IN THE IOWA SUPREME COURT

Supreme Court No. 22-0038

District Court No. 01311 LACV109349

WILLIAM L. PITZ and LYNN S. PITZ,

Appellants/Cross-Appellees,

vs.

UNITED STATES CELLULAR OPERATING COMPANY OF DUBUQUE, an Iowa Corporation,

Appellee/Cross-Appellant.

DECISION BY THE COURT OF APPEALS NOVEMBER 2, 2022

APPELLEE/CROSS-APPELLANT'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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STATEMENT OF THE FACTS

William and Lynn Pitz are husband and wife. (App. 105, Pitz Dep. 5:7–8). Nonparties Robert and Dorothy Pitz are William's parents. (App. 105, Pitz Dep. 5:16–19). In 1988, Robert and Dorothy Pitz agreed to a 30-year lease permitting U.S. Cellular to build a cellphone tower on their property, in exchange primarily for an upfront payment of $20,000. (App. 8, art. 4.1). Following a series of real-estate transactions, William and Lynn purchased Robert and Dorothy's property in 2009. (App. 21–24; App. 25–27; App. 28–30).

The lease provided U.S. Cellular an option to renew the lease for an additional 30-year term. (App. 7, art. 3.2). Under Article 3.2, captioned "Option to Renew," U.S. Cellular could "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). Article 4.2, captioned "Option Term Rent," separately prescribed the procedure for calculating and paying the option-term rent. (App. 8, art. 4.2). The first lease term expired on November 13, 2018. (App. 17).

On September 1, 2017, over fourteen months before the initial lease term expired, U.S. Cellular sent a letter to Robert and Dorothy's address in the lease. (App. 6; App. 31). That letter provided "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." (App. 31). With enclosed forms, the letter also requested the return of completed tax and banking documents needed to transmit the option-rent payment. (App. 32–33; App. 226, Tr. 101:4–10).

U.S. Cellular received no response until September 6, 2018, when William Pitz notified U.S. Cellular by phone that he'd bought his parents' property. (App. 36; App. 226, Tr. 101:15–23). Five days later, U.S. Cellular sent a letter to William informing him that it exercised its option to renew the lease over a year ago in its September 1, 2017, letter. (App. 36). U.S. Cellular also requested tax, banking, and real estate documents, explaining that once they were returned "we will be able to disburse the option renewal payment to you." (App. 36). Although William and Lynn Pitz never returned these documents, U.S. Cellular mailed the Pitzes a check on October 29, 2018, for $31,494.02, reflecting the option-term rent, less tax withholdings. (App. 40; App. 111, Pitz Dep. 29:16–30:10; App. 204, Tr. 53:15–19; App. 226, Tr. 101:11–14).

Less than two weeks later, the Pitzes' counsel returned the check, claiming that U.S. Cellular had failed to validly exercise its option to renew the lease. (App. 42). U.S. Cellular wrote back, reiterating that the option had

been exercised and again requesting a W-9 needed to "issue a new rent check." (App. 46). The Pitzes never provided the W-9. (App. 204, Tr. 53:15–19; App. 226, Tr. 101:11–14). Instead, they filed their Petition at Law against U.S. Cellular, seeking a declaration that U.S. Cellular failed to validly exercise its option to renew the lease for a second thirty-year term because it failed to tender the rent payment 60 days before the expiration of the initial term of the lease. (App. 133–134).

After a bench trial, the District Court concluded that U.S. Cellular wasn't required to tender payment with its notice to exercise its option to renew the lease. (App. 164–168). Then, it found that U.S. Cellular had validly exercised its option by providing timely written notice. (*Id*.). The District Court accordingly denied the declarations sought by the Pitzes and dismissed the case. (App. 168).

On appeal, the Court of Appeals affirmed the District Court's judgment, concluding the lease did not require U.S. Cellular to tender the rent payment as a precondition to exercising its option to renew the lease. *Pitz v. U.S. Cellular Operating Co. of Dubuque*, No. 22-0038, at 5–8 (Iowa Ct. App. Nov. 2, 2022). Specifically, the Court of Appeals determined that the written-notice requirements included in Article 3.2 of the lease were the only conditions to exercising the lease renewal option. *Id*. Then, it explained that

the payment terms in Article 4.2 were separate performance obligations, not preconditions to exercising U.S. Cellular's option.

Now, for no other reason than that they disagree with the Court of Appeals' interpretation of the lease, the Pitzes seek further review from this Court under Rule 6.1103. (Appl.).

