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SUPREME COURT NO. 19-0657
(Muscatine County No. EQCV024741)

COMMUNITY BANK & TRUST COMPANY,
Defendant/Appellant,

vs.

BLUE GRASS SAVINGS BANK,
Plaintiff/Appellee.

Appeal from the Iowa District Court for Muscatine County
The Honorable John D. Telleen, District Court Judge

APPELLANT COMMUNITY BANK & TRUST COMPANY FINAL BRIEF

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ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court pursuant to Iowa Rule of Civil Procedure section 6.1101(2)(c) as it presents a substantial issue of first impression in Iowa. Contrary to the plain meaning of Iowa Code section 654.12A, governing priority of future advances up to any maximum amount stated in a recorded mortgage, an unreported Iowa Court of Appeals decision suggests the future advance clause contained in a mortgage governs priority disputes between lenders. The Iowa Supreme Court has not interpreted section 654.12A with regard to maximum credit amounts or future advance clauses, nor has the Iowa Court of Appeals done so in any *published* opinion. The Iowa Supreme Court's determination of this issue and establishment of precedent regarding priority of future advances in excess of maximum credit amounts will provide important clarity for all junior mortgagees and other potential lienholders determining whether to advance funds when a senior mortgagee holds a mortgage containing a future advance clause with a maximum credit cap provision.

STATEMENT OF THE CASE

This appeal arises from summary judgment entered upon motion by Plaintiff-Appellee Blue Grass Savings Bank ("Blue Grass") in a foreclosure action concerning priority of mortgages. Notwithstanding Defendant-

Appellant Community Bank & Trust Company's ("Community Bank") resistance to Blue Grass's motion for summary judgment, the Muscatine County District Court, by and through the Honorable John Telleen, granted the summary judgment motion and simultaneously entered a decree of foreclosure in favor of Blue Grass. The Court's summary judgment ruling and decree awarded Blue Grass priority over Community Bank for all funds advanced by Blue Grass to Defendant borrower Joseph Stecher ("Stecher"), even though the advanced amounts claimed by Blue Grass and awarded priority by the Court far exceed the maximum credit amount secured by Blue Grass's mortgage. The course of proceedings and trial court disposition are summarized as follows, to-wit:

On August 10, 2018, Plaintiff-Appellee Blue Grass filed a Foreclosure Petition in the Iowa District Court for Muscatine County against borrower Stecher, Twin States, Inc. and Community Bank. (App. 13-47). On September 14, 2018, Defendant-Appellant Community Bank filed its Answer. (App. 49-50). On November 16, 2018, Blue Grass filed an uncontested Motion for Leave to Amend Foreclosure Petition, seeking to add two individual defendants with an interest in the real estate subject to foreclosure. (App. 51-52). On November 19, 2018, the District Court entered its Order Granting Leave to Amend Foreclosure Petition. (App. 53-

54). On November 19, 2018, Blue Grass filed its First Amended Foreclosure Petition. (App. 55-88). On December 5, 2018, Community Bank filed its Answer to First Amended Foreclosure Petition. (App. 89-91).

In both Petitions, Blue Grass acknowledged Community Bank had a mortgage on the real estate in question but asserted Community Bank's "interest in the real estate is junior and inferior" to Blue Grass's interest. (App. 15 at ¶ 12; App. 57 at ¶ 12). In each of Community Bank's Answers to Blue Grass's Petitions, Community Bank denied the allegation that its interest in the real estate was junior and inferior to Blue Grass's interest. (App. 50 at ¶ 12; App. 90 at ¶ 12). None of the three individual defendants appeared or filed an answer. Default judgment was entered against Stecher, Defendant Christofferson and Defendant Mack and these individuals are not parties to this appeal. (App. 174-179). Defendant Twin States, Inc. filed an appearance, but filed no responsive pleadings and is not a party to this appeal.

On February 13, 2019, Blue Grass filed its Motion for Summary Judgment and Memorandum of Law, together with all related materials. (App. 92-111). On February 19, 2019, Community Bank filed its Resistance to Motion for Summary Judgement. (App. 112-141). On March 6, 2019, Blue Grass filed its Reply to Community Bank's Resistance to Summary

Judgment. (App. 142-145). On March 7, 2019, the District Court entered an Order directing the parties to coordinate a hearing date. (App. 146-147).

On March 11, 2019, the District Court entered an Order Setting Hearing on Motion for Summary Judgment on March 20, 2019. (App. 148-149). On March 15, 2019, Community Bank filed its Response to Blue Grass's Reply to Resistance to Summary Judgment, including an affidavit from Community Bank's Vice President and Senior Ag Lender, Dwight Watkins. (App. 152-155; App. 150-151). Mr. Watkins attested that Community Bank made a loan to Stecher and took a second mortgage, realizing the first mortgage held by Blue Grass was subject a $148,000.00 maximum obligation limit or "cap" (App. 150-151). This cap provided Community Bank sufficient equity to secure its loan to Stecher. Mr. Watkins further attested that Community Bank would not have made this loan to Stecher but for the presence of the cap in Blue Grass's recorded mortgage. (App. 150-151).

On March 20, 2019, the day of the hearing on the summary judgment motion, Blue Grass filed its Sur Reply regarding Summary Judgment, together with its Amended Statement of Facts. (App. 159-163; App. 164-165). At the conclusion of the hearing, Judge Telleen indicated Blue Grass's one earlier and several later notes were secured by the recorded mortgage

notwithstanding the maximum obligation limit contained within the mortgage and requested Blue Grass's counsel prepare a ruling on the Motion for Summary Judgment. (App. 213-214 at 20.18-21.20). On April 8, 2019, Judge Telleen entered his Order Granting Plaintiff's Motion for Summary Judgment. (App. 168-173). Judge Telleen simultaneously entered a Decree of Foreclosure, finding Blue Grass's mortgage prior, superior and paramount to any lien or interest asserted by any Defendant, including Community Bank's interest, and entered judgment in favor of Blue Grass and against Stecher. (App. 174-179).

On April 22, 2019, Community Bank timely filed its Notice of Appeal in the Iowa District Court In and For Muscatine County. (App. 180-181). On April 23, 2019, Community Bank filed its Notice of Appeal in the Iowa Supreme Court. (App. 185-186).

STATEMENT OF FACTS

Joseph Stecher is a Muscatine, Iowa, resident that obtained certain financing from Plaintiff-Appellee Blue Grass. (App. 56 at ¶ 2-4). Blue Grass's Amended Petition and exhibits thereto reveal Blue Grass extended the following financing in exchange for promissory notes from Stecher:

Loan No.	Note Date	Note Amount	Note Purpose
121654	4/29/2011	$231,562.08	Consolidation per Forbearance Agreement

123047	5/23/2014	$148,000.00	Purchase Acreage

(App. 56 at ¶ 3, 60, 62). The only mortgage held by Blue Grass related to these notes contained in the record is the Real Estate Mortgage executed on May 23, 2014 and recorded on May 27, 2014 ("Blue Grass Mortgage"). (App. 80-87). The Blue Grass Mortgage secures "Lot 1 of Stecher Farms Subdivision in Muscatine County, Iowa" ("Stecher Acreage"). The purchase of the Stecher Acreage was the stated purpose of Blue Grass's promissory note 123047, the note executed on the same day as the Blue Grass Mortgage. (App. 56 at ¶ 4, 62, 80).

The Blue Grass Mortgage expressly provides it was "prepared by BLUE GRASS…" (App. 80). The document lists Stecher as "Mortgagor" and Blue Grass as "Lender." (App. 80). The Blue Grass Mortgage, which is also referred to as the "Security Instrument," contains the following additional provisions relevant to this dispute.

