier than this, but was somehow not recorded so as to be related to the property here.**

9. Except as stated above in paragraph 6 concerning the limitation on Chartier's ability to assign this Agreement, this Agreement shall be binding upon and inure to the benefit of the parties successors and/or assigns.

DATED this 17th day of September, 1999.

Stanley Edward Chartier
STANLEY EDWARD CHARTIER

Willard B. McNaughton
WILLARD B. MCNAUGHTON

Jeanine Chartier
JEANINE KAY CHARTIER

On September 17, 1999, Chartiers and McNaughton entered into the written Easement Agreement ("Easement") above. This easement was for ingress and egress across a portion of McNaughton's real estate to provide Chartiers' access between their property and U.S. Highway 20. Chartiers had acquired 15.97 acres of real estate adjacent to McNaughton's real estate in order to construct an assisted living facility. The facility later became Char-Mac and the construction was completed in 2000. McNaughton had purchased his property in 1998 and at the time of his purchase, the site had a home and a garage on the property. McNaughton's property at the time of his purchase had access onto Highway 20 via an existing driveway. Chartiers had purchased their adjacent property to McNaughton's to the east of his property in 1998 as well and at the time of their purchase, the property was used for agricultural purposes (raising crops).

The City of Lawton improved the access from U.S. Highway 20 to the Char-Mac facility in 2000 by installing a public street and other related public improvements as noted in trial exhibit 19. This was detailed in trial exhibits 16 and 24 and was identified

as the 1999 Char-Mac Addition Street Improvement Project by the City of Lawton. The street installed by the City of Lawton was named East Char-Mac Drive.[2] The City utilized Tax Incremental Financing (TIF) to fund this project. A portion of the easement area identified in trial exhibit 1 was paved over by the City in this project. The easement area, the roadway, and the related overlap referenced here is best shown on trial exhibit 2. The easement portion that is paved is a 13-foot wide by 80-foot long strip of concrete at the west end of East Char-Mac Drive. There is a portion of the easement that is not paved and it is a strip 10 feet by 80 feet and is in McNaughton's yard.

As part of the street improvement project, the Iowa Department of Transportation (IDOT) approved an Application for Establishment of a Special Access Connection related to the easement at issue here and the access to East Char-Mac Drive. This Application and related documents are set forth in trial exhibit 8. The precise location of the access from Highway 20 was determined and set by IDOT.[3]

Anyone wishing to access the Char-Mac facility must access it over East Char-Mac Drive. In accessing East Char-Mac Drive, the public must use the easement, which is the subject of this action. McNaughton did not, with one exception, restrict or limit access of the easement since its inception. He never limited who could have access or use of the easement. He willingly allowed the City of Lawton to pave over the easement when they installed East Char-Mac Drive. The area of the easement has been subject to the free and generally unrestricted use by the public since the Char-Mac facility was

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[2] East Char-Mac Drive runs east and west parallel to Highway 20 with access directly onto Highway 20. It has no outlet but accesses the parking lot of the Char-Mac facility.

[3] Chartiers and McNaughton signed the agreement with IDOT (Ex. 8) and the location of the access was aligned with an existing city street in Lawton (Cedar). The approved access location was a change in McNaughton's access location prior to the approval. The new access was further to the East and onto the Chartiers' property in part.

constructed and the East Char-Mac Drive was installed. McNaughton did not take any steps to convey to the public the private nature of the easement or the separate identification of his property within the easement area to properly inform the public.

The Chartiers dedicated their interest in East Char-Mac Drive to the City of Lawton as a public street in 2012. McNaughton did not ever convey his interest to the City of Lawton nor agree to dedicate his portion of the easement area to the City as a city street. He retains ownership of his portion of the easement area to this day. McNaughton refused to convey to the City or dedicate to the City his portion of the easement area despite requests from the City to do so. The City of Lawton did at one point agree to provide snow removal, necessary maintenance, and any repairs needed to the concrete on McNaughton's property. The City of Lawton has not apparently carried out this obligation consistently. Nor has McNaughton taken any steps to enforce this agreement.