ARGUMENT

The Court should deny the Application for Further Review because the Pitzes have not demonstrated any enumerated or unenumerated grounds that merit further review. The Pitzes simply disagree with the Court of Appeals' resolution of a simple dispute over the correct interpretation of a particular lease, a grievance hardly deserving of yet another layer of appellate review. If this case deserves further review, then so do all the other generic disputes over the meaning and effect of contract language decided by the Court of Appeals.

I. The Pitzes Failed to Demonstrate Any Enumerated or Unenumerated Grounds that Merit Further Review.

The Pitzes cited three of the enumerated grounds this Court considers when evaluating an application for further review, but their Application fails to demonstrate that any of these grounds actually exist. (Appl. 4–5). And because the Pitzes cited no other grounds—enumerated or unenumerated—the Court should deny the Application for Further Review.

Further review "is a matter of judicial discretion," and an application for further review "will not be granted in normal circumstances." Iowa R. App. P. 6.1103(1)(b). Although they do not dictate or limit the Court's discretion, the Court generally considers whether any the following grounds exist when evaluating an application for further review:

> (1) The court of appeals has entered a decision in conflict with a decision of this court or the court of appeals on an important matter;
>
> (2) The court of appeals has decided a substantial question of constitutional law or an important question of law that has not been, but should be, settled by the supreme court;
>
> (3) The court of appeals has decided a case where there is an important question of changing legal principles;
>
> (4) The case presents an issue of broad public importance that the supreme court should ultimately determine.

Iowa R. App. P. 6.1103(1)(b)(1)–(4).

The Pitzes' Application cited the first, second, and ostensibly the fourth circumstances as grounds for further review. None of these grounds are supported by the record in this case.

A. The Decision of the Court of Appeals is Not in Conflict with Another Court of Appeals Decision or a Decision of the Supreme Court, Let Alone a Decision on an Important Matter.

Despite citing Rule 6.1103(1)(b)(1), the Pitzes demonstrated no real conflict between the Court of Appeals' decision in this case and another

decision of the Court of Appeals or this Court. In fact, rather than identify a particular conflicting decision, the Pitzes say the Court of Appeals' decision in this case conflicts with the general principle that, like the acceptance of an offer, the exercise of an option must strictly comply with all applicable conditions without variation. This argument misunderstands the Court of Appeals' decision. When properly understood, there is no conflict between the Court of Appeals' decision and the general principles applicable to exercising an option provision.

The Pitzes' conflict argument misunderstands the Court of Appeals' decision. The Court of Appeals did not neglect the lease's rent payment as a precondition to U.S. Cellular exercising its option to renew the lease, as the Pitzes summarily contend. The Court of Appeals instead expressly recognized that "[a]ny conditions precedent to the option provision must be fulfilled" and concluded that the rent payment was not a precondition to U.S. Cellular exercising its option to renew the lease. *Pitz*, No. 22-0038, at 5–7 (quoting *SDG Macerich Props., L.P. v. Stanek Inc.*, 648 N.W.2d 581, 586 (Iowa 2002)). So the Pitzes' conflict argument is built on an incorrect presumption. They improperly presume—without demonstrating—that the rent payment was a precondition to exercising the option and summarily conclude the Court of Appeals' decision neglected this condition, putting it in

conflict with all other decisions articulating the general principle that all the conditions of exercising an option must be fulfilled. This classically fallacious argument does not present a conflict between the Court of Appeals' decision in this case and a decision from this Court. *See* Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. Colo. L. Rev. 741, 784 (1988) ("When a premise directly related to the point in issue is assumed, without proof, for purposes of establishing the conclusion, the fallacy of begging the question has occurred."). Like every other unsuccessful appellant, the Pitzes simply disagree with the Court of Appeals' decision.

In fact, the Court of Appeals' decision is entirely consistent with this Court's precedents distinguishing between performance obligations and conditions precedent to exercising an option. As the Court of Appeals pointed out, payment is not always a condition precedent to the exercise of an option. *Pitz*, No. 22-0038, at 7–8; *see also* Appellee Br. 25–28. Under Iowa law, some contracts may require payment as a precondition to exercising an option to renew the contract while others may simply make payment a performance obligation under the renewed contract. *See Matter of Est. of Clausen*, 482 N.W.2d 381, 384 (Iowa 1992) (concluding payment of the purchase price for land was not a precondition to exercising the option to purchase the land);

Lyon v. Willie, 288 N.W.2d 884, 888 (Iowa 1980) (explaining payment is a precondition to exercising an option only when a lease clearly and expressly requires it); *Breen v. Mayne*, 118 N.W. 441, 443 (Iowa 1908) (explaining it is important "to distinguish that which pertains to the performance of a contract from that which pertains to its making").

