ELECTRONICALLY FILED FEB 12, 2020 CLERK OF SUPREME COURT

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.

APPEAL FROM
THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

THE HONORABLE JEFFREY A. NEARY, JUDGE
WOODBURY COUNTY NO. EQCV180496

FINAL APPELLEE BRIEF OF APPELLEE ABILIT HOLDINGS (LAWTON) LLC

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STATEMENT OF THE ISSUES

I. Was the paved portion of McNaughton's property publicly dedicated when he allowed unrestricted public use for twenty years and when he admits the City of Lawton would issue a citation to him if he now attempted to prevent public use?

Breezy Property Co., L.L.C. v. Bickford, No. 03-1389, 695 N.W.2d 593, 2005 WL 67132 at * 3 (Iowa Ct. App. 2005)

Carter v. Barkley, 115 N.W. 21, 22 (Iowa 1908)

City of Riverdale v. Diercks, 806 N.W.2d 643, 651 (Iowa 2011)

City of Valley Junction v. McCurnin, 163 N.W. 345, 347 (1917)

De Castello v. City of Cedar Rapids, 153 N.W. 353, 355 (Iowa 1915).

Dillon v. Fehd, 222 N.W. 881 (Iowa 1929)

Dugan v. Zurmuehlen, 211 N.W. 986, 988 (Iowa 1927).

Ernst v. Johnson Cty., 522 N.W.2d 599, 602 (Iowa 1994)

Gray v. Osborn, 739 N.W.2d 855, 860–61 (Iowa 2007)

Henry Walker Park Assn. v. Mathews, 91 N.W.2d 703 (Iowa 1958)

Horsfield Materials, Inc. v. City of Dyersville, 834 N.W.2d 444, 452 (Iowa 2013)

In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984)

Iowa Loan & Trust Co. v. Board of Supervisors of Polk County, 174 N.W. 97, 98 (Iowa 1919)

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Pippen v. State, 854 N.W.2d 1, 8 (Iowa 2014).

Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 763 (Iowa 1999)

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

Sons of Union Veterans of Civil War, Dep't of Iowa v. Griswold Am. Legion Post 508, 641 N.W.2d 729, 734 (Iowa 2002)

State of Iowa v. Hutchison, 721 N.W.2d 776, 782 (Iowa 2006)

Stecklein v. City of Cascade, 693 N.W.2d 335, 339 (Iowa 2005)

Sutton v. Iowa Trenchless, L.C., 808 N.W.2d 744, 748–49 (Iowa Ct. App. 2011)

Vance v. Iowa Dist. Court for Floyd Cty., 907 N.W.2d 473, 476 (Iowa 2018)

Vaughn v. Williams, 345 So. 2d 1195, 1199 (La. Ct. App. 1977)

Walsh v. Nelson, 622 N.W.2d 499, 502 (Iowa 2001)

Wilson v. Sexon, 27 Iowa 15, 16 (Iowa 1869)

Wolfe v. Kemler, 293 N.W. 322, 324 (Iowa 1940)

4 Tiffany Real Prop. § 1102 (3d ed.)

23 Am. Jur. 2d Dedication § 20

II. Did the written easement agreement between McNaughton and the Chartiers grant an appurtenant easement when McNaughton admits the easement is for ingress and egress to Highway 20 and when McNaughton admits the Chartiers' successor-in-interest can use the easement area?

Campbell v. Waverly Tire Co., Case No. 02-1948, 796 N.W.2d 456, 2003 WL 23008846 at * 1-3 (Iowa Ct. App. 2003)

Cassens v. Meyer, 134 N.W. 543 (Iowa 1912)

City of Riverdale v. Diercks, 806 N.W.2d 643, 651 (Iowa 2011)

Ernst v. Johnson Cty., 522 N.W.2d 599, 602 (Iowa 1994)

Fausel v. JRJ Enterprises, Inc., 603 N.W.2d 612, 618 (Iowa 1999)

Gray v. Osborn, 739 N.W.2d 855, 860–61 (Iowa 2007)

Halvorson v. Bentley, No. 15-0877, 895 N.W.2d 489, 2016 WL 7403703 at * 11

Hofmeyer v. Iowa Dist. Court for Fayette Cty., 640 N.W.2d 225, 228 (Iowa 2001)

Horsfield Materials, Inc. v. City of Dyersville, 834 N.W.2d 444, 452 (Iowa 2013)

Karmuller v. Krotz, 18 Iowa 352, 357 (Iowa 1865)

Kersey v. Babich, No. 80-1556, 780 N.W.2d 248, 2010 WL 446995 at * 2 (Iowa Ct. App. 2010)

McDonnell v. Sheets, 234 Iowa 1148, 1154, 15 N.W.2d 252, 255 (Iowa 1944)

McNally & Nimergood v. Neumann-Kiewit Constructors, Inc., 648 N.W.2d 564, 573 (Iowa 2002)

Metro. Prop. & Cas. Ins. Co. v. Auto-Owners Mut. Ins. Co., 924 N.W.2d 833, 839 (Iowa 2019)

Pillsbury Co. v. Wells Dairy, Inc., 752 N.W.2d 430, 436 (Iowa 2008)

Pippen v. State, 854 N.W.2d 1, 8 (Iowa 2014)

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

Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 763 (Iowa 1999)

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

Sutton v. Iowa Trenchless, L.C., 808 N.W.2d 744, 748–49 (Iowa Ct. App. 2011)

Vance v. Iowa Dist. Court for Floyd Cty., 907 N.W.2d 473, 476 (Iowa 2018)

Walsh v. Nelson, 622 N.W.2d 499, 502 (Iowa 2001)

Wiegmann v. Baier, 203 N.W.2d 204, 208 (Iowa 1972)

Iowa R. App. P. 6.907

III. Does McNaughton's conduct warrant the imposition of common law attorney fees when he attempted to profit from his sister's sale of property by claiming an easement for ingress and egress was a private easement after he allowed unrestricted public use for twenty years and after he represented to his sister that the easement would transfer to the new owner of the property?

A & R Concrete & Const. Co. v. Braklow, 103 N.W.2d 89, 91 (Iowa 1960)

Boyle v. Alum-Line, Inc., 773 N.W.2d 829, 833 (Iowa 2009)

Condemnation of Certain Land v. City of Des Moines, 119 N.W.2d 187, 188 (Iowa 1963)

Dugan v. Zurmuehlen, 211 N.W. 986, 988 (Iowa 1927)

Engstrom v. State, 461 N.W.2d 309, 314 (Iowa 1990)

Evans v. Herbranson, 41 N.W.2d 113, 117 (Iowa 1950)

Hoeppner v. Holladay, No. No. 06-1288, 741 N.W.2d 823, 2007 WL 2963662 at * 5 (Iowa Ct. App. 2007)

Hofmeyer v. Iowa Dist. Court for Fayette Cty., 640 N.W.2d 225, 228 (Iowa 2001)

Iowa Loan & Trust Co. v. Board of Supervisors of Polk County, 174 N.W. 97, 98 (Iowa 1919)

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Loudon v. State Farm Mut. Auto. Ins. Co., 360 N.W.2d 575, 583 (Iowa Ct. App. 1984)

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Olson v. Elsbernd, No. 10-0236, 795 N.W.2d 99, 2010 WL 5023241 at * 6 (Iowa Ct. App. 2010)

Pierce v. Staley, 587 N.W.2d 484, 486 (Iowa 1998)

Schaefer v. Putnam, Case No. 11-1437, 834 N.W.2d 872, 2013 WL 2368819 at * 7 (Iowa Ct. App. 2013)

Smith v. Iowa State Univ., 885 N.W.2d 620, 626 (Iowa 2016)

Thornton v. Am. Interstate Ins. Co., 897 N.W.2d 445, 475 (Iowa 2017)

Wilker v. Wilker, 630 N.W.2d 590, 594 (Iowa 2001)

Williams v. Van Sickel, 659 N.W.2d 572, 579 (Iowa 2003)

Iowa R. App. P. 6.4.

Iowa R. App. P. 6.903(2)(g)(3)

ROUTING STATEMENT

This appeal involves the application of existing legal principles and is subject to transfer to the Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

This case arises from Willard McNaughton's attempt to restrict use of the paved portion of his property, which is part of the paved street known as East Char-Mac Drive, after he knowingly allowed the public to use it without restriction for more than twenty years.

On April 19, 2018, McNaughton filed a "Petition for Declaratory Judgment, Injunctive Relief and Damages." (App. 9)(Petition). The named defendants were Stanley Chartier and Jeanine Chartier ("the Chartiers") and Char-Mac, Inc. *Id.*

The Chartiers and Char-Mac, Inc. answered, asserting a counterclaim as well as a third-party claim against the City of Lawton. (App. 247)(Chartier Answer).

