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IN THE SUPREME COURT OF IOWA
No. 22-0038
Dubuque County No. 01311 LACV109349

WILLIAM L. PITZ and LYNN S. PITZ,
APPELLANTS/CROSS-APPELLEES,

vs.

UNITED STATES CELLULAR OPERATING COMPANY OF DUBUQUE, an Iowa Corporation,
APPELLEE/CROSS-APPELLANTS.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR DUBUQUE COUNTY
THE HONORABLE MICHAEL J. SHUBATT, JUDGE

APPELLANTS/CROSS-APPELLEES'
WILLIAM L. PITZ and LYNN S. PITZ
FINAL REPLY BRIEF

Todd J. Locher AT0004721
LOCHER & DAVIS PLC
202 2nd Avenue NW, P. O. Box 7
Farley, IA 52046
Tel: (563) 744-3359
Fax: (563) 744-3350
Email: tlocher@locherlaw.com

ATTORNEY FOR WILLIAM L. PITZ and LYNN S. PITZ,
APPELLANTS/CROSS-APPELLEES

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ARGUMENT

I. THE CLEAR TERMS OF THE OPTION REQUIRED USCOCD TO PROVIDE WRITTEN NOTICE AND PAYMENT OF $20,000 AT THE SAME TIME IN ORDER TO EXERCISE ITS RENEWAL OPTION.

USCOCD argues that the Court should only read Section 3.2 of the Lease Agreement to determine whether USCOCD validly exercised the terms of the lease. USCOCD says "to exercise its option [USCOCD] needed only to (1) give written notice to the Pitzes (2) at least 60 days before the lease's initial term expired." (Appellee's Brief, p. 23). In support of this argument, USCOCD cited *Figge v. Clark*, 174 N.W.2d 432 (Iowa 1970) and *Steele v. Northup*, 143 N.W.2d 302 (Iowa 1966). *Steele* is in inapposite.

The pertinent facts in *Steele* are as follows:

> The option with which we are here concerned did not provide it was to be exercised within a given period of time by payment of a fixed sum of money. Rather plaintiffs were granted leave to exercise the option by a tender of $3904 with interest at six percent, plus taxes, purchase contract payments, seed, fertilizer and necessary expenses, less one-half the value of all 1961 crops.

Steele v. Northup, 259 Iowa 443, 448, 143 N.W.2d 302, 305 (1966)

Steele further provided that: "Second party is to have until the date of March 1st, 1962 to execute this option by tender of the total sum due the party of

the first part as hereinafter set out. * * *." *Id*. at 304. In order for the optionee to calculate the option payment, the optionor had to communicate to optionor the sums expended on the "purchase contract payments, seed, fertilizer and necessary expenses, less one-half the value of all 1961 crops." *Id*. at 305. Despite repeated requests by the optionee for the information, the optionor did not give optionee the information required to compute the option payment. *Id*. at 304. Due to optionor's delay, the optionee brought suit seven days before the expiration of the option period to extend the option purchase date and for an accounting to determine the option purchase price under the option formula. *Id*.

In the instant case, USCOCD required nothing from the Pitzes in order to exercise its option. In Section 3.2 the Lease Agreement, USCOCD was required to give "written notice to Lessor at least (60) days before the expiration of the initial term of this Lease Agreement." (App. 7). The Lease Agreement further provided:

> Lessee **shall pay** to Lessor as full consideration for use of the Leased Premises during the option term, payable in a lump sum **in advance at the exercise of the option**, the amount of Twenty Thousand Dollars ($20,000), adjusted upward by the percentage increase in the Consumer Price Index ("CPI") from the Commencement Date to the first day of the last month of the current lease term.

*   *   *

> If the amount of the CPI increase is not known at the time the option is exercised, Lessee **shall pay Lessor Twenty Thousand Dollars ($20,000) at the time of exercise**, and the balance of the option term rent within thirty (30) days of Lessor's notice of calculation."

(App. 8)(emphasis added).

