IN THE SUPREME COURT OF IOWA

SUPREME COURT APPEAL NO. 19-1681

WOODBURY COUNTY CASE NO. EQCV180496

WILLARD B. MCNAUGHTON,
Plaintiff-Appellant,

v.

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

APPEAL FROM THE DISTRICT COURT
FOR WOODBURY COUNTY
THE HONORABLE JEFFREY A. NEARY

# APPELLANT'S REPLY FINAL BRIEF

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## ARGUMENT

### I. THE FACTS OF THIS CASE DO NOT SUPPORT AN AWARD OF COMMON LAW ATTORNEY FEES.

#### A. McNaughton's actions were not vexatious, wanton, conniving, oppressive, tyrannical, or cruel.

AbiliT and the Chartiers argue in their response briefs that McNaughton's behavior was vexatious and wanton because he made unrealistic demands in negotiating an assignment of the easement to AbiliT. They further argue his behavior was oppressive because, after allegedly assuring Jeanine Chartier he would not interfere with the sale of the property, he filed this suit. (Appellee AbiliT's Proof Br. 53-58; Appellee Chartiers' Proof Br. 30-31).

##### 1. McNaughton had a legitimate property interest of which he was entitled to negotiate the transfer.

The genesis of this litigation began when Jeanine Chartier approached McNaughton in February 2018 with an offer of a $15,000 payment in exchange for his signature on a "Clarification of Easement" allowing the easement rights to transfer to AbiliT. Jeanine Chartier informed him of the anticipated sale with AbiliT and her desire to have him assign the easement rights to AbiliT. (App. 35-36 (Tr. p. 21, L. 13 – p. 22, L. 12); App. 228-229 (Tr. p. 214, L. 8 – p. 215, L. 20)). Jeanine Chartier's actions themselves lend credibility to McNaughton's claim that he had a property interest with

value. He refused her offer and countered with offers previously briefed. (Appellant's Proof Br. 26-27).

Both Appellees argue that McNaughton's counter-offers were "excessive," "unrealistic," "oppressive," and "baseless." (Appellee AbiliT's Proof Br. 54-55; Appellee Chartiers' Proof Br. 33). They further impune his desire to profit from the sale of the Char-Mac property. McNaughton had a legitimate property interest to assign and it was not, therefore, unreasonable for him to engage in negotiations. Unfortunately, Jeanine Chartier never responded to his offers nor did she otherwise engage in additional negotiations. Appellees seem to suggest that McNaughton should have signed the easement over without any benefit to himself, notwithstanding the fact the Chartiers were profiting from the easement access he provided.

In addition, Appellees provided no evidence to demonstrate that, in fact, McNaughton's counter-offers were unrealistic or baseless. What was the value of the assignment? Without evidence to demonstrate the value of the assignment, and Jeanine Chartier's unwillingness to negotiate, one is left to wonder whether his offers truly were excessive, unrealistic, baseless, or oppressive.

2. McNaughton did not obstruct the sale of the property and his purposes in filing the suit were not vexatious or wanton.

Both AbiliT and the Chartiers claim in their briefs that McNaughton promised Jeanine Chartier he would not disrupt or otherwise interfere with the sale to AbiliT. They then suggest that, purely based on his promise, she pursued the sale with AbiliT. By filing this suit, the argument goes, he acted vexatiously and oppressively in attempting to disrupt the sale. (Appellee AbiliT's Proof Br. 53-55; Appellee Chartiers' Proof Br. 31-34). Jeanine Chartier's conversation with McNaughton on February 15, 2018, was his first notification of the anticipated sale. Regarding his alleged promise not to disrupt the sale, McNaughton testified: "I may have said I don't want to impede on the sale, but I had to talk with my attorney because there was just a lot here." (App. 229 (Tr. p. 215, Ll. 13–15)). That is certainly different than a broad assertion that he promised not to interfere. He further testified that, in that moment, he felt like he was being asked to "give[] up something" so he told Jeanine Chartier he wanted his attorney to review it. (App. 228-229 (Tr. p. 214, L. 25 – Tr. p. 215, L. 4)). It is important to note that the facts that followed align with his testimony.

