IN THE SUPREME COURT OF IOWA

NO. 23-1356

MERLE BRENDELAND, JANIS BRENDELAND, MEGAN RUSSELL, AND JOSEPH RUSSELL,

Plaintiffs-Appellants,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR STORY COUNTY
THE HONORABLE JENNIFER MILLER, JUDGE

APPELLEE'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Other Authorities:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. IS THERE JURISDICTION OVER THIS APPEAL?

Cases:

Cook v. City of Council Bluffs, 264 N.W.2d 784 (Iowa 1978)
Deng v. White, 941 N.W.2d 360 (Table), 2019 WL 6358427 (Iowa App. 2019)
Evenson v. Winnebago Indus., Inc., 922 N.W.2d 335 (Iowa 2019)
Eves v. Iowa Employment Security Commission, 211 N.W.2d 324 (Iowa 1973)
Explore Info. Servs. v. Ct. Info. Sys., 636 N.W.2d 50 (Iowa 2001)
Gordon v. Wright County Board of Supervisors, 320 N.W.2d 565 (Iowa 1982)
Hawkeye Security Insurance Co. v. Ford Motor Co., 199 N.W.2d 373 (Iowa 1972)
Interest of K.C., 957 N.W.2d 720 (Table), 2021 WL 609081 (Iowa App. 2021)
Iowa Supreme Court Attorney Disciplinary Board v. Mathahs, 918 N.W.2d 487 (Iowa 2018)
Lutz v. Iowa Swine Exports Corp., 300 N.W.2d 109 (Iowa 1981)
Neumeister v. City Development Board, 291 N.W.2d 11 (Iowa 1980)
Palmer v. Hofman, 745 N.W.2d 745 (Iowa App. 2008)
Root v. Toney, 841 N.W.2d 83 (Iowa 2013)
Thayer v. State, 653 N.W.2d 595 (Iowa 2002)

Statutes and Other Authorities:

Iowa R. App. 6.101(1)(b)
Iowa R. App. P. 6.101(4) (2011)
Iowa R. App. P. 6.101(4) (2023)
Iowa R. App. P. 6.102(2)
Iowa R. App. P. 6.102(2)(b)
Iowa R. of Prof'l Conduct 32:5.3(b)

II. DO PLAINTIFFS' CLAIMS IN STORY COUNTY CVCV053090 AND CVCV053167 CHALLENGE DOT'S EXERCISE OF EMINENT DOMAIN AUTHORITY AND THEREFORE ARE THE CLAIMS BARRED BECAUSE THEY WERE NOT TIMELY BROUGHT IN ACCORDANCE WITH IOWA CODE SECTION 6A.24(1)?

Cases:

Bennett v. City of Marion, 106 Iowa 628, 76 N.W. 844 (1898)
Bernau v. Iowa Dep't of Transp, 580 N.W.2d 757 (Iowa 1998)
Castles Gate Homeowners' Association v. K & L Properties, LLC, 991 N.W.2d 796 (Table), 2023 WL 1812849 (Iowa App. 2023)
Clark v. Iowa Dep't of Revenue and Finance, 644 N.W.2d 310 (Iowa 2002)
Harris v. Short, 153 Iowa 1206, 115 N.W.2d 865 (1962)
In re Marriage of Hoffmeyer, 947 N.W.2d 682 (Table), 2020 WL 1887954 (Iowa App. 2020)
Johnson v. Metro. Wastewater, 814 N.W.2d 240 (Iowa 2012)
Johnson Propane Heating & Cooling, Inc. v. Iowa Dep't of Transp., 891 N.W.2d 220 (Iowa 2017)
King v. State, 818 N.W.2d 1 (Iowa 2012)
MidWestOne Bank v. Heartland Co-op, 941 N.W.2d 876 (Iowa 2020)
Milholin v. Vorhies, 320 N.W.2d 552 (Iowa 1982)
Millwright v. Romer, 322 N.W.2d 30 (Iowa 1982)
Planned Parenthood of Mid-Iowa v. Maki, 478 N.W.2d 637 (Iowa 1991) (per curiam)
Snyder v. Davenport, 323 N.W.2d 225 (Iowa 1982)
State v. Lange, 831 N.W.2d 844 (Iowa App. 2013)
Van Baale v. City of Des Moines, 550 N.W.2d 153 (Iowa 1996)
White v. Harkrider, 990 N.W.2d 647 (Iowa 2023)
Witkowski v. Employment Appeal Bd., 756 N.W.2d 480 (Table), 2008 WL 2902064 (Iowa App. 2008)

Statutes and Other Authorities:

Iowa Constitution, Article I, § 18
Iowa Code §4.4(2)
Iowa Code ch. 6A
Iowa Code § 6A.24
Iowa Code §6A.24(1)
Iowa Code § 6A.24(3)

Iowa Code ch. 6B
Iowa Code §6B.3(1)
Iowa Code §6B.3(1)(g)
Iowa Code §6B.3A
Iowa Code § 6B.8
Iowa Code §6B.54(8)
Iowa Code § 306.4(1)
Iowa Code §306.19(1)
Iowa Code § 306A.4
Iowa Code § 306A.5
Iowa Acts 2006, 1st Ex. Sess., ch. 1001, H.F.2351 § 5
Iowa Acts 2006, 1st Ex. Sess., ch. 1001, H.F.2351 § 11
761 IAC § 112.5
761 IAC § 112.5(3)(c)
761 IAC 112.5(5)(f)
Iowa R. App. P. 6.903(2)(g)(1)
Iowa R. App. P. 6.903(2)(g)(3)
14 Am.Jur., Costs, section 63
1A C.J.S. *Actions* § 14 n. 55 (1985)

III. DO ALTERNATE GROUNDS EXIST TO AFFIRM THE DISTRICT COURT'S DISMISSAL OF THESE CASES?

Cases:

Bertran v. Glens Falls Ins. Co., 232 N.W.2d 527 (Iowa 1975)
Duck Creek Tire Service v. Goodyear Corners, 796 N.W.2d 886 (Iowa 2011)
Handlos v. Intercreditor Committee, 838 N.W.2d 870 (Table), 2013 WL 4502325 (Iowa App. 2013)
Hawkeye By-Products, Inc. v. State, 419 N.W.2d 410 (Iowa 1988)
Hunter v. City of Des Moines, 300 N.W.2d 121 (Iowa 1981)
Ostrander v. Linn, 237 Iowa 694, 22 N.W.2d 223 (1946)
Palmer v. State, 888 N.W.2d 902 (Table), 2016 WL 6396168 (Iowa App 2016)
Pavone v. Kirke, 807 N.W.2d 828 (Iowa 2011)
Planned Parenthood of Mid-Iowa v. Maki, 478 N.W.2d 637 (Iowa 1991) (per curiam)
State v. Colvin, 899 N.W.2d 740 (Table), 2017 WL 936173 (Iowa App. 2017)
State v. Hopper, 899 N.W.2d 739 (Table), 2017 WL 936085 (Iowa App. 2017)

Walthart v. Board of Directors of Edgewood-Colesburg Comt. Sch. Dist., 667 N.W.2d 873 (Iowa 2003)
Wilkes v. Iowa State Highway Commission, 172 N.W.2d 790 (Iowa 1969)

Statutes and Other Authorities:
Iowa Code § 6A.24
Iowa Code § 6A.24(1)
Iowa Code § 6B.3A
Iowa Code § 6B.4(2)(a)
Iowa Code § 6B.18
Iowa Code § 6B.25(1)(a)
Iowa Code §25A.14(4)(1985)
Iowa Code §669.14(4) (2023)
761 IAC 112.5(3)(c)
Iowa R. Civ. P. 1.1105
Iowa R. Civ. P. 1.1402(3)
Iowa R. Evid. 5.201(b)(1) and (2)

ROUTING STATEMENT

This appeal can be resolved through application of existing legal principles. Iowa R. App. P. 6.1101(3)(a). This case involves the straightforward application of the filing deadline in Iowa Code section 6A.24(1) to plaintiffs' untimely effort challenging condemnation proceedings undertaken by the Iowa Department of Transportation (DOT). Moreover, there is the issue of whether this appeal is timely as noted by Justice McDermott's order filed November 6, 2023. Consequently, this case is not a good candidate for retention by the Iowa Supreme Court; rather, it should be transferred to the Iowa Court of Appeals.

STATEMENT OF THE CASE

Nature of the Case. This appeal is from Judge Miller's ruling entered in Story County cases CVCV053090 and CVCV053167. Appendix (App.) pp. 184-193; 481-490. Both actions sought the same goal, *i.e.*, to challenge DOT's exercise of eminent domain authority regarding plaintiffs' property. Plaintiffs' response, p. 4, filed June 27, 2023, in CVCV053090 and CVCV053167. App. pp. 172; 469.

Course of Proceedings and Disposition of Case in District Court. Case CVCV053090 was filed March 20, 2023; Case CVCV053167 was filed May 2, 2023. Petitions; App. pp. 8-17; 197-271. Motions to dismiss were

filed by DOT in each action; the motions were resisted by plaintiffs; DOT filed replies to the resistances. *See generally* motions; resistances; replies; App. pp. 18-144: 152-183; 272-321; 397-480.

CVCV053090 and CVCV053167 involved common questions of fact and law. Both sides agreed the two actions could be consolidated. *See* DOT motion to consolidate filed May 25, 2023; plaintiffs' amended response filed June 1, 2023; App pp. 145-151; 390-396. An order consolidating the actions was never entered, but the two cases proceeded as one without objection for hearing on the motions to dismiss on July 20, 2023, and Judge Miller entered one ruling filed in each case on August 1, 2023. *See* ruling, p. 9 ("[T]he Defendant's Motion to Dismiss in each of these cases is granted."); App. pp. 192; 489. Plaintiffs' notice of appeal, however, was not filed with the district court clerk until September 27, 2023, fifty-seven days after the ruling. App. pp. 194-196; 491-493.

Statement of Facts. DOT is making highway improvements at the junction of Highway 210 with Interstate 35 in Story County. To do so it needed to acquire additional property. Some of the property DOT needed was owned by plaintiffs (Merle Brendeland, Janis Brendeland, Megan Russell, and Joseph Russell).

Because the property could not be acquired from plaintiffs by purchase and conveyance, DOT exercised its right to pursue eminent domain to acquire property by submitting its written application to the Chief Judge of Iowa's Second Judicial District. DOT's Exhibit C (application dated January 6, 2023) to motion to dismiss filed April 17, 2023, in CVCV053090; App. pp. 77-78.[1]

The chief judge, through then Assistant Chief Judge Adria Kester, on January 10, 2023, approved DOT's Application for Condemnation and directed the appointment of a compensation commission to appraise the damages from the condemnation. DOT's Exhibit C (orders of Judge Kester) to DOT's motion to dismiss filed April 17, 2023, in CVCV053090. App. pp. 77-80. The date for the compensation commission hearing to determine the damage award was March 21, 2023. DOT's Exhibit C in CVCV053090. App. p. 76.