> **1. CONVEYANCE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debts and Mortgagor's performance under this Security Instrument, Mortgagor does hereby grant, bargain, warrant, convey and mortgage to Lender the following described property: [the Stecher Acreage].
> …
> **NOTICE. THIS MORTGAGE SECURES CREDIT IN THE AMOUNT OF $148,000.00. LOANS AND ADVANCES UP TO THIS AMOUNT, TOGETHER WITH INTEREST, ARE SENIOR TO INDEBTEDNESS TO**

> **OTHER CREDITORS UNDER SUBSEQUENTLY RECORDED OR FILED MORTGAGES AND LIENS.**

(App. 80-81). The Blue Grass Mortgage further provides:

> **2. MAXIMUM OBLIGATION LIMIT.** The total principal amount secured by this Security Instrument at any one time and from time to time will not exceed the amount stated above. Any limitation of amount does not include interest and other fees and charges validly made pursuant to this Security Instrument. Also, this limitation does not apply to advances made under the terms of this Security Instrument to protect Lender's security and to perform any of the covenants contained in this Security Instrument.

(App. 81). The Blue Grass Mortgage defined "Secured Debts" to include:

> **A. Specific Debts.** The following debts and all extensions, renewals, refinancings, modifications and replacements. A promissory note or other agreement, dated May 23, 2014, from [Stecher] to [Blue Grass], with a loan amount of $148,000.00 and maturing on May 23, 2017.
> **B. All Debts.** All present and future debts from [Stecher] to [Blue Grass], even if this Security Instrument is not specifically referenced, or if the future debt is unrelated or of a different type than this debt …"
> **C. Sums Advanced.** All sums advanced and expenses incurred by [Blue Grass] under the terms of this Security Instrument.

(App. 81).

Subsequent to the execution of the two promissory notes and Blue Grass's Mortgage referenced above, and notwithstanding Stecher's apparent default under earlier financial obligations, as assumed by the reference to a "forbearance agreement" in Note 121654 executed in 2011, Blue Grass continued to advance over six hundred thousand dollars in additional funds

to Stecher under new notes from 2014 through 2017, as summarized below. (App. 56 at ¶ 3, 64, 66, 68, 70, 72, 74, 76, 78).

Loan No.	**Note Date**	**Note Amount**	**Note Purpose**
123138	8/5/2014	$30,000.00	Purchase Cows
123188	9/15/2014	$20,000.00	Purchase Combine
123376	1/6/2015	$60,000.00	2015 Crop Expenses
123467	3/6/2015	$75,000.00	2015 Rents
123945	2/29/2015	$125,000.00	2016 Crop Expenses
124069	5/26/2016	$30,000.00	Improvements and Tractor Repair
124307	12/14/2016	$7,000.00	Purchase Pickup
124443	3/16/2017	$125,000.00	2017 Crop Expenses

Each of these notes reference the only mortgage held by Blue Grass contained in this record, the Blue Grass Mortgage executed the same day as Note 123047 and recorded on May 27, 2014. Comparing the original note terms and maturity dates to the unpaid principal amounts alleged by Blue Grass in the underlying foreclosure proceedings, reveals Blue Grass frequently advanced additional funds to Stecher even when Stecher was in default under earlier obligations.

Loan No.	Note Date	Note Amount	Maturity Date	Unpaid Principal

121654	4/29/2011	$231,562.08	4/29/2014	$56,226.51
123047	5/23/2014	$148,000.00	5/23/2017	$139,341.51
123138	8/5/2014	$30,000.00	8/5/2017	$24,943.55
123188	9/15/2014	$20,000.00	9/15/2018	$10,786.21
123376	1/6/2015	$60,000.00	1/6/2016	$953.15
123467	3/6/2015	$75,000.00	3/6/2016	$65,000.00
123945	2/29/2016	$125,000.00	2/28/2017	$125,000.00
124069	5/26/2016	$30,000.00	5/26/2019	$18,150.47
124307	12/14/2016	$7,000.00	2/15/2017	$7,000.00
124443	3/16/2017	$125,000.00	3/2018	$109,563.92
	Totals	**$851,562.08**		**$556,965.32**

(App. 56 at ¶ 3: App. 60-78). Blue Grass contends all of these advanced funds are secured by the Blue Grass Mortgage pursuant to the future advance clause contained therein, notwithstanding the presence of the maximum obligation clause limiting priority of the secured obligation to $148,000.00 in principal, plus interest on that amount.

In 2017, Stecher sought additional financing from Community Bank. Stecher represented to Community Bank that Blue Grass's interest was capped at $140,000.00, the amount likely owed by Stecher to Blue Grass

under Note 123047 in 2017.[1] (App. 150). Based on his representations to Community Bank, it is anticipated that Stecher believed and intended that the Blue Grass Mortgage only secured Note 123047. Community Bank investigated and found that while Blue Grass had a prior recorded mortgage on the Stecher Acreage, such mortgage was expressly capped at $148,000.00. (App. 150-151). Stecher's assertion that Blue Grass's interest was capped at $140,000.00 was consistent with a pay down of any note secured by the Blue Grass Mortgage, leaving only approximately $8,000.00 in additional security for future advances by Blue Grass under the Blue Grass Mortgage.

On March 18, 2017, Community Bank took a second mortgage on the Stecher Acreage, which was duly recorded on March 21, 2017 ("Community Bank Mortgage"). (App. 131-141). As a second mortgage, Community Bank's mortgage was junior only to the maximum obligation limit contained in the prior recorded Blue Grass Mortgage in the amount of $148.000.00. The same day, Community Bank extended a loan, loan XXX180, to Stecher

[1] In Blue Grass's Amended Petition, the unpaid principal amount on the note executed at the same time as the Blue Grass Mortgage, Note 123047, is reflected as $139,341.51. It is anticipated this is the only amount and only note Stecher believed to be secured under the Blue Grass Mortgage in 2017. This issue, however, is an issue between Stecher and Blue Grass as to Blue Grass's secured interest and irrelevant to Community Bank's secured interest or claims advanced herein.

and two other individuals in the sum of $589,502.59. (App. 150-151). By its express terms, the Community Bank Mortgage secured a promissory note, dated March 18, 2017, from Stecher to Community Bank in the amount of $193,485.00 in addition to securing all obligations, debts and liabilities owed to Community Bank by Stecher or the other two individuals included on the Community Bank loan described above via a cross-collateralization provision.

As of March 20, 2019, Blue Grass claimed $592,579.24 due from Stecher under the promissory notes described above. (App. 172). Blue Grass alleged the Blue Grass Mortgage, via the future advance clause, secured all amounts due from Stecher and was senior in priority for the full amount owed as against all junior lienholders. The balance owed on Stecher's note to Community Bank as of March 13, 2019, was $469,237.23. (App 150-151). As noted above, a portion of Stecher's note with Community Bank was secured by the Community Bank Mortgage. Pursuant to the affidavit filed by Community Bank's Vice President, Senior Ag Lender and lender responsible for the Stecher note, the Stecher loans secured by Community Bank's Mortgage were "impaired" and a "significant charge-off has already been taken." (App 150-151). The parties agree there is insufficient collateral to resort to paying the loans at issue. Blue Grass

values the Stecher Acreage, which serves as collateral for both the Blue Grass Mortgage and the Community Bank Mortgage, at around $200,000.00. (App. 204 at 11.12-11.17). The dispute therefore lies in determining the parties' relative priority to the foreclosure proceeds, which are inadequate to satisfy either party's financial interest in the Stecher Acreage.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FINDING BLUE GRASS'S MORTGAGE SECURED ALL DEBTS IN EXCESS OF BLUE GRASS'S MAXIMUM OBLIGATION LIMIT

A. ERROR PRESERVATION

Community Bank preserved error in this matter by timely resisting Blue Grass's Motion for Summary Judgment, both in writing and at the hearing before the District Court. The issues of priority and maximum credit limits raised by Community Bank in its resistance to Blue Grass's Motion for Summary Judgment, together with all of the pleadings filed by the parties in connection with their respective summary judgment motions, are the same issues of interpretation and construction that Community Bank now raises throughout the argument in its appellate brief below. The District Court expressly ruled on these issues both in its summary judgment ruling and simultaneous entry of Decree of Foreclosure, finding the Blue Grass Mortgage "secures all present and future debts," including all promissory

notes and that the Blue Grass Mortgage was "prior, superior, and paramount to any lien, claim, right, title, or interest of any of the Defendants …" (App. 168-173; App. 175-176 at ¶ 13, 20). Following the District Court's grant of summary judgment in favor of Blue Grass and simultaneous entry of Decree of Foreclosure, Community Bank timely appealed further preserving error.