The Lease Agreement was drafted by or on behalf of USCOCD. (App. 51). When USCOCD drafted the Lease Agreement, it provided a clear way to calculate the option term rent payment that USCOCD must pay the Pitzes "in advance at the exercise of the option." If the CPI was unknown, all USCOCD was required to do is tender "Twenty Thousand Dollars ($20,000) at the time of exercise . . . ." *Id*. Thus, USCOCD designed the terms of the Lease to avoid the precise type of problem the optionee encountered in *Steele* – reliance on the optionor to provide figures necessary for the optionee to compute the option payment. To validly exercise its renewal option, all USCOCD had to do was send a check to the Pitzes in the sum of $20,000 "at the time of exercise." (App. 8). The Iowa Supreme Court held that ordinary contract rules govern the validity of option provisions and that "[t]he contract will be strictly construed if its words are clear and unambiguous." *SDG Macerich Properties, L.P. v. Stanek Inc.*, 648 N.W. 2d 581, 586 (Iowa 2002). USCOCD should be held to the clear and

unambiguous terms of its contract. *Steele* provides no shelter from that rule.

Figge is likewise inapplicable. 174 N.W.2d 432. As in *Steele*, *Figge* involved an option to purchase real estate. Unlike this case: "This agreement is silent as to how this option was to be exercised, and no particular form of notice was provided therein." *Id*. at 433. The optionee in *Figge* evaded the service of the notice of exercise of option and the cashier's check for the option purchase price. *Id*. The optionee sued to enforce the option and the optionor raised the defense that optioner did not receive the option purchase price by the date called for in the option agreement. *Id*. The *Figge* court found that the optioner "willfully dodged service" of the notice of exercise of the option. *Id*. The court further stated:

> All defendants needed to do, after being advised of the acceptance, was to present a deed to the property and accept the consideration agreed upon in the option. This was not done, and nothing appears to indicate simultaneous delivery of the deed and payment of the money at that time was not the fault of the defendants [optionor].

Id. at 436.

Like *Steele*, *Figge* involved real estate that required the optionor to deliver a deed in exchange for the option payment. In this case, USCOCD required nothing from the Pitzes in order to exercise its renewal option. All of the information that USCOCD required to exercise its renewal option was

clearly stated in the Lease Agreement that USCOCD drafted. USCOCD simply needed to send $20,000 along with its written intent to exercise its option within 60 days from the end of the lease. The Pitzes did nothing to prevent USCOCD from doing that. Accordingly, *Steele* and *Figge* do not apply.

A. The Requirement That USCOCD Pay $20,000 in Advance at the Exercise of the Option Was a Condition of Acceptance.

As an escape hatch for USCOCD's failure to timely tender the option term rent, USCOCD advances the argument that the $20,000 option rent payment was a term of performance and was not a condition of acceptance. USCOCD cited a slew of cases to advance that argument. All but two of the cases cited by USCOCD involved options to purchase real estate that required performance by the optionee in order for the optionor to exercise its option. The typical fact pattern for a "payment as a term of performance" case involves an option to purchase real estate where the optionee has a fixed period of time in order to give notice of optionee's intent to exercise the purchase option, and then, after optionor shows proof of good title, the option purchase price must be tendered at closing in exchange for a deed. Other typical facts in these "term of performance" cases is that the optionee

gives timely notice of optionee's intent to exercise the purchase option, but the optionor fails to peform in some manner – usually by failing to deliver optionee proof of good title or by failing to deliver the deed that was to be given by optionor in exchange for the option purchase price. Understandably, under those fact patterns, courts are reluctant to find fault in the optionee when the optionee gave timely notice of its intent to exercise the option but the option purchase payment is delayed due to the optionor's failure to deliver proof of good title or a deed. This fact pattern was present in the following cases cited by USCOCD: *Matter of Est. of Claussen*, 482 N.W.2d 381, 384 (Iowa 1992)(option to purchase real estate that required $5,000 to be paid *at closing* – court rejected argument that payment of $5,000 was required in advance to exercise option.); *Figge v. Clark*, 174 N.W.2d 432, 433 and 436 (Iowa 1970)(option to purchase real estate where optionor ducked service of notice and option payment and refused to tender deed); *Steele v. Northup*, 143 N.W.2d 302, 304-305 (Iowa 1966)(option to purchase real estate and optionor refused to provide details necessary to calculate option payment); *Breen v. Mayne*, 118 N.W. 441 (Iowa 1908)(option to purchase real estate where the optionee gave timely notice of intent to purchase – option payment was due upon the delivery of deed

and proof of "perfect title" which optionor refused to give and instead optionor sold an option to another party) *Welsh v. Jakstas*, 82 N.E.2d 53,56 and 60 (Ill. 1948)(option to purchase real estate - court found optionor waived right to immediate payment by participating in months of negotiation with optionee regarding the terms of the required separate real estate contract called for in the option.); *Horgan v. Russell*, 140 N.W. 99, 100 (N.D. 1913)(option to purchase real estate where optionor sold property to third party during 30 day option period); *Pet. of Hilltop Dev.*, 342 N.W.2d 344, 346-347 (Minn. 1984)(Optionee gave notice of its intent to exercise its purchase option. "We conclude that the parties did not intend to allow [optionor] to avoid its contract by simply refusing to show up at closing").[1]