After East Char-Mac Drive was installed, McNaughton removed his garage and built a new one, which was larger. The position of this new garage was different in its orientation to the easement property. The new garage doors face the east to allow McNaughton direct access onto the street. After the new garage was built, McNaughton's access to the garage would cause him to drive over both his property and the Chartiers' property. Chartiers separated the Char-Mac parcel of property from the remainder of the tract in 2012.

Char-Mac later built a shed or garage on their property. This building was used for storage and some office space. McNaughton was one of the contractors for the building construction. Access to this new building was by way of a gravel roadway that

ran alongside the western lot line of Char-Mac. The work done in this building was Char-Mac related. This building can be accessed without the need to travel over the portion of the easement in dispute here.

In late 2017 and early 2018, the Chartiers sought a buyer for this facility and they reached an agreement with AbiliT to buy the facility and the land. Prior to closing, Chartiers disclosed to AbiliT the existence of the easement at issue here. Jeanine Chartier approached McNaughton concerning the easement and asked him to sign an amendment originally entered into and offered to pay him $15,000 as incentive and consideration. At this time, it was discovered that the easement had not become part of the chain of title record for the impacted real property. McNaughton had the easement recorded on March 7, 2018. Despite the concern on behalf of AbiliT as to the impact on it by the easement, the sale of Char-Mac was completed. The Chartiers have agreed in their transactional documents to defend this lawsuit and pay the cost of legal counsel for AbiliT.

Anyone who wished to have access to Char-Mac during its construction and after has had free and unfettered ability to access it over the easement at issue here. This has been the case for nearly 20 years. McNaughton, when pressed at trial, could only identify three individuals he has told of the easement over the concrete that is the public street East Char-Mac Drive. McNaughton did not object to the City's installation of the public improvements over the easement area. McNaughton acknowledged that the general public likely believed that the street (including the easement portion) was a City street. He also acknowledged that he would likely invite law enforcement intervention if he were to disrupt access over or through the street. The change of ownership has not

had any consequential damage consequences to McNaughton and the use of the property or the easement has not changed since the sale by Char-Mac to AbiliT. McNaughton took no action to stop the sale of the facility to AbiliT.

Once McNaughton became aware of the pending sale by Chartiers of Char-Mac to AbiliT, he made demands on Chartiers. These demands included 1) that Chartiers give him $100,000, guarantee that he could purchase roughly 50 acres of farm real estate from his sister's estate, and pay his legal fees, 2) that Chartiers purchase his present property for $410,000, 3) that Chartiers pay him $160,000 and he would retain his property, and 4) that Chartiers transfer the remaining 12 acres in the tract to him. McNaughton appears to have clearly wanted to make some money from the Chartiers' transaction with AbiliT or somehow profit from it some way.

Chartiers seek an award of attorney fees from McNaughton in the event they prevail in this action. This request is a request at common law as there is no specific statutory or contract provision that authorizes the Chartiers' ability to request and receive an award of attorney fees.

CONCLUSIONS OF LAW

Scope of Review

A declaratory judgment declares the rights, duties, status, or other legal relationships of the parties. **Iowa R. Civ. P. 1.1101; Dubuque Policemen's Protective Ass'n v. City of Dubuque, 553 N.W.2d 603, 607 (Iowa 1996)** (stating that "[i]n general, the purpose of the declaratory judgment is to resolve uncertainties and controversies before obligations are repudiated, rights are invaded, or wrongs are committed"). Such a declaration, which can be "either affirmative or negative," is effectively "a final decree."

