

IN THE SUPREME COURT OF IOWA

Supreme Court No. 24-0298

**MARTIN ROBINSON, THOMAS ROBINSON,
LAURA ROBINSON AND PAULA ROBINSON,**

Plaintiff-Appellants,

v.

**CENTRAL IOWA POWER COOPERATIVE, COGGON SOLAR, LLC, AND
KENNETH M. LUDOLPH AND DEANICE R. LUDOLPH,**

Defendant-Appellees.

APPEAL FROM THE DISTRICT COURT OF IOWA
IN AND FOR LINN COUNTY NO. EQCV100043
HONORABLE JUDGE IAN K. THORNHILL,
JUDGE OF THE SIXTH JUDICIAL DISTRICT, PRESIDING

**APPELLEES KENNETH AND DEANICE LUDOLPH'S
BRIEF AND REQUEST FOR NONORAL ARGUMENT**

Joseph T. Moreland
Hayek, Moreland, Smith, and Bergus, L.L.P.
120 East Washington Street
Iowa City, Iowa 52240-3924
319/337-9606 telephone; 319/338-7376 facsimile
E-mail: moreland@hayek-law.com
ATTORNEY FOR DEFENDANTS-APPELLEES LUDOLPH

TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES.....	3
CASES.....	3
IOWA CODE SECTIONS.....	4
OTHER AUTHORITIES.....	4
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	4
ROUTING STATEMENT	4
NATURE OF THE CASE.....	5
STATEMENT OF THE FACTS	7
ARGUMENT.....	11
<i>I. WAS THE DISTRICT COURT CORRECT IN FINDING AS A MATTER OF LAW THAT THE PLAINTIFFS DID NOT HAVE A PRESCRIPTIVE EASEMENT OVER THE LUDOLPH PROPERTY?</i>	<i>11</i>
<i>II. WAS THE DISTRICT COURT CORRECT IN FINDING, AS A MATTER OF LAW, THAT THE PLAINTIFF’S NATURAL EASEMENT (THE DRAINAGE EASEMENT) DOES NOT GIVE THEM A RIGHT TO ACCESS, A REPAIR CORRIDOR OR, AN ACCESS-WAY ONTO OR OVER THE LUDOLPH PROPERTY?.....</i>	<i>20</i>
CONCLUSION	26
REQUEST FOR NONORAL SUBMISSION.....	27
ATTORNEY’S COST CERTIFICATE.....	28
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS	28
CERTIFICATE OF FILING AND PROOF OF SERVICE	29

TABLE OF AUTHORITIES

CASES

<i>Collins Trust v. Allamakee County Bd. Of Supervisors</i> , 599 N.W.2d 460, 465 (Iowa 1999).....	17
<i>Countryman, Trustee of Ronald W. Woodbury Generation Skipping Trust v. Lex</i> , No. 18-0979, 2019 WL 3317352, *1 (Iowa Ct. App. July 24, 2019)	13, 18, 22, 23
<i>Cundiff v. Kopsseiker</i> , 61 N.W.2d 443, 445 (Iowa 1953).....	13, 18
<i>Downey v. Phelps</i> , 208 N.W. 499, 502 (Iowa 1926).....	13
<i>Ditch v. Hess</i> , 212 N.W.2d 442, 448 (Iowa 1973).....	14
<i>Heinse v. Thorborg</i> , 230 N.W. 881, 882 (Iowa 1930).....	22
<i>Johnson</i> , 637 N.W.2d at 178.....	15
<i>Kleinschmidt</i> , No. 00-0183, 2001 WL 98456, at *3	19
<i>Koenigs v. Mitchell Cnty. Bd. of Supervisors</i> , 659 N.W.2d 589, 595 (Iowa 2003).....	21
<i>Larman v. State</i> , 552 N.W.2d 158, 162 (Iowa 1996).....	17
<i>Nixon v. Welsh</i> , 24 N.W.2d 476 (Iowa 1947).....	25, 26
<i>Rames v. Adams Labs., Inc.</i> 778 NW2d 677,685 (Iowa 2010).....	12, 20
<i>Sojka v. Breck</i> , 823 N.W 2d 384 (Table) 2013 1453241, *4 (Iowa Ct. App. 2013)	21
<i>Thome v. Retterath</i> , 433 N.W.2d 51, 53 (1988).....	21, 22
<i>Young v. Ducil</i> , 176 N.W. 272, 274 (1920).....	18

IOWA CODE SECTIONS

Iowa Code § 468.621 12, 14, 21, 24
Iowa Code § 468.14824, 25
Iowa Code § 468.149..... 24, 25