B. STANDARD OF REVIEW

The granting of a motion for summary judgment is reviewed for correction of errors at law. *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 542 (Iowa 2006). Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 657 (Iowa 2008) (citing IOWA R. CIV. P. 1.981(3)). A fact is considered material if it will affect the outcome of a lawsuit, given the applicable law at issue. *Parish*, 719 N.W.2d at 543. Community Bank agrees there was no issue of material fact that precluded summary judgment, but asserts the Court erred in its application of the law to the undisputed material facts.

C. ARGUMENT

The plain language of Iowa Code section 654.12A, governing priority of future advances such as those made by Blue Grass, is dispositive of the

priority dispute between Blue Grass and Community Bank presented in this appeal. The plain reading of the applicable statute is supported by fundamental principles of statutory interpretation and theories of equitable fairness. In lieu of following the plain language of Iowa Code section 654.12A, the District Court erroneously relied upon an unpublished, split decision by the Iowa Court of Appeals in *Wells Fargo Bank, N.A. v. Valley Bank and Trust*, No. 12-2031, 2013 WL 4767889 (Iowa Ct. App. Sept. 5, 2013). Neither of the issues presented in the pending case, the effect of a "maximum obligation" clause or the application of Iowa Code section 654.12A, were analyzed or apparently even considered by the majority in *Wells Fargo*, rendering the *Wells Fargo* opinion wholly irrelevant to the issues presented in the pending case. The dissenting opinion in *Wells Fargo*, however, does analyze the maximum obligation clause and the application of Iowa Code section 654.12A, providing the requisite framework to correctly determine priority between lienholders when the maximum obligation limit has been exceeded or the precise issue presented in the pending case. The analysis contained in the *Wells Fargo* dissent, authored by now Chief Judge of the Iowa Court of Appeals, Judge Vogel, is the same analysis urged herein by Community Bank and supported by Iowa's sister courts as summarized at pages 39-51, below.

1. The Plain Language of Iowa Code Section 654.12A Provides Community Bank with Priority Interest Over Any Amount Advanced by Blue Grass in Excess of Blue Grass's Maximum Obligation Limit

In what appears to be an issue of first impression for the Iowa Supreme Court and absent binding legal precedent, which as noted above does not exist in Iowa, this appeal must be resolved by plain reading of the statute governing priority of future advances contained in Iowa Code section 654.12A. This statute provides:

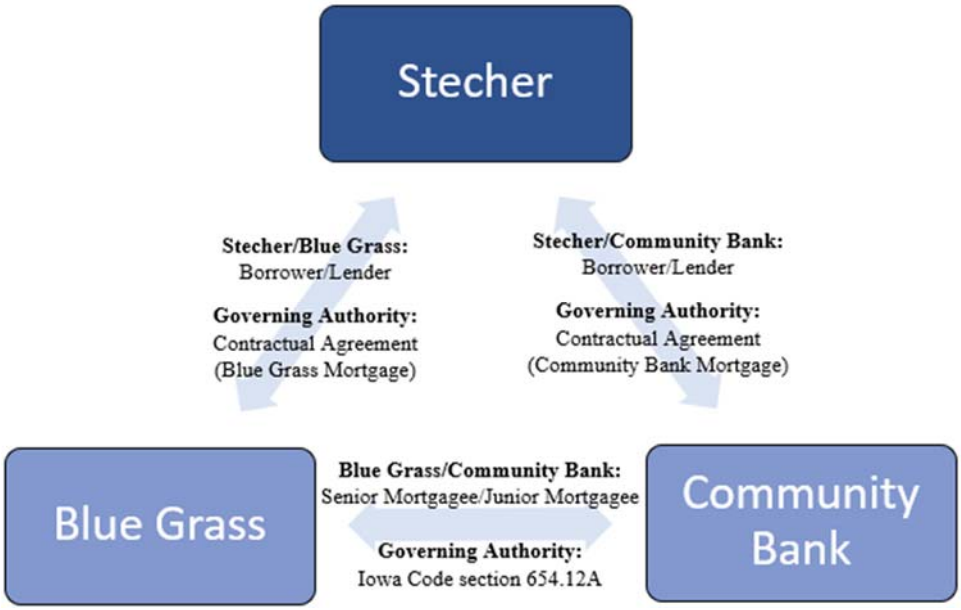
> 1. Subject to section 572.18,[2] if a prior recorded mortgage contains the notice prescribed in this section and identifies the maximum credit available to the borrower, then loans and advances made under the mortgage, up to the maximum amount of credit together with interest thereon, are senior to the indebtedness to other creditors under subsequently recorded mortgages … The notice prescribed by this section for the prior recorded mortgage is as follows:
>
> NOTICE: This mortgage secures credit in the amount of ..... Loans and advances up to this amount, together with interest, are senior to indebtedness to other creditors under subsequently recorded or filed mortgages and liens.

IOWA CODE § 654.12A (emphasis supplied). The express terms of the statute award priority to a senior mortgagee for "loans and advances made under a mortgage, up to the maximum amount of credit" contained within that mortgage. In the pending case, the maximum amount of credit provided by

[2] Section 572.18 governs priority for certain types of liens, none of which are involved in the pending case.

the Blue Grass Mortgage was $148,000.00. Blue Grass nonetheless sought priority over Community Bank's recorded interest in excess of Blue Grass's maximum amount of credit.

Blue Grass thus seeks to have its cake and eat it too by requesting priority on *all* future advances (loans), in *any amount*, pursuant to the terms of its contractual agreement with Stecher and in complete disregard of the clear priority language of Iowa Code section 654.12A. The District Court, awarding priority to Blue Grass pursuant to the terms of the Blue Grass Mortgage, similarly conflated the tripartite relationship between the parties and authority governing each relationship. The result subjects Community Bank to the terms of an agreement it is not a party to and disregards the statute which governs the relationship between Community Bank and Blue Grass. It is helpful to set forth each interested party, as well as the authority governing the terms of their respective relationships, as depicted below.



While the Blue Grass Mortgage incorporates the prescribed notice set forth in Iowa Code section 654.12A to put future lienholders on notice of the applicable terms of the Blue Grass/Stecher relationship and Blue Grass's secured interest, the relationship between Blue Grass and Stecher is contractual. Specifically, the Blue Grass/Stecher relationship is governed by the Blue Grass Mortgage and notes secured thereby, in addition to any other written agreement that may exist between them. Community Bank had a similar, separate contractual relationship with Stecher via the Community Bank Mortgage and notes secured thereby. The Community Bank Mortgage and other written agreements govern the terms of the relationship between Community Bank and Stecher. Nothing in 654.12A limits the contractual rights between Blue Grass and Stecher or Community Bank and Stecher, as both lenders are able to enforce any and all contractual terms against

Stecher, including full recovery of agreed upon amounts loaned to Stecher via an in personam judgment.

