IN THE SUPREME COURT OF IOWA

NO. 21-0215

RITA MCNEAL and CLIFF MCNEAL
PLAINTIFFS/APPELLANTS

V.

WAPELLO COUNTY, WAPELLO COUNTY BOARD OF SUPERVISORS
DEFENDANTS/APPELLEES

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR WAPELLO COUNTY, IOWA
HONORABLE JUDGE SHAWN SHOWERS
WAPELLO COUNTY CASE NUMBER LALA106019

DEFENDANTS/APPELLEES' FINAL BRIEF

Hugh J. Cain
Brent L. Hinders
Eric M. Updegraff
Daniel J. Johnston

Hopkins & Huebner, P.C.
2700 Grand Avenue, Suite 111
Des Moines, IA 50312
Telephone: (515) 244-0111
Fax: (515) 244-8935
Emails: hcain@hhlawpc.com
bhinders@hhlawpc.com
eupdegraff@hhlawpc.com
djohnston@hhlawpc.com

ATTORNEYS FOR
DEFENDANTS/APPELLEES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ORDINANCES:

RULES:

TEXTS AND TREATISES:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE IOWA DISTRICT COURT CORRECTLY FOUND THE PARTIES' AGREEMENT BARRED PLAINTIFFS' LAWSUIT AND CORRECTLY GRANTED SUMMARY JUDGMENT.

CASES

- *Fausel v. JRJ Enters., Inc.*, 603 N.W.2d 612 (Iowa 1999)
- *Fouts ex rel. Jensen v. Mason*, 592 N.W.2d 33 (Iowa 1999)
- *Hamilton v. Wosepka*, 154 N.W.2d 164 (Iowa 1967)
- *Huber v. Hovey*, 501 N.W.2d 53 (Iowa 1993)
- *Phillips v. Covenant Clinic*, 625 N.W.2d 714 (Iowa 2001)
- *Pillsbury Co., Inc. v. Wells Dairy, Inc.*, 752 N.W.2d 430 (Iowa 2008)
- *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823 (Iowa 2007)

RULES

- Iowa Rule of Civil Procedure 1.981(3)

A. The Parties' Settlement Agreement Prohibits Plaintiffs' Breach of Contract Claim.

STATUTES

- Iowa Code § 331.384(2)

B. No Genuine Issue of Material Fact Exists Regarding Whether the Vehicles were Derelict.

CASES

- *Alta Vista Properties, LLC v. Mauer Vision Center, PC*, 855 N.W.2d 722 (Iowa 2014)
- *Am. Tower, L.P. v. Local TV Iowa, L.L.C.*, 809 N.W.2d 546 (Iowa Ct. App. 2011)
- *Bagelmann v. First Nat'l Bank*, 823 N.W.2d 18 (Iowa 2012)

- *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859 (Iowa 1991)
- *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987)
- *Midwest Management Corp. v. Stephens*, 291 N.W.2d 896 (Iowa 1980)
- *Montgomery Properties Corp. v. Economy Forms Corp.*, 305 N.W.2d 470 (Iowa 1981)
- *Mulger v. Kansas*, 123 U.S. 623 (1887)
- *Peak v. Adams*, 799 N.W.2d 535 (Iowa 2011)
- *Waechter v. Aluminum Co. of America*, 454 N.W.2d 565 (Iowa 1990)

STATUTES

- Iowa Code § 331.384
- Iowa Code § 331.384(2)
- Iowa Code § 331.384(4)
- Iowa Code § 657.1(1)
- Iowa Code § 657.2

ORDINANCES

- Wapello County, Iowa, Code of Ordinances § 40.05(53)
- Wapello County, Iowa, Code of Ordinances § 40.05(75)

TEXT AND TREATISES

- 30 Am.Jur.2d Evidence § 1016 (1967)

ROUTING STATEMENT

The issues presented in this appeal will be resolved by the application of existing legal principles; accordingly, this case should be transferred to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs appealed a ruling granting Defendant's motion for summary judgment. [Ruling, App. 78–83]. Plaintiffs alleged a breach of a settlement agreement reached between the parties in resolution of prior litigation. [Petition p. 3, App. 6; Agreement, App. 21–23]. The district court ruled the settlement agreement barred the Plaintiffs' lawsuit. [Ruling p. 5, App. 82]. The issue on appeal is a matter of contract interpretation.

