IN THE SUPREME COURT OF IOWA
NO. 24-0298

MARTIN ROBINSON, PAULA ROBINSON, TOM ROBINSON, AND LAURA ROBINSON,
Plaintiffs-Appellants,

vs.

CENTRAL IOWA POWER COOPERATIVE, COGGON SOLAR, LLC, KENNETH M. LUDOLPH, and DEANICE R. LUDOLPH,
Defendants-Appellees.

Appeal from the Iowa District Court for Linn County
The Honorable Ian K. Thornhill, No. EQCV100043

DEFENDANTS-APPELLEES CENTRAL IOWA POWER COOPERATIVE AND COGGON SOLAR LLC'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Was the district court below, and the Iowa Court of Appeals in Case No. 23-0705, correct that Plaintiffs have no right to insist on the path that water must travel underneath the ground on their neighbors' property where they only have the (undisputed) right to historical drainage outflow of surface water from their land through man-made underground drainage tiling?

II. Did the district court correctly rule that an uphill neighbor's natural drainage right does not grant unfettered authority for the neighbor to enter a downhill neighbor's property?

III. Did the district court correctly rule that a nuisance claim could not survive where the Defendant retained a drainage tiling contractor to maintain historical flow and therefore did not act unlawfully to create an obstruction?

IV. Did the district court correctly rule that crop yield loss damages were speculative where Plaintiffs admitted that they did not compare any baseline yield to establish any actual loss (past damages), and they had no evidence to contradict their farming tenant's testimony that the drainage was now "Cadillac" (future damages)?

V. Did the district court correctly rule that Restatement (Second) of Torts § 409 applies to bar liability where underground drainage tiling work was entrusted to a professional drainage contractor who was instructed to preserve historical flow?

VI. Did the district court act within its discretion awarding attorneys' fees on Defendants' quiet title counterclaim where Plaintiffs received Iowa Code § 649.5 notice that fees would be sought, but refused to remove the cloud of title despite an absence of legal authority for their position in order to slow down or stop a solar farm?

ROUTING STATEMENT

A prompt and final determination of this appeal, including affirming Defendants' counterclaim judgment quieting title in relation to the location of CIPCO's high voltage electrical substation, affects nearly 20,000 Iowa customers who will draw power from the solar energy facility that the electrical substation will support. Defendants Central Iowa Power Cooperative and Coggon Solar respectfully request that the Supreme Court retain this case. Iowa R. App. P. 6.1101(2)(d).

NATURE OF THE CASE

Plaintiffs filed a petition at law claiming that they, as uphill landowners draining surface water away from their land through man-made underground drainage tiling, were entitled to determine the path that water travels underneath the ground on their neighbors' property. D0002, Petition (6/22/2022). Plaintiffs also asserted claims for damages against Defendant CIPCO for allegedly obstructing drainage flow. D0002, Petition (6/22/2022). Defendants CIPCO and Coggon Solar counterclaimed for quiet title and Iowa Code § 649.5 attorneys' fees.[1] D0020, Answer to Petition at Law, Affirmative Defenses, Counterclaims, and Jury Demand; D0022, Order (11/18/2022).

Regarding who holds the right to route and reroute underground drainage tiling, Plaintiffs appeal rulings granting summary judgment in Defendants' favor quieting title, denying Plaintiffs' motion to reconsider, entering judgment quieting title, and awarding attorneys' fees related to the quiet title counterclaim. D0077, Ruling (9/13/2023); D0145, Ruling (10/11/2023); D0158, Judgment Quieting Title, (1/3/2024); D0175, Ruling and Order on Defendants' Fee Application (3/6/2024). Regarding Plaintiffs' tort theories alleging drainage obstruction, Plaintiffs appeal a

[1] Coggon Solar also counterclaimed for tortious interference. It dismissed it tortious interference claims after the court granted summary judgment in its favor to expedite a final, unappealable judgment (as opposed to waiting for a trial date that had been continued to July 2024). *See* D0166.

ruling granting summary judgment in Defendant CIPCO's favor. D0157, Ruling (12/28/2023).

STATEMENT OF FACTS

A. Plaintiffs' Underground Natural Drainage Flow Enters at the Historical Inlet, and No Overland Access Easement Exists

Plaintiffs' natural drainage outflow enters CIPCO Second Addition to Linn County at its historical underground tiling inlet on the north border. D0045 ¶ 5; D0048 at 81; *see also* D0048 at 8. Drainage outflow that enters CIPCO's land from land owned by Plaintiff Martin Robinson exits CIPCO's land at its historical outlet at the south border. D0045 ¶ 6; D0048 at 81; *see also* D0048 at 8. The original path of 4" clay tile on CIPCO's property (unused or disconnected since 2014) is underneath high voltage electrical substation equipment currently operating for the benefit of CIPCO's members. D0045 ¶ 10; D0048 at 3; D0048 at 8; D0048 at 206, Fett Dep. at 60:22-61:6.

"There's not a written easement" between Plaintiffs (or any of the predecessors in interest of CIPCO's land) and CIPCO (or any of its predecessors in interest of CIPCO's land). D0045[2] ¶ 1; D0048[3] at 168, Tom Robinson Dep. Tr. at 139:1-11.

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[2] CIPCO and Coggon Solar's Statement of Undisputed Facts in Support of Its Motion for Partial Summary Judgment (8/15/2023).

[3] Appendix in Support of CIPCO and Coggon Solar's Motion for Partial Summary Judgment (8/15/2023).

B. CIPCO Entrusted a Professional Drainage Contractor to Reroute Underground Tiling in 2014 and to Make Improvements in 2022.

In 2014, CIPCO hired independent contractor Klima to reroute underground drainage tile on the property it owns and at issue in this lawsuit. D0146[4] ¶ 3; D0146 Attachment, Fett Decl. ¶ 6; D0048 at 205, Fett Dep. at 29:9-10. Plaintiffs admit Klima is "highly esteemed" and has done drainage tiling work on Plaintiffs' farms. D0146 ¶ 1; D0048 at 157-158, Tom Robinson Dep. at 12:23-13:1. CIPCO directed Klima to make the rerouted drainage flow equivalent to the original. D0146 ¶ 5; D0146 Attachment, Fett Decl. ¶ 8. CIPCO trusted Klima with all aspects of the installation, including drainage tile material, diameter, elevation, and backfill. *Id.*

In 2022, a contractor retained by CIPCO rerouted the tile line again using an 8" line. D0045 ¶ 4; D0048 at 201-202, Price Dep. at 28:3-10; 72:11-73:1; *see also* D0048 at 90 ¶ 11; D0048 at 205, Fett Dep. 29:11-16. Plaintiffs testified that the impact of construction that occurred in 2022 on crop yield on their land is inconclusive. D0146 ¶ 14. Their farming tenant testified that the repair looked "Cadillac" and had taken care of any drainage issues. D0146 ¶¶ 15-16.

[4] CIPCO and Coggon Solar's Statement of Undisputed Facts in Support of their Second Motion for Summary Judgment (10/11/2023).

C. Plaintiffs Admit that This Lawsuit is Part of a Strategy to Slow Down or Stop a Solar Farm Construction Across from Them

Plaintiffs admitted that this lawsuit is part of the strategy to slow down or stop a solar farm from being constructed across from their homes. D0048, App. 193, Paula Robinson Dep. at 39:11-40:3; *see also* D0048 at 186-188, Laura Robinson Dep. at 45:20-51:2 (Plaintiffs have each spent hundreds of hours working to stop its development). Accordingly, Plaintiffs not only claimed common law drainage rights (which no one disputes), but they claimed the unprecedented legal right to dictate exactly how and where water should be channeled underneath Defendants' property in this case and in parallel litigation. *See Robinson v. Linn Cnty. Bd. of Sup'rs*, No. 23-0705, 2024 WL 2842296, at *9 (Iowa Ct. App. June 5, 2024). Plaintiffs sought to displace the high voltage electrical substation that will support the solar farm being constructed. D0002, Plaintiffs' Petition at 8 (seeking injunction to restore tile line).

SUMMARY OF THE ARGUMENT

Underground agricultural drainage tiling carries away surface water that falls on land to improve crop yield. D0045 ¶ 7. "When it comes to natural drainage easements, the law only requires 'the natural flow or passage of the waters cannot be interrupted or prevented by the servient owner to the detriment or injury of the dominant proprietor.'" *Robinson v. Linn Cnty. Bd. of Sup'rs*, No. 23-0705, 2024 WL 2842296, at *9 (Iowa Ct. App. June 5, 2024) (quoting *Ditch v. Hess*, 212 N.W.2d 442, 448 (Iowa 1973)). Drainage tiling disputes ordinarily arise when neighbors interrupt water flow or dump water at an unnatural outlet. Not here. Drainage from Plaintiffs' land flows onto Defendant CIPCO's land at its historical inlet and exits at its historical outlet. D0045 ¶¶ 5-6. CIPCO engaged a contractor who Plaintiffs admit was "highly esteemed" to "maintain historical subsurface drainage tiling flow." D0157, Ruling at 4 (12/28/2023); D0146 ¶ 1 (10/11/2023). When questions arose whether it had done so, CIPCO engaged a drainage engineer that Plaintiffs selected and a contractor to make the engineer's recommended improvements on CIPCO's land. D0045 ¶ 4. CIPCO even offered to pay for windfall improvements to drainage tiling on Plaintiffs' land, which Plaintiffs rejected. Instead, they brought this lawsuit.

