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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MARY JANE BUCK; LOIS ERBSTEIN; DONALD AND LORRAINE SHIRK; and MAUREEN D. WILSON, Individually and as Trustee of the MAUREEN D. WILSON REVOCABLE TRUST, Plaintiffs, v. THE RESERVE, A NONPROFIT CORPORATION d/b/a THE RESERVE ON WALNUT CREEK, Defendant,	Case No. CVCV052364 **THE RESERVE'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF ITS COMBINED MOTION FOR SUMMARY JUDGMENT AND RESISTANCE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
THE RESERVE, A NONPROFIT CORPORATION d/b/a THE RESERVE ON WALNUT CREEK, Third-Party Plaintiff, v. S.X. CORPORATION d/b/a ESSEX CORPORATION, Third-Party Defendant.	

COMES NOW Defendant/Third-Party Plaintiff The Reserve, a Nonprofit Corporation d/b/a The Reserve on Walnut Creek ("The Reserve"), pursuant to Iowa Rule of Civil Procedure 1.981, and hereby provides its Memorandum of Authorities in Support of its Combined Motion for Summary Judgment and Resistance to Plaintiffs' Motion for Summary Judgment ("Combined Motion and Resistance"):

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INTRODUCTION

The Reserve and counsel for Plaintiffs have been down this road before. On May 30, 2012, counsel for Plaintiffs sued The Reserve on behalf of the estate of William R. Raisch and William F. Raisch, in his capacity as personal representative of his deceased father. *See* Petition in *Estate of Raisch v. The Reserve*, Iowa District Court for Polk County, Case No. LACL125314 (hereinafter, "*Raisch*"). In *Raisch*, the plaintiffs alleged, among other things, that The Reserve violated Iowa's Uniform Residential Landlord and Tenant Act - Iowa Code chapter 562A. *See id.*

On February 7, 2013, the *Raisch* Court was presented with the following question (on cross motions for summary judgment): "whether Iowa's Uniform Residential Landlord and Tenant Act, Iowa Code chapter 562A, is applicable to The Reserve and the Agreement, and thus whether Plaintiffs can properly bring claims for violation of such statute." *Id.* The *Raisch* Court held that "chapter 562A is not applicable to [Plaintiffs'] Agreement with The Reserve and the Plaintiffs' claims under this chapter cannot stand as a matter of law." *Id.*

Undeterred by that clear and definitive ruling, Plaintiffs herein have again teamed up with William F. Raisch (a plaintiff in *Raisch*, who is also a licensed Iowa attorney) to bring another claim against The Reserve alleging the exact same cause of action for violation of Iowa's Uniform Residential Landlord and Tenant Act.

In light of the fact that this Court has already decided that Iowa Code chapter 562A does not apply to The Reserve, it is clear that The Reserve could not have violated its provisions. Thus, Plaintiffs' chapter 562A claims in Count I of their Petition must be dismissed. Additionally, because Plaintiffs specifically state in their Memorandum in Support of their Motion for (Partial)[1]

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[1] Plaintiffs' Motion for Summary Judgments seeks affirmative relief on only two of the five counts of Plaintiffs' Petition. The Reserve resists judgment in favor of Plaintiffs on these counts and seeks summary judgment in favor of The Reserve on all counts of Plaintiffs' Petition.

Summary Judgment ("Plaintiffs' Memorandum") that, as "rental agreements," The Reserve's Agreements with Plaintiffs are unconscionable, Count IV of Plaintiffs' Petition also fails as a matter of law with Count I.

Plaintiffs additional Counts II, III, and V must also be dismissed. Count II, which is untimely, alleges a violation of Iowa Code chapter 714H based on the premise The Reserve committed "consumer fraud" based on various representations made to Plaintiffs prior to their entry into integrated agreements that explicitly disclaimed their reliance on any prior or outside information of precisely the type they now seek to base their claims. Count III asserts a claim that The Reserve violated Iowa Code 523D by failing to "provide disclosure statements compliant with" that chapter. However, this claim is also untimely, and Plaintiffs all admitted that they received the required statements anyway.

Finally, regarding Plaintiffs' claim of breach of fiduciary duty (Count V), they have failed to state a cause of action and identified no admissible evidence in support of these claims. At best, Plaintiffs have advanced rumor, innuendo, and conjecture regarding past and current activities at The Reserve that they attack without regard to the fact that one Plaintiff was formerly a member of The Reserve Board of Directors that is now assailed in Plaintiffs' Petition. For all of these reasons, Plaintiffs' pending Motion for Summary Judgment must be denied and their Petition dismissed in its entirety.

STATEMENT OF FACTS

A. The Reserve

The Reserve on Walnut Creek is a senior adult congregate living facility that is owned and operated by The Reserve, a nonprofit corporation, and governed by a Board of Directors. (The Reserve's Statement of Undisputed Material Facts in Support of its Combined Motion for Summary Judgment and Resistance to Plaintiffs' Motion for Summary Judgment ¶ 1 ("The

Reserve's SUMF")). As a senior adult congregate living facility, The Reserve provides housing and supportive services to residents with periodic charges in consideration of an entrance fee. (*Id.* ¶ 2). The supporting services provided by The Reserve to its senior (geriatric) residents include but are not limited to the following: maintenance, activity services, security, dining options, transportation, and some health care and personal care services. (*Id.* ¶ 3 (citing excerpts from the transcripts of the depositions of Plaintiffs herein)).

For example, each Plaintiff testified that he or she was aware of the following services being available at The Reserve, even if that Plaintiff had not used or participated in each of those specific supportive services: blood pressure checks, podiatry/toe nail clinics, transportation services, dining options/meal services, seminars/learning events, and other social activities. (*Id.* ¶ 4). Additionally, The Reserve provides door-to-door trash pick-up and disposal for its residents, in-unit dining tray-service after hospitalization and at other times, if needed, and each residential unit is equipped with an emergency call system having a push button cord in each bedroom and a pull cord in each bathroom of each unit which are monitored at all times. (*Id.* ¶ 5).

The Reserve also had a supportive relationship with Iowa Health Home Care – In Trust, which provided a complete range of home care services and medical equipment. (*Id.* ¶ 6). Currently, through The Reserve's relationship with a successor entity, UnityPoint at Home, a registered nurse with expertise in community and home-based care is provided on a regular basis and is available to every member at their request. (*Id.* ¶ 7). This nurse provides clinical consultation, disease and medication management and/or diagnosis related education, and facilitates and enhances communications with the members' physicians. (*Id.* ¶ 8). The nurse is also a liaison for pre-operative and post-operative care activities and ensures smooth transition from hospital to home for members through enhanced services like physical therapy, home health

aide, and social work. (*Id.* ¶ 9). These services are provided in the member's home at The Reserve and promote safely aging in place during restoration or rehabilitation. (*Id.* ¶ 10).

