ELECTRONICALLY FILED NOV 22, 2022 CLERK OF SUPREME COURT

Supreme Court of Iowa

No. 22-0038

William L. Pitz and Lynn S. Pitz,

Plaintiffs-Appellants/Cross-Appellees,

vs.

United States Cellular Operating Company of Dubuque, an Iowa Corporation

Defendant-Appellee/Cross-Appellant.

On Appeal from the Iowa District Court for Dubuque County,
Case No. LACV109349,
The Honorable Michael J. Shubatt

Plaintiffs-Appellants' Application for Further Review of the Iowa Court of Appeals Decision Filed November 2, 2022

Chad D. Brakhahn, AT0010883
Joseph J. Porter, AT0014454
SIMMONS PERRINE MOYER BERGMAN PLC
115 3rd Street SE, Suite 1200
Cedar Rapids IA 52401-1266
Telephone: 319-366-7641
Facsimile: 319-366-1917
cbrakhahn@spmblaw.com
jporter@spmblaw.com
ATTORNEYS FOR APPELLANTS

Question Presented for Review

1. Defendant-appellee/cross-appellant is a telecommunications company which had a thirty-year lease on plaintiffs-appellants' farmland. Defendant had an option to renew the lease if it delivered notice and a lump-sum of rent to the appellants at least sixty days before the lease expired, but defendant-appellee did not pay rent within that time. Did the court of appeals err in holding that delivering the sump-sum of rent was not essential to exercising the option to renew the lease?

Table of Contents

Question Presented for Review 2

Table of Contents 3

Statement Supporting Further Review 4

Table of Authorities 6

Brief in Support of Application for Further Review......................8

I. Introduction..8

II. Factual Background 9

III. U.S.C.D. Did Not Exercise the Renewal Option Because the Terms of Its Acceptance Deviated from the Pitzes' Offer 13

IV. U.S.C.D. Had to Pay Rent to Exercise the Renewal Option 18

V. Conclusion...23

Certificate of Electronic Filing and Service 24

Certificate of Compliance with Type Requirements 24

Statement Supporting Further Review

Lease renewals are a matter of great importance to Iowa. Much of Iowa's farmland is operated under a lease. Nonagricultural leases, such as those for utilities, are common, and are becoming even more frequent as Iowa shifts to renewable energy sources. In addition to cell phone tower leases, which are the subject of this dispute, the number of wind turbines, for example, has burgeoned. Consequently, Iowa's public has a strong interest in establishing and clarifying the law on renewing leases. For the two reasons below, plaintiffs-appellants respectfully request the supreme court exercise discretion for further review.

First, the decision below should be reviewed further because it is "in conflict with a decision of this court" on an "important matter." Iowa R. App. P. 6.1103(1)(b)(1). The opinion held that U.S.C.D.[1] validly exercised its option to renew its lease with the Pitzes[2] even though U.S.C.D. did not pay a lump-sum of rent at the time of renewal and before the option expired, contrary to the lease's renewal terms. This court has held that exercising an option is the equivalent of "accept[ing]"

---

[1] Defendant-appellee/cross-appellant United States Cellular Operating Company of Dubuque, an Iowa Corporation ("U.S.C.D").

[2] Plaintiffs-appellants/cross-appellees William L. Pitz and Lynn S. Pitz (the "Pitzes").

an "offer,"[3] and that an "acceptance must conform strictly to the offer in all its conditions, without any deviation or condition whatever."[4] In finding that U.S.C.D. accepted the renewal-option despite its "deviation" from the terms of the renewed lease, the decision conflicted with supreme court caselaw. *Id.*

Second, the decision also should be reviewed further because it decided "an important question of law that has not been, but should be, settled by the supreme court." Iowa R. App. P. 6.1103(1)(b)(2). Jurisdictions nationwide distinguish between the conditions precedent to exercising an option when the option is embedded in a lease and when payment has to be made at the time the option is taken, and other contractual settings where payment can be made after accepting the option. Iowa law recognizes, in general, that an option-holder can effectuate an option via notice to the option-giver, but it has not determined whether payment is a condition precedent to exercising a lease-embedded option when payment must occur at the same time the option is effectuated. The Pitzes ask this Court to do so.

---

[3] *SDG Macerich Properties, L.P. v. Stanek Inc.*, 648 N.W.2d 581, 585 (Iowa 2002).

[4] *Rick v. Sprague*, 706 N.W.2d 717, 724 (Iowa 2005) (citing *Shell Oil Co. v. Kelinson*, 158 N.W.2d 724, 727-28 (Iowa 1968) (applying strict conformity rule to options)).

Table of Authorities

Cases

Blakeslee v. Davoudi, 633 P.2d 857 (Or. Ct. App. 1981) 15

Burns v. Reves, 457 S.E.2d 178 (Ga. Ct. App. 1995)..............................21

Figge v. Clark, 174 N.W.2d 432 (Iowa 1970) 17

Foshier v. Fetzer, 134 N.W. 556 (Iowa 1912)............................. 8, 14, 17

Fries v. Fries, 470 N.W.2d 232 (N.D. 1991)..15

Gildea v. Kapenis, 402 N.W.2d 457 (Iowa Ct. App. 1987) 22

Harvard v. Anderson, 524 P.2d 880 (Wyo. 1974) 15

Hayward Lumber & Inv. Co. v. Constr. Prod. Corp., 255 P.2d 473 (Cal. Ct. App. 1953)..15

Hofmann v. Sullivan, 599 P.2d 505 (Utah 1979) 21

Hunter Inv., Inc. v. Divine Eng'g, Inc., 83 N.W.2d 921 (Iowa 1957)..14

Ingram v. Kasey's Assocs., 531 S.E.2d 287 (S.C. 2000)............................ 9

Lyon v. Willie, 288 N.W.2d 884 (Iowa 1980).......................................18