The fact pattern that is typical in real estate purchase option cases is

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[1] The following cases cited by USCOCD in support of its assertion that the payment of $20,000 was a term of performance were inapposite because the cases have a dissimilar fact pattern or were decided on different grounds: *Foard v. Snider*, 109 A.2d 101 (Md. 1954)(Inapposite because "We do not decide whether a tender was essential or notice of acceptance would suffice in the instant case . . . because . . . the appellees waived any defense they might have that the exercise of the option was not seasonably made or made in proper form."); *Killam v. Tenney*, 366 P.2d 739 (Or. 1961)(involved a broker and real estate owner dispute over real estate commission).

missing here. Here, USCOCD required nothing from the Pitzes to exercise its option. The Lease Agreement unambiguously provides that USCOCD do two things to exercise its renewal option: tender written notice within 60 days from the end of the first lease term and send $20,000 with the notice. (App. 7-8). Unlike the "payment as a term of performance" cases cited by USCOCD, the Pitzes did nothing that interfered with USCOCD's ability to do either. The "payment as a term of performance cases" reward the optionee that performed the duties of the optionee in the face of a non-performing optionor. This is not the case here – USCOCD simply dropped the ball and failed to mail a check for $20,000 at the same time it sent the notice of its intent to exercise its renewal option. The rational behind the "payment as a term of performance cases" does not exist here. Accordingly, the "payment as a term of performance" cases cited by USCOCD do not apply here.

USCOCD cited two other cases that actually support the Pitzes' position that payment of $20,000 was a condition of acceptance: *Lyon v. Willlie*, 288 N.W.2d 884, 889 (Iowa 1980) and *Matrix Props. Corp. v. TAG Invs.*, 609 N.W.2d 737, 742-743 (N.D. 2000). *Lyon* involved a buy/sell agreement that granted the optionee an option to purchase stock that

required the optionee to do two things: provide notice in writing with 60 days and "by making full payment in cash" of the option purchase price within 120 days. *Id*. at 887. The court found that "timely notice and tender of payment are both necessary for the exercise of the option." *Id*. at 889. The *Lyon* Court further stated:

> When an option requires tender of payment, it is not exercised unless payment is tendered before the option expires.

Id. at 888.

Here, the Lease Agreement requires that "Lessee shall pay to Lessor as full consideration for use of the Leased Premises during the option term, payable in a lump sum *in advance at the exercise of the option*, the amount of Twenty Thousand Dollars ($20,000) . . . ." (App. 8)(emphasis added). Like *Lyon*, USCOCD did not exercise its renewal option because it failed to tender payment before the option expired as unambiguously required by the Lease Agreement.

The *Matrix* case likewise supports the Pitzes. *Matrix* involved the option to purchase real estate. In interpreting the option, the court stated:

> The plain language of the option agreement states the option is to be exercised by giving notice to optionor adequately identifying the individual parcel to be purchased. Nothing in the contract requires optionee to tender the purchase price in order to exercise the option.

> Thus, tender of the purchase price is an incident of performance, not a condition precedent to the exercise of the option.

609 N.W.2d at 743.

Here, the renewal option in the Lease Agreement stated in Section 4.2 that the $20,000 was "payable in a lump sum in advance at the exercise of the option" and further stated that $20,000 was due "at the time of exercise." (App. 8). Unlike *Matrix*, the Lease Agreement required USCOCD to tender the option term rent in order to exercise the option. *Id*.

B. The District Court Correctly Refused to Find that USCOCD Was Excused From Timely Tender of the Option Payment Rent on Futility Grounds.

USCOCD cites *Lange v. Lange*, 520 N.W.2d 313 (Iowa 1994) to argue that USCOCD should be excused from timely tendering the option term rent payment because doing so would be futile. USCOCD's argument is based upon speculation and is unsupported by Iowa case law.