OTHER AUTHORITIES

2 C.J.S. Adverse Possession § 54, at 727, 729-30 (1972)..... 16, 17

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. WAS THE DISTRICT COURT CORRECT IN FINDING AS A MATTER OF LAW THAT THE PLAINTIFFS DID NOT HAVE A PRESCRIPTIVE EASEMENT OVER THE LUDOLPH PROPERTY?**
- II. WAS THE DISTRICT COURT CORRECT IN FINDING, AS A MATTER OF LAW, THAT THE PLAINTIFF’S NATURAL EASEMENT (THE DRAINAGE EASEMENT) DOES NOT GIVE THEM A RIGHT TO ACCESS, A REPAIR CORRIDOR OR, AN ACCESS-WAY ONTO OR OVER THE LUDOLPH PROPERTY?**

ROUTING STATEMENT

As Kenneth M. Ludolph and Deanice R. Ludolph (the “Ludolphs”) would like to have a prompt and final determination of this appeal, they respectfully request that the Supreme Court retain this case. Iowa R. App. P. 6.1101(2)(b).

NATURE OF THE CASE

A. Statement of the Case Appealed. The issues on appeal in this matter relevant to the Ludolphs is the Court's ruling on the Ludolphs motion for summary judgment granting their motion and dismissing the Plaintiffs-Appellants claims against them. (D0077, Ruling RE: MSJ and Motion to Compel, 9/12/2023). The Ludolphs have no interest in the remaining portion of this appeal other than the above ruling dismissing them from this case.

B. Type of Case Appealed. This is a dispute involving Plaintiffs-Appellants' claims to rights beyond a legal and natural easement that an upper and dominant estate landowner's rights for the drainage of surface waters through natural flow onto and over the lower and servient estates land. Specifically, the Plaintiffs-Appellants have claimed a prescriptive easement onto and over the Ludolphs' property and, as part of that, a right of access, a repair corridor or an access way onto or over the Ludolphs' property. (D0002, Petition, 6/22/2022).

The implications of Plaintiffs-Appellants' claims for a prescriptive easement and rights of access by the mere fact that the natural course of drainage has had water flowing from the Plaintiffs-

Appellants' property onto the Ludolph property has troubling and far-reaching implications for property rights involving tens of thousands of farms in Iowa.

C. Disposition of Case Appealed. The District Court ruled that the Plaintiffs-Appellants failed to establish, as a matter of law, the elements necessary to establish a prescriptive easement over and through the Ludolphs property or any rights other than a legal and natural easement for the drainage of surface waters. (D0077, Ruling RE: MSJ and Motion to Compel at 12, 9/12/2023). Further, the District Court specifically found that the Plaintiffs-Appellants common law legal and natural easement (the drainage easement) did **NOT** give them a right to access, a repair corridor, or an access way onto or over the Ludolph property. (emphasis added) (D0077, Ruling RE: MSJ and Motion to Compel at 12-13, 9/12/2023). The District Court granted the Ludolphs' motion for summary judgment in its entirety, dismissed the Plaintiffs-Appellants' claims against the Ludolphs, and dismissed the Ludolphs from the underlying action. (D0077, Ruling RE: MSJ and Motion to Compel at 11-12; 15, 9/12/2023).

D. Course of Proceedings. The Ludolphs do not dispute the Course of Proceedings set forth by the Plaintiffs-Appellants in their Appellants' Brief.

STATEMENT OF THE FACTS

The Ludolphs adopt the following facts from their Statement of Undisputed Facts filed as part of their Brief in Support of Motion for Summary Judgment. (D0043, Defendant's Brief in Support of Motion for Summary Judgment, 8/15/2023):

1. Central Iowa Power Company, (hereinafter, "CIPCO") owns 5.14 acres in Linn County, Iowa known as Lot 1 CIPCO Second Addition to Linn County, Iowa. (D0002, Petition, Pg 1, Paragraph 1.1, 6/22/2022);
2. The Ludolphs, own property located south and west of the CIPCO property. (D0002, Petition, Pg. 1, Paragraph 1.2, 6/22/2022).
3. The Ludolphs previously also owned the CIPCO property before it was sold to CIPCO. (D0041, Defendant's Appendix in Support of Motion for Summary Judgment, Pg. 14, Martin Robinson Deposition, Pg 161, at 23-25, Pg 162 at 1-2, 8/15/2023);

4. The Plaintiffs, Martin, Thomas, Laura, and Paula Robinson (hereinafter the “Robinsons”) own Property lying north immediately across a public road from the CIPCO and Ludolph property. (D0002, Petition, Pg 2, Paragraphs 1.3, 1.4, 1.5, and 1.6 6/22/2022);
5. The Robinsons’ property lies generally uphill from the CIPCO property and the Ludolph property. (D0002, Petition, Pg 2, Paragraph 1.8, 6/22/2022);
6. The natural water drainage of portions of the Robinson property flows across the CIPCO property and the Ludolph property. (D0002, Petition Pg 3, Paragraph 1.11, 6/22/2022);
7. To accommodate drainage from the Robinsons’ properties a drainage tile was installed over fifty (50)¹ years ago across the CIPCO property and the Ludolph property (then all owned by the Ludolchs). (D0002, Petition Pg 3, Paragraph 1.12², 6/22/2022);
8. Coggon Solar, LLC (hereinafter “Coggon Solar”) has announced its intention to construct a large-scale solar farm on

¹ The Petition indicates fifty (50) years. Testimony indicates over sixty (60) years. Reference here is to what is in the Petition.