B. Course of Proceedings

On September 6, 2019, Plaintiffs filed a petition and request for temporary injunctive relief. [Petition, App. 4–8]. The Petition alleged a breach of a settlement agreement that provided the manner and timeline in which derelict vehicles would be removed from Plaintiffs' property. [Petition p. 2, App. 5; Agreement, App. 21–23].

On August 17, 2020, Defendants filed a motion for summary judgment. [Defendants' MSJ, App. 9–11]. Defendants argued the terms of

the settlement agreement prohibited Plaintiffs from maintaining an action about the meaning of the term "derelict vehicles," and that the contract gave Wapello County, Iowa (hereinafter "Wapello County" or "the County"), discretion to determine which vehicles needed to be removed in exchange for foregoing certain statutory remedies for a time. [Summary Judgment Br. pp. 6–7].

On January 11, 2021, the court held a virtual hearing on the contested motion. [Ruling p. 1, App. 78].

On January 20, 2021, the court entered its ruling, granting Defendants' motion for summary judgment. [Ruling p. 5, App. 82]. The court found the settlement agreement barred Plaintiffs' lawsuit. *Id.* The court also found the agreement granted Defendants the right to determine whether the vehicles were derelict. *Id.*

On February 16, 2021, Plaintiff timely filed notice of appeal in Wapello County District Court. [Notice of Appeal, App. 84].

FACTS

The parties reached a settlement agreement that resolved prior litigation. [Petition p. 2, App. 5; Agreement, App. 21–23]. The settlement agreement allowed Plaintiffs additional time to clean their property located at 6052 Madison Avenue, Ottumwa, Iowa. [Agreement p. 1, App. 21].

The agreement set forth a timeline for Plaintiffs to comply. *Id.* Plaintiffs had ninety days from April 1, 2019, to clean the property, including removal of debris and derelict vehicles, and to begin repairing the residence located on the property. [Agreement p. 1, App. 21]. Forty-five days after April 1, 2019, the County was granted the right to come onto the property "to determine what remaining debris, derelict vehicles, or repairs need[ed] to be completed," and then notify Plaintiffs of the additional work needed to be completed within the ninety day period. *Id.* Importantly, the following provision governed the determination of whether vehicles were derelict and provided recourse to the County if Plaintiffs didn't clean the property:

> If the removal of debris, derelict vehicles, and maintenance on the property ***has not been completed to the satisfaction of the County*** by the end of the 90th day (June 30, 2019), ***then the McNeals grant unto the County the right for the County and/or its agents to enter onto the Property and to remove all remaining debris, derelict vehicles, and unrepaired structures***. The County's cost in removing such debris, derelict vehicles, or structures will be assessed against the Property pursuant to provisions of Iowa law, including Iowa Code § 331.384.

[Agreement p. 2, App. 22] (emphases added).

Plaintiff also agreed to waive causes of action related to this:

> Other than the procedure set forth in this Settlement Agreement, the McNeals waive and release any other statutory or common law right to challenge the County's right to enter

> the property and to conduct clean up activities, including any rights against the County's employees, elected officials, or agents.

Id.