On September 7, 2018, McNaughton filed an "Amended Petition for Declaratory Judgment, Injunctive Relief and Damages," adding AbiliT Holdings (Lawton) LLC ("AbiliT") as a defendant. (App. 519)(Amended Petition). The requested declaratory and injunctive relief was framed in terms of "ingress and egress":

> WHEREFORE, McNaughton respectfully requests the Court enter declaratory relief establishing the respective parties' rights as to: 1) ingress and egress as described in the Easement Agreement, and 2) ingress and egress using McNaughton's property south of the easement described in the Easement Agreement. Additionally, McNaughton prays for injunctive relief consistent with the Court's determination of the parties' rights of ingress and egress, for monetary damages, and for such other and further relief as the court deems appropriate in the premises.

(App. 524)(Amended Petition p. 6).

AbiliT answered and asserted counterclaims on October 15, 2018. (App. 281)(AbiliT Answer).

On October 26, 2018, the Chartiers and Char-Mac, Inc. were granted permission to file additional counterclaims. (Order).

The case was tried to the District Court on July 16, 2019. (App. 406) (8-27-19 Findings of Fact). AbiliT withdrew its counterclaims at the beginning of trial. (App. 406)(*Id.*p. 1).

The District Court entered its Findings of Fact, Conclusions of Law, and Ruling on August 27, 2019. *Id.* The District Court held that the paved portion of McNaughton's property "is a public street having been dedicated as such to the City of Lawton, Iowa by McNaughton…." and that "McNaughton's rights to that area are extinguished and terminated…." (App. 422)(*Id.* p. 17). AbiliT's counterclaims and all claims against the City of Lawton were dismissed with prejudice. (App. 423)(*Id.* p. 18). The District

Court granted the Chartiers' common law claim for attorney fees. (App. 422)(*Id.* p. 17).

On September 10, 2019, McNaughton filed a motion to reconsider, enlarge, or amend. (Motion). The Chartiers, Char Mac, Inc., and AbiliT resisted the motion on September 17, 2019. (Resistance).

On September 17, 2019, Chad Thompson (counsel for the Chartiers and Char Mac, Inc.) filed an affidavit of attorney fees. (App. 480) (Thompson Affidavit). On September 18, 2019, Kevin Collins (counsel for AbiliT) filed an affidavit of attorney fees. (App. 496)(Collins Affidavit). McNaughton resisted the application for attorney fees on September 20, 2019. (Resistance). The Chartiers, Char Mac, Inc., and AbiliT replied on September 23, 2019. (App. 504) (9-23-19 Reply).

On September 24, 2019, McNaughton filed a reply in support of his motion to reconsider, enlarge, or amend. (Reply).

The District Court denied McNaughton's motion to reconsider, enlarge, or amend on September 30, 2019. (App. 548)(Order denying motion). That same day, the District Court awarded attorney fees of $70,604.14, entering judgment against McNaughton and in favor of the Chartiers. (App. 508)(Order regarding attorney fees).

STATEMENT OF THE FACTS

McNaughton's Property and the Chartiers' Property

In August 1998, McNaughton purchased property known as 2156 Highway 20 in Lawton, Iowa. (App. 370) (Exhibit 26). This property is South of Highway 20. (App. 345)(Exhibit 2). (App. 347)(Exhibit 3).

In December 1998, McNaughton's sister Jeanine Chartier and brother-in-law Stanley Chartier entered into a contract to purchase property to the East of McNaughton's property. *See* (App. 371)(Exhibit 27). The Chartiers' goal was to build an assisted living facility. (App. 124)(Tr. 110:2-15). For the Chartiers to obtain financing for the assisted living project, a public street between the facility and Highway 20 was needed. (App. 127-128) (Tr. 113:14-114:15).

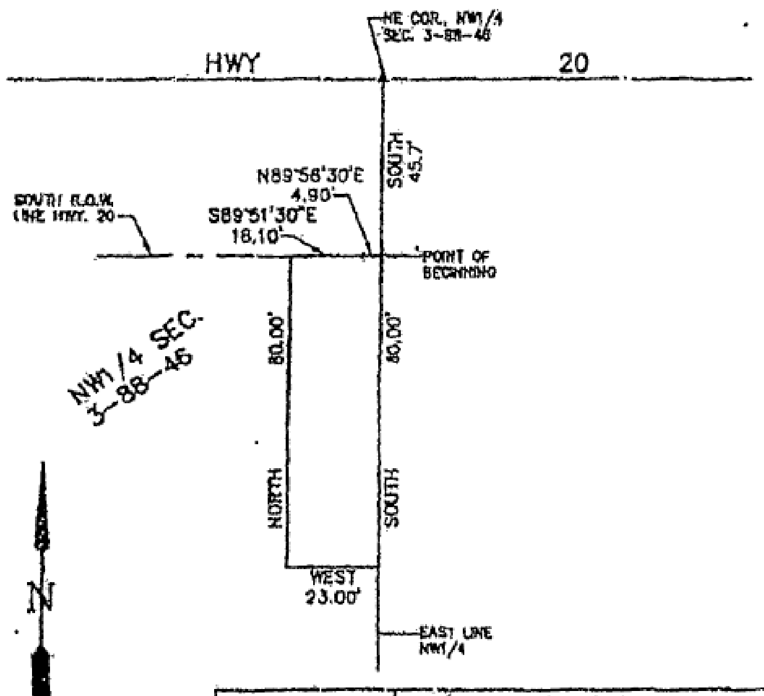
Special Access Connection Agreement

In January 1999, McNaughton and the Chartiers signed an agreement with the Iowa Department of Transportation for establishment of a special access connection. (App. 349)(Exhibit 8). The result of this document was to move the access to Highway 20 from being entirely on McNaughton's property to being partially on both McNaughton's property and the Chartiers' property, so that the access on the South of Highway 20 aligned with access

on the North of Highway 20. (App. 33-34) (Tr. 19:1-20:3). (App. 180-181) (Tr. 166:12-167:15).

The Easement Agreement

McNaughton and the Chartiers entered into an Easement Agreement dated September 17, 1999, whereby McNaughton expressly granted an easement. (App. 339)(Exhibit 1 p. 4). McNaughton admits the easement created by the Easement Agreement is for ingress and egress from Highway 20. (App. 98-99) (Tr. 84:19-85:12). The plat of easement visually depicts the easement area as follows:



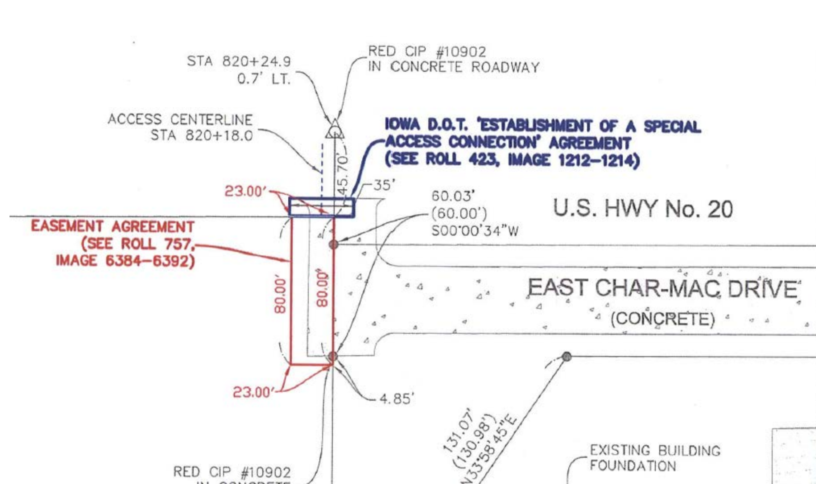
(App. 344) (Exhibit 1 p. 9).

East Char-Mac Drive, A Public Street

The public street known as East Char-Mac Drive was installed beginning in late 1999. (App. 188)(Tr. 174:6-8).

The City of Lawton hired the engineers for the street project and paid for the installation of East Char-Mac Drive and the associated public improvements. (App. 127)(Tr. 113:8-13). (App. 354) (Exhibit 17). (App. 357) (Exhibit 19). (App. 360) (Exhibit 20). (App. 361) (Exhibit 21). (App. 363) (Exhibit 22). (App. 364) (Exhibit 23). (App. 172)(Tr. 158:7-11). (App. 216)(Tr. 202:10-18). In early 2000, the city attorney for the City of Lawton informed McNaughton that the City of Lawton would be solely responsible for the maintenance of the street. (App. 353) (Exhibit 15). (App. 75-76) (Tr. 61:18-62:8).

Joint Trial Exhibit 2 depicts East Char-Mac Drive as including the easement area defined by the written Easement Agreement:



(App. 345) (Exhibit 2 - excerpt).