O'Brien v. Fitzhugh, 215 N.W. 944 (Iowa 1927) 17

Peebler v. Seawell, 265 P.2d 109 (Cal. Ct. App. 1954) 21

Rick v. Sprague, 706 N.W.2d 717 (Iowa 2005).................................5, 14

SDG Macerich Properties, L.P. v. Stanek Inc., 648 N.W.2d 581 (Iowa 2002) 5, 13

Sealy (Pines Road) v. Physicians & Surgeons Hosp., Inc., 480 So. 2d 832 (La. Ct. App. 2d Cir. 1985), *writ denied*, 483 So. 2d 1024 (La. 1986)..15

Shell Oil Co. v. Kelinson, 158 N.W.2d 724 (Iowa 1968)............5, 8, 14, 15

Shellart v. Axford, 485 P.2d 1031 (Wyo. 1971)................................ 20, 22

Texas State Optical, Inc. v. Wiggins, 882 S.W.2d 8 (Tex. App. 1994)..15

Rules

Iowa R. App. P. 6.1103 ....4, 5

Treatises

49 Am. Jur. 2d *Landlord and Tenant* § 336 22

52 *C.J.S. Landlord & Tenant* § 124 (November 2022 Update).................16

71 A.L.R.3d 1201..18

Brief in Support of Application for Further Review

I. Introduction

Iowa law has long held that a party can accept an offer only if its acceptance strictly conforms to the offeror's terms. *Foshier v. Fetzer*, 134 N.W. 556, 564 (Iowa 1912) ("if [acceptance] is not to the exact thing offered . . . no contract is made") (citation omitted). Because an option is an offer, the same mirror-image rule applies. *Shell Oil*, 158 N.W.2d at 728.

The decision below effectively found otherwise. It permitted U.S.C.D. to accept the Pitzes' lease-renewal offer by sending notice one day, while delivering payment on some later day after the option period closed, even though the provisions of the option term plainly state that rent must be paid "at the exercise of the option[.]" App. 8, Art. 4.2. By unilaterally altering the option term's payment schedule, U.S.C.D. did not accept the "exact thing offered" by the Pitzes, and therefore did not properly exercise the option. *Foshier*, 134 N.W. at 564. The appellate court erred in holding differently.

The option rent's payment "at the exercise of the option" also presented a novel issue of Iowa law to the appellate court. Nationwide, option provisions that are "embedded" in leases, such as the Pitzes', are

treated "very different[ly]" than "free standing real estate option contract[s]." *Ingram v. Kasey's Assocs.*, 531 S.E.2d 287, 293 (S.C. 2000). For lease-embedded options, the presumption is that payment, if provided for, it must be made to exercise the option. *Id.* Free-standing options enjoy the reverse presumption. *Id.*

The decision below drew on principles undergirding free-standing option cases to resolve the Pitzes' lease-embedded option issue. Using the appropriate standard, which the Pitzes request this Court adopt, the Pitzes should prevail.

II. Factual Background

Sometime before September 2018, William Pitz ("William") was "stunned" by a letter his father handed him. App. 108, William Dep. 19:6. The utility lease on William's farmland, which was set to expire in November 2018, was claiming to be renewed for thirty years without any negotiations by the tenant, U.S.C.D.. App. 108, William Dep. 19:9-11. William was aware of the lease's original thirty-year term, which began in 1988, well before the time he and his wife purchased the farmland from his parents in 2002. App. 108, William Dep. 18:16; App. 21; App. 1, Art. 1.1. But he did not know of the option to renew, or actually see the lease, until the letter from his dad arrived. App. 108, William Dep.

14:18-21, 18:23-19:1. William took the letter to his attorney to find out if the option exercise was valid. App. 206, Tr. 60:9-10.

William's father was the lease's original lessor. On November 14, 1988, he granted U.S.C.D. a lease for about six acres of farmland to construct a telecommunications tower and related buildings and provide U.S.C.D. necessary access to those structures. App. 6, Art. 1.1; App. 7, Art. 2. The payment terms of the original lease were five hundred dollars when the leased was signed, and then nineteen thousand five hundred dollars on the following January 5. App. 8, Art. 4.1(a)-(b). This twenty-thousand-dollar total was U.S.C.D.'s rent payment for the first thirty years.

The lease gave U.S.C.D. an option to renew for a second thirty years:

> Option to Renew. Lessee shall have the option to renew this Lease Agreement for one (1) additional term of thirty (30) years, at the rental rate set forth in Article Four and upon all the other terms and conditions hereof. Lessee may exercise such option by giving written notice to Lessor at least sixty (60) days before the expiration of the initial term of this Lease Agreement.

App. 7, Art. 3.2. November 13, 2018 was the lease's original expiration date. *See* App. 7, Art. 3.1. Sixty days before that was September 14, 2018.

The rental rate for the option term, established in article four, states in relevant part:

> Option Term Rent. Lessee shall pay to Lessor as full consideration for use of the Leased Premises during the option term, payable in a lump sum in advance at the exercise of the option, the amount of Twenty Thousand Dollars ($20,000.00), adjusted [for inflation.]

App. 8, Art. 4.2. Reading these two provisions together, if U.S.C.D. exercised its renewal option, the resulting contract would have a payment schedule term (lump-sum at the time U.S.C.D. accepted the offer to renew) that differed from the rest of the lease, but every other term and condition would be the same as the first lease.

U.S.C.D. claimed to exercise the renewal option in the letter William's father gave to William, dated September 1, 2017, with the following language:

> This letter shall serve as notice that Dubuque Telephone, L.P. is exercising its option to renew the Lease Agreement dated November 14th, 1988, for the first of one renewal terms (Option 1) of thirty years. The new term will commence on November 14th, 2018 and expire on November 13, 2048.

App. 31. No payment was enclosed in this letter.