Plaintiffs asserted various claims for relief based upon injunction, mandamus, certiorari, declaratory relief, and even claimed they should be allowed via a discovery rule to proceed under Iowa Code section 6A.24(1),

[1] Application to the chief judge is required for commencement of condemnation proceedings. Iowa Code § 6B.3(1) ("The proceedings shall be instituted by a written application filed with the chief judge of the judicial district of the county in which the land sought to be condemned is located.").

because their claims were otherwise untimely. Plaintiffs claimed an excessive amount of property was taken by eminent domain, and alleged they had understood they would be able to get a commercial access upon Highway 210 at their property in the southwest quadrant of the intersection of Highway 210 and Interstate 35, only to later learn no such access was permitted. Plaintiffs noted entities in the intersection's other quadrants had access points onto Highway 210 (the Bayer property in the northwest quadrant; the Kum and Go property in the southeast quadrant; the Hale Trailer property in the northeast quadrant). *See generally* petitions in CVCV053090 and CVCV053167; App. pp. 8-17; 197-271.

The law governing access points upon Highway 210, however, had changed shortly before DOT's initiation of the condemnation proceedings. Plaintiffs noted in paragraph 7B of their petition in CVCV053090 "Highway 210 is a 'rural 600' category highway." App. p. 9. In November 2022, a new administrative rule went into effect in respect to rural-600 highways as noted in plaintiffs' petition in CVCV053090 at paragraphs 7A and 8. App. p. 9. Under 761 Iowa Administrative Code (IAC) 112.5(3)(c), in respect to a rural-600 highway, unless it is a Type D access which is typically confined to farm field entrances not relevant here, there must be "a minimum spacing distance of 600 feet from other connections." DOT's Exhibit D filed April 17, 2023,

to DOT's motion to dismiss in CVCV053090 (DOT rules found at 761 IAC 112.5); DOT declaratory order filed as plaintiffs' exhibit 2 on May 2, 2023, in CVCV053167; DOT declaratory order filed in the certified agency record May 24, 2023, in CVCV053167[2]; App. pp. 81-84; 210-221; 264-267; 328-339; 362-363; 382-385.

Therefore, the accesses for the Bayer, Kum and Go, and Hale Trailer properties were developed under a different access regime. Plaintiffs desired commercial access *west* of Station 1035 upon Highway 210. *See* paragraphs 2 and 4, petition filed in CVCV053090; App. p. 8. Plaintiffs were denied the commercial access because they could not comply with the 600-foot spacing requirement of the new rule (761 IAC 112.5(3)(c)). Plaintiffs never claimed their proposed commercial access could comply with the 600-foot spacing requirement; nor did they claim the highway area west of Station 1035 to be encompassed by DOT's condemnation. DOT motion to dismiss filed April 17, 2023, in CVCV053090, pp. 11-13; DOT declaratory order filed as plaintiffs' exhibit 2 on May 2, 2023, in CVCV053167; DOT declaratory order filed in the certified agency record May 24, 2023, in CVCV053167 App. pp. 28-30; 210-271; 328-389.

[2] The certified agency record was filed non-electronically. *See* Iowa R. Elec. P. 16.313(1)(a).

Case CVCV053090 was filed March 20, 2023; Case CVCV053167 was filed May 2, 2023. App. p. 4. Plaintiffs admitted: "Cases CVCV053090 and CVCV053167 challenge the DOT's intended excessive taking of access rights from the Plaintiffs' property." Plaintiffs' response, p. 4, filed June 27, 2023, in CVCV053090 and CVCV053167. App. pp. 172; 469. Therefore, these two cases, as plaintiffs concede, sought to challenge DOT's exercise of eminent domain and the condemnation proceedings. The plaintiffs said they were served with the notice of condemnation assessment on January 29, 2023. Plaintiffs' petition, paragraph 3, filed March 20, 2023, in CVCV053090; App. p. 8. *See also* DOT's Exhibit C (notice of condemnation assessment) to DOT's motion to dismiss filed April 17, 2023, in CVCV053090; App. pp. 70-80. Thus, neither action challenging DOT's eminent domain exercise was filed within thirty days of service of the notice of assessment as required by Iowa Code section 6A.24(1).

Also, pertinent to the factual background is the action Merle Brendeland had previously pursued to enjoin the compensation commission hearing from proceeding on March 21, 2023. Merle Brendeland filed on March 10, 2023, an "Application for Stay or Temporary Injunction" separately docketed in Story County District Court as CVCV053078. *See* DOT's Exhibit Z (Merle Brendeland injunction application in CVCV053078)

filed in CVCV053090 and CVCV053167 on June 20, 2023; *see also* Exhibit A in the certified agency record filed May 24, 2023, in CVCV053167; App. pp. 165-168; 341-368; 462-465.

An evidentiary hearing was held on Mr. Brendeland's application in Story County District Court on March 15, 2023, before Judge Ellefson. Judge Ellefson denied injunctive relief holding there could be no possibility of "irreparable damage" if the compensation commission was allowed to proceed because any damages from DOT's taking as assessed by the compensation commission would be subject to Mr. Brendeland's right to appeal the compensation commission's award to district court for de novo review. DOT's Exhibit B (Judge Ellefson order) filed April 17, 2023, in CVCV053090; Exhibit B in the certified agency record filed May 24, 2023, in CVCV053167; App. pp. 68-69; 369-370. In other words, as allowed by Iowa Code section 6B.18, there was an existing adequate remedy by means of the condemnation appeal process to district court to address any damages plaintiffs claimed were the result of DOT's condemnation.

Plaintiffs appealed the compensation commission's finding to district court in an action now pending as Story County EQCV053107. Ruling, p. 3; DOT's Exhibit A (plaintiffs' notice of appeal) filed in CVCV053090 April 17, 2023; DOT's Exhibit B (plaintiffs' notice of appeal) filed in

CVCV053167 May 24, 2023; App. pp. 57-67; 186; 303-313; 483. Therefore, though plaintiffs through these actions (Story County CVCV053090 and CVCV03167), complain they have been damaged by DOT's taking through condemnation, the fact is while this appeal is being processed, plaintiffs already have an action pending in Story County District Court (EQCV053107) allowing them to pursue damages to recompense them from DOT's taking. Consistent with Judge Ellefson's order denying injunctive relief in case CVCV053078, plaintiffs "will have the opportunity to offer evidence … in the district court on appeal." DOT's Exhibit B filed April 17, 2023, in CVCV053090; Exhibit B in the certified agency record filed May 24, 2023, in CVCV053167; App. pp 68; 369.

Unfortunately, this matter can be succinctly and accurately summarized as follows: This appeal is a needless expenditure of time, money, and judicial resources because plaintiffs already have the opportunity to pursue any damages caused by DOT's taking in the condemnation appeal pending in Story County EQCV053107.

ARGUMENT

I.

THERE IS NO JURISDICTION OVER THIS APPEAL.

The parties, pursuant to Senior Judge Zager's order of September 27, 2023, previously filed statements concerning the jurisdictional question hanging over this appeal. DOT's statement was filed in this appeal on October 12, 2023. DOT continues to rely upon the authority presented in that statement. Justice McDermott, by order entered November 6, 2023, ordered the timeliness of plaintiffs' appeal submitted with this appeal with that issue addressed in the appellate briefs.

Plaintiffs filed their notices of appeal with the district court clerk on September 27, 2023, fifty-seven days after entry of Judge Miller's ruling. Under Iowa R. App. P. 6.102(2), appeal "*is taken by filing a notice of appeal with the clerk of the district court* where the order or judgment was entered within the time provided in rule 6.101(1)(b) (emphasis added)." Iowa R. App. P. 6.101(1)(b) allows thirty days to file the appeal. Timely filing the appeal is jurisdictional. *Root v. Toney*, 841 N.W.2d 83, 87 (Iowa 2013).

Plaintiffs, who bear the burden of establishing jurisdiction, *see Lutz v. Iowa Swine Exports Corp.*, 300 N.W.2d 109, 111 (Iowa 1981), offer no explanation for their late filing. At page 16 of their proof brief plaintiffs

simply state it is "unknown" why they failed to timely file their appeal notices with the district court clerk. Curiously, plaintiffs suggest the Clerk of the Iowa Supreme Court should have notified them there was an "issue" with this appeal. Plaintiffs contend counsel's secretary telephoned the Iowa Supreme Court Clerk about a briefing schedule on September 18, 2023, and was told "one should be issued soon" but no mention was made "of any issue pertaining to this appeal." Plaintiffs' proof brief, p. 16. It is not, however, the job of the clerk to serve as a tickler for plaintiffs.

Plaintiffs cite Iowa R. App. P. 6.101(4) (tolling the time for filing notice of appeal from when the notice was served provided the notice is filed with the district court clerk "within a reasonable time"). Plaintiffs cite to the notice of appeal they filed with the Supreme Court on August 23, 2023, and reason service of that notice via EDMS on August 24th tolled the time through September 27, 2023, when their notice of appeal was filed with the district court clerk. However, the notice filed with the Iowa Supreme Court on August 23rd was not the required notice. It could be, at most, merely the informational copy of a notice of appeal. *See* Iowa R. App. P. 6.102(2)(b).

The separate nature of the jurisdictionally required notice of appeal for filing with the district court clerk highlights a significant point undergirding the tolling provision in Iowa R. App. P. 6.101(4). That rule has been around

for years going back before electronic filing of appeals. *See, e.g.*, Iowa R. App. P. 6.101(4) (2011). The original intent of the rule was to recognize the postal system could be erratic in delivering mail. *See Eves v. Iowa Employment Security Commission*, 211 N.W.2d 324, 326 (Iowa 1973) (reference made to "breakdown" in U.S. mail deliveries). Plus, it was recognized when a document was mailed on the last day of a filing period, it would not reach the clerk's office until past the filing deadline; thus, the filing period was tolled for a "reasonable" time. *However, this process assumed something had been put into the postal pipeline enroute to the clerk for filing within the period provided for taking an appeal.*

Plaintiffs via EDMS filed a notice of appeal with the Supreme Court on August 23, 2023. There was no need to "toll" any filing going to the Iowa Supreme Court on August 23rd because that filing reached its intended destination at the clerk's office in Des Moines. That transaction was completed. However, no notice of appeal was filed in either CVCV053090 or CVCV053167 with the Story County Clerk on August 23, 2023. Nor was any appeal notice going to be filed with the district court clerk absent the "wake-up call" plaintiffs received when Judge Zager issued his order on September 27, 2023. Rule 6.101(4) should not be implicated under these facts; to apply it is to sustain a fiction.

