IN THE SUPREME COURT OF IOWA

NO. 19-1681

WILLARD B. MCNAUGHTON,

Plaintiff-Appellant,

vs.

STANLEY E. CHARTIER, JEANINE K. CHARTIER, CHAR-MAC, INC., CITY OF LAWTON &, ABILIT HOLDINGS (LAWTON) LLC,

Defendants-Appellees.

APPEAL FROM
THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

THE HONORABLE JEFFREY A. NEARY, JUDGE
WOODBURY COUNTY NO. EQCV180496

FINAL BRIEF OF DEFENDANTS/APPELLEES STANLEY E. CHARTIER, JEANINE K. CHARTIER And CHAR-MAC, INC.

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ROUTING STATEMENT

Pursuant to Rule 6.1101(3)(a) of the Iowa Rules of Appellate Procedure, this Court should transfer the case to the Iowa Court of Appeals. Three issues are presented to this Court: (1) whether the trial court erred in awarding Defendants-Appellees Stanley E. Chartier and Jeanine K. Chartier common law attorney fees; (2) whether Plaintiff-Appellant publicly dedicated a portion of his property as a public street; and (3) whether a copy of an easement recorded approximately 18 years after its execution is an easement appurtenant. All three issues involve the application of existing legal principles.

This appeal does not involve substantial questions concerning established legal principles in the area of common law attorney fees. The trial court's ruling does not expand the interpretation of common law attorney fees to include situations where a litigant considers the other party's offer of settlement to be excessive or unreasonable, but involves the intentional, oppressive conduct by one party to profit from the sale of the other litigant's business and filing a lawsuit in hopes to extract money from the other litigant.

In addition, this appeal does not involve questions pertaining to the legal principle that a person's property should not be taken without proper

process and just compensation. The issue relating to the public dedication of one's property for public use is one that has been readily addressed by the Iowa Court of Appeals.

REFERENCES

For purposes of simplicity and continuity with the briefs filed with this Court, Defendants-Appellees shall adopt the references set forth in Plaintiff-Appellant's Brief.

Appellant shall be referred to as "McNaughton," Appellees Stanley E. Chartier and Jeanine K. Chartier shall be referred to as "the Chartiers," Jeanine K. Chartier shall be referred to individually as "Jeanine Chartier," Char-Mac, Inc., shall be referred to as "Char-Mac," AbiliT Holdings, LLC, shall be referred to as "AbiliT," and the City of Lawton shall be referred to as the "City of Lawton" or "the City."

STATEMENT OF THE CASE

As set forth in McNaughton's Petition filed on April 19, 2018, this case initially concerned the respective parties' rights as to: (1) ingress and egress as described in an easement agreement that was unrecorded for a period of almost 20 years; (2) ingress and egress using McNaughton's property south of the easement area described in the easement agreement; and (3) whether McNaughton is entitled to damages. App. P. 13-14.

On May 11, 2018, Chartiers and Char-Mac filed an Amended Answer, Counterclaim, and Third-Party Claim, naming the City of Lawton as a Third-Party Defendant due to the City's rights it may have in the concrete portion of easement area. App. P. 247-252.

On June 5, 2018, the City filed a Motion to Dismiss stating that the Third-Party Claim against the City failed to state a claim upon which any relief may be granted. App. P. 552-553. Chartiers and Char-Mac filed a resistance to the motion to dismiss and, in support of the resistance, attached a letter dated February 11, 2000 from Glenn A. Metcalf, city attorney for the City of Lawton, to McNaughton which proved in part "[T]he paved portion of the **street** is partially located on your (McNaughton's) property." App. P. 554-557, 353. A hearing on the Motion to Dismiss was held on July 30, 2018 at which McNaughton's attorney, Chartiers' attorney, and the City of Lawton's attorney all personally appeared. At the hearing, Chartiers' attorney argued that the City may have an interest in the concrete portion of the easement area. In a court order filed on August 2, 2018 the district court denied the motion to dismiss and ruled that the City was an indispensable party to the case. App P. 561-563.

On August 23, 2018 McNaughton filed a motion for leave to include AbiliT as an additional defendant. App. P. 253-271. On September 6, 2018

the district court granted the relief requested by McNaughton and AbiliT was added as a defendant to the lawsuit. App. P. 564-565.

On October 10, 2018, Chartiers and Char-Mac filed a motion for leave to amend its answer to assert an addition counterclaim against McNaughton for attorney fees incurred by Chartiers and Char-Mac in defending the lawsuit. App. P. 293-294. No party filed a resistance to the Motion for Leave to Amend and on October 26, 2018 the district court entered an order granting the motion. App. P. 293-294.

Trial was held on July 16, 2019, and the parties submitted proposed proposed findings of fact and conclusions of law. The significant issue presented to the trial court ended up being the rights of the respective parties as to the concrete portion of the easement area depicted by the red rectangle in Joint Exhibit 2. App. P. 345-346. On August 27, 2019, The Honorable Jeffrey A. Neary adjudged and decreed that:

(1) The concrete portion of the 13-foot by 80-foot easement area as shown in trial exhibit 2 is a public street having been dedicated as such to the City of Lawton, Iowa by McNaughton as determined herein. McNaughton's rights to that area are extinguished and terminated by this order.

(2) Chartiers' common law claim for attorney fees as damages is granted.

(3) AbiliT's counterclaims are withdrawn and accordingly dismissed with prejudice.

(4) All claims against the City of Lawton, Iowa are dismissed with prejudice.

(5) All court costs are taxed against McNaughton.

The district court retained jurisdiction to enter by separate order a judgment for attorney fees. App. P. 422-423.

On September 10, 2019, McNaughton filed a Motion to Reconsider, Enlarge, or Amend Findings of Fact and Conclusions of Law. App. P. 425-460. On September 17, 2019 Chartiers, Char-Mac, and AbiliT filed A Joint Resistance to the motion and McNaughton subsequently filed a Reply to the Joint Resistance. App. P. 485-495, 504-507. On September 30, 2019 the district court entered an order denying McNaughton's Motion to Reconsider, Enlarge, or Amend Findings of Fact and Conclusions of Law. App. P. 548-549.

On September 17 and 18, 2019, Chartiers' attorney and AbiliT's attorney each filed an Affidavit of Attorney's Fees and on September 20, 2019 McNaughton filed a Resistance to Application for Attorney's fees.

App. P. 480-484, 496-497, 498-503. On September 23, 2019 Chartiers filed a Reply to McNaughton's Resistance. App. P. 504-507. On September 30, 2019 the district court entered a judgment for attorney fees in the amount of $70,604.14 in favor of Chartiers and against McNaughton. App. P. 508-510. Notice of Appeal was filed on October 3, 2019.

STATEMENT OF THE FACTS

McNaughton and Jeanine Chartier are siblings. App. P. 27; Tr. 13:1.

On August 18, 1998, McNaughton purchased the property located at 2156 Highway 20, Lawton, Iowa, which is located south of Highway 20. App. P. 25, 27, 370; Tr. 11:16; Tr. 13:20-21. At the time McNaughton purchased the property, a house and garage were located on the property with a driveway extending north from those structures that allowed McNaughton to access Highway 20. App. P. 28; Tr. 14:3-9.