However, Blue Grass and Community Bank had no similar contractual relationship nor any agreement regarding priority. Just as Blue Grass was not a party to the Community Bank Mortgage and cannot be bound by the terms therein, neither was Community Bank a party to the Blue Grass Mortgage or subject to the terms agreed upon between Blue Grass and Stecher. Default priority, described in Iowa Code section 654.12A, governs the relationship between Blue Grass and Community Bank. Blue Grass could not, by contract with Stecher, alter the statutorily governed priority relationship it had with Community Bank. Nor could Blue Grass, by contract with Stecher, limit the rights or priority statutorily afforded to Community Bank pursuant to Iowa Code section 654.12A. The Blue Grass/Stecher future advances contract clause, would, if enforced *as between Blue Grass and Community Bank*, contravene section 654.12A, and be unenforceable, against Community Bank to the extent doing so would grant priority to Blue Grass beyond the maximum credit specified in the Blue Grass Mortgage. *See Mincks Agri Ctr., Inc. v. Bell Farms, Inc.*, 611 N.W.2d 270, 273 (Iowa 2000) ("It is a general rule that an agreement which violates a provision of a constitution or of a constitutional statute *or which cannot be performed*

without violation of such a provision is illegal and void.") (emphasis original, quoting *Keith Furnace Co. v. Mac Vicar*, 280 N.W. 496, 497 (Iowa 1938)); 17A Am. Jur. 2d Contracts § 223 (May 2019 Update) ("a contract which violates or contravenes a constitution, statute, or regulation may be illegal, invalid, unenforceable, or void."). Both the District Court and Blue Grass conflated the contractual obligations between the parties with the statutory priority protections to improperly elevate the terms of the Blue Grass Mortgage in violation of priority statutorily afforded to Community Bank.

Community Bank did just what the applicable statute permits and is therefore entitled to the priority afforded by Iowa Code section 654.12A. Community Bank first reviewed the senior mortgagee's maximum obligation limit, determined there was sufficient equity in the encumbered asset above the senior mortgagee's maximum limit to support a second mortgage and then took a second mortgage intending to be given priority on all secured amounts in excess of the senior mortgagee's maximum limit. But for Blue Grass's recorded maximum obligation limit and the priority intended to be afforded by statute only up to the maximum obligation amount, Community Bank would have never extended additional financing

to Stecher on the already encumbered Stecher Acreage in exchange for a second mortgage. (App. 150-151).

Community Bank had no knowledge or notice of the significant advancements/loans made by Blue Grass, which far exceeded not only the maximum obligation limit to be awarded priority, but similarly far exceeded the loan to value ratio of the encumbered asset. These consequences must be realized by Blue Grass, the party who was fully aware its loans far exceeded both the maximum obligation limit and the property value, not Community Bank. Community Bank, without notice of the fact that Blue Grass had exceeded its own maximum obligation limit and without notice of the additional funds advanced to Stecher, was entitled to rely on the maximum obligation limit disclosed and recorded by Blue Grass as intended by a plain reading of Iowa Code section 654.12A.

2. Finding Blue Grass Has Priority Over Community Bank on All Amounts Advanced by Blue Grass in Excess of Blue Grass's Maximum Obligation Limit Violates Fundamental Principles of Statutory Construction Requiring All Parts of a Statute Be Given Effect

While Iowa Code section 654.12A is clear and unambiguous, therefore requiring no further statutory construction regarding the meaning and intent of the statute, fundamental rules of statutory construction further support the plain reading of the statute. Rules of statutory construction

provide "a statute will not be construed to make any part of it superfluous unless no other construction is reasonably possible." *Miller v. Westfield Ins. Co.*, 606 N.W.2d 301, 306 (Iowa 2000). In addition to avoiding statutory construction that would make any part of a statute superfluous, Iowa Courts "presume the legislature included every part of a statute for a purpose, and intended each part to be given effect." *Id*. at *305*. The Court first looks "to the plain language of the statute to establish this intent. In doing so, we give a plain, ordinary meaning to words, phrases, and punctuation." *TLC Home Health Care, L.L.C. v. Iowa Dept. of Human Services*, 638 N.W.2d 708, 713 (Iowa 2002). General principles of statutory interpretation seek to give meaning to rules and statutes that are reasonable, logical and avoid results which are strained, absurd or extreme. *See State v. Berry*, 247 N.W.2d 263, 265 (Iowa 1976).

In this case, statutory construction requires we presume <u>every part</u> of Iowa Code section 654.12A has a purpose and that the legislature intended each part of the statute to be given effect. *See Miller*, 606 N.W.2d at *305. Accordingly, the clause "up to the maximum amount," which is read to modify the loans and advancements that will be senior to indebtedness of other secured creditors, must be found to have meaning and purpose. The plain reading of this statute requires that loans and advances in excess of the

maximum contained in a prior recorded mortgage will not be senior to the indebtedness of other creditors.

Finding Blue Grass had senior priority on *all loans and advances*, including those in excess of the maximum obligation contained *in the recorded Blue Grass Mortgage*, the District Court rendered the "up to the maximum amount" clause meaningless. If this was the effect envisioned by the legislature, the statute would provide "all loans and advances made under the mortgage are senior to the indebtedness to other creditors," without the necessity of the up to the maximum language the legislature elected to include in Iowa Code section 654.12A. As written, and guided by statutory construction principles, section 654.12A provides Blue Grass priority of its loans and advances *only up to the maximum amount* recorded in its mortgage. Applied to the facts of this case, only Blue Grass's loans and advances up to its $148,000.00 recorded maximum obligation, plus interest, are senior to Community Bank's subsequently recorded mortgage.

This result makes sense in today's competitive financial environment where customers frequently obtain financing on the same asset from various lenders. Iowa Code section 654.12A is meant to ensure orderly enforcement of liens and protection of both senior *and* junior lienholders. Prior to the enactment of Section 654.12A, the Iowa Supreme Court in dicta recognized

that "[a]dvances to a borrower by a lender holding a senior mortgage after that lender has actual knowledge of the existence of a junior mortgage, are junior to the intervening rights of the junior mortgagee unless the senior mortgagee's mortgage makes such advances obligatory." *Nat'l Bank of Waterloo v. Moeller*, 434 N.W.2d 887, 890 (Iowa 1989) (citing *Freese Leasing, Inc. v. Union Trust & Savings Bank*, 253 N.W.2d 921, 925 (Iowa 1977) and *Corn Belt Trust & Savings Bank v. May*, 196 N.W. 735, 738–40 (Iowa 1924)). This scheme put unnecessary risk on both senior and junior lenders, with senior lenders risking termination of priority on a future advance (including future advances necessary to protect its investment) by a junior lienholder. Junior lenders were similarly subject to risk in attempting to determine the extent of advances made by senior lienholders and whether such advances were "obligatory."

Iowa Code section 654.12A, enacted in 1984, prescribed language giving notice of a future advances provision. *Moeller*, 434 N.W.2d at 890-91 (Iowa 1989) (recognizing the statute in a case involving a transaction that pre-dated the enactment of section 654.12A). The enactment made it easier for senior mortgagors to secure future advances and avoid termination of priority on future advances simply by disclosing a maximum obligation limit in an amount sufficient to secure future advances. The statute further

minimized risk of the unknown for junior lienholders by clearly establishing the priority of a senior mortgagee "up to the maximum amount" disclosed in the mortgage, affording junior lienholders the ability to make loans with a clear understanding of the exact amount of a senior lienholder's interest.

Resolution of this issue in accordance with the plain meaning of Iowa Code section 654.12A, and as supported by fundamental principles of statutory construction, is vital for continued orderly lending by financial institutions and a debtor's ability to secure second mortgages or other additional funding on real estate already encumbered by a senior lender. The resolution advanced by Blue Grass and adopted by the District Court introduces uncertainty and unnecessary risk for junior lienholders in a way that would obviously make banks and other creditors reluctant to lend additional sums in the presence of a prior recorded mortgage with a future advance clause. Iowa Code section 654.12A removes this uncertainty and unnecessary risk by providing a clear, express maximum obligation limit on the amount that will be secured by a senior lender's mortgage. This maximum obligation limit, which is determined by the senior lender and recorded in that lender's mortgage, must be enforced as written. To allow senior lenders to have secured interests in any amount, including amounts in excess of that lender's maximum obligation limit, prevents junior

lienholders from being able to rely on the purported maximum obligation limit and prohibits junior lienholders from accurately accessing whether the encumbered real estate can secure additional financing as intended by Iowa Code section 654.12A.