East Char-Mac Drive is 36 feet wide. (App. 89)(Tr. 75:3-9). At the West end, twenty-three (23) feet of the street are on the property previously owned by the Chartiers (and now owned by AbiliT). (App. 89-90)(Tr. 75:6-76:5). Thirteen (13) feet of East Char-Mac Drive are on McNaughton's property. (App. 75) (Tr. 61:4-7); (App. 89-90) (Tr. 75:6-76:5).

The portion of East Char-Mac Drive on Chartiers'/AbiliT's property has always been referred to as a public street. (App. 127-128)(Tr. 113:14-114:15). McNaughton admits this portion of East Char-Mac Drive was publicly dedicated. (Appellant's Proof Brief p. 61).

Jeff Nitzschke served as council member for the City of Lawton for four years, and he served as the mayor of Lawton for ten years. (App. 169-170) (Tr. 155:17-156:18). Nitzschke was mayor in the 1999-2000 time frame, when East Char-Mac Drive was built. *Id.* In Trial Exhibit 9, Nitzschke outlined in black the public street:

(App. 352) (Exhibit 9 - excerpt). (App. 171) (Tr. 157:1-15). Thus, it is Nitzschke's opinion that all of East Char-Mac Drive, including the portion on McNaughton's property, is a public street. (App. 171-172) (Tr. 157:1-158:11). (App. 352) (Exhibit 9). Nitzschke is not aware of any restrictions regarding travel on East Char-Mac Drive. (App. 173)(Tr. 159:17-19).

McNaughton admits "a lot of people believe" East Char-Mac Drive is a "public street." (App. 97-98) (Tr. 83:22-84:12). At trial, McNaughton could identify only three people who in the prior 20 years had indicated they believed East Char-Mac Drive was something other than a public street. (App. 94-96) (Tr. 80:15-82:4).

Assessment documents indicate McNaughton does not pay taxes on the paved portion of his property. (App. 215-216) (Tr. 201:13-202:9). (App. 582) (Exhibit 25).

Unrestricted Public Use for More than Twenty (20) Years

McNaughton admits the paved portion of his property is open to the general public. (App. 77-78)(Tr. 63:10-64:7). He admits that each day forty (40) to seventy (70) cars are driven on the paved portion of his property. (App. 40) (Tr. 26:13-19). *See also* (App. 94) (Tr. 80:7-10) (acknowledging McNaughton's ability to watch drivers). McNaughton does not keep track of who visits the assisted living facility. (App. 77) (Tr. 63:21-23). He has not

placed any signage in the area reflecting his position that the paved portion constitutes a private easement. (App. 77-78) (Tr. 63:24-64:2).

McNaughton admits the public has had unrestricted use of the paved portion of his property for twenty (20) years. (App. 92-93) (Tr. 78:23-79:1). He testified:

> Q. Any member of the public has had unrestricted use to cross that easement area for the past 20 years, correct?
> A. Correct.

Id.

It is undisputed that in twenty (20) years, McNaughton has never restricted anyone's use of his property in order to travel East to the assisted living facility. (App. 92) (Tr. 78:20-22). On one occasion, when he was being "kind of ornery," he parked "inappropriately" to block traffic from going South. (App. 92) (Tr. 78:4-19).

McNaughton admits that the public's use of his property to turn east to visit the care facility has been the same for twenty (20) years. He testified:

> Q. The use of which AbiliT is putting the easement area is no different than the use to which your sister put the easement area, correct?
> A. As far as turning east, no.
> Q. Well, let's – we can start with that.
> All of the traffic that comes in and turns east and goes to the care facility, whether it's the public, whether it's an invitee, whether it's a resident, whether it's a guest, whether it's a vendor, they're all using the easement in the same manner that it's been used for the last 20 years, correct?
> A. Correct.

(App. 99-100)(Tr. 85:23-86:10). McNaughton also admits any traffic using the easement to go to the South is similar to the use by his sister since 2012. (App. 100)(Tr. 86:11-16).

McNaughton is "sure" he would be cited by the City of Lawton if he were to erect a barrier to define an easement and prevent someone from crossing it. (App. 97) (Tr. 83:6-18).

The Need to Use McNaughton's Paved Property to Reach the Assisted Living Facility to the East

McNaughton admits there is a "good likelihood" any traffic using East Char-Mac Drive would drive on his property. (App. 48-49) (Tr. 34:19-35:14). According to McNaughton, a driver would need to "really work at it" to access the property to the East without driving on his property. (App. 60-61) (Tr. 46:23-47:6).

The Sale to AbiliT, and McNaughton's Representations to His Sister Regarding Transferring the Easement to AbiliT

Because of Jeanine Chartier's health issues, the Chartiers decided to sell the assisted living facility. (App. 203)(Tr. 189:7-19). In January 2018, Char Mac, Inc. entered into a letter of intent with AbiliT. (App. 154)(Tr. 140:8-18). The letter of intent required entry into a contract for sale within a certain period of time. (App. 154-156) (Tr. 140:19-142:2). From the Chartiers' perspective, it was imperative to timely close on the sale because

Mrs. Chartier's health was not good and she was not functioning well. (App. 158) (Tr. 144:8-16).

In reviewing the information provided by the Chartiers, AbiliT discovered the Easement Agreement between McNaughton and the Chartiers was not properly recorded. (App. 71-73, 135-136, 155) (Tr. 57:14-59:3, 121:10-122:7, 141:17-22). The parties' attorneys discussed the effect of the Easement Agreement. (App. 156-157)(Tr. 142:19-143:23). It was decided that the most expeditious approach was to have Mrs. Chartier approach her brother. (App. 157) (Tr. 143:1-23).

In February 2018, Jeanine Chartier presented her brother with a document entitled "Clarification of Easement." (App. 378)(Exhibit 31). Mrs. Chartier offered him $15,000 to sign the document. (App. 228-229)(Tr. 214:5-215:3).

McNaughton indicated he needed to have his attorney review the "Clarification of Easement" before signing. *Id.* Nonetheless, McNaughton informed his sister that he believed the easement would transfer to the new owner of the assisted living facility, he was not going to stop the sale, and he was worried about her health. (App. 137-138) (Tr. 123:1-124:1). McNaughton represented to his sister that she should go ahead with the sale to AbiliT. (App. 203-204)(Tr. 189:20-190:8).

McNaughton's Demands When Trying to Profit
from His Sister's Sale to AbiliT

After representing to his sister that AbiliT could use the paved portion of his property, McNaughton began to make demands regarding such use. (App. 204-205)(Tr. 190:9-191:2). To allow the paved portion of his property to be used to reach the assisted living facility owned by AbiliT, McNaughton demanded at various times: $100,000; 12.5 acres of property South of the assisted living facility; the right for McNaughton to purchase fifty (50) acres from another sister's estate; or $160,000. (App. 79-81, 198-203, 219-220)(Tr. 65:17-67:7, 184:11-189:6, 205:5-206:7). When asked if his $100,000 demand represented an attempt to profit from his relatives' sale of the assisted living facility, McNaughton responded: "I guess if you look [sic] the 100,000 as a profit from the sale, you could say that." (App. 79)(Tr. 65:17-20). McNaughton also offered to sell his property for $410,000. (App. 202-203)(Tr. 188:16-189:6). However, once AbiliT became owner of the property to the East, McNaughton has fully consented to AbiliT's use of his property, as discussed below.

Mrs. Chartier felt her brother was trying to profit from her. (App. 204)(Tr. 190:9-24). She viewed his demands as ridiculous and frustrating. *Id.*

In March 2018, Mrs. Chartier emailed AbiliT apologizing for her brother's stubbornness and expressing her embarrassment for his conduct. (App. 388) (Exhibit 43).

Agreement to Indemnify

On April 19, 2018, McNaughton filed this lawsuit. (App. 9)(Petition). In order to close the deal with AbiliT, the Chartiers agreed to pay AbiliT's legal fees if McNaughton added AbiliT to this lawsuit. (App. 137-138, 202, 224)(Tr. 123:1-124:8, 188:7-15, 210:18-21). McNaughton admits: "Due to the pending declaration action, the Chartiers agreed to indemnify AbiliT for any expenses associated with litigation regarding the easement agreement." (Appellant Proof Brief pp. 28-29).

AbiliT's Ownership of the Property to the East,
and McNaughton's Consent to AbiliT's Use of His Property

The sale to AbiliT closed in May 2018. (App. 201-202)(Tr. 187:18-188:3). AbiliT now owns the property East of McNaughton's property originally owned by the Chartiers. *Id.*

McNaughton's opening brief admits he "generally does not object to AbiliT using the easement area as originally intended." (Appellant's Proof Brief p. 29). With respect to AbiliT, McNaughton testified: "I'm not going to stop you from using it [the paved portion of his property] today." (App. 91)(Tr. 77:15-23). Regarding AbiliT, McNaughton testified: "They can use

the easement. I just have a problem with them crossing onto her private property to do business as AbiliT because that's two businesses operating over the original easement." (App. 52)(Tr. 38:14-22). McNaughton claims the "two businesses" are AbiliT's assisted living facility and his sister's farming operation to the south. *Id.* However, McNaughton admits two businesses have always used the easement area. (App. 101) (Tr. 87:16-21).[1]

Additional Admissions by McNaughton

When asked if he intends to interfere with anyone's use of East Char-Mac Drive, McNaughton testified: "No, I'm not going to interfere with that." (App. 90) (Tr. 76:10-13).