Here, Article 3.2 of the lease, titled "Option to Renew," says U.S. Cellular "may exercise" its option to renew the lease by "giving written notice" to the Pitzes "60 days before" the initial term expired. (App. 7, art. 3.2). An entirely separate Article on another page of the lease, titled "Option Term Rent," calls for a lump-sump rent payment "at the exercise of the option." (App. 8, art. 4.2). The Court of Appeals correctly distinguished between the express preconditions to exercising the lease renewal option in Article 3.2 and the separate payment terms in Article 4.2 and concluded that Article 4.2's payment terms were separate performance obligations, not preconditions to exercising the renewal option. *Pitz*, No. 22-0038, at 7–8. This is entirely consistent with this Court's decisions in *Matter of Estate of Claussen*, *Lyon*, and *Breen*. 482 N.W.2d 381; 288 N.W.2d 884; 118 N.W. 441. It is also consistent with the law in several other jurisdictions. *See Matrix Props. Corp. v. TAG Invs.*, 609 N.W.2d 737, 742–43 (N.D. 2000); *Acme Inv., Inc. v. Sw. Tracor, Inc.*, 105 F.3d 412, 415 (8th Cir. 1997)

(applying Nebraska law); *Pet. of Hilltop Dev.*, 342 N.W.2d 344, 346 (Minn. 1984); *Killam v. Tenney*, 366 P.2d 739, 747–48 (Or. 1961); *Ford v. Lord*, 586 P.2d 270, 274 (Idaho 1978); *Foard v. Snider*, 109 A.2d 101, 106 (Md. 1954).

The Pitzes have therefore failed to demonstrate a Rule 6.1103(1)(b)(1) conflict. All they've shown is that they disagree with the Court of Appeals' interpretation and construction of the lease. That is not grounds for further review.

B. The Court of Appeals Did Not Decide an Important Question of Law that has Not Been, But Should Be, Settled by the Supreme Court.

The Court of Appeals decided this case based on "the plain language of [the] particular lease" at issue. *Pitz*, No. 22-0038, at 7. It did not decide an important question of law that has not been, but should be, settled by this Court. *See* 6.1103(1)(b)(2).

Two elements make up the grounds described in Rule 6.1103(1)(b)(2): (1) the Court of Appeals decided an important question of law, and (2) the Supreme Court has not, but should, finally settle it. *Id*. To demonstrate these grounds then, an applicant for further review must first show that the Court of Appeals decided a particular question of law. *See id*. The applicant cannot pick a question that was never decided by the Court of Appeals and ask the Supreme Court to decide it in the first instance. *See id*. It is, after all, an

application for *further* review.

The Pitzes' Application identifies a question of law that the Court of Appeals did not decide, or even address. Their Application asks this Court to determine "whether payment is a condition precedent to exercising a lease-embedded option when payment must occur at the same time the option is effectuated." (Appl. 5). The Court of Appeals did not even address this question, let alone decide it, because the Pitzes never raised it in their appellate brief. *See Pitz*, No. 22-0038; *see also infra* Section II. (arguing the Pitzes failed to preserve this argument). Instead, the Court of Appeals expressly stated it was resolving this case based on "the plain language of this particular lease." *Id*. at 7. The Court of Appeals never considered whether Iowa courts should follow the Pitzes' proposed new rule. *See Pitz*, No. 22-0038. The question of its propriety is therefore not grounds for further review under Rule 6.1103(1)(b)(2), because the Pitzes never presented it to the Court of Appeals and the Court of Appeals never decided it.

C. This Case Does Not Present an Issue of Broad Public Importance that the Supreme Court Should Ultimately Determine.

Without citing Rule 6.1103(1)(b)(4)—or for that matter anything else—the Pitzes say "[l]ease renewals are a matter of great importance to Iowa," ostensibly arguing this is grounds for further review under Rule

6.1103(1)(b)(4). It isn't.

Just because this case involves the renewal of a lease does not mean it presents an issue of broad public importance that this Court should determine. Leases are important to the public like other contracts and legal relations are important to the public. But not every Court of Appeals decision involving a dispute over the meaning of a lease or other contract deserves further review. So by asserting that leases, in the abstract, are important to the public, the Pitzes have not demonstrated grounds for further review under Rule 6.1103(1)(b)(4). In fact, this assertion just underscores that this case lacks the characteristics of a case deserving further review by this Court.