In addition, Jeanine Chartier acknowledged in correspondence with the buyers that McNaughton was not inclined to sign the clarification of easement agreement and discussed options to resolve the matter. (App. 388). Her email makes clear she was quite aware of his reservations and that

she was *choosing* to proceed with the sale regardless. McNaughton's refusal to sign the agreement, and Jeanine Chartier's acknowledgement of his refusal, should weigh heavily against any alleged promises and ensuing reliance.[1]

Furthermore, and the point lost in Appellees' arguments, is that McNaughton had a valid property interest at stake that he was concerned about, and he had legitimate concerns about giving up that interest. Although, as McNaughton testified, he did not necessarily want to obstruct her plans, he also needed to protect himself and that is exactly what he did. Appellees argue McNaughton is tyrannical in the fact he refused to sign the

[1] AbiliT refers to the emotional state of Jeanine Chartier and that she was tearful during her testimony. (Appellee AbiliT's Proof Br. 56). First, there is nothing in the record to support a claim that she was tearful. Second, AbiliT attempts to portray Jeanine Chartier as victim of a tyrannical brother, yet a reading of the transcript demonstrates she was not an entirely feeble victim bore down by an oppressive brother. In fact, when Jeanine Chartier was asked if McNaughton was her brother, rather than acknowledge the fact, she responded with "I guess." (App. 126 (Tr. p. 112, Ll. 17-18)). She herself engaged in behavior that was antagonistic. When family is involved in litigation, it is not surprising emotions become involved. However, the facts do not change because the parties are related, the easement language does not change, and a party should not assign away rights or forego profit opportunities simply because a sibling expects it.

document and waive any right or interest he had in *his* property interest. Which party is being unfair?

Appellees further argue McNaughton was being oppressive by filing this action because he has effectively allowed AbiliT to continue to use the easement. (Appellee AbiliT's Proof Br. 57-58; Appellee Chartiers' Proof Br. 40). A pause is appropriate here. McNaughton is oppressive and vexatious for being *reasonable* in allowing the new purchasers to use the property? McNaughton testified he generally does not object to AbiliT's use of the easement area as long as similar use continues, but he does have an interest in protecting himself and ensuring that use does not expand. (App. 64 (Tr. p. 50, Ll. 7-13)). That is the crux of his concern and it is reasonable. Further, it is hard to reconcile how, on the one hand, McNaughton is portrayed as tyrannical and oppressive yet, on the other hand, because he has allowed AbiliT to use the easement area without physically obstructing their access, he is blamed for bringing a frivolous suit. Which is it? Had he physically obstructed their access, making clear his claim to his easement rights, Appellees most assuredly would have used those facts as further support for their alleged claim of obstructive and tyrannical behavior. But because he is trying to do the right thing by *not*

obstructing access and pursuing recourse with the court, he is now complicit in AbiliT's use and *that* is being held against him?

AbiliT makes reference to the District Court's finding that McNaughton was not concerned about the easement until after he learned the details of the pending sale. (Appellee AbiliT's Proof Br. 54). There is nothing in the record to support that finding and, in fact, the testimony of McNaughton is that he was concerned when Jeanine Chartier first presented him with the Clarification of Easement. He did not have any details of the sale at that point, nor did he acquire any details subsequent to that conversation. (App. 35 (Tr. p. 21, Ll. 13-25); App. 228-230 (Tr. p. 214, L. 5 – p. 216, L. 1)). Further, whether he was concerned at the outset or subsequently does not change the fact McNaughton had an easement containing exclusive use language and barring assignment without his permission. He had every right to ensure the language was respected and every right to file suit to clarify the rights involved.

McNaughton spent considerable time in his opening brief discussing the elements and requirements for an award of common law attorney fees, and he will not do so again in this brief. However, AbiliT in its brief cites Engstrom v. State, 461 N.W.2d 309, 314 (Iowa 1990) for the proposition that bad faith negotiations can result in sanctions and tort remedies.

(Appellee AbiliT's Proof Br. 55). McNaughton would simply counter that Engstrom did not involve common law attorney fees, or the heightened standard required for an award of common law attorney fees, and caselaw addressing common law attorney fees directly have held that more than bad faith is required. See Thornton v. American Interstate Insurance Company, 897 N.W.2d 445, 477 (Iowa 2017).

Appellees finally argue that McNaughton's conduct during the litigation supports an award of common law attorney fees claiming he has "taken shifting and unreasonable positions." (Appellee AbiliT's Proof Br. 56-57; Appellee Chartiers' Proof Br. 35-38). Shifting positions is simply the result of litigation, facts developing, and the fine-tuning of legal theory. When McNaughton filed suit, individuals accessing the shed occasionally drove onto his private property to get there. Not until *after* suit was filed did Jeanine Chartier place a rock wall to keep Char-Mac's employees from going across the property line. (App. 57-58 (Tr. p. 43, L. 21 – p. 44, L. 3)). Facts changed. AbiliT also focuses on McNaughton's general agreement to allow AbiliT to use the property and how that works counter to him filing suit. Once again, AbiliT overlooks the overarching concern McNaughton has with protecting his property interest.