Jeff Skalberg, the County Engineer/Zoning Administrator for Wapello County, entered the property on May 16, 2019, as per the agreement. [Skalberg Affidavit p. 1 (DA 6), App. 12]. He observed that no cleanup work had been completed. *Id.* He therefore sent a letter to Plaintiffs on May 21, 2019, documenting his findings. *Id.* After ninety days, plus an additional thirty-five days, on August 5, 2019, Wapello County, at Skalberg's direction, removed sixteen derelict vehicles from the property. [Skalberg Affidavit p. 2 (DA 7), App. 13; 8/27/2019 Letter, Exhibit 3 to Answer (hereinafter "Exhibit 3"), App. 24–25]. Between April 1, 2019, and August 5, 2019, the County refrained from exercising statutory or other remedies to abate nuisances. [Skalberg Affidavit p. 2 (DA 7), App. 13]. On August 27, Wapello County provided Plaintiffs with a letter notifying them of the vehicles that had been removed and giving them an opportunity to claim the vehicles within ten days of receipt of the letter. [Exhibit 3, App. 24–25].

Additional facts will be developed in connection with the legal arguments below.

ARGUMENT

I. THE IOWA DISTRICT COURT CORRECTLY FOUND THE PARTIES' AGREEMENT BARRED PLAINTIFFS' LAWSUIT AND CORRECTLY GRANTED SUMMARY JUDGMENT.

Error Preservation

Defendants agree with Plaintiffs preserved error on the issues presented for appellate review.

Standard of Review

Courts review summary judgment rulings for correction of errors at law. *Pillsbury Co., Inc. v. Wells Dairy, Inc*, 752 N.W.2d 430, 434 (Iowa 2008). Summary judgment must be granted when the record shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 1.981(3). Courts view facts in the light most favorable to the nonmoving party. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001). "A factual issue is 'material' only if 'the dispute is over facts that might affect the outcome of the suit.' " *Id.* (quoting *Fouts ex rel. Jensen v. Mason*, 592 N.W.2d 33, 35 (Iowa 1999)). "A party resisting a motion for summary judgment cannot rely on the mere assertions in his pleadings but must come forward with evidence to demonstrate that a genuine issue of fact is presented." *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007). "Summary

judgment is proper if the only issue is the legal consequences flowing from undisputed facts." *Huber v. Hovey*, 501 N.W.2d 53, 55 (Iowa 1993)).

Discussion

The cardinal principle in constructing contracts is that the intent of the parties must control, and except in cases of ambiguity, this is determined by what the contract itself says. The Iowa Supreme Court has held, "The cardinal rule of contract interpretation is to determine what the intent of the parties was at the time they entered into the contract." *Pillsbury Co., Inc.*, 752 N.W.2d at 436. The interpretation of a contract is a legal issue unless the interpretation depends on extrinsic evidence. *Id*. at 435. "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." *Id.* (quoting *Fausel v. JRJ Enters., Inc.*, 603 N.W.2d 612, 618 (Iowa 1999)). The meaning of a contract "can almost never be plain except in a context." *Id*. (quoting *Hamilton v. Wosepka*, 261 Iowa 299, 313, 154 N.W.2d 164, 171–72 (1967)). Therefore,

> [a]ny determination of meaning or ambiguity should only be made in the light of relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. *But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention.*

Id. (quoting *Fausel*, 603 N.W.2d at 618) (emphasis in original). Accordingly, although extrinsic evidence aids interpretation, "the words of the agreement are still the most important evidence of the party's intentions at the time they entered into the contract." *Id.* A court looks to a fact finder only "[w]hen 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." *Id*. at 436.

Here, the plain language of the agreement establishes at minimum the following: (a) it gave the County the power to determine and identify public health and safety hazards, which, in the context of this case, included derelict vehicles; (b) it empowered Wapello County to abate these hazards if Plaintiffs failed to do so; and (c) it intended to prevent further nuisance litigation by binding Plaintiffs to a waiver of their rights to challenge the County's right to clean Plaintiffs' property if Plaintiffs' failed to do so.

Under the settlement agreement, this court should find Plaintiffs' breach of contract claim is barred as a matter of law. The court should further find there is no genuine issue of material fact about the definition of "derelict" in the agreement. This court should find there is no genuine issue of material fact as to whether the vehicles removed by the County were in fact derelict. This court should find there is no genuine issue of material fact

as to whether the County arbitrarily used its discretion to identify and remove derelict vehicles. On every issue raised on appeal, this court should find Defendants are entitled to judgment as a matter of law.