When asked "As a practical matter, is there anything you can do to stop anybody, member of the public, employee of AbiliT, invitee of AbiliT, from using this public street that grants access from Highway 20 to the care facility," McNaughton responded: "The way it's written and the way it stands, no." (App. 97) (Tr. 83:6-12).

McNaughton testified that he was asking the District Court to restrict AbiliT from crossing onto his property to access an outbuilding. (App. 82)

[1] When the eastern property was owned by the Chartiers, vehicles were driven over the paved portion of McNaughton's property both to reach the assisted living facility and for purposes of a farming operation. (App. 101) (Tr. 87:1-21).

(Tr. 68:18-21). The outbuilding is located on the property formerly owned by the Chartiers and now owned by AbiliT. (App. 345) (Exhibit 2).[2] McNaughton admits AbiliT does not need to cross onto his property to access the outbuilding. (App. 104-107) (Tr. 90:24-93:5). (App. 348) (Exhibit 4). (App. 109) (Tr. 95:11-23). In fact, landscaping boulders that Mrs. Chartier placed on the East side (Chartier/AbiliT side) of the boundary line ensure that AbiliT and others will not drive on McNaughton's property to access the outbuilding. *Id.*

McNaughton admits the "damages" he has allegedly sustained are a matter of his inconvenience when backing out of his garage. (App. 106-108) (Tr. 92:20-94:2). Because of the landscaping boulders placed on the property he does not own, McNaughton cannot back onto AbiliT's property when he backs up from his garage. *Id.*

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[2] McNaughton assisted in constructing the outbuilding and never took any action to restrict access to it when his sister and brother-in-law owned the property. (App. 104)(Tr. 90:3-14).

ARGUMENT

I. The Paved Portion of McNaughton's Property Was Publicly Dedicated.

A. Error Preservation.

AbiliT acknowledges McNaughton preserved error on the issue of public dedication.

B. Scope and Standard of Appellate Review.

The District Court commented during the bench trial that the matter was "in equity." (App. 80) (Tr. 66:6-15). However, the District Court sustained some evidentiary objections during trial; and, after trial, issued "Findings of Fact, Conclusions of Law, and Ruling." (App. 49, 66, 93-94) (Tr. 35:15-23, 52:8-15, 79;19-80:14). (App. 406) (8-27-19 Findings of Fact). For these reasons, the trial should be deemed at law. *See City of Riverdale v. Diercks*, 806 N.W.2d 643, 651 (Iowa 2011) ("The district court ruled on numerous objections during this three-day bench trial. 'Normally, this is the 'hallmark of a law trial'....'"); *Gray v. Osborn*, 739 N.W.2d 855, 860–61 (Iowa 2007) (in finding review of determination of easement rights to be for errors of law, noting that some evidentiary objections were sustained during trial); *Ernst v. Johnson Cty.*, 522 N.W.2d 599, 602 (Iowa 1994) ("Where there is uncertainty about the nature of a case, a litmus test we use in making this determination

is whether the trial court ruled on evidentiary objections"); *Sutton v. Iowa Trenchless, L.C.*, 808 N.W.2d 744, 748–49 (Iowa Ct. App. 2011) (in finding that a case was tried as a law action, noting: "The court's decision was captioned as 'Findings of Fact, Conclusions of Law and Ruling,' and not 'decree' as is generally the case in equity actions"). *See also Mahaska State Bank v. Kelly*, 520 N.W.2d 329, 331 (Iowa Ct. App. 1994) (on appeal from district court's finding of dedication, review for substantial evidence). *Cf. Lenz v. Hedrick*, No. 00-1258, 2002 WL 1766629, at *2 (Iowa Ct. App. 2002) (in action for injunctive and declaratory relief, applying de novo review).

Review is for correction of errors of law. Iowa R. App. P. 6.907. The District Court's findings of fact have the effect of a special verdict and are binding if supported by substantial evidence. *See Metro. Prop. & Cas. Ins. Co. v. Auto-Owners Mut. Ins. Co.*, 924 N.W.2d 833, 839 (Iowa 2019); *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 763 (Iowa 1999). "Evidence is considered substantial when reasonable minds could accept it as adequate to reach a conclusion." *Vance v. Iowa Dist. Court for Floyd Cty.*, 907 N.W.2d 473, 476 (Iowa 2018) (quoting *State v. Garrity*, 765 N.W.2d 592, 595 (Iowa 2009)). Substantiality of evidence is viewed "in the light most favorable to upholding the trial court's judgment." *Pippen v. State*, 854 N.W.2d 1, 8 (Iowa 2014). "An appellate court is not free to substitute its own

findings of fact for those of the district court simply because the evidence supports different inferences." *Walsh v. Nelson*, 622 N.W.2d 499, 502 (Iowa 2001).

Even if this Court engages in de novo review, deference should be given to the district court's findings of fact "because the district court had the opportunity to assess the credibility of the witnesses." *See Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 452 (Iowa 2013).

C. There is Clear, Satisfactory, and Convincing Evidence of Public Dedication, Including McNaughton's Admissions Regarding Twenty Years of Public Use with His Knowledge.

"A common law dedication of land for a public purpose is well recognized in law." *Sioux City v. Tott*, 60 N.W.2d 510, 515 (Iowa 1953).

"The doctrine of dedication is based upon public policy and public convenience." *Dugan v. Zurmuehlen*, 211 N.W. 986, 988 (Iowa 1927). "It is analogous to the doctrine of equitable estoppel, and implied dedication, as a general rule, operates on this principle." *Id.*

Dedication to the public requires: "'(1) intent to dedicate, (2) dedication, and (3) acceptance by the public or the party to whom the dedication is made.'" *State of Iowa v. Hutchison*, 721 N.W.2d 776, 782 (Iowa 2006) (quoting *Sons of the Union Veterans of the Civil War v. Griswold Am. Legion Post 508*, 641 N.W.2d 729, 733 (Iowa 2002)).

The District Court's finding of public dedication of the paved portion of McNaughton's property should be affirmed. The evidence of implied dedication is "clear, satisfactory, and convincing…." *Sons of Union Veterans of Civil War, Dep't of Iowa v. Griswold Am. Legion Post 508*, 641 N.W.2d 729, 734 (Iowa 2002).

1. McNaughton intended to publicly dedicate and did publicly dedicate the paved portion of his property.

"[N]o writing or conveyance is necessary to render a dedication effective." *Dugan*, 211 N.W. at 988. "The manner in which the dedication is made is not a material matter." *De Castello v. City of Cedar Rapids*, 153 N.W. 353, 355 (Iowa 1915). *See also Carter v. Barkley*, 115 N.W. 21, 22 (Iowa 1908) ("It is a familiar rule that no particular form of dedication is necessary, and that any act clearly indicating the intention of the owner to set apart lands for the use of the public as a highway constitutes a sufficient dedication").

"Long acquiescence in user by the public may, under certain circumstances, operate as a dedication of land to the public use." *Dugan*, 211 N.W. at 988. *See Iowa Loan & Trust Co. v. Board of Supervisors of Polk County*, 174 N.W. 97, 98 (Iowa 1919) ("Mere acquiescence in long-continued use of land as a highway has been held to operate as a dedication of the land to the public use"). "'It is every day's practice to presume a dedication of land

to the public use from an acquiescence of the owner in such use.'" *Dugan*, 211 N.W. at 988 (quoting *Knight v. Heaton*, 22 V. 280).

"The intent to dedicate may be established in any conceivable way, but the act or declaration must clearly evince the intent to dedicate." *Dugan*, 211 N.W. at 988. "The act or acts must be such that the intention may be inferred, or the owner estopped from denying an intention to dedicate his property to the public use." *Dugan*, 211 N.W. at 988.

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.'" *Sons of the Union Veterans*, 641 N.W.2d at 734 (Iowa 2002) (quoting *De Castello v. City of Cedar Rapids*, 153 N.W. 353, 355 (Iowa 1915)).

"'User by the public at large such as is generally known which is continuous, … will establish the owner's intention to dedicate.'" *Henry Walker Park Assn. v. Mathews*, 91 N.W.2d 703 (Iowa 1958) (quoting *City of Sioux City v. Tott*, 60 N.W.2d 510, 517 (Iowa 1953). *Cf. Sons of Union Veterans*, 641 N.W.2d at 734 ("Mere permissive use of a way, no matter how long continued, will not amount to a dedication").