B. The attorney fees awarded were unreasonable and lacked adequate substantiation.

McNaughton briefed in detail the reasonableness of the fees awarded and the lack of substantiation. (Appellant's Proof Br. 48-53). He stands by that brief and further responds to AbiliT's argument that he has waived any possible argument to the existence of an indemnification agreement. (Appellee AbiliT's Proof Br. at 58-59). McNaughton does not generally object to the *existence* of the agreement, his concern raised in his opening brief relates to the fact he has never seen it and, therefore, no proof of the *terms* of the agreement have been provided by Defendants.

AbiliT further observes that, because McNaughton did not cite any authority for his claim that he should not be subject to fees that were contractually negotiated between AbiliT and the Chartiers/Char-Mac, he has waived his argument. (Appellee AbiliT's Proof Br. 59). McNaughton did not provide a legal citation because the present circumstances are unique and there appears to be no caselaw addressing the responsibility of a litigant for attorney fees that are the result of an indemnification agreement to which he was not a party.

## II. MCNAUGHTON DID NOT PUBLICLY DEDICATE THE EASEMENT AREA TO THE CITY OF LAWTON.

Appellees claim that McNaughton's actions resulted in an implied public dedication to the City of Lawton.

A. The long-term use by the residents, guests, and invitees of Char-Mac does not result in a forfeiture of McNaughton's rights to the easement area.

AbiliT cites various cases to support its claim of an implied dedication. (Appellee AbiliT's Proof Br. 31-33). In particular, AbiliT suggests that McNaughton engaged in a pattern of long-term acquiescence to the general public's use of the easement area and that acquiescence turned into an implied dedication to which he is estopped from contesting. (Appellee AbiliT's Proof Br. 32, 34, 36). In support of its claim, AbiliT refers to several cases citing the principle that a landowner's acquiescence in the long-term public use of property results in an implied dedication. (Appellee AbiliT's Proof Br. 32-33); see Dugan v. Zurmuehlen, 211 N.W. 986 (Iowa 1927); Henry Walker Park Assn. v Mathews, 91 N.W.2d 703 (1958); and Iowa Loan & Trust Co. v. Board of Supervisors of Polk County, 174 N.W. 97, 98 (Iowa 1919).

The facts in the cases cited by AbiliT are different, i.e., none of the cases cited by AbiliT involved use via an easement agreement. In Henry Walker Park, the court found an implied dedication for a parking lot that was used by a considerable portion of the community with the destination being

a cemetery supported by taxpayer funds. 91 N.W.2d at 710. It did not involve permissive use via an easement. In Iowa Loan & Trust, the court found an implied dedication where the owners had filed a plat showing intersecting streets and highways and the general public made long-term use of the roadways. 174 N.W. at 97. It did not involve permissive use via an easement. In Dugan, the court, although recognizing the principle that a public dedication can be found based on acquiesced long-term use by the public, found no implied dedication for a blind alley because the city never recognized it and the users were not the general public due to the cul de sac nature of the alley. 211 N.W. at 990.

Furthermore, McNaughton has not "acquiesced" in any use, the use was permitted, required, and allowed pursuant to the Agreement. Cases cited by AbiliT actually support McNaughton's claims because they state the principle that *permissive use* cannot result in an implied dedication. See Dugan, 211 N.W. at 990 ("[I]t is a well-recognized principle that mere permissive use of a way, not matter how long continued, will not amount to a dedication."); Songs of Union Veterans of Civil War, dept. of Iowa v. Griswold American Legion Post 508, 641 N.W.2d 729, 734 (Iowa 2002) ("Mere permissive use of a way, not matter how long continued, will not amount to a dedication. The user is presumed to be permissive, and not

adverse."); see also Culver v. Converse, 224 N.W. 834, 836 (Iowa 1929); 4 Tiffany Real Prop. § 1102 (3d ed. Nov. 2019 Update) ("If the user is not as of right, but is based upon a license or permission given to individuals or to a class of individuals, the owner's acquiescence therein can obviously not support an inference of dedication.")[2]

Appellees also argue, and assume, that the use made of the easement was by the "general public." (Appellee AbiliT's Proof Br. 33-34; Appellee Chartiers' Proof Br. 47-48). From McNaughton's point of view, the people accessing the road were the residents, guests, and invitees of the assisted living facility because of the dead-end nature of the road. Appellees bear the burden of proof in their claim of public dedication, and they offered nothing to support their claim that individuals outside the easement grant used the easement area. AbiliT claims McNaughton testified the general public uses the easement area and that admission results in an implied dedication.