3. Iowa Precedent Disfavoring Future Advance Clauses and Requiring Future Advance Clauses Be Closely Scrutinized Further Supports Limiting Blue Grass's Priority on Future Advances

The above analysis requiring the priority afforded to Blue Grass's Mortgage be capped at its maximum obligation limit, $148,000.00, based on a plain reading of Iowa Code section 654.12A and fundamental principles of statutory construction, is further supported by Iowa authority governing dragnet clauses generally. "Dragnet clauses," also known as "future advance clauses," work to secure all existing and future indebtedness from a borrower to a lender. These clauses "are not favored in equity" and "should be carefully scrutinized and strictly construed." *Freese Leasing, Inc. v. Union Trust and Sav. Bank, Stanwood*, 253 N.W.2d 921, 925 (Iowa 1977); *see also Wells Fargo*, 2013 WL 4767889 at *4 (Vogel, J., dissenting). The Iowa Supreme Court has "said many times that such provisions are not favored and should be closely scrutinized, but [such a provision] will be enforced to the extent it appears to have been within the intent of the parties." *Id.* (*quoting Brose v. International Milling Co.*, 129 N.W.2d 672,

675 (Iowa 1964)). However, as a contract term agreed upon as between Blue Grass and Stecher, not Blue Grass and Community Bank, the dragnet clause cannot be used to overcome the priority rights afforded to Community Bank pursuant to Iowa Code section 654.12A.

4. The District Court Erroneously Relied on *Wells Fargo*, an Unpublished Court of Appeals Opinion Providing No Analysis or Guidance Concerning Maximum Obligation Clauses or Iowa Code Section 654.12A

In lieu of entering a ruling limiting Blue Grass's priority to its recorded $148,000 maximum obligation limit, as required by Iowa Code section 654.12A, the District Court erroneously relied on an inapposite opinion expressed in an unpublished Iowa Court of Appeals split decision, *Wells Fargo Bank, N.A. v. Valley Bank and Trust*, No. 12-2031, 2013 WL 4767889 (Iowa Ct. App. Sept. 5, 2013). The District Court's reliance on *Wells Fargo* was in error because the issues decided by the majority in the split *Wells Fargo* decision do not even touch on the issues presented in the pending case. Furthermore, as an unpublished opinion, the case does not constitute binding authority for the District Court or this appellate court.

While the District Court noted during the summary judgment hearing it wasn't sure whether *Wells Fargo* was "rightly decided or not," the issue is not just the correctness of the unpublished case but whether the narrowly framed majority decision in *Wells Fargo* has any application to the facts of

this dispute. *Wells Fargo* concerned a singular issue identified in the first sentence of the majority's discussion section which provides:

> The district court examined the *future advances clause* and determined it applies "only to those loans and advances which identify the security as the real estate which is the subject of this action." [The appellant] argues *this ruling* is in error and *the mortgage applies to any existing debt between the [borrower] and [the appellant]*.

Wells Fargo, 2013 WL 4767889 at *1 (Iowa Ct. App. Sept. 5, 2013) (emphasis supplied). In fact, at no time in the *Wells Fargo* majority opinion does the Court even mention whether the mortgage at issue contained a "maximum obligation limit" clause, the application of Iowa Code section 654.12A, or the effect of the future advance clause relative between lenders relative to the maximum obligation clause or applicable statutory authority, thereby negating any precedential value the case may have offered. Accordingly, *Wells Fargo* is of no value when resolving the pending dispute concerning the effect of a maximum obligation clause and application of Iowa Code section 654.12A. The District Court itself acknowledged the Court of Appeals failed to explain why the amount listed in the lender's notice clause did not constitute the maximum to be secured by the mortgage, the fighting issue in the case at bar.

In *Wells Fargo*, a priority dispute arose between lienholders regarding their respective secured interests in foreclosure proceeds. *Wells Fargo*, 2013

WL 4767889 at *1 (Iowa Ct. App. Sept. 5, 2013). The district court established the priority of lienholders with plaintiff *Wells Fargo* as the most senior lien holder, followed by defendant Valley Bank and Trust ("Valley") and then defendant Primebank. *Id*. When a surplus remained after satisfaction of Wells Fargo's senior lien, Valley sought to condemn the remaining funds to recover on two notes it had under its mortgage. *Id*. Primebank resisted the application, arguing Valley's "mortgage did not serve as security on the second note and Valley's superior security interest was limited to the outstanding balance on the first note." *Id*. Notwithstanding Valley's argument that the mortgage applied to all existing debt between Valley and the borrower, the district court examined the future advance clause contained in Valley's mortgage and determined it only applied to loans and advances identifying the real estate which was the subject of the foreclosure proceeding as security. *Id*. Valley appealed, asserting the District Court's ruling on the *extent and scope of the future advances clause* was in error, thereby very narrowly framing appeal issues. *Id*.

In a split decision, the majority in *Wells Fargo* found the parties to the Valley open-ended mortgage intended for the mortgage to cover two loans in excess of $150,000 via a *future advance clause*. *Id*. at *2. The majority

thereby determined *the extent and scope of the future advance clause as between the parties to the mortgage – Valley and its borrower* but offered no analysis concerning the effect a *maximum obligation clause* would have as between lenders. The words "maximum obligation" does not even appear in the majority's opinion and Iowa Code section 654.12A is only referenced in passing. It is therefore unknown whether the issues presented in the pending appeal were even considered by the majority in *Wells Fargo* given the narrow issue presented and decided on appeal. Thus, under no circumstances was the District Court in this action entitled to rely on an inapposite case concerning the scope of a future advance clause, to resolve issues concerning a maximum obligation clause.

Nonetheless, the relationship between a future advance clause and a maximum obligation clause was resolved in the *Wells Fargo* dissent authored by Judge Vogel. *Id*. at *3-4. In her dissent, the now Chief Judge of the Court of Appeals found the district court's priority determination, limiting Valley's priority to the maximum amount of credit plus interest and costs, was "consistent with the clear language on the front page of the mortgage, which states: 'Notice: This mortgage secures credit in the amount of $46,500. Loans and advances up to this amount, together with interest, are senior to indebtedness to other creditors …'" *Id*. at *3. After quoting the

maximum obligation limit clause contained in Valley's mortgage, which provided the total principal amount secured by the mortgage "at any one time shall not exceed the amount stated above…," Judge Vogel notes that the majority's reliance on later language in the mortgage concerning future advancements "obscured" the maximum obligation clause. *Id*. at *3-4. Judge Vogel concludes with the following analysis:

> As the majority notes, both the mortgage and second promissory note were executed the same day. The full amount of note number 5-950, $46,500, was secured by the mortgage, but no more could be secured, due to the document's "maximum obligation limit" contained in paragraph three, clearly stating the indebtedness "shall not exceed the amount stated above," that is, $46,500. That left the second note, 5-494, unsecured by the mortgage… [separate security for 5-494] was necessary because the mortgage instrument clearly spelled out the maximum amount it could secure. Additional security was required for the additional funds loaned by Valley.
>
> Therefore, regardless of the expansive future advances clause in paragraph four of the mortgage instrument, no amount of the second promissory note could be secured by the mortgage at the time it was executed.

Id. at *4.