A. The Parties' Settlement Agreement Prohibits Plaintiffs' Breach of Contract Claim.

Plaintiffs waived their right to bring this lawsuit. The agreement provided:

> Other than the procedure set forth in this Settlement Agreement, *the McNeals waive and release any other statutory or common law right to challenge the County's right to enter the Property and to conduct clean up activities*, including any rights against the County's employees, elected officials or agents.

[Agreement p. 2, App. 22].

Plaintiffs' challenge is clearly subsumed in the waiver. Plaintiffs challenged the removal of vehicles which the County determined were derelict. As established in detail in the following section, the County, rather than Plaintiffs, had the power under the agreement to make this determination. [Agreement p. 2, App. 22]. "[T]he County's right to enter the Property and to conduct clean up activities," includes, and necessarily presupposes, its determination of whether the vehicles were derelict within the context of this agreement.

Plaintiffs waived "statutory and common law" rights and challenges "[o]ther than the procedure set forth in this Settlement Agreement . . ." [Agreement p. 2, App. 22]. This refers to the procedure whereby Plaintiffs would have "additional reasonable time after notice to clean the property." [Agreement p. 1, App. 21]. Specifically, Plaintiffs could bring a challenge if (1) the County did not provide an additional ninety days to remove the vehicles; or (2) the County did not designate vehicles to remove within forty-five days. [Agreement, App. 21–23]. Plaintiffs alleged neither circumstance in their petition. [Petition, App. 4–8]. Plaintiffs also received a substantial benefit from the County deferring its rights under Iowa Code section 331.384(2). Plaintiffs received the benefit of the bargain.

Plaintiffs cannot show Defendants breached the procedures set forth in the agreement. Plaintiffs' challenge to the removal of derelict vehicles goes to a right conferred by the agreement upon Defendants to clean up Plaintiffs property when Plaintiffs failed to do it themselves. Accordingly, Plaintiffs' challenge is within the scope of the waiver provision, and the district court correctly found the Plaintiffs' suit was barred by the settlement agreement.

B. No Genuine Issue of Material Fact Exists Regarding Whether the Vehicles were Derelict.

Because the settlement agreement empowered the County to determine whether the vehicles were derelict, there is no genuine issue of material fact as to the definition of "derelict" in the agreement. The agreement empowered the County to remove "derelict vehicles" to its "satisfaction" if "the McNeals fail[ed] to clean the Property in accordance with Iowa Code § 331.384 and Wapello County Ordinances." [Agreement, App. 21–23]. The '*completed-to-the-satisfaction-of-the-County*' language cannot be cleverly parsed out of the agreement—it was integral to the resolution of the prior litigation and clarified the agreement's intent. The language expressly stated that the parties' dispute would be resolved by allowing the County to determine whether Plaintiffs sufficiently removed derelict vehicles.

A contract will be interpreted as giving one party discretion when the contract clearly requires such an interpretation. *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991). Two provisions in the contract require this 'discretion' interpretation. First, section two of the settlement agreement empowers the County "to enter onto the Property and ***to determine what remaining debris, derelict vehicles, or repairs need to be completed***." [Agreement p. 1, App. 21] (emphasis added). Second, section three of the settlement agreement provides that "[i]f

the removal of . . . derelict vehicles . . . has not been completed ***to the satisfaction of the County*** by the end of the 90th day," then the County may "enter onto the property and remove all remaining . . . derelict vehicles . . ." [Agreement p. 2, App. 22] (emphasis added). This grant of authority forecloses any issues of material fact over the condition of the vehicles removed or the definition of "derelict" in the agreement.

Plaintiffs' extrinsic evidence does not create a fact issue over the definition of "derelict" in the agreement either. Plaintiffs' post-hoc-affidavit testimony reveals nothing about the *mutual intention* of the parties, *Peak v. Adams*, 799 N.W.2d 535, 544 (Iowa 2011), and it ultimately amounts to an attempt "to vary, add to, or subtract from a written agreement." *Montgomery Properties Corp. v. Economy Forms Corp.*, 305 N.W.2d 470, 475–476 (Iowa 1981).