On December 3, 1998, Chartiers purchased on contract approximately 15.97 acres of real estate located directly to the east of McNaughton's property and directly south of Highway 20. App. P. 28, 347, 371; Tr. 14:18-21. At the time Chartiers purchased the property, it was primary used for agricultural purposes. App. P. 29; Tr. 15:3-11. Chartiers purchased the property with the intent of constructing a care facility to be utilized as an assisted living facility. App. P. 164; Tr. 164:16-22. Chartiers eventually

received title to the property via warranty deed recorded on October 4, 1999. App. P. 371.

In order to obtain SBA financing for the construction of the care facility, Chartiers needed to have a public street installed to access the care facility from Highway 20. App. P. 179; Tr. 165:18-23. Prior to installing a public street, Chartiers needed to obtain a permit from the Iowa Department of Transportation to gain access off of Highway 20. App. P. 180; Tr. 166:12-15. The original plan was for the access to be located on McNaughton's property, but the DOT required that the access be moved further east onto Chartiers' property so the public street would be directly south of the existing Cedar Street located on the north side of Highway 20. App. P. 180-181, 347; Tr. 166:15-19, 167:1-14. In January of 1999, McNaughton and Chartiers submitted an application for a special access connection to the DOT to obtain access to Highway 20 and the application was approved by the DOT on January 25, 1999. App. P. 349. One-third of the access area is located on McNaughton's property and two-thirds of the access area is located on Chartiers' property. App. P. 181, 345; Tr. 167:9-10. The access area is depicted by the blue rectangle area on Joint Exhibit 2. App. P. 345.

After acquiring the access permit, Chartiers approached the City of Lawton concerning the construction of the public street and other public

improvements. App. P. 182; Tr. 168:6-12. Beginning in July of 1999, the City of Lawton then proceeded to: (1) hire an engineer to prepare plans and specifications for the public street and related public improvements; (2) prepare the site plan; (3) conduct the necessary council proceedings to publicly bid the project; (4) hire a contractor for the project and approve the construction contract; (5) adopt the Char-Mac Addition Urban Renewal Plan; and (6) enact a Tax Increment Financing ordinance to capture the increase in the real estate taxes for Chartiers' property and use those public funds to pay for the public street and related public improvements. App. P. 182-186, 353-368, 573-581; Tr. 168:6 through 172:12. Construction of the public street and related public improvements was completed in late 1999 or early 2000. App. P. 188, 352; Tr. 174:6-8. The public street and related public improvements were partially constructed on McNaughton's property. App. P. 75-76, 345-346, 353, 356; Tr. 61:4-7, 62:9-13. The City of Lawton named the public street East Char-Mac Drive. App. P. 188, 347; Tr. 174:15-20.

On September 17, 1999, Chartiers and McNaughton entered into a written Easement Agreement ("Easement") concerning the easement area depicted by the red rectangle on Joint Exhibit 2. App. P. 336-346. The Easement was "for ingress and egress across a portion of McNaughton's real

estate to provide Chartiers with an access between their real estate and U.S. Highway 20." App. P. 339. The Easement remained unrecorded from its creation in 1999 until 2018 when a copy of it was unilaterally recorded by McNaughton. App. P. 133, 336-344; Tr. 119:5-9 The original Easement cannot be located. App. P. 71; Tr. 57:22-23.

The easement area consists of a 13-foot wide by 80-foot long concrete area of the "stub" or "T" at the west end of East Char-Mac Drive. App. P. 345-346. The concrete "stub" or "T" is 36 feet wide. App. P. 345-346. There is an unpaved portion of the easement area which is 10 feet by 80 feet in McNaughton's yard. App. P. 89; Tr. P. 75:17-21. The portion of the easement area at issue in this case is the area that is 13 feet wide by 80 feet long in the concrete "stub" or "T" on East Char-Mac Drive.

Chartiers completed construction of care facility in the spring of 2000. App. P. 188; Tr. 174:11-14. In the fall of 2012, Chartiers added an accessary building to the care facility. App. P. 189; Tr. 175:13-16. McNaughton assisted in the erection of the accessary building having installed the HVAC system. App. P. 52-53; Tr. 38:23-25, Tr. 39:1. The accessary building was constructed to house an office, maintenance equipment, a shop and record storage. App. P. 189; Tr. 175:13-19. Chartiers installed a gravel driveway on their property to access the accessary

building. App. P. 189-190; Tr. 175:20-25; Tr. 176:1-2. McNaughton admitted that access to the accessory building can be obtained without using the 13-foot x 80-foot concrete portion of the easement area. App. P.106; 345-346; Tr. 92:12-17.

In January of 2018, Chartiers and Char-Mac began the process of selling the care facility and a letter of intent was executed by Chartiers, Char-Mac and AbiliT for the sale of the care facility to AbiliT. App. P. 154; Tr. 140:11-18. As part of that process, Chartiers and Char-Mac were required to provide AbiliT various documents relating to the operation of the care facility and was required to make certain disclosures to AbiliT. App. P. 155; Tr. 141:3-16. The terms of the letter intent also required AbiliT, Chartiers, and Char-Mac to enter into a contract for the sale of the care facility within a certain timeframe. App. P. 154-156; Tr. 140:19-24; Tr. 141:24-25; Tr. 142:1.

In January of 2018, Jeanine Chartier disclosed to AbiliT the existence of the Easement, however, the Easement did not show up on the title search performed by AbiliT. App. P. 155; Tr. 141:20-22. The attorneys for Char-Mac, Chartiers, and AbiliT then engaged in various discussions concerning the impact the Easement had on title to the property on which the care facility was located. App. P. 145, 147, 148, 156, 383-392; Tr. 131:18-22,

133:12-16, 134:9-12, 142:3-23. In light of the impending deadline to sign a contract, the attorneys were of the opinion that it would easier to have Jeanine Chartier approach McNaughton to seek clarification of the unrecorded Easement as opposed to seek court intervention. App. P. 157-158; Tr. 143:24-25; Tr. 144:2-4, 22-23. Jeanine Chartier wanted to get the contract signed because she needed to sell the care facility due to her health issues. App. P. 158; Tr. 144:8-16. The primary concern for Jeanine Chartier was to have the title issue, if one existed, resolved so the sale of the care facility could proceed. App. P. 159; Tr. 145:7-14. At one point, the attorneys for AbiliT questioned whether a title issue even existed. App. P. 157; Tr. 143:13-18.

In February of 2018, with the deadline to enter in the contract approaching, Jeanine Chartier, at the request of AbiliT, approached McNaughton about clarifying paragraph 6 of the Easement. App. P. 157, 378; Tr. 143:1-12. McNaughton didn't even have a copy of the Easement so Jeanine Chartier provided him a copy of the document. App. P. 133; Tr. 119:2-14. Chartier informed McNaughton of the proposed sale and that she needed to sell the care facility due to her health issues. App. P. 137-138; Tr. 123:11-12, 22-25, Tr. 124:1. McNaughton assured Jeanine Chartier that he was not going to disrupt the sale of the care facility and that there were no

problems with the Easement and that the Easement goes with the care facility. App. P. 136-137; Tr. 122:2; 123:11-16, 22-24. Further, McNaughton assured Jeanine Chartier that he was going to have the Easement recorded. App. P. 217, 378; Tr. 203:6-7. Once McNaughton recorded the Easement, Chartier agreed to pay McNaughton $15,000. App. P. 217; Tr. 203:3-11.