In a second letter delivered on the last day to exercise the option, September 14, 2018, App. 38, U.S.C.D. wrote:

> Pursuant to our phone conversation on September 06, 2018[5] notifying us that you have purchased the property from your parents Robert & Dorothy Pitz, please note that we are still in need of the following documents to reflect this change of ownership and update the rent payee in our system.
>
> Recorded copy of deed
> W-9 Form (Attached)
> Direct Deposit form (Attached)
> Contact information of New Owners
>
> Dubuque Cellular Telephone, L.P. has renewed the Lease agreement dated November 14, 1988 as per section 3.2 of the Lease. Copy of Acknowledged Letter dated September 01, 2017 is attached. Once we have these documents, we will be able to disburse the option renewal payment to you. This letter is being sent to the last address on record.

App. 36. This letter also did not enclose payment for the renewed lease term.

In fact, it was not until U.S.C.D. sent a letter over a month later, dated October 29, 2018, that U.S.C.D. finally tendered payment for the option term—just sixteen, rather than sixty, days before the term was to begin. App. 40. The Pitzes returned the check and explained that since U.S.C.D. did not provide payment within the sixty-day window, the option was not validly exercised. App. 42-45.

---

[5] The topics of the phone call are unknown. App. 110, William Dep. 28:16-18. Additionally, the lease agreement apparently does not require notice of the lessor's change of ownership. *See* App. 13, Art. 19.

The Pitzes then filed a declaratory judgment action in June of 2019 to protect their rights. After a bench trial on August 6, 2021, the district court ruled that U.S.C.D. effectuated its option. U.S.C.D. submitted post-trial motions, which were denied, and both parties appealed. The court of appeals affirmed the district court's ruling on all issues on November 2, 2022.

III. U.S.C.D. Did Not Exercise the Renewal Option Because the Terms of Its Acceptance Deviated from the Pitzes' Offer

To exercise its option, U.S.C.D. was required to accept the terms of Pitzes' offer to extend the lease. These terms were laid out in the lease agreement. The Pitzes offered to extend the lease if U.S.C.D. paid the rent in a lump sum at the time the option was exercised, at least sixty days before the new lease started (September 14, 2018). App. 7-8, Art. 3.2, 4.2. U.S.C.D. did not accept these terms, and instead proposed a payment term of less than sixty days prior to the renewed lease's commencement date. It therefore did not validly accept the option.

"An option is merely an offer that cannot be revoked until a certain date." *SDG*, 648 N.W.2d at 585. The option-holder possess a "power of acceptance," *id.*, which it uses in exercising the offer to form a contract:

> The acceptance of the option . . . must be unqualified and unequivocal, must be communicated to the party giving the option in no uncertain manner, and be such that after it is exercised it becomes binding upon the party exercising it. That is to say, it must assume the form of a contract proper as distinguished from a mere option or offer.

Hunter Inv., Inc. v. Divine Eng'g, Inc., 83 N.W.2d 921, 926 (Iowa 1957).

"In a contract by offer and acceptance, 'the acceptance must conform strictly to the offer in all its conditions, without any deviation or condition whatever.'" *Rick*, 706 N.W.2d at 724 (quoting *Shell Oil*, 158 N.W.2d at 728). Even if party appears to express acceptance, but in reality modifies a term of the offer, the common law will not bless the contract: "Though there is an acceptance, if it is not to the exact thing offered, or if it is accompanied by any conditions or reservations however slight, in time or otherwise, no contract is made." *Foshier*, 134 N.W. at 564.

For instance, in *Rick*, a defendant offered to confess judgment to the plaintiffs, a husband and wife, for personal injuries and loss of consortium. *Rick*, 106 N.W.2d at 719-20. The husband rejected the offer for his personal injury claim, while wife the accepted it for her loss of consortium claim. *Id.* at 720. On review, the appellate court found that the offer was not divisible between the spouses, and that because the wife "attempted to accept the offer to confess judgment in a way that did not

conform to the offer in all of its conditions[,]" she "rejected" it. *Id.* at 724.

The Iowa Supreme Court has applied this mirror-image to uphold an option contract, *see Shell Oil*, 158 N.W.2d at 728, but apparently has not yet held that an optionee fails to exercise its option by straying from the optionor's terms. Nonetheless, such a holding is a familiar occurrence in other courts.[6] For lessees attempting to exercise an option to renew a lease, these holdings reflect the rule that:

[6] *E.g.*, *Fries v. Fries*, 470 N.W.2d 232, 234 (N.D. 1991) (option-holders did not exercise option by attempting to purchase less than all of the real estate subject to option); *Sealy (Pines Road) v. Physicians & Surgeons Hosp., Inc.*, 480 So. 2d 832 (La. Ct. App. 2d Cir. 1985), *writ denied*, 483 So. 2d 1024 (La. 1986) (option-holder's notice to renew lease for three years, rather than the five year term in the option clause, was a new offer and not an exercise of option to renew); *Blakeslee v. Davoudi*, 633 P.2d 857, 860 (Or. Ct. App. 1981) (plaintiffs-lessees did not exercise their renewal option because their "proposals" to "alter the lease terms, apart from the rental rate, amounted to counteroffers not accepted by defendants"); *Harvard v. Anderson*, 524 P.2d 880, 883 (Wyo. 1974) (option to purchase real estate was not effectuated where option-holder accepted a modified version of the option); *Dep't of Pub. Works & Bldgs. v. Halls*, 220 N.E.2d 167, 169 (Ill. 1966) (option-holder failed to exercise real estate purchase option by including title quality terms in acceptance); *Hayward Lumber & Inv. Co. v. Constr. Prod. Corp.*, 255 P.2d 473, 476 (Cal. Ct. App. 1953) (lessee ineffectually exercised option to renew lease for two years where he sent notice of renewal for one year); *see Texas State Optical, Inc. v. Wiggins*, 882 S.W.2d 8, 11 (Tex. App. 1994) ("With regard to an option, generally a purported acceptance containing a new demand, proposal, condition, or modification of the terms of the offer is not an acceptance, but a rejection.").