Extrinsic evidence is helpful only to the extent it reveals the parties' *mutual intentions*. *Peak*, 799 N.W.2d at 544. ("Evidence of the parties' *mutual* intent is what matters . . .") (emphasis in original). Further,

> In searching for that intention, we look to what the parties did and said, rather than to some secret, undisclosed intention they may have had in mind, or which occurred to them later. In addition we are guided by another sound principle that has particular application to settlements: in the absence of an express reservation of rights, a settlement agreement disposes of all claims between the parties arising out of the event to which the agreement related.

Id. (quoting *Waechter v. Aluminum Co. of America*, 454 N.W.2d 565, 568 (Iowa 1990)). The Iowa Supreme Court holds that "an undisclosed, unilateral intent" is insufficient to maintain an action for breach of contract. *Id.* at 544–545.

The Plaintiffs' affidavits claim various private intentions held by Rita and Cliff McNeal. [Rita Affidavit, App. 46–50; Cliff Affidavit, App. 26–30]. But the affidavits provide neither direct evidence nor an inference that the settlement agreement did not mean what it said. *Peak*, 799 N.W.2d at 544; [Rita Affidavit, App. 46–50; Cliff Affidavit, App. 26–30]. Even if read in a light most favorable to Plaintiffs, the affidavits do no more than show that at the time they signed the agreement, they "had an undisclosed, unilateral intent" with respect to the vehicles. *Peak*, 799 N.W.2d at 544; [Rita Affidavit, App. 46–50; Cliff Affidavit, App. 26–30]. Plaintiffs have produced no evidence that their private understandings were discussed with Defendants or played any role in negotiations, and Plaintiffs were represented by counsel through negotiation and settlement. Plaintiffs' extrinsic evidence proves nothing about the parties' *mutual* intentions. This is insufficient to alter the legal effect of the agreement. *Peak*, 799 N.W.2d at 544.

The Iowa Supreme Court further holds that "[a]lthough extrinsic evidence may be admissible to explain the real meaning of the parties by the language used in a contract . . . the parole evidence rule forbids the use of extrinsic evidence to vary, add to, or subtract from a written agreement." *Montgomery Properties Corp.*, 305 N.W.2d at 475–476. The rule is based on the principle that:

> when the parties have discussed and agreed upon their obligations to each other and reduced those terms to writing, the writing, if clear and unambiguous, furnishes better and more definite evidence of what was undertaken by each party than the memory of man . . . . The rule rests upon a rational foundation of experience and policy and is essential to the certainty and stability of written obligations. It is designed to permit a party to a written contract to protect himself against perjury, infirmity of memory, or the death of witnesses.

Id. at 476 (quoting 30 Am.Jur.2d Evidence § 1016, at 151–52 (1967)).

The court should reject Plaintiffs' attempt to rewrite the contract through extrinsic evidence interpretation. Plaintiffs are attempting to re-litigate the dispute about the abatement of a nuisance on their property through extrinsic evidence. Plaintiffs' interpretation would essentially remove most salient portion of the contract. Plaintiffs' interpretation would require the court to remove the language ". . . to the satisfaction of the County . . ." from the agreement. [Agreement p. 2, App. 22]. It would require the court to remove the waiver of causes of action from the

agreement. *Id.* It would require the court to remove the language that empowered the County to "enter onto the Property and to determine what remaining debris, derelict vehicles, or repairs need to be completed." [Agreement p. 1, App. 21]. This impermissibly varies and subtracts from the written agreement. *Montgomery Properties Corp*, 305 N.W.2d at 475–476.

Also,

> Because a contract is to be interpreted as a whole, it is assumed in the first instance that no part of it is superfluous; an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.

Iowa Fuel & Minerals, Inc., 471 N.W.2d at 863. Plaintiffs' interpretation renders superfluous the most salient provisions of the agreement.