The argument EDMS served notice of the filing on counsel for DOT when plaintiffs filed their notice of appeal with the Supreme Court on August 23rd should be of no aid to plaintiffs. Timely filing the proper notice of appeal is jurisdictional. Strict adherence to the filing deadline requires this Court to dismiss an appeal on its own if the appellate deadline is violated, and even if the issue is not raised by an opposing party. *Explore Info. Servs. v. Ct. Info. Sys.*, 636 N.W.2d 50, 54 (Iowa 2001). Interestingly, in *Neumeister v. City Development Board*, 291 N.W.2d 11, 13-14 (Iowa 1980), when the applicable statute (later amended) required service of a petition for judicial review by mail in order to obtain jurisdiction, but the petition was instead served with the original notices personally, the appeal was dismissed because the requisite method for conferring jurisdiction (the required mailing) had been violated. Dismissal ensued regardless of the fact the other side had actual notice of the petition's filing. Therefore, compliance with the method prescribed to confer jurisdiction is mandatory. It is immaterial whether the other side had actual notice of what its opponent was attempting to accomplish.

Under plaintiffs' theory, the filing with the Supreme Court Clerk on August 23rd tolled the required filing with the Story County Clerk until September 27th. That is a delay of thirty-five days. In *Cook v. City of Council Bluffs*, 264 N.W.2d 784, 787 (Iowa 1978), though it ultimately allowed the

appeal to go forward, the Court noted there had been a delay of twenty-six days from when the notice of appeal was served until it was delivered to the district court clerk. That amount of delay was characterized as presenting a "close" question and "near the line." In contrast, the delay here is thirty-five days from the filing with the supreme court clerk. In *Cook*, the notice of appeal to the district court clerk was routed *at the same time* the notice was served by mail, and the Court found that fact significant in determining what was "reasonable." *Id.*

In *Thayer v. State*, 653 N.W.2d 595, 598 (Iowa 2002), the delay was described as thirty-five days after Thayer served notices on opposing counsel, or thirty-two days between when the notice was due and when it was filed with the clerk. The *Thayer* Court found it had jurisdiction to hear the appeal finding the scenario like *Cook* because: "Thayer sent notice of appeal in a timely manner to the district court clerk, but, for some reason, the notice did not arrive." *Id.* at 599.

The problem here, unlike in *Cook* and *Thayer*, is when the filing was made with the Iowa Supreme Court on August 23, 2023, there was *never* any notice of appeal in transit to the Story County Clerk of Court on that date, or at any other point in time up through and including August 31, 2023, when the time for appeal expired. The notices of appeal were never filed in Story

County until September 27, 2023, the same date Judge Zager's order was issued.

Both *Cook* and *Thayer*, in applying the test for what is a "reasonable" time, noted it meant the time needed for a reasonably prudent and diligent person to conveniently do what the contract or duty requires. *Thayer*, 653 N.W.2d at 599; *Cook*, 264 N.W.2d at 787. That same test was used as recently as 2019 in *Evenson v. Winnebago Indus., Inc.*, 922 N.W.2d 335, 336 (Iowa 2019) (dismissing appeal where the filing delay with the district court clerk was 144 days).

Two unpublished decisions of the Court of Appeals allowed appeals to go forward with a delay of forty-three days in *Interest of K.C.*, 957 N.W.2d 720 (Table), 2021 WL 609081 (Iowa App. 2021), and a delay of "some forty days" in *Deng v. White*, 941 N.W.2d 360 (Table), 2019 WL 6358427 at *2 (Iowa App. 2019). A common thread running through those cases was the untimeliness of an appeal should be excused for various reasons, including (1) opposing counsel knew an appeal was being attempted, (2) the court reporter already filed a transcript, (3) the failure to timely file the appeal with the district court clerk was an inadvertence, etc. In short, "no harm, no foul."

Lack of prejudice should be rejected. This matter is not concerned with the verbiage or formatting used in the body of the appeal as drafted by

plaintiffs. *See, e.g., Hawkeye Security Insurance Co. v. Ford Motor Co.,* 199 N.W.2d 373, 378 (Iowa 1972) (dustup concerning whether an otherwise timely appeal notice sufficiently identified the final judgment from which appeal was taken). Instead, the issue is whether an appeal was *timely filed*, and specifically whether a notice filed with the Clerk of the Iowa Supreme Court on August 23rd, and served by EDMS on August 24th, can nonetheless perform "double duty" by being deemed a form of service of notice of the appeal "in advance" to the district court clerk. It must be "in advance" because at the time the notice was served via EDMS on August 24th, there was no notice of appeal on its way to the district court.

Timeliness of an appeal should not be subject to a "substantial compliance" standard. It could always be argued an appeal taken thirty-one days following a final order is no more prejudicial than one taken thirty days after a final order. However, *the timeliness* of the appeal is jurisdictional. *See Root,* 841 N.W.2d at 87. Ironically, what plaintiffs propose creates actual prejudice. By relying upon the fiction service via EDMS of a notice filed with the supreme court's clerk, can nevertheless be deemed service of a notice of appeal filed with the district court clerk, this Court becomes mired in the form of analysis found in the *K.C.* and *Deng* cases. What is the "reasonable" time to be allowed, and how is it discerned? There is no real means of measurement

beyond employment of ad hoc judgments. The analysis devolves into a sort of "gut feeling" about whether the appeal should be permitted or dismissed. This approach is prejudicial to the uniformity needed in the even-handed administration of justice.

It may be legitimately inferred plaintiffs filed their notices of appeal with the district court clerk *only* because of Judge Zager's September 27th order. What if the order had not been issued until October 26, 2023, and the plaintiffs filed their notices of appeal in district court that date? That would have rendered the delay sixty-three days from August 24, 2023 (when EDMS served notice of the filing in the Supreme Court). We know from *Gordon v. Wright County Board of Supervisors*, 320 N.W.2d 565, 567 (Iowa 1982), a delay of sixty-three days was not allowed. So, a sixty-three-day delay is not allowed, but if plaintiffs have their way, a delay of thirty-four days to thirty-five days is permitted. Where is a time certain line drawn?

Plaintiffs have not sustained *their burden* to establish their delay was "reasonable." They admit they have no clue why the notice was not filed on time in district court, and as noted earlier, they suggest any question concerning the timelines of their appeal is subject to estoppel because when the secretary for plaintiffs' counsel phoned the clerk's office in Des Moines to check on a briefing schedule, they were never informed there was any issue

with the appeal. In their statement filed with this appeal on October 3, 2023, the assertion is made on page 3 plaintiffs' counsel "assumed" his secretary had filed the notice in the district court at the same time the notice was filed with the supreme court clerk.

Deflecting responsibility to others is not consistent with the reasonably prudent and diligent test for determining reasonableness approved in *Cook*, *Thayer*, and *Evenson*. Nor is an effort based upon having "assumed" in keeping with reasonable prudence and due diligence. Lawyers are obliged to take reasonable steps to adequately supervise nonlawyer personnel. *See, e.g.*, *Iowa Supreme Court Attorney Disciplinary Board v. Mathahs*, 918 N.W.2d 487, 493-97 (Iowa 2018) (attorney's supervisory duty to ensure secretary's conduct conformed to obligations imposed upon lawyers); *see also* Iowa R. of Prof'l Conduct 32:5.3(b) (responsibilities imposed upon lawyers regarding nonlawyer personnel). Arguments attempting to justify delay by pointing the finger at nonlawyer staff are not well received. *Palmer v. Hofman*, 745 N.W.2d 745 (Iowa App. 2008) (delay not excused because of paralegal's inaction).

"Good cause" justifying the late filings in CVCV053090 and CVCV053167 has not been established by plaintiffs in this circumstance. This appeal should be dismissed.

II.

PLAINTIFFS' CLAIMS IN STORY COUNTY CVCV053090 AND CVCV053167 CHALLENGE DOT'S EXERCISE OF EMINENT DOMAIN AUTHORITY AND ARE THEREFORE BARRED BECAUSE THEY WERE NOT TIMELY BROUGHT IN ACCORDANCE WITH IOWA CODE SECTION 6A.24(1).

A. Error preservation, scope of review and standard of review.

Plaintiffs at page 16 of their proof brief claim they preserved error by means of their notice of appeal. Error is not preserved by filing a notice of appeal. The plaintiffs' notice of appeal was untimely for reasons discussed above, but even a timely filed notice of appeal has nothing to do with error preservation. *See, e.g., State v. Lange*, 831 N.W.2d 844, 846-47 (Iowa App. 2013) (error is not preserved by an appeal notice). Accordingly, DOT cannot agree plaintiffs preserved error through their appeal notice.

Nor under the Argument portion of plaintiffs' brief is the Court favored with adequate record cites from plaintiffs specifically pointing out where issues were raised and decided. *See* Iowa R. App. P. 6.903(2)(g)(1). Nonetheless, DOT acknowledges the issue of the application of Iowa Code section 6A.24(1) to this case, and whether it was plaintiffs' exclusive remedy, was raised by DOT's motions and decided by Judge Miller. *See, e.g.*, DOT motion to dismiss filed April 17, 2023, in CVCV053090, pp. 5-7, 9-14; 20-

28, 33, 36-37; DOT reply filed June 8, 2023, in CVCV053167, pp. 5-6, 10-11, 17-20; Ruling, pp. 4-9; App. pp. 22-24; 26-31; 37-45; 50; 53-54; 187-192; 423-424; 428-429; 435-438; 484-489.

The scope and standard of review for this appeal is for correction of legal error. *White v. Harkrider*, 990 N.W.2d 647, 650 (Iowa 2023).

B. The governing law of Iowa Code section 6A.24.

Plaintiffs reach back in time at pages 18 through 21 of their proof brief trotting out a hodgepodge of older cases which plaintiffs, at page 18, contend "establish the Iowa Common Law right of a property owner to *challenge a condemnation* as being excessive." (Emphasis added). Before going further, this quoted portion from plaintiffs' brief leaves no doubt what plaintiffs are up to with Story County CVCV053090 and CVCV053167. They are *challenging* the condemnation proceedings DOT initiated.[3] Plaintiffs are claiming too much land was taken.

