Supreme Court No. 23-1186
Hardin District Court No. CVCV0101911

IOWA SUPREME COURT

Kent Kasischke
Defendant-Appellant

v.

Summit Carbon Solutions, LLC
Plaintiff-Appellee

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR HARDIN COUNTY
HONORABLE AMY M. MOORE, DISTRICT COURT JUDGE

Final Reply Brief for Defendant-Appellant

Brian E. Jorde
Christian T. Williams
Counsel of Record for Defendant-Appellant
DOMINALAW Group pc llo
2425 S. 144th Street
Omaha, NE 68144
Phone: 402-493-4100
Fax: 402-493-9782
Email: bjorde@dominalaw.com
cwilliams@dominalaw.com

Proof of Service

On January 23, 2024, I served this brief on all other parties by EDMS to their respective counsel:

Bret A. Dublinske (AT0002232)
Brant M. Leonard (ATOO10157)
Kristy Dahl Rogers (AT0012773)
Nicci M. Ledbetter (AT0014206)
Fredrickson & Byron, P.A.
111 East Grand Avenue, Suite 301
Des Moines, IA 50309
bdublinske@fredlaw.com
bleonard@fredlaw.com
krogers@fredlaw.com
nledbetter@fredlaw.com

Brian D. Boone (*Pro hac vice)*
Michael R. Hoernlein (*Pro hac vice)*
Alston & Bird, LLP
Vantage South End
1120 S. Tryon Street, Suite 300
Charlotte, NC 28203
Brian.boone@alston.com
Michael.hoernlein@alston.com

Karla M. Doe (*Pro hac vice)*
Andrea L. Galvez (*Pro hac vice)*
Alston & Bird, LLP
1201 West Peachtree Street
Atlanta, GA 30309
Karla.doe@alston.com
Andrea.galvez@alston.com

/s/ Christian T. Williams
Brian E. Jorde, AT0011638
Christian T. Williams, AT0011109
Counsel of Record for Defendant-Appellee
DOMINALAW Group pc llo
2425 S. 144th Street
Omaha, NE 68144

Phone: 402-493-4100
Fax: 402-493-9782
Email: bjorde@dominalaw.com
cwilliams@dominalaw.com

Certificate of Filing

I, Christian T. Williams, certify that I did file the attached Appellant's Proof Brief with the Clerk of the Iowa Supreme Court by EDMS on January 23, 2024.

/s/ Christian T. Williams
Christian T. Williams, AT0011109

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Statement of the Issues

I. Whether the District Court Erred Finding that Appellee is a Pipeline Company as Defined by Iowa Code § 479B.2

Cases

Ackerman v. Lauver, 242 N.W.2d 342 (Iowa 1976)
Bair v. Blue Ribbon, Inc., 256 Iowa 660, 129 N.W.2d 85 (1964)
Heartland Express v. Gardner, 675 N.W.2d 259 (Iowa 2003)
Heartland Express, Inc. v. Terry, 631 N.W.2d 260 (Iowa 2001)
Rife v. D.T. Corner, 641 N.W.2d 761 (Iowa 2002)

Statutes

Iowa Code Ch. 479B
Iowa Code § 479B.2

II. Whether the District Court Erred Finding Appellee was Entitled to Injunctive Relief through Iowa Code § 479B.15

Cases

Buss v. Gruis, 320 N.W.2d 549 (Iowa 1982)
Max 100 L.C. v. Iowa Realty Co., 621 N.W.2d 178, 180 (Iowa 2001)
Roshek Realty Co. v. Roshek Bros. Co., 87 N.W.2d 8 (Iowa 1957)
Worthington v. Kenkel, 684 N.W.2d 228, 233 (Iowa 2004)

Statues

Iowa Code § 479B.5
Iowa Code § 479B.15
Iowa Code § 618.15

Regulations

49 CFR § 195.1
49 CFR § 195.2

III. Whether the District Court Erred in Granting Summary Judgment Finding that Iowa Code § 479B.15 was Constitutional.

Cases

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021)
Lucas v. Carolina Coastal Council., 505 U.S. 1003, 112 S. Ct. 2886 (1992)
Palazzolo v. Rhode Island, 533 U.S. 606 (2001)
U.S. v. Dow, 357 U.S. 17, 78 S.Ct. 1039 (1958)