Iowa R. Civ. P. 1.1101. Courts can issue a declaratory judgment even when another remedy exists if such an action is appropriate to resolve the underlying action. **Id.**

The declaratory judgment rules are remedial in nature and must be "liberally construed" to effectuate their purpose. **Green v. Shama, 217 N.W.2d 547, 551 (Iowa 1974); State v. Cent. States Elec. Co., 28 N.W.2d 457, 466 (Iowa 1947)**. The difference between a declaratory judgment action and an action that is usually before the courts is that, in a declaratory judgment action, "no actual wrong need have been committed or loss incurred to sustain a declaratory judgment relief." **Borman v. Bd. of Supervisors, 584 N.W.2d 309, 313 (Iowa 1998)**. Yet, it must be certain that loss will occur or that the right asserted by the parties will be compromised. **Id.** Moreover, "a justiciable controversy" must exist between the parties as opposed to an "abstract" legal question, meaning that the "facts alleged ... must show there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant a declaratory judgment." **McCarl v. Fernberg, 126 N.W.2d 427, 428 (Iowa 1964)**. The facts before the Court in this case are ripe for a declaratory judgment.

"The burden of proof in a declaratory judgment action is the same as in an ordinary action at law or equity." **Owens v. Brownlie, 610 N.W.2d 860, 866 (Iowa 2000)**. "The plaintiff bringing the action has the burden of proof, even if a negative declaration is sought." **Id.** Where the defendant denies the plaintiff's allegations, the plaintiff must then prove the truth of the allegations within his or her pleading. **General Cas. Co. of Wis. v. Hines, 156 N.W.2d 118, 121, 261 Iowa 738, 742 (Iowa 1968)**.

Public Dedication

Whether a street has been publicly dedicated is a question of fact and must be proven by the party relying on it. **Marksbury v. State, 322 N.W.2d 281, 284 (Iowa 1982)**. The Defendants assert that the paved portion of the subject easement has been publicly dedicated to the City of Lawton by McNaughton.

> The elements necessary to establish an express dedication 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.

Id. A dedication for public use must be for the use of the public at large, not for one person or a limited number of persons. **Id. at 285.** There can be no dedication to or for private uses or for a "purpose bearing an interest or profit in the land." **Id.** As with any other contract, a dedication must have an acceptance of an offer in order for it to be binding. **Id.** Acceptance need not come from a municipality or public authority; it may be made by the general public and may be manifested, among other methods, by long and uninterrupted use on the part of the public without interruption or objection. **Id.**

The pertinent facts here include the following findings of this Court as to this issue:

1. McNaughton consented to the City of Lawton installing a public street and other public improvements on his property that were paid for by the City of Lawton.

2. McNaughton admitted at trial that he does not now and never has objected to the general public crossing the concrete portion of the easement area to access the Char-Mac facility from U.S. Highway 20.

3. McNaughton admitted at trial that that he has suffered no damages as a consequence of the public having unrestricted access for ingress and egress

across the concrete portion of the easement area for the past approximately 20 years.

4. McNaughton admitted that in the approximately 20 years the public street has existed, Mr. McNaughton has never attempted to restrict the use of the concrete portion of the easement area by the general public with one exception.

5. McNaughton admitted that members of the general public would reasonably conclude the concrete portion of the easement area is a public street in light of the fact there is no signage and the fact he has never attempted to regulate the use of the area.

6. In July 1999, the City of Lawton initiated the necessary statutory proceedings to install a city street to be located in between Lot 1, Char-Mac Addition and Highway 20, and just east of the McNaughton property. At a special meeting of the city council on July 20, 1999, the city passed a resolution setting the date for a public hearing on the proposed 1999 Char-Mac Addition Street Improvement Project (a/k/a 1999 Frontage Road Improvement Project Lawton, Iowa) Plans, Specifications, Form of Contract, the Estimated Cost, Bid Bond, and Taking of Bids Therefore. This included engaging Schlotfeldt Engineering to prepare the plans and specifications for the project, issuing a Notice of Award to Steve Harris Construction, Inc., entering into a contract with Steve Harris Construction, Inc., financing the project through tax incremental financing, and paying for all of the costs for this public improvement.

7. The City of Lawton named the public street Char-Mac Drive.

8. There is no signage designating any boundary between the public street (Chartiers' property) and that part of the public street located on the concrete portion of the easement area (McNaughton property).

9. Mr. McNaughton provided no credible evidence that in the past 20 years he has ever paid real estate taxes on the concrete portion of the easement area.