All the cases cited in plaintiffs' brief under the heading "Common Law" were decided prior to 2006. Judge Miller also noted this. Ruling, p. 8 ("The cases cited by Plaintiffs all occurred before the enactment of Iowa Code

[3] DOT, as part of its jurisdiction over the primary highway system, *see* Iowa Code § 306.4(1), may exercise eminent domain through condemnation proceedings pursuant to Iowa Code section 306.19(1). *See also* Iowa Constitution, Article I, § 18 (State's power of eminent domain).

Section (*sic*) 6A.24(1) in 2006."); App. pp 191; 488. This includes *Comes*, *De Penning*, *In Re Condemnation of Certain Rights*, *Mann*, *Owens*, *Thompson*, and *Vittetoe*. Why is 2006 significant? It was 2006 when today's Iowa Code section 6A.24(1) was passed and went into effect. *See* Iowa Acts 2006, 1st Ex. Sess., ch. 1001, H.F.2351 § 5, effective July 14, 2006. Iowa Code section 6A.24(1) (2023) provides in relevant part:

> An owner of property described in an application for condemnation may bring an action challenging the exercise of eminent domain authority or the condemnation proceedings. Such action shall be commenced within thirty days after service of notice of assessment pursuant to section 6B.8 by the filing of a petition in district court.

Also, in 2006 when the statutory language found in Iowa Code section 6A.24(1) was first enacted, the legislature in Iowa Acts 2006, 1st Ex. Sess., ch. 1001, H.F.2351 § 11, effective July 14, 2006, adopted the present Iowa Code section 6B.3A (2023) which provides:

> An owner of property described in an application for condemnation may bring an action to challenge the exercise of eminent domain authority or the condemnation proceedings in the district court of the county in which the private property is situated as provided in section 6A.24.

Iowa Code section 6A.24 is in Iowa Code chapter 6A pertaining to "Eminent Domain Law (Condemnation)" and Iowa Code section 6B.3A is in Iowa Code chapter 6B pertaining to "Procedure Under Eminent Domain."

There is no dispute plaintiffs' property was described in the application for condemnation. The condemnation application attached the notice of condemnation describing the property and is found in the record as DOT's Exhibit C, filed April 17, 2023, in CVCV053090. App. pp. 70-80. Judge Miller deemed Plaintiffs served with notice of the condemnation assessment on January 29, 2023. Ruling, p, 5; App. p. 188; 485. Plaintiffs conceded: "Cases CVCV053090 and CVCV053167 challenge the DOT's intended excessive taking of access rights from the Plaintiffs' property." Plaintiffs' response, p. 4, filed June 27, 2023, in CVCV053090 and CVCV053167. App. pp. 172; 469. Neither CVCV053090 nor CVCV053167 was commenced within thirty days of January 29, 2023.

Iowa Code section 6A.24(1) was clearly implicated. The two actions were untimely when measured against the statute's thirty-day limitation period. Plaintiffs recognize they have no viable means to sue under Iowa Code section 6A.24(1). That is why they claim entitlement to proceed on some basis outside the scope of Iowa Code section 6A.24(1).[4]

[4] Plaintiffs in district court claimed section 6A.24(1) should be subject to a discovery rule as a way to extend the filing deadline. The word "discovery" appears but twice in plaintiffs' appellate brief, *see* proof brief, p. 33, where plaintiffs itemize the counts in their petition filed in CVCV053090, referencing a Count III concerning a "Discovery Date Rule." This illustrates another deficiency with plaintiffs' brief. Plaintiffs can list claims made in the petition all they wish. However, by simply listing claims made under various

The Iowa case law in relation to Iowa Code section 6A.24(1) has supported dismissal of untimely claims. When a landowner sought to challenge the condemnation proceedings beyond the thirty-day period allowed under section 6A.24(1), the claim was barred as untimely. *See Johnson Propane Heating & Cooling, Inc. v. Iowa Dep't of Transp.,* 891 N.W.2d 220, 225 (Iowa 2017):

> The district court was without authority to hear Johnson Propane's uneconomical remnant challenge. Therefore, we affirm the judgment of the district court finding Johnson Propane's petition claiming it was left with an uneconomical remnant was untimely under Iowa Code section 6A.24(1) and dismissing the action.

Johnson Propane, not unlike the case here, involved an untimely effort to challenge DOT's eminent domain exercise by raising an issue concerning the amount of land taken through condemnation. The plaintiff in that case claimed DOT had engaged in a partial taking which caused the remaining property to become an "uneconomical remnant." In other words, not enough land was taken according to the plaintiff in *Johnson Propane*. Here, the opposite claim is made with plaintiffs contending DOT took too much property by condemnation. Either way, the challenge is being made to DOT's

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counts in their pleadings, while declining to offer any substantive supportive argument in their brief with citation to authority, plaintiffs waive the claims listed. *See* 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.").

exercise of eminent domain and the resulting condemnation proceedings. Like *Johnson Propane*, the actions brought in this matter were untimely efforts to contest DOT's eminent domain exercise.

In *Castles Gate Homeowners' Association v. K & L Properties, LLC,* 991 N.W.2d 796 (Table), 2023 WL 1812849 (Iowa App. 2023), the condemnation notice was claimed to be deficient, and other alleged deficiencies were raised including whether the taking was for a public purpose and whether property being condemned was the nearest feasible route to an existing public road. 2023 WL 1812849 at *1, 3-4. The action asserting these challenges was commenced thirty-one days after service of the notice. Being just one day late proved fatal to those claims:

> Because the Association's petition for judicial review was filed more than thirty days after that notice was served, we agree with the district court the petition was untimely under section 6A.24(1). As a result, the court correctly concluded that it had no authority to consider the petition. *See Johnson Propane Heating & Cooling, Inc. v. Iowa Dep't of Transp.*, 891 N.W.2d 220, 225 (Iowa 2017).

Id. at *5.

C. Iowa Code section 6A.24 supplants the common law.

Plaintiffs argue section 6A.24 is cumulative. They argue it does not supersede the common law and creates no rights unknown at common law. This errant assertion is made as part of their notion their claims are undeterred

by the thirty-day limit in Iowa Code section 6A.24(1); instead, that remedy, in their view, is a mere option and they can challenge the condemnation proceedings outside the thirty-day limit in other ways such as through injunction, mandamus, or certiorari.

First, it is important to consider how plaintiffs' assertion runs afoul of the obvious reason behind the legislature's adoption of Iowa Code sections 6A.24 and 6B.3A in the first place. Those provisions were enacted to provide an unequivocal statutory right to parties who were the subject of a condemnation action to challenge the proposed condemnation, but to raise that challenge at the outset of the proceedings so the propriety of the government's proposed taking could be resolved early on. Plaintiffs' theory would permit them to disregard the thirty-day limitation period in section 6A.24(1), wait while a highway authority lets a contract for a highway improvement project, but then come roaring in while the project is underway with a lawsuit for injunction holding the completion of the project hostage to litigation.[5]

The public interest and public safety are jeopardized by plaintiffs' approach to section 6A.24. At some point public works need to be able to proceed free of litigation threat. Sections 6A.24 and 6B.3A serve that purpose

[5] Plaintiffs' approach renders section 6A.24 meaningless. The statute's time limitation, in plaintiffs' view, can always be bypassed. This violates Iowa Code section 4.4(2) (entire statute presumed to be effective).

by allowing property owners the right to contest the proposed condemnation but requiring the challenge be asserted early in the process within thirty days after service of notice of the proposed exercise of eminent domain.

Nor are the concerns above hypothetical. This case shows the sort of mischief which can occur if section 6A.24 is cast aside as a mere cumulative exercise by Iowa's legislature. For example, under the terms of their petition in CVCV053167 as shown by their prayer at page 10, plaintiffs astoundingly sought a form of specific performance under which the district court would assume authority to order DOT to give plaintiffs a commercial access to Highway 210 "600 feet" from the I-35 and Highway 210 interchange reconstruction project "opposite the Bayer property's commercial access to Highway 210," or if it was determined DOT may acquire 1,000 feet of access rights, then under plaintiffs' offbeat formulation, the court was alternatively invited *to order* DOT to acquire from Bayer (who is not a party to this action), 1,000 feet of access rights and create new commercial accesses for plaintiffs and Bayer "opposite of each other" while ordering DOT to "extend any driveway under Section (*sic*) 306.19(2), Code of Iowa, to comply with 761 IAC § 112.5(3)(c)." App. p. 206.

It is anyone's guess where any Iowa court would get the jurisdictional authority to effectively become a highway designer with power to direct the

highway's layout to fit plaintiffs' desires. Plaintiffs would apparently have the court simply ignore the 600-foot spacing requirements imposed by the new rule in 761 IAC 112.5(3)(c).[6] But the point is, plaintiffs have proposed this while this highway project is ongoing. This is why there is wisdom in the legislature's enactment of section 6A.24 which grafts a new scheme upon Iowa eminent domain law requiring challenges to condemnation proceedings be made on the front end before the inevitable time and expense of a major public improvement project is incurred. Section 6A.24 clearly promotes the public interest in a way the common law did not.

Plaintiffs bizarrely seek to avoid the clear holding in *Johnson Propane* by suggesting because that case involved an uneconomical remnant issue, it triggered section 6A.24(1) since, in plaintiffs' view, there was no pre-existing common law right to make challenges based on an uneconomical remnant. *See* plaintiffs' proof brief, p. 26. They claim the right to litigate concerns about uneconomical remnants came about only because of the legislature's enactment in 1989 of what today is Iowa Code section 6B.54(8) concerning

[6] The rule was adopted to enhance highway safety by reducing the potential for crashes which occurs when too many access points are situated in relation to each other. DOT declaratory order pp. 8-9 filed by plaintiffs as their exhibit 2 on May 2, 2023, in CVCV053167; DOT declaratory order pp. 8-9 filed in the certified agency record on May 24, 2023, in CVCV053167; App. pp. 217-218; 335-336.

uneconomical remnants. First, it is important to note Iowa Code section 6B.54(8) did not alter what damages could be obtained in condemnation actions; instead, it was a statutory direction to acquiring agencies concerning the "policies" they are to follow when condemnation is sought.

Section 6B.54(8) merely provides if the acquiring agency finds its condemnation has created an uneconomical remnant, the acquiring agency should make an offer to acquire the entire parcel. However, that does not mean damages could not be previously obtained if an uneconomical remnant was created. If in a partial taking the remaining property is damaged and no longer economical, litigants have always had the right in condemnation actions to pursue the damages done to the remainder. *See Johnson v. Metro. Wastewater*, 814 N.W.2d 240, 246-47 (Iowa 2012) (damages in a partial taking measured by a before-and-after formula whereby damages are the difference between the fair market value of the whole property beforehand versus the fair market value of the property remaining after condemnation without concern for any benefit caused by the condemnation).