² The Robinsons allege that the tile line was installed by the Robinsons parents and/or other predecessors in the Robinsons title. This fact is in dispute but is not relevant or material to the issue of prescriptive easement.

approximately 750 acres of real estate which includes the Ludolph property. (D0002, Petition, Pg 2, Paragraph 1.7, 6/22/2022);

9. To further orientate the Court to the various properties at issue in this case, the Ludolphins direct the Court to Deposition Exhibit 1. (D0041, Defendant's Appendix in Support of Motion for Summary Judgment, Pg 20, 8/15/2023)³. The property shown enclosed with red lines is the CIPCO property. The property in blue ink with a "L" is the Ludolph property. The remaining property indicated by "PR", "R" and "TR" are the Paula Robinson, Martin Robinson, and Tom Robinson properties, respectively, inherited from their parents. The red line crossing Linn-Delaware Road indicates the approximate location of a culvert for drainage under Linn-Delaware Road from the Martin Robinson property onto the CIPCO property. The green line running north to south off the CIPCO property across the Ludolph property is the main tile line installed sometime prior to the Robinsons' parents purchasing the Robinson property in the 1960s. (D0041, Defendant's Appendix in Support of Motion for Summary Judgment, Pg 12, Martin Robinson Deposition, Pg. 11 at 1-25,

³ This deposition exhibit can also be found on page 16 of the Robinsons' Appellants' Brief.

8/15/2023) (D0041, Defendant's Appendix in Support of Motion for Summary Judgment, Pg 15, Dennis Price Deposition Pg. 12 at 1-25, Pg 13 at 1-25, and Pg 14 at 1-25, 8/15/2023) (D0041, Defendant's Appendix in Support of Motion for Summary Judgment, Pg 20, 08/15/2023)

10. Regarding claims for easement rights across the Ludolph property, there is no written easement agreement which may convey any rights to the Robinsons beyond any common law easement through natural water courses. (D0041, Defendant's Appendix in Support of Motion for Summary Judgment, Pg 15-17, Tom Robinson Deposition Pg. 139 at 1-7, 8/15/2023) (D0041, Defendant's Appendix in Support of Motion for Summary Judgment, Pg 13, Martin Robinson Deposition p. 160 at 18-22, 8/15/2023);

11. The Robinsons have NEVER accessed the Ludolph property in the sixty (60) plus years after the tile line was installed to conduct any maintenance or make any repairs on tile line running through the Ludolph property. (D0041, Defendant's Appendix in Support of Motion for Summary Judgment, Pg 17-18, Tom Robinson Deposition Pg. 144, at 5-15, and 145 at 1-9, 08/15/2023); (D0041 Defendant's Appendix in Support of Motion for Summary Judgment,

Pg 14, Martin Robinson Deposition Pg. 162 at 3-25, Pg 163 at 1-24, 8/15/2023). (Emphasis added).

Of these eleven statements to undisputed fact, the Robinsons agree that facts numbers 1-9 were undisputed. (D0067, Response to Statement of Facts RE Ludolph MSJ paragraphs 1-9, 8/29/2023). For fact number ten (10) above, the Robinsons disputed this fact, but then conceded that “there is no formal signed written easement agreement between the parties or their predecessors.” (D0067, Response to Statement of Facts RE Ludolph MSJ paragraph 10, 8/29/2023). So basically, admitted. Similarly, for fact number eleven (11) above, the Robinsons disputed this fact, but then admitted “that there has never been any repairs or maintenance by the Robinsons.” (D0067, Response to Statement of Facts RE Ludolph MSJ paragraph 11, 8/29/2023). So basically, admitted. Therefore, the facts as set forth by the Ludolphs above are admitted, undisputed, and uncontroverted.

ARGUMENT

III. WAS THE DISTRICT COURT CORRECT IN FINDING AS A MATTER OF LAW THAT THE PLAINTIFFS DID NOT HAVE A PRESCRIPTIVE EASEMENT OVER THE LUDOLPH PROPERTY?