B. Plaintiffs' Agreements with The Reserve

Plaintiffs each signed a contract with The Reserve, called an Application Agreement ("Agreement"), containing identical provisions that are relevant to this case. (*Id.* ¶ 11) (each Plaintiff's Application Agreement was attached to their Petition as Exhibits 1-4 and is also reproduced in Plaintiffs' Appendix at 1-54). The material provisions of the Agreements signed by Plaintiffs herein are also identical to those in the Agreement at issue in *Raisch*. (*Id.* ¶ 12).

The Agreements provide that each resident/member could appoint a personal representative to receive "copies of [the Agreement], [The Reserve's] Articles of Incorporation, Bylaws, Covenants of Occupancy and all other notices, disclosures, or forms required to be delivered to the Applicant <u>under Chapter 523D of the Iowa Code</u>." (Emphasis added.) (*Id.* ¶ 13). Additionally, attached to and incorporated into the Agreement were certain Covenants of Occupancy that have been amended from time to time. (*Id.* ¶ 14).

Pursuant to paragraph 3 of the Agreements and the original and amended Covenants of Occupancy, Plaintiffs are obligated to pay The Reserve a monthly fee varying in amount as set forth in their respective Agreements. (*Id.* ¶ 15). More specifically, Plaintiffs were obligated to:

> pay Monthly Charges in advance of the first day of each succeeding month until such Resident's Residential Membership is transferred as detailed in these Covenants of Occupancy; . . . and Monthly Charges and all other expenses due and payable by the Resident shall continue until the earlier of (i) the date such Resident's Residential Membership is transferred as provided in Article 7, or (ii) the date such Resident's Residential Membership is terminated as provided in Article 12.

(*Id.*)

Plaintiffs, and all other residents at The Reserve, are generally charged three fees depending on the circumstances: an Entrance Fee; a Supplemental Amount (both the Entrance Fee

and Supplemental Amount are paid at the time a prospective member applies for Residential Membership at The Reserve); and a Monthly Charge that Plaintiffs agreed to pay for the annual expenses of The Reserve. (*Id.* ¶ 16).

The Entrance Fee and Supplemental Amount received from the first set of residential members assisted in constructing the physical structure of The Reserve. (*Id.* ¶ 17). Subsequent Entrance Fees and/or Supplemental Amounts pass through The Reserve and are paid to a departing member upon the transfer of his or her unit to a new member. (*Id.* ¶ 18).

The Monthly Charge paid by Plaintiffs is the same fee paid by all other residential members of The Reserve while they are residential members of the facility, with the only differences in the amount of fees arising from the type of unit in which the residential member resides. (*Id.* ¶ 19). These fees, including the fees paid by Plaintiffs, pay for month-to-month expenses for operation of The Reserve, such as payroll for The Reserve's employees, and expenses associated with The Reserve's social programming and the other services and activities provided to its residential members. (*Id.* ¶ 20).

If a residential member of The Reserve fails to uphold his or her contractual obligations, such as payment of the fees described, that failure directly affects the other residential members by requiring, among other things, the other residential members to pay increased costs to "cover" for the amounts that have not been paid by another resident. (*Id.* ¶ 21). As a nonprofit corporation, any and all funds The Reserve collects or receives are necessarily spent on operating The Reserve at Walnut Creek for the benefit of its residential members. In other words, non-payment by a residential member does not affect any "profit" to The Reserve, but only affects the resident's fellow members. (*Id.* ¶ 22). For this reason, The Reserve actively monitors payments by residential members and pursues remedies, where appropriate. (*Id.* ¶ 23).

All of the described circumstances are derived from Plaintiffs' Agreements with The Reserve, which conclude with the following bold-faced language:

> **Applicant acknowledges that:**
>
> **i. Upon disbursement of such Entrance Fee and such Supplemental Amount to the uses and purposes of the Corporation the Corporation will have no further obligation to refund or return such Entrance Fee or Such Supplemental Amount to Applicant.**
>
> **ii. Applicant's ability to recover such Entrance Fee and such Supplemental Amount will depend entirely on the Applicant's ability to assign or transfer his Membership in the Corporation to another person or persons.**
>
> **iii. The Monthly Charge is subject to fluctuation.**
>
> **iv. Upon the transfer of Applicant's Membership in the Corporation to another person or persons there is no guarantee the Applicant will recover the entire Entrance Fee, the entire Supplemental Amount, or such other funds as may have accrued during Applicant's residency within the Development pursuant to Article 7 of the Covenants of Occupancy.**
>
> **v. Should Applicant default under the terms of the Covenants of Occupancy, which default is not cured in a manner deemed satisfactory by the Corporation, Applicant's Residential membership shall be terminated and all of Applicant's right, title and interest in and to such Entrance Fee, such Supplemental Amount, and such other funds as may have occurred during Applicant's residency within the Development pursuant to Article 7 of the Covenants of Occupancy shall be forfeited by Applicant and become the sole and separate property of the Corporation, and the Corporation shall have the right and authority to transfer Applicant's Apartment to an assignee or transferee. Upon such transfer, the Corporation, in its sole discretion, shall have the right to deduct all Monthly Charges by Applicant and other expenses due and payable upon transfer.**

(*Id.* ¶ 24). The Agreements also include identical language stating, "This Agreement will supersede any prior understandings and agreements and constitutes the entire agreement between us, and no oral representations or statements shall be considered a part hereof." (*Id.* ¶ 25).

C. <u>The *Raisch* Lawsuit and the Connection of William F. Raisch to this Lawsuit</u>

William F. Raisch ("Raisch") was a named party in the *Raisch* lawsuit, discussed above, which was previously filed against The Reserve. (*Id.* ¶ 26). Raisch is the son of a former member

of The Reserve and was a party to the *Raisch* litigation as a personal representative of his deceased father. (*Id.* ¶ 27).

One of the issues decided on cross motions for summary judgment in *Raisch* was "whether Iowa's Uniform Residential Landlord and Tenant Act, Iowa Code chapter 562A, is applicable to The Reserve and the Agreement, and thus whether Plaintiffs can properly bring claims for violation of such statute." (*Id.* ¶ 28). The *Raisch* Court decided that question in favor of The Reserve, holding that "chapter 562A is not applicable to [Plaintiffs'] Agreement with The Reserve and the Plaintiffs' claims under this chapter cannot stand as a matter of law." (*Id.* ¶ 29).

Following the *Raisch* Ruling, the parties to that case entered into a confidential settlement agreement that resolved the remaining claims in *Raisch* and resulted in Plaintiffs dismissing their claims against The Reserve with prejudice. (*Id.* ¶ 30). As a party to that prior lawsuit, Raisch actively and vigorously litigated the matters at issue in the *Raisch* cross motions for summary judgment and agreed to be bound by the settlement that resulted in the dismissal of the remaining claims. (*Id.* ¶ 31).