[2] AbiliT also takes issue with McNaughton's reference to the proposition that express refusal to dedicate cannot be overturned by a subsequent tacit dedication. (Appellee AbiliT's Br. 37). AbiliT suggests it runs counter to Iowa law. However, the cases and arguments used by AbiliT do not involve a situation where a landowner expressly, on multiple occassions, made clear his intent *not* to dedicate followed by use allowed pursuant to an easement agreement. Further, the cases cited by AbiliT are different that the proposition set forth in the Tiffany Real Property treatise and, therefore, do not operate to counter the stated premise.

McNaughton's testimony was that the public uses the easement area, but he clarified it was used by "some parties" (App. 93 (Tr. p. 79, Ll. 2-13)) or for "Char-Mac" purposes. (App. 77 (Tr. p. 63, Ll. 17-18)). Further, he testified that his portion of the road has never been a city street. (App. 93 (Tr. p. 79, Ll. 2-13)).

McNaughton's testimony, combined with the express language of the Agreement and the dead-end nature of the roadway, supports his contention that the use allowed was permissive to the limited class of individuals noted in the Agreement. It is Appellees' burden to prove otherwise. See Dugan, 211 N.W. at 989 (noting that in cases of implied dedication, "[t]he user is presumed to be permissive and not adverse"); see also id. ("stronger evidence is necessary to establish a local road than to establish a thoroughfare between towns").

B. The facts alleged by Appellees do not support an unequivocal act of dedication.

In support of their claim that McNaughton engaged in unequivocal acts of dedication and that the public accepted the dedication, Appellees point to a variety of factors. First, Appellees argue McNaughton's permitted use to the "general public" for 20 years demonstrates his act of dedication. (Appellee AbiliT's Proof Br. 34; Appellee Chartiers' Proof Br. 48).

McNaughton adequately refuted that argument above. Second, Appellees point to McNaughton's decision to join with Jeanine Chartier in applying for a special access connection with the IDOT. (Appellee AbiliT's Proof Br. 35). It is not clear how McNaughton agreeing to highway access for a portion of his property results in an unequivocal act of dedication. Further, the intent to dedicate must exist at the beginning of any public use. See Dugan, 211 N.W. at 989. In this case, if the intent to dedicate occurred when McNaughton filed the application for an IDOT special access permit, then he would not have, in the same time period, prepared and executed the Agreement granting an easement setting forth the exclusive nature of the use permitted.

Appellees further rely upon the testimony of Jeff Nitzschke, the City's Mayor when East Char-Mac Drive was installed, and his opinion that the street was a public street. (Appellee AbiliT's Proof Br. 34-35; Appellee Chartiers' Proof Br. 48). However, Mr. Nitzschke also testified he was unaware of restrictions concerning travel across the street. (App. 173 (Tr. p. 159, Ll. 17-19)). His testimony demonstrates his general lack of awareness regarding the Agreement and the restrictions therein. Further, McNaughton testified that Mr. Nitzschke approached him about dedicating the property in 2001 and he refused. (App. 41 (Tr. p. 27, Ll. 1-4)).

Appellees argue "the fact assessment documents indicate McNaughton does not pay taxes on the paved portion of his property" proves his intent to dedicate. (Appellee AbiliT's Proof Br. 35; Appellee Chartiers' Proof Br. 52). McNaughton would counter that the documents prove no such thing. The proof of nonpayment of taxes at trial included beacon assessment information for McNaughton's property (App. 582) and Jeanine Chartier's opinion, objected to by counsel, that he must not be paying on the concrete because it is not listed on the beacon sheet. (App. 215-216 (Tr. p. 201, L. 13 – p. 202, L. 9)). Nothing on the assessment information clarifies whether the land description does or does not include the concrete portion, and Jeanine Chartier would have no particular expertise in that area. Further, countering her testimony was McNaughton's testimony that he was in fact paying taxes on the easement area. (App. 42 (Tr. p. 28, Ll. 20-22)). The trial court, in its ruling on the public dedication issue, specifically found that "Mr. McNaughton provided no credible evidence that in the past 20 years he has ever paid real estate taxes on the concrete portion of the easement area." (App. 417). The trial court's finding, however, incorrectly placed the burden on McNaughton. As detailed in McNaughton's opening brief filed with this Court, and not disputed by Appellees, is the fact that Appellees have the burden of proving

a public dedication and, therefore, would have the burden of proving nonpayment of property taxes. (See Appellant's Proof Br. 55).