When applied to the facts of this case, Judge Vogel's analysis holds true here, especially when the Blue Grass promissory notes at issue were

executed over the course of nearly six years.[3] The Blue Grass Mortgage, securing $148,000, and the note for loan 123047 in the amount of $148,000, were executed the same day on May 23, 2014. At the time of execution, "no more than" the note for 123047 "could be secured, due to the document's maximum obligation limit." That left an earlier note executed in 2011, "unsecured by the mortgage." Similarly, unless and until the borrower paid down the principal amounts owed under note 123047 and secured by the Blue Grass Mortgage, additional notes would be unsecured. The Mortgage, by its terms, did not secure antecedent debt. Separate or additional security was therefore necessary for both the older 2011 debt and all additional funds loaned by Blue Grass after May 23, 2017, "because the mortgage instrument clearly spelled out the maximum amount it could secure." The parties in

[3] If *Wells Fargo* is found to be applicable, the facts are distinguishable from the pending matter given the span of time between the promissory notes. The two notes executed in *Wells Fargo* were *executed on the same day* and governed by a contemporaneously executed mortgage. Here, the Blue Grass Mortgage was executed on May 23, 2014 along with one note, note 123047, in the amount of $148,000, but seeks to secure promissory notes executed over the span of six years. There is no evidence aside from the buried, contradictory future advance clause that the parties intended to bootstrap default debt from 2011 plus future debts, debts that were likely not even contemplated at the time the Blue Grass Mortgage was executed. *See Wells Fargo*, 2013 WL 4767889 at *2 (noting Valley's future advance clause, contained in a mortgage titled "open-ended real estate mortgage" to alert the reader to the presence of a future advance clause, was "broad in scope, and not buried in the document in a way that might be misleading or allow for surprise.").

Wells Fargo never sought further review and the Iowa Supreme Court was never afforded the opportunity to weigh in on the proper analysis.

In 2018, an Iowa bankruptcy court considered *Wells Fargo* in relation to *claims made by debtors* concerning the validity of future advance clauses contained in two mortgages executed by the borrowers in favor of their bank. *In re McMahon*, No. BR 18-00443, 2018 WL 3014067 (Bankr. N.D. Iowa June 8, 2018). In *McMahon*, the debtors argued that because they did not know what the future advance clause meant, they had insufficient notice of the meaning and effect of the future advance clause and because the "Maximum Obligation Limit" clause limited the amount of debt their homestead could secure, the future advance clauses did not apply. *Id*. at *3. The bank on the other hand "argued the 'Maximum Obligation Limit' *applies only against lienholders junior to the Bank* and … the *function of this 'maximum obligation' clause is to limit the amount of secure that will be senior*, not to limit the total collateral amount." *Id*. (emphasis supplied).

After summarizing how future advance clauses are disfavored in Iowa and analyzing both the majority and "thought-provoking" dissenting opinion in *Wells Fargo*, the bankruptcy court through the Honorable Judge Thad Collins agreed with the bank's analysis regarding the import of the maximum obligation limit. "The Court thus must agree with the bank that,

under Iowa law, the 'Maximum Obligation Limit' does not limit the reach of a future advance clause as Debtors suggest. Instead, *such clause appears to limit the amount of debt that will be senior to another security interest*, not the total amount of collateral available to the Bank in a situation like this." *Id.* at *4 (emphasis supplied). Again, there can be no other result under the unambiguous language contained in Iowa Code section 654.12A than to limit the amount of debt advanced by a senior lender pursuant to that lender's maximum obligation limit.

Further, while the District Court expressed that the correctness of a Court of Appeals ruling was not within its purview, neither the District Court nor any appellate court is bound to follow the unpublished holdings set forth by the majority in the unpublished *Wells Fargo* opinion. In Iowa, "[u]npublished opinions or decisions shall not constitute controlling legal authority." IOWA R. CIV. P. 6.904(2)(c). The Iowa Court of Appeals has relied on this procedural rule when declining to follow their own unpublished opinions on similar issues and justify otherwise incompatible rulings. *Compare Lanczos v. Walker*, No. 11-2101, 2012 WL 5355959 at *2 (Iowa Ct. App. Oct. 31, 2012) (finding although standard purchase agreement language at issue did not expressly reference chapter 558A, the language was sufficient to allow the Court to consider the breach of contract

and chapter 558A claims together), *with Sokol v. Morrissey*, No. 16-0801, 2017 WL 4838821 at *9, fn. 17 (Iowa Ct. App. Oct. 25, 2017) (confronted with purchase agreement language identical to that presented in *Lanczos*, the Court of Appeals found the language was insufficient to allow the Court to consider breach of contract claims, noting "unpublished decisions are not binding precedent."). Thus, not only can a different result be reached in this case than the result reached in *Wells Fargo*, especially based on inapposite appeal issues, identical contractual language can result in differing legal analysis.

Even if *Wells Fargo* was binding legal authority, which as an unpublished opinion it is not, the Iowa Supreme Court has recognized "stare decisis does not prevent the court from reconsidering, repairing, correcting or abandoning past judicial announcements when the error is manifest, including error in the interpretation of statutory enactments …" *Miller v. Westfield Ins. Co.*, 606 N.W.2d 301, 306 (Iowa 2000) (citations omitted) (overruling *Lindahl v. Howe*, 345 N.W.2d 548 (Iowa 1984), a case "built on a false premise" and "arrived at an erroneous conclusion."). Stare decisis "should not be invoked to maintain a clearly erroneous result." *Id.* In *Miller*, the Supreme Court acknowledged its opinion in a prior case must be overturned given the Court's failure "to apply a fundamental rule of

statutory construction: a statute will not be construed to make any part of it superfluous unless no other construction is reasonably possible." *Miller, 606 N.W.2d* at 305 (internal quotations and alterations omitted). Here, stare decisis is not an issue and no case is required to be overturned because *Wells Fargo* is not a controlling authority.

Community Bank requests this Court adopt Judge Vogel's "thought-provoking," well-reasoned analysis, consistent with Judge Collin's agreement as to the effect of a maximum obligation limit, both of which are set forth above to comply with contract construction principals and the plain meaning of Iowa Code section 654.12A. Other courts around the country have weighed in on the proper analysis and adopted approaches similar to that advanced by Judge Vogel in *Wells Fargo* and by Community Bank herein.

5. Iowa's Sister Courts Have Resolved Maximum Obligation Clauses and Priority Disputes in Favor of Junior Lienholders

The Utah Supreme Court, without relying on statutory authority, has broadly held a senior mortgagee is "precluding from claiming a priority against the subsequent mortgagees, in any sum greater than the express limitation declared in its mortgage of record." *Bank of Ephraim v. Davis*, 559 P.2d 538, 540 (Utah 1977). In *Ephraim*, the Bank of Ephraim ("bank")

was first in time to record its mortgages against the borrower which contained a dragnet clause that provided the mortgage broadly "secure[d] payment of any and all extensions or renewals … and any other indebtedness at any time arising from the mortgagor to the mortgagee…" *Id*. at 539. The bank's first mortgage, securing a café property, had a "face amount of $2,400" but had contained an additional provision which added "[t]his mortgage covers all additional advances on this loan, the total principal not to exceed $3,000." *Id*. The bank's second mortgage, covering a trailer court property, had a "face amount of $4,000" with an additional provision permitting additional advances "in excess of $6,000." *Id*. The mortgagor subsequently executed a second mortgage with Babylon Corporation and a third mortgage with Prudential before executing three additional notes to the bank. *Id*. at 539-40.

Assigning priorities on the café property during a foreclosure proceeding, the bank's "*first position* was limited to $3,000," or the express limitations of amount set forth in the bank's mortgage securing the café property. *Id*. at 540 (emphasis supplied). Babylon Corporation was given second priority, Prudential was assigned third priority, and the balance of the remaining indebtedness owed to the bank was given fourth priority. *Id*. The bank appealed the trial court's priority determination, asserting the dragnet

clause in its mortgages secured all advances it made and alleging the bank "should have priority over the intervening liens." *Id*. Noting uncertainty regarding the mortgage should be constructed against its framer, the Utah Supreme Court noted "[o]ne will not be permitted to so fashion a contract to mislead another, by setting forth clearly an apparent representation, induce a contrary limitation or expansion elsewhere in the instrument." *Id*. Accordingly, the court held the bank could not claim priority against subsequent mortgagees Babylon Corporation or Prudential in an amount "greater than the express limitation declared in its mortgage of record." *Id*.