Despite the above, during the depositions of Plaintiffs in the present matter, The Reserve learned of Raisch's significant involvement with Plaintiffs' current lawsuit. (*Id.* ¶ 32 (citing excerpts from the transcripts of the depositions of Plaintiffs)). More specifically, Plaintiffs have, on several occasions, discussed their claims against The Reserve with Raisch, and Raisch has attended meetings with Plaintiffs and their attorneys herein. (*Id.* ¶ 33). Interestingly, all Plaintiffs testified that Raisch is not their lawyer in this matter. (*Id.* ¶ 34). However, when asked about the content of Plaintiffs' meetings with Raisch, Plaintiffs' attorney objected to the questions and prevented testimony by Plaintiffs regarding same. (*Id.* ¶ 35). The objections were based on the attorney-client privilege (even though no attorney-client relationship existed between Raisch and

Plaintiffs) and/or based on the assertion that Raisch is a "consultant" to Plaintiffs in the instant case. (*Id.* ¶ 36).

It is also important to note that Plaintiffs herein were all residential members of The Reserve during *Raisch*. (*Id.* ¶ 37). In fact, The Reserve notified its members, including Plaintiffs, about the nature of the *Raisch* litigation, such as the claims at issue therein and the confidential resolution of that lawsuit, via The Reserve's publicly available board meetings and minutes and an announcement of the settlement distributed to all members. (*Id.* ¶ 38). During *Raisch*, Plaintiff Maureen Wilson even served on the Board of Directors for The Reserve and received legal memoranda and other confidential material relating to *Raisch* and its settlement. (*Id.* ¶ 39).

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. *See* Iowa R. Civ. P. 1.981(3). The moving party bears the burden to prove that no material fact is in dispute and that it is entitled to judgment as a matter of law. *See Goodpaster v. Schwan's Home Serv., Inc.*, 849 N.W.2d 1, 6 (Iowa 2014).

"If the moving party has met its burden, 'the resisting party must set forth specific facts showing that a genuine factual issue exists.'" *K&W Elec., Inc. v. State*, 712 N.W.2d 107, 112 (Iowa 2006) (quoting *Grabill v. Adams Cnty. Fair & Racing Ass'n*, 666 N.W.2d 592, 594 (Iowa 2003)). "[A]n adverse party may not rest upon the mere allegations or denials in the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *See* Iowa R. Civ. P. 1.981(5).

A "genuine issue" of material fact exists only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Meade v. Ries*, 642 N.W.2d 237, 241 (Iowa 2002). A fact is "material" only if it is outcome determinative. *See id.*

ARGUMENT

At issue in the pending Motions for Summary Judgment is the exact same question that was definitively answered in *Raisch*: "whether Iowa's Uniform Residential Landlord and Tenant Act, Iowa Code chapter 562A, is applicable to The Reserve and the Agreement." (The Reserve's SUMF ¶ 28).

The Polk County District Court in *Raisch* (Schemmel, J.) correctly decided that chapter 562A was not applicable to The Reserve and to its Agreement with plaintiff therein, which contained provisions that are identical in all relevant parts to the Agreements at issue in the instant lawsuit. (*See id.* ¶ 29).

The *Raisch* Ruling is also binding on Plaintiffs in this matter due to the doctrine of defensive collateral estoppel. Alternatively, that previous Ruling, and the court's analysis therein, is at minimum, persuasive in the instant case.

Additionally, the law and facts developed in relation to Plaintiffs in the instant case also and further demonstrate that The Reserve qualifies as a senior adult congregate living facility under Iowa Code chapter 523D due to the services offered to the geriatric residents of the Reserve, and therefore, chapter 562A cannot be applicable to The Reserve.

I. IOWA CODE CHAPTER 562A DOES NOT APPLY TO SENIOR ADULT CONGREGATE LIVING FACILITIES SUCH AS THE RESERVE

A. Non-Mutual Defensive Collateral Estoppel Precludes Plaintiffs From Re-Litigating the Issues Decided in *Raisch*

1. The elements of collateral estoppel

It is black letter law in Iowa that parties are prohibited from litigating the same issue more than once. *See Goolsby v. Derby*, 189 N.W.2d 909, 915 (Iowa 1971); *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981). Pursuant to the doctrine of collateral estoppel (also known as issue preclusion), "once a court has decided an issue of fact or law necessary to its judgment, the

same issue cannot be relitigated in later proceedings." *Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 571 (Iowa 2006). Collateral estoppel is intended to "further 'the interest of judicial economy and efficiency by prevent unnecessary litigation,'" and to "protect litigants from the vexation of relitigating identical issues with identical parties . . . .'" *Id.* at 571-72 (quoting *Am. Family Mut. Ins. Co. v. Allied Mut. Ins. Co.*, 562 N.W.2d 159, 163 (Iowa 1997)).

Iowa courts recognize a difference between "defensive" and "offensive" collateral estoppel. *See Goolsby*, 189 N.W.2d at 913. The Iowa Supreme Court has explained the difference as follows:

> The phrase "defensive use" of the doctrine of collateral estoppel is used here to mean that a stranger to the judgment, ordinarily the defendant in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an element of his defense.
>
> On the other hand, the phrase "offensive use" or "affirmative use" of the doctrine is used to mean that a stranger to the judgment, ordinarily the plaintiff in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an essential element of his cause of action or claim.
>
> In other words, defensively a judgment is used as a "shield" and offensively as a "sword."

Id. Both offensive and defensive collateral estoppel have been utilized under Iowa law.

Generally, collateral estoppel applies where four elements are established: "1) there must be an identity of the issues; 2) the issue must have been raised and litigated in the prior action; 3) the issue must have been material and relevant to the disposition of the prior action; and 4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment." *Ray v. Union Pac. R.R. Co.*, 971 F. Supp. 2d 869, 892-93 (S.D. Iowa 2013) (citing *Haberer v. Woodbury Cnty.*, 188 F.3d 957, 961-62 (8th Cir. 1999); *Dolan v. State Farm Fire & Cas. Co.*, 573 N.W.2d 254, 256 (Iowa 1998)).

It is clear that all four elements are present in the instant case, and that the *Raisch* Ruling

prevents Plaintiffs herein from re-litigating the applicability of chapter 562A to The Reserve as a senior adult congregate living facility.

It is beyond dispute that the issues herein are identical to those that were raised and litigated in the *Raisch* Lawsuit; namely, whether Iowa Code chapter 562A applies to The Reserve and its Agreements with its Members. (*See* The Reserve's App. at 124 (*Raisch* Lawsuit at 7) (setting forth the Raisch plaintiffs' virtually identical claim for violation of Iowa Code chapter 562A)).

The second "requirement is generally satisfied if the parties to the original action disputed the issue and the trier of fact resolved it." *Hall v. Barrett*, 412 N.W.2d 648, 651 (Iowa Ct. App. 1987). The second collateral estoppel element does not require a trial on the merits; it can be satisfied by other means as well, including on a motion for summary judgment or by a dismissal with prejudice. *See Ideal Mut. Ins. Co. v. Winker*, 319 N.W.2d 289, 296 (Iowa 1982) (holding that issue preclusion was applicable after ruling on motion for summary judgment); *Buckingham v. Fed. Land Bank Ass'n*, 398 N.W.2d 873, 876 (Iowa 1987) (holding that issue preclusion was applicable after settlement and dismissal with prejudice). "Collateral estoppel may apply 'no matter how slight was the evidence on which a determination was made, in the first suit, of the issue to be collaterally concluded.'" *Hall*, 412 N.W.2d at 651 (citation omitted).