After McNaughton provided the easement clarification to his attorney, it was discovered that the Easement contained the incorrect legal description concerning Chartiers' property. App. P. 35; Tr. 21:21-25. Jeanine Chartier then provided McNaughton's attorney the abstracts and a letter dated February 21, 2018 in effort to get the clarification of easement recorded with the correct legal description. App. P. 135, 378; Tr. 121:20-23. Jeanine Chartier cooperated with McNaughton because he stated that he was not going to disrupt the sale of the care facility and that the Easement goes with the care facility. App. P. 136-137; Tr. 122:2-7; 123:11-16, 22-24.

McNaughton then approached Jeanine Chartier with an offer in exchange for McNaughton executing the easement clarification. App. P. 198; Tr. 184:4-12. McNaughton requested that Chartiers pay him $100,000 and Jeanine Chartier, as executor of her sister's estate, allow him to purchase 50 acres from the estate, and the Chartiers pay all the expenses related to the

transaction. App. P. 198, 201; Tr. 184:16-21, 187:10-12. Jeanine Chartier, due to her fiduciary duty as an executor, refused to comply with McNaughton's demands because allowing him to purchase 50 acres from the estate would have devalued the remaining 30 acres of real estate at the detriment of the estate's beneficiaries. App. P. 198, 200; Tr. 184:22-24, 186:22-25. After Chartiers declined this offer, McNaughton wouldn't sign the easement clarification. App. P. 136; Tr. 122:20. On March 7, 2018 McNaughton unilaterally recorded a copy of the Easement by attaching the Easement to an Affidavit Explanatory of Title to Real Estate. App. P. 336-344.

Chartiers and Char-Mac did enter into a purchase agreement with AbiliT concerning the sale of the care facility. After further analyzing the affidavit recorded by McNaughton, AbiliT decided to proceed with the purchase of the care facility. App. P. 201; Tr. 187:13-17. The transaction was initially scheduled to close on April 20, 2018, but was delayed to May 10, 2018. App. P. 201; Tr. 187:18-25. On April 19, 2018 McNaughton filed this lawsuit and a Lis Pendens notice. App. P. 243. Due to the pending lawsuit, AbiliT required that Chartiers and Char-Mac indemnify AbiliT for all costs, including attorney fees, incurred by AbiliT should they be named a defendant in the lawsuit. App. P. 202, 595; Tr. 188:7-15.

On May 24, 2018, McNaughton, via a letter, made the three following proposals to resolve the issue concerning the concrete portion of the easement area:

a. Chartiers purchase McNaughton's property located at 2156 Highway 20, Lawton, Iowa for $410,000;
b. Chartiers pay McNaughton $160,000 and McNaughton retain his property; and
c. Chartiers transfer to McNaughton the 12 acres of farm real estate located just south of the care facility.

App. P. 202, 219; Tr. 188:20-25, 205:11-25. Chartiers declined all three offers. App. P. 203; Tr. 189:2-6.

On August 23, 2018 McNaughton filed a Motion for Leave to Amend its Petition to add AbiliT as a defendant and the district court granted the motion on September 6, 2018. App. P. 253-271, 564-565. Pursuant to paragraph 21 of the Amended Petition, McNaughton claimed that AbiliT's use of the Easement as well as McNaughton's property south of the Easement has caused and continues to cause damages to McNaughton. App. P. 260. McNaughton made this same allegation against Char-Mac in paragraph 17 of the original petition filed in this case. App. P. 13.

Prior to the filing this lawsuit, McNaughton did not complain about anyone using the gravel driveway located on Chartiers' property to access the accessary building. App. P. 191; Tr. 177:14-16. So Chartiers couldn't figure out why now McNaughton was complaining about them using his property south of the Easement. App. P. 191; Tr. 177:19-25. After AbiliT was named as a defendant, Chartiers installed a landscape boulder wall on their side of the property line to clarify that neither Char-Mac nor AbiliT was driving across McNaughton's property south of the Easement to access the accessory building. App. P. 192-193, 570; Tr. 178:18-25, Tr. 179:1-2. After the boulder wall was installed, McNaughton did block the gravel driveway to the accessory building so Chartiers and AbiliT couldn't access the accessary building. App. P. 193-196, 568-569, 571-572; Tr. 179:24-25, Tr. 180:1-25, Tr. 181:1-25, Tr. 182:1-2.

Trial in this matter was held on July 16, 2019. App. P. 406. The significant issue presented to the trial court was whether the 13-foot wide by 80-foot long concrete portion of the easement area is considered a public street. App. P. 345-346, 411, 416-418.

At trial, Jeff Nitzschke, a lifelong resident of Lawton, and mayor of Lawton at the time East Char Mac Drive was installed, testified that East Char Mac Drive is a public street. App. P. 169-171, 352; Tr. 155:21-23, Tr.

156:16-22, Tr. 157:5-15. Mr. Nitzschke outlined what he believed to be the boundary of East Char-Mac Drive, a public street, which included the concrete portion of the easement area. App. P. 353. Mr. Nitzschke also agreed with the statement in the letter dated February 11, 2000 to McNaughton from the city attorney, Mr. Metcalf, that the paved portion of the street (East Char-Mac Drive) is located on McNaughton's property. App. P. 173, 353; Tr. 159:1-8. Mr. Nitzschke further testified that there have been no restrictions implemented by McNaughton concerning travel across the public street (East Char-Mac Drive including the concrete portion of the easement area). App. P. 173, 353; Tr. 159:17-19.

At trial, McNaughton testified:

a. With the exception of one time when he was "being ornery", he has never restricted access to the concrete portion of easement area. App. P. 92; Tr. 78:4-19.

b. He never placed any restriction on who could use the concrete portion of the easement area over the past approximately 20 years. App. P. 92; Tr. 78:20-22.

c. Any member of the public had unrestricted use of the concrete portion of the easement area for the past approximately 20 years. App. P. 77, 92-93; Tr. 63:19-20, Tr.78:23-25, Tr. 79:1.

d. He could identify only 3 people he has told in the last approximately 20 years that there was an easement over a portion of concrete public street. App. P. 95-96; Tr. 81:21-25, Tr. 82:1-4.

e. The public street was partially constructed on his property; the concrete portion of easement area. App. P. 75, Tr. 61:4-7.

f. He never placed a sign indicating there was a private easement on the public street. App. P. 77-78; Tr. 63:10-25; Tr. 64:1-2.

g. He didn't know where the original Easement was located and he didn't record the easement until 2018 (19 years after it was established) when he recorded a copy of it. App. P. 71, 336-344; Tr. 57:22-23.

h. That a lot of people believe the concrete portion of the easement area is a public street. App. P. 98; Tr. 84:11-12.

i. If he attempts to interfere with the use of the public street by installing a barrier to disrupt access across the concrete portion of the easement area, the City of Lawton would cite him. App. P. 97; Tr. 83:13-18.

j. There is no reasonable alternative for access the care facility from U.S. Highway 20. App. P. 99; Tr. 85:1-22.

k. He does not plan to interfere with anyone's use of East Char-Mac Drive to the care facility. App. P. 90; Tr. 76:10-20.

l. He admits he does not have a right to dictate how Chartiers use their property to the south of the easement area. App. P. 111; Tr. 97:2-10.