A. Error Preservation. The Ludolphs do not dispute error preservation.

B. Standard of Review. The standard of review for the granting of a motion for summary judgment is for the correction of errors at law. *Rames v. Adams Labs., Inc.* 778 NW2d 677, 685 (Iowa 2010). The Appellate Court examines the record to determine whether any of the material facts are in dispute and, if not, whether the district court properly applied the law. *Id.*

C. Argument. The Robinsons have the right to drain their property in the general course of natural drainage onto and over the Ludolphs property. No more, no less. The District Court was correct in finding that the Robinsons have not established a prescriptive easement over the Ludolphs property.

Iowa Code § 468.621 provides as follows:

Owners of land may drain the land in the general course of natural drainage by constructing or reconstructing open or covered drains, discharging the drains in any natural watercourse or depression so the water will be carried into some other natural watercourse, and if the drainage is wholly upon the owner's land the owner is not liable in damages for the drainage unless it increases the quantity of water or changes the manner of discharge on the land of another. An owner in constructing a replacement drain, wholly on the owner's land, and in the exercise of due care, is not liable in damages to another if a previously constructed drain on the owner's own land is rendered inoperative or less efficient by the new drain, unless in violation of the terms of a written contract. This section does not affect the rights or liabilities of proprietors in respect to running streams. Iowa Code § 468.621 (2023).

“As construed, the statute affords ‘[a]n upper landowner...the right to construct a drain in order to carry water from his land in its natural and usual course onto and over the land of another unless [the] quantity of water thrown upon the other’s land is materially and unduly increased to his damage.’” *Countryman, Trustee of Ronald W. Woodbury Generation Skipping Trust v. Lex*, No. 18-0979, 2019 WL 3317352, *1 (Iowa Ct. App. July 24, 2019) (citing *Cundiff v. Kopseiker*, 61 N.W.2d 443, 445 (Iowa 1953)). “The upper landowner or ‘dominant estate has the right to discharge water upon’ the lower landowner or ‘servient estate whether such water is surface water or from a natural water course, either open or tiled.” *Id.* “In determining the dominant estate holder and the servient estate holder, the ‘general movement of flood waters is not determinative.’” *Id.* (citing *Downey v. Phelps*, 208 N.W. 499, 502 (Iowa 1926)). “Each is determined ‘largely by the elevations of the lands.’” *Id.* “These principles derive from the statute and opinions construing the statute as well as a common law easement for natural water courses.” *Id.*

The general principle of law is ‘that the owner of the upper or dominant estate has a legal and natural easement in the lower or servient estate for the drainage of surface waters, that 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 ... and that the owner of the dominant estate may cast an additional quantity of surface water upon the servient estate; if in so doing, he does not thereby do substantial damage to the servient estate.’ *Id.* (citing *Ditch v. Hess*, 212 N.W.2d 442, 448 (Iowa 1973)).

The District Court correctly found that under the facts and circumstances of this case, the Robinsons have not utilized the Ludolph property in any other way other than what is allowed under Iowa Code § 468.621, opinions construing this statute, and the common law regarding easements for natural water courses. (D0077, Ruling RE: MSJ and Motion to Compel at 11-12, 9/12/2023). It is undisputed that the Robinson have never accessed the Ludolph property to conduct any maintenance or make any repairs on the tile line running through the Ludolph property and have not produced any evidence that they installed the original tile line. (D0041, Defendant’s Appendix in Support of Motion for Summary Judgment, Pg 17-18, Tom Robinson Deposition Pg. 144, at 5-15, and 145 at 1-9, 08/15/2023); (D0041 Defendant’s Appendix in Support of Motion for Summary Judgment, Pg 14, Martin Robinson Deposition Pg. 162 at 3-25, Pg 163 at 1-24, 8/15/2023). The only use the Robinsons have had of the Ludolph

property, is to discharge their water onto it as allowed under Iowa drainage law.

As such, the District Court also correctly found that, as a matter of law, the Robinsons could not establish a prescriptive easement over and across the Ludolph property. (D0077, Ruling RE: MSJ and Motion to Compel at 10-12, 9/12/2023). Due to the permissive use of the Ludolph property allowed under Iowa statutory and common law, the Robinsons can not establish an “open and notorious” use of the Ludolph property or a “hostile” use of the Ludolph property to establish a prescriptive easement.

“Under Iowa law, an easement by prescription is created when a person uses another’s land under a claim of right or color of title, openly, notoriously, continuously, and hostilely for ten years or more.” *Johnson*, 637 N.W.2d at 178. “We consider principles of adverse possession when determining whether an easement by prescription has been created.” *Id.* “However, the concepts of adverse possession and easement by prescription are not one and the same.” *Id.* “Rather, easement by prescription concerns the use of property and adverse possession determines acquisition of title to property by possession.” *Id.* For Plaintiffs “to claim a right to continued use of the disputed property, they must show something more than use for the statutory period.” *Id.* “They must also show they claimed an easement of right, and this

must be established by evidence distinct from and independent of their use.”