> [T]he lessee usually cannot exercise an option different in scope from the precise option conferred in the lease. The lessee cannot require the lessor to do more than is called for by the stipulation of the lease as a condition of acceptance, and if the lessee does so, or accepts on materially different terms, it amounts in effect to a rejection of the offer or a counteroffer requiring acceptance by the lessor before any contract of sale comes into being.

52 *C.J.S. Landlord & Tenant* § 124 (November 2022 Update) (footnotes omitted).

Applying this rule, U.S.C.D. did not validly exercise the renewal option because its purported acceptance materially changed the payment terms of the renewed lease. The option agreement—the Pitzes' offer—required U.S.C.D. to pay rent for the option term "in a lump sum" "at the exercise of the option," App. 8, Art. 4.2, which had to be at least sixty days before the lease expired on November 13, 2018, App. 7, Art. 3.2. However, neither of U.S.C.D.'s letters from that timeframe tendered the option term rent. App. 31-35, 34-39. Rather, U.S.C.D. attempted to "accept" the Pitzes' option by giving notice of exercising it and, fatally, by delaying tendering payment until about two weeks before the option term was to begin.[7] App. 40-41.

---

[7] The mailed check demonstrates U.S.C.D. easily could have accepted the renewal by sending notice concomitantly with payment. App. 40-41.

In doing so, U.S.C.D. did not properly exercise the renewal option because it did not "embod[y] the same terms as contained in [the] offer." *O'Brien v. Fitzhugh*, 215 N.W. 944, 946 (Iowa 1927) ("Unless it may be said that the alleged acceptance by the appellee of the offer of appellant embodied the same terms as contained in his offer, there is no acceptance, but a rejection of the offer."); *see Foshier*, 134 N.W. at 564 ("Though there is an acceptance, if it is not to the exact thing offered, or if it is accompanied by any conditions or reservations however slight, in time or otherwise, no contract is made.").

On this front, the court of appeals' ruling that the advance-payment term is an "obligation of performance once the option to renew was exercised" runs together the *mode* in which an option is accepted with the *terms* on which an option is accepted. Appellate Decision 7; *see Figge v. Clark*, 174 N.W.2d 432, 435-36 (Iowa 1970) (discussing the "mode of acceptance" of an option contract). Even if U.S.C.D. used the proper mode of exercising the option contract (written notice), it could not have accepted the option on the Pitzes' terms because it did not tender payment at the time the option was exercised, nor at a minimum of sixty days prior to the option term. Thus, the court of appeals erred in holding U.S.C.D. renewed the lease.

IV. U.S.C.D. Had to Pay Rent to Exercise the Renewal Option

The Pitzes' lease agreement with U.S.C.D. provides that paying rent in advance is a condition precedent to exercising the option to renew, not merely a term of performance. *See Breen v. Mayne*, 118 N.W. 441, 443 (Iowa 1908) (distinguishing between payment as a condition precedent and condition subsequent). Although the lease agreement's language is the touchstone, *Lyon v. Willie*, 288 N.W.2d 884, 888 (Iowa 1980), the distinction between option agreements that provide for payment after the option is exercised and those that require payment at the time of exercise, which are typically found in leases, is critical.

The following American Law Report expounds the "general rule" for discerning an option contract's mode of exercise:

> [W]here an option contract does not provide for payment of the purchase price at the time of, or coincident with, an optionee's exercise or attempted exercise of the option, or where such contract is silent as to the time of payment, the courts have usually adhered to the view, sometimes referred to as the general rule, that in such circumstances payment is not a necessary requisite to exercise but is instead simply one of the acts required of the optionee in performance of his part of the bilateral contract of purchase and sale which was formed when he communicated to the optionor his election or intention to exercise the option and thereby accepted the optionee's offer.

71 A.L.R.3d 1201. The court of appeals decision employed something akin to the general rule in holding that payment was not a condition

precedent since the renewal option section and the option rent section were not joined with "conjunctive language." Appellate Decision 7.

But this general rule "is not applicable to every circumstance" and gives way to options "embedded" in leases, as the South Carolina Supreme Court explained:

> To determine whether actual payment is required to exercise an option, it is important to look at both the specific language used in the option contract and also the context in which it was made. The Court of Appeals correctly cited the general rule for the exercise of an option contract. However, this rule is not applicable to every circumstance.
>
> For example, *an option provision embedded in a lease is very different than a free standing real estate option contract*:
>
> > In the absence of a provision in the option agreement specifying the time or method of payment, the question of whether the purchase price or a part thereof must be paid or tendered in order to exercise the option has generally been found to depend on whether the terms of the option require the payment of a fixed sum at the expiration of a certain period, *such as the term of a lease, in which case payment is required in order to exercise the option.*

Ingram, 531 S.E.2d at 293 (first italics added) (quoting 77 Am.Jur.2d Vendor and Purchaser § 53 (1997)).

In *Ingram*, the lessee had the right "to purchase the premises at any time during the term [t]hereof." *Id.* The lessee attempted to trigger the option with only an express notice that it was "exercising [its] option and

right to purchase the above-referenced premises pursuant to the option contained in the" lease. *Id.* at 290. But the court found the timely notice ineffectual. *Id.* at 293. It reasoned "the nature of a lease is different than that of a contract to sell," in that a lessor bears the opportunity costs of lost rent and potential lessees if payment is not timely made. *Id.* So payment, not mere notice, was needed to exercise the option. *Id.*

Ingram is not alone in putting lease-embedded options in a class by themselves. The Supreme Court of Wyoming reached a similar holding in *Shellart v. Axford.* 485 P.2d 1031 (Wyo. 1971). There, the lessee's lease agreement gave it an option to purchase the property for twelve thousand dollars during the lease term that could be exercised "by giving the LESSORS at least 30 days notice in writing of LESSEE'S intention to so exercise said option." *Id.* at 1032. To determine how to properly exercise the option, however, the court noted:

> it goes without saying an essential step in the exercise of a purchase option is payment of the purchase price. Whether expressed in so many words or not, it is to be impliedly understood that an option such as the one considered cannot be exercised without the requisite notice and without payment of the purchase price.