The *Lange* case involved a dispute between the heirs of the deceased director of a closely held corporation. One of the arguments advanced in that case was that an option held by one of the shareholders should be voided because the option purchase price was never tendered. 520 N.W.2d 118. In *Lange*, evidence was presented at trial that the parties knew of the

shareholders' intent to purchase the shares pursuant to the option but refused to sign an agreement because they believed it was not a "good deal." *Id.* In this case, there is no track record by the Pitzes of rejecting payments. In fact, there were no negotiations whatsoever between the Pitzes and USCOCD relating to USCOCD's desire to exercise its renewal option. In addition, *Lange* was a suit tried in equity. *Id.* at 115. Several references were made by the court in the *Lange* case that the reviewing court approved of the district court's fashioning of an equitable remedy. *Id.* at 117, 118, 120.

Moreover, USCOCD's claim that the Pitzes would have rejected a timely option payment is based on speculation. Mr. Pitzes' deposition transcript contains the following exchange:

> Q. (By Mr. Underwood) Absolutely. Do you think that when somebody enters a contract, they should keep it?
> **A. A valid one.**

(William Lee Pitz Dep., P. 72:19-22; App. 121).

The above exchange is not evidence that Mr. Pitz would have rejected a payment by USCOCD had it been timely tendered. Since USCOCD did not timely tender option term rent, asking Mr. Pitz if he would have returned a check if it had been properly tendered calls for speculation. Mr. Pitz

testified that he had provided the lease and correspondence at issue in this case to his counsel for review prior to the initiation of this suit. Specifically, William Pitz presented the September 1, 2017 letter on "U.S. Cellular" letterhead to his counsel for review. (William Lee Pitz Dep, p. 16:23-17:2; App. 107). Mr. Pitz testified that he had spoken to his counsel concerning the lease and the renewal option contained therein to determine whether the lease was valid. (William Lee Pitz Dep, p. 30:11-31:17; App. 111). In addition, Mr. Pitz testified the following at trial:

> Q. But you would also agree with me that if your father and mother entered a contract that – where they agreed to a particular rent, that's what they agreed to, right?
> **A. Correct.**
>
> Q. And they should honor that contract, right?
> **A. Correct.**
>
> Q. And in fact I think your deposition testimony was folks should honor valid contracts, right?
> **A. Correct.**
>
> Q. So there's nothing unfair about the rent figure if the contract is valid, right?
> **A. If it is valid, correct.**
>
> Q. Okay. So if the contract is valid, you don't have any dispute with the amount of rent; is that right?
> **A. Right. We wouldn't be here.**

(Tr. 46:15-47:8; App. 200-201)

Mr. Pitz further testified:

> Q. Okay. Mr. Pitz, at your deposition on Page 69 --
> **A. Okay.**
>
> Q. -- I asked you a question at Line 18, "If U.S. Cellular had sent you a check more than 60 days before the expiration of the lease term, would you have agreed that that lease for the second period was valid?"
> **A. I would have had to talk to my counsel.**

(Tr. 47:22-48:4; App. 201-202)

The above exchanges show: (1) that Mr. Pitz would honor a valid contract and (2) if USCOCD would have followed the express terms of the Lease Agreement and tendered the $20,000 option term rent payment more than 60 days prior to the expiration of the lease term, Mr. Pitz would have relied on the advice of counsel as to whether to accept the check. Thus, USCOCD's assertion that a timely tender of its option rent payment would have been futile is not supported by the deposition testimony or the trial testimony. The district court was correct to reject USCOCD's futility argument.

II. THE DISTRICT COURT ERRED BY CONCLUDING THAT AN ENTITY OTHER THAN THE LESSEE COULD EXERCISE LESSEE'S OPTION TO RENEW.

USCOCD argues that the Pitzes' claim that the notice of exercise of option was defective because it was exercised by the wrong party lacks

applicable legal authority. (Appellee's Brief, p. 41). The authority for the Pitzes' argument is the plain language of the Lease Agreement as well as the interpretive rules set forth in *SDG Macerich Properties.* 648 N.W.2d 581. *SDG Macerich Properties* held that ordinary contract rules govern the validity of option contracts and that "[t]he contract will be strictly construed if its words are clear and unambiguous." 648 N.W.2d 581, 586. The clear and unambiguous terms of the Lease Agreement that are relevant to this issue are as follows:

1. The introductory paragraph defines that lessee as "United States Cellular Operating Company of Dubuque, an Iowa Corporation." (App. 6).