Therefore, if in a partial taking the remainder was an uneconomical remnant with a value of zero, a litigant would be able to seek damages as the difference in value to the entire property immediately before the taking and compare that to the value of the property afterwards (zero) if the remaining

property was truly damaged to that extent. That has been the law for well over a century. *See, e.g., Bennett v. City of Marion*, 106 Iowa 628, 635, 76 N.W. 844, 846 (1898) (upholding the rule the proper measure of condemnation damages is the difference in the fair market value of the whole property before and the fair market value of the remaining property following condemnation).

Therefore, any notion *Johnson Propane* can be limited in its precedential value to uneconomical remnant issues on the unfounded ground there was never the right to recover damages caused by an uneconomical remnant until the legislature's adoption of section 6B.54(8), is wrong. *Johnson Propane* stands for the proposition if a party is going to make challenges to the exercise of eminent domain authority, those challenges must be brought within thirty days of service of the condemnation notice. Otherwise, the challenges are time-barred.

Plus, in respect to both the *Johnson Propane* and the *Castles Gate* decisions, where in those opinions is there the suggestion the affirmance of the dismissals of those actions on appeal was without prejudice because those plaintiffs could simply return to court challenging the exercise of eminent domain or the condemnation proceedings on some alternate ground as if section 6A.24 had never been adopted by the legislature? No such formulation is found in those decisions. Each decision noted the lack of

authority in the district court to entertain the claim. For instance, because the actions had been filed beyond the thirty-day period in section 6A.24(1), in *Johnson Propane* the Supreme Court held the district court was "without authority" to proceed, 891 N.W.2d at 225, and in *Castles Gate* the Court of Appeals stated the district court had "no authority" to consider the petition, 2023 WL 1812849 at *5. "Without authority" and "no authority" are words of finality. Those words leave no doubt allowing the plaintiffs to do an "end run" around the thirty-day time limit in section 6A.24(1) by filing claims on some other basis was not contemplated.

Plaintiffs, it should be noted, engage in an amazing display of distortion concerning the *Castles Gate* opinion. They suggest the decision holds there is no new right created by section 6A.24 which did not exist at common law, and they further claim the decision affirmed the statute did not supersede common law because it is "merely" a new remedy for a preexisting right. Plaintiffs' proof brief, p. 23. In other words, according to plaintiffs, the Court of Appeals in *Castles Gate* ruled section 6A.24 to be cumulative. It did no such thing.

The Court of Appeals in *Castles Gate* noted Iowa Code section 6A.24(1) had been adopted with the purpose of providing a statutory avenue for property owners to challenge the exercise of eminent domain authority or

the condemnation proceedings. 2023 WL 1812849 at *3. That is clearly true. However, the language plaintiffs rely upon for their contorted representation in their appellate brief concerning the decision in *Castles Gate* comes from footnote 2 of the decision, quoted in their brief, which provided:

> This statutory right [referring to section 6A.24] was added by amendments to the condemnation statutes in 2006. *See* 2006 Iowa Acts ch. 1001, §§ 5, 11. Before those amendments, owners "wishing to challenge issues regarding the propriety of condemnation" had to resort to "the traditional procedural vehicles" of injunction, mandamus, and certiorari.

2023 WL 1812849 at *3, fn.2 (citation omitted).

The logical interpretation of the above-quoted passage is the Court of Appeals noted the legislature adopted section 6A.24 creating this new statutory right in 2006, whereas "[b]efore those amendments," 2023 WL 1812849 at *3 fn.2, parties were consigned to injunction, certiorari, or mandamus. In other words, section 6A.24(1) supplants what the practice was before its adoption. Additionally, the Court of Appeals in *Castles Gate* expressly noted the "clock" limiting the time for bringing challenges to the exercise of eminent domain authority and the condemnation proceedings when it observed:

> The statute that we are concerned with here is section 6B.8 – the notice of assessment *that starts the thirty-day clock in section 6A.24(1) for the filing of the petition for judicial review.*

2023 WL 1812849 at *3 (emphasis added).

In other words, if a claimant challenging the acquiring agency's exercise of eminent domain or the condemnation proceedings fails to bring the action within the thirty-day parameter of the "clock" in section 6A.24(1), the claim becomes untimely. Plaintiffs, try as they might, cannot spin *Castles Gate* in favor of their position in this case; rather, the decision wholly supports DOT.

Plus, Iowa Code section 6A.24 creates a new statutory right unlike anything available at common law. First off, if a party files a timely action challenging the exercise of eminent domain or the condemnation proceedings, the burden is imposed upon the acquiring agency to show the propriety of the taking, including proof the proposed acquisition is for a public purpose or public use. *See* Iowa Code § 6A.24(3). At common law, the party bringing an action would bear the burden of proof, and in the case of a claim seeking to enjoin the taking, that would require a heavy burden to show "irreparable" harm and the lack of any other adequate remedy. *Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 639 (Iowa 1991) (per curiam) (proof needed to obtain an injunction). Allowing the filing of suit, but then imposing a burden of proof upon the defendant to the suit, is a definite change from the common law.

Similarly, in section 6A.24(3), should the party bringing the challenge

to the exercise of eminent domain prevail, then the acquiring agency becomes liable for the challenging party's attorney fees. No such right existed at common law. *See Harris v. Short*, 153 Iowa 1206, 1208, 115 N.W.2d 865, 868 (1962), quoting 14 Am.Jur., Costs, section 63 at 38: "The right to recover attorneys' fees from one's opponent in litigation as a part of the costs thereof does not exist at common law." This represents another dramatic change from the common law in the legislature's adoption of section 6A.24.

Nor, as plaintiffs suggest, does a statute have to recite it is the exclusive method to be deemed the exclusive remedy. When the legislature creates a new statutory right, couples the new right with a corresponding liability unknown at common law, and prescribes the method for enforcing the new right, the statutory method must be pursued exclusively. Iowa Code sections 6A.24 and 6B.3A do indeed create new rights, and the provisions prescribe the method for the enforcement of those rights as part of an overall statutory scheme.[7] *See also Van Baale v. City of Des Moines*, 550 N.W.2d 153, 155-

[7] That the legislature would place section 6A.24 in chapter 6A pertaining to "Eminent Domain Law (Condemnation)," and at the same time insert in chapter 6B pertaining to "Procedure Under Eminent Domain" section 6B.3A directing parties to the right to challenge the exercise of eminent domain authority or the condemnation proceedings "as provided in section 6A.24," is itself evidence the law and procedure for making such challenges had been altered. It offers a strong indication of legislative intent to render section 6A.24 the exclusive method for enforcement of the right it created.

156 (Iowa 1996), quoting 1A C.J.S. *Actions* § 14 n. 55 (1985); *Snyder v. Davenport*, 323 N.W.2d 225, 227 (Iowa 1982).

Iowa Code sections 6A.24 and 6B.3A, therefore, represent a very substantial change to the common law because (1) a new right was created by section 6A.24(1) allowing an explicit statutory right to challenge the exercise of eminent domain authority and the condemnation proceedings, (2) if the right is pursued there is a burden transferred to the acquiring agency to demonstrate as part of that action the acquisition was for a proper public purpose or use, and (3) the challenger, if the challenge is sustained, is to be awarded attorney fees. The addition of section 6A.24 to chapter 6A and section 6B.3A to chapter 6B (both chapters dealing with Iowa's law and procedure pertaining to eminent domain) reflects the sort of "comprehensive scheme for dealing with a specified kind of dispute" referenced in *Van Baale*. 550 N.W.2d at 156. The right of action created by section 6A.24(1) meets the criteria for deeming section 6A.24(1) the exclusive method for challenging the exercise of eminent domain authority and the condemnation proceedings.

D. There was no excessive taking, but any claim the taking was excessive needed to be timely brought pursuant to Iowa Code section 6A.24(1), which plaintiffs failed to do.

Plaintiffs assert argument under the heading of "Excessive Taking" in their brief. Proof brief, p. 27. Plaintiffs, as noted earlier, candidly admit

CVCV053090 and CVCV053167 were filed to challenge to what plaintiffs characterize as DOT's "excessive taking." Plaintiffs do not dispute the fact both CVCV053090 and CVCV05167 were filed more than thirty days after plaintiffs were served with the condemnation assessment notice.

If plaintiffs believed the condemnation was excessive in its taking, they should have availed themselves of the right to bring *a timely* action challenging the condemnation proceedings as provided in Iowa Code section 6A.24(1). Indeed, in district court, though it now appears to have been implicitly abandoned by plaintiffs on appeal in light of their failure to offer any substantive argument in their brief on the subject, plaintiffs claimed to be pursuing an action under section 6A.24(1) through the guise of a "discovery rule." *See* Count III, petition in CVCV053090; App. pp. 14-15.

Section 6A.24(1), of course, has never been interpreted as containing a discovery rule as a means of extending its thirty-day deadline. Plus, the thirty-day "clock," as the Court of Appeals referred to the limitation provision in section 6A.24(1) in *Castles Gate*, *see* 2023 WL 1812849 at *3, fixes a definite time for the commencement of the limitations period in section 6A.24(1). The date specifically runs from the date of service of the condemnation notice of assessment. This is completely at odds with any discovery rule concept. *See MidWestOne Bank v. Heartland Co-op*, 941 N.W.2d 876, 884 (Iowa 2020)

(noting application of a discovery rule to be impermissible where the plain language of a statute such as a "date of sale" precisely fixes the time when the clock begins to run). Judge Miller noted this in her ruling as well.[8] Ruling, pp. 5-7; App. pp. 188-190; 485-487.

DOT's application to condemn and its condemnation notice, which plaintiffs alleged they were served with on January 29, 2023, is in the record as part of DOT's Exhibit C, filed April 17, 2023, in support of DOT's motion to dismiss in CVCV053090; *see also* Exhibit C in the certified agency record filed May 24, 2023, in CVCV053167. App. pp. 70-80; 371-381. The application expressly provided in compliance with Iowa Code section 6B.3(1)(g) the following:

[8] A discovery rule would wreak havoc. The compensation commission hearing cannot take place until the thirty-day period following service of notice has run. *See* Iowa Code § 6B.8. This allows filing of any claim under section 6A.24(1) *before* the compensation commission holds its hearing. This offers further evidence of a comprehensive statutory scheme consistent with the conclusion section 6A.24(1) was intended to afford an exclusive remedy for challenging the exercise of eminent domain authority or condemnation proceedings. Extending the period in section 6A.24(1) beyond its prescribed thirty-day period could create problems in scheduling the compensation commission hearing. It could inject delay into the condemnation proceedings which must go forward to acquire the property needed for public improvements. Projects needing to be let for contract could needlessly be held up if the legislature's express thirty-day period as provided in section 6A.24(1) was ignored. A discovery rule is at odds with the legislature's intent in adopting section 6A.24(1).