Id. at 1033. And because the lessee did not pay the purchase price, it did not exercise the option. *Id.*

Other courts too have adopted this line of reasoning. *Hofmann v. Sullivan*, 599 P.2d 505, 508 (Utah 1979) ("In general, such a provision [granting the lessee an option to purchase the premises at the expiration of the lease] calls for a payment of cash at the time of the exercise of the option; hence, as a matter of law, there was no ambiguity as to how and when payments would be made."); *Peebler v. Seawell*, 265 P.2d 109, 112 (Cal. Ct. App. 1954) (down payment was necessary to exercise option with notice provision); *see Burns v. Reves*, 457 S.E.2d 178 (Ga. Ct. App. 1995).

The renewal option in the Pitzes' lease agreement, which requires payment "at the time" the option is exercised, fits flush with these cases finding that payment is a condition precedent to exercising an option. The option is embedded in a lease, it must be accepted before the lease expires, and although it is an option to renew and not to purchase, the Pitzes are subject to similar opportunity costs as the *Ingram* lessor.

Further, the lease "expressly requires" that option payment "accompany the optionee's election to exercise the option," making payment a condition precedent. 71 A.L.R.3d 1201 ("[W]here an option contract expressly . . . requires that payment of the purchase price . . . accompany the optionee's election to exercise the option, the making or

tender of such payment is essential, or a condition precedent, to the formation of a contract") (emphasis added). And the rule that payment is a mere obligation of performance does not apply. *See* 49 Am. Jur. 2d *Landlord and Tenant* § 336 ("Where an option contract does not provide for payment of the purchase price at the time of an optionee's exercise . . . the general rule is that payment is not a necessary requisite to exercise.") (emphasis added).

Thus, even though there is not "conjunctive language" explicitly connecting the renewal option section to the option rent section, the supporting caselaw and persuasive authority gives decisive reason to "read an implicit conjunction between the sections in order to give full meaning to the lease." Appellate Decision 7; *Gildea v. Kapenis*, 402 N.W.2d 457, 459 (Iowa Ct. App. 1987) ("A determination that a condition precedent exists does not, however, depend on the particular form of the words used, but rather depends upon the intention of the parties gathered from the language of the entire instrument."); *cf. Shellhart*, 485 P.2d at 1034 ("The optionee should not overlook that the option granted to him was an option 'to purchase' real estate 'for the sum of $12,000.00.' When these terms are given meaning and effect, it becomes clear the intent of the parties was for payment of the purchase

price to be a necessary part of the 'exercise' of the option."). In holding that U.S.C.D. validly exercised its option without payment, the court of appeals overlooked the implicit ties between the option sections of the lease agreement and failed to identify payment as a condition precedent.

V. Conclusion

The court of appeals erred in finding that U.S.C.D. accepted the Pitzes' option to renew the lease on materially different payment terms than the ones the Pitzes proposed. The court also erred in concluding that payment at the time U.S.C.D. tried to exercise the option was an incident of performance, and not a condition precedent. The Pitzes request further review by the Iowa Supreme Court and for such other and further relief as the Court deems just as proper.

/s/ Joseph J. Porter
Chad D. Brakhahn, AT0010883
Joseph J. Porter, AT0014454
Simmons Perrine Moyer Bergman, PLC
115 Third Street SE, Suite 1200
Cedar Rapids, IA 52401-1266
Tel: 319-366-7641; Fax: 319-366-1917
cbrakhahn@spmblaw.com
jporter@spmblaw.com
ATTORNEYS FOR PLAINTIFFS-APPELLANTS
WILLIAM L. PITZ AND LYNN S. PITZ

Certificate of Electronic Filing and Service

I certify that on November 22, 2022, I electronically filed the foregoing with the Clerk of Court of the Supreme Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

/s/ Joseph J. Porter

Certificate of Compliance with Type Requirements

This application for further review complies with the limitation on the volume of type set forth in Iowa R. App. P. 6.1103(4). It contains 4,326 words, excluding parts of the brief exempted by Iowa R. App. P. 6.1103(4)(a).

This application for further review complies with the type-face and the type-style requirements of Iowa R. App. P. 6.1103(4). It has been prepared in a proportionally spaced typeface, using Microsoft Word 2013 in 14-point Calisto MT.

/s/ Joseph J. Porter

ELECTRONICALLY FILED NOV 02, 2022 CLERK OF SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 22-0038
Filed November 2, 2022

WILLIAM LEE PITZ and LYNN S. PITZ,
Plaintiffs-Appellants/Cross-Appellees,

vs.

UNITED STATES CELLULAR OPERATING COMPANY OF DUBUQUE,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt, Judge.

William and Lynn Pitz appeal the ruling on their petition for declaratory judgment while United States Cellular Operating Company of Dubuque cross-appeals the denial of its request for attorney fees. **AFFIRMED ON BOTH APPEALS.**

Todd J. Locher of Locher & Davis PLC, Farley, for appellants.

Bret A. Dublinske and Brandon R. Underwood of Fredrikson & Byron, P.A., Des Moines, for appellee.

Heard by Schumacher, P.J., Chicchelly, J., and Gamble, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2022).

GAMBLE, Senior Judge.

This case involves an option to renew a lease on land containing a cellular telecommunication tower. William and Lynn Pitz (the Pitzes) appeal the ruling on their petition for declaratory judgment requesting, among other things, a declaration that United States Cellular Operating Company of Dubuque (US Cellular) did not exercise a valid option to renew the lease. US Cellular cross-appeals the denial of its request for attorney fees. We affirm on appeal and cross-appeal.

I. Background Facts and Prior Proceedings

On November 14, 1988, William's parents, Robert and Dorothy Pitz, entered into a lease, leasing a portion of their farmland to US Cellular. US Cellular was to build a telecommunications tower on the property. The lease lasted thirty years (terminating on November 13, 2018) and included an option to renew for one additional term of thirty years. If US Cellular wanted to exercise the option, the lease required it to give written notice at least sixty days prior to expiration of the original lease term.