Id. Finally, Plaintiffs must show the Ludolphs “and their predecessors in title had express notice of their claim of right to use the disputed property.” *Id.*

“Evidence tending to show hostility and claim of right to satisfy the requirements of a prescriptive easement is of a similar nature.” *Id.* “Hostility of possession does not imply ill will, but only an assertion of ownership by declarations or acts showing a claim of exclusive right to the land.” *Id.* “However, mere use of land does not, by lapse of time, ripen into an easement.” *Id.* “A party claiming an easement by prescription must prove, independent of use, the easement was claimed as a matter of right.” *Id.* at 178-79. “Though mere use does not constitute hostility or claim of right, we have held certain acts, including maintaining and improving land, can support a claim of ownership and hostility to the true owner.” *Id.* at 179. “Ultimately, we must determine on a case-by-case basis whether there is evidence to support the requirements of a prescriptive easement.” *Id.*

“[U]nlike adverse possession, continuous, adverse possession for a prescriptive easement does not mean constant use.” *Id.* “Similarly, the use need not be exclusive.” *Id.* “Rather, a claimant’s possession ‘need only be of a type of possession which would characterize an owner’s use.’” *Id.* (citing 2 C.J.S. Adverse Possession § 54, at 727 (1972)). “Furthermore, ‘mere casual

intrusion by others on property occupied by the adverse claimant does not deprive his possession of its exclusive character....” *Id.* at 179-80 (citing 2 C.J.S. Adverse Possession § 54, at 729-30).

“Under Iowa law the owner or the grantor is required to have ‘express notice’ of any claim of adverse possession.” *Id.* at 180. “This requirement exists to help place the true owner of land on notice of the adverse use of land by another.” *Id.* “This requirement ‘ensure[s] the landowner knows another’s use of the property is claimed as a right hostile to the landowner’s interest in the land. Otherwise, the landowner may incorrectly assume the other’s use results merely from the landowner’s willingness to accommodate the other’s desire or need to use the land.’” *Id.* (citing *Larman v. State*, 552 N.W.2d 158, 162 (Iowa 1996)). “The notice must be actual or ‘from known facts of such nature as to impose a duty to make inquiry which would reveal the existence of an easement.’” *Id.* (citing *Collins Trust v. Allamakee County Bd. Of Supervisors*, 599 N.W.2d 460, 465 (Iowa 1999)).

The undisputed facts of this case establish that, as a matter of law, the Robinsons cannot meet the first two elements to establish a prescriptive easement: use of the Ludolph property in an open and notorious way. In fact, the Robinsons have not taken any action regarding the Ludolph property other than draining their property into a natural watercourse as allowed by

the Iowa code and Iowa common law. See *Countryman, Tr. of Ronald W. Woodbury Generation Skipping Tr. v. Lex*, No. 18-0979, 2019 WL 3317352 *1 (Iowa Ct. App. July 24, 2019) (citing *Cundiff v. Kopseiker*, 61 N.W. 2d 443, 445 (Iowa 1953)). It is impossible for the Robinsons to establish that they put the Ludolphs “on notice” of the Robinsons’ “adverse use of their property” when the only action taken by the Robinsons was action they were legally entitled to take. There would be nothing about the Robinsons draining their property into the natural watercourse which would “impose a duty” on the Ludolphs to inquire about the Robinsons limited and lawful use of their property let alone inquire about whether an easement exists beyond a drainage easement.

Additionally, the undisputed facts of this case establish as a matter of law, the Robinsons cannot meet the fourth and fifth elements to establish a prescriptive easement: use in a hostile way and use under a claim of right or color of title. As set forth above, there is no hostile use by the Robinsons of the Ludolph property, only lawful use. Similarly, there is nothing about the use of the Ludolph property by the Robinsons to make ANY claim of right to use the Ludolph property other than for lawful drainage. (Emphasis added). It is ludicrous to suggest otherwise under the undisputed facts of this case. As set forth in *Young v. Ducil*, 176 N.W. 272, 274 (1920):

Mere proof of use ... is not sufficient. The use may be permissive only. To invest the plaintiff [appellant] with a right to a continued use, he must show something more than use for the statutory period, and two things more are essential: (1) That he claimed an easement as his right, and this must be established by evidence distinct from and independent of its use; and (2) that the party against whom the claim is made had express notice thereof—that is, not of the use, but of the claim of right to use against the objections or protest of the owner.
(Emphasis added).

Finally, if the argument is that the lawful drainage from the Robinsons' property onto the Ludolph property is considered "permissive use," the Robinsons cannot establish that this use ripened into a prescriptive easement. The only reason permissive use "may ripen into a prescriptive easement" is when the "party claiming the easement has expended substantial amounts of labor or money into reliance upon the servient owner's consent or his oral agreement to the use." (*Kleinschmidt*, No. 00-0183, 2001 WL 98456, at *3). This simply does not exist here. The Robinsons do not even know who installed the original tile line and have taken no action and spent no funds to maintain or repair the tile line. (D0041 Defendant's Appendix in Support of Motion for Summary Judgment, Pg. 14, Martin Robinson Deposition Pg. 161 at 1-25, Pg. 162 at 1-25, Pg. 163 at 1-20).