Statutes & Constitutional Provisions

Acts 1995 (76 G.A.) ch. 192, § 42 eff. May 26, 1995.
Iowa Code § 479B.5
Iowa Code § 479B.15

Regulations

Cal. Code Regs., tit. 8, § 20900(e)

Argument

I. The District Court Erred Finding that Appellee is a Pipeline Company as Defined by Iowa Code § 479B.2

A. The Trial Court Had Discretion to Allow Appellant's Amendment

1. At the time of trial, Appellant requested leave to amend its ¶ 1 of its answer and counterclaim, to allege Appellee is not a pipeline company within the meaning of Iowa Code § 479B.2. (Appdx. 227-228, Tr. 154:17-158:7). Competing affidavits were allowed to be submitted to the trial court by both sides that were limited to this issue. *Id.* The evidentiary record remained open until affidavits were submitted. (Appdx. pp. 228-229, Tr. 155:21-156:6). Both parties submitted affidavits. Appellant submitted affidavits as part of his brief, and as separate standalone exhibits. (Appdx. pp. 140-177). Appellee filed a single affidavit of a lay witness. (Appdx. pp. 40-44).

2. The trial court is within its discretion to allow an amendment of Appellant's position regarding whether Appellee is a pipeline company. A trial court has considerable discretion in ruling on motions for leave to amend pleadings. *Rife v. D.T. Corner,* 641 N.W.2d 761, 766 (Iowa 2002). Even after the completion of the evidence. *Ackerman v. Lauver,* 242 N.W.2d 342, 345 (Iowa 1976). As long as the amendment does not substantially change the issues or defense of the case, the court should permit the

amendment." *Rife*, 641 N.W.2d at 767. In fact, "[e]ven an amendment that substantially changes the issues may still be allowed if the opposing party is not prejudiced or unfairly surprised." *Id*.

3. Further, the trial court's grant of Appellant's amendment concerns the subject matter jurisdiction of the trial court. The amendment challenges the notion that Appellee can seek injunctive relief on the basis that it is a pipeline company within the meaning of Iowa Code § 479B.2, and § 479B.15.

4. "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings belong." *Heartland Express v. Gardner*, 675 N.W.2d 259, 262 (Iowa 2003) (citations omitted). "Challenges to the subject matter jurisdiction of an adjudicatory body—be it a court or an agency—may be raised at any time, and we have consistently held that parties cannot confer subject matter jurisdiction by waiver or consent." *Heartland Express, Inc. v. Terry*, 631 N.W.2d 260, 265 (Iowa 2001); *see also Bair v. Blue Ribbon, Inc*., 256 Iowa 660, 665–66, 129 N.W.2d 85, 88 (1964) (noting that "[a]n objection based upon the want of jurisdiction of the court over the subject matter of the action may be raised at any time, and is not even waived by consent.")

5. Here, Appellee makes no argument through its briefing presented to this Court that the trial court's decisions on this topic proved prejudicial. The sole argument made to this Court is that the rules of civil procedure do not allow for the disclosure of expert witnesses at the time the trial court allowed competing affidavits. (Appellee's Br. p. 39). Appellee appears to have abandoned any argument of prejudice, and instead relies on an argument that the amendment and subsequent exchange of competing affidavits was untimely. The implication of allowing amendments on the date of trial explicitly means that rules of civil procedure can be overridden, including deadlines.

6. To the extent that Appellee would claim it preserved the issue of prejudice in granting the amendment, there was none. There is no prejudice because any risked delays to their requested relief found in their Petition did not manifest. As Appellee says in its reply brief, despite not yet surveying Appellant's property, it went ahead with a pipeline permit application submission to the Iowa Utilities Board pursuant to Iowa Code Ch. 479B, and the Iowa Utility Board just recently concluded the receipt of evidence through public hearings. (Appellee's Br. pp. 15-16). Thus, any claimed concern of prejudice by Appellee does not hold up in the face of

Appellee's decision to press forward with an application even while it was suing for an injunction against Appellant.