m. That access to the accessory building can be obtained without using the 13-foot x 80-foot concrete portion of the easement area that is visualized in the concrete public street (App. P. 345-346); App. P. 90; Tr. 76:6-9.

n. That there have always been two businesses accessing the Chartier property – the care facility and the farm to the south of the easement area owned by the Chartiers. App. P. 101; Tr.87:9-21.

o. That there remain two businesses accessing the Chartier property – AbiliT (the new owner of the care facility) and the Chartiers for their farm ground to the South of the easement area. App. P. 101; Tr. 87:22-24.

p. He has not sustained any compensable or monetary damage. App. P. 76, 107; Tr. 62:14-16; 93:6-12.

q. That the use of the concrete portion of the easement area has not changed as a result of the change of ownership of the care facility. App. P. 99-100; Tr. 85:23-25, Tr. 86:1-16.

r. That 2 to 5 cars per day use the gravel driveway to the accessory building and that the frequency of accessing the accessory building is similar from the time the accessory building was erected in 2013 to the present. App. P. 100, 112; Tr. 86:1-16, Tr. 98:17-20.

s. That any damage he has sustained is "perceived" inconvenience he experiences as a result of his sister taking action to show that Chartiers and AbiliT were not crossing his property located south of the concrete portion of the easement area. App. P. 107-108, 192-193; Tr. 93:13-24, Tr. 94:1-2, Tr. 178:18-25, Tr. 179:1-2.

t. That he was not concerned about the Easement until he learned of the pending sale of the Char-Mac facility. App. P. 79; Tr. 65:6-16.

u. That he wanted to profit from the pending sale of the Char-Mac facility. App. P. 79; Tr. 65:17-20.

v. That the paved portion of the street is located on his property. App. P. 76; Tr. 62:9-13.

w. That he does not object to members of the public crossing the concrete portion of the easement area. App. P. 77; Tr. 63:10-20.

McNaughton did try to disrupt the sale of Char-Mac assisted living facility by filing this lawsuit during the final months during which the sale was set to close. As a result of this lawsuit, Chartiers have incurred expenses totaling $70,604.14 to date. App. P. 397-404, 480-484, 496-497.

ARGUMENT

I. Whether the Trial Court Erred in Determining Defendants-Appellees Chartiers Were Entitled to Common Law Attorney Fees

A. Preservation of Error

Error was preserved by Plaintiff-Appellant because the issue was tried and decided by the trial court. Further, Rule 1.904(1) provides a party on appeal may challenge the sufficiency of the evidence to sustain any finding without having objected to it by motion or otherwise.

B. Scope of Review

Whether to grant common law attorney fees rests in the court's equitable powers. Hockenberg Equipment Co. v. Hockenberg's Equipment

& Supply Co., 510 N.W.2d 153, 158 (Iowa 1993). The standard of review of this issue is de novo. Hockenberg Equipment Co., 510 N.W.2d at 158.

"The trial court's findings of fact have the effect of a special verdict and are binding if supported by substantial evidence." Land O'Lakes, Inc. v. Hanig, 610 N.W.2d 518, 522 (Iowa 2000). "'Evidence is substantial for purposes of sustaining a finding of fact when a reasonable mind would accept it as adequate to reach a conclusion.'" Hanig, 610 N.W.2d at 522 (citing Falczynski v. Amoco Oil Co., 533 N.W.2d 226, 230 (Iowa 1995).

"When the challenge to the district court's ruling is lack of substantial evidence, we view the evidence in the light most favorable to the judgment. In our review, we liberally construe the district court's findings to uphold, rather than defeat, the result reached." Tim O'Neil Chevrolet, Inc. v. Forristall, 551 N.W.2d 611, 614 (Iowa 1996). "Additionally, in our review, the question we face is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made." Forristall, 551 N.W.2d at 614.

C. McNaughton's actions were oppressive and/or conniving that justify the award of common law attorney fees.

"A [party] seeking common law attorney fees must prove that the culpability of the [other party's] conduct exceeds the 'willful and wanton disregard for the rights of another'; such conduct must rise to the level of

oppression or connivance to harass or injure another." Hockenberg Equipment Co. v. Hockenberg's Equipment & Supply Company of Des Moines, Inc., 510 N.W.2d 153, 159 (Iowa 1993). In Suss v. Schammel, the Iowa Supreme Court "required a finding of 'oppressive' conduct, which denotes conduct that is difficult to bear, harsh, tyrannical, or cruel." Hockenberg Equipment Co., 510 N.W.2d at 159. "These terms envision conduct that is intentional and likely to be aggravated by cruel and tyrannical motives." Id. Connivance "is defined as 'voluntary blindness [or] an intentional failure to discover or prevent the wrong.'" Id. (citation omitted).

As set forth in the trial court's ruling, the trial court relied on the following undisputed facts in correctly concluding McNaughton's conduct was willful, wanton, oppressive, harassing and conniving:

> After Chartiers notified McNaughton of the pending sale of the Char-Mac assisted living facility located in Lawton, Iowa, to Ability Holdings (Lawton), LLC, McNaughton assured them that he would not disrupt the sale. McNaughton did not appear to be concerned about the easement or its status until he learned of the details of the pending sale of the Char-Mac facility to AbiliT. It was after this point and after Jeanine inquired further about the easement that

McNaughton recorded the easement. McNaughton testified that he wanted to profit from the sale of the Char-Mac facility. McNaughton's proposals included the following as noted above, but restated here in the context of the discussion about attorney fees as damages to highlight his actions as context for consideration of this claim of damages:

a. Chartiers would give him $100,000, guarantee that he could purchase roughly 50 acres of the farm real estate from his sister's estate, and pay all of his legal fees;
b. Chartiers would purchase McNaughton's property for $410,000;
c. Chartiers would pay McNaughton $160,000 and McNaughton retain his property; and
d. Chartiers would transfer to McNaughton the 12 acres of farm real estate just south of the Char-Mac Facility (the remaining acres of the larger parcel after separating off the Char-Mac Facility parcel).

McNaughton's motive(s) for filing this lawsuit were vexatious and wanton, and constitute bad faith. McNaughton's excessive demands to resolve the use of the concrete portion of the easement area, especially

in light of the fact that these demands took place at a time when Chartiers were selling the assisted living facility, reach the level of oppressive conduct that was intentional and driven by McNaughton's desire to extract money from the transaction between the Chartiers and AbiliT. McNaughton was aware that Chartiers were going to have a significant profit in the sale of the assisted living facility and he wanted to cash in as well. Such conduct reaches the level set forth in **Hockenberg Equipment Co.** and **Suss** supporting an award to Chartiers of attorney fees as damages.

App. P. 421-422.

In his brief McNaughton cites several cases that set forth the standard for awarding attorney fees at common law. The trial court applied the appropriate standard.

McNaughton contends it was not until the sale of the care facility that he understood the concrete portion of the easement area may be compromised and at issue, but this is not an accurate statement. In a letter dated October 9, 2017, from attorney Mark Cord (member of the same law firm that represents McNaughton in this case) to Glenn A. Metcalf, Mr. Cord stated in part that "the road access off of Highway 20 used by Char-Mac and its guests over and across Mr. McNaughton's property may not be addressed

by a valid written and recorded ingress and egress easement." App. P. 584-585. As was his course of action for approximately 20 years, McNaughton did nothing concerning the purported easement, that is, until he became aware that Chartier was selling the care facility.