More to the point, the Court of Appeals decided this case based on "the plain language of [the] particular lease" at issue. *Pitz*, No. 22-0038, at 7. The decision and the issues involved were certainly important to the parties, but it hardly presented any issues of importance to the public at large. And by generically asserting that lease renewals, in the abstract, are important to the public, the Pitzes have done nothing to show that the particular issue decided by the Court of Appeals—whether the lease required payment of the rent as a condition to exercising the option to renew the lease—is an issue of broad public importance. The Pitzes' assertions that this issue is one of broad public importance are speculation and nothing more.

II. The Pitzes Failed to Preserve Their Argument that the Supreme Court Should Adopt a New Rule that Payment is a Condition Precedent to Exercising an Option to Renew a Lease When the Lease Calls for Payment at the Time of Renewal.

As discussed above, the Court of Appeals never considered, let alone determined, the propriety of the new rule that the Pitzes now ask this Court to consider on further review. That's because the Pitzes never presented it to the Court of Appeals and thus failed to preserve it as grounds for further review.

This Court may consider only "the issues properly preserved and raised in the original briefs." *Bokhoven v. Klinker*, 474 N.W.2d 553, 557 (Iowa 1991). An applicant cannot argue an issue for the first time in its application for further review. *See id.*; *see also State v. Iowa Dist. Ct. for Warren Cnty.*, 828 N.W.2d 607, 616 n.6 (Iowa 2013) (declining to consider one of the applicant's arguments because it never raised the argument before the trial court or in its appellate brief). That well-settled rule dooms the Pitzes' challenge.

A review of the Pitzes' appellate briefing shows the Pitzes' did not preserve their argument that the Court should adopt a new rule that payment is a condition precedent to exercising an option to renew a lease when the lease calls for payment at the time of renewal. *See* Appellants/Cross-Appellees Br. 22–44; Appellants/Cross-Appellees Reply Br. 12–37; *Pitz*, No. 22-0038. The Pitzes' briefs argued that the language in the lease *itself*

required payment as a precondition to exercising the option to renew, not that the application of their new proposed rule required payment as a precondition to exercising the option. *See* Appellants/Cross-Appellees Br. 22–34; Appellants/Cross-Appellees Reply Br. 12–21. These briefs never even mention a new rule of law, let alone argued for the application of one. Instead, the Pitzes improperly saved that argument for their Application. It's too late.

If that were not enough, the Court of Appeals' opinion confirms the Pitzes never argued for the application of their proposed new rule. The Court of Appeals decided this case based on the plain language of the lease and never mentioned the Pitzes' proposed new rule, or any other new rule. *Pitz*, No. 22-0038, 5–8. It is therefore apparent from both the Pitzes' appellate briefs and the Court of Appeals' opinion that the Pitzes failed to preserve their argument that this Court should grant further review in order to consider and adopt the Pitzes' proposed new rule of law. The Court should not consider it here.

III. Further Review is Inappropriate Because Even if the Court of Appeals' Interpretation of the Lease Were Incorrect, the Court Would Have to Remand this Case to the District Court to Determine Whether U.S. Cellular's Failure to Tender Payment Should be Excused Because Tender Have Been Futile.

Both the District Court and the Court of Appeals properly rejected the Pitzes' misguided reading of the lease and agreed with U.S. Cellular that the rent payment was not a precondition to exercising U.S. Cellular's option to

renew the lease. (App. 170; App. 172); *Pitz*, No. 22-0038. As a result, neither addressed U.S. Cellular's alternative argument that its failure to make the rent payment when it exercised its option should be excused because any such payment would have been futile. So even if this Court were to grant further review, and even if the Court decided to reverse the Court of Appeals and District Court, this case would not end there. The Court would need to remand the case to the District Court to determine whether U.S. Cellular's failure to tender payment was futile.

This Court has repeatedly excused payment tenders in option cases when—as here—tender would have been futile. *See Lange v. Lange*, 520 N.W.2d 113, 118 (Iowa 1994) ("When a tender would be of no avail, . . . it may be excused."); *Lyon*, 288 N.W.2d at 891 (holding that the option holder "was excused from making a valid tender by the June 25 deadline"); *Figge v. Clark*, 174 N.W.2d 432, 437 (Iowa 1970) ("[R]easonable efforts to make that tender proved futile . . . ."); *Steele v. Northup*, 143 N.W.2d 302, 306 (Iowa 1966) (excusing failed tender). Specifically, in *Lange*, the plaintiffs knew the option holder wanted to purchase company stock "far in advance of the expiration of the option." 520 N.W.2d at 118. Still, the plaintiffs refused the stock sale because they didn't think it was a "'good deal.'" *Id*. This Court decided to excuse the option holder's failure to tender payment. *Id*.