That would be confounding absent further context. After all, Plaintiffs and Defendants are aligned in their views that drainage water from Plaintiffs' land should be carried underground from its historical inlet to its historical outlet at (or better

than) its historical flow rate through CIPCO's land at CIPCO's expense. Plaintiffs attempt to insinuate otherwise, accusing CIPCO of having "unilaterally cut or divert[ed] this tile" but omitting the crucial detail that CIPCO undisputedly directed the contractor to maintain historical flow in the 2014 reroute. D0157, Ruling at 4. Plaintiffs falsely describe this subsurface drainage tile on Ludolph and CIPCO land as the "Robinsons' [t]ile" without record support of ownership or that they did anything but drain water into their neighbor's underground tile line with permission. *See* Iowa Code § 564.1 (use inadmissible to prove prescriptive easement).

The real dispute is one that has nothing to do with carrying water from land to improve crop yield. Plaintiffs advance a legally unsupported right to insist that downhill neighbors retain a particular path of man-made underground drainage tile, treating the right for underground passage of surface water like overland access easements. They cite no authority that would extend the law of overland access easements to a neighbor's man-made underground drainage tiling. They ignore authority authorizing landowners to route drainage tiling to improve productive use of land. More broadly, this unprecedented right would make easily rerouted clay and plastic tile lines impediments to development throughout the state, allowing neighbors to interfere with landowners' discretion over placements of silos, outbuildings, and a variety of other common structures on agricultural land.

Since a neighbor's authority to demand a particular path of underground drainage tiling is unprecedented, and because Defendants were always willing to assure (at Defendants' cost) that Plaintiffs' ability to drain water away from their land was not negatively impacted, Defendants requested that Plaintiffs quitclaim that (and only that) asserted interest under Iowa Code § 649.5 prior to filing their quiet title counterclaim. This would have left a comparatively nominal dispute whether CIPCO restricted flow and could be liable for Plaintiffs' damages, if any, in the event their drainage had been impaired. Plaintiffs declined, knowingly assuming the disclosed risk of fee shifting. Instead, they fought to displace CIPCO's high voltage substation that had been built in 2014 to replace an adjacent 1950s-era substation.

It's no mystery why they only pressed this claim in 2022, eight years after the modern substation had been built. Plaintiffs admit this lawsuit is part of the strategy to slow down or stop the solar farm from being constructed across from their homes. D0048, App. 193, Paula Robinson Dep. at 39:11-40:3. Claiming an unrecognized right to determine a neighbor's underground drainage tiling path was the only theory that allowed Plaintiffs to advance their strategic purpose. Even now, with the district court's rulings pointing to the lack of legal authority for Plaintiffs' theory, and a June 2024 Iowa Court of Appeals decision in parallel litigation underscoring this deficiency, Plaintiffs press forward.

ARGUMENT

I. Natural Drainage Rights Ensure Unobstructed Flow, Not an Overland Right of Way Along the Course of Underground Drainage Tiling.

A. Standard of Review and Preservation of Error

Review is for correction of errors at law. *Quality Plus Feeds, Inc. v. Compeer Fin., FLCA*, 984 N.W.2d 437, 444 (Iowa 2023). Defendants do not dispute error preservation.

B. Plaintiffs Have No Legal Right to Determine a Particular Path of Underground Drainage on Their Neighbor's Property

1. Drainage Common Law Does Not Support an Overland Right of Way Easement

Plaintiffs not only claim common law drainage rights (which no one disputes), but they claim to hold the legal right to dictate exactly how and where their surface water should be channeled underneath Defendants' property. This unyielding position was advanced by Plaintiffs and heavily litigated, irrespective of a lack of legal authority for it. *See* D0077, Ruling at 14 (9/13/2023) ("[T]he authorities providing for drainage easements cannot be construed to provide that the dominant landowner can dictate the path and terms of the placement of drainage tile on the neighboring property."). Most recently, the Iowa Court of Appeals highlighted this deficiency in a parallel litigation that affirmed the finding that zoning for a solar farm was not a taking of Plaintiffs' claimed right: "When it comes to natural drainage easements, the law only requires 'the natural flow or passage of the waters cannot be interrupted or prevented by the servient owner to the detriment or injury of the

dominant proprietor.'" *Robinson*, No. 23-0705, 2024 WL 2842296, at *9 (quoting *Ditch*, 212 N.W.2d at 448). "In examining the Robinsons' claim, we note that the sources they rely on deal with overland right of way easements, not natural drainage easements." *Robinson*, No. 23-0705, 2024 WL 2842296, at *9.

Natural drainage easements are distinct from overland right of way easements because the scope of any easement depends on the purpose that gave rise to its existence. "If an easement is not specifically defined, the rule is that the easement need only be such as is reasonably necessary and convenient for the purpose for which it was created." *Flynn v. Michigan-Wisconsin Pipeline Co.*, 161 N.W.2d 56, 61 (Iowa 1968) (citation and internal quotation omitted). "We think the same rule applies irrespective of the method by which the easement was created." *Flynn*, 161 N.W.2d at 61; *see also, e.g., Loughman v. Couchman*, 53 N.W.2d 286, 289 (Iowa 1952) ("[T]he extent of an easement created by prescription is measured by the use through which it arose."); *State ex rel. Wasserman v. Fremont*, 20 N.E.3d 664, 666 (Ohio 2014) (applying this principle to an underground drainage tiling reroute: "The purpose of the easement in this case was and remains to drain water from the Wasserman property into Minnow Creek. If the rerouted pipe still accomplishes that purpose, the rerouting does not violate the purpose of the easement."). The ordinary right to discharge natural drainage from higher elevation land to lower elevation land is the only purpose for the drainage right Plaintiffs

claim. *See* D0045 ¶ 7 (citing D0048 at 160, Tom Robinson Dep. at 35:5-12; D0048 at 173, Martin Robinson Dep. at 31:8-20; D0048 at 184, Laura Robinson Dep. at 8:15-9:16; D0048 at 192, Paula Robinson Dep. at 12:12-25).

Plaintiffs have no right to restrict the location of structures or fixtures on neighboring property, and neighboring property owners may instead route surface water through underground drainage tiling provided it does not disrupt adjoining property. *See Sojka v. Breck*, 832 N.W.2d 384, 2013 WL 1453241, at *5 (Iowa Ct. App. 2013) (recognizing that "a servient landowner could divert surface water without disrupting the adjoining property") (citing, inter alia, *Jenkins v. Pedersen*, 212 N.W.2d 415, 420 (Iowa 1973)); *Dorr v. Simmerson*, 103 N.W. 806, 807 (Iowa 1905) (describing right to conduct surface water using underground drainage); *Logsdon v. Anderson*, 30 N.W.2d 787, 792 (Iowa 1948) (referencing "the right to direct surface water on his own premises, without burdening his neighbors"). CIPCO takes Plaintiffs' drainage outflow at its historical inlet on the CIPCO property's north border and delivers water through underground drainage tiling to its historical outlet at the south border. D0045 ¶¶ 5-6.

Plaintiffs failed to adduce evidence of any access easement purporting to restrict CIPCO's common law authority to direct natural drainage flow on its property using a tiling route that improves the productivity of its land (here, with an electrical substation serving the local area). Access easements authorize unlimited

physical entry onto property along a prescribed route. *See Bagley v. Petermeier,* 10 N.W.2d 1, 3 (Iowa 1943). Plaintiffs assume that ordinary drainage rights operate the same way, but they do not. Drainage rights require only that a servient estate allow the natural discharge of surface water without obstruction. *Braverman v. Eicher*, 238 N.W.2d 331, 334 (Iowa 1976).

Where the owner does not interrupt historical drainage outflow from higher-elevation land to lower elevation land, what is left is the most fundamental attribute of property ownership—property owners retain the right to use land how they choose. *See, e.g., State v. Osborne*, 154 N.W. 294, 301 (Iowa 1915) ("The first section of our Bill of Rights assures to every man protection in his natural right to acquire, possess, and enjoy property."); *c.f.* Restatement (Third) of Property (Servitudes) § 4.9 (2000) ("[T]he holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude.") (cited by *Skow v. Goforth*, 618 N.W.2d 275, 279 (Iowa 2000)).

Plaintiffs' inapposite authority regarding watercourses does not alter the analysis. This case involves *surface water* conducted through man-made underground drainage tile, not a *watercourse*. *See Hunt v. Smith*, 28 N.W.2d 213, 220 (Iowa 1947) ("A watercourse is defined as a natural stream of water usually flowing in a definite channel, having a bed and sides, or banks, and discharging itself into some other stream or body of water.") (citation and internal quotation omitted).

Regardless, even where (contrary to the record here) "surface water has a fixed and certain course, as a swale, though it may be narrow or broad, its flow cannot be interrupted to the injury of an adjoining proprietor." *Hunt*, 28 N.W.2d at 221 (emphasis added). Again, this does not give rise to a right to select a path of underground drainage tiling where, as here, flow is preserved.