Plaintiffs' re-litigation interpretation is problematic for another reason: because the contract at issue is a settlement agreement. Iowa law holds that "another sound principle that has particular application to settlements" applies: "in the absence of an express reservation of rights, a settlement agreement disposes of all claims between the parties arising out of the event to which the agreement related." *Waechter*, 454 N.W.2d at 568–569. The purpose of including language that allows the County to "determine what remaining debris, derelict vehicles, or repairs need to be

completed … to the satisfaction of the County," was to foreclose re-litigation about nuisance abatement on Plaintiffs' property. [Agreement, App. 21–23]. The purpose of a settlement agreement in a nuisance action is to prevent litigation about the nature or extent of the nuisance. Plaintiffs cannot claim ignorance of the meaning of "derelict" post hoc and thereby reserve for themselves the right to re-litigate the nuisance abatement matter under the guise of breach of contract.

Plaintiffs are clearly attempting to do just that. Plaintiffs claim Wapello County failed to prove the vehicles were "derelict" under Iowa Code section 331.384 and Wapello County Ordinances. [Plaintiffs' Br. p. 17]. However, section 331.384 contains no definition of "derelict." Plaintiffs therefore rely on Iowa Code section 657.1(1)'s definition of "nuisance," Wapello County Ordinance 40.05(75), which cross references Iowa Code section 657.2, which lists some nuisances. Essentially, Plaintiffs are claiming that Wapello County cannot enforce the settlement agreement, unless Wapello County proves the vehicles were a statutory nuisance. Such an interpretation eviscerates the primary purpose of settling the original statutory nuisance case.

The agreement does not require proof of nuisance under chapter 657 as a condition precedent to the County's removal of the derelict vehicles.

Plaintiffs erroneously read the elements of nuisance *into* the agreement because Plaintiffs are attempting to re-litigate the abatement-of-nuisance issue from the original litigation. Plaintiffs' interpretation defeats the central purpose of the agreement which was to establish a procedure whereby the County could remove the derelict vehicles if Plaintiffs failed to do so and to prevent further litigation of the nuisance issue. Plaintiffs cannot supplant the clear language of the agreement—"to the satisfaction of the County"—with the elements of nuisance and extend this litigation in perpetuity.

The clear purpose of using the term "derelict vehicles" and requiring their removal to the "satisfaction of the County" was to avoid litigation about the meaning of the phrase "nuisance." By its nature, a nuisance law is subject to different interpretations. And the definition of a nuisance can be subjective. As the United States Supreme Court acknowledged, "[l]ong ago it was recognized that 'all property in this county is held under the implied obligation that the owner's use of it shall not be injurious to the community . . . ." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491–492 (1987) (quoting *Mulger v. Kansas*, 123 U.S. 623, 664–665 (1887)). Nuisance ordinances merely codify this long "implied obligation." But here, the parties negotiated a settlement with the assistance of counsel that explicitly identified the categories of nuisances and then explicitly required

their removal "to the satisfaction of the County." [Agreement, App. 21–23]. The intent of this was to avoid a second lawsuit about the meaning of "nuisance."

Additionally, the County did not exercise its discretion arbitrarily, and there is no genuine issue of material fact on this issue either. As established above, the agreement here clearly requires the interpretation that the County had discretion to determine what vehicles were derelict. *Iowa Fuel & Minerals, Inc.*, 471 N.W.2d at 863. Discretion cannot be exercised arbitrarily but rather "in a reasonable manner on the basis of fair dealing and good faith." *Midwest Management Corp. v. Stephens*, 291 N.W.2d 896, 913 (Iowa 1980). The implied duty of good faith and fair dealing inheres in all contracts. *Alta Vista Properties, LLC v. Mauer Vision Center*, PC, 855 N.W.2d 722, 730 (Iowa 2014). " 'The underlying principle is that there is an implied covenant that neither party will do anything which will have the effect of destroying or injuring the right of the other party *to receive the fruits of the contract*.' " *Id.* (quoting *Am. Tower, L.P. v. Local TV Iowa, L.L.C.*, 809 N.W.2d 546, 550 (Iowa Ct. App. 2011) (emphasis added)). But, importantly, the implied covenant of good faith and fair dealing "does not give rise to new substantive terms that do not otherwise exist in the

contract." *Id.* (quoting *Bagelmann v. First Nat'l Bank*, 823 N.W.2d 18, 34 (Iowa 2012)).