Here, U.S. Cellular notified the Pitzes it was exercising its option over a year before the lease's initial term expired. (App. 31). In fact, U.S. Cellular was ready and willing to make the rent payment. (App. 228, Tr. 103:14–18). U.S. Cellular sent the Pitzes a check for the rent before the lease expired in November 2018. (App. 40). Despite knowing that U.S. Cellular wanted to exercise the option, the Pitzes refused the check, hoping to renegotiate a more lucrative payment. (App. 42; App. 113, Pitz Dep. 38:22–25).

Like the plaintiffs in *Lange*, the Pitzes simply didn't like the option terms and wanted to find a way out. This is plainly apparent from William's deposition testimony. He testified that "we would still be here" in a lawsuit to invalidate the option even if U.S. Cellular had sent the rent payment in time to exercise its option to renew the lease. (App. 121, Pitz Dep. 70:1–3). William thought the rent—which was originally agreed to by his parents—was "very unfair," not "very favorable," "way undervalued," and "insulting." (App. 109, Pitz Dep. 22:16–18, 22:19–25; App. 113, Pitz Dep. 38:12–17; App. 114, Pitz Dep. 44:17–19; App. 121, Pitz Dep. 70:1–3; App. 200, Tr. 46:5–14).

With that negative view of the lease in mind, the Pitzes delayed responding to U.S. Cellular's September 2017 notice until a year later, in September 2018. (App. 36). In September 2017 and September 2018, U.S.

Cellular requested tax, banking, and real estate documents it needed to pay the Pitzes. (App. 31–35; App. 36–39; App. 226, Tr. 101:4–10). But the Pitzes ignored U.S. Cellular, choosing instead to hire counsel with hopes to invalidate the lease and renegotiate. (App. 111, Pitz Dep. 29:16–30:10, 30:14–31:21; App. 198, Tr. 40:12–17); *see Steele*, 143 N.W.2d at 451 (concluding a party's failure to furnish "essential information" supported excuse of payment tender). And unlike an ordinary landlord, the Pitzes never demanded the tower be removed before they filed this action. (App. 111, Pitz Dep. 32:14–17). They wanted the tower on their property but on their own terms and at their desired price. (App. 113, Pitz Dep. 38:10–11; App. 117, Pitz Dep. 55:22–25).

Most tellingly, though, William arbitrarily testified at his deposition that he believed the rent payment should be $1,000,000, well above his own expert's valuation of about $203,000. (App. 113, Pitz Dep. 39:6–20, 40:6–21; App. 114, Pitz Dep. 41:18–42:9; App. 196, Tr. 38:23–25). William lacks any experience valuing real estate. (App. 114, Pitz Dep. 41:18–42:9; App. 196, Tr. 38:23–25). So when asked how he arrived at such a high amount, William said he picked it out of "the air." (*Id.*). Then, he capriciously suggested that even $1,000,000 might not satisfy him. (App. 117, Pitz Dep. 55:23–25; App. 197–198, Tr. 39:13–40:17).

Based on this record, it is plainly apparent that the Pitzes never would have accepted the rent payment called for in the lease. According to William, the Pitzes would have accepted nothing less than $1,000,000, but maybe more than that depending on whether William felt like picking another number out of "the air." (App. 114, Pitz Dep. 41:18–42:9; App. 196, Tr. 38:23–25). So any payment U.S. Cellular sent with its notice to exercise its option would have been to "no avail." *Lange*, 520 N.W.2d at 118. Even if the Court granted further review and reversed the courts below, then, it would have to remand the case to the District Court to determine whether tendering payment was futile—which it plainly was. This makes further review of this case particularly inappropriate.

CONCLUSION

For the reasons stated, the Court should deny the Pitzes' Application for Further Review.

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CERTIFICATE OF COST

The undersigned certifies that the cost for printing and duplicating necessary copies of this Appellee/Cross-Appellant's Resistance to Application for Further Review was $0.

Respectfully submitted this 2nd day of December 2022.

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

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.1103(4), 6.903(1)(*d*), and 6.903(1)(*g*)(1) or (2) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2010 in Times New Roman, 14-point font and contains 3,872 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

Respectfully submitted this 2nd day of December 2022.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 2nd day of December 2022, a copy of Appellee/Cross-Appellant's Resistance to Application for Further Review was filed and served on the Clerk of the Supreme Court, which will serve a notice of electronic filing to all registered counsel of record.

/s/ *Olivia Lucas*
Olivia Lucas