Plaintiffs do not bother to address the only case any party has cited in the district court specifically concerning rerouted underground drainage tiling—*State ex rel. Wasserman v. Fremont*, 20 N.E.3d 664, 666 (Ohio 2014). Much as demanded by Iowa law, *Wasserman* examined the purpose for which the easement was created (here adequate drainage). *Wasserman*, 20 N.E.3d at 670. *Wasserman* protected a landowner's right to route and reroute drainage tiling where it fulfills the purpose of providing adequate drainage (consistent with *Sojka*, *Jenkins*, and other drainage cases in Iowa). "An easement should be interpreted to give effect to the language used in the instrument and to carry out the purpose for which it was created." *Id.* (citing Restatement of the Law 3d, Property, Servitudes, Section 4.1 (2000)). *Wasserman* ruled no taking had occurred because the rerouted line continued to fulfill the purpose of the drainage easement:

> The purpose of the easement in this case was and remains to drain water from the Wasserman property into Minnow Creek. If the rerouted pipe still accomplishes that purpose, the rerouting does not violate the purpose of the easement. Therefore, we hold that the right of Fremont's predecessor to fix the line and depth of the tile remained with the heirs and assigns, and that right includes the right to reroute the line as long

> as the line continues to fulfill its primary purpose, which is to drain the Wassermans' land.

Id. (emphasis added).

By comparison, this case is not a close call where Plaintiffs merely rely on common law higher-elevation-to-lower-elevation drainage flow rights. Unlike *Wasserman*, where an express easement was negotiated, Plaintiffs admit "[t]here's not a written easement," D0045 ¶ 1 (citing D0048, App. 168, Tom Robinson Dep. Tr. at 139:1-11). The only purpose of drainage tiling that Plaintiffs have identified is the same purpose referenced in *Wasserman*, the right to drain water from their property. D0045 ¶ 7. The Wassermans, despite having an express drainage easement, could not meet their burden to establish an easement for a particular path of drainage. Here the Plaintiffs have no express easement and failed to establish that they have a fixed, specific underground tiling easement.

The district court's ruling should be affirmed that Plaintiffs cannot meet their burden to strictly prove an easement to a particular path of underground drainage tiling on CIPCO's property by clear, convincing, and satisfactory evidence. *See Webb v. Arterburn*, 67 N.W.2d 504, 514 (Iowa 1954) (burden).

2. Drainage Statutes Do Not Create a Right to Direct the Path of Man-Made Underground Drainage on Neighboring Land

Statutes cited by Plaintiffs do not address, much less prohibit rerouting underground *tile lines*, as plaintiffs claim; they prohibit diverting drainage *flow* with respect to neighboring property resulting in damage:

> Any person who shall willfully break down or through or injure any levee or bank of a settling basin, or who shall dam up, divert, obstruct, or willfully injure any ditch, drain, or other drainage improvement authorized by law shall be liable to the person or persons owning or possessing the lands for which such improvements were constructed in double the amount of damages sustained by such owner or person in possession; and in case of a subsequent offense by the same person, the person shall be liable in treble the amount of such damages.

Iowa Code § 468.148.

> 1. A person is guilty of a serious misdemeanor if, without legal authority, the person willfully does any of the following:
>
> > a. Diverts, obstructs, impedes, or fills up any ditch, drain, or watercourse.

Iowa Code § 468.149(a).

These provisions have no bearing on whether a landowner may reroute the path of tile within the boundaries of its own property. Specifically, CIPCO preserved the original inlet and outlet when rerouting tiling within its property border, it did not alter the ultimate course of flow. CIPCO has a right to "divert surface water without disrupting the adjoining property," under *Sojka* and *Jenkins*. This right is consistent with longstanding authority permitting landowners to direct surface water through their land to improve productive use of the land, as detailed in *Dorr*. Iowa

Code §§ 468.148 and 468.149 are directed at diversions that result in damage, and can be read in conjunction with this precedent allowing downhill property to divert surface water without disrupting adjoining property.

Here, the rerouted tiling does not divert surface water (i.e., change the inlet or outlet). It merely takes a different underground path within the boundaries of CIPCO's property. CIPCO's counterclaim for quiet title did not seek declaratory relief which would alter any drainage discharge with respect to neighboring property. It continues to take subsurface drainage tile discharge at its historical inlet. D0064, Plaintiffs' Response to CIPCO and Coggon Solar's Statement of Undisputed Facts, ¶ 5 ("Admit that the . . . tile line . . . extended into and then directly across the CIPCO substation property."). It transfers drainage to its historical outlet. D0064, ¶ 6 ("Admit that the tile drainage from the Robinsons' property eventually reaches the historically used four in tile."). CIPCO did not seek to avoid accepting the downstream waterflow from any higher elevated neighboring properties.

Consistent with the purpose of the statutes, the district court held that it was "not persuaded that Iowa Code §§ 468.148, 468.149, or 468.621 prohibit routing or rerouting of underground tile lines, as argued by Plaintiffs." D077, Ruling at 14. The Court identified authority that this statute affords an uphill landowner the "right to discharge water upon" downhill land and "into" a natural watercourse or depression. *Id.* at 11-13; *see also* Iowa Code 468.621 (". . . discharging the drains in any natural

watercourse or depression"); *Thome v. Retterath*, 433 N.W.2d 51, 53 (Iowa Ct. App. 1988) ("The owner of dominant land has the right to drain his land into a natural watercourse, despite the fact the quantity of water cast upon the servient estate is somewhat increased.") (emphasis added). This provision authorizes discharge of drainage "in" a natural watercourse or depression. It does not restrict the downhill landowner from routing and rerouting drainage tile lines around obstacles on its own land in order to put the land to its best and most productive use (here, helping supply energy to thousands of Iowa residents).

3. The Deed Restriction is Consistent with CIPCO's Common Law Right to Direct Surface Water Through Tiling

Plaintiffs alternatively rely on a Deed Restriction in CIPCO's Plat, ignoring its purpose, text, and the circumstances surrounding its creation. Paradoxically, Plaintiffs contend that a Deed Restriction entered as a condition to the application to construct the substation in its present location in 2014 instead prohibits construction of the substation in that location. The Deed Restriction provides, in pertinent part:

> The owners of said Lot 1 shall agree to extend any natural surface waterway or tile drainage system for adjoining properties and shall also agree to perpetually maintain said drainage system and protect from any obstruction or any type of blockage which would cause damage to adjoining properties.

D0048 at 31, Fenceline and Drainage Deed Restriction (emphasis added). CIPCO agreed to this Deed Restriction to obtain county approval to build the modern substation. D0048 at 42. Its location, adjacent to the old site, permitted uninterrupted

operation of the old substation until the new one came online. D0048 at 206, Fett Dep. at 61:12-14. Notwithstanding Plaintiffs' argument to the contrary, the Deed Restriction does not mandate a particular location for the drainage system or prohibit rerouting that drainage system as the need arises. Wherever located, the drainage system need only be maintained and protected from obstruction.

"It is a general rule that in the construction of an instrument such as a deed, consideration is to be given to the intention of the grantor and that the entire instrument is to be considered in the light of the circumstances when made." *Schenck v. Dibel*, 50 N.W.2d 33, 34 (Iowa 1951); *see also Leverton v. Laird*, 190 N.W.2d 427, 431 (Iowa 1971) (recognizing "intention of the parties as the determinative force" interpreting a deed restriction). "[T]he intention of the parties may be ascertained from the language of the instrument or may be implied from the surrounding circumstances." *Thodos v. Shirk*, 79 N.W.2d 733, 738 (Iowa 1956).

(a) The Deed Restriction Does Not Specify a Fixed Location for Underground Drainage Tiling.

Nowhere in the text of the Deed Restriction is there any description of a fixed path that drainage tiling must follow or any prohibition on rerouting the drainage tile lines. *See* D0048 at 31, Dep. Ex. 7 at 22-24. This is consistent with the lack of intent to create an easement for a path of drainage. *See Schenck*, 50 N.W.2d at 35 (citing 16 Am. Jur. Sec. 169, p. 533) ("[A] court can neither put words into a deed which

are not there nor put a construction on the words directly contrary to the plain sense of them.").

A case cited by Plaintiffs that found a fixed path overland access easement illustrates the critical difference between overland easements and underground tiling. In the plat map there, "[t]he easement is indicated by a dotted line running parallel to the northern border of the property with the phrase '50′ ingress egress easement' placed in the middle of the area between the northern border of Lot 5 and the dotted line." *Gray v. Osborn*, 739 N.W.2d 855, 857 (Iowa 2007). Accordingly, "[t]he recorded plat for Maple Ridge Estates I clearly denotes an intention to create an easement along the northern border of Lot 5. Not only is the easement's location and dimension specifically delineated, the precise term 'EASEMENT' is used. Moreover, the easement's purpose—ingress and egress—is explicitly noted." *Gray*, 739 N.W.2d at 861. Here, none of those attributes are indicated on the plat to establish any fixed-path easement by clear, convincing, and satisfactory, and conclusive evidence. *See Webb*, 67 N.W.2d at 514 (burden of proof).

Plaintiffs argue that the term "perpetually maintain said drainage system" somehow requires a fixed underground drainage tile path. D0048 at 31. That reading ignores that "said drainage system" references back to the obligation to "extend any . . . tile drainage system for adjoining properties," not *the* tile drainage system for adjoining properties. *See id.* (emphasis added). In other words, CIPCO retains both

the right and obligation to extend as changing circumstance may dictate, and there is no obligation that locks in place a single design. Had the drafters wished to fix a particular location of a single tile drainage system they could have done so. For instance, the Deed Restriction does not state *extend along the lowest route,* or *extend along the existing route*. It instead requires CIPCO to extend any tile drainage system. Further, an obvious component of maintenance of drainage tiling includes rerouting tiling lines around obstructions, like the substation contemplated to be built when the Deed Restriction was drafted.