2. Section 3.2 provides that the "*lessee* shall have the option to renew this lease agreement for one (1) term of thirty (30) years, at the rental rate set forth in Article Four and upon all other terms and conditions hereof." (App. 7).

3. Article Thirteen provides for the lessee's right to assign lessor's interest in the lease agreement which provides as follows:

> This Lease Agreement and all rights, powers, and privileges granted hereunder shall not be assignable without the written consent of the Lessor, which consent, however, may not be unreasonably withheld or delayed provided, however, that Lessee may without Lessor's consent assign this Lease Agreement and all rights, powers, privileges and obligations hereunder to the legal entity which is the cellular telephone operating company

> which from time to time owns the cellular telephone market served by the cell site located at the Premises. Any such assignment shall be effectuated by an instrument in writing duly accepted by assignee whereby such assignee shall assume and agree to be personally bound by the covenants, agreements, terms and provisions of this Lease Agreement, in which event the assignor shall be released of all further obligations hereunder. Within 60 days from the effective date of such assignment, the assigning party shall cause to be delivered to other party executed copies of the assignment and the acceptance thereof. (App. 11).

The plain language of the Lease Agreement requires the lessee to exercise the option – the lessee is USCOCD. The only way that Dubuque Cellular Telephone, L.P. would have any legal authority to exercise the option of USCOCD would be if USCOCD assigned its interest in the contract to Dubuque Cellular Telephone, L.P. USCOCD presented no evidence at trial that the lessee had assigned its interest in the lease. Even if USCOCD had produced evidence of an assignment, it would be ineffective due to non compliance of the provisions set forth in Article Thirteen of the lease. (App. 11). Accordingly, any notice of exercise of the renewal option from Dubuque Cellular Telephone, L.P. is ineffective.

III. THE DISTRICT COURT ERRED BY FAILING TO AWARD FAIR MARKET RENT FOR THE HOLDOVER PERIOD.

A. Error Preservation and Standard of Review.

USCOCD agrees that the Pitzes preserved error on this issue. The Pitzes agree that the standard of review for the issue of whether the Pitzes should have been awarded fair market rent for the period of USCOCD's holdover tenancy is for correction of errors at law. USCOCD challenged the district court's decision to overrule USCOCD's Motion to Exclude the Pitzes' expert appraiser, Thomas Howe. (Appellee's Brief, p. 44). The standard of review regarding the district court's ruling on USCOCD's motion to exclude Mr. Howe is as follows:

> We review for abuse of discretion discovery rulings on whether to exclude evidence as a sanction for untimely disclosure. '[W]e will not reverse the court's decision to admit evidence unless the record shows prejudice to the complaining party.' We likewise review for abuse of discretion rulings allowing or disallowing expert testimony challenged is untimely and 'accord the trial court broad discretion.' 'An abuse of discretion consists of a ruling which rests upon clearly untenable or unreasonable grounds.'

Hagenow v. Schmidt, 842 N.W.2d 661, 669-670 (Iowa 2014)(citations omitted).

B. Argument.

For the reasons set forth in Appellant's Brief Point III, the district

court erred by failing to award the Pitzes' holdover rent from the date USCOCD's lease expired – November 13, 2018 at 11:59 p.m. to the date USCOCD vacates the Pitz farm. In addition, the district court properly admitted the testimony of the Pitzes' expert appraiser, Thomas Howe.

1. The Howe Report Coupled with the Expert Disclosures Complied with the Iowa Rules of Civil Procedure.

USCOCD complains that the expert report "lacked information about whether the expert had authored any publications in the last ten years, about whether he had testified as an expert in the previous four years, and the compensation he was paid for his testimony." (Appellee's Brief, p. 44-45). All of the required information was disclosed in Plaintiffs' Supplemental Expert Disclosure served on May 10, 2021. (App. 145-147). In compliance with Iowa R. Civ. P. 1.500(2), the Pitzes' Supplemental Expert Disclosure provided the list of publications that the expert authored in the previous 10 years, which were none. (App. 102, 145). In addition, paragraph 5 of the Pitzes' Supplemental Expert Disclosure listed the 12 cases in which Mr. Howe provided testimony as an expert at trial or by deposition in the previous four years. (App. 145-146). Also, paragraph 6 of the Pitzes' Supplemental Expert Disclosure indicated that the compensation that Mr.