The Robinsons were unable to establish, as a matter of law an open and notorious or hostile use of the Ludolphs property as required to create a

prescriptive easement. Their only use of the Ludolph property was that which is allowed under law. As such, the District Court was correct in finding that no prescriptive easement exists and dismissing this claim against the Ludolfs and this Court should uphold the District Court's ruling.

II. WAS THE DISTRICT COURT CORRECT IN FINDING, AS A MATTER OF LAW, THAT THE PLAINTIFF'S NATURAL EASEMENT (THE DRAINAGE EASEMENT) DOES NOT GIVE THEM A RIGHT TO ACCESS, A REPAIR CORRIDOR OR, AN ACCESS-WAY ONTO OR OVER THE LUDOLPH PROPERTY?

A. Error Preservation. The Ludolfs do not dispute error preservation.

B. Standard of Review. The standard of review for the granting of a motion for summary judgment is for the correction of errors at law. *Rames v. Adams Labs., Inc.* 778 NW2d 677,685 (Iowa 2010). The Appellate Court examines the record to determine whether any of the material facts are in dispute and, if not, whether the district court properly applied the law. *Id.*

C. Argument. The District Court properly determined, as a matter of law, that the Robinsons did not establish a right of access, a repair corridor, or an access way onto or over the Ludolph property as a result of their drainage easement. As such it was appropriate for the Court to grant summary judgment finding that the dominant estate does not have any easement rights or interest in the servient estate other than the drainage of

surface waters. (D0077, Ruling RE: MSJ and Motion to Compel Pg. 13, 9/13/2023). It was proper for the District Court to dismiss the Robinsons' claims against the Ludolphs in their entirety and dismiss the Ludolphs from this action.

Iowa follows the natural flow doctrine, which means water can run from higher to lower elevation in its natural course, regardless of manmade property divisions. *Sojka v. Breck*, 823 N.W.2d 384 (Table), 2013 1453241, *4 (Iowa Ct. App. 2013) (Discussing nuisance claims regarding surface water rights). Essentially this makes water a “a common enemy, which every [landowner] must fight for himself as long as it takes its natural course.” *Id.*; quoting *Koenigs v. Mitchell Cnty. Bd. of Supervisors*, 659 N.W.2d 589, 595 (Iowa 2003). A dominant estate, or land located at a higher elevation than its neighbor, has a right to “drain the land in the general course of natural drainage” onto servient, or lower, landowners. Iowa Code § 468.621. The dominant estate can “discharge” the water by constructing a drain to carry the water “from his land in its natural and usual course onto and over the land of another. *Thome v. Retterath*, 433 N.W.2d 51, 53 (1988). This discharge of water is considered a “legal and natural easement” for the dominant estate over the servient estate. *Id.* This has also been called an

“easement of drainage.” *Heinse v. Thorborg*, 230 N.W. 881, 882 (Iowa 1930).

A drainage easement affirmatively gives the dominant estate the “right to drain his land into a natural watercourse,” through tiling systems or otherwise, even if that means the servient estate has an increased amount of surface water. *Thome*, 433 N.W.2d 51, 53(1988); see also *Heinse*, 230 N.W. 881, 882 (Iowa 1930); and *Countryman*, 938 N.W.2d 718 (Table), 2019 WL 3317352, *1 (Iowa Ct. App. 2019), as amended (July 25, 2019). The dominant estate cannot increase the level of water onto the servient estate to the point where the amount of water “materially results in damage” to the servient landowner. *Thome*, 433 N.W.2d 51, 53 (1988). A drainage easement means that the servient estate must “maintain the natural water course” and cannot artificially prevent the flow of surface water which naturally flows from the dominant estate. *Heinse*, 230 N.W. 881, 882 (Iowa 1930).

Under a drainage easement, it is the servient estate’s responsibility to “maintain the natural water course,” and the dominate estate does not have a right to access the servient estate to maintain or make repairs. The Robinsons cannot claim access rights (or repair corridor or access way) onto the Ludolph property under their drainage easement rights. This can only be

done through a prescriptive (or express) easement which cannot be established in this case.