The clear and convincing evidence is that McNaughton intended to publicly dedicate and did publicly dedicate the paved portion of his property.

This evidence includes numerous admissions by McNaughton as well as the testimony of a former mayor/ council member of the City of Lawton.

McNaughton admits the paved portion of his property is open to the general public and that forty (40) to seventy (70) cars are driven on the paved portion of this property each day. (App. 77-78)(Tr. 63:10-64:2). (App. 40) (Tr. 26:13-19).

McNaughton admits the public has enjoyed use of the paved portion of his property for twenty (20) years. (App. 92-93) (Tr. 78:4-79:1). McNaughton admits the public's use of his property to turn East to visit the assisted living facility has been the same for twenty (20) years. (App. 99-100) (Tr. 85:23-86:10). McNaughton admits that in twenty (20) years, he has never restricted anyone's use of his property in order to travel East to the assisted living facility. (App. 92)(Tr. 78:4-22).[3]

McNaughton admits "a lot" of people believe East Char-Mac Drive is a public street and could only identify three people who, in the prior twenty years, had allegedly indicated they believed it to be something other than a

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[3] McNaughton testified on one occasion, when he was being "kind of ornery," he parked "inappropriately" in an attempt to block traffic from going South – which is not the direction of the care facility. (App. 92) (Tr. 78:4-19). *See also* McNaughton's Trial Brief, stating that he "did not particularly like that the traffic continued south beyond the easement onto the gravel road on Chartier's property, rather than turning east onto East Char-Mac Drive like he intended, but he never objected." (7-9-19 Plaintiff's Trial Brief p. 11).

public street. (App. 94-96, 97-98) (Tr. 80:15-82:4, 83:22-84:12). Jeff Nitzschke, who served as mayor of the City of Lawton when East Char-Mac drive was installed, also testified that the paved portion of McNaughton's property is a public street. (App. 171-172)(Tr. 157:1-158:11). (App. 352)(Exhibit 9).

McNaughton's long acquiescence in use by the public proves dedication and intent to dedicate. *See Dugan*, 211 N.W. at 988; *Iowa Loan*, 174 N.W. at 98. McNaughton is estopped from denying a dedication and intent to dedicate. *See Wilson v. Sexon*, 27 Iowa 15, 16 (Iowa 1869); *Dugan*, 211 N.W. at 988.

The fact that McNaughton joined in the special access connection agreement, allowed his property to be paved by the City of Lawton, and knowingly acquiesced in public use for twenty (20) years satisfies any requirement of an "unequivocal act" to dedicate. *Sons of Union*, 641 N.W.2d at 734. *See Wilson*, 27 Iowa at 16; *Dugan*, 211 N.W. at 988.

Further proving dedication and intent to dedicate is the fact that assessment documents indicate McNaughton does not pay taxes on the paved portion of his property. (App. 215-216) (Tr. 201:13-202:9). (App. 582) (Exhibit 25). *See Henry Walker Park Ass'n v. Mathews*, 249 Iowa 1246, 1256, 91 N.W.2d 703, 710 (Iowa 1958) ("Payment or non-payment of taxes is not

conclusive, but the matter has some bearing upon the intent to dedicate"); *Lenz v. Hedrick*, No. 00-1258, 2002 WL 1766629 at *4 (Iowa Ct. App. 2002) (in finding dedication, noting lack of payment of taxes). While McNaughton claimed to pay taxes on this area of the property (App. 42) (Tr. 28), considerable deference should be given to the District Court's decision to reject his testimony as non-credible. *See In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) ("There is good reason for us to pay very close attention to the trial court's assessment of the credibility of witnesses. …[A]ppellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented.").

McNaughton attempts to characterize his long acquiescence as simply complying with the written Easement Agreement with the Chartiers. (Appellant's Proof Brief p. 57). However, McNaughton contends the written agreement only granted a "private easement" to the Chartiers which was "*not* for general, public use" and which could not be assigned. (Appellant's Proof Brief p. 68). Therefore, the written agreement does not justify McNaughton knowingly allowing unrestricted public use for more than twenty years only to subsequently attempt to restrict the same use. *See Wilson*, 27 Iowa at 16 ("[W]hen the owner of the soil so long acquiesces in the using the way, having

knowledge thereof, he is estopped to deny his prior dedication”). Furthermore, McNaughton has repeatedly admitted he does not object to AbiliT’s use of the paved portion of his property to travel East. (Appellant’s Proof Brief p. 29). (App. 91, 52, 97) (Tr. 77:15-23, 38:14-22, 83:6-12). This consent cannot be squared with McNaughton’s position that the express easement could not be assigned.

McNaughton claims he told the City of Lawton he did not want to publicly dedicate the paved portion of his property prior to February 2000 and “in about 2001…,” citing Tiffany Real Property for the notion that “tacit dedication does not result where active opposition is directly communicated by the landowner to the governing body.” (Appellant’s Proof Brief p. 56). (App. 40-42)(Tr. 26-28). This quotation from Tiffany Real Property does not reflect Iowa law. In support of the quoted proposition, Tiffany Real Property cites to only one case which is from the Court of Appeal of Louisiana. *See* 4 Tiffany Real Prop. § 1102 (3d ed.). That Louisiana case does not support McNaughton’s position, as it found a tacit dedication under Louisiana Statute 48:491 notwithstanding an assertion of the private nature of the road:

> At least since 1969, and particularly since 1973, the Police Jury has worked on the road several times each year, grading, ditching and adding gravel. It is significant that the southerly part of the road crossing defendant's property in Section 3 is a continuation of or extension of a dedicated public road, and that the road has been used by the public for many years. Although defendant

> asserted the private nature of the road at a Police Jury meeting in 1967, she thereafter consented to work done by the Jury in 1969 and 1975, and allowed other maintenance to be done without protest.
>
> Our conclusion is that the trial court was correct in finding the road to be a public road by reason of maintenance by the Police Jury for more than three years. There was a tacit dedication under LSA-R.S. 48:491.

Vaughn v. Williams, 345 So. 2d 1195, 1199 (La. Ct. App. 1977). Moreover, it would be contrary to Iowa law to hold that McNaughton's alleged denial of a public dedication back in 2000 and 2001 precludes the application of principles of estoppel and acquiescence, given his subsequent knowing acceptance of public use for more than a decade. The Iowa Supreme Court "ha[s] said: '* * * 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.'" *Henry Walker Park*, 91 N.W.2d at 710 (quoting *Kinsinger v. Hunter*, 192 N.W. 264, 265 (Iowa 1923)). *See also* 23 Am. Jur. 2d Dedication § 20 ("[W]here public or private rights have been acquired upon the faith of the conduct of the landowner under such circumstances as to make the doctrine of estoppel applicable, the law will imply the intent to dedicate even where

there is an entire absence thereof in the mind of the landowner and even against a contrary intent").

McNaughton also attempts to rely on the City of Lawton's position that it "does not own" the paved portion of his property. (Appellant's Proof Brief p. 56). Iowa law provides that a common-law dedication creates a right of use. *See Sioux City*, 60 N.W.2d at 515 (Iowa 1953) (describing a "common law dedication of land for a public purpose" as "in no sense a *taking* of land for public purpose" but rather "the owner's *giving* the right or easement for public use – the devotion to public use by the owner"). Thus, the City's position regarding ownership does not preclude a finding of dedication.

2. The public dedication was accepted by the Public and the City of Lawton.

"'Very slight evidence is required to establish acceptance by the public. …'" *Marksbury v. State*, 322 N.W.2d 281, 285 (Iowa 1982) (quoting *Iowa Loan & Trust Co. v. Board of Supervisors*, 174 N.W.2d 97, 98-99 (Iowa 1919)). *See City of Valley Junction v. McCurnin*, 163 N.W. 345, 347 (Iowa 1917) ("Where a way is convenient and beneficial to the public, slight evidence, if amounting to recognition as above indicated, will suffice in establishing acceptance").

"An offer of dedication to bind the dedicator need not be accepted by the city, but may be accepted by the general public." *Dugan*, 211 N.W. at 989. "To deny this would be to deny the whole doctrine of implied dedication." *Id.*

"Acceptance of the dedication may be implied." *Sons of the Union Veterans*, 641 N.W.2d at 734. Or, "acceptance may be by some formal action or by public use." *Sons of the Union Veterans*, 641 N.W.2d at 734. *See Stecklein v. City of Cascade*, 693 N.W.2d 335, 339 (Iowa 2005).

Use by the public "'need not be continuous or heavy'" to establish acceptance of a dedication. *Breezy Property Co., L.L.C. v. Bickford*, No. 03-1389, 695 N.W.2d 593, 2005 WL 67132 at * 3 (Iowa Ct. App. 2005) (quoting *Henry Walker Park Assn. v. Matthews*, 91 N.W.2d 703 (Iowa 1958)). The public use "'need only be such as the public wants and necessities demand.'" *Breezy Property*, 2005 WL 67132 at * 3 (quoting *Kelroy v. City of Clear Lake*, 5 N.W.2d 12, 19-20 (Iowa 1942)).