Howe received for the preparation of his expert report and his hourly rate for an additional time that he would spend on the case. (App. 146). Accordingly, USCOCD had the information almost four months before trial – well before the 30 day deadline for supplementing expert disclosures.

2. The Pitzes Produced all of the Documents the Expert Relied Upon to Form his Opinion.

USCOCD received the two leases referenced in Mr. Howe's expert report on July 28, 2021. However, USCOCD received Mr. Howe's report on March 2, 2021. (App. 142-143; App. 53-103). All of the pertinent details of all three leases were described in Mr. Howe's report. (App. 80-81). Mr. Howe described the following details concerning each of the comparable leases he considered for his report: (1) the location of the real estate, (2) the year of the lease, (3) the length of the lease, (3) cost of living increases provided in the lease, (4) the amount of the rent. *Id*. USCOCD's brief is completely devoid of any facts showing how USCOCD was prejudiced by receiving the two leases on July 28, 2021.

The district court offered USCOCD the opportunity for a short continuance, 30 days or less. (Tr. 14:1-14; App. 186). Counsel for USCOCD indicated to the court that a continuance was not necessary. (Tr.

14:15-16; App. 186). The district court denied USCOCD's motion to exclude Mr. Howe. (Tr. 14:17-18; App. 186). The district court's decision was not a ruling which rested upon clearly untenable or unreasonable grounds. *Hagenow*, 842 N.W.2d *at 670.*

3. The Pitzes Carried Their Burden to Prove Fair Market Rent.

As plaintiffs, the Pitzes carried the burden of proving their damages for the holdover rent period by preponderance of evidence. *Holliday v. Rain and Hail L.L.C.*, 690 N.W.2d 59, 64 (Iowa 2004). Mr. Howe's determined the fair market rental value of the cell tower site on the Pitz Farm. (App. 53-103). Mr. Howe's report calculated that value as of January 21, 2020 – the date that Mr. Howe viewed the property and less than one year before the trial at issue. (App. 58). Mr. Howe's expert testimony and expert report were more than adequate to sustain the Pitzes' burden of proof fair market rent value for the period of the holdover tenancy.

IV. THE DISTRICT COURT ERRED BY FAILING TO AWARD THE PITZES ATTORNEY FEES.

A. Error Preservation.

The Iowa Supreme Court has stated the following concerning error preservation.

> It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal. The reason for this principle relates to the essential symmetry required of our legal system. It is not a sensible exercise of appellate review to analyze facts of an issue 'without the benefit of a full record or lower court determination[ ].' When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.

Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002)(citations omitted).

The district court stated the following:

> For all of these reasons, the court denies *all* of the declarations sought by Plaintiffs, having found, for the reasons set forth above, the contrary to be true with respect to *each* of said requested declarations. *All* associated claims for relief are denied and this action is dismissed.

(App. 168)(emphasis added).

The Pitzes' Petition at Law contained the following prayer for relief:

> WHEREFORE the Plaintiffs, William L. Pitz and Lynn S. Pitz, pray for judgment against United States Cellular Operating Company of Dubuque and that the Court declare the following:
>
> A. United States Cellular Operating Company of Dubuque has failed to validly exercise its option to renew by failing to pay Plaintiffs the full amount of the option term rent in advance at the time of the exercise of the option;
>
> B. United States Cellular Operating Company of Dubuque failed to provide notice of its intent to exercise its option because said option to renew was made by Dubuque Cellular Telephone, L.P. instead of the proper party,

United States Cellular Operating Company of Dubuque;

C. United States Cellular Operating Company of Dubuque failed to exercise its option because it sent notice to Robert and Dorothy Pitz and not William L. Pitz and Lynn S. Pitz, the title holders of record;

D. The Lease expired at the end of the first lease term which ended November 13, 2018 and that United States Cellular Operating Company of Dubuque be ordered to remove the tower and any structures and to establish fair rent for the period of November 13, 2018 to date equipment is removed;

D. Defendant must issue a corrected 1099-MISC form indicating that the Pitzes did not receive any rent from Defendant in 2018; and

E. Plaintiffs are entitled to court costs, attorney fees, interest and any other relief the Court deems just and proper.

(App. 134).