(b) The Purpose is to Avoid Damage, Not to Prescribe an Exact Underground Drainage Path.

Plaintiffs' reading of the Deed Restriction as fixing a specific underground drainage path also does not square with its purpose. That purpose is set forth in an Acknowledgment of Responsibility signed the same day: "We will be responsible for not adversely affecting drainage of adjoining properties; and ensure that we fully comply with all state and local drainage and flood control laws, ordinances and regulations." D0048 at 25-27. CIPCO fulfills this purpose by taking the discharge of water onto CIPCO's substation property from the historical inlet at the north border and delivering it by whatever route it chooses to the historical outlet at the south border. D0048 at 81; D0048 at 201-202, Price Dep. at 28:3-10; 72:11-73.

The only purpose of drainage tiling that Plaintiffs have identified is to drain water from their property to increase crop yield. *See* D0048 at 160, Tom Robinson

Dep. at 35:5-12; *Id.* at 173, Martin Robinson Dep. at 31:8-20; *Id.* at 184, Laura Robinson Dep. at 8:15-9:16; *Id.* at 192, Paula Robinsons Dep. at 12:12-25. Rerouting tiling is permissible because it continues to fulfill that purpose. *See, e.g., Wasserman*, 20 N.E.3d at 670 ("The purpose of the easement in this case was and remains to drain water from the Wasserman property into Minnow Creek. If the rerouted pipe still accomplishes that purpose, the rerouting does not violate the purpose of the easement.").

(c) The Circumstances Surrounding Creation of the Deed Necessarily Required Rerouting

Plaintiffs' argument for a fixed path of drainage runs contrary to the plain intent of drafters and signatories of the Deed Restriction by ignoring what is "implied from the surrounding circumstances." *See Thodos*, 79 N.W.2d at 738. The Deed Restriction was signed to facilitate the proposal to construct the substation in its current location. D0048 at 58 (observing in Zoning Board of Adjustment Order "the new substation will move west approximately 200 feet" from the original substation); *see also* D0048 at 206, Fett Dep. at 61:12-16 ("The new substation in 2014 had to be built while the existing substation was still in operation."). That location required the rerouting of the underground tiling system then in place. It would make no sense for the drafters and signatories to agree to a provision that would bar the contemplated substation construction and the necessary tile rerouting

where its text supports an interpretation that permits the new substation to exist at its planned location adjacent to the old substation.

This is consistent with the documents that gave rise to the Deed Restriction, which have been recorded with the Plat. Approval of the Plat for CIPCO Second Addition to Linn County was conditioned upon having "all easements marked on the final plat," but no drainage easements were marked. D0048 at 41 (Linn County Planning and Development – Zoning Division Condition 3); D0048 at 15 (Final Plat of CIPCO Second Addition). Plaintiffs have argued that the Plat map's notes state that "there shall be no above-ground utility structures where easements cross sewer, water, drainage, or access easements," D0048 at 15, n. 2, but the lack of any marking of any drainage easement, let alone a drainage easement along the specific path of the original tile line contradicts Plaintiffs attempt to manufacture any such fixed-path easement.

Additionally, the Deed Restriction was drafted to satisfy the following condition for Linn County Planning and Development Zoning Division approval: "Deed restriction concerning individual drainage rights as per the Code of Iowa, Chapter 468, subchapter V, will be required." D0048 at 42 (Linn County Planning and Development – Zoning Division Condition 6(h)). Iowa Code Chapter 468, subchapter V, governs "Individual Drainage Rights." In other words, the Deed Restriction was drafted to fulfill a mandate drawn from ordinary obligations under

Iowa Code regarding drainage. As detailed in the prior sections, Iowa law merely requires owners to take discharge of water from higher elevated dominant estates but then authorizes servient owners to direct (and redirect) drainage on their own property using tiling to improve productive use of land.

Lastly, Plaintiffs rely on email correspondence from a CIPCO engineer, which acknowledges Plaintiffs' right to use drainage tile on CIPCO's property for drainage outflow. D0064, Plaintiffs' Statement of Additional Material Facts ¶ 19. The section of the email cited states that "CIPCO is not aware of any documentation to support the Robinson's statement concerning their ownership of tile on CIPCO property," observes that the deed restriction "did not specifically detail the location of any drainage tile," and notes that "CIPCO merely relocated the tile away from the construction zone." D0069 at 45, Plaintiffs' August 29, 2023 Combined Appendix. The email is entirely consistent with the ability to route and reroute drainage tile in accordance with the purpose, text, and context of the Deed Restriction.

4. Plaintiffs Could Not Carry the Burden to Establish an Overland Right of Way Prescriptive Easement.

Plaintiffs failed to generate any genuine question of fact whether there was clear and convincing evidence to establish that CIPCO or the Ludolphs were on notice of any open, notorious, and hostile claim to a path of subsurface drainage. An easement by prescription can only be created under Iowa law when a person uses another landowner's estate, or part of an estate, in an (1) open, (2) notorious, (3)

continuous, (4) and hostile way, (5) under a claim of right or color of title, for ten (10) years or more. Iowa Code § 564; *Bales v. Shepard*, 867 N.W.2d 195, 2015 WL 2089604, *1 (Iowa Ct. App. 2015).

Plaintiffs had no evidence of hostile use because when drainage flowed along the original tiling path, that flow was by consent of the prior owners of the land (the Ludolphs) and their predecessors in interest. Hostile use of a particular path would arise, for example, if Plaintiffs entered the land, routed the tiling along a particular path, and CIPCO or the Ludolphs opposed Plaintiffs actions. Plaintiffs cannot by definition establish open, notorious, and hostile use to establish an easement by prescription.

Additionally, Plaintiffs' historical *use* of subsurface drainage tiling is not admissible as evidence in support of any defined path of subsurface drainage tiling:

> In all actions hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession thereof for the period of ten years, the use of the same shall not be admitted as evidence that the party claimed the easement as the party's right, but the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that the party against whom the claim is made had express notice thereof; and these provisions shall apply to public as well as private claims.

Iowa Code § 564.1 (emphasis added). Plaintiffs do not offer any evidence of hostile use, and "[p]ermissive use is not adverse or under a claim of right." *Heald v. Glentzer*, 491 N.W.2d 191, 193 (Iowa Ct. App. 1992).

Plaintiffs had no evidence—let alone strict proof—of any open, notorious, and hostile claim to a particular path of subsurface drainage flow. *See Brede v. Koop*, 706 N.W.2d 824, 828 (Iowa 2005) (quoting *Simonsen v. Todd*, 154 N.W.2d 730, 736 (Iowa 1967)) ("The facts relied upon to establish a prescriptive easement 'must be strictly proved.' They cannot be presumed."). The 2014 substation construction and tiling rerouting, done in an open manner next door to Plaintiffs, demonstrates that CIPCO had no reason to believe that the Plaintiffs claimed a right to determine the location of underground drainage tiling. Plaintiffs failed to meet their burden to establish a prescriptive easement to a particular path of subsurface drainage by clear, convincing, and satisfactory evidence so the district court's ruling should be affirmed. *See Webb*, 67 N.W.2d at 514 (burden).

5. Additionally and Alternatively, the High-Voltage Electrical Substation is Now Protected by the Doctrine of Laches

Even if there were somehow any basis to disturb the district court's ruling below and the Iowa Court of Appeals' observations in the Robinsons' parallel zoning case, Plaintiffs' claim to an access easement along the original route of drainage tiling on CIPCO's property is alternatively barred under the doctrine of laches. "Laches is an equitable doctrine premised on unreasonable delay in asserting a right, which causes disadvantage or prejudice to another." *State ex rel. Holleman v. Stafford*, 584 N.W.2d 242, 245 (Iowa 1998). "The party asserting the defense has

the burden to establish all the essential elements thereof by clear, convincing, and satisfactory evidence." *Id.* "Prejudice is an essential element of laches."

"[D]elay in bringing action for a period less than the statute of limitations does not amount to laches unless defendant has suffered injury or prejudice thereby, as by making expenditures in reliance on his own right, or unless there is some change in conditions rendering enforcement of plaintiff's right inequitable." *Atkin v. Westfall*, 69 N.W.2d 523, 527 (Iowa 1955), *abrogated on other grounds by Lowers v. United States*, 663 N.W.2d 408 (Iowa 2003). In *Atkin*, the defendant failed to establish laches in an action to quiet title over a 2-acre strip of land brought within the limitations period, having established no prejudice. *Id.* at 527.

The difference here could not be starker. Plaintiffs were aware that CIPCO was expanding its substation in 2014 and knew that the plan was to move the substation to the west. D0048 at 163, Tom Robinson Dep. 62:12-63:17. After approval, CIPCO began construction of the new substation. Plaintiffs Thomas and Laura Robinson, as well as Paula and Martin Robinson's predecessor in interest (their mother Mary Lu Robinson), lived in nearby homes on Linn Delaware Road during construction. D0048 at 3; *see also* D0048 at 157, 164-165, Tom Robinson Dep. at 10:3-21; 92:19-93:8; D0048 at 172, Marty Robinson Dep. at 12:1-8. They did not file this action until June 24, 2022, eight years after the tiling reroute. Plaintiffs will suffer no prejudice where drainage tiling continues to fulfill the only

purpose Plaintiffs have identified—draining their land to improve crop yield. D0048 at 160, Tom Robinson Dep. at 35:5-12; D0048 at 173, Martin Robinson Dep. at 31:8-20; D0048 at 184, Laura Robinson Dep. at 8:15-9:16; D0048 at 192, Paula Robinsons Dep. at 12:12-25.