10. The easement by its terms states that it is for ingress and egress across a portion of McNaughton's real estate to provide Chartier with an access between their real estate and U.S. Highway 20 (a public highway) and the only access to Chartiers' property and the Char-Mac facility.

11. Further, the easement states that the easement rights are for the exclusive use and benefit of Chartiers, and the residents, guests, and other invitees of the assisted living facility located on Chartiers' property. The easement by its language inures to the benefit of the public members who might be residents, guests, and invitees of the assisted living facility on Chartiers' property. This

> is the public. The language also does not limit this access to Chartiers, but rather appears to be an attempt to only limit access to the easement 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.

These facts support a finding that McNaughton has dedicated the concrete portion of the easement to the City of Lawton and the City of Lawton has accepted the same area as a public street (public improvement). Any rights created under the easement at issue here have been extinguished and McNaughton's rights to the 13-foot by 80-foot easement area covered by the concrete street are terminated and extinguished.

Easements

The Court having found that McNaughton has dedicated the area within the easement at issue here to the City of Lawton for a public street as a public improvement need not examine the assertions made by the parties as to the claim of easement for this segment of real property. However, in the interest of completeness, the Court will discuss the easement arguments here.

McNaughton claims the easement at issue here is a "private" easement or an easement in gross. The Defendants alternatively argue that the easement is an appurtenant easement thereby running with the land.

Here, the easement is based upon a written agreement and a copy of that document appears above. The easement is described in the document as an easement for "ingress and egress". McNaughton admits that the easement is for "ingress and egress" to the Char-Mac facility from U.S. Highway 20. This easement allows access in

the only reasonable way to the Char-Mac facility from Highway 20. The easement is necessary for such access to Char-Mac from Highway 20.

An easement for ingress and egress is appurtenant. **Rank v. Frame, 522 N.W.2d 848, 852 (Iowa Ct. App. 1994).**

> An appurtenant easement runs with the land:
>
> Another feature of easements is that easements run with the land: The land which is entitled to the easement or service is called a dominant tenement, and the land which is burdened with the servitude is called the servient tenement. Neither easements [n]nor servitudes are personal, but they are accessory to, and run with, the land. The first with the dominant tenement, and the second with the servient tenement.

Bormann v. Board of Supervisors in and for Kossuth County, 584 N.W.2d 309 (Iowa 1998).

> 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. It is incapable of existence separate and apart from the particular land to which it is annexed."
> ... Easements appurtenant pass with the description of the property to which they are appurtenant without specific designation, and the purchaser of the servient property takes subject to the easement without express reservation. ....

Rank at 852 (Iowa Ct. App. 1994).

McNaughton asserts that the easement is a "private" easement and it states it is "granted for the use and benefit of the parties identified in this paragraph and it is not construed as an easement for the use and benefit of the general public." However, the language "for ingress and egress is more specific and therefore trumps the more generalized "private" easement statement. **McNally & Nimergood v. Neumann-Kiewit Constructors, Inc., 648 N.W.2d 564, 573 (Iowa 2002).** ("This specific clause trumps the general clause). Furthermore, the trial testimony unequivocally demonstrates the

easement is appurtenant. Mr. McNaughton admitted that absent use of the easement, there is simply no other way to access the care facility. Further, the easement has always been treated as a public easement, despite language to the contrary. In light of that fact, there have been no restrictions on use for almost two decades, the only reasonable conclusion is that the 13-foot by 80-foot area in the public street is an appurtenant easement. This appurtenant easement was however later dedicated as a public street as noted above thereby extinguishing the easement.

As a direct consequence of the Court's findings and conclusions with regard to the public dedication, the Court need not address McNaughton's claims with regard to his request for injunctive relief. The same is true with regard to McNaughton's claim for trespass.