The Supreme Court of New Mexico has addressed the issue of the limits on a dragnet or future advance clause and decided "[b]ecause potential lenders rely upon the recorded mortgages to determine whether to make other loans there must be certainty as to the extent to which a mortgage encumbers a property." *New Mexico Bank & Tr. Co. v. Lucas Bros.*, 582 P.2d 379, 380 (N.M. 1978). This rationale is supported by New Mexico's priority statute governing future advances which requires for a mortgage upon real property to secure future advances, "the lien of such mortgage *shall not exceed at any one time the maximum amount stated in the mortgage*." N.M. STAT. ANN. § 48–7–9 (1978) (emphasis added). Although the statute was not controlling when *Lucas Bros.* was decided, the New

Mexico Supreme Court was persuaded by the rationale and logic of the statute. *Lucas Bros.*, 582 P.2d at 381 (N.M. 1978). While a maximum obligation clause was not referenced, the "face amount" of the senior lienholder's mortgage was $20,000 but contained a dragnet clause. *Id*. at 382. The New Mexico Supreme Court held the senior lienholder had "first priority in the real estate in the amount of $20,000," plus costs. *Id*. After awarding second priority to the junior lienholder, the court found the senior lienholder was entitled to a "third priority lien on the real estate" on the remaining balance owed under the mortgage in excess of its face value. *Id*.

Similar to the priority afforded by Iowa Code section 654.12A and other statutes, Kansas has enacted statutory authority governing the priority of future advances made by a senior lienholder. The Kansas statute concerning security and priority of future advances provides:

> *Every mortgage or other instrument securing a loan upon real estate* and constituting a lien or the full equivalent thereof upon the real estate securing such loan, according to any lawful or well recognized practice, which is best suited to the transaction, *may secure future advances and the lien of such mortgage shall attach upon its execution and have priority from time of recording as to all advances made thereunder* until such mortgage is released of record: *Provided*, That *the lien of such mortgage shall not exceed at any one time the maximum amount stated in the mortgage.*

KAN. STAT. ANN. § 58-2336 (2019) (emphasis supplied). Citing to this statute, the Kansas Supreme Court resolved a priority dispute as between a

first mortgage (together with future advances made under that mortgage) and a second mortgage. *First Nat. Bank in Wichita v. Fink*, 736 P.2d 909, 913 (Kan. 1987). The Kansas Supreme Court found that while advances by a bank pursuant to a future advance clause contained in its mortgage had priority over a subsequently recorded mortgage of a junior lienholder, "[t]he priority of the Bank's lien is limited, however, to the principal" recited in the mortgage and interest thereon. *Id*. The Kansas Court of Appeals in a published decision concerning mortgage registration fees similarly articulated that under this statute "priority of those future advances under an open-ended advance clause is limited to the maximum amount of money stated in the mortgage." *Halliburton Co. v. Bd. of Cty. Comm'rs for Jackson Cty.*, 755 P.2d 1344, 1346, 1351 (Kan. Ct. App. 1988).

Missouri courts are also faced with statutory language governing future advances similar to that in Iowa Code section 654.12A, providing:

> 2. Security instruments may secure future advances or other future obligations of a borrower to a lender, whether the advances or obligations are optional or obligatory with the lender... The fact that a security instrument secures future advances or future obligations shall be clearly stated within the body of the security instrument, or within the body of any amendment if such amendment is made to cause the original instrument to become a security instrument and secure future advances or future obligations as provided in this section, and *the security instrument shall state the face amount*. The total amount of obligations that may be secured by such a security instrument may decrease or increase from time to time, but

> except as to advances made pursuant to subsection 3 of this section,[4] *the total principal amount of the obligations secured at any given time may not exceed the face amount stated in the security instrument.*

MO. ANN. STAT. § 443.055 (2019) (emphasis supplied). In a published opinion from the Missouri Court of Appeals, the court confirmed "Section 443.005.2 makes clear that a promissory note with a set face amount may also secure future advances or obligations that the lender could loan to the debtor, *up to the face amount of the promissory note.*" *Manns v. SB RE Properties, LLC*, 567 S.W.3d 206, 208 (Mo. Ct. App. 2018). In analyzing the maximum lien provision at issue in that case, which provided "[t]he total principal amount of obligations at any one time which is secured by this Deed of Trust, in addition to any interest and any amounts advanced by Lender for the protection of the security interests granted herein, is $237,000.00," the court found the provision limited "the secured amount of principal to $237,000…" *Id*. at 209 (emphasis in original omitted).

In a similar dispute between two lienholders, the Missouri Court of Appeals again relied upon section 443.055.2 as well as section 443.055.6, which provides future advances relate back to the date the original

[4] Subsection 3 of this section provides that future advances made by a lender "for the reasonable protection of the lender's security interest" shall have priority even if the future advances exceed the face amount stated in the security agreement. Subsection 3 provides these advances include taxes, insurance premiums, reasonable repairs and maintenance, etc.

instrument is filed, to resolve the dispute. *S. Side Nat. Bank v. Commerce Bank of St. Louis, N.A.*, 897 S.W.2d 657, 659 (Mo. Ct. App. 1995). The court concluded that "[t]hese two provisions make it clear that all advances made pursuant to a deed with a future advance clause relate back to the date of the deed for creditor priority purposes, so long as the balance owing on any given day does not exceed the face amount of the mortgage." *Id*. (citing Comment, *Future Advances in Missouri,* 49 Mo. L. Rev 103, 115 n. 83 (1984)). The mortgage at issue had a "face value" of 50,000, expressly providing the "total amount of the obligations which may be secured hereby is $50,000…" *Id*. at 658. The court concluded "all advances or obligations, not exceeding $50,000 at any given time," had priority over a subsequent lien held by a junior creditor. *Id*. at 659-60.

The law review article cited by the Missouri Court of Appeals, *Future Advances in Missouri,* summarizes that mortgages under section 443.055 secure advances "so long as the total indebtedness after the advance does not exceed the face amount of the mortgage or any applicable amendment" and further noting "[a]dvances exceeding the amount stated in the agreement are unsecured." *Future Advances in Missouri,* 49 Mo. L. Rev 103, 114-5 n. 83 (1984). Similarly here, Community Bank is not arguing Blue Grass's advancements in excess of the maximum obligation be extinguished, but

simply that the advancements are unsecured by the Blue Grass Mortgage as against Community Bank and junior to Community Bank's Mortgage pursuant to Iowa Code section 654.12A.

Consistent with the plain meaning of Iowa Code section 654.12A, principals of statutory construction, the legal framework advanced by Judge Vogel and adopted by Iowa's sister states, Community Bank respectfully requests this Court reverse the District Court's grant of Blue Grass's Motion for Summary Judgment and entry of Decree of Foreclosure in favor of Blue Grass and find Community Bank's valid, recorded mortgage has priority over all sums advanced by Blue Grass in excess of its mortgage obligation limit for the reasons set forth above.

II. THE DISTRICT COURT ERRED IN FINDING THE APPLICABLE DEFAULT RATE, IF THE JUDGMENT WAS DISTURBED ON APPEAL, WOULD BE SET AT 18%

A. ERROR PRESERVATION

Community Bank preserved error in this matter by resisting Blue Grass's request for 18% interest the first time the issue was raised – at the hearing on Blue Grass's Motion for Summary Judgment. Community Bank further preserved error on this issue by timely appealing the ruling on summary judgment in favor of Blue Grass wherein the District Court made findings concerning the applicable rate of default interest. (App. 168-173).

Given the District Court's summary judgment ruling, the interest issue does not become ripe unless and until this Court finds the District Court erred regarding the parties' respective priority interests. If this Court limits Blue Grass's priority to $148,000.00 for the reasons set forth above, this Court must also address the applicable default interest rate Blue Grass is entitled to recover from the Stecher Acreage foreclosure proceeds.

B. STANDARD OF REVIEW

The standard of review for this issue, based on the granting of a motion for summary judgment and contract interpretation, is reviewed for correction of errors at law as further set forth in section I(B), above. The District Court's finding of facts are binding only if supported by substantial evidence and the appellate court is not bound by the District Court's application of a legal principle or conclusions of law. *Fausel v. JRJ Enterprises, Inc.*, 603 N.W.2d 612, 617 (Iowa 1999).