It is also beyond dispute that the Iowa Code chapter 562A issues were material and relevant to the disposition in *Raisch* and that those issues were necessary and essential to the resulting judgement. Indeed, the court in *Raisch* described "the crux of the issue" as "whether Iowa's Uniform Residential Landlord and Tenant Act, Iowa Code chapter 562A, is applicable to The Reserve and the Agreement, and thus whether Plaintiffs can properly bring claims for violation of such statute." (The Reserve's App. at 122 (*Raisch* Ruling at 5)). Then, upon consideration of fully-briefed and argued cross-motions for summary judgment, the court in *Raisch* held that

"chapter 562A is not applicable to [Plaintiffs'] Agreement with The Reserve and the Plaintiffs' claims under this chapter cannot stand as a matter of law." (*Id.* at 125 (*Raisch* Ruling at 8)).

Therefore, each of the elements required for the application of collateral estoppel to Plaintiffs in the instant case have been satisfied.

2. Community of interest and adequacy of representation

In addition to the aforementioned prerequisites, Iowa courts traditionally required mutuality of the parties or privity between the parties before invoking the principles of collateral estoppel. *See Hunter, 300 N.W.2d* at 123. However, the mutuality/privity requirement has since been relaxed. *See id.* ("this court has modified the traditional requirement of privity where the doctrine is invoked in a defensive manner"); *see also Opheim v. Am. Interinsurance Exch.*, 430 N.W.2d 118, 121 (Iowa 1988). More specifically:

> [n]either mutuality of parties nor privity is required where issue preclusion is applied defensively if the party against whom issue preclusion is invoked was so connected in interest with one of the parties in the former action as to have had a full and fair opportunity to litigate the relevant claim or issue and be properly bound by its resolution.

Dettmann v. Kruckenberg, 613 N.W.2d 238, 244 (Iowa 2000).

In fact, "where the four prerequisites of issue preclusion enumerated in *Hunter* have been established, and the nonmutual party against whom the doctrine is defensively invoked has a 'community of interest with, and adequate representation by, the losing party in the first action,' <u>the nonmutual party has had a full and fair opportunity to litigate the issue and is properly bound by its resolution in the former action.</u>" *Opheim.*, 430 N.W.2d at 121 (emphasis added); *see also Goolsby*, 189 N.W.2d 916 (noting "courts have been more liberal with the exception to the mutuality rule where collateral estoppel is proposed for defensive purposes to bar an action").

To determine whether non-mutual defensive issue preclusion applies, the key inquiry is <u>not</u> whether a stranger to the first action had an opportunity to litigate, but whether there was

"'adequate representation by the losing party in the first action.'" *See West v. Ohrt*, No. 05-0040, 2006 Iowa App. LEXIS 1705, at *8 (Iowa Ct. App. May 10, 2006) (quoting *Opheim*, 430 N.W.2d at 121). Accordingly, Iowa courts have invoked non-mutual defensive issue preclusion to prohibit plaintiffs who were not parties to the first action from re-litigating issues decided in that action. *See Brown v. Kassouf*, 558 N.W.2d 161, 165 (Iowa 1997) (holding that non-mutual defensive issue preclusion prohibited re-litigating issue in subsequent lawsuit); *State ex rel. Casas v. Fellmer*, 521 N.W.2d 738, 742-43 (Iowa 1994) (same); *Opheim*, 430 N.W.2d at 121 (same); *Bryan v. Hall*, 367 N.W.2d 251, 255 (Iowa Ct. App. 1985) (same).

In the instant case, there is no question that the plaintiffs in *Raisch* fully and fairly litigated the chapter 562A issue on a fully-briefed motion for summary judgment. *See Ideal Mut.*, 319 N.W.2d at 296 (holding that issue preclusion applies with equal force to issues decided on a motion for summary judgment). Additionally, it is clear that Plaintiffs' interests in the present action were adequately represented by the plaintiffs in *Raisch*. *See West*, 2006 Iowa App. LEXIS 1705, at *8 (quoting *Opheim*, 430 N.W.2d at 121) (holding that the key inquiry is whether there was "'adequate representation by the losing party in the first action'"). Indeed, Plaintiffs' counsel in the instant case also served as counsel for the plaintiffs in *Raisch*. *See Brown*, 558 N.W.2d at 165 (finding adequate representation where parties shared the same attorney as the prior action). Additionally, Raisch himself is apparently serving as a consultant to Plaintiffs in this case. (*See* (The Reserve's SUMF ¶ 36 (citing excerpts from the transcripts of the depositions of Plaintiffs providing descriptions of Raisch's relationship to Plaintiffs)).

Plaintiffs' interests herein are also identical to the plaintiffs' interests in *Raisch*. In fact, Plaintiffs were actually members of The Reserve at the time *Raisch* was litigated, they had actual

or constructive knowledge of the lawsuit via The Reserve's board meetings and minutes, and they could have joined *Raisch* but apparently chose not to do so.

Plaintiffs clearly share a community of interest with the plaintiffs in *Raisch* such that they were adequately represented therein with regard to the matters at issue in the instant Motions for Summary Judgment and therefore, Plaintiffs are precluded from re-litigating the chapter 562A claims that were definitively denied in *Raisch*. *See Brown*, 558 N.W.2d at 165; *Casas*, 521 N.W.2d at 742-43; *Opheim*, 430 N.W.2d at 121; *Bryan*, 367 N.W.2d at 255.

B. <u>Plaintiffs' Claims under the Landlord-Tenant Act Fail as a Matter of Law</u>

Even if this Court does not adopt the Court's ruling in *Raisch* as a matter of collateral estoppel, it is apparent that a like analysis will lead to a like result in this case. As noted, despite the authority and ruling discussed, Plaintiffs herein claim that The Reserve's Agreements and corresponding entrance fees, which are <u>expressly permitted</u> by <u>specific provisions of chapter 523D</u>, should nonetheless be prohibited by chapter 562A and that The Reserve's use of same has violated chapter 562A. Plaintiffs' arguments under chapter 562A fail for several reasons.

1. The context of chapter 523D reveals the inapplicability of chapter 562A

"The goal of statutory construction is to determine legislative intent." *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590 (Iowa 2004). "To determine legislative intent, we look to the language used, the purpose of the statute, the policies and remedies implicated, and the consequences resulting from different interpretations." *Des Moines Flying Serv. v. Aerial Servs.*, 880 N.W.2d 212, 220 (Iowa 2016) (citing *Iowa Individual Health Benefit Reins. Ass'n v. State Univ. of Iowa*, 876 N.W.2d 800, 804-05 (Iowa 2016)). The court must "assess the entire statute and its enactment to 'give the statute its proper meaning in context.'" *Id.* (quoting *Sanon v. City of Pella*, 865 N.W.2d 506, 511 (Iowa 2015)).