By contrast, recognition of a right to drainage along the original path underneath the CIPCO substation is impracticable because it sits beneath high voltage electrical substation equipment operating, since 2014, for the benefit of CIPCO's members. *See* D0048 at 3, D0048 at 8; D0048 at 206, Fett Dep. at 60:22-61:6. Taking the substation offline, tearing it up, and installing a tile line that delivers the same level of drainage intake that Plaintiffs already have would be highly prejudicial and inequitable to CIPCO and local electricity users after Plaintiffs acquiesced to the substation's location from 2013 when it was proposed until 9 years later when they filed this lawsuit. Plaintiff's claim to a right for a particular path of drainage is barred by the doctrine of laches.

II. Plaintiffs Right to Drainage Flow Does Not Authorize Overland Access

A. Standard of Review and Preservation of Error

Review is for correction of errors at law. *Quality Plus Feeds*, 984 N.W.2d at 444. Defendants do not dispute error preservation.

B. Plaintiffs Have No Right to Unrestricted Overland Access

"If an easement is not specifically defined, the rule is that the easement need only be such as is reasonably necessary and convenient for the purpose for which it was created." *Flynn*, 161 N.W.2d at 61. No right of access is described anywhere in the record and no right of access onto CIPCO's substation property is reasonably necessary to secure drainage outflow that CIPCO agrees to maintain. Plaintiffs are limited to a right to discharge surface water through the subsurface drainage tile on the north border of CIPCO's land.

A contrary rule recognizing a right for uphill landowners to enter and dig up neighboring property throughout the state—in which Plaintiffs contend there are 14 million crop acres tiled—without an injunction is at extreme odds with the expectations of farmers and other property owners throughout Iowa. *See, e.g., Cedar Point Nursery v. Hassid,* 594 U.S. 139 (2021) ("The right to exclude is 'one of the most treasured' rights of property ownership."). This is particularly so here, where the property contains high-volage electrical equipment.

Plaintiffs cite Iowa Code § 468.621 and *Nixon v. Welch*, 24 N.W.2d 476, 477 (Iowa 1946), but those authorities do not abrogate the proverb that good fences make good neighbors. Plaintiffs have cited no authority giving uphill neighbors a right to enter property they do not own and start digging in the absence of a court order, solely based on a natural drainage right.

Uphill neighbors may, of course, petition a court for mandatory injunctive relief to gain access for maintenance in circumstances where the defendant would not make repairs to avoid damage. *Nixon*, 24 N.W.2d at 481. By contrast, CIPCO has agreed to maintain drainage tiling on its property and has retained contractors to make improvements. D0048 at 31, Fenceline and Drainage Deed Restriction; D0064, Plaintiffs' Response to CIPCO and Coggon Solar's Statement of Undisputed Facts, ¶4 (admitting 2022 installation of 8"-tile line). *Nixon* does not recognize any general right of unfettered access of an uphill landowner merely because of drainage outflow onto downhill land. *See Nixon*, 24 N.W.2d at 481. At best, it recognizes that a servient estate "must permit the cleaning out of the watercourse across his land" and is susceptible to a court injunction authorizing that work if they do not. *See id.* at 479, 481.

III. Plaintiffs' Nuisance Claim Fails because There is No Unlawful Action

A. Standard of Review and Preservation of Error

Review is for correction of errors at law. *Quality Plus Feeds*, 984 N.W.2d at 444. Defendants do not dispute error preservation.

B. There is No Nuisance because CIPCO Has a Right to Reroute Tile

Nuisance requires proof that Defendants "unlawfully" diverted drainage discharge (not alleged lack of due care installing or maintaining drainage tiling); unreasonable interference with Plaintiffs' use and enjoyment of their land; and resulting damage. *See Pottawattamie Cnty. v. Iowa Dep't of Env't Quality, Air*

Quality Comm'n, 272 N.W.2d 448, 453 (Iowa 1978) ("The elements of public nuisance are: (1) unlawful or anti-social conduct that (2) in some way injures (3) a substantial number of people. The determination of private nuisance rests upon whether there has been 'an actionable interference with a person's interest in the private use and enjoyment of his land.'"); Iowa Code § 657.2(4) ("The following are nuisances: . . . The corrupting or rendering unwholesome or impure the water of any river, stream, or pond, or unlawfully diverting the same from its natural course or state, to the injury or prejudice of others.") (emphasis added).

Plaintiffs argue that that interfering with drainage of an uphill landowner is a nuisance, but they ignore a crucial distinction in nuisance and negligence law that is significant here where CIPCO directed a contractor to maintain historical flow. *See* D0150[5] ¶ 5 (admitting that "CIPCO directed Klima to make the rerouted drainage flow equivalent to what was there before."). Proof of unlawful action, not mere negligence installing or maintaining drainage tiling, is necessary because "[t]he key for . . . a stand-alone claim of nuisance is that the degree of danger likely to result in damage must be inherent in the thing itself." *Martins v. Interstate Power Co.*, 652 N.W.2d 657, 664 (Iowa 2002).

"The distinction between nuisance and negligence claims is often important because common law nuisance generally exists as a separate area of recovery from

[5] Plaintiff's Response to Defendants' Statement of Undisputed Facts (10/26/2023).

negligence only when the danger at issue is inherent in the activity and not the results of the negligent conduct." *Kellogg v. City of Albia*, 908 N.W.2d 822, 829 (Iowa 2018) (emphasis added). If the alleged harm goes to a question of due care, it does not give rise to a nuisance claim. *See Kellogg*, 908 N.W.2d at 828; *see also Hall v. Town of Keota*, 79 N.W.2d 784, 790 (Iowa 1956) ("The traffic post was a lawful structure lawfully on the sidewalk. Failure to maintain it in a safe condition, if there was such failure, was no more than negligence; it was not a nuisance.").

There is nothing inherently dangerous in hiring any "highly esteemed" drainage contractor to maintain historical flow. Moreover, CIPCO has the right to reroute drainage tiling within the boundaries of its property. D0077, September 13, 2023 Ruling; D0145, October 11, 2023 Ruling. There is no harm inherent in having done so. *See id.* Plaintiffs have only pointed to the quality of Klima's tiling work, which was capable of being performed in a manner that maintains historical drainage flow. There is nothing inherently dangerous or illegal in a tiling installation that sets out to maintain historical flow, so Plaintiffs' nuisance claim was properly dismissed. D0157, Ruling at 5.

IV. Plaintiffs' Deposition Admissions Establish No Damage

A. Standard of Review and Preservation of Error

Review is for correction of errors at law. *Quality Plus Feeds*, 984 N.W.2d at 444. Defendants do not dispute error preservation.

B. Damages were an Afterthought, and Plaintiffs' Deposition Admissions Establish that They Cannot Prove any Crop Loss

Plaintiffs appeal the district court's ruling dismissing their claims to past and future crop losses, failing to confront key deposition admissions that they made that exposed the speculative nature of their theory.

Stepping back, and as further detailed in the next section, the district court's damage and liability rulings were made in the alternative. The district court ruled that CIPCO was not liable because it merely instructed a contractor, who Plaintiffs recognize as "highly esteemed," to preserve drainage flow when rerouting tiling around substation site. *See* D0157 at 4-5 ("CIPCO has offered undisputed evidence that it directed Klima to maintain historical subsurface drainage tiling flow, not obstruct it, and the Court is not persuaded that CIPCO's act of hiring an engineer to assess Klima's work constitutes an assumption of liability by CIPCO for Klima's work.")

With respect to its alternative ruling on damages, the district court held:

> Plaintiffs have offered nothing by way of showing what the baseline productivity for the land was prior to the rerouting process. "The proper measure of damage for loss of growing crops is their value in the field at the time of injury or their value in matured condition less the reasonable expense of maturing and marketing." Plaintiffs' own deposition testimony does not provide an adequate basis for showing what the value in the field was at the time of the injury, nor does it provide any specific evidentiary fact regarding what future loss Plaintiffs may suffer.

Ruling at 5 (quoting *Eppling v. Seuntjens*, 117 N.W.2d 820, 824 (Iowa 1962)).

1. Past Harm: Plaintiffs Admitted No Evidence of Past Yield

Plaintiffs had no evidence of non-speculative harm because they admitted in deposition testimony that they had no baseline yield from which to derive the existence of any loss. "The proper measure of damage for the loss of growing crops . . . is 'their value in the field at the time of injury . . . .'" *Moody v. Van Wechel*, 402 N.W.2d 752, 757 (Iowa 1987) (quoting *Eppling*, 117 N.W.2d at 824). In *Moody*, Plaintiffs offered nothing more than speculation as to the value of crops damaged because there was no allowance for ordinary impediments to yield:

> We agree with the trial court that there is insufficient evidence to fix damages. There is no showing of the value of the crops which were ruined. In Moodys' speculative estimates of the overall damages, no allowance was made for damages the crops would ordinarily receive from surface drainage.