> **Plat:** The location of the right of way or other property rights sought to be condemned or affected are shown on the plat(s) attached to and a part of the attached Notice of Condemnation.
>
> **Minimum Land Needs:** The minimum amount of land necessary to achieve the public purpose is as described in and shown on the Notice of Condemnation and attached plat(s).

App. pp. 77; 378.

Therefore, back on January 29, 2023, plaintiffs had been served with a detailed notice of condemnation affording them (1) a description of the property being acquired, (2) plats alerting them to the scope of the taking, (3) the time and date of the compensation commission hearing (set for March 21, 2023), (4) the identity of the compensation commissioners, and (5) a copy of the application for condemnation DOT had submitted in January 2023 to the chief judge pursuant to Iowa Code section 6B.3(1). This is all set forth in DOT's exhibit C in CVCV053090 and Exhibit C in the certified agency record filed in CVCV053167; App. pp. 70-80; 371-381.

Plaintiffs, at page 32 of their proof brief, contend the notice did not inform them "their property would not be allowed any commercial entrance to Hwy (*sic*) 210." Plaintiffs assert, also on page 32 of their proof brief, on February 21, 2023 "Merle Brendeland happened to be told by an IDOT employee that the Brendeland property would not be allowed to have a commercial entrance to Hwy (*sic*) 210." Plaintiffs alleged going back to May

2022 Merle Brendeland had "conversations" with DOT personnel the property would have "a commercial entrance to Hwy (*sic*) 210 west of Station 1035." *See* plaintiffs' statement of facts, p. 10, proof brief. The plaintiffs complain they have been unable to gain a commercial entrance in their quadrant of the intersection of Interstate 35 and Highway 210 the way those owning the Bayer, Kum & Go, and Hale trailer properties did.

First, the condemnation assessment notice appropriately alerted plaintiffs access rights along Highway 210 on the highway's south side between Stations 1035 and 1045 were being acquired by DOT. *See* DOT Exhibit C filed April 17, 2023, in CVCV053090, and Exhibit C in the certified agency record filed May 24, 2023, in CVCV053167 (condemnation notice text and plats); App. pp. 71; 372. Therefore, the extent of any access taken by the condemnation, contrary to plaintiffs' assertions, was explicitly set forth in the plats and on the condemnation notice served upon plaintiffs. All one needed to do was examine the notice and plats.

Furthermore, in areas not acquired by DOT's condemnation, access along the relevant segment of Highway 210, now a rural-600 highway, is governed by administrative rules which went into effect on November 9, 2022. Plaintiffs admit this in paragraph 7A of their petition in Story County Case No. CVCV053090: "On November 9, 2022, new Administrative Rule

761 IAC Chapter 112 went into effect." App. p. 9. Plaintiffs desired an access west of Station 1035. *See* paragraphs 2 and 4, petition filed in CVCV053090; App. p. 8. However, effective with the new rule's adoption in November 2022, the ability to gain a commercial access upon Highway 210 from the plaintiffs' property west of Station 1035 was no longer possible because of the 600-foot spacing requirement between points of connection upon the highway. *See* 761 IAC 112.5(3)(c) (DOT's Exhibit D filed April 17, 2023, in CVCV053090 and DOT's Exhibit D in the certified agency record filed May 24, 2023, in CVCV053167); App. pp. 81-82; 382-383.

DOT carefully explained this in its declaratory order with associated exhibits A through G filed in CVCV053167. *See* DOT declaratory order filed as plaintiffs' exhibit 2 on May 2, 2023, in CVCV053167; DOT declaratory order filed in the certified agency record May 24, 2023, in CVCV053167 App. pp. 210-271; 328-389. Plaintiffs never claimed the establishment of an entrance from their property at any point west of Station 1035 upon Highway 210 could be accomplished in compliance with the access rule at a point 600 feet or more from other existing points of connection along the highway.

Plaintiffs also complained about DOT taking 1,000 feet of access rights along the south side of Highway 210 between Stations 1035 and 1045 (each station number represents 100 feet). They believed their personal preferences

were better served by DOT taking only 600 feet of access rights. However, once again, the change in law occurring through the new rules adopted in November 2022, also answers this contention. Given future traffic projections, the 1,000 feet of access rights acquired *to preclude any new entrances* on the south side of Highway 210 was consistent with 761 IAC 112.5(5)(f) (if annual average daily traffic (AADT) will exceed 10,000 within 20 years a minimum of 1,000 feet of access rights should be acquired). *See* DOT declaratory order, pp. 10-11, and Exhibit F filed as plaintiffs' exhibit 2 on May 2, 2023, in CVCV053167; DOT declaratory order, pp. 10-11, and Exhibit F filed in the certified agency record May 24, 2023, in CVCV053167 App. pp. 219-220; 269; 337-338; 387.

Simply put, the law changed. Plaintiffs do not claim (nor could they credibly claim) the Bayer, Kum & Go, and Hale Trailer entrances were established under the law which went into effect in November 2022. Those entrances came about previously under a different regulatory scheme. The application to this newly classified R-600 highway segment of the 600-foot spacing requirement between points of connection as set forth in 761 IAC 112.5(3)(c) adopted November 9, 2022, means *any new entrances* from Highway 210 must be assessed differently from what was previously the case.

Requiring any new points of access to be at least 600 feet from other connections is rationally related to meet DOT's safety goal to reduce crashes.[9]

Plaintiffs desire an access point *they never had* unlike the existing entrances to the Bayer, Kum & Go and Hale Trailer properties which were in place before the rule change on November 9, 2022. Indeed, plaintiffs contended, if need be, the court could simply (1) order Bayer's existing entrance closed, (2) move the entrance to a different location directly across from where plaintiffs would like their access situated, and (3) even order a driveway extended. Plaintiffs' petition, CVCV053167, p.10; App. p. 206. In short, the plaintiffs claimed entitlement to what Bayer may have, even though Bayer's access was developed prior to the new rules.

The plaintiffs' approach would be akin to DOT ordering plaintiffs to close the existing driveway they have to their property because under the new 600-foot spacing rule, *see* 761 IAC 112.5(3)(c), their current driveway is less

[9] Plaintiffs, as alluded to in footnote 4 above, listed in their brief various claims made in their petition in CVCV053090, including a constitutional challenge. However, other than challenging whether section 6A.24(1) affords an exclusive remedy, little else has been argued by plaintiffs in their appellate brief. Claims made in the petition which are not substantively argued with citation to authority should be deemed waived under Iowa R. App. P. 6.903(2)(g)(3). Nonetheless, in terms of any constitutional challenge, DOT's Rule 761 IAC 112.5(3)(c) is obviously rationally related to achieve the government's highway safety objective. *See King v. State*, 818 N.W.2d 1, 27-28 (Iowa 2012) (detailing the "rational basis" test for constitutional analysis).

than 600 feet from another connection point to the highway. *See* DOT motion to dismiss, pp. 19-20, filed May 24, 2023, in CVCV053167; DOT declaratory order Exhibit E filed as plaintiffs' exhibit 2 May 2, 2023, in CVCV053167; DOT declaratory order Exhibit E in the certified agency record filed May 24, 2023, in CVCV053167 App. pp. 268; 290-291; 386. DOT has, instead, attempted to impose its new rules *prospectively* to refrain from interfering with locations which were implemented before the new rules in November 2022 went into effect. This has the effect as well of minimizing the amount of property needed to be acquired by condemnation consistent with Iowa law.

Courts are not the institution society has established to design and construct our highways, and in particular courts are not looked to for the purpose of laying out the coordinates for precise points of access to highways. The Iowa Supreme Court persuasively noted in respect to highway placement:

> Generally speaking, the decision where to locate a highway rests solely within the discretion of the legislative body, or its delegated administrative agency. 39 Am.Jur.2d *Highways, Streets, and Bridges* § 49, at 438 (1968). Thus, the power to determine the location of a highway is a legislative, and not a judicial, function. *Id.* In the absence of fraud, corruption, oppression, or gross injustice, courts are not to interfere with that function. *Id.*

Bernau v. Iowa Dep't of Transp, 580 N.W.2d 757, 760 (Iowa 1998). *See also* Iowa Code §§ 306A.4 and 306A.5 (conferring upon the highway authority with jurisdiction over the highway the discretion to acquire, design, and

regulate access locations to best serve traffic).

A fair reading of plaintiffs' claim is they were unaware of the access rule change effective in November 2022. Nonetheless, adopted administrative rules have the force of statutes. *See Milholin v. Vorhies*, 320 N.W.2d 552, 553 (Iowa 1982). Thus, plaintiffs, as are all people, are charged with knowledge of the law. *See, e.g., Clark v. Iowa Dep't of Revenue and Finance,* 644 N.W.2d 310, 319 (Iowa 2002) ("It is a well-established principle that ignorance of the law is no excuse."); *Millwright v. Romer*, 322 N.W.2d 30, 33 (Iowa 1982) ("Every citizen is assumed to know the law and is charged with knowledge of the provisions of statutes."); *In re Marriage of Hoffmeyer*, 947 N.W.2d 682 (Table), 2020 WL 1887954 at *3 (Iowa App. 2020) (Judge Vaitheswaran concurring specially in affirming the trial court with an approving quotation from *Clark* for the proposition "ignorance of the law is no excuse"); *Witkowski v. Employment Appeal Bd.,* 756 N.W.2d 480 (Table), 2008 WL 2902064 at *3 (Iowa App. 2008) ("Furthermore, ignorance of the law is no excuse …" citing approvingly to *Clark* and *Millwright*).

There is irony in plaintiffs' position. On the one hand plaintiffs purport to challenge the condemnation action as taking an excessive amount of land. They argue DOT should not take 1,000 feet of access rights on the south side of Highway 210. On the other hand, if the acquisition of 1,000 feet of access

rights was deemed appropriate as it is under 761 IAC 112.5(5)(f)) as discussed earlier, plaintiffs were attempting to have the court order DOT close the preexisting entrance to the Bayer property, make Bayer move its driveway, and situate a new entrance for Bayer opposite an entrance to plaintiffs' property. Plaintiffs' petition in CVCV053167, p. 10; App. p. 206. All this to be done without Bayer being subject to the jurisdiction of the district court as a party to the case. It is plaintiffs who were proposing a radically excessive exercise of the eminent domain powers for the purpose of achieving their purely personal preferences. In the final analysis, the district court, pursuant to Iowa Code section 6A.24(1), properly dismissed these untimely actions challenging DOT's exercise of eminent domain authority and the condemnation proceedings.