The district court clearly addressed and rejected "all of the declarations sought by Plaintiffs" and "all associated claims of relief . . . ." (App. 168). A clearer case of issues raised and issues decided by the district court is hard to imagine. For the reasons set forth in Brief Point V of Appellant's Brief, the Pitzes are entitled award of reasonable attorney fees and reasonable appellate attorney fees.

B. Standard of Review.

The Pitzes disagree that the standard of review is for correction of errors at law. The standard of review for a challenge to the district court's grant or denial of attorney fees is for abuse of discretion. *NevadaCare, Inc. v. Department of Human Services*, 783 N.W.2d 459, 469 (Iowa 2010).

V. THE DISTRICT COURT CORRECTLY DENIED USCOCD'S REQUEST FOR ATTORNEY FEES.

A. Error Preservation.

The Pitzes admit that USCOCD preserved error by requesting attorney fees and receiving a ruling denying their request for attorney fees.

B. Standard of Review.

The Pitzes disagree with USCOCD that the standard of review is for correction of errors at law. The standard of review for a challenge to the district court's grant or denial of attorney fees is for abuse of discretion. *Nevada Care, Inc. v. Department of Human Services*, 783 N.W.2d 459, 469 (Iowa 2010).[2]

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[2] USCOCD cites *City of Riverdale v. Diercks*, 806 N.W.2d 643 (Iowa 2011) in support of its claims that the award of attorney fees is for correction of errors at law. That case involved the application of Iowa Code Chapter 22 (Open Records Law). The analysis is inapplicable here.

C. Argument.

On December 1, 2021, USCOCD filed a Motion for Costs and Attorney Fees claiming a right to attorney fees under Iowa Code §§ 625.1 and 625.22 for the first time in the case relying upon an indemnification clause contained in Article Nine of the Lease Agreement. USCOCD is not entitled to an award of attorney fees.

1. USCOCD May Not Recover Attorney Fees in a Post Trial Motion When it Failed to Specifically Plead Attorney Fees.

In *Nelson Cabinets, Inc. v. Peiffer*, the Iowa Court of Appeals stated as follows:

> [W]e conclude attorney fees must be specifically pleaded before they may be awarded. We can find no reason to separate attorney fees from other kinds of special damages to or establish separate rules allowing them to be raised after the trial. Attorney fees are not automatically awarded to a successful party following the entry of judgment simply because they are provided by statute. *See Western Casualty & Sur. Co. v. Southwestern Bell Tel. Co.,* 396 F.2d 351,356 (8th Cir. 1968). The statute only provides the opportunity to claim attorney fees. It is not a substitute for notice provided by pleadings. Furthermore, requiring a claim for attorney fees to be specifically pleaded is consistent with the approach followed in federal courts under Federal Rule of Civil Procedure 9(g). *See generally* 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1310 (2d Ed. 1990). In this case, the Peiffers never claimed attorney fees in the pleadings, at pretrial conference, or at trial. The issue was not tried by consent. Accordingly, we affirm the denial by the district court of the post-trial application for attorney fees.

542 N.W.2d 570, 573 (Iowa App. 1995).[3]

Like the *Peiffer* case, USCOCD failed to specifically plead a claim for attorney fees. Thus, as held in *Peiffer*, USCOCD's claim for attorney fees must be denied.

2. Had USCOCD Pleaded a Claim for Attorney Fees, Article Nine of the Contract Does Not Support An Award of Attorney Fees Against the Pitzes.

The language in the contract relating to attorney fees is set forth as follows:

ARTICLE NINE

Indemnification

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[3] In an unpublished opinion, the Iowa Court of Appeals awarded attorney fees relating to an action on a real estate contract that "authorized a successful party to recover attorney fees and costs '[i]n any action or proceeding relating to this contract'" despite the fact the defendant pleadings did not specifically request attorney fees. *Townsend v. Nickell*, 770 N.W.2d 850, 2009 WL 928697, p. 1 (Iowa App. April 8, 2009)(unpublished opinion). *Townsend* is inapplicable for two reasons – (1) it is an unpublished opinion and not controlling authority and (2) the contract clause at issue in *Townsend* clearly provided that the winner of a suit enforcing the contract recovers attorney fees. IOWA R. APP. P. 6.904(2)(c); *Townsend*, 770 N.W.2d 850 at p.1. In the instant case, USCOCD's claim for attorney fees stems from an indemnification clause and the Lease Agreement does not "[authorize] a successful party to recover attorney fees and costs '[i]n any action or proceeding relating to this contract.'" *Id*. *Townsend* did not involve a declaratory judgment action seeking the court to declare the rights of the parties.