Moody, 402 N.W.2d at 758 (emphasis added).

Plaintiffs' admissions show that, as in *Moody*, Plaintiffs offer nothing more than speculation as to the value of crops damaged because there was no allowance for ordinary impediments to yield. They speculated as to yield performance prior to the tiling reroute in 2014, testifying that they only looked at yield for 2021:

> Q. Okay. How do you know that there's been any yield loss in any of the years 2014 through 2021 if you haven't looked at the yield maps?
>
> A. Don't know that we've said that per se. I anticipated, in general, the reason I haven't looked at it more deeply than anticipated per the discussions and description of the yield loss itself, didn't feel motivated to dig into it more deeply at this early stage.
>
> Q. Well, this case goes to trial in September. You realize that, right?

A. Understood. No, actually I didn't know that, so . . .

Q. Okay. As you sit here today --

A. Um-hm.

Q. -- you don't know whether there was any yield loss in 2014, do you?

A. Can't comment. Don't know.

Q. And the same thing is true for '15 all the way through 2020 at least?

A. Haven't analyzed it.

Q. Okay. Never looked at it, never asked for the information?

A. I said previously I glanced at them. I have not made an effort to analyze them.

Q. You reviewed the 2021 yield map. Since that time have you asked for 2022?

A. Yes.

Q. And what did you find there?

A. In the same category; I haven't looked at it in-depth because I didn't consider it a proximate need.

Q. The only year you've looked at is 2021?

A. That's the only one I've analyzed in depth, that is correct.

Q. And what was the yield that year?

A. Approximately 50 bushels.

Q. 50 bushels?

A. 50 bushels per acre on, as stated, 25 acres, which -- plus 10 acres of Paula's, so . . .

Q. So that's a loss in yield of 50 bushels per year per acre is what you say, right?

A. Correct, yep.

Q. That was the answer that you furnished in this lawsuit, right?

A. That's correct.

Q. But you don't know if that's true for 2014 through 2020, do you?

A. That's correct.

D0146 ¶ 11, Martin Robinson Dep. at 68:18-70:16 (emphasis added). Plaintiffs conceded that the number of acres allegedly affected by their claimed drainage concerns is a "swag." D0146 ¶ 12, Tom Robinson Dep. 94:11-16. Plaintiffs offer nothing more than speculation as to the value of crops damaged because there was no allowance for pre-existing impediments to yield.

Faced with this conundrum, Plaintiffs belatedly advanced inadmissible hearsay in the form of late expert opinions drawn from a Youtube screengrab on the alleged impact of tiling flow rates on crop yield. D0157, Ruling at 5. The Court properly declined to consider these late and inadmissible opinions. *Id.*; Iowa R. Civ. P. 1.981(5) (requiring admissible evidence).

2. Future Harm: Plaintiffs Had No Evidence to Refute their Farming Tenant's Testimony that Repairs were "Cadillac"

As to future alleged damages, Plaintiffs admit they have no evidence of yield impairment to refute their farming tenant's testimony that tile repairs were effective. Diminution in farmland value requires evidentiary support that a buyer would pay

less for their land, but there was none. *See, e.g., Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 641 (Iowa 1996) (finding damages too speculative when the plaintiff "produced scant evidence to establish the reduction in value" of the property in question); *see also St. Malachy Roman Cath. Congregation of Geneseo v. Ingram*, 841 N.W.2d 338, 353 (Iowa 2013) (citing *Sun Valley* for this proposition). Plaintiffs admitted that they have no evidence of any permanent and ongoing drainage concern—and thus no future value impairment—following CIPCO's improvements in July 2022:

> Q. Then let me be a little bit more precise with my question. Do you have any reason to believe that drainage issues are going to impact crop yields in 2023?
>
> **A. Do I have any --**
>
> Q. -- reason to believe that any drainage issues on the Robinson farm are going to impact crop yield --
>
> **A. Couldn't tell you.**
>
> Q. Okay. You heard Mr. Price's testimony that he felt the work done on the CIPCO side had taken care of the issue. Do you remember when he testified to that effect?
>
> **A. I remember him testifying to that effect.**
>
> Q. Okay. Do you have any reason to believe that he's mistaken about that?
>
> **A. My main concern is addressing the issue -- addressing the issue of CIPCO destroying our tile easement.**

D0146 ¶ 13, Tom Robinson Dep. at 116:4-22.

> Q. After the construction that occurred in mid-2022, what has been the impact, if any, on the yield to the crops on your land?
>
> **A. Inconclusive, I guess, last year.**

D0146 ¶ 14, Martin Robinson Dep. at 44:12-15; *see also id.* 15-16, Laura Robinson Dep. at 40:14-44:21; *id.* Paula Robinsons Dep. at 52:9-16.

Irrespective of Plaintiffs' arguments that Martin Robinson's could somehow be qualified to testify to property value as an owner or otherwise *if drainage flow were impaired*, the basis for any such an opinion (future crop loss) is speculative because they admit there is no evidence drainage is currently impaired. The only record evidence is that there will be no future crop loss due to drainage concerns. Namely, Dennis Price, who was actively involved in farming Plaintiffs' land on behalf of their farming tenant (Price Brothers, LLC) believes the 2022 repair looked "Cadillac" and had taken care of any drainage issues. D0146 ¶¶ 15-16, Price Dep. at 28:3-10; 72:11-73:1; Price Dep. at 13:23-15:13 (identifying Robinson property Dennis Price farms). Because there was no evidence of any future yield loss, and the only evidence is that the issue has been resolved, Plaintiffs' claim for diminution of land value due to future yield loss is speculative under *Sun Valley*.

V. CIPCO Engaged a Professional Contractor to Preserve Flow and is Not Liable for the Quality of the Contractor's Work

A. Standard of Review and Preservation of Error

Review is for correction of errors at law. *Quality Plus Feeds*, 984 N.W.2d at 444. Defendants do not dispute error preservation.

B. CIPCO Retained a Professional Drainage Contractor to Preserve Flow, so Restatement (Second) of Torts § 409 Bars Liability

1. Restatement § 409 Applies to the Drainage Work Here

CIPCO entrusted the tiling contractor Klima, who Plaintiffs admit was "highly esteemed" and had done work on their own farms, to install drainage tiling to preserve drainage flow. *See* D0157 at 4-5 ("CIPCO has offered undisputed evidence that it directed Klima to maintain historical subsurface drainage tiling flow, not obstruct it, and the Court is not persuaded that CIPCO's act of hiring an engineer to assess Klima's work constitutes an assumption of liability by CIPCO for Klima's work."); *see also* D0048 at 157-158, Tom Robinson Dep. at 12:23-13:1; D0048 at 205, Fett Dep. at 29:9-10. Klima was entrusted with all aspects of the installation, including drainage tile material, diameter, elevation, and backfill. D0146, Attachment, Fett Decl. ¶¶ 7-8. CIPCO did not dictate the means or methods in which Klima performed its work. *Id.*, Fett Decl. ¶ 9. CIPCO communicated the desired outcome (equivalent drainage flow to what was there before), and then relied on Klima's expertise to achieve it. *Id.* As detailed below, a defendant who fully entrusts work to an independent contractor owes no duty as to the manner in which the work is performed by the contractor.

Whether an independent contractor's work gives rise to a duty on the part of the person or entity that retained the independent contractor is a legal question. *Clausen v. R. W. Gilbert Const. Co.*, 309 N.W.2d 462, 465 (Iowa 1981). Restatement

(Second) of Torts § 409 (1965) "provides the general rule: 'Except as stated in §§ 410–429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.'" *Est. of Fields by Fields v. Shaw*, 954 N.W.2d 451, 458 (Iowa Ct. App. 2020); *see also Clausen v. R. W. Gilbert Const. Co.*, 309 N.W.2d 462, 465–66 (Iowa 1981) ("We start from the general rule that ordinarily the employer (here, the prime contractor) of an independent contractor (here, a subcontractor) is not liable for injuries arising out of the latter's negligence.") (citing Restatement (Second) of Torts § 409 (1965)); *Lunde v. Winnebago Indus., Inc.*, 299 N.W.2d 473, 475 (Iowa 1980) ("The general rule is that an employer of an independent contractor is not vicariously liable for injuries arising out of the contractor's negligence.").[6]

"Although various reasons have been suggested as the basis for this rule, the commonly-accepted reasoning is the lack of control by the employer over the details of the contractor's work." *Lunde*, 299 N.W.2d at 475 (citing W. Prosser, Handbook of the Law of Torts s 71, at 468 (4th ed. 1971)). Any alternative would be contrary to the purpose of seeking out an independent contractor's assistance in the first place

[6] Modernly the Restatement (Third) of Torts only differs in its mechanics (by flipping the rule and exception), not substance. *See Est. of Fields by Fields v. Shaw*, 954 N.W.2d 451, 459–60 (Iowa Ct. App. 2020) (citing Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 55 (2012)). "[T]he duty limitation in § 56 is an exception to the general rule of direct liability set out in § 55." Restatement (Third) of Torts: Phys. & Emot. Harm § 56 n. a (2012).

for a Defendant like CIPCO who is in the business of providing electricity to its cooperative of electricity customers, not engineering underground drainage tiling systems. D0146, Attachment, Fett Decl. ¶ 5. Having entrusted Klima, and given Plaintiffs' unconditional praise for Klima's quality, Plaintiffs cannot fault CIPCO for leaving Klima to implement the 2014 tiling reroute.