III.

ALTERNATE GROUNDS EXIST TO AFFIRM THE DISTRICT COURT'S DISMISSAL OF THESE CASES.

There are alternate grounds to affirm the district court which DOT argued before the district court, but which Judge Miller did not reach because of her understandable finding the plaintiffs' claims were untimely and therefore barred by Iowa Code section 6A.24(1). Notwithstanding, the district court can always be affirmed on any basis previously urged before it. *See Duck Creek Tire Service v. Goodyear Corners*, 796 N.W.2d 886, 893 (Iowa

2011). Additional grounds do support affirmance of the district court as explained below.

A. Res Judicata bars plaintiffs' claims.

DOT urged before the district court issue preclusion (a branch of the doctrine of res judicata) as a basis in support of its motions to dismiss. *See* DOT's supplement to motion to dismiss filed June 20, 2023, and replies filed June 29, 2023, in CVCV053090 and CVCV053167; App. pp. 152-168; 177-183; 449-465; 474-480.

DOT noted cases CVCV053090 and CVCV053167 were not the first actions filed challenging DOT's exercise of eminent domain authority in this matter. Before filing the two actions involved in this appeal, Merle Brendeland had filed on March 10, 2023, a separate action for "Application for Stay or Temporary Injunction" docketed in Story County District Court as CVCV053078 in an effort to enjoin the condemnation proceedings from going forward on March 21. 2023. *See* DOT's Exhibit Z (Merle Brendeland injunction application in CVCV053078) filed June 20, 2023, in CVCV053090 and CVCV053167; *see also* Exhibit A in the certified agency record filed May 24, 2023, in CVCV053167; App. pp. 165-168; 341-368; 462-465.

Mr. Brendeland's effort to enjoin the condemnation proceedings from taking place on March 21, 2023, was denied by order of Judge Ellefson

entered March 15, 2023, after an evidentiary hearing held that same date. *See* DOT's Exhibit B (Judge Ellefson order) filed April 17, 2023, in CVCV053090; s*ee also* Exhibit B in the certified agency record filed May 24, 2023, in CVCV053167; App. pp. 68-69; 369-370. Judge Ellefson held Mr. Brendeland would incur no "irreparable damage" if the condemnation proceedings went forward before the compensation commission because any damages from DOT's taking would be subject to a de novo appeal in the district court where plaintiffs would have the opportunity to offer evidence in support of their claims. In his words: "Thus, there will be no irreparable damage if the stay or injunction is denied." App. pp. 68; 369.

Judge Ellefson relied upon *Wilkes v. Iowa State Highway Commission*, 172 N.W.2d 790, 792-93 (Iowa 1969) (holding the appeal to district court is de novo in nature with the question of all property damaged open for consideration "regardless of what matters were improperly considered or overlooked by the condemnation commission"). Therefore, prior to placing on the docket Story County cases CVCV053090 and CVCV053167, there had been a prior adjudication made in Story County District Court finding DOT's condemnation action would not cause "irreparable damage," and further concluding plaintiffs had an available adequate remedy at law by simply

taking their damage claims on appeal to district court following the conclusion of the compensation commission hearing on March 21, 2023.

Plaintiffs, as noted in Judge Miller's ruling at page 3, App. pp. 186; 483, have appealed the compensation commission award to district court in an action pending as Story County EQCV053107. *See* DOT's Exhibit A filed in CVCV053090 April 17, 2023; DOT's Exhibit B filed in CVCV053167 May 24, 2023; App. pp. 57-67; 303-313. The ruling of Judge Ellefson in CVCV053078 was not appealed and became final. Indeed, on June 9, 2023, Judge Ellefson issued an order in CVCV053078 giving the parties a ten-day opportunity to air any remaining issues. *See* DOT's Exhibit W filed in CVCV053090 and CVCV053167 June 20, 2023; App. pp. 160-161; 457-458. Plaintiffs responded the same day (June 9) indicating:

> The below signed attorney for the Plaintiff, Merle D. Brendeland, hereby states that there are no remaining issues to be tried in this Case No. CVCV053078, and the case should be dismissed.

DOT's Exhibit X filed in CVCV053090 and CVCV053167 June 20, 2023; App. pp. 162-163; 459-460.

Issue preclusion is applicable whenever (1) the issue concluded is identical; (2) the issue was raised and litigated in the prior action; (3) the issue was material and relevant to the prior action; and (4) the determination of the issue was necessary and essential to the resulting judgment. *Hunter v. City of*

Des Moines, 300 N.W.2d 121, 123 (Iowa 1981). The order of Judge Ellefson denying injunctive relief in Story County Case no. CVCV053078 meets all four requirements. Nor is there any doubt about CVCV053078 having become "concluded." The Iowa Courts Online Electronic Docket summary shows a "Disposition Status" of "DISMISSED" for the case as of "06/09/2023." *See* exhibit Y filed in CVCV053090 and CVCV053167 June 20, 2023; App. pp. 164; 461.[10]

Plaintiffs, though erroneously, have relied upon cases decided before the adoption of Iowa Code section 6A.24 for the proposition injunction is an available procedural remedy to challenge condemnation proceedings beyond the thirty-day limitation period in section 6A.24(1). Yet, in CVCV053078, Merle Brendeland's claim for injunction was denied because no "irreparable damage" could be shown and there was an available adequate remedy which plaintiffs are currently pursuing, *i.e.*, an appeal from the compensation

[10] Documents filed in court via EDMS may be judicially noted. *See* Iowa R. Evid. 5.201(b)(1) and (2) (court file contents are maintained by the court's clerk and are readily available via EDMS and Iowa Courts Online through an accurate process which cannot be reasonably questioned and offers matter generally known within the court's territorial jurisdiction). *See also State v. Colvin,* 899 N.W.2d 740 (Table), 2017 WL 936173 at *2, fn. 4 (Iowa App. 2017); *State v. Hopper*, 899 N.W.2d 739 (Table), 2017 WL 936085 at *3 (Iowa App. 2017); *Palmer v. State*, 888 N.W.2d 902 (Table), 2016 WL 6396168 at * 2 (Iowa App 2016).

commission award to district court as allowed in Iowa Code section 6B.18.[11] No injunction can possibly be granted under such circumstances. *See Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 639 (Iowa 1991) (per curiam) (elements of irreparable harm and lack of adequate remedy at law necessary to support grant of injunction).

Nor is it material Merle Brendeland was the only plaintiff in CVCV053078. The remaining plaintiffs in this appeal were sufficiently connected in interest to be bound by Judge Ellefson's order. Issue preclusion may be appropriately invoked where the prerequisites of issue preclusion are otherwise satisfied, and a nonmutual party against whom the doctrine is defensively invoked "was so connected in interest with one of the parties in the former action as to have had a full and fair opportunity to litigate the relevant claim or issue and be properly bound by its resolution." *See Hunter*, 300 N.W.2d at 123, quoting *Bertran v. Glens Falls Ins. Co.*, 232 N.W.2d 527, 533 (Iowa 1975).

Accordingly, plaintiffs' cases were properly dismissed by Judge Miller because they represented untimely challenges under Iowa Code section 6A.24(1). Nonetheless, even if one were to assume injunction was available

[11] Presently, the trial date in EQCV053107 (the condemnation appeal) is November 19, 2024, a fact which may be judicially noted.

notwithstanding section 6A.24, injunctive relief was already denied in CVCV053078, and plaintiffs are bound by that ruling through issue preclusion. For that matter, since plaintiffs will be accorded the chance to present their claims of damage in the appeal to district court pending in Story County EQCV053107, plaintiffs have already had their day in court in their efforts to challenge the condemnation proceedings. *See Pavone v. Kirke*, 807 N.W.2d 828, 835 (Iowa 2011) (claim preclusion bars a second action on the adjudicated claim as well as all relevant matters which could have been determined in the first action). Thus, plaintiffs' claims in these actions are barred under the doctrine of res judicata.

B. Any certiorari claim would be separately barred.

Plaintiffs suggest they should be able to bring a certiorari claim independent of the time limit prescribed in Iowa Code section 6A.24(1). DOT pointed out in district court even if section 6A.24(1) was disregarded, plaintiffs would still be unable to timely pursue certiorari. DOT motion to dismiss, pp. 24-28, filed April 17, 2023, in CVCV053090; DOT reply, pp. 22-24, filed May 3, 2023, in CVCV053090; DOT reply, pp. 14-15, 21-22, filed June 8, 2023, in CVCV053167; App. pp. 41-45; 129-131; 432-433; 439-440.

Any certiorari action filed to address an illegal act must be brought within thirty days of the unlawful action. Iowa R. Civ. P. 1.1402(3) (certiorari

to be brought within thirty days of the alleged illegality). The claimed illegal act plaintiffs are pursuing relates to the condemnation proceedings. Plaintiffs alleged they were served January 29, 2023, with notice concerning those proceedings. Even mistakenly assuming certiorari was available, any action based upon certiorari would be required to be filed by February 28, 2023, thirty days after plaintiffs were put on notice concerning the condemnation. Neither CVCV053090 nor CVCV053167 were filed within that timeframe.

Similarly, condemnation proceedings cannot be undertaken without the district court's appointment of a compensation commission to assess the damages stemming from the taking. The condemnation proceedings, therefore, go forth under the auspices of the district court. Accordingly, any certiorari action would need to be directed against the district court. It is the district court which would constitute the proper "tribunal, board or officer" as provided in Iowa R. Civ. P. 1.1402(3). *See also* Iowa Code § 6B.4(2)(a) (chief judge selects by lot six persons to serve as a compensation commission to assess damages). Plaintiffs never brought any certiorari claim against the district court.

Certiorari will also be barred if there is another available remedy deemed exclusive. *See, e.g, Walthart v. Board of Directors of Edgewood-Colesburg Cmty. Sch. Dist.*, 667 N.W.2d 873, 877-879 (Iowa 2003). Section

6A.24 affords an exclusive remedy. Therefore, certiorari is not available. Plaintiffs never filed any timely certiorari claim in accordance with Iowa R. Civ. P. 1.1402(3); nor did they join the proper "tribunal, board, or officer" to any putative certiorari claim. For these separate reasons, a certiorari action is not viable.