Finally, Appellees point to the City's agreement to maintain the concrete area. (Appellee AbiliT's Proof Br. 41-42). The evidence at trial, however, showed that McNaughton, as a condition of granting the easement, required Jeanine Charter to pursue the City of Lawton, *via contract*, to become responsible for the maintenance. The Agreement states: "As additional consideration for the grant of easement herein, Chartier shall be obligated to take all action necessary to insure that the town of Lawton, Iowa becomes contractually obligated to maintain the easement area for use consistent with the easement rights granted hereunder." (App. 336). McNaughton testified he felt he was being generous enough by granting the easement and did not want the responsibility of maintaining the access. (App. 41-42 (Tr. p. 27, L. 24 – p. 28, L. 5)). The City responded with a letter to McNaughton assuring him it would provide the necessary maintenance. (App. 353). The testimony at trial, however, was that the City has failed in its maintenance promises. (App. 38-39 (Tr. p. 24, L. 20 – p. 25, L. 13)). McNaughton's letter dated January 7, 2004, wherein he bemoans the City's refusal to maintain the property because the Chartiers had not yet

dedicated their portion of the property as promised by them, supports his trial testimony. (App. 379).

In its Findings of Fact, the trial court found:

> McNaughton did not ever convey his interest to the City of Lawton nor agree to dedicate his portion of the easement area to the City as a city street. He retains ownership of his portion of the easement area to this day. McNaughton refused to convey to the City or dedicate to the City his portion of the easement area despite requests from the City to do so.

(App. 412). The court went on, however, to find the facts of the case supported a finding that he dedicated the property. Those facts, as discussed above, do not support an implied dedication and McNaughton's clear, unequivocal statements to not dedicate the property should prevail.

## III. THE EASEMENT GRANTED WAS PRIVATE AND NOT APPURTENANT.

Appellees claim that, because the Agreement provides ingress and egress, it necessarily is an appurtenant easement. (Appellee AbiliT's Proof Br. 44; Appellee Chartiers' Proof Br. 54). McNaughton stands by his opening brief wherein he detailed the specific language of the Agreement to the contrary. (Appellant's Proof Br. 66-70). AbiliT also, again, refers to McNaughton's general (and reasonable) willingness to allow AbiliT to continue to use the roadway as proof that it is appurtenant to their property. (Appellee AbiliT's Proof Br. 48). McNaughton's reasonable willingness to

work with the new owner should not be held against him nor should it be a reason to strip him of his rights to his property or a means to overlook the clear language of the Agreement.

The Chartiers, in their brief, argue that 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." (Appellee Chartiers' Proof Br. 35). They then conclude that his allegations are, therefore, baseless. McNaughton clearly set forth his interpretation of the Agreement in his Pretrial Brief at 5-6 and his Proposed Findings of Facts and Conclusions of Law. (App. 445-47). Subsequent to the trial court's ruling, McNaughton detailed again his interpretation of the Agreement in Plaintiff's Brief in Support of His Motion to Reconsider at 15-19. Finally, in his opening brief, McNaughton briefed for this Court his interpretation of the Agreement. (Appellant's Proof Br. 65-69). It is unclear how the Chartiers can suggest McNaughton never provided his interpretation of the Agreement.

## CONCLUSION

This case involves the unfortunate circumstance of a family agreement gone awry. The facts began over 20 years ago with McNaughton agreeing to provide use of a portion of his property via an easement to his

sister and her husband so they could pursue their dream of owning and running an assisted living facility. Years later, when informed of ownership changes, McNaughton became concerned the easement use may expand. He wanted to protect himself, so he declined to sign the Clarification of Easement when Jeanine Chartier presented it to him. At this point, the relationship began to deteriorate. McNaughton wanted to ensure his rights were respected. He further wanted to exercise all rights he possessed as owner of the real estate described in the easement. Because Jeanine Chartier refused his offers to assign the easement as unreasonable and pursued the sale regardless, McNaughton had no choice but to file suit to protect his interests and to have the rights of the parties declared. McNaughton's actions, while not always perfect, have not exceeded the bounds of ordinary in litigation behavior and he certainly has not exceeded the standard required for punitive damages. This is not a case warranting the rare award of common law attorney fees.

McNaughton respectfully requests that this Court find that (1) he is not liable for common law attorney fees, (2) he never, either expressly or impliedly, demonstrated an unequivocal intent to publicly dedicate the easement area, and (3) the words of the Agreement limiting use and requiring his permission upon assignment be respected and enforced.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Times New Roman typeface in 14 point font size and contains 4,052 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

## CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on February 19, 2020, I caused the foregoing Appellant's Reply Final Brief to be filed with the Iowa Supreme Court Clerk using 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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