Iowa's Uniform Residential Landlord and Tenant Act explicitly excludes application of chapter 562A to Plaintiffs' Agreements with The Reserve. *See* Iowa Code § 562A.5(1). More specifically, section 562A.5(1) excludes application of chapter 562A to "Residence at an institution, public or private, if incidental to . . . the provision of medical, geriatric . . . or similar services."[2] The Reserve's senior adult congregate living facility provides just such a residence that is incidental to geriatric and similar services, such as the maintenance and security services, activity services, dining options, transportation, and health care and personal care services described by all Plaintiffs during their depositions.[3] (The Reserve's SUMF ¶ 3 (providing Plaintiffs' deposition testimony as already discussed)). The Reserve also provides door-to-door trash pick-up and disposal for its residents, in-unit dining tray-service after hospitalization and at other times, if needed, and each residential unit is equipped with an emergency call system having a push button cord in each bedroom and a pull cord in each bathroom of each unit which are monitored at all times. (*Id.* ¶ 5). In addition, through The Reserve's relationship with UnityPoint at Home, a registered nurse with expertise in community and home-based care is provided on a

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[2] Plaintiffs have attempted to limit the definition of "geriatric" services to mean "the types of services commonly provided by a nursing home or other type of care facility." *See* Plaintiffs' Memorandum at page 5 and at pages 14-15. However, the statute does not limit the term "geriatric services" in that manner, and actually is more expansive, stating that it includes "similar services" as well.

Moreover, the plain meaning of "geriatric" is "an old or aged person." *See* Random House Unabridged Dictionary (2011); Merriam-Webster Dictionary (2013). Accordingly, geriatric or similar services (as expressly included by the statute) would commonly mean services supporting or for the benefit of old or aged persons, such as those offered by The Reserve and described in this Memorandum.

[3] In their Motion for Summary Judgment, Plaintiffs have attempted to avoid the implications of these prior admissions by stating that each Plaintiffs' subjective purpose was to secure housing, not geriatric or similar services. *See, e.g.*, Plaintiffs' Memorandum at pages 6-8 and the affidavits referred to therein. However, Plaintiffs' subjective intent is irrelevant under the statute and cannot avoid the plain meaning of the statutory provisions.

regular basis, is available to every member at their request, and provides numerous health-related services. (*Id.* ¶¶ 6-10).

Moreover, the plain language of Iowa Code chapter 523D relates specifically to retirement facilities, such as The Reserve, which are described in the chapter as providing either "continuing care" services or "senior adult congregate living services." Accordingly, it is clear that The Reserve is excluded from the application of Iowa Code chapter 562A, and is instead governed by the provisions of Iowa Code chapter 523D.

More specifically, chapter 523D "applies to a provider who executes a contract to provide continuing care or senior adult congregate living services in a facility . . . if the contract requires or permits the payment of an entrance fee" for a facility located in Iowa. *See* Iowa Code § 523D.2. A "resident" of such a facility "means an individual, sixty years of age or older, entitled to receive care in a . . . senior adult congregate living facility." *See* Iowa Code § 523D.1(9).

"Senior adult congregate living services" means "housing and one or more supportive services" including, but not limited to, "activity services, security, dining options, [and] transportation." *Id.* § 523D.1(11), (12). A "provider" is a person/entity "undertaking through a lease or other type of agreement to provide care" in either type of facility. *Id.* § 523D.1(8).

As noted, in interpreting or construing a statute, Iowa courts look to the context in which the words of a statute are used. *See U.S. Bank N.A. v. Lamb*, 874 N.W.2d 112, 117 (Iowa 2016). It is clear that chapter 523D sets forth a comprehensive regulatory framework that provides for its own remedies for violations thereunder. *See* Iowa Code 523D.7. Chapter 523D is located in a subtitle to the Iowa Code for chapters pertaining to "Insurance and Related Regulation." The

Commissioner of the Insurance Division has the authority to "establish, publish, and enforce rules" such as those found in rule 191—24 which pertain to chapter 523D. *See* Iowa Code § 505.8.

The Reserve is a senior adult congregate living facility operating under chapter 523D, (*see* Petition ¶ 5), and as such, The Reserve is subject to oversight by the Commissioner of Insurance and is required to make annual reports of its operations to the Iowa Division of Insurance. *See* Iowa Code § 523D.12. Furthermore, Plaintiffs' suggestion that the applicability of chapter 523D somehow is lessened by a purported lack of day-to-day oversight by the Commissioner proves nothing. (*See* Plaintiffs' Memorandum at 19). As demonstrated, as a chapter 523D facility, The Reserve is subject to that law to the extent the legislature has directed and the Commissioner has stated through his rule-making authority. There is no requirement that daily interaction with the facility must occur to establish this relationship.

Chapter 523D—read in conjunction with its administrative rules (Iowa Administrative Code rule 191—24.1 to .12) promulgated by the Iowa Division of Insurance—sets forth a comprehensive system of law and regulation pertaining to the operation of such a retirement facility.[4] Notably, Plaintiffs seek to take advantage of this very system via Count III of their Petition, by which they have alleged "The Reserve failed to provide disclosure statements

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[4] While Plaintiffs cite the title to the original act that established chapter 523D in an attempt to show it is "merely a disclosure law," (*see* Plaintiffs' Memorandum at 18), the title to the amended 2004 act, which is similar to the title applied to all substantive amendments to the chapter since its initial passage, is far more telling:

> AN ACT providing for the <u>regulation</u> of business entities, <u>including</u> . . . <u>businesses providing</u> continuing care or <u>adult congregate living services</u>, and providing penalties.

See 2004 Iowa Acts ch. 1104 (emphasis added); *See also* 2000 Iowa Acts ch. 1147; 93 Iowa Acts ch. 60; 92 Iowa Acts ch. 1078; 91 Iowa Acts ch. 205; HSB 547 (80 G.A.) (2001) (acknowledging chapter 523D provides "for the regulation of places which undertake to provide . . . senior adult congregate living services.

compliant with Iowa Code Chapter 523D." Plaintiffs' persistence in misdirecting the Court to Iowa chapter 562A as governing their relationship with The Reserve is specious and must be rejected by this Court just as a like effort was rejected by Judge Schemmel in *Raisch*.

2. The Court's analysis in the Raisch Ruling

In a well-reasoned decision, the court in *Raisch* considered the arguments of the parties, examined the language of section 562A.5(1), and held that an "Agreement for residence at The Reserve, a senior adult congregate living facility, falls within the exclusion in section 562A.5(1). (The Reserve's App. at 122 (*Raisch* Ruling at 5)).

In other words, the *Raisch* Court held that the agreement at issue (which is identical to Plaintiffs' Agreements in the case at bar) was "for residence in an institution that is incidental to the provision of 'geriatric' or other 'similar service.'" (*Id.* at 123-24 (*Raisch* Ruling at 6-7)). The *Raisch* court then explained that it could "see no reason a senior adult congregate living facility would not fall within this exclusion and thus would *not be* governed by the Uniform Residential Landlord and Tenant Act pursuant to section 562A.5(1)." (*Id.* at 124 (*Raisch* Ruling at 7)). (emphasis in original).