A drainage easement is distinct from any other easement, including an easement by prescription. *Countryman*, 938 N.W.2d 718 (Table), 2019 WL 3317352, *1 (Iowa Ct. App. 2019), as amended (July 25, 2019). For example, in *Countryman*, the dominant estate argued they had a “statutory and common law ‘right to drain its land via subsurface drainage tile across [the servient] estate’s land to the county’s main drain.’” *Id.* The Iowa Court of Appeals agreed that the drainage easement “right arises independently of the four types of easements enumerated by [the servient estate.]” *Id.* The servient estate argued there was no easement arising by prescription—or any other easement. *Id.* The Court agreed and held that there was no easement by prescription and at the same time, held there was a common law drainage easement. *Id.* The Court ordered the servient estate to replace drainage tiles that had been filled in and overgrown with trees and did not allow the dominate estate access to repair the tile. *Id.* A drainage easement simply does not allow for access onto or over the servient estate. As such, it was appropriate for the District Court to grant summary judgment of the Ludolphs on this issue.

The Robinsons' reliance on Iowa Code § 468.621 does not support their position that they have a right to access onto the Ludolph property and they are misinterpreting this statute.

Iowa Code § 468.621 does address the “construction or reconstruction. . .

“ . . . constructing or reconstructing open or covered drains, discharging the drains in any natural watercourse or depression so the water will be carried into some other natural watercourse . . . ”

Iowa Code §468.621.

The dominant landowners right to construct and reconstruct tile under this section only applies to open or covered drains ON THEIR OWN PROPERTY. (emphasis added). There is nothing in the code section that allows access onto or over the servient estates' property. This code section clarifies that a landowner is allowed to make repairs to its own property and provides protection from liability under certain circumstances in doing so. To find otherwise, and as the Robinsons suggest, would be disastrous to the sanctity of property rights in our state.

The dominant tenant does not have a right to enter a downhill property to repair his drain as suggested by the Robinsons. That is why the legislature put “the teeth” into Iowa’s statutory drainage law through Iowa Code § 468.148 and 468.149 as suggested by the Robinsons on page 40 of

their brief. The State of Iowa will allow for double the amount of damages sustained by the dominant tenant or will criminally charge the servient landowner who intentionally does not maintain the drainage watercourse through their property. Iowa Code § 468.148 and 468.149 (2023). What the legislature did not do is create a right of access by the dominant tenant onto and over the servient landowner's property. To suggest otherwise is not based in Iowa law or even remotely a good idea.

Similarly, the Robinsons have misconstrued the findings in *Nixon v. Welsh*, 24 N.W.2d 476 (Iowa 1947). The right of the dominant tenant to enter a downhill servient property to repair a drain is not firmly established in *Nixon* as argued by the Robinsons. In fact, *Nixon* is distinguishable from the facts in this case as properly determined by the District Court in granting summary judgment. (D0077, Ruling RE: MSJ and Motion to Compel Pg. 13, 9/13/2023).

The present case involves a natural drainage easement without any other easement rights. This is why the Robinsons are desperately attempting to unsuccessfully establish an easement by prescription to have easement rights above and beyond natural waterflow and drainage rights.

The *Nixon* case is distinguishable from the present case as *Nixon* involved a drainage ditch known as "the Bowman ditch" that was

established by the joint action of the owners through which the water flowed and drained. *Nixon*, 24 N.W.2d at 477. This drainage ditch was established by Harrison County when the owners petitioned the Board of Supervisors and the Board established the ditch, put out for contracts to construct the ditch, and paid for the construction of the ditch. *Id.* The drainage ditch was not merely established by natural drainage and waterflow as is the case in the present case.

It will take some easement rights above and beyond the natural drainage easement rights that is needed to establish the right to entry that the Robinsons are requesting be recognized. Such rights do not exist here. The District Court was correct in distinguishing *Nixon* and, as such, it was appropriate for the District Court to grant summary judgment dismissing the Robinsons' claims to such a right of entry.

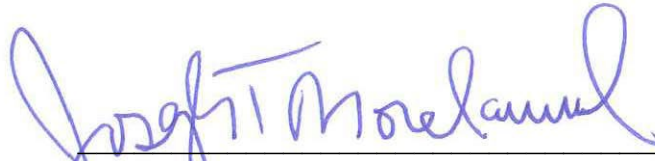
This Court should uphold the entry of summary judgment dismissing the Ludolphs from this action, as a matter of law.

CONCLUSION

For the reasons set forth above, Appellees Kenneth M. Ludolph and Deanice R. Ludolph respectfully request that the Court uphold the District Court's ruling granting their motion for summary judgment, confirm the

dismissal of the Ludolphs from the claims brought by the Robinsons, and assess the cost of the appeal against the Robinsons.

Respectfully submitted,



Joseph T. Moreland AT0005472

Hayek, Moreland, Smith & Bergus, L.L.P.