B. Summit is not a "pipeline company" under 479B.2(4) because it is not storing or transporting "hazardous liquid."

7. Iowa law is clear: Iowa Code Ch. 479B only allows a "pipeline company" to own, operate or control a hazardous liquid pipeline. Iowa Code § 479B.2.

8. To be more specific, the term "pipeline company" is defined as "a person engaged in or organized for the purpose of owning, operating, or controlling pipelines for the transportation or transmission of any hazardous liquid or underground storage facilities for the underground storage of any hazardous liquid." § 479B.2(4) (emphasis added).

9. So, in order to qualify as a "pipeline company" under Chapter 479B, the applicant must prove through evidence that it owns, operates, or controls either (1) "pipelines for the transportation or transmission of any hazardous liquid," or (2) "underground storage facilities for the underground storage of any hazardous liquid." § 479B.2(4). Because Summit has not at any point claimed to own or control underground storage facilities, jurisdiction to grant an injunction turns on whether the proposed pipeline transports or transmits "hazardous liquid." *Id*.

10. For purposes of Ch. 479B, "hazardous liquid" means "crude oil, refined petroleum products, liquefied petroleum gases, anhydrous ammonia, liquid fertilizers, liquefied carbon dioxide, alcohols, and coal slurries." And, "pipeline" means "an interstate pipeline . . . used for the transportation or transmission of natural gas or hazardous liquids." Iowa Code § 479B.2(2) (emphasis added). Thus, Summit cannot meet its burden merely by showing the transmission of some phase of carbon dioxide—rather, Summit's petition must establish the transportation or transmission of liquified carbon dioxide. § 479B.2(2).

11. Summit cannot meet this requirement. The trial court lacked jurisdiction over Appellee's request for injunctive relief that was filed in the underlying case. Indeed, in its January 28, 2022 Petition, Summit states it is proposing to construct 681 miles of 4-to-24-inch diameter pipeline in Iowa for the transportation of "carbon dioxide." (Appdx. 114, § II).

12. Then, on May 23, 2023, Appellee submitted the Affidavit of James Powell to the trial court stating that Appellee will be transporting CO2 in the "supercritical state". (Appdx. p. 40, ¶ 5)

13. Accepting Appellee's statement as true, the trial court lacked jurisdiction because (1) carbon dioxide in the "supercritical" phase is not a "liquid," and (2) "supercritical" carbon dioxide is not the same as or

synonymous with "liquified carbon dioxide." (Appdx. pp. 140-177). As detailed in Trial Exhibits M & N by two chemical engineer experts, supercritical carbon dioxide describes a separate and distinct phase of carbon dioxide from liquified carbon dioxide. Scientifically these describe different phases and are not synonymous. (Appdx. pp 143-145, 174-177). Thus, supercritical carbon dioxide is not a liquid under Iowa Code§ 479B.2(2).

14. If the Iowa Legislature intended "supercritical" carbon dioxide be included for purposes of Iowa Code 479B, then it would have added the word "supercritical" to the definition of "hazardous liquid." Because the legislature did not do so, the trial court lacked subject matter jurisdiction to her the Appellee's petition. See § 479B.2(4) (pipeline companies must transport hazardous liquid, which is defined in part as liquified carbon dioxide).

15. The regulations of the Pipeline Hazardous Materials Safety Administration (PHMSA) incorporate this important distinction. For example, 49 CFR § 195.1 provides that "…this Part applies to pipeline facilities and the transportation of hazardous liquids or carbon dioxide…" Then, 49 CFR § 195.2 defines both terms separately.

16. The definition of "hazardous liquid" does not include carbon dioxide. "Hazardous liquid means petroleum, petroleum products, anhydrous

ammonia, and ethanol or other non-petroleum fuel, including biofuel, which is flammable, toxic, or would be harmful to the environment if released in significant quantities." *Id*. And the definition of "carbon dioxide" makes specific reference to the physical state of carbon dioxide and that state is the "supercritical" state. "Carbon dioxide means a fluid consisting of more than 90 percent carbon dioxide molecules compressed to a supercritical state." See *Id*. (emphasis added). The definition of "carbon dioxide" does not utilize the word "liquid" as that is a different physical state than "supercritical."