Upon learning of the sale of the care facility, McNaughton wanted to profit from the sale as well. In effort to do so, McNaughton filed this lawsuit and made excessive demands upon Chartiers to resolve the issue concerning use of the concrete portion of the area, despite the fact that McNaughton informed Chartier that he wouldn't disrupt the sale of the care facility and that the Easement goes with the care facility.

McNaughton asserts that a desire to profit does not belong in the same category as oppressive and conniving behavior, but the trial court rejected that argument taking into context the sequence of events in this case and correctly concluded McNaughton's actions do rise to the level of oppressive and conniving behavior. App. P. 421-422.

McNaughton further contends, in part, that the award of common law attorney fees is limited to those cases involving fraud, but cites no authority that specifically provides that a court can only award common law attorney fees in cases involving fraud. McNaughton's actions, although not fraudulent, do rise to the level of civil extortion. See Duncan v. Ford Motor

Credit, Repossessors, Inc., No. 17-1122, 2018 WL 3060265, (Iowa Ct. App. 2018).

The trial court also rejected McNaughton's attempts to excuse his actions which he described as nothing more than aggressive negotiation tactics. The trial court correctly concluded there was clear and convincing evidence that McNaughton's actions were wanton and willful and "oppressive and tinctured with legal malice". See Hockenberg Equipment Co. v. Hockenberg's Equipment & Supply Company of Des Moines, Inc., 510 N.W.2d 153, 159 (Iowa 1993); App. P. 421-422.

Of significant importance, the Court should consider the allegations set forth in McNaughton's petition and in conjunction with McNaughton's testimony at trial in analyzing McNaughton's motive for filing this lawsuit. In his petition, McNaughton requested relief in establishing the parties' rights as to (1) ingress and egress as described in the Easement, (2) ingress and egress using McNaughton's property south of the easement area, (3) injunctive relief consistent with the court's determination of the parties' ingress and egress rights, and (4) monetary damages. App. P. 13-14.

Considering the first two allegations of his petition, McNaughton never provided his interpretation of the Easement for the trial court to consider and to this date has not provided an interpretation for this Court to

consider. McNaughton's failure to provide an interpretation makes it impossible for a court to issue a ruling based upon his request to establish the parties' rights of ingress and egress pursuant to the Easement. McNaughton's allegations for such determination are essentially baseless. Considering these baseless allegations in conjunction with McNaughton's testimony that:

a. With the exception of one time when he was "being ornery", he has never restricted access to the concrete portion of easement area. App. P. 92; Tr. 78:4-19.
b. He never placed any restriction on who could use the concrete portion of the easement area over the past approximately 20 years. App. P. 98; Tr. 78:20-22.
c. Any member of the public had unrestricted use of the concrete portion of the easement area for the past approximately 20 years. App. P. 77, 92-93; Tr. 63:19-20, Tr.78:23-25, Tr. 79:1.
d. He could identify only 3 people he has told in the last approximately 20 years that there was an easement over a portion of concrete Public Street. App. P. 96-97; Tr. 81:21-25, Tr. 82:1-4.

e. The public street is partially constructed on his property; the concrete portion of easement area. App. P. 75; Tr. 61:4-7.

f. He never placed a sign indicating there was a private easement on the public street. App. P. 77-78; Tr. 63:10-25; Tr. 64:1-2.

g. That the paved portion of the street is located on his property. App. P. 76; Tr. 62:9-13.

h. That he does not object to members of the public crossing the concrete portion of the easement area. App. P. 77; Tr. 63:10-20.

further substantiates that McNaughton had no legal justification in requesting such relief.

Considering McNaughton's third allegation requesting an injunction, McNaughton never requested the trial court to issue an injunction against Chartiers, Char-Mac, or AbiliT. McNaughton never provided any evidence at trial that would warrant the trial court to issue an injunction. McNaughton's third allegation was baseless and he had no legal justification for requesting such relief.

Considering McNaughton's fourth allegation for damages, McNaughton testified that: (1) He has not sustained any compensable or monetary damage (App. P. 76, 107; Tr. 62:14-16, Tr. 93:6-12) and (2) That any damage he has sustained is "perceived" inconvenience he experiences

as a result of his sister taking action to show that Chartiers and AbiliT were not crossing his property located south of the concrete portion of the easement area. App. P. 107-108, 192-193; Tr. 93:13-24, Tr. 94:1-2, Tr. 178:18-25, Tr. 179:1-2. Based upon his own testimony, McNaughton's fourth allegation for damages is baseless and he had no legal justification for requesting such relief.

The only two reasons McNaughton gave for filing this lawsuit was to restrict how Chartiers use their property located to the east of McNaughton's property and that he wanted to profit from Chartiers sale of the care facility to AbiliT. App. P. 51, 79; Tr. 37:20-22, Tr. 65:17-20. McNaughton's actions before and after filing this lawsuit certainly rise to the level of oppression or connivance to harass or injure Chartiers and the trial court's ruling in awarding Chartiers common law attorney fees should be affirmed.

D. The amount awarded for common law attorney fees was not excessive and was supported by the evidence.

1. McNaughton should be responsible for AbiliT's attorney fees.

On April 19, 2018 McNaughton filed this lawsuit and a Lis Pendens notice with intention of stopping Chartiers sale of the care facility to AbiliT. Due to the pending lawsuit, AbiliT required that Chartiers and Char-Mac indemnify AbiliT for all costs, including attorney fees, incurred by AbiliT

should they be named a defendant in the lawsuit. App. P. 202, 595; Tr. 188:7-15. On August 23, 2018 McNaughton filed a motion for leave to include AbiliT as an additional defendant. On September 6, 2018 the district court granted the relief requested by McNaughton and AbiliT was added as a defendant to the lawsuit.

On October 10, 2018, Chartiers and Char-Mac filed a motion for leave to amend its answer to assert an addition counterclaim against McNaughton for attorney fees incurred by Chartiers and Char-Mac in defending the lawsuit. No party filed a resistance to the Motion for Leave to Amend and on October 26, 2018 the district court entered an order granting the motion.

McNaughton had the opportunity to conduct discovery concerning the issue of attorney fees and the amount of attorney fees incurred by Chartier in defending this lawsuit. McNaughton did not depose any of the Defendant-Appellees nor any of their representatives. McNaughton was aware of the indemnification provision on or about December 18, 2018. App. P. 595. McNaughton did not contest the issue of indemnification at trial. Additionally, McNaughton admitted the indemnification agreement between AbiliT and Chartiers existed. Appellant's Proof Brief p. 28-29.

McNaughton testified he informed Jeanine Chartier that he was not going to disrupt the sale of the care facility to AbiliT and that he didn't have

any issues with AbiliT accessing the care facility via the public street. Yet, McNaughton named AbiliT a defendant in this lawsuit and claimed that he was damaged that by AbiliT using the concrete portion of the easement area to access the care facility. However, McNaughton at his deposition and at trial testified he suffered no damages. McNaughton also testified that he was not going to interfere with anyone using East Char-Mac Drive.