In the realm of drainage, the circumstances surrounding CIPCO's retention of Klima are analogous to those in *Grewal v. N. Dakota Ass'n of Ctys. & Nw. Contracting, Inc.*, 670 N.W.2d 336, 338 (N.D. 2003). Defendant "Association of Counties purchased the vacant lot to the west of [plaintiff] Grewal's land. The Association of Counties contracted with entities to provide architectural services, construction, excavation, backfill, compaction, and landscaping." *Id.* An elevated area of land was removed, and "a severe rainstorm resulted in excessive water and mud runoff from the construction site onto" the plaintiff's land, allegedly causing property damage. *Id.* The Court affirmed summary judgment dismissing the claim against Association of Counties because plaintiff failed to adduce evidence of control over the work:

> Grewal has not presented any competent admissible evidence by affidavit or other comparable means to raise a factual dispute as to whether the Association of Counties controlled the method, manner, and operative details for the plans and design for the building, or for the work at the construction site. A party resisting a motion for summary judgment may not simply rely upon pleadings or unsupported allegations; rather, the resisting party must present competent admissible evidence by affidavit or other comparable means raising an

> issue of material fact. We conclude Grewal failed to raise a disputed factual issue regarding his claim against the Association of Counties, and we affirm the summary judgment dismissal of that claim.

Id. at 340-41.

Likewise, in *Strickland v. State*, 13 Misc. 2d 425, 426, 177 N.Y.S.2d 983 (N.Y. Ct. Cl. 1958), a plaintiff filed a claim against the State of New York "to recover damages to claimant's real and personal property alleged to have been caused by reason of the collection, diversion and discharge of rain and surface water, which brought quantities of earth, gravel, sand, clay, stones, boulders and filth upon claimant's premises." *Id.* The damage occurred because of work by an independent contractor. *Id.* at 430. "It is rather elementary that an employer is not liable for the torts of an independent contractor, or his servants, with some exceptions," none of which applied to the drainage work. *Id.* at 430.

2. Plaintiffs' Argument that Natural Drainage Rights Run Appurtenant to Land is a Non-Sequitur

Plaintiffs argue that non-interference with a neighbor's drainage is a non-delegable duty and—despite cases summarized above applying the Restatement (Second) of Torts § 409 principles to drainage work—Plaintiffs cite no cases limiting its scope under the circumstances here. None of Plaintiffs' citations provide that landowners are strictly liable for the quality of a contractor's drainage work (let alone where they admit the contractor is "highly esteemed").

Plaintiffs' concern that easement rights would be gutted from application of Restatement (Second) of Torts § 409 is illusory. Plaintiffs ignore that CIPCO retained a contractor and directed that contractor to *maintain* historical subsurface drainage tiling flow (not obstruct it). D0150, Plaintiff's Response to Defendants' Statement of Undisputed Facts ¶ 5 (admitting that "CIPCO directed Klima to make the rerouted drainage flow equivalent to what was there before."). This is not a situation where, for example, a landowner directed a contractor to obstruct flow. Plaintiffs could have, but did not, bring a claim against Klima, demonstrating that recovery of alleged drainage damages was never the objective of this lawsuit.

3. The Nuisance Exception Does Not Apply

CIPCO had the right to reroute drainage tiling as detailed extensively in the sections above, so Plaintiffs' arguments regarding impairment and nuisance exceptions fail. D0077, September 13, 2023 Ruling; D0145, October 11, 2023 Ruling. The only claimed injury pertains to the efficacy of the installation, which is entirely within the scope of Section 409.

4. CIPCO's Retention of a Drainage Engineer and an Additional Contractor Does Not Give Rise to Liability.

Plaintiffs argue that CIPCO somehow assumed responsibility for the quality of Klima's work by later hiring an engineer to assess that work and implementing the recommended plan to improve drainage flow beyond its original performance

with a drainage installation contractor.[7] Plaintiffs' citations do not support retroactive liability for an independent contractor's past work or in any way limit the Restatement (Second) of Torts Section 409 principle that the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.

As to any assumption concerning future alleged liability, Plaintiffs' farming tenant testified that tiling improvements had taken care of any drainage issues, which Plaintiffs did not refute. D0146 ¶ 14, Martin Robinson Dep. at 44:12-15; D0146 ¶¶ 15-16, Price Dep. at 28:3-10; 72:11-73:1; Price Dep. at 13:23-15:13; D0150, Plaintiff's Response to Defendants' Statement of Undisputed Facts ¶ 15 (admitting this was the farming tenant's testimony).

While there is no evidence of any future concern per Plaintiffs' farming tenant's testimony that that the issue has been addressed, Restatement (Second) of

[7] As Defendants cautioned in the district court, Plaintiffs' fidelity to the record warrants scrutiny. Plaintiffs argue that CIPCO "refused to implement" engineer Don Etler's drainage design. Plaintiff's Brief at 61. The undisputed record reflects that the tile that CIPCO installed *on its own property* was the exact size and type that drainage engineer Etler recommended, and Etler's other comments relied upon by Plaintiffs concerned *neighboring* property to the south that CIPCO does *not* own. Further, nowhere in the record has Etler ever suggested a repair corridor would have any impact on drainage flow (as opposed to ease of future access for potential future repairs *by CIPCO*). If Plaintiffs had an admissible, sworn statement, or offered any admissible deposition testimony of Etler, he would presumably point Plaintiffs to the portions of the inadmissible (hearsay) emails upon which Plaintiffs rely making that much clear. *See* Iowa R. Civ. P. 1.981(5) (requiring admissible evidence).

Torts Section 409 applies to both Klima's work in 2014 and the work performed in 2022, because CIPCO hired independent contractors for the design and installation of that work as well. D0153, Fett Dep. 29:11-19 ("In 2022 the tile around the CIPCO property was installed per Don Etler's recommendation. . . . The installation in 2022 was completed by Brandenburg.").

VI. The Award of Fees on Plaintiffs' Unprecedent Claim to a Path of Underground Drainage was Tailored to the Quiet Title Issue[8]

A. Standard of Review and Preservation of Error

Review of the amount of a fee award is for abuse of discretion. *Lee v. State*, 906 N.W.2d 186, 194 (Iowa 2018). Defendants do not dispute error preservation.

B. The District Court Properly Exercised its Discretion to Award Fees, with Proper Deductions for Unrelated Time

1. The District Court Awarded Quiet Title Judgment that Tracked the Scope of Iowa Code § 649.5 Notice Sent.

Plaintiffs' refusal to execute a quitclaim deed expressly preserving their natural uphill to downhill drainage rights, at the risk of triggering fee shifting identified in the July 2022 letter giving notice under Iowa Code § 649.5, is baffling without further context. After all, the only purpose of underground drainage tiling is

[8] Significantly, the fee award is based on the Judgement Quieting Title and stands independent and apart from any resolution of Plaintiffs' failed tort damage claims.

to drain surface water from property to increase crop yield,[9] and the quitclaim deed expressly safeguarded that interest. The crucial difference in Plaintiffs' decision to press for a particular path of neighboring underground drainage tiling is that the cloud of title over the land occupied by CIPCO's high voltage substation advanced Plaintiffs' ulterior motive to slow down or stop construction of a solar farm from being constructed across from their homes. *See* D0048 at 193, Paula Robinsons Dep. at 39:11-40:3; *see also* D0048 at 186-188, Laura Robinson Dep. at 45:20-51:2 (Plaintiffs have each spent hundreds of hours working to stop its development).

The quiet title statute was enacted for situations such as this case. It encourages early resolution of disputes by providing notice of the issues affecting title and allowing parties to resolve their differences without court intervention. Defendants always acknowledged Plaintiffs' drainage rights, though they dispute that they have violated those rights. At all times, Plaintiffs intractably claimed that they not only possessed common law drainage rights (a claim that no one disputes), but that they also held the legal right to dictate exactly how and where their surface water would need to be channeled underneath Defendants' property. Before the district court, Plaintiffs attempted to rewrite the record by claiming they did not

[9] *See* D0048 at 160, Tom Robinson Dep. at 35:5-12; D0048 at 173, Martin Robinson Dep. at 31:8-20; D0048 at 184, Laura Robinson Dep. at 8:15-9:16; D0048 at 192, Paula Robinsons Dep. at 12:12-25.

actually insist on an easement in a particular underground tile line, but merely sought to preserve their common law drainage rights. D0163, Plaintiffs' Resistance to Defendants' Fee Application (2/1/2024). Not so. D0063 at 3-4;[10] D0087 at 4.[11] Plaintiffs clouded title by insisting on a position for which no legal support exists (a right to determine a specific path of neighboring, underground drainage tiling) despite advance, written notice that fee shifting would result for doing so. *Id.*

Defendants' quiet title counterclaim centered solely on whether Plaintiffs could insist on a *specific path* of subsurface drainage and force the restoration of an abandoned tile line underneath a high-voltage substation. The totality of Plaintiffs' arguments regarding the quality of drainage tile *performance* or alleged damages flowing from performance has no bearing on fees awarded by the district court because the proposed quitclaim deed Defendants transmitted in 2022 expressly preserved Plaintiffs' common law drainage right. *See* D0160 at 5 (including the right to file suit if Defendants failed to maintain their obligation to extend "any natural surface waterway or tile drainage system for adjoining properties to be perpetually maintained and protected from any obstruction or any type of blockage which would cause damage to adjoining properties and providing other enumerated restrictions.").