Here, as in *Raisch*, The Reserve is a senior adult congregate living facility as that term is defined by section 523D.1(12). *See, e.g.*, Plaintiffs' Petition at ¶ 5 ("The Reserve is a 'senior adult congregate living facility' as defined under Iowa Code Chapter 523D."). As a senior adult congregate living facility, The Reserve provides housing and one or more supportive services including, but not limited to, activity services, security, dining options, and transportation to residents sixty years or older. (*See* The Reserve's SUMF ¶¶ 3-10); *accord* Iowa Code § 523D.1(11), (12). Thus, as in *Raisch*, the inescapable conclusion is that The Reserve provides housing incidental to geriatric or similar services and is, therefore, beyond the reach of chapter

562A. *See* Iowa Code § 562A.5(1) (excluding application of chapter 562A to "Residence at an institution, public or private, if incidental to . . . the provision of medical, geriatric . . . or similar service").

3. Specific statutory provisions control over general statutory provisions

There are also additional reasons to reject Plaintiffs' landlord-tenant theory. When the provisions of a general statute and a specific statute conflict, and the provisions cannot be logically reconciled, the "special or local provision prevails as an exception to the general provision." *See* Iowa Code § 4.7; *accord Rojas v. Pine Ridge Farms, L.L.C.*, 779 N.W.2d 223, 231 (2010). Thus, where a specific law "addresses the particular matter at issue" (such as chapter 523D herein), the general law (such as the uniform landlord-tenant law found in chapter 562A), does not apply. *See In re Estate of Laughead*, 696 N.W.2d 312, 317 (Iowa 2005).

In the instant case, chapter 523D sets forth a specific law governing retirement facilities that expressly permits and governs the agreements and fees at issue in this case and provides a statutory remedy for violations thereof. *See, e.g.*, Iowa Code §§ 523D.1(4), 523D.6(e), (l). As such, the more general law governing landlord-tenant relationships (chapter 562A), which allegedly would <u>not</u> allow the fees at issue herein, cannot apply to the Reserve because the two provisions cannot be logically reconciled and effect cannot be given to both at the same time.

Plaintiffs argued (in their Memorandum at page 19) that there is no reason why The Reserve cannot be governed by Iowa Code chapter 523D and <u>also</u> by chapter 562A. The fallacy of this argument can be shown by reference to Plaintiffs' Memorandum at page 21, where Plaintiffs argue that the Entrance Fee and Supplemental Amounts paid by residents qualify as a "rental deposit" under chapter 562A. As indicated above, Iowa Code chapter 523D expressly allows The Reserve to charge an Entrance Fee. The legislature could have called that payment a "rental

deposit," making it subject to chapter 562A, but it chose not to do so because it clearly sees a significant difference in the two types of dwelling units. Moreover, under Plaintiffs' theory of applying both chapters simultaneously, The Reserve would have been able to charge its residents an Entrance Fee, Supplemental Amount, and a "rental deposit." However, The Reserve did not do so because it is not governed by Iowa Code chapter 562A.

Additionally, at page 23 of their Memorandum, Plaintiffs argue that their alleged tenancy at The Reserve must be month-to-month and subject to termination with thirty days' written notice. However, that cannot be correct because if the provisions of chapter 562A were applicable, they would allow that type of termination by both the tenant and the landlord. In the instant case, The Reserve cannot simply terminate its residents' occupancy at the end of any month in light of the membership interest held by the residents, which entitles them to occupancy of their unit until specified conditions occur. Similarly, provisions in the Agreements that were signed by Plaintiffs also delineate when and how they can terminate or transfer their membership. As such, the provisions cited by Plaintiffs in the landlord-tenant act are clearly not applicable to The Reserve.[5] Therefore, Plaintiffs' claims under that statute fail as a matter of law.

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[5] At page 12 of their Memorandum, Plaintiffs have also argued that The Reserve allegedly "admitted" the existence of a landlord-tenant relationship between its Members and The Reserve.

In reality, however, the contracting parties simply chose to voluntarily include a provision that states The Reserve's policy regarding certain situations, which is permitted under Iowa Code section 523D.6; namely, that The Reserve would have available to it "such legal remedy or remedies as are available to a landlord for the breach or threatened breach under the law by a Resident of any provision of a lease or rental agreement."

This provision in the Agreement that provides *additional* remedies does not alter the relationship created between The Reserve and Plaintiffs herein, under chapter 523D. *Cf. American Nat'l Bank & Trust of New Jersey v. Presbyterian Homes of New Jersey*, 372 A.2d 1147, 1152 (N.J. Super. Ct. 1977) ("A reading of the residence agreement in its entirety dispels any conception of a leasehold interest.").

4. The legislature did not extend the provisions of chapter 562A to chapter 523D

It is clear that the Iowa Legislature understands the discrete functions served by chapter 523D, and it has acknowledged the distinction between facilities that are regulated under chapter 523D and other facilities that may house older Iowans.[6] Nowhere is this more apparent than in a comparison in the legislature's treatment of three seemingly-similar geriatric facilities that actually serve different functions and are accordingly treated differently under the Iowa Code: (1) "elder group homes," established under Iowa Code chapter 231B; (2) "assisted living programs," established under Iowa Code chapter 231C; and (3) "senior adult congregate living facilities" established under Iowa Code chapter 523D (such as The Reserve).

"The legislature knows how to cross-reference" chapters or sections of the Iowa Code where it intends those chapters or sections to be incorporated in its legislation. *See Des Moines Flying Serv.*, 880 N.W.2d at 221. Importantly, both chapter 231B ("elder group homes") and chapter 231C (assisted living) facilities are expressly subject to chapter 562A. *See* Iowa Code §§ 231B.18; 231C.19. <u>However, no similar Code provision extends the application of 562A to chapter 523D facilities</u>. Had the legislature intended chapter 562A to apply to chapter 523D senior

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Moreover, if a landlord-tenant relationship was already in existence between the parties due to Iowa Code chapter 562A, then there would be no need for The Reserve and the residents, including Plaintiffs, to "expressly agree" that those remedies would be applicable. However, since The Reserve is governed by chapter 523D, in order to obtain those additional remedies, the parties had to expressly agree that they were applicable.

[6] *See, e.g.*, Iowa Code § 105.11(11) (listing the different types of care facilities established under Iowa law); HF 2058 (84 G.A.) (2012) (same); HF 2079 (83 G.A.) (2010) (same); HSB 547 (80 G.A.) (2001) (acknowledging chapter 523D provides "for the regulation of places which undertake to provide . . . senior adult congregate living services"; HSB 675 (78 G.A.) (1995) (noting chapter 523D provides "for the regulation of contracts to provide care to persons in a retirement facility."

adult congregate living facilities it would have incorporated application of that chapter by reference as it did for the other types of facilities.

Notably, the Iowa Legislature approved an extensive amendment to chapter 523D in 2004, one year after amending chapter 231C to explicitly apply chapter 562A to its provisions, and one year before passing the same amendment to chapter 231B. *Compare* 2004 Iowa Acts ch. 1104, *with* 2003 Iowa Acts ch. 166, *and* 2005 Iowa Acts ch. 62. Thus, the Iowa Legislature was aware of the issue at the time it approved the extensive amendments to chapter 523D but still chose not to subject facilities operating under chapter 523D, like the Reserve, to the provisions of chapter 562A.