So, essentially, the claim for damages was unsubstantiated from the date the petition was filed and McNaughton's only purpose for filing this lawsuit was in hope to profit from the sale of the care facility to AbiliT. The frivolous nature of McNaughton's lawsuit and his conniving actions before and after the filing of this lawsuit warrant that he should be liable to Chartiers for the attorney fees they incurred as a result of AbiliT being named a defendant in this case and the trial court's ruling awarding Chartiers a judgment for those fees should be affirmed.

2. Chartiers offered sufficient proof of the amount of attorney fees.

Whether to grant common law attorney fees rests in the court's equitable powers. Hockenberg Equipment Co. v. Hockenberg's Equipment & Supply Co., 510 N.W.2d 153, 158 (Iowa 1993). "However, the amount awarded is 'vested in the district court's broad, but not unlimited discretion.'" Schaffer v. Frank Moyer Construction, Inc., 628 N.W.2d 11, 22

(Iowa 2001)(case involving mechanic's lien enforcement). "Only when the district court bases its decision of the amount of the award on clearly unreasonable or untenable grounds will this court reverse." Schaffer, 628 N.W.2d at 22.

On September 17, 2019 Chad Thompson, attorney for Chartiers and Char-Mac, filed an affidavit of attorney fees in the amount of $71,794.89 and attached to the affidavit as exhibits invoices from Thompson, Phipps, & Thompson LLP and Nyemaster & Goode, P.C. On September 18, 2019, Kevin Collins, attorney for AbiliT, filed an affidavit of attorney fees. The attorney fees requested are as follows:

a) Exhibit A - $25,528.34

b) Exhibit B - $8,028.70

c) Trial Exhibit C-2 - $29,236.90

d) Trial Exhibit C-3 - $4,040.00

e) Trial Exhibit C-4 - $3,770.20

f) Trial Exhibit C-5 - $874.75

g) Trial Exhibit C-6 - $316.00

Total - $71,794.89

App. P. 480-484, 397-405. Both affidavits provide that the attorney fees prayed for are for services rendered by each attorney in this lawsuit. App. P.

480-484, 496-497. Upon review of the respective affidavits and exhibits, the trial court reduced the award to $70,604.14. App. P. 508-510.

Chartiers did not submit the entire itemization of the attorney fee statements due to the statements containing attorney work product that is privileged. Chartiers did request that the trial court conduct an in-camera review of the itemized attorney fee statements to verify that the amount claimed for fees is directly related to this case, but the trial court ruled that the attorney fee exhibits became part of the record despite their lack of detailed entry information for the billing statements. Further, the trial court noted that McNaughton made a relevancy objection at trial to those exhibits supporting the award of attorney fees which was overruled. McNaughton never made an objection regarding lack of proof of responsibility. App. P. 206; Tr. 192: 5-10 ("There's no proof in this case that there's any contractual obligation by Mr. McNaughton to pay any sort of bill like this under the easement agreement. Nor has there been any statute cited that would – that would require the same sort of payment by Mr. McNaughton").

The trial court's ruling awarding Chartiers common law attorney fees in the amount of $70,604.14 is supported by the evidence and should be affirmed.

If this Court does not affirm the trial court's ruling, Chartiers request that this issue be remanded to the trial court for determination of the amount of attorney fees.

3. The trial court's award of attorney fees was not unreasonable and not excessive.

Whether to grant common law attorney fees rests in the court's equitable powers. Hockenberg Equipment Co. v. Hockenberg's Equipment & Supply Co., 510 N.W.2d 153, 158 (Iowa 1993). "The district court is itself an expert on the issue of reasonable attorney fees." See Green v. Iowa Dist. Court for Mills County, 415 N.W.2d 606, 608 (Iowa 1987)(citations omitted)(case involving the review of the amount of approved court appointed attorney fees.) "The district court must look at the whole picture and, using independent judgment with the benefit of hindsight, decide on a total fee that is appropriate for handling the complete case." Green, 415 N.W.2d at 608.

In determining the amount of attorney fees, the trial court reviewed the affidavit of attorney fees filed by Chad Thompson and Kevin Collins along with the corresponding exhibits and trial exhibits. Both affidavits provide that the attorney fees prayed for are for services rendered by each attorney in this lawsuit. App. P. 480-484, 496-497. The trial court determined the amount to be reasonable and not excessive.

The trial court's ruling awarding Chartiers common law attorney fees in the amount of $70,604.14 should be affirmed.

If this Court does not affirm the trial court's ruling, Chartiers request that this issue be remanded to the trial court for determination of the amount of attorney fees.

II. Whether the Trial Court Erred in Ruling that Plaintiff-Appellant Publicly Dedicated the Concrete Portion of the Easement Area as a Public Street.

A. Preservation of Error

Error was preserved because the issue was tried and decided by the trial court.

McNaughton claims that the first time the issue of public dedication of the concrete portion of the easement area was in Chartiers' Trial Brief. This is simply not the case. The issue was alleged by Chartier and Char-Mac in its Resistance to Motion to Dismiss filed on June 15, 2018. Specifically, Chartier and Char-Mac alleged that the City of Lawton was a necessary party as to determining the respective parties' rights as to the concrete portion of the easement; specifically the approximate 13x60 area of the easement has been improved with concrete that was paid for by the City of Lawton. App. P. Resistance to Motion to Dismiss. In support of its Resistance, Chartier and Char-Mac attached a copy of J. Ex. 15 (App. P.

353), a letter from City of Lawton's attorney Glenn Metcalf to McNaughton, in which he stated "The paved portion of the street is partially located upon your property." Further, Chartier provided the case of Lenz v. Hedrick as further support to its Resistance.

B. Scope of Review

The standard of review is de novo. Lenz v. Hedrick, No. 00-1258, 2002 WL 1766629, (Iowa Ct. App. July 31, 2002).

C. Plaintiff-Appellant did publicly dedicate the concrete portion of the easement area as a public street.

1. Plaintiff-Appellant impliedly dedicated the concrete portion of the easement area as a public street.

"Dedication is 'the setting aside of land for public use.'" Barz v. State, No. 11-2071, 2012 WL 5356106, at *3 (Iowa App. 2012)(citation omitted). "Three elements are required to show dedication: (1) an intent to dedicate, (2) dedication, and (3) acceptance by the public or the party to whom the dedication is made. Barz, 2012 WL 5356106, at *3. "A dedication must be proven by clear, satisfactory, and convincing evidence. Id. (citing Merritt v. Peet, 24 N.W.2d 757, 762 (Iowa 1946)). "Dedication is a question of fact, and must be proven by the party relying upon it." Marksbury v. State, 332 N.W.2d 281, 284 (Iowa 1982)(citing Jochimsen v. Johnson, 173 Iowa 553,

560, 156 N.W. 21, 21 (1916))(citing Dugan v. Zurmuehlen, 203 Iowa 1114, 1119, 21 N.W. 986, 989 (1927)).

"A dedication may be either express or implied." Barz, 2012 WL 5356106, at *3 (citing Sons of the Union Veterans of the Civil War v. Griswold Am. Legion Post 508, 641 N.W.2d 729, 734 (Iowa 2002)). "An implied dedication is shown 'by some act or course of conduct on the part of the owner from which a reasonable inference of intent may be drawn.'" Barz, 2012 WL 5356106, at *3. "Whether a dedication is express or implied, the intent to dedicate 'must be unmistakable in its purpose.'" Id. (quoting Merritt v. Peet, 24 N.W.2d 757, 762 (Iowa 1946). "'There can be no dedication unless there is a present intent to appropriate the land to public use.'" Id. (quoting De Castello v. City of Cedar Rapids, 153 N.W. 353, 356 (Iowa 1915)).