C. ARGUMENT

Although the District Court declined to apply default interest, to the extent this Court rules in favor of Community Bank concerning the priority and maximum obligation issues set forth above, Community Bank requests this Court also reduce the default interest rate set by the District Court. In a

footnote to its Order Granting Plaintiff's Motion for Summary Judgment, the District Court noted:

> The Court finds that Blue Grass was authorized to charge a default rate of interest of 18% under the Notes. However, the Court has declined to apply the default rate of interest. The Court finds that if the Notice provision in Blue Grass's Mortgage limits the amount of its priority to $148,000, Blue Grass would be entitled to default interest at 18% in the amount of $43,134.90 through March 20, 2019, with interest accruing thereon at a rate of $72.99 per day after March 20, 2019. Because this Court finds Blue Grass's Mortgage has priority for all amounts advanced to Stecher prior to the Community Bank mortgage, this amount is not used in the final Decree of Foreclosure.

(App. 169 at fn 1).

At the summary judgment hearing, counsel for Blue Grass acknowledged the notes at issue did not specify a default rate. Concerning interest, the promissory notes at issue provide:

> **3. INTEREST.** Interest will accrue on the unpaid Principal balance of this Note at a rate of [] percent (Interest Rate).
>
> > **A. Interest After Default.** If you declare a default under the terms of the Loan, including for failure to pay in full at maturity, you may increase the Interest Rate otherwise payable as described in this section. In such event, interest will accrue at the unpaid principal balance of this Note at the Interest Rate in effect from time to time under the terms of this Loan, until paid in full.
> > **B. Maximum Interest Amount.** Any amount assessed or collected as interest under the terms of this Note will be limited to the maximum lawful amount of interest allowed by state or federal law, whichever is greater. Amounts collected in excess of the maximum lawful

> amount will be applied first to the Principal balance. Any remainder will be refunded to me.
> **C. Statutory Authority.** The amount assessed or collected on this Note is authorized by the Iowa usury laws under Iowa Code §§ 537.2601 and 535.2 et. seq.
> **D. Accrual.** Interest accrues using an Actual/365 days counting method.

(App. 60-79).

Counsel for Blue Grass conceded that if the Court found the notes beyond the $148,000.00 maximum obligation limit were awarded priority over Community Bank's mortgage, it would not make "any practical difference what interest rate would apply." (App. 215-216 at 22.25-23.11). Notwithstanding, counsel for Blue Grass argued the usury limit was likely unlimited but that the bank applied a rate of 18% default interest. Iowa Code section 535.2, referenced in the Notes sought to be foreclosed, provides a default rate of interest for money due by express contract at "five cents on the hundred by the year in the following cases, unless the parties shall agree in writing for the payment of an interest rate not exceeding the rate permitted by subsection 3." IOWA CODE § 535.2(1) (emphasis supplied).

The exception provided by subsection (2) provides that a "person borrowing money for the purpose of acquiring real property," "may agree in writing to pay any rate of interest." Iowa Code § 535.2(2) (emphasis added). Where in any note or mortgage executed by Stecher, which constitute the

writing required by section 535.2, does Stecher agree to 18% default interest? Here, the only interest agreed to in writing is the non-default interest rates contained within the promissory notes. These rates vary between 4.75% and 6.0% between all the applicable promissory notes and is far less than the default interest rate Blue Grass alleges it is entitled to. Absent an agreement in writing, Blue Grass is only entitled to recover either the statutory amount or the express non-default interest rate agreed to in writing. In no event is Blue Grass entitled to assess an arbitrary default interest rate it sets on its own after default without any agreement by the borrower to pay that amount.

Additionally, concerning interest calculations in general, the Iowa Supreme Court has previously held "[i]n no event would plaintiffs to be entitled to more than they asked." *Kuper v. Chicago & N. W. Transp. Co.*, 290 N.W.2d 903, 910 (Iowa 1980). Under no circumstance based on the facts of this case, especially where Blue Grass never pled the applicable default interest rate at 18% or prayed that the default rate to be set at 18%, should the District Court have found Blue Grass was entitled to 18% default interest in the event its priority was limited to its maximum security obligation.

Paragraph 9 of Blue Grass's Amended Foreclosure Petition declared Stecher's entire principal balance, plus accrued interest, immediately due and payable, noting a principal balance in the amount of $556,965.35, accrued interest to June 15, 2018 in the amount of $33,025.02, and interest after June 15, 2018 in the amount of $86.58 per diem. (App. 57 at ¶ 9). These calculations were set forth in greater detail at paragraph 3, which provided the following:

Loan No.	Date	Unpaid Principal	Accrued Interest	Per Diem Interest
121654	4/29/2011	$56,226.51	$2,926.93	$8.38
123047	5/23/2014	$139,341.51	$6,946.97	$21.95
123138	8/5/2014	$24,943.55	$2,641.14	$3.93
123188	9/15/2014	$10,786.21	$979.01	$1.70
123376	1/6/2015	$953.15	$582.94	$0.15
123467	3/6/2015	$65,000.00	$3,990.32	$10.25
123945	2/29/2016	$125,000.00	$6,815.90	$19.69
124069	5/26/2016	$18,150.47	$241.35	$2.98
124307	12/14/2016	$7,000.00	$480.79	$1.05
124443	3/16/2017	$109,563.92	$7,419.69	$16.51
		$556,965.32	**$33,025.02**	**$85.58**

It is clear Blue Grass's requested interest is calculated at a rate much lower than the 18% default interest it claimed at the summary judgment hearing. Instead, Blue Grass determined the applicable rate was the non-default rate set forth in each promissory note and requested interest be awarded at that amount, as represented by the per diem calculations set forth in its original and amended Petitions. Blue Grass cannot now, if unsuccessful on appeal, claim it is entitled to a higher default interest rate than the rates contained in both its original and amended petitions.

CONCLUSION

Above all else, the law strives to be fair and just. This is true for our statutes, which in this case ensure the interests of senior and junior mortgagors are established and all parties understand the priority their liens will have. This is also true for our recording statutes, which ensure all parties with a legal interest in real estate are on notice of all other parties with an interest in the same real estate and the extent of each party's interest. When the District Court found in favor of Blue Grass and awarded Blue Grass priority over Community Bank in an amount that far exceeds the maximum amount of credit contained in Blue Grass's mortgage, the result was anything but fair or just.

Community Bank does not ask this Court to disregard contractual language in favor of equitable concepts of fairness or justice and in fact is asking for the opposite. Finding that Blue Grass's secured interest and priority in the encumbered asset must be limited to the maximum obligation limit contained in Blue Grass's own mortgage while ensuring Iowa's statutory authority governing the Blue Grass's priority is given its plain meaning, is what is fair and just. For all the reasons cited above, Community Bank respectfully requests this Court reverse the District Court's decision granting Blue Grass's Motion for Summary Judgment and entry of Decree of Foreclosure in favor of Blue Grass and find Community Bank's valid, recorded mortgage has priority over all sums advanced by Blue Grass in excess of its mortgage obligation limit. Community Bank further requests this Court remand this matter to the District Court with directions to reduce Blue Grass's judgment to the mortgage obligation limit in the amount of $148,000.00, with interest at the contract rate on note 123047, and for such further relief as is necessary and appropriate.

REQUEST FOR ORAL SUBMISSION

Community Bank requests oral argument.

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CERTIFICATE OF COST

I hereby certify that the cost of printing Defendant/Appellant Community Bank's Final Brief was $0.00.

s/ H. Raymond Terpstra II 8-30-2019

Signature Date

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. 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 size 14-point font and contains 10,857 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g).

s/ H. Raymond Terpstra II 8-30-2019

Signature Date

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, I electronically filed the foregoing document with the Clerk of the Iowa Supreme Court using the Iowa EDMS, which will send notification of such filing to the following attorneys of record:

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