120 East Washington Street

Iowa City, Iowa 52240-3924

319/337-9606 telephone; 319/338-7376 facsimile

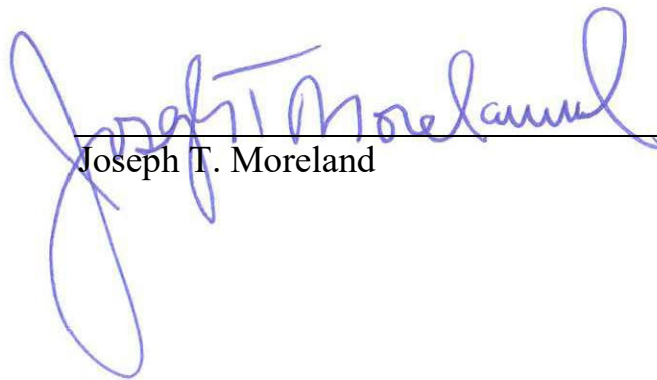
E-mail: moreland@hayek-law.com

ATTORNEY FOR DEFENDANT-APPELLEES

LUDOLPH

REQUEST FOR NONORAL SUBMISSION

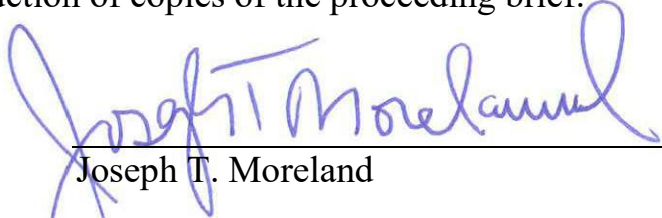
Appellees Kenneth M. Ludolph and Deanice R. Ludolph hereby do not believe that oral argument is not necessary in this matter and, as such, waive oral argument. However, if the Court sets this matter for oral argument, these appellees request to be heard.



Joseph T. Moreland

ATTORNEY’S COST CERTIFICATE

I, Joseph T. Moreland, hereby certify that there were no costs associated with the reproduction of copies of the proceeding brief.

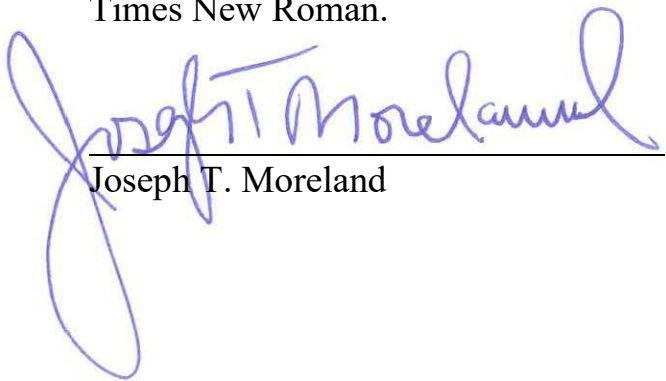


Joseph T. Moreland

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

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this proof brief contains 4,865 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO Version 2405 in 14-point Times New Roman.



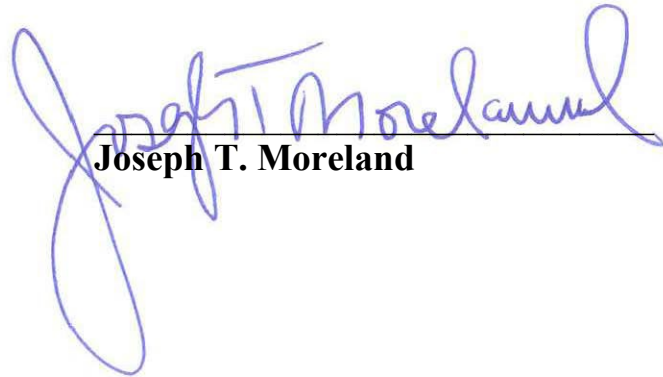
Joseph T. Moreland

June 24, 2024
Date

CERTIFICATE OF FILING AND PROOF OF SERVICE

I, Joseph T. Moreland, attorney for Defendants-Appellees Kenneth and Deanice Ludolph, hereby certify that I filed the within Appellee's Brief on behalf of Defendants-Appellees Kenneth and Deanice Ludolph by submitting the same to the Supreme Court through the Electronic Document Management System (EDMS) on June 24, 2024.

I further certify that I served the same on behalf of Defendants-Appellees Kenneth and Deanice Ludolph by serving Attorney Greg Geerdes, attorney for Petitioner-Appellants Martin, Thomas, Laura and Paula Robinson, and by serving Attorneys Brian J. Fagan, Nicholas Petersen, Paul D. Gamez for Defendant-Appellees, Coggon Solar, LLC, and by serving Attorneys Jeffrey P. Schultz, Brian J. Fagan, Nicholas Petersen, Paul D. Gamez and Dennis Puckett for Defendant-Appellees Central Iowa Power Cooperative, through the Electronic Document Management System (EDMS) on June 24, 2024, in full compliance with the provisions of the Rules of Appellate Procedure and the Rules Pertaining to the Use of the EDMS.



Joseph T. Moreland