On April 14, 2009, Robert and Dorothy transferred their farmland, including the portion leased to US Cellular, to the Pitzes. No one informed US Cellular of the property transfer.

Assuming Robert and Dorothy still owned the farmland, US Cellular sent a letter to them on September 1, 2017, notifying them it was exercising its option to renew the lease. Of note, the letter stated Dubuque Cellular Telephone, L.P. (DCT) was exercising the option contained in the original lease, and the letter was on the US Cellular letterhead and included supporting documents identifying US

Cellular. William received the letter from one of his parents. However, William did nothing in response to the letter.

Once US Cellular discovered the Pitzes purchased the farmland from Robert and Dorothy, it sent a letter dated September 11, 2018, to William informing him it exercised its option to renew by way of the September 2017 letter and needed him to supply it with a recorded copy of the deed, a W-9 form, a direct deposit form, and contact information for the new owners. The letter stated once US Cellular had the required information, it could make the rental payment. Once again, William did nothing in response to the letter.

Because US Cellular never received a W-9 form or direct deposit information, it sent the Pitzes a rent check for the full amount less tax withholdings. In response, an attorney for the Pitzes informed US Cellular that the Pitzes believed US Cellular did not properly exercise its option to renew and returned the rent check. US Cellular responded by claiming the option was properly exercised and issued the Pitzes a 1099-MISC tax form documenting the rental income from US Cellular as miscellaneous income.

The Pitzes then initiated this action seeking declaratory judgment that US Cellular failed to validly exercise its option to renew the lease because it did not pay the full amount of the rent due at the time it exercised the option; it incorrectly provided notice to Robert and Dorothy Pitz; and DCT was not the proper party to exercise the option. The Pitzes also sought declaratory judgment that the lease expired on November 13, 2018; that US Cellular be ordered to remove all structures from their land; to establish fair rent for the period from November 13,

2018, to the date of removal; that US Cellular issue an updated 1099-MISC form; and that they are entitled to court costs, attorney fees, and interest.

Following a bench trial, the district court determined US Cellular properly exercised its option to renew the lease because its written notice was not defective and payment of the rent due was not a condition precedent to the renewal option. The court denied "[a]ll associated claims for relief" and dismissed the action. After the court issued its ruling, US Cellular filed a motion for costs ($1300.27) and attorney fees ($38,303.00). The court determined US Cellular was required to "specifically plead that it was seeking attorney fees" and that "attorney fees are not recoverable even if [US Cellular] was not required to specifically plead the relief."

The Pitzes appeal, and US Cellular cross-appeals.

II. Standard of Review

"Because a lease is a contract, we apply ordinary contract principles to determine its meaning and legal effect." *Alta Vista Props., LLC v. Mauer Vision Ctr., PC*, 855 N.W.2d 722, 727 (Iowa 2014). "[O]ur review of the district court's contract interpretation and construction is at law." *Homeland Energy Sols., LLC v. Retterath*, 938 N.W.2d 664, 683 (Iowa 2020). "The district court's factual findings have the effect of a special verdict and are binding on us if supported by substantial evidence." *Metro. Prop. & Cas. Ins. Co. v. Auto-Owners Mut. Ins. Co.*, 924 N.W.2d 833, 839 (Iowa 2019).

As to our review of the district court's denial of attorney fees, we review for an abuse of discretion. *Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 832 (Iowa 2009). "Reversal is warranted only when the court rests its discretionary ruling on grounds

that are clearly unreasonable or untenable." *Id.* (quoting *Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 342 (Iowa 2000)).

III. Discussion

A. Direct Appeal

We begin with the Pitzes' claims on appeal. First, they argue US Cellular failed to timely renew the lease because it did not provide the rent payment with the notice of renewal. Because US Cellular did not pay the rent at the time of the renewal notice, if payment of the rent amounted to a condition precedent to the renewal option, then US Cellular's renewal notice did not transform the option into a contract. *SDG Macerich Props., L.P. v. Stanek Inc.*, 648 N.W.2d 581, 586 (Iowa 2002) ("Any conditions precedent to the option provision must be fulfilled according to the agreement for the option to become a contract between the parties.").

At its heart, this case presents a simple contract dispute. So we look to the terms of the lease to determine if US Cellular was required to pay rent in tandem with its renewal notice to trigger the renewal option. *See Manatt v. Manatt*, No. 21-0319, 2022 WL 1232226, at *6 (Iowa Ct. App. Apr. 27, 2022). Section 3.2 of the lease provided:

> Option to Renew. Lessee shall have the option to renew this Lease Agreement for one (1) additional term of thirty (30) years, at the rental rate set forth in Article Four and upon all the other terms and conditions hereof. *Lessee may exercise such option by giving written notice to Lessor at least sixty (60) days before the expiration of the initial term of this Lease Agreement*.

(Emphasis added.) Section 4.2 provided:

> Option Term Rent. Lessee shall pay to Lessor as full consideration for use of the Leased Premises during the option term, *payable in a lump sum in advance at the exercise of the option*, the amount of Twenty Thousand Dollars ($20,000.00), adjusted upward

> by the percentage of increase in the Consumer Price Index ("CPI") from the Commencement Date to the first day of the last month of the current lease term. For purposes of the Lease Agreement, the "Consumer Price Index" shall mean the Consumer Price Index-Urban Wage Earners and Clerical Workers, U.S. City Average, All Items (1982-1984 equals 100) published by the United States Department of Labor, Bureau of Labor Statistics, for the month preceding the Commencement Date or Adjustment Date (as the case may be). If the amount of the CPI increase is not known at the time the option is exercised, Lessee shall pay Lessor Twenty Thousand Dollars ($20,000.00) at the time of exercise and the balance of the option term rent within thirty (30) days of the Lessor's notice of calculation. If the CPI shall become unavailable, then a reasonably comparable index of the increase and decrease in United States consumer prices shall be substituted in its place. Notwithstanding the foregoing, the CPI adjustment shall never exceed more than 5% per lease year, cumulatively.