CHARTIERS' COMMON LAW CLAIM FOR ATTORNEY FEES

Chartiers seek an award of attorney fees at common law from McNaughton. "A party generally has no claim for attorney fees as damages in the absence of a statutory or written contractual provision allowing such an award." **Suss v. Schammel, 375 N.W.2d 252, 256 (Iowa 1985)**. "A party seeking common law attorney fees must prove that the culpability of the other party's conduct exceeds the 'willful and wanton disregard for the rights of another'; such conduct must rise to the level of oppression or connivance to harass or injure another." **Hockenberg Equipment Co. v. Hockenberg's Equipment & Supply Company of Des Moines, Inc., 510 N.W.2d 153, 159 (Iowa 1993)**. In **Suss v. Schammel**, the Iowa Supreme Court "required a finding of 'oppressive' conduct, which denotes conduct that is difficult to bear, harsh, tyrannical, or cruel." Described another way, the Court in **Hockenberg** citing **Alyeska Pipeline Serv.**

V. Wilderness Soc'y, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) indicated that attorney fees as damages may be awarded when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. "These terms envision conduct that is intentional and likely to be aggravated by cruel and tyrannical motives." **Hockenberg Equipment Co., 510 N.W.2d at 159**. Often, common law attorney fees as damages claims are viewed similarly to a claim for punitive damages. The **Hockenberg Equipment Co.** court suggests that there must be a showing of connivance or oppression in order for a party to prevail on request for attorney fees as damages award. **Id. At 159**. McNaughton's actions must be examined in light of these criteria.

After Chartiers notified McNaughton of the pending sale of the Char-Mac assisted living facility located in Lawton, Iowa, to Ability Holdings (Lawton), LLC, McNaughton assured them that he would not disrupt the sale. McNaughton did not appear to be concerned about the easement or its status until he learned of the details of the pending sale of the Char-Mac facility to AbiliT. It was after this point and after Jeanine inquired further about the easement that McNaughton recorded the easement. McNaughton testified that he wanted to profit from the sale of the Char-Mac facility. McNaughton's proposals included the following as noted above, but restated here in the context of the discussion about attorney fees as damages to highlight his actions as context for consideration of this claim of damages:

a. Chartiers would give him $100,000, guarantee that he could purchase roughly 50 acres of the farm real estate from his sister's estate, and pay all of his legal fees;

b. Chartiers would purchase McNaughton's property for $410,000;

c. Chartiers would pay McNaughton $160,000 and McNaughton retain his property; and

d. Chartiers would transfer to McNaughton the 12 acres of farm real estate just south of the Char-Mac Facility (the remaining acres of the larger parcel after separating off the Char-Mac Facility parcel).

McNaughton's motive(s) for filing this lawsuit were vexatious and wanton, and constitute bad faith. McNaughton's excessive demands to resolve the use of the concrete portion of the easement area, especially in light of the fact that these demands took place at a time when Chartiers were selling the assisted living facility, reach the level of oppressive conduct that was intentional and driven by McNaughton's desire to extract money from the transaction between the Chartiers and AbiliT. McNaughton was aware that Chartiers were going to have a significant profit in the sale of the assisted living facility and he wanted to cash in as well. Such conduct reaches the level set forth in **Hockenberg Equipment Co.** and **Suss** supporting an award to Chartiers of attorney fees as damages.

RULING

ACCORDINGLY, IT IS HEREBY ORDERED ADJUDGED AND DECREED AS FOLLOWS:

1. **The concrete portion of the 13-foot by 80-foot easement area as shown in trial exhibit 2 is a public street having been dedicated as such to the City of Lawton, Iowa by McNaughton as determined herein. McNaughton's rights to that area are extinguished and terminated by this order.**
2. **Chartiers' common law claim for attorney fees as damages is granted. Chartiers' shall file an affidavit of attorney fees within 30 days of today's ruling and the Court retains jurisdiction to enter by separate order a judgment for these attorney fees.**

3. **AbiliT's counterclaims are withdrawn and accordingly dismissed with prejudice.**
4. **All claims against the City of Lawton, Iowa are dismissed with prejudice.**
5. **All court costs are taxed against Willard Brian McNaughton.**

So ordered. Clerk to notify.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
EQCV180496	MCNAUGHTON, WILLARD V CHARTIER, STANLEY & JEANINE

So Ordered

Jeffrey A. Neary

Jeffrey A. Neary, District Court Judge,
Third Judicial District of Iowa