Accordingly, the conclusion that this Court must draw from the interplay of chapters 231B, 231C, and 523D is that the legislature clearly knew how to invoke and apply chapter 562A when it desired to do so, but it has chosen not to extend the provisions chapter 562A to facilities operating pursuant to chapter 523D. *See Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008) ("When interpreting laws, [the court is] guided by the rule of 'expressio unius est exclusio alterious.' 'This rule recognizes that 'legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.'" (Citation omitted.)).

5. Other jurisdictions have reached similar conclusions

Other courts that have encountered issues similar to those presented in this case have confirmed or concluded that agreements like the those at issue herein, including agreements created pursuant to statutes similar to Iowa Code chapter 523D, are permissible and not subject to the state's general landlord-tenant law. *See, e.g., Emerson v. Adult Cmty. Total Servs., Inc.*, 842 F. Supp. 152, 156-57 (E.D. Pa.1994); *Jackim v. CC-Lake, Inc.*, 842 N.E.2d 1113, 1120-24 (Ill. Ct.

App. 2006) (collecting cases); *Bower v. The Estaugh*, 369 A.2d 20, 22-24 (N.J. Super. Ct. App. Div. 1977) (concluding, in part, that the agreement at issue was not void as against public policy); *Sunrise Group Homes, Inc. v. Ferguson*, 777 P.2d 553, 555 (Wash. Ct. App. 1989).

For instance, in *Jackim*, the Appellate Court of Illinois was asked to determine if a life care contract, which was comparable to contracts for "continuing care" under Iowa Code chapter 523D, established a landlord-tenant relationship between the parties, making the contract subject to certain provisions of the general landlord-tenant law of Illinois. *See* 842 N.E.2d at 1120-24. Acknowledging "[t]he primary rule of statutory construction is to ascertain and give effect to the legislature's true intent and meaning" (the same principle applicable under Iowa law), the *Jackim* court concluded the landlord-tenant law did not apply. *See id.* at 1117-18. In reaching this conclusion, the *Jackim* court distinguished between the obligations of landlords and tenants and the statutorily-mandated services provided by providers, such as the Reserve, to residential members, such as Plaintiffs. *See id.* at 1118-20.

As in *Jackim*, Plaintiffs in this case are essentially asking this Court "to isolate a few of the characteristics of the parties' relationship and few of the terms of their contract in order to find that" the alleged requirements of Iowa's landlord-tenant law apply. *See id.* at 1119. However, that argument is contrary to the statutory scheme established by the Iowa legislature in chapter 523D to govern relationships of the type at issue in this case.

Plaintiffs have cited just one decision (from the Wisconsin Court of Appeals) to support their Iowa Code chapter 562A claims; *M & I Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 536 N.W.2d 175 (Wis. Ct. App. 1995). However, that Wisconsin case merely serves to underscore the distinction between a general statute, such as chapter 562A, and a specific statute, such as chapter 523D.

While the Wisconsin Court of Appeals did conclude that general principles of landlord-tenant law applied to the particular agreement at issue under Wisconsin law, the Wisconsin court also explained that it was not analyzing the question presented in light of the Wisconsin law that parallels Iowa Code chapter 523D, because that Wisconsin provider did not offer geriatric or similar services (such as those offered by The Reserve in the instant case). *See id.* 536 N.W.2d at 185, n.12. Moreover, the arguments that Plaintiffs rely on regarding that case have been previously rejected (at least implicitly) by the Polk County District Court. (*See* The Reserve's App. at 118-29 (*Raisch* Ruling)).

Therefore, the *M & I Nat'l Bank* case is easily distinguished on both legal and factual grounds from the present case and cannot serve as a basis for denying the instant Motion for Summary Judgment.

6. Impractical and absurd results must be avoided

Plaintiffs' claims regarding the landlord-tenant act must be also dismissed because if Plaintiffs' arguments about the applicability of chapter 562A were correct, it would lead to the impractical and absurd result of upending the entire industry for senior adult congregate living facilities in Iowa. Such a result would be contrary to common sense, the Iowa Code, and other precepts of Iowa law. *See United Fire & Cas. Co. v. Acker*, 541 N.W.2d 517, 519 (Iowa 1995) ("We will not construct a statute in a way that would produce impractical or absurd results."); *see also Rojas*, 779 N.W.2d at 231 (observing that when interpreting a statute, a court is to presume the legislature "included all parts of the statute for a purpose" and "avoid reading the statute in a way that would make any portion of it redundant or irrelevant").

Quite simply, the provisions about which Plaintiffs now complain are not prohibited by chapter 523D or the administrative code that governs senior adult congregate living facilities. As

in *Raisch*, the Agreements at issue herein are expressly permitted under Iowa law and are regulated by Iowa Code chapter 523D. As such, Plaintiffs' claims under the more general chapter 562A fail as a matter of law. For these reasons, The Reserve's Motion must be granted and all of Plaintiffs' claims that are based on chapter 562A must be dismissed.

II. THE AGREEMENTS AT ISSUE ARE NOT UNCONSCIONABLE

As indicated previously, because Plaintiffs specifically state in their Memorandum that, as "rental agreements," The Reserve's Agreements with Plaintiffs are unconscionable (and because Plaintiffs do not argue any other way that they claim the Agreements are unconscionable), Count IV of Plaintiffs' Petition fails as a matter of law for the same reasons as Count I. Plaintiffs' Agreements are valid and not unconscionable as violating Iowa Code chapter 562A.

Additionally, the Iowa Supreme Court has stated:

> There are two generally recognized components of unconscionability: procedural and substantive.
>
> The former includes the existence of factors such as 'sharp practices[,] the use of fine print and convoluted language, as well as a lack of understanding and an inequality of bargaining power.' *In re Marriage of Shanks*, 758 N.W.2d 506, 515 (Iowa 2008)
>
> The latter includes 'harsh, oppressive, and one-sided terms.' *Id.* Whether an agreement is unconscionable must be determined at the time it was made. *See* Iowa Code § 554.2302(1); *see also C & J Vantage*, 795 N.W.2d at 81.

See Bartlett Grain Co. v. Sheeder, 829 N.W.2d 18, 27 (Iowa Ct. App. 2013) (internal citations and quotation marks omitted). In examining the two components of unconscionability identified above—procedural and substantive unconscionability—it is apparent that the Agreements at issue were in no way unconscionable at the time they were made.

First, with respect to the procedural component, the Agreements explicitly informed Plaintiffs of their obligations to pay continued monthly charges even in the event that they were no longer able to occupy their units, and that notice was not buried in fine print or hidden from

normal view, but instead it was contained within the one paragraph governing "Occupancy/Monthly Charges" in the Agreements (*see* Plaintiffs' App. at 36, 34, 40, and 48), and it was also prominently noted in the Covenants of Occupancy attached to and incorporated within each Agreement (*see* Plaintiffs' App. at 2).