> Lessor shall indemnify and hold harmless Lessee herein from any and all costs, claims, damages and suits arising out of or resulting from or in connection with Lessor's or Lessor's employees', agents', invitees', sub-lessees' or assignees' occupancy, possession, use or management of the Leased Premises and License areas of the Real Estate or any portion thereof or the exercise or enjoyment of their rights and breach of their obligations under this Lease Agreement, including reasonable attorneys' fees.

In *FNBC Iowa, Inc. v. Jennessey Group LLC*, the Iowa Court of Appeals stated:

> An indemnification clause 'does not apply to claims between the parties to the agreement. Rather it obligates the indemnitor to protect the indemnitee against claims brought by persons not a party to the provision.'

759 N.W.2d 808, 811 (Iowa App. 2008).

Assuming arguendo that this Court were to determine that the indemnification clause at issue allows USCOCD to seek indemnification against the Pitzes for attorney fees, USCOCD failed to allege or plead a breach of contract or other action by the Pitzes which would trigger an award for attorney fees under the indemnification clause. In this case, the Pitzes brought a petition seeking a declaratory judgment action asking the Court to declare the rights of the parties with respect to USCOCD's attempts to exercise its renewal option. (App. 133-134). USCOCD made no counterclaim against the Pitzes claiming that the Pitzes (or their

employees, agents, invitees, sublessees or assignees) interfered with USCOCD's use and enjoyment of the leased premises and USCOCD never claimed that the Pitzes breached the Lease Agreement in any way. In fact, no evidence at trial showed that the Pitzes (or their agents) interfered with USCOCD's use of its tower or USCOCD's use of the Pitzes' real estate. The tower is still on the Pitz farm. (App. 113). Assuming without conceding that the indemnity clause allows USCOCD to recover attorney fees against the Pitzes, absent USCOCD pleading and successfully prosecuting a counterclaim against the Pitzes for interference or breach of the Lease Agreement against the Pitzes, USCOCD may not recover attorney fees under the terms of the indemnification clause in the Lease. The district court correctly rejected USCOCD's request for attorney fees.

CONCLUSION

WHEREFORE the Appellants/Cross-Appellees, William L. Pitz and Lynn S. Pitz, pray that this Court remand this case to the District Court to enter judgment against United States Cellular Operating Company of Dubuque to declare or award the following:

A. Declare that United States Cellular Operating Company of Dubuque has failed to validly exercise its option to renew by

failing to pay the Pitzes the full amount of the option term rent in advance at the time of the exercise of the option;

B. Declare that United States Cellular Operating Company of Dubuque failed to provide notice of its intent to exercise its option because said option to renew was made by Dubuque Cellular Telephone, L.P. instead of the proper party, United States Cellular Operating Company of Dubuque;

C. Declare that the Lease expired at the end of the first lease term which ended November 13, 2018 and that United States Cellular Operating Company of Dubuque be ordered to remove the tower and any structures and to pay fair market rent for the period of November 13, 2018 to the date that the tower and all related equipment is removed;

D. Declare that United States Cellular Operating Company of Dubuque must issue a corrected 1099-MISC form indicating that the Pitzes did not receive any rent from United States Cellular Operating Company of Dubuque in 2018;

E. Award the Pitzes reasonable attorney fees in an amount to be determined in post judgment proceedings; and

F. Award court costs, pre and post judgment interest and any other relief the Court deems just and proper.

WILLIAM L. PITZ and LYNN S. PITZ,
Appellants/Cross-Appellees

By: /s/ Todd J. Locher

Todd J. Locher AT0004721
LOCHER & DAVIS PLC
202 2nd Avenue NW
P. O. Box 7
Farley, IA 52046
Tel. (563) 744-3359
Fax (563) 744-3350
Email: tlocher@locherlaw.com

ATTORNEYS FOR
APPELLANTS/CROSS-APPELLEES

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/s/ Todd J. Locher
Signature

May 27, 2022
Date

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2022, I electronically filed the foregoing with the Clerk of the Supreme Court by using EDMS which will send a notice of the electronic filing to the following:

Brandon Robert Underwood
Bret A. Dublinske
FREDRIKSON & BYRON, P.A.
111 E Grand Ave Ste 301
Des Moines IA 50309

/s/ Todd J. Locher