Under the agreement, Plaintiffs received "an additional reasonable time after notice to clean the property located at 6052 Madison Avenue, Ottumwa, Iowa." [Agreement p. 1, App. 21]. Pursuant to the agreement, the County did not enter the property until May 16, 2019. [Skalberg Affidavit p. 1 (DA 6), App. 12]. As per the agreement, because Plaintiffs hadn't cleaned the property, Engineer Skalberg sent a letter to Plaintiffs on May 21, 2019, documenting his findings. *Id.* As required by the agreement, Defendants did not enter the property and remove vehicles within the 90 day period. *Id.* In fact, Wapello County waited an additional thirty-five days to enter and remove the sixteen derelict vehicles. [Skalberg Affidavit p. 2 (DA 7), App. 13; Exhibit 3, App. 24–25]. Between April 1, 2019, and August 5, 2019, the County refrained from exercising statutory or other remedies to abate nuisances. [Skalberg Affidavit p. 2 (DA 7), App. 13]. On August 27, Wapello County provided Plaintiffs with a letter notifying them of the vehicles that had been removed and giving them an opportunity to claim the vehicles within ten days of receipt of the letter. [Exhibit 3, App. 24–25].

Further, Plaintiffs received a substantial benefit from the County deferring its rights under Iowa Code section 331.384(2). Wapello County

had the right to perform the required abatement of nuisance and assess the costs against the property in the same manner as a property tax. Iowa Code section 331.384(2). The assessment of costs against the property constitutes a "special assessment" that "is a lien against the benefited property from the date of filing the schedule of assessments until the assessment is paid." Iowa Code § 331.384(4). This "special assessment" has "equal precedence with ordinary taxes and is not divested by judicial sale." *Id.* The contract specifically references the County's forbearance of these remedies. [Agreement p. 1, App. 21].

Defendants gave Plaintiffs every opportunity and then some to remove vehicles from its property and comply with the agreement. Plaintiffs failed to do so, and the Defendants acted according to the express provisions of the settlement agreement. Plaintiffs come forward with no evidence to show Defendant acted arbitrarily or without good faith and fair dealing.

It is finally worth noting that the McNeal's property is zoned R–1, and a "junk or salvage yard" is not permitted. [Skalberg Affidavit, 10/8/2020 (DS' SUPP APP 8–9), App. 66–67; Wapello County, Iowa, Zoning Ordinance (DS' SUPP APP 12–17), App. 70–75]. The zoning ordinance defines a junk or salvage as follows:

> "Junk or salvage yard" means any area where junk or salvage is brought, sold, exchanged, baled or packed,

> disassembled, kept, stored or handled. This definition also includes auto or other vehicle or machinery wrecking or dismantling activities. This definition does not include the processing of used, discarded or salvaged materials as part of a manufacturing operation located on the same property, and contractors' storage yards. The presence on any lot, parcel or tract of land of three (3) or more wrecked, scrapped, ruined, dismantled or inoperative motor vehicles, including implements of husbandry not a part of a farming operation, shall constitute prima facie evidence of a junk or salvage yard. This does not include motor vehicles licensed for the current year as provided by law; and/or up to five (5) motor vehicles legally placed in storage; and/or more than five (5) legally stored vehicles if kept within a completely enclosed building or totally screened from view.

[Wapello County, Iowa, Zoning Ordinance § 40.05(53) (DS' SUPP APP 14), App. 72]. Engineer Skallberg provided by affidavit,

> During the clean-up that occurred, no vehicle had a dealer license plate or had any identification of the current year licensure. Mr. McNeal did bring a dealer license's plate and leaned it against one vehicle for a picture and then took it back with him.