17. The point is that the physical state of the carbon dioxide matters for purposes of both federal regulations and Iowa Code chapter 479B. Because Summit is not a "pipeline company," the trial court erred in its determination.

II. The District Court Erred Finding Appellee was Entitled to Injunctive Relief through Iowa Code § 479B.15

A. Appellee Failed to Prove Appellant Actually Received Lawful Notice.

18. Restricted certified mail requires that the specific intended recipient – here, Appellant – actually receives the notice. Appellee contends that a presumption exists of compliance and delivery absent evidence to the contrary and cites *Roshek Realty Co. v. Roshek Bros. Co.*, 87 N.W.2d 8 (Iowa 1957) for this proposition. (Appellee Br. p. 46). Appellee was

selective of the portions of this case to present it its brief, because the same case then goes on to say, “In many cases the addressee's denial he received the letter has been held to justify a finding the presumption has been overcome, at least under the particular circumstances.” *Id* at 13. When the presumption is rebutted under these circumstances, the party trying to prove service continues to have the burden of proof. *Id*.

19. Here, Appellant specifically stated during his testimony that he did not receive notices from Appellee that concerned the intent by Appellee to survey his land. (Tr. 148:15-24; 149:20-150:5). Appellant is then asked about Trial Exhibit 6, and whether that bears his signature. Appellant responses that “it appears to be”. (Appdx. p. 223, Tr. 150:14-22). However, the purported mailing alleged by Appellee’s to have been sent, including the envelope (Appdx. pp. 123-124), does not follow the mailing requirements discussed in Appellant’s opening brief. These include required notice via “restricted certified mail.” Iowa Code § 479B.15. This means that the Pipeline company must place its notice in an envelope containing the endorsement “Deliver to Addressee Only.” Iowa Code § 618.15. If the envelope does not contain the words “Deliver to Address Only,” service is not valid. *Buss v. Gruis*, 320 N.W.2d 549, 550 (Iowa 1982) (service invalid because “the envelope was not marked ‘Deliver to addressee only’”). If the

landowners do not actually receive the notice, then service is not perfected, and notice is not effectuated.

20. Finally, restricted certified mail is effectuated if—and only if—the sender provides proof of delivery through a return slip. The return slip must contain "the date of delivery, the place of delivery, and person to whom delivered." Iowa Code § 618.15. The failure to provide a fully executed return slip is a separate and independent basis for invalidating notice via restricted certified mail. *See Buss*, 320 N.W.2d at 550 (restricted certified mail, to be valid, must include a return receipt to the mailer). For trial purposes, competent evidence is required to prove each of these steps and Appellee cannot overcome Appellant's foundational and hearsay objections to its evidence. Appellee's reliance during direct examination of Appellant concerning Exhibit 6, which none of Appellee's witnesses could lay foundation or cure the hearsay issues within it or correctly claim that it is a return slip, is not competent evidence that anything concerning a notice of intent to survey.

B. Appellee has not Complied with the Notice Requirement of § 479B.15 as to any Person in Possession of the Land in Question.

21. Appellee admitted it did not provide evidence that the required notice was provided to Appellant's tenant and Appellant confirmed the same. (Appdx. p. 203, Tr. 76:3-14; Appdx. p. 221, Tr. 146:3-25). Therefore,

it is uncontroverted that Appellee failed to follow each element of § 479B.15. This alone is basis for denying Appellee injunction.

22. Appellee's sole defense in its brief is that the trial court did not find Appellant credible on the issue of whether a tenant existed. There is no evidentiary standard or discovery requirement at issue that required Appellant to identify a tenant at a certain time in the proceedings. The statute at issue, Iowa Code § 479B.15, places the burden on the party seeking a survey to provide notice to all the interested parties identified. There is no exception within the statute for substantial compliance that would excuse the failure by Appellee to serve a tenant.

C. Tenants per Iowa Code § 479B.15 are Indispensable Parties. Appellee failed to Name Them as a Party or Serve Them.

23. The tenant is an indispensable party because a judgment granting an injunction through Iowa Code § 479B.15 is defective, or incomplete, and therefore a land survey cannot proceed because all the indispensable parties were not served in strict compliance with the statute. A judgment against the landowner, Mr. Kasischke does nothing, because the statute makes the perfection of an injunction an all or nothing proposition. You either get an injunction or you do not. Without effective service on all interested parties, the party who was not properly served can defeat the

enforceability of the injunction by not allowing Appellee onto the land and there is nothing that Appellee can do.