(Emphasis added.)

The Pitzes highlight that we interpret contracts as a whole and in a manner that gives reasonable, lawful, and effective meaning to each provision of the contract. *Iowa Fuel & Mins., Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991). US Cellular's attorney agreed with this proposition at oral argument. But the parties' agreement ends there. The Pitzes assert that—when giving full meaning to the terms of the contract—for US Cellular "to exercise its option[,] it was required to give the Pitzes notice of its intent to renew in writing on or before September 14, 2018[,] *and* 'pay to Lessor as full consideration for the use of the Leased Premises during the option term payable in a lump sum in advance at the exercise of the option.'" (Emphasis added.) US Cellular counters there is no conjunction between sections 3.2 and 4.2 and highlights the "Option Term Rent" requirements are contained in a "separate provision, under a different heading, in a distinct article, on another page" of the lease from the "Option to Renew" requirements. *Cf. Lyon v. Willie*, 288 N.W.2d 884, 888–89 (Iowa 1980)

(concluding payment was a condition precent to a renewal contract because the payment provision of the contract was linked to the notice requirement with a conjunctive "and"). We agree with US Cellular that the lack of conjunctive language between the sections is telling, and we do not think we are required to read an implicit conjunction between the sections in order to give full meaning to the lease.

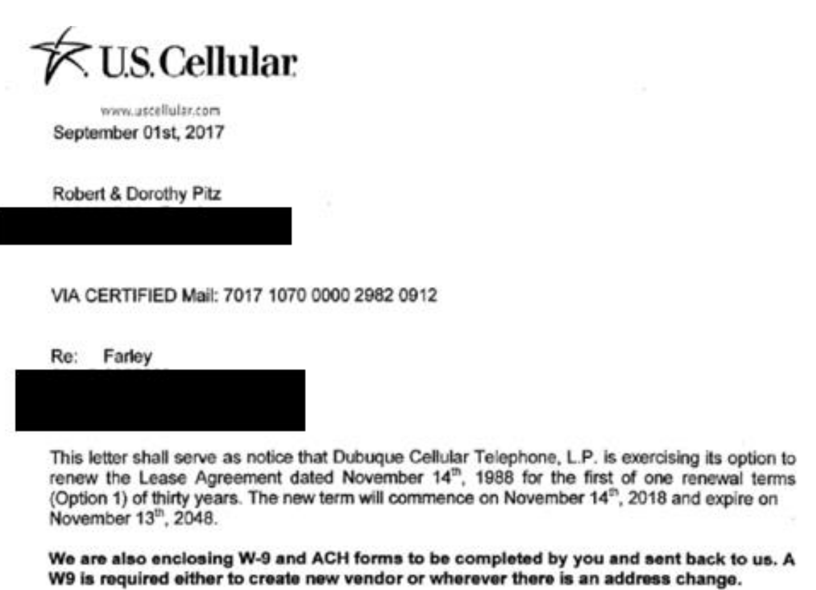
Ultimately, the district court correctly determined payment of the rent was not a condition precedent to renewal of the lease. Section 3.2 specifically stated the option would be exercised "*by giving written notice* to Lessor at least sixty (60) days before the expiration of the initial term of this Lease Agreement." (Emphasis added.) "It may be that under the terms of a given option the only proper and binding method of election or acceptance is by the payment or a tender of the purchase price." *Breen v. Mayne*, 118 N.W. 441, 443 (Iowa 1908). But by the plain language of this particular lease, there is no requirement that US Cellular also pay the rent at the same time to effectuate the renewal option. *Peak v. Adams*, 799 N.W.2d 535, 544 (Iowa 2011) ("The most important evidence of the parties' intentions at the time of contracting is the words of the contract.").

We understand section 4.2 of the contract required the rent to be "payable in a lump sum in advance at the exercise of the option." However, this does not create a condition precedent. Instead, it clarifies the time that the rent payment is due, i.e., it must be made upon exercise of the option. So it created an obligation of performance once the option to renew was exercised. It also specified this contract required a lump sum rental payment instead of the common practice of monthly installments and that the payment would come at the beginning of the

lease as opposed to the end.[1] It does not tack on a condition to the renewal terms, which are contained in an entirely different section of the lease.

Next, the Pitzes argue the renewal was defective because it was exercised by the wrong party. They complain the renewal notices reference DCT as the party attempting to exercise the renewal option, not US Cellular. And they point out article thirteen of the lease required any assignment of US Cellular's rights under the contract be made by written assignment and notice be provided to the lessors, which did not occur here.

But looking at the documents sent, both on September 1, 2017, and September 11, 2018, it is clear DCT was exercising the renewal option on behalf of US Cellular. Below are images of some of the paperwork sent.[2]


U.S. Cellular

www.uscellular.com

September 01st, 2017

Robert & Dorothy Pitz

VIA CERTIFIED Mail: 7017 1070 0000 2982 0912

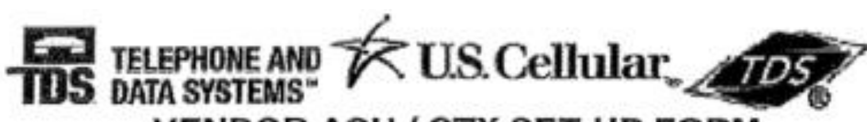
Re: Farley

This letter shall serve as notice that Dubuque Cellular Telephone, L.P. is exercising its option to renew the Lease Agreement dated November 14th, 1988 for the first of one renewal terms (Option 1) of thirty years. The new term will commence on November 14th, 2018 and expire on November 13th, 2048.

We are also enclosing W-9 and ACH forms to be completed by you and sent back to us. A W9 is required either to create new vendor or wherever there is an address change.