"There must be a parting with the use of the property to the public, made in praesenti, manifested by some unequivocal act, indicating clearing an intent that it be so devoted." Id. A dedication "may not be predicated on anything short of deliberate, unequivocal, and decisive acts and declarations of the owner, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use." Id. (quoting Culver v. Converse, 224 N.W. 834, 835 (Iowa 1929). "Furthermore, 'the

acts proved must not be consistent with any other construction than that of dedication." Id.

In this case, the trial court correctly ruled that "McNaughton has dedicated the concrete portion of the easement to the City of Lawton and the City of Lawton has accepted the same area as a public street (public improvement). Any rights created under the easement at issue here have been extinguished and McNaughton's rights to the 13-foot by 80-foot easement area covered by concrete street are terminated and extinguished." App. P. 418.

The following facts demonstrate that McNaughton appropriated the concrete portion of the easement area for public use and/or made a declaration manifesting an intent to surrender said property to the public and McNaughton actually parting with the use of said property to the public:

a. The public street was partially constructed on McNaughton's property and the cost of the street was paid for by the City of Lawton. App. P. 75, 186; Tr. 61:4-7, Tr. 172:4-12.

b. McNaughton admitted at trial that he does not now and never has, objected to the general public crossing the concrete portion of the easement area to access the Char-Mac facility from U.S.

Highway 20. App. P. 77, 90, 92-93; Tr. 63:19-20, Tr. 76:10-20, Tr. 78:20-22, Tr. 78:23-25, Tr. 79:1.

c. McNaughton admitted at trial that that he has suffered no compensable or monetary damage. App. P. 76, 107; Tr. 62:14-16, Tr. 93:6-12.

d. McNaughton admitted that in the approximately 20 years the public street has existed, McNaughton has never attempted to restrict the use of the concrete portion of the easement area by the general public. App. P. 77, 92-93; Tr. 63:19-20, Tr. 78:20-25, Tr. 79:1.

e. McNaughton admitted that he has not placed any signage indicating a private easement existed. App. P. 77-78; Tr. 63:10-25, Tr. 64:1-2.

f. McNaughton admitted that the paved portion of the street is located on his property. App. P. 76; Tr. 62:9-13.

Jeff Nitzschke, a lifelong resident of Lawton, and mayor of Lawton at the time East Char Mac Drive was installed, testified that East Char Mac Drive, including the concrete portion of the easement area, is a public street. App. P. 169-171, 352; Tr. 155:21-23, Tr. 156:16-22, Tr. 157:5-15. Additionally, the evidence presented at trial shows McNaughton is not

paying real estate taxes on the concrete portion of the easement area. App. P. 215-216, 582-583; Tr. 201:13-25, Tr. 202:1-9.

Based upon the foregoing, the trial court correctly concluded that McNaughton dedicated the concrete portion of the easement to the City of Lawton and the trial court's ruling should be affirmed. App. P. 418.

2. Defendants-Appellees provided sufficient evidence that Plaintiff-Appellant unequivocally dedicated the concrete portion of the easement area as a public street.

For purposes of Defendants-Appellees argument on this issue, please refer to argument presented on the previous issue (Plaintiff-Appellant impliedly dedicated the concrete portion of the easement area as a public street).

3. The public accepted the concrete portion of the easement area as a public street.

In order to show that the concrete portion of the easement area was publicly dedicated, Chartiers must show an actual acceptance of the property by the public. Marksbury, 332 N.W.2d at 284. Chartiers do not need to show the acceptance be by the City of Lawton or any other public authority. See Marksbury, 332 N.W.2d at 285. "It may be by the general public." Id.

"Very slight evidence is required to establish acceptance by the public . . . The acceptance may be so worked by the public, entering upon the land and enjoying the privileges offered, -briefly, by user. And when the use is

relied on to raise a presumption of dedication, the duration of the use is wholly immaterial. And such acceptance may be manifested, among other methods, by long and uninterrupted use on part of the public without objection." Id.

The following facts demonstrate actual acceptance of the property by the public:

a. In July 1999, the City of Lawton initiated the necessary statutory proceedings to install a city street to be located in between Lot 1, Char-Mac Addition and Highway 20, and just east of the McNaughton property. At a special meeting of the city council on July 20, 1999, the city passed a resolution setting the date for a public hearing on the proposed 1999 Char-Mac Addition Street Improvement Project (a/k/a 1999 Frontage Road Improvement Project Lawton, Iowa) Plans, Specifications, Form of Contract, the Estimated Cost, Bid Bond, and Taking of Bids Therefore. App. P. 354-355.

b. The city formally engaged Schlotfeldt Engineering to prepare the plans and specifications for the public improvement project. App. P. 573-581.

c. A statutory Notice of Hearing and Letting 1999 Frontage Road Improvement Project, Lawton, Iowa was prepared and published in The Record, the local newspaper. App. P. 357-359.

d. A statutory Notice of Award dated August 29, 1999, was issued to Steve Harris Construction, Inc. as the contractor for the street project. App. P. 360.

e. As required by statute for a public improvement, a contract was entered into between the City of Lawton and Steve Harris Construction, Inc. for the project. App. P. 361-362.

f. To finance the public improvement, the City of Lawton, at the August 24, 1999, council meeting, adopted the Char-Mac Addition Urban Renewal Plan and subsequently adopted a TIF ordinance to capture the increment property taxes to be generated by the assisted living facility to pay for the project. App. P. 172, 186, 364-368; Tr. 158:7-11, Tr. 172:4-12.

g. The cost of the public street and other related public improvements were paid by the City of Lawton. App. P. 182-186, 354-368, 573-581; Tr. 168:6 through 172:12.

h. The City of Lawton named the public street Char-Mac Drive. App. P. 188, 347; Tr. 174:15-20.

i. In a letter dated February 11, 2000, from the city attorney Glenn Metcalf to McNaughton, Mr. Metcalf stated: "The paved portion of the street is partially located upon your property." App. P. 353.

j. McNaughton does not pay real estate taxes on the concrete portion of the easement area. App. P. 582-583.

k. McNaughton admitted that a lot of people believe the concrete portion of the easement area is a public street. App. P. 98; Tr. 84:11-12.

l. He never placed any restriction on who could use the concrete portion of the easement area over the past approximately 20 years. App. P. 92; Tr. 78:20-22.

m. Any member of the public had unrestricted use of the concrete portion of the easement area for the past approximately 20 years. App. P. 77, 92-93; Tr. 63:19-20, Tr.78:23-25, Tr. 79:1.

n. He never placed a sign indicating there was a private easement on the public street. App. P. 77-78; Tr. 63:10-25; Tr. 64:1-2.

o. That the paved portion of the street is located on his property. App. P. 76; Tr. 62:9-13.