"'[A]cceptance by the public is presumed where it is shown that the claimed highway is of common convenience and necessity, and therefore beneficial to the public." *Wolfe v. Kemler*, 293 N.W. 322, 324 (Iowa 1940) (quoting *Iowa Loan & Trust Co. v. Board of Supervisors*, 174 N.W. 97, 98 (Iowa 1919)).

Public use of the paved portion of McNaughton's land is a matter of common convenience, necessity, and benefit. McNaughton admits a driver would need to "really work at it" to access the property to the East without driving on his property. (App. 60-61) (Tr. 46:23-47:6). Therefore, acceptance should be presumed. *Wolfe*, 293 N.W. at 324.

In addition, there is clear and convincing evidence that the public accepted the dedication of the paved portion of McNaughton's property. The public has used the paved portion of McNaughton's property, by necessity, for more than twenty (20) years. (App. 92, 99-100) (Tr. 78:4-22, 85:23-86:10). This alone proves acceptance. *See Sons of the Union Veterans*, 641 N.W.2d at 734.

McNaughton does not cite any record evidence in support of the proposition that "only those members of the public who 'were residents, guests and other invitees' of the facility on the Chartiers' property were using the roadway." (Appellant's Proof Brief p. 60). The record evidence is that the paved portion of his property has been used both to reach the assisted living facility and his sister's farming operation to the South. (App. 101) (Tr. 87:1-21). All such use is "as the public wants and necessities demand," which proves acceptance. *Breezy Property*, 2005 WL 67132 at * 3

There is also clear and convincing evidence the City of Lawton accepted the dedication. The City paid for the paving. (App. 354) (Exhibit 17). (App. 357) (Exhibit 19). (App. 360) (Exhibit 20). (App. 361) (Exhibit 21). (App. 363) (Exhibit 22). (App. 364) (Exhibit 23). (App. 172)(Tr. 158:7-12). (App. 216)(Tr. 202:10-18). *See Dillon v. Fehd*, 222 N.W. 881 (Iowa 1929) (in affirming finding of acceptance of public dedication, explaining: "There is, as stated in this case, in addition to user for a long period of years, the testimony of at least one witness that work was done upon the road by township trustees with teams and that a part of it, at least, was graded up. We think this sufficient"). The City informed McNaughton that the City would have sole responsibility for maintenance. (App. 353) (Exhibit 15). The mayor at the time of the paving project characterizes the paved portion of McNaughton's property as a public street without any restrictions on travel. (App. 171-173) (Tr. 157:1-159:19). And, significantly, McNaughton is "sure" he would receive a citation from the City of Lawton if he erected a barrier trying to prevent someone from crossing his property. (App. 97) (Tr. 83:13-18).

The fact that the City has taken the position it does not own the paved portion of McNaughton's property does not preclude a finding of acceptance. *See Sioux City*, 60 N.W.2d at 515 (Iowa 1953) (describing a "common law

dedication of land for a public purpose" as "in no sense a *taking* of land for public purpose" but rather "the owner's *giving* the right or easement for public use – the devotion to public use by the owner").

II. The Easement Agreement Created an Appurtenant Easement for Ingress and Egress.

A. Error Preservation.

AbiliT acknowledges McNaughton preserved error on the issue of whether the easement agreement created an appurtenant easement.

B. Scope and Standard of Appellate Review.

Because the District Court sustained some evidentiary objections during trial and issued "Findings of Fact, Conclusion of Law, and Ruling," the matter should be deemed to have been tried at law. (App. 49, 66, 93-94) (Tr. 35:15-23, 52:8-15, 79:19-80:14). (App. 406) (8-27-19 Findings of Fact). *See City of Riverdale*, 806 N.W.2d at 651; *Gray*, 739 N.W.2d at 860–61; *Ernst*, 522 N.W.2d at 602; *Sutton*, 808 N.W.2d at 748–49.

Review is for correction of errors of law. Iowa R. App. P. 6.907. The District Court's findings of fact have the effect of a special verdict and are binding if supported by substantial evidence. *See Metro.*, 924 N.W.2d at 839 (Iowa 2019); *Revere Transducers,* 595 N.W.2d at 763. "Evidence is considered substantial when reasonable minds could accept it as adequate to

reach a conclusion." *Vance*, 907 N.W.2d at 476. Substantiality of evidence is viewed "in the light most favorable to upholding the trial court's judgment." *Pippen*, 854 N.W.2d at 8. "An appellate court is not free to substitute its own findings of fact for those of the district court simply because the evidence supports different inferences." *Walsh*, 622 N.W.2d at 502.

"When the interpretation of a contract depends on the credibility of extrinsic evidence or on a choice among reasonable inferences that can be drawn from the extrinsic evidence, the question of interpretation is determined by the finder of fact." *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008). "[W]hen the meaning of an agreement depends on extrinsic evidence, a question of interpretation is left to the trier of fact unless "the evidence is so clear that no reasonable person would determine the issue in any way but one."" *Fausel v. JRJ Enterprises, Inc.*, 603 N.W.2d 612, 618 (Iowa 1999) (quoting Restatement (Second) of Contracts § 212 cmt. e (1979)).

Even if this Court engages in de novo review, deference should be given to the district court's findings of fact "because the district court had the opportunity to assess the credibility of the witnesses." *See Horsfield Materials,* 834 N.W.2d at 452.

C. By Granting An Easement for Ingress and Egress, the Easement Agreement Granted An Appurtenant Easement.

"Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it." *Sherwood v. Greater Mammoth Vein Coal Co.*, 185 N.W. 279, 283 (Iowa 1921). Substantial evidence supports the District Court's conclusion that Easement Agreement created an appurtenant easement (which was later dedicated to the public). (App. 420) (8-27-19 Findings of Fact p. 15).

1. <u>McNaughton's admissions prove an appurtenant easement</u>.

McNaughton admits the Easement Agreement created an easement for ingress and egress from Highway 20. (App. 98-99) (Tr. 84:19-85:12). McNaughton also admits a driver would need to "really work at" it to access the assisting living facility without driving on his property designed as the easement area. (App. 60-61)(Tr. 46:23-47:6). These admissions alone support a finding that the express easement was appurtenant.

In *Cassens v. Meyer*, 134 N.W. 543 (Iowa 1912), Meyer executed a deed to Michel with the following reservation: "'To be used as a private road only. In case of abandonment of same as a private road, said road to revert to grantors." *Id.* p. 544. Michel later conveyed back to Meyer the same strip of land with the following reservation: "The said grantor reserves the right to use

said strip of land as a private road." *Id.* The Iowa Supreme Court held the easement was "clearly appurtenant" to Michel's property, explaining:

> Where the nature of the easement is not disclosed by the specific language of the reservation, such reservation must be construed in the light of the circumstances surrounding the parties when it was made. Clearly Michel had no use for the roadway in question except to connect the particular land with the public highway. The use of the roadway was essential to the advantageous use of the farm. If the right to use this roadway would cease with the sale of the farm, then was Michel deprived of a market for the sale of his farm. To our minds, the easement was clearly appurtenant to the land.

Id. at 545.

Similarly, the express easement granted by McNaughton for ingress/egress should be deemed appurtenant. *See also Karmuller v. Krotz*, 18 Iowa 352, 357 (Iowa 1865) (in case involving express language providing that "John Krotz should have the privilege of a road through the land of said Bernhart, so as to enable him to take the nearest and best road to Dubuque," holding "the rights of way are appurtenant"); *Campbell v. Waverly Tire Co.,* Case No. 02-1948, 796 N.W.2d 456, 2003 WL 23008846 at * 1-3 (Iowa Ct. App. 2003) (reservation of easement "for road and driveway purposes to provide a method of ingress and egress to real estate located immediately west of the premises" deemed appurtenant easement); *Rank v. Frame*, 522 N.W.2d 848, 852 (Iowa Ct. App. 1994) ("Based on the facts of this case, we conclude Ranks' easement is appurtenant since it is necessary for ingress to and egress

from the property. The right to the easement is attached to and belongs with the property and is not merely personal to Ranks").

2. <u>The easement agreement and the parties' conduct prove the express easement was appurtenant</u>.

Two provisions in the Easement Agreement describe the easement as for ingress and egress. Paragraph 3 states: "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." (App. 339)(Exhibit 1 p. 4). Paragraph 5 states: "For good and valuable consideration, receipt of which of [sic] 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 …." *Id.* By contrast, Paragraph 6 of the Easement Agreement states:

> The easement rights granted herein are 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 Chariter 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.

Id.