24. The trial court's judgment must be reversed for this reason alone.

D. Appellee did not Prove Irreparable Harm or Substantial Injury

25. Appellee contends that Iowa Code § 479B.15 speaks for itself when it comes to how an injunction may be granted. A plain reading of the statue rebuts this assertion. Iowa Code § 479B.15 speaks nothing of the relevant standard of review for an injunction. The "injunctive relief [is] to be granted or denied within the discretion of the court under the applicable equitable principles." *Max 100 L.C. v. Iowa Realty Co.*, 621 NW2d 178, 181 (Iowa 2001). This is another way of saying that the moving party must show (1) irreparable harm, (2) maintenance of the status quo, and (3) the lack of an adequate remedy at law. *Id*. at 180. The trial court committed error when it stated that the statute provided the standard for an injunction. (Order on Plaintiff's Petition for Injunctive Relief p. 6). Compliance with the notice requirements discussed above is not a basis alone to comply with injunctive relief. Notice requirements are conditional pre-requisitions *before* a party seeks an injunction. Notice requirements do not comprise the basis for an injunction or a factor into whether an injunction is necessary. If notice

cannot be established, there is no need to have a discussion as to whether an injunction is necessary.

26. The language of § 479B.15 states that entry for a land survey "…may be aided by injunction." This alone indicates a grant of discretionary authority. Injunctions need not be utilized in every situation. There must be a demonstrated legislative intent to supplant traditional equitable principles for granting or denying an injunction. *Worthington v. Kenkel*, 684 N.W.2d 228, 233 (Iowa 2004) (additional citations omitted). "There must be some showing that the statute was designed to provide for an injunction based on the violation of some act prohibited by the statute independent of the equitable principles. *Id.* 233. The trial court's order did not demonstrate legislative intent supportive of its position.

27. The injunction sought is temporary in nature. Trial testimony on this point makes clear that there are distinct surveys to be performed by Appellee on Appellant's land for the purpose of submitting this information to the Iowa Utilities Board in compliance with Iowa Code § 479B.15, which indicates that the survey is to determine the direction and depth of a pipeline. Iowa Code § 479B.5 requires a petition for a permit to condemn property to include several criteria, including descriptions of the land, waters and streams present, location of the route, alternative routes, and the

inconvenience and injury to the landowner from the route. (Appdx. p. 187-189, Tr. 26:4-28:5; Appdx. p. 219-220, Tr. 131:3-132:17).

28. Appellee failed to put on any evidence of irreparable harm or substantial injury. It is not necessary in this reply brief to re-identify the standards for each because the trial record lacks any evidence to compare against the injunction standard. Instead, Appellee wrongly asserts that no comparison is required because the standard for a temporary injunction does not apply. The trial court agreed and committed reversible error in the process of rendering the present judgment.

III. The District Court Erred in its Order on Summary Judgment Finding that Iowa Code § 479B.15 was Constitutional

A. Iowa Code § 479B.15 Constitutes a Taking

29. Prior to *Cedar Point*, the Supreme Court had enumerated two *per se* rules. First, the permanent physical occupation rule established in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982), where the Court held that the permanent placement of cable wires and boxes on the outside of apartment buildings constituted a *per se* taking. The Court focused on the permanence of the physical occupation rather than the size, which it deemed relevant only to the amount of compensation owed. The second *per se* rule was established in *Lucas v. Carolina Coastal Council.* 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d

798 (1992), is the "total takings" rule which automatically categorizes a government act as a taking if the act deprives an owner of all beneficial use of their property.

30. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) changed things by expanding *Loretto* and established a new *per se* rule – when the government, by regulation or otherwise, appropriates a right to physically invade private property, it has exercised a physical taking for which just compensation is owed. The frequency and duration of the invasion are no longer relevant. *Cedar Point*, 141 S. Ct. 2063, 2074. "Physical invasions constitute takings even if they are intermittent as opposed to continuous." *Id.* at 2075. "The fact that a right to take access is exercised only from time to time does not make it any less a physical taking." *Id.* "The duration of an appropriation—just like the size of an appropriation, see *Loretto*, 458 U.S. at 436–437, 102 S.Ct. 3164—bears only on the amount of compensation." *Cedar Point Nursery v. Hassid*, 141 S. Ct. at 2074, citing *U.S. v. Dow*, 357 U.S. 17, 26, 78 S.Ct. 1039 (1958).

31. The regulation discussed in *Cedar Point* dealt with union organizer's access to landowners' farm labor. The California regulation limited the time of the year in which organizers could set foot on landowners' property (not during harvest), limited total number of days of

access, and limited hours of the day. Hours of the day were limited to one hour before laborers commenced work, during the lunch hour, and for one hour after work ceased. Cal. Code Regs., tit. 8, § 20900(e),

32. All times where no economic acitivity was taking place. This avoided interference with harvesting operations.

33. Here, Iowa Code § 479B.15 contains no such restrictions. It is unlimited as to scope, frequency, duration, location, and severity. The manner of how the survey is to take place is left to the discretion of company seeking to access the land in question. It can take place during times of economic activities, in the middle of the night or any other times inconvenient or burdensome to the landowner and tenant. Despite Appellees best attempts to mininze the holding in *Cedar Point*, it is significant and controlling here. In fact, the regulation struck down as unconstitional in Cedar Point was far more limited in scope than § 479B.15:

	Cedar Point **Unconstitutional Regulation**	**§ 479B.15**
Limits as to the **frequency** of invasion & occupation?	YES	NO
Limits as to **duration** of invasion & occupation?	YES	NO

Limits as to **type of property** that can be invaded & occupied	YES; only commercial production agricultural land	NO
Limits as to **business disruption / inconvenience?**	YES; 1 hour before work; 1 hour during lunch; 1 hour after work	NO
Long-time Regulation/Statute?	40 years	NO; 27 years

B. Pre-condemnation Survey is Not a Background Restriction Upon Private Property

34. The trial court asserts that pre-condemnation surveys are a background principle. (Appdx. p. 94). Appellee also asserts this.

35. Pre-condemnation survey is not a background principle that saves Iowa Code § 479B.15 from being a taking. For a background principle to suffice as a defense to takings liability, it must be consistent with a landowner's reasonable expectation of the government's ability to regulate or enter his or her property. Indeed, in Appellee's Brief Addendum, as it relates to Iowa, it cites several statutes that pertain to government authority to enter onto private land for various purposes. Specifically, government functions such as platting, electrical transmission, and various types of other

inspections. However, all but two cited by Appellee are for government actions. The notable exceptions are Iowa Ch. 479 and 479B statutes, the latter of which is being challenged here. The former is only a variation of the challenged statute and pertains to other types of pipelines.

36. The *Cedar Point* Court provides examples of background restrictions which may immunize the government from takings liability. Again, these explicit examples include nuisance abatement, public necessity to avert an imminent public disaster, and criminal law enforcement under certain circumstances. *Cedar Point,* 141 S. Ct. at 2079. Notably absent from the stated exceptions to the *per se* rule is the right of a prospective private party condemnor to enter and perform exploratory measures on private property simply because they have an idea of how to profit off said property. In this case the prospective condemnor is a private party seeking to establish a pipeline for its own economic benefit. There is no citation to an Iowa law, outside of the challenged statute, that authorizes a private third party to invade, without compensation and have free reign over landowners' land.

37. The privileged entries exempted from takings liability contained in *Cedar Point* are entries which any reasonable landowner would expect under the attending circumstances. That is not by mistake. The concept of background principles being exempt from *per se* takings liability

originated in *Lucas v. Carolina Coastal Council*. 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). In *Lucas*, the Court held that the South Carolina Legislature's passage of a zoning ordinance prohibiting construction on Lucas's beach front lots deprived him of all "economically viable use" and thus constituted a *per se* taking. *Lucas*, 112 S. Ct. at 2087-2088.