Second, as the Court made clear in *Bartlett Grain Co.*, unconscionability, and substantive unconscionability in particular, is an onerous standard for Plaintiffs to meet:

> 'A contract is unconscionable where no person in his or her right senses would make it on the one hand, and no honest and fair person would accept it on the other hand.' *C & J Vantage*, 795 N.W.2d at 80.
>
> [T]he doctrine of unconscionability does not exist to rescue parties from bad bargains.' *Id.; see also Home Fed. Sav. & Loan Ass'n of Algona v. Campney*, 357 N.W.2d 613, 619 (1984) (quoting comment 1 to this section of the UCC, which provides that '[t]he principle is one of the prevention of oppression and unfair surprise ... and not ... disturbance of allocation of risks because of superior bargaining power').

See 829 N.W.2d at 27 (emphasis added). Plaintiffs simply cannot meet this standard in this case as a matter of law.

The Official Comment to the Uniform Residential and Landlord Tenant Act that was cited by Plaintiffs in their Memorandum at page 23 also demonstrates that the Agreements with The Reserve are not unconscionable, even if they were governed by that Act (which, as set forth above, they are not so governed). That Comment instructs that the "basic test" must be viewed "in light of the background and setting of the market" and at the "time of the making of the agreement."

At the time Plaintiffs entered into the Agreements with The Reserve, senior adult congregate living facilities governed by chapter 523D were popular and most, including The Reserve, had waiting lists for certain types of units. (The Reserve's SUMF ¶ 40). Thus, the Agreements are clearly not so "one-sided" that "no person in his or her right senses" would make them, and therefore, they are not unconscionable under Iowa law. Further the model used by The

Reserve, which includes payment of both an Entrance Fee and Monthly Charges by the residents, is expressly allowed by Iowa Code chapter 523D, which further shows that the Agreements are not unconscionable under Iowa law.

Finally, as a remedy, Plaintiffs ask this Court to invalidate all aspects of the contractual relationship between Plaintiffs and The Reserve. (*See* Plaintiffs' Memorandum at 25-27). However, that outcome is not warranted legally or as Plaintiffs have presented their chapter 562A claims in their Motion for Summary Judgment. *See In re Marriage of Shanks*, 758 N.W.2d 506, 514-16 (Iowa 2008) (describing the elements and principles applicable to a claim of unconscionability and noting, in part, "the concept is not a means by which a party may escape the requirements of an unfavorable contract after experiencing buyer's remorse"); *see also* 17A Am. Jur. 2d *Contracts* § 318 (discussing the fact "a court may, where possible sever the illegal portion of [an] agreement and enforce the remainder") *Casey v. Lupkes*, 286 N.W.2d 204, 207-08 (Iowa 1979) (observing summary judgment was inappropriate in a case involving allegations the subject lease included unconscionable terms).

For all of the foregoing reasons, Count IV of Plaintiffs' Petition fails as a matter of law.

III. PLAINTIFFS CLAIM UNDER 523D IS TIME-BARRED, AND THEY RECEIVED THE REQUIRED DISCLOSURE STATEMENT ANYWAY

If this Court has any lingering doubt that Iowa Code chapter 523D applies in this case, and not chapter 562A, the Court need look no further than Count III of Plaintiffs' Petition, by which they allege "The Reserve failed to provide disclosure statements compliant <u>with Iowa Code Chapter 523D</u>." (Emphasis added.) Setting aside the irony of Plaintiffs' claim under chapter 523D, it clearly fails for two reasons: first, the claim is time barred and second, Plaintiffs have admitted they received the disclosure to which they were entitled.

Plaintiffs' Count III claim is subject to the statute of limitations set forth in section 523D.7. Pursuant to that section, the time for bringing a chapter 523D claim elapsed before Plaintiffs filed their Petition. Specifically, Iowa Code section 523D.7(4) (emphasis added) provides:

> An action shall not be maintained to enforce a liability created under this chapter unless brought before the expiration of six years after the execution of the contract for continuing care or senior adult congregate living services which gave rise to the violation.

In this case, the "contract[s] for continuing care or senior adult congregate living services" that allegedly gave rise to the asserted violations of chapter 523D, including the alleged disclosure violations, were executed on December 20, 2004 (Wilson); August 22, 2009 (Erbstein); December 15, 2004 (Shirk); and April 3, 2007 (Buck). (The Reserve's SUMF ¶ 41). The Petition in this matter was not filed until July 20, 2016, almost a year after the six-year statute of limitations had run for the Plaintiff (Erbstein) who had executed her Application Agreement most recently in time. Of course, the other Plaintiffs' statutes of limitations ran long before this more recent timeframe. Therefore, Plaintiffs' Count III is barred by the statute of limitations, and should be dismissed with prejudice.

Moreover, it is also notable that Plaintiffs' Count III was alleged in their Petition "on information and belief" because, in fact, Plaintiffs' depositions established that each of them received a disclosure statement required by Iowa Code chapter 523D at the time they were prospective members considering whether to enter into a contractual relationship with The Reserve.[7] (*Id.* ¶ 42 (citing excerpts from the transcripts of Plaintiffs' depositions). Accordingly,

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[7] Iowa Code chapter 523D.3 sets forth obligations of an entity such as The Reserve with respect to preparation of disclosure statements and their delivery to prospective residents and their personal representatives, but creates no ongoing obligation for delivery of annual disclosure statement to current residents or their personal representatives.

it is undisputed that Plaintiffs' Count III, which is time-barred, would also fail in light of the undisputed evidence in the record. For both reasons, Count III must be dismissed.

IV. PLAINTIFFS' ACTION FOR CONSUMER FRAUD FAILS BECAUSE IT IS UNTIMELY AND ANY ALLEGED REPRESENTATIONS WERE DISCLAIMED BY THEIR WRITTEN AGREEMENTS

Plaintiffs have also alleged that The Reserve is liable under Iowa Code section 714H on the basis of representations made "that their Entrance Fee and Supplemental Amount was, among other things, an investment which would increase in value while the Plaintiffs occupied their respective Apartments (sic)." (Petition ¶ 42). This claim should also be dismissed as untimely and misplaced as against The Reserve.

As an initial matter, Iowa Code section 714H.5 states that "An action pursuant to this chapter must be brought within two years of the occurrence of the last event giving rise to the cause of action under this chapter or within two years of the discovery of the violation of this chapter by the person bringing the action, whichever is later." Plaintiffs' claim under chapter 714H focuses on alleged representations made to Plaintiffs at the time they entered into their Application Agreements. As noted previously, the most recent of the Agreements to be executed was done so in 2009. The other Agreements were signed several years before. Any and all representations made would have been made or discovered far longer than two years ago. Plaintiffs' claims under chapter 714H are barred by the statute of limitations of Iowa Code section 714H.5.

Even if the claims were not barred, any allegation against The Reserve with respect to representations made to Plaintiffs at the time they entered into their Application Agreements is wholly misplaced. Four of the five Plaintiffs—Buck, the Shirks, and Wilson—were all initial residential members of The Reserve that signed Agreements shortly after The Reserve was incorporated by attorneys working for Third-Party Defendant