[10] Plaintiffs' Memorandum of Authorities in Resistance to CIPCO and Coggon Solar's Motion for Partial Summary Judgment (8/29/2023).

[11] Plaintiffs' Motion to Expand and Reconsider (9/18/2023).

The quitclaim deed, and the Quiet Title Judgment ultimately entered in Defendants' favor, awarded the relief Defendants sought (and Plaintiffs vigorously contested) and no more: terminating Plaintiffs' unprecedented claim to a right to determine a *specific path* of subsurface drainage tiling through neighboring property. D0158, Judgment Quieting Title (1/3/2024).

Plaintiffs argue out of both sides of their mouths on appeal, asserting that the quitclaim deed was too broad (alleging it "improperly demanded that they relinquish their easement rights") and too narrow (alleging a quit claim must convey all of the grantor's interest in property). Plaintiff's Brief at 64-65. On the contrary, Defendants' section 649.5 letter transmitted a quitclaim deed that sought a concession related to the cloud over CIPCO's title but preserved the rights of the Deed Restriction and natural drainage rights that necessarily exist by virtue of being uphill. The letter transmitting the proposed quitclaim deed underscored that detail: "the Robinsons have merely identified rights to extend their tile drainage system (which CIPCO does not dispute and agreed to improve according to the Bolton & Menk engineering plan)." *See* D0160 at 107, Fee Application Exhibit 3 at 3 (emphasis added). This would have nipped in the bud any notion that a high-voltage substation that will support a $150 million renewable energy project that affects 20,000 local customers would have to make way for a subsurface drainage tile line.

This Court quieted title consistent with what Defendants' initially requested of Plaintiffs—"subject to the reservation of the Fenceline and Drainage Deed Restriction at Book 8910 Page 400 (extending any natural surface waterway or tile drainage system for adjoining properties to be perpetually maintained and protected from any obstruction or any type of blockage which would cause damage to adjoining properties and providing other enumerated restrictions therein), but not subject to any easement for access or a particular route of drainage tile underneath CIPCO Second Addition to Linn County, Iowa." D0158, Judgment Quieting Title (emphasis added).

Because Plaintiffs would not have been giving up any common law drainage rights if they had executed the quitclaim deed, the only benefit Plaintiffs gained by refusing to sign and return the deed (and insisting on a specific subsurface tiling path) was perpetuating the pall hanging over the substation property which has jeopardized the solar farm project's development. Plaintiffs took an unwavering stance despite the absence of legal authority providing a right to dictate a specific path of subsurface drainage and despite Defendants' consistent, articulated willingness to accept Plaintiffs' waterflow and avoid harm to Plaintiffs' land. They ignored a July 8, 2022 letter giving them notice of this court's authority to assess attorneys' fees. D0160, Fee Application Exhibit 3. They resisted through discovery, trial preparation, dispositive motion briefing, a reconsideration motion, through an

application for interlocutory appeal, and this appeal. They could do so at low cost to themselves but high consequence to the customers who are waiting for the solar farm to come online. This case is Exhibit A for why Iowa Code § 649.5 was enacted, "to avoid litigation, and enable the landowner to get rid of clouds upon his title by negotiation and agreement rather than by decree of court." *Collier v. Wetmore*, 145 N.W. 944, 947 (Iowa 1914). Plaintiffs were offered that incentive, and the district court acted in its discretion to impose the statutory consequence for declining it.

2. Defendants' Fees are Reasonable in Light of the Nature of the Dispute, Attempts to Avoid Litigation, and the Quiet Title Judgment Mirroring the Quitclaim Deed

Plaintiffs briefly challenge the reasonableness of Defendants' fee application but fail to offer any basis for the contention that the rates and amount of hours expended are unreasonable. Plaintiffs have long known this litigation would impact the viability of a $150 million solar farm development, threatening a source of renewable energy for 20,000 customers. This is not a run-of-the-mill easement dispute but is instead one that forms a part of a multifaceted litigation strategy initiated by Plaintiffs in several district court proceedings and multiple challenges before administrative boards.

The only objections Plaintiffs particularize are the number of attorneys and the number of summary judgment motions, both of which resulted in lower fees than any alternative. As to the multiple lawyers representing Defendants, Plaintiffs ignore

the efficiency of lawyers with different levels of skill and experience performing different functions to appropriately staff a case. D0160, Fee Application Exhibit 1, ¶11; Exhibit 2 (listing rates). For instance, the brunt of efforts to confer and correct Plaintiffs' non-compliance with discovery, briefing (and re-briefing following a motion to reconsider), and certain pre-trial preparation was most efficiently completed by Defendants' attorney who had the lowest billing rate. *See* D0160, Fee Application Exhibit 2. Other work was completed by one of Defendants' attorneys who has extensive trial experience suited for a case involving a dispute contributing to the viability of what Plaintiffs know from public hearings is a $150 million project (not taking into account the immeasurable future renewable energy benefits for local residents). *Id.* If work had been completed by a single attorney with sufficient skill and experience to defend this case to completion, it would have resulted in greater expense, not savings.

Regarding the second summary judgment motion, which was prepared and filed after the district court entered partial summary judgment on Defendants' counterclaim quieting title,[12] that time was specifically deducted from the amount

[12] Defendants moved for partial summary judgment on their quiet title counterclaim and were prepared to proceed to trial in the fall of 2023 on Plaintiffs' damage claims. After Defendants had submitted all pre-trial filings, the court continued the jury trial due to a lack of judicial resources. The parties were offered a new trial date in January 2024, but Plaintiffs rejected that date in favor of a trial date in July 2024. With the added time, Defendants converted pre-trial submissions into a summary judgment motion.

requested. D0160 at 14-16, Fee Application Exhibit 1 ¶¶ 13-14, 19 (listing fees claimed "until the point that summary judgment was granted on Defendants' quiet title counterclaim" and deductions for unrelated work). This deduction was consistent with the process applied to analyze a fee award where one claim (here, quiet title) entitles a party to an award of fees and others do not. *See Smith v. Iowa State Univ. of Sci. & Tech.*, 885 N.W.2d 620, 625–26 (Iowa 2016); *Lee v. State*, 874 N.W.2d 631, 648 (Iowa 2016). The award reflected time "devoted generally to the litigation as a whole" and made "an appropriate reduction for unrelated time" spent on claims that are ineligible for fee recovery. *Smith*, 885 N.W.2d at 625. Claims that involve "a common core of facts or will be based on related legal theories" require attorneys to devote time "generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Claims without recoverable fees do not insulate a party from paying reasonable attorney's fees on a claim for which fees are recoverable. *Smith*, 885 N.W.2d at 624. Defendants necessarily performed written discovery, deposition discovery, unsuccessful settlement negotiations, and pre-trial preparation (up to the point summary judgment was entered) that applied to the litigation as a whole and was necessarily expended in pursuit of the quiet title counterclaim. Time entries unrelated to the quiet title counterclaim were not claimed and therefore not awarded. D0160 at 14-16, Fee Application Exhibit 1 ¶¶ 13-14, 19.

Finally, as occurred in briefing before the district court, Plaintiffs fail to address Defendants' efforts to minimize fees during this litigation through the quitclaim deed (that would take the path of drainage issue off of the table and preserve Plaintiffs common law drainage rights) and settlement efforts.[13] D0160, Fee Application, Exhibit 2. Even now, with the district court judgment in hand and a June 2024 Iowa Court of Appeal decision highlighting the lack of precedent to support the notion that an uphill landowner can somehow dictate a neighboring downhill property's underground drainage path, Plaintiffs have pressed onward without authority. Defendants' fee statements are reasonable in light of Plaintiffs' intractable posture in this case.

CONCLUSION

For the reasons stated herein, Defendants-Appellees CIPCO and Coggon Solar respectfully requests that the Court affirm the judgment below.

REQUEST FOR SUBMISSION WITH ORAL ARGUMENT

Defendants-Appellees CIPCO and Coggon Solar request submission with oral argument.

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[13] "While evidence of settlement negotiations is inadmissible to prove the merit or lack of merit of a claim, the use of such evidence as bearing on the issue of what relief was sought by a plaintiff does not offend the clear terms of Rule 408. Such evidence can be relevant when comparing what a plaintiff 'requested' to what the plaintiff was ultimately 'awarded.'" *Lohman v. Duryea Borough*, 574 F.3d 163, 167 (3d Cir. 2009); *see also* Iowa R. Evid. 408(b) (authorizing evidence of settlement for purposes other than proving validity of a disputed claim).

Dated: June 24, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2024, I electronically filed the foregoing document with the Clerk of Court using the EDMS system with a copy being sent via electronic notice to all parties and attorneys of record.

/s/ Brian J. Fagan

CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This brief complies with the limitation on the volume of type set forth in IOWA R. APP. P. 6.903(1)(g)(1). It contains 12,576 words, excluding parts of the brief exempted by IOWA R. APP. P. 6.903(1)(g)(1).

This brief complies with the type-face requirements of IOWA R. APP. P. 6.903(1)(e) and the type-style requirements of IOWA R. APP. P. 6.903(1)(f). It has been prepared in a proportionally spaced typeface, using Microsoft Word 2013 in 14-point Times New Roman.

/s/ Brian J. Fagan