The provisions regarding an easement for ingress and egress are specific and therefore controlling. *See generally McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 573 (Iowa 2002) ("This specific clause trumps the general clause"). Thus, the express easement created an easement for ingress and egress, which is appurtenant. *See Karmuller*, 18 Iowa at 357; *Campbell*, 2003 WL 23008846 at * 1-3; *Rank*, 522 N.W.2d at 852.

Alternatively, the Easement Agreement should be deemed ambiguous. To determine whether a written contract is ambiguous, it is appropriate to consider not only its express terms but "all the circumstances," including the parties' course of dealing. *See Hofmeyer v. Iowa Dist. Court for Fayette Cty.*, 640 N.W.2d 225, 228 (Iowa 2001). When an agreement 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*, 185 N.W.2d at 283.

> When the purpose of an express easement is not clear, a court must ascertain the objectively manifested intention of the parties to the original conveyance in light of the circumstances in existence at the time the easement was made, as well as the physical condition of the premises, and the use of the easement and acts acquiesced to during the years shortly after the original grant.

Halvorson v. Bentley, No. 15-0877, 895 N.W.2d 489, 2016 WL 7403703 at * 11 (Iowa Ct. App. 2016) (quoting 25 Am. Jur. 2d *Easements and Licenses* § 63).

McNaughton has not acted as if he granted only a private easement to the Chartiers. McNaughton allowed the City of Lawton to pave the portion of property defined as the easement area. (App. 345) (Exhibit 2). McNaughton allowed unrestricted public use of the paved portion of his property for twenty (20) years. (App. 92-93) (Tr. 78:4-79:1). (App. 99-100) (Tr. 85:23-86:10). Moreover, after AbiliT purchased the property from his sister, McNaughton never attempted to prevent AbiliT from using the paved portion of his property. *Id.* McNaughton admits AbiliT can use the paved portion of his property. (App. 52, 91) (38:14-22, 77:14-23). McNaughton admits he is not going to interfere with anyone's use of East Char-Mac Drive. (App. 90, 97) (Tr. 76:10-20, 83:6-12). This is strong evidence of an appurtenant easement. *See Wiegmann v. Baier*, 203 N.W.2d 204, 208 (Iowa 1972) ("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"); *McDonnell v. Sheets*, 234 Iowa 1148, 1154, 15 N.W.2d 252, 255 (Iowa 1944) ("We think the construction which the parties placed on the wording of the grant is of considerable

importance"); *Kersey v. Babich,* No. 80-1556, 780 N.W.2d 248, 2010 WL 446995 at * 2 (Iowa Ct. App. 2010) (affirming interpretation of express easement to Babich's predecessor in interest for driveway and landscaping purposes to also allow use by Babich's family, friends, and agents to access the residence/garage because such "interpretation was consistent with the essentially undisputed extrinsic evidence showing Babich's expansive use of the second driveway for more than a decade").

On page 64 of his opening brief, McNaughton argues that "once the Chartiers sold the assisted living facility and land to AbiliT… any continued use required the express permission of McNaughton." (Appellant Proof Brief p. 64). This argument is exactly the opposite of McNaughton's testimony at trial. McNaughton conceded during his trial testimony that AbiliT can use the paved portion of his property – without ever having given express permission to AbiliT. (App. 52, 90, 91, 97) (38:14-22, 76:10-20, 77:15-23, 83:6-12). In addition, on page 29 of his opening brief, McNaughton admits he "generally does not object to AbiliT using the easement area as originally intended." (Appellant Proof Brief p. 29).[4]

[4] On page 30 of his opening brief, McNaughton contends his "main concern in filing this action was to maintain his right to limit any assignment should additional development south occur." (Appellant Proof Brief p. 30). However, the issue of additional development is not even mentioned in the Amended Petition. (App. 519) (Amended Petition).

It is also significant to note that before the Chartiers sold their property to AbiliT, McNaughton represented to his sister that the easement would transfer to AbiliT. (App. 137-138) (Tr. 123:19-124:1). That is, McNaughton agreed that just as the general public had used the paved portion of his property for more than twenty (20) years, so too would AbiliT be allowed to use his property in order to reach the assisted care facility. There is no evidence supporting a finding that the parties intended a private easement terminating when the Chartiers sold their property.

III. The Attorney Fee Award Should Be Affirmed.

A. Error Preservation.

AbiliT agrees McNaughton preserved error regarding the award of common law attorney fees.

B. Scope and Standard of Appellate Review.

"Whether to grant common law attorney fees rests in the court's equitable powers." *Williams v. Van Sickel*, 659 N.W.2d 572, 579 (Iowa 2003). Therefore, review is de novo. *Id.*; Iowa R. App. P. 6.4. *See Hoeppner v. Holladay*, No. No. 06-1288, 741 N.W.2d 823, 2007 WL 2963662 at * 5 (Iowa Ct. App. 2007) (affirming award of common law attorney fees even though the district court "did not employ the correct standard for a common law attorney fee award").

C. McNaughton's Conduct Warrants An Award of Common Law Attorney Fees.

Common law attorney fees may be awarded when the culpability of a defendant's conduct exceeds willful and wanton disregard for another's rights by rising "to the level of oppression or connivance to harass or injure another." *Thornton v. Am. Interstate Ins. Co.*, 897 N.W.2d 445, 475 (Iowa 2017) (quoting *Hockenberg Equip. Co.*, 510 N.W.2d at 159–60). "Willful and wanton" means that "[t]he actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *McClure v. Walgreen Co.*, 613 N.W.2d 225, 230 (Iowa 2000) (quoting *Fell v. Kewanee Farm Equip. Co.,* 457 N.W.2d 911, 919 (Iowa 1990)). Oppressive behavior is "difficult to bear, harsh, tyrannical, or cruel." *Id.* Connivance reflects "voluntary blindness or an intentional failure to discover or prevent the wrong." *Id.*

While McNaughton emphasizes that the Iowa Supreme Court has only upheld an award of common law attorney fees on one occasion, in *Williams v. Van Sickel*, "the treasurer's actions in *Williams* are not the exclusive manner in which a defendant may risk being assessed common law attorney fees; rather they exemplify the tyrannical conduct that justifies such an award."

Schaefer v. Putnam, Case No. 11-1437, 834 N.W.2d 872, 2013 WL 2368819 at * 7 (Iowa Ct. App. 2013).

"Respectful consideration" should be given to the District Court's determination that McNaughton's conduct warrants the imposition of common law attorney fees. *See Wilker v. Wilker*, 630 N.W.2d 590, 594 (Iowa 2001) (under de novo review, "respectful consideration is given to the trial court's factual findings and credibility determinations, but not to the extent where those holdings are binding upon [an appellate court]"). The District Court's findings of fact and credibility were informed by its opportunity to observe the witnesses' demeanor. *See A & R Concrete & Const. Co. v. Braklow*, 251 Iowa 1067, 1071, 103 N.W.2d 89, 91 (Iowa 1960) ("A "trial court with the witnesses before it" is in "a much better position" to decide "questions of fact and credibility" than an appellate court "with only the exhibits and the cold record to aid [it]"); *Loudon v. State Farm Mut. Auto. Ins. Co.*, 360 N.W.2d 575, 583 (Iowa Ct. App. 1984) ("The trial court had the opportunity to observe the demeanor of all the witnesses, and specifically relied on those observations in finding that Hill did not consent. We should defer to such observation instead of forming our own conclusion from the cold record").

McNaughton's conduct was more than willful and wanton – it was "difficult to bear," "harsh," and "cruel." McNaughton was voluntarily blind to and/or intentionally failed to prevent the wrongs he caused. *McClure*, 613 N.W.2d at 230.