C. Claims for injunction, certiorari, and mandamus are separately barred by the doctrine of sovereign immunity.

The plaintiffs, as shown by the statement of facts in their brief, are upset with the change in the law which came into effect in November 2022 designating Highway 210 a rural-600 highway with its attendant 600-foot spacing requirement between points of connection. Plaintiffs contend they had been told they could get a commercial access only to later be told they could not.[12]

The law is applied when it becomes effective. *See, e.g.*, DOT declaratory order, p. 9 filed by plaintiffs as their exhibit 2 May 2, 2023, in CVCV053167; DOT declaratory order, p. 9, filed in the certified agency

[12] Plaintiffs reference conversations with DOT personnel from May 2022 through February 20, 2023. Plaintiffs' proof brief, p. 10. They claim Merle Brendeland had been told a commercial access would be available west of Station 1035. But on February 21, 2023, *see* proof brief at p.15, Mr. Brendeland says he was told by a DOT employee a commercial entrance would not be permitted. It was in November 2022 when the law changed with the adoption of 761 IAC 112.5(3)(c).

record May 24, 2023, in CVCV053167; App. pp. 218; 336. Plaintiffs suggest they have been the victims of misrepresentation by DOT personnel. For example, at page 33 of their proof brief they note they received an email on March 8, 2023, more than thirty days after the condemnation notice was served, indicating no commercial access would be allowed. This prompts this nefarious suggestion by plaintiffs also at page 33 in their proof brief: "Was the response from the IDOT purposely made more than 30 days after the condemnation notice was served on the Brendelands?" Apparently, the implication is DOT personnel lured the plaintiffs beyond the thirty-day period for bringing challenges to the condemnation proceedings under Iowa Code section 6A.24(1).

First, plaintiffs were charged with knowledge of the law change regarding access to Highway 210 because, as noted before, ignorance of the law is no excuse. Therefore, knowledge of 761 IAC 112.5(3)(c) was imputed to plaintiffs. Second, though plaintiffs reference an email dated March 8, 2023, they also indicated at page 15 of their proof brief Merle Brendeland had already been told by "Brian Whaley with the IDOT" on February 21, 2023, the "property would not be allowed to have a commercial access to Hwy (sic) 210." February 21, 2023, of course, was only twenty-three days after plaintiffs say they were served on January 29, 2023, with notice of the

condemnation. If so, plaintiffs still had time to file their action under section 6A.24(1).

There was no misrepresentation as implied by plaintiffs, but even assuming arguendo there was, because of sovereign immunity, there is no claim which can be made against the State, or a state agency, based upon alleged assurances regarding whether there would or would not be a commercial entrance permitted upon Highway 210. Those claims would be barred under the rationale found in *Hawkeye By-Products, Inc. v. State*, 419 N.W.2d 410 (Iowa 1988). DOT raised this in district court. DOT motion to dismiss, pp. 28-33, filed April 17, 2023, in CVCV053090; DOT reply, pp. 24-27, filed May 3, 2023, in CVCV053090; App. pp. 45-50; 131-134.

In *Hawkeye By-Products*, suit was brought against the State alleging a business had been assured it would receive a permit from the Iowa Department of Agriculture to locate an animal rendering plant in Adair County if local authorities did not object. Tentative approval had been initially extended by the local board of supervisors (causing Hawkeye By-Products to exercise an option on the property, buy needed equipment, and incur related expense of $312,000). Later, the board of supervisors withdrew approval for the plant with the state agriculture department denying the permit. *Id.* at 410-411. The Iowa Supreme Court barred the claim on the basis of the immunity found in

then Iowa Code section 25A.14(4)(1985), today codified as Iowa Code section 669.14(4) (2023), stating:

> Assuming that the false assurances for project approval which were given plaintiff by the State or its agents were of a nature otherwise actionable as misrepresentation, *see Beeck v. Kapalis*, 302 N.W.2d 90, 95 (Iowa 1981), we conclude that the exclusionary language of section 25A.14(4) [today section 669.14(4)] supports the State's entitlement to sovereign immunity. As we stated in *Greene v. Friend of Court, Polk County*, 406 N.W.2d 433, 436 (Iowa 1987), "[t]he latter section identifies excluded claims in terms of the type of wrong inflicted." Here, the gravamen of plaintiffs' claim is misrepresentation, deceit, and interference with contract rights. The district court was correct in concluding that such claims will not lie against the sovereign.

419 N.W.2d at 411-412.

Under Iowa Code section 669.14(4) (2023), the State of Iowa today still remains immune from any claim based upon "misrepresentation, deceit, or interference with contract rights." Section 669.14(4) is part of the Iowa Tort Claims Act. Nevertheless, the Iowa Supreme Court did not confine its holding in *Hawkeye By-Products* to matters in tort. It was held the "misrepresentation" immunity represents an expression of the types of claims over which the State retains sovereign immunity. *See Hawkeye By-Products*, 419 N.W.2d at 411-412. Thus, in *Hawkeye By-Products*, not only was the suit in tort barred, but a promissory estoppel contract claim was also rejected. *Id.* The Court observed:

> The statute [then 25A.14(4), today 669.14(4)] is designed to relieve the State from liability for the false or inaccurate representations of its employees to the extent that such liability would extend to the acts of private parties. *There would be little purpose in such a statutory scheme if it could be circumvented merely by a shift of legal theory.*

419 N.W.2d at 412 (emphasis added).

The emphasized portion from the *Hawkeye By-Products* quote performs double duty for DOT's argument in this appeal. One could correctly say there would be little purpose served in the statutory scheme the legislature created in 2006 when it adopted Iowa Code sections 6A.24 and 6B.3A if those provisions could be ignored "merely by a shift of legal theory." In any event, regardless of the time limitation in Iowa Code section 6A.24(1), there has been no waiver of sovereign immunity which would permit plaintiffs to sue DOT under any legal theory, be it injunction, certiorari, or mandamus, based on the facts alleged by plaintiffs.

D. Judicial review should be declined under Iowa R. Civ. P. 1.1105 because a pending action already exists which can afford relief to plaintiffs.

This argument was urged before the district court by DOT. *See* DOT motion to dismiss, pp. 5-16 filed May 24, 2023, in CVCV053167. App. pp. 276-287. Plaintiffs, in their petition at paragraph 6 in CVCV053167, even questioned the need for bringing CVCV053167. App. p. 198. As earlier noted, both CVCV053090 and CVCV053167, by plaintiffs' admission, were

brought to challenge DOT's taking via eminent domain. Plaintiffs' response, p. 4, filed June 27, 2023, in CVCV053090 and CVCV053167. App. pp. 172; 469.

The district court, courtesy of the ruling of Judge Ellefson in CVCV053078, concluded an adequate remedy existed for plaintiffs to be recompensed for any damage done from DOT's taking. The available adequate remedy was their right to pursue damages in the condemnation appeal in district court as plaintiffs are doing. DOT's Exhibit B (Judge Ellefson order) filed April 17, 2023, in CVCV053090; s*ee also* Exhibit B in the certified agency record filed May 24, 2023, in CVCV053167; App. pp. 68-69; 369-370. Because the injunction was denied by Judge Ellefson, the compensation commission proceedings went forward as scheduled on March 21, 2023, and plaintiffs were awarded damages. Plaintiffs, in their petition in CVCV053167, paragraph 4, admit they appealed the commission's award to district court by the action pending as Story County EQCV053107. App. p. 197.

Plaintiffs in Story County EQCV053107 have gained the release to them of the full amount awarded by the compensation commission. *See* DOT's Exhibit C filed May 24, 2023, in CVCV053167; App. pp. 314-316. Under Iowa Code section 6B.25(1)(a), DOT has, therefore, gained rights to

possess the property taken and it may proceed with its highway improvement. Plaintiffs admitted this in their application for disbursement filed in EQCV053107 where at paragraph 5 of the application plaintiffs stated: "The DOT is now entitled to take possession of the condemned property pursuant to Section (*sic*) 6B.25, Code of Iowa." DOT's Exhibit E (application for disbursement) filed May 3, 2023, in CVCV053090; DOT's Exhibit D filed May 24, 2023, in CVCV053167; App. pp. 140; 317.

Hence the highway project is underway and there is no mechanism to stop the highway project, or to give back to plaintiffs the land acquired through DOT's taking or alter the taking after-the-fact in a manner to suit plaintiffs' personal preferences. DOT, because it has tendered the amount awarded by the compensations commission (which plaintiffs have received in full via the order for disbursement), "may take possession of the land condemned and proceed with the improvement." *See* Iowa Code § 6B.25(1)(a). Plaintiffs in their condemnation appeal (EQCV053107) may pursue damages for the taking. They have, as Judge Ellefson ruled, an adequate district court remedy they are pursuing. This is why in its statement of the case to this brief, DOT described this appeal as a needless expenditure of time, money, and judicial resources.

Iowa courts have discretion in determining whether issuance of a declaratory order or judgment is appropriate. *See, e.g.,* Iowa R. Civ. P. 1.1105 ("The court may refuse to render a declaratory judgment or decree where it would not, if rendered, terminate the uncertainty or controversy giving rise to the proceeding."). In *Handlos v. Intercreditor Committee*, 838 N.W.2d 870 (Table), 2013 WL 4502325 at *7 (Iowa App. 2013), the denial of declaratory relief by means of a motion to dismiss was affirmed on appeal "where another pending action can afford the litigant relief." Similarly, in *Ostrander v. Linn*, 237 Iowa 694, 702-703, 22 N.W.2d 223, 228 (1946), it was said:

> [D]eclaratory judgment relief may be denied if there is another action then pending between the parties and, in such action, the parties will be able 'to procure a full and immediate adjudication of their rights', or the issues involved in the case already pending 'can be tried with equal facility' or the suit for declaratory relief 'will serve no useful purpose.'

Costs are being needlessly incurred, and time is being wasted by the pursuit of CVCV053090 and CVCV053167 given the available remedy provided by the condemnation appeal pending in Story County EQCV053107. To borrow words from *Ostrander*, any damages caused by DOT's taking can be tried with "equal facility" in that appeal, and therefore these two actions, CVCV053090 and CVCV053167, "serve no useful purpose."

CONCLUSION

DOT, for the reasons urged above, requests this Court affirm the district court's ruling dismissing both Story County CVCV053090 and CVCV053167.

REQUEST FOR ORAL ARGUMENT

DOT requests oral argument upon submission of this appeal.

Respectfully submitted,

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

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Brief contains 13,403 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 Microsoft Word in size 14 Times New Roman.

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CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE

We, Shean D. Fletchall and Robin G. Formaker, hereby certify that on January 30, 2024, a copy of Appellee's Final Brief was filed electronically with the Clerk of the Iowa Supreme Court through the EDMS system, and which system further will provide access and service to the brief to:

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