Additionally, at trial, Jeff Nitzschke, a lifelong resident of Lawton, and mayor of Lawton at the time East Char Mac Drive was installed, testified that East Char Mac Drive, including the concrete portion of the easement area, is a public street. App. P. 169-171, 352; Tr. 155:21-23, Tr. 156:16-22, Tr. 157:5-15. Mr. Nitzschke also agreed with the statement in the letter dated February 11, 2000 to McNaughton from the city attorney, Mr. Metcalf, that the paved portion of the street (East Char-Mac Drive) is located on McNaughton's property. App. P. 173, 353; Tr. 159:1-8. Mr. Nitzschke further testified that there have been no restrictions implemented by McNaughton concerning travel across the public street (East Char-Mac Drive including the concrete portion of the easement area). App. P. 173, 352; Tr. 159:17-19.

Based upon the foregoing, the trial court correctly ruled that the City of Lawton has accepted the concrete portion of the easement area as a public street (public improvement) and that any rights created under the easement at issue have been extinguished and McNaughton's rights to the 13-foot by 80-foot easement area covered by the concrete street are terminated and extinguished. App. P. 418. The trial court's ruling should be affirmed.

III. Whether the Trial Court Erred in Ruling That, even if Plaintiff-Appellant Did Not Publicly Dedicate the Concrete Portion of the Easement Area as a Public Street, the Easement was Appurtenant to Defendants-Appellees' Property.

A. Preservation of Error

Error was preserved because the issue was tried and decided by the trial court.

B. Scope of Review

The standard of review is de novo. Rank v. Frame, 522 N.W.2d 848, 850 (Iowa Ct. App. 1994). The Court gives "weight to the fact findings of the trial court, especially when considering the credibility of witnesses," but the Court is not bound by them. Rank, 522 N.W.2d at 850.

C. The Easement at Issue is an Appurtenant Easement.

An easement is appurtenant if it is necessary for ingress and egress. Rank v. Frame, 522 N.W.2d 848, 852 (Iowa Ct. App. 1994). "An appurtenant easement is an incorporeal right which is attached to, and belongs with, some greater or superior right-something annexed to another thing more worthy and which passes as an incident to it. It is incapable of existence separate and apart from the particular land to which it is annexed." Rank, 522 N.W.2d at 853 (quoting Wymer v. Dagnillo, 162 N.W.2d 514 (Iowa 1968)).

"Easements appurtenant pass with the description of the property to which they are appurtenant without specific designation, and the purchaser of the servient property takes subject to the easement without express reservation." Id. "The right to the easement is attached to and belongs with the property and is not merely personal." Id.

" Easements run with the land:

> The land which is entitled to the easement or service is called a dominant tenement, and the land which is burdened with the servitude is called the servient tenement. Neither easements [n]or servitudes are personal, but they are accessory to, and run with, the land. The first with the dominant tenement, and the second with the servient tenement."

Bormann v. Board of Supervisors in and for Kossuth County, 584 N.W.2d 309, 316 (Iowa 1998).

The trial court concluded that the Easement is appurtenant. App. P. 419-420. In reaching that conclusion, the trial noted that McNaughton "admitted that absent the use of the easement, there is simply no other way to access the care facility." App. P. 420. The trial court further concluded "In light of the fact, there have been no restrictions on use for almost two decades, the only reasonable conclusion is that the 13-foot by 80-foot area in the public street is an appurtenant easement." App. P. 420.

McNaughton argues that he has consistently maintained that he and Chartiers intended the Easement be exclusively used by Chartiers and the

guests, invitees, and residents of the care facility, but this argument is contrary to McNaughton's testimony. McNaughton testified that: (1) he never placed any restriction on who could use the concrete portion of the easement area over the past approximately 20 years (App. P. 92; Tr. 78:20-22); (2) any member of the public had unrestricted use of the concrete portion of the easement area for the past approximately 20 years (App. P. 77, 92-93; Tr. 63:19-20, Tr.78:23-25, Tr. 79:1); (3) he never placed a sign indicating there was a private easement on the public street (App. P. 77-78; Tr. 63:10-25; Tr. 64:1-2); and (4) there is no practical or reasonable alternative for access the care facility from U.S. Highway 20. App. P. 99; Tr. 85:1-22.

McNaughton further argues that the language of the easement is specific in the declaring the easement to be "private" and that the "ingress/egress" provision (paragraph 3 of the easement) is compatible with the provisions of the easement (1) declaring it to be a private easement, (2) restricting use of the easement, and (3) requiring McNaughton's approval concerning assignment of the easement. What McNaughton asks the Court to completely ignore, however, is how McNaughton, Chartiers, and the public have treated the easement area over the past two decades; a public street.

The evidence presented at trial establishes the Easement as an easement appurtenant. The language contained in the agreement defining the easement as one for ingress and egress and, because the easement area is necessary for ingress and egress to the care facility, then by law the Easement is considered an easement appurtenant. Rank v. Frame, 522 N.W.2d 848, 852 (Iowa Ct. App. 1994). Additionally, the conduct of the parties for the past 20 years utilizing the easement to access the care facility and McNaughton's admission that he doesn't intend to interfere with AbiliT's use of the easement area to access the care facility also support the trial court's conclusion that the Easement is an appurtenant easement.

Because the Easement is an appurtenant easement, the Easement runs with AbiliT's property and is binding upon McNaughton and AbiliT. See Rank, 522 N.W.2d at 852; Bormann v. Board of Supervisors in and for Kossuth County, 584 N.W.2d at 316 (Iowa 1998).

As additional support, Chartiers and Char-Mac fully incorporate AbiliT's argument set forth in its Brief.

The trial court correctly concluded that the easement is an appurtenant easement and the trial court's ruling should be affirmed.

CONCLUSION

The trial court correctly ruled that

(1) The concrete portion of the 13-foot by 80-foot easement area as shown in trial exhibit 2 is a public street having been dedicated as such to the City of Lawton, Iowa by McNaughton as determined herein. McNaughton's rights to that area are extinguished and terminated by this order.

(2) Chartiers' common law claim for attorney fees as damages is granted.

(3) AbiliT's counterclaims are withdrawn and accordingly dismissed with prejudice.

(4) All claims against the City of Lawton, Iowa are dismissed with prejudice.

(5) All court costs are taxed against McNaughton.

Further, the trial court correctly ruled that Chartiers are entitled to a judgment against McNaughton for attorney fees in the amount of $70,604.14.

Defendants-Appellees request that the Court affirm the Trial Court's findings of fact, conclusions of law, and ruling. In the alternative, if the Court deems the evidence insufficient as to the

award of attorney fees, the Court remand the issue of attorney fees to the district court for determination of the award of fees.

REQUEST FOR NON-ORAL ARGUMENT

Chartiers and Char-Mac respectfully submit that oral argument is not warranted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Appellee pursuant to Iowa Rules of Appellant Procedure 6.903(1)(g)(1), hereby certifies that this brief contains 11,540 words of a 14-point proportionally spaced Times new Roman font and it complies with the 14,000 word maximum permitted length of the brief.

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CERTIFICATE OF COST

I hereby certify that the actual cost of printing or duplicating this document (exclusive of sales tax and postage) was $0.00 due to electronic filing.

/s/ Chad Thompson

PROOF OF SERVICE AND CERTIFICATE OF FILING

The undersigned hereby certify that on February 12, 2020, we caused the foregoing Appellees' Final Brief to be filed with the Iowa Supreme Court Clerk used the Electronic Document Management System (EDMS) which, pursuant to Iowa R. Elec. P. 16.315(1) and Iowa R. App. P. 6.702(2), will send notification of such filing to the attorneys of record who are registered with EDMS.

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