McNaughton knowingly allowed the public to use the paved portion of his property to reach an assisted living facility for more than twenty (20) years without restriction. (App. 92)(Tr. 78:4-22). He admits no harm was caused to his property by this use. (App. 107) (Tr. 93:10-12). When his sister became ill and it became necessary for her to sell the facility, McNaughton initially told her that he would not interfere with the sale and acknowledged what he considered to be an easement would transfer to the new owner. (App. 137-138) (Tr. 123:1-124:1). (App. 203-204)(Tr. 189:20-190:8). However, McNaughton later took the opposite position. McNaughton made unrealistic demands for compensation in exchange for the new purchaser (AbiliT) being able to drive on his property. (App. 79-81, 198-203, 219-220)(Tr. 65:17-67:7, 184:11-189:6, 205:5-206:7). (App. 79) (Tr. 65:17-20). As the District Court observed, "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." (App. 421) (Findings of Fact p. 16). The baseless nature of McNaughton's demands is revealed by McNaughton's admissions in this

case that AbiliT is free to use the paved portion of his property. (App. 52, 91) (Tr. 38:14-22, 77:14-23). McNaughton admits he was looking to profit from the sale of the assisted living facility. (App. 421) (Findings of Fact p. 16). (App. 79, 204) (Tr. 65:17-20, 190:9-18). The District Court found: "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." (App. 422) (Findings of Fact p. 17). These findings should be affirmed. *See Johnson v. Ventling, D.O.,* No. 13-0157, 852 N.W.2d 20, 2014 WL 1714966 at * 1 (Iowa Ct. App. 2014) (affirming imposition of common law attorney fees in case involving "fraudulent real estate and personal property machinations"); *Olson v. Elsbernd*, No. 10-0236, 795 N.W.2d 99, 2010 WL 5023241 at * 6 (Iowa Ct. App. 2010) (in affirming common law attorney fees, noting "Glady's pattern of dishonest dealings"); *Kline v. Keystar One, L.L.C.,* No. 99-1649, 2002 WL 681237 at * 7 (Iowa Ct. App. 2002) (affirming imposition of common law attorney fees because conduct by the general partner and corporation such as improper taking of asset "exhibit more than simply a lack of care, and constitute vexation and

oppression"); *Schaefer*, 2013 WL 2368819 at * 7 ("We believe intentionally subjecting his sons to financial liability to mitigate his own loss—especially when his sons involvement appeared to be for the purposes of helping their father in the first place—typifies the connivance the *Hockenberg* court sought to punish when setting the heightened standard for common law attorney fees").

Imposing common law attorney fees for McNaughton's oppressive demands is consistent with the Iowa Supreme Court's view regarding bad-faith negotiations. The Court has explained: "Bad faith in negotiations of a contract may result in the imposition of sanctions, such as invalidation of the contract if fraud and duress are shown. Additionally, tort remedies may be available for bad faith negotiations." *Engstrom v. State*, 461 N.W.2d 309, 314 (Iowa 1990).

Imposing common law attorney fees for McNaughton's oppressive demands is also consistent with long-standing Iowa law regarding acquiescence in the context of property rights. It was unfair and unreasonable for McNaughton to consent to unrestricted public use for decades and then demand large amounts of money for the same use to continue. *See Dugan*, 211 N.W. at 988 ("It is every day's practice to presume a dedication of land to the public use from an acquiescence of the owner in such use"); *Iowa Loan &*

Trust Co. v. Board of Supervisors of Polk County, 174 N.W. 97, 98 (Iowa 1919) ("Mere acquiescence in long-continued use of land as a highway has been held to operate as a dedication of the land to the public use").

Even though McNaughton's demands were baseless, they were very hurtful to the Chartiers at a time when they were dealing not only with Mrs. Chartier's health issues and but also the impending deadline associated with the sale of the facility. In March 2018, Mrs. Chartier expressed to AbiliT her frustration and embarrassment regarding her brother's conduct. (App. 388) (Exhibit 43). She became tearful and emotional at trial testifying regarding the frustration she experienced. (App. 203-204) (Tr. 189:20-190:18).

The District Court also appropriately found McNaughton's motives in connection with this lawsuit to be "vexatious and wanton." (App. 422) (Findings of Fact p. 17). Throughout this litigation McNaughton has taken shifting and unreasonable positions. The Amended Petition seeks monetary damages. (App. 524) (Amended Petition). But, McNaughton admitted at trial his alleged damages relate to the inconvenience he experiences because he can no longer trespass onto AbiliT's property when he backs out of his garage due to landscaping stones placed on AbiliT's side of the property line. (App. 106-108) (Tr. 92:20-94:2). McNaughton testified at trial he was asking the Court to restrict AbiliT from accessing an outbuilding located on AbiliT's

own property that AbiliT can reach from its own property, which is nonsensical. (App. 82) (Tr. 68:18-21); (App. 107) (Tr. 93:1-5). In his opening appeal brief, McNaughton contends he "provided the easement to Jeanine Chartier primarily because she was family and he wanted to help her out." (Appellant's Proof Brief p. 18). However, in November 2018, McNaughton asserted the affirmative defense that "the Easement Agreement dated September 17, 1999 was obtained from McNaughton by way of fraud or misrepresentation." (App. 302)(11-9-18 Amended Reply p. 3). McNaughton takes the position at one point in his opening brief that the express easement was private and therefore not subject to assignment to AbiliT without his express permission. (Appellant's Opening Brief p. 64). But, he testified at trial that AbiliT could use the easement and admits elsewhere in his opening brief he "generally does not object to AbiliT using the easement area as originally intended." (App. 52) (Tr. 38:14-22). (Appellant's Proof Brief p. 29). McNaughton's conduct in this litigation supports the imposition of common law attorney fees. *See Olson v. Elsbernd*, No. 10-0236, 795 N.W.2d 99, 2010 WL 5023241 at * 6 (Iowa Ct. App. 2010) (in affirming imposition of common law attorney fees, noting "less than credible testimony in the fraudulent conveyance case").

D. McNaughton Has Conceded Indemnification and Waived any Possible Argument Regarding His Obligation to Pay for AbiliT's Fees.

McNaughton's argument that he should not be responsible for AbiliT's fees fails on several grounds.

McNaughton has admitted the fact of an indemnification agreement between AbiliT and the Chartiers. McNaughton admits Chartiers' obligation to indemnify in his Statement of Facts, stating: "Due to the pending declaration action, the Chartiers agreed to indemnify AbiliT for any expenses associated with litigation regarding the easement agreement." (Appellant's Opening Brief p. 28-29).[5] Because of this admission, McNaughton has waived any possible argument regarding the existence of an indemnification agreement. *See generally Evans v. Herbranson*, 41 N.W.2d 113, 117 (Iowa 1950) ("This is clearly established by defendants' admission in the 'Statement of Facts' in their printed opening argument, to wit: 'The sellers agreed to comply with Bulk Sales Law, but did not.' This statement quite definitely implies that the defendants, likewise, did not

[5] McNaughton's footnote to this statement reads: "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. (Chartier's Pretrial Br. 13)." (Appellant's Opening Brief p. 29 n. 4).

comply with the law and did not insist upon compliance by the sellers, and were equally at fault with the sellers").

McNaughton cites no law in support of his argument that he "should not be subject to attorney fees that are a contractual obligation negotiated by the Chartiers and/or Char-Mac…." (Appellant's Proof Brief p. 48). The only legal authority cited in this section of McNaughton's brief relates to preservation of error. McNaughton's lack of legal authority constitutes waiver of his ability to dispute his obligation to pay AbiliT's fees. *See Pierce v. Staley*, 587 N.W.2d 484, 486 (Iowa 1998) ("When a party, in an appellate brief, fails to state, argue, or cite authority in support of an issue, the issue may be deemed waived"); Iowa R. App. P. 6.903(2)(g)(3) ("… Failure to cite authority in support of an issue may be deemed waiver of that issue").

E. The Amount of the Attorney Fee Award is Supported by the Evidence and Reasonable.

The Iowa Supreme Court has "often said that the trial court has a considerable discretion in fixing fees in cases in which they are taxable…" *Condemnation of Certain Land v. City of Des Moines*, 119 N.W.2d 187, 188 (Iowa 1963). A district court is considered an expert in reasonableness of attorney fees. *See Landals v. George A. Rolfes Co.,* 454 N.W.2d 891 (Iowa 1990) (in context of fees under Iowa Code chapter 601A, explaining that "the district court is an expert on the issue of reasonable attorney fees"). There is

"no precise rule or formula" for determining an award of fees, and an attorney fee claim "should not result in a second major litigation." *Smith v. Iowa State Univ.,* 885 N.W.2d 620, 626 (Iowa 2016).

A district court "must look at the whole picture and, using independent judgment with the benefit of hindsight, decide on a total fee appropriate for handling the complete case." *Boyle v. Alum-Line, Inc.,* 773 N.W.2d 829, 833 (Iowa 2009).

The District Court's award of fees in the amount of $70,604.14 is supported by the record evidence and reasonable. (App. 397, 400, 403) (Exhibits C-2, C-3, C-4). (App. 480) (Thompson Affidavit). (App. 496) (Collins Affidavit).

CONCLUSION

The District Court's rulings of September 30, 2019 should be affirmed. McNaughton publicly dedicated the paved portion of his property. Alternatively, the express Easement Agreement created an appurtenant easement that transferred to AbiliT. The imposition of common law attorney fees is warranted by McNaughton's conduct, and the amount of the fee award is supported by the evidence.

REQUEST FOR NON-ORAL SUBMISSION

AbiliT respectfully submits that oral argument is not warranted.

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CERTIFICATE OF COST

I hereby certify that the actual cost of printing or duplicating this document (exclusive of sales tax and postage) was $0.00 due to electronic filing.

/s/ Sarah Gayer

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because*:*

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/s/ Sarah Gayer

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of this Final Appellee Brief was served on 2-12-2020, upon the following persons and upon the Clerk of the Supreme Court using the Electronic Document Management System, which will send notification of electronic filing:

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