[1] For example, the Pitzes' expert witness testified he reviewed similar contracts that included monthly rental terms, and a US Cellular representative also testified that this contract is unique because it requires rent payment in a lump sum as opposed to monthly installments. *Peak*, 799 N.W.2d at 544 (permitting us to look to extrinsic evidence including the subject matter of the transaction when interpreting the terms of a contract).

[2] We have redacted addresses referenced in the documents.



VENDOR ACH / CTX SET-UP FORM

Vendor Information

Existing Vendor Yes ☐ Vendor Number: ____________

TAX ID FEIN / Tax ID or SS# if sole proprietor: ____________

Company Name: ______________________________

Attention: ______________________________

Address: ______________________________

City: ______________________________

State: Zip:

U.S. Cellular

September 11, 2018

William Pitz
c/o Robert & Dorothy Pitz

[REDACTED]

VIA OVERNIGHT MAIL:

Re: Farley

[REDACTED]

To Whom It May Concern:

Pursuant to our phone conversation on September 06, 2018 notifying us that you have purchased the property from your parents Robert & Dorothy Pitz, please note that we are still need of the following documents to reflect this change of ownership and update the rent payee in our system.

Recorded copy of deed
W-9 Form (Attached)
Direct Deposit form (Attached)
Contact information of New Owners

Dubuque Cellular Telephone, L.P. has renewed the Lease agreement dated November 14, 1988 as per section 3.2 of the Lease. Copy of Acknowledged Renewal letter dated September 01, 2017 is attached. Once we have these documents, we will be able to disburse the option renewal payment to you. This letter is being sent to the last address on record.

These communications also came with return envelopes addressed to U.S. Cellular.

Contrary to the Pitzes' assertions, this is not an instance of US Cellular improperly assigning its rights to a third party. Instead, it's a case of US Cellular exercising its option to renew through DCT. US Cellular's representative testified, "United States Cellular Corporation is the owner of United States Cellular Operating Company of Dubuque who in town is the Dubuque Cellular, LP." The Pitzes understood this. William testified at trial that he made no distinction between DCT and US Cellular because US Cellular was clearly identified on the paperwork. And it is clear from the record that US Cellular was intending to exercise its option to renew—that is all we require. *See Figge v. Clark*, 174 N.W.2d 432, 436 (Iowa 1970) ("[I]n this jurisdiction anything amounting to an unqualified manifestation of an optionee's determination to accept is sufficient.").

So we conclude US Cellular exercised its option to renew the contract and there is a valid contract between the parties. Accordingly, the Pitzes' claims that they are entitled to fair market value for a holdover period and US Cellular should issue a new 1099-MISC form are moot.

With respect to their claim for attorney fees, they point to the indemnification clause as the basis for their claim.[3] That provision states:

> Lessee shall indemnify and hold harmless Lessor herein from any and all costs, claims, damages and suits arising out of or resulting from or in connection with Lessee's or Lessee's employees', agents', invitees', sub-lessees' or assignees' occupancy, possession, use or management of the Leased Premises and the License areas of the Real Estate or any portion thereof or the exercise or enjoyment of their rights and breach of their

---

[3] US Cellular argues the Pitzes' request for attorney fees is not preserved because the court did not explicitly rule on it. But the court did state, "All associated claims for relief are denied." We think this is minimally sufficient to show the court considered the Pitzes' request for attorney fees contained in their petition and denied it. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

> obligations under this Lease Agreement, including reasonable attorneys' fees.
>
> Lessor shall indemnify and hold harmless Lessee herein from any and all costs, claims, damages and suits arising out of or resulting from or in connection with Lessor's or Lessor's employees', agents', invitees', sub-lessees' or assignees' occupancy, possession, use or management of the Leased Premises and the License areas of the Real Estate or any portion thereof or the exercise or enjoyment of their rights and breach of their obligations under this Lease Agreement, including reasonable attorneys' fees.

However, that section does not provide for recovery of attorney fees in actions between the parties. *See NevadaCare, Inc. v. Dep't of Hum. Servs.*, 783 N.W.2d 459, 471 (Iowa 2010) ("In Iowa, we have held an indemnification clause that uses the terms 'indemnify' and 'hold harmless' indicates an intent by the parties to protect a party from claims made by third parties rather than those brought by a party to the contract. Therefore, a party to a contract cannot use an indemnity clause to shift attorney fees between the parties unless the language of the clause shows an intent to clearly and unambiguously shift the fees." (internal citation omitted)).

B. Cross-Appeal

Next, we address US Cellular's cross-appeal claiming it is entitled to attorney fees. Because US Cellular did not specifically plead for attorney fees prior to the court's ruling, it cannot recover. This court previously explained, "We can find no reason to separate attorney fees from other kinds of special damages or to establish separate rules allowing them to be raised after the trial." *Nelson Cabinets, Inc. v. Peiffer*, 542 N.W.2d 570, 573 (Iowa Ct. App. 1995).

Moreover, US Cellular would not be entitled to attorney fees even if it had specifically pleaded for attorney fees at the proper time. "Generally, attorney fees

are recoverable only by statute or under a contract." *NCJC, Inc. v. WMG, L.C.*, 960 N.W.2d 58, 62 (Iowa 2021) (citation omitted). US Cellular points to no statute in support of its request for attorney fees; instead, it points to article nine of the contract. This provision of the contract is the same indemnification clause we determined could not provide the Pitzes with attorney fees. Likewise, it does not provide US Cellular with the ability to recover attorney fees in this instance. *See NevadaCare*, 783 N.W.2d at 471.

IV. Conclusion

We find no error of law in the ruling of the district court. Payment of the rent was not a condition precedent to the renewal option, and US Cellular's renewal notice was not defective. So there is a valid contract between the Pitzes and US Cellular. And the district court did not abuse its discretion in determining neither party is entitled to attorney fees.

AFFIRMED ON BOTH APPEALS.

State of Iowa Courts

Case Number	**Case Title**
22-0038	Pitz v. US Cellular Operating Co. of Dubuque

Electronically signed on 2022-11-02 08:27:28