[Skalberg Affidavit, 10/8/2020 (DS' SUPP APP 9), App. 67].

The record evidence refutes Plaintiffs' claim that the County's prior conduct never revealed there was any problem with the vehicles. Wapello County corresponded with Plaintiffs via letter in December of 2002, notifying them they were in violation of the Zoning Ordinance that does not allow them to use their property as a junk or salvage yard. [Wapello County Letter, 12/3/2002 (DS' SUPP APP 10), App. 68]. The letter explicitly raised

the concern about the vehicles and questioned whether they were being stored properly and had their fluids removed. *Id.* In response, Plaintiffs told the County, "[T]he vehicles in question we will remove for the property within 45 days." [McNeal's Letter, 12/14/2002 (DS' SUPP APP 11), App. 69].

Defendants have not acted contrary to good faith and fair dealing towards Plaintiffs, but have an established history of notifying Plaintiffs of derelict vehicles on their property and giving them opportunity to remove them. The circumstances here relating to Plaintiffs' property and the settlement agreement reached gave Plaintiffs no reasonable expectation to believe they could keep inoperative motor vehicles on their property. These circumstances belie any claim of ignorance that these vehicles were within the agreement's purview when it empowered the County to remove the derelict vehicles to the County's satisfaction.

CONCLUSION

The district court rightly found the agreement granted discretion to Defendants to determine whether vehicles were derelict. [Ruling p. 5, App. 82]. The district court rightly found the agreement granted the Defendants "the ability to determine what remaining derelict vehicles need to be removed." *Id.* The district court rightly found that "the removal of the

derelict vehicles is explicitly stated to be at the satisfaction of the Defendants, and grants to the Defendants the right to finish removal." *Id.* The district court rightly found that the determination of dereliction was a right conferred to Defendants by the agreement, not the process by which the vehicles were removed. *Id.* And accordingly, the court correctly held that paragraph 4 of the agreement barred Plaintiffs' suit because it was a challenge to the County's rights under the agreement. *Id.*

For the reasons argued above, this court should affirm the district court's ruling granting Defendants' motion for summary judgment.

STATEMENT ON ORAL ARGUMENT

Defendants requests the case be submitted with oral argument.

Respectfully Submitted,

By: /s/ *Hugh J. Cain*
Hugh J. Cain, AT0001379

/s/ *Brent L. Hinders*
Brent L. Hinders, AT0003519

/s/ *Eric M. Updegraff*
Eric M. Updegraff, AT0008025

/s/ *Daniel J. Johnston*
Daniel J. Johnston, AT0013146

2700 Grand Avenue, Suite 111
Des Moines, IA 50312
Telephone: (515) 244-0111
Fax: (515) 244-8935
Email: hcain@hhlawpc.com
bhinders@hhlawpc.com
eupdegraff@hhlawpc.com
djohnston@hhlawpc.com
ATTORNEYS FOR DEFENDANT/APPELLEE

CERTIFICATE OF COST

I, Daniel J. Johnston, hereby certify that the amount actually paid for printing or duplicating paper copies of this brief in final form is $0.00.

By: /s/ *Daniel J. Johnston*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 4820 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 font.

By: /s/ *Daniel J. Johnston*

CERTIFICATE OF SERVICE

I, Daniel J. Johnston, a member of the Bar of Iowa, hereby certify that on the 29th day of October, 2021, I served the above Appellees' Final Brief by electronic filing thereof to the following:

Matthew G. Sease
Sease & Wadding
The Rumley Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309
Attorney for Appellant

By: /s/ *Daniel J. Johnston*

CERTIFICATE OF FILING

I, Daniel J. Johnston hereby certify that I, or a person acting on my direction, did file the attached Appellee's Final Brief by electronic filing thereof to the Clerk of the Iowa Supreme Court at 1111 East Court Avenue, Des Moines, Iowa 50319 on this 29th day of October, 2021.

By: /s/ *Daniel J. Johnston*