38. The government argued that Lucas's property was subject to the background principle of nuisance prevention which allowed regulation of the property for protection of the coastal ecosystem. The *Lucas* Court weighed the background principle of nuisance prevention against Lucas's reasonable expectation of limitations upon his property rights. *Id.* Within its holding, the Court reasoned that "the question must turn, in accord with this Court's "takings" jurisprudence, on citizens' historic understandings regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they take title to property." *Id. (emphasis added).* The Court recognized that although it is reasonable for a landowner to expect their property may be regulated pursuant to the police power, the background principle of nuisance prevention which eliminates all economically viable use of land is insufficient to avoid takings liability because it "is inconsistent

with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Lucas,* 112 S.Ct. at 2900.

39. For background principles to serve as a valid defense to takings liability, they must comport with the understanding of citizens of that specific State regarding that State's power over the bundle of rights. *Lucas,* 112 S.Ct. at 2899. When considering the concept of background principle, you do not look to the legal tradition or custom of any other State or jurisdiction.

40. A reasonable landowner can expect that the government, or a designee thereof, may enter the landowner's property without express permission for the purpose of nuisance abatement, public necessity, or criminal law enforcement. *Cedar Point,* 141 S. Ct. at 2079. No landowner, including Appellant, understands that they took their property subservient to a condemnor's right, upon 10 days' notice, to enter their property and conduct various surveys. (Appdx. pp. 204-204. Tr. 80:7-81:6). There is no counter-evidence in the record.

C. Per *Palazzolo,* Enactment of Iowa Code § 479B.15 Alone Does not Make it a Background Principle as Applied to Appellant

41. The Supreme Court has not fully defined a background principle or when a property law concept can be deemed a background principle such that it absolves the government of takings liability. In

Palazzolo v. Rhode Island, the Court further explored the background principle concept introduced in *Lucas*, and declined to make affirmative judgment on when a statute affecting property interests qualifies as a background principle. 533 U.S. 606, 629 (2001) ("We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law").

42. However, the *Palazzo* Court did instruct that the passage of a statute alone is not sufficient. "A law does not become a background principle for subsequent owners by enactment itself." *Id.* The Court rejected the government's argument that a landowner deemed to have notice of an earlier statutory enactment would be barred from claiming that it effects a taking. *Palazzolo,* 121 S.Ct. at 2453. Given the Court's declaration in *Palazzolo*, the fact that Iowa has enacted earlier survey statutes and that all states have adopted some form of pre-condemnation survey statutes does not establish that pre-condemnation survey is a background principle. In fact, § 479B.15 was enacted in 1995. Acts 1995 (76 G.A.) ch. 192, § 42 eff. May 26, 1995. Hardly "longstanding" and certainly not steeped in Iowa's legal tradition.

43. In this case, there is ample support for this Court's finding that a private party's authorization to conduct surveys per Iowa Code § 479B.15, does not exist within the realm of background principles.

D. Payment of Actual Damages Only does not Make § 479B.15 Constitutional.

44. § 479B.15 allows only for post-access related actual damages. There are no damages and no mechansim to ascertain or meaure damages for taking Mr. Kasischke's right to exclude unwanted persons from his property. Compensation must be made prospectivvly and must not be limted to "actual" or physical damage only, such as destruction to corn crop damage to a fence. Applying *Cedar Point*'s propositions makes clear that there is no consideration for compensation related to the intrusion itself.

45. The remainder of Summit's argument was pre-emptively addressed in Appellant's opening brief and those arguments are incorporated here.

Conclusion

46. The trial court's orders incorrectly conclude that Iowa Code § 479B.15 is constitutional, that notices required by this statute were properly served, and that Appellee is entitled to injunctive relief. The trial court's May 10, 2023, and July 11, 2023, orders are respectfully requested to be reversed.

Cost Certificate

47. Appellant certifies that the cost of printing this brief was $0.00 and that amount has been paid in full by the undersigned.

Certificate of Compliance

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

49. This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point font, and contains 4,460 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Kent Kasischke, Appellant

By: /s/ Brian E. Jorde
Brian E. Jorde, AT0011638
Christian T. Williams, AT0011109
DOMINALAW Group pc llo
2425 S. 144th Street; Omaha, NE 68144; (402) 493-4100
bjorde@dominalaw.com
cwilliams@dominalaw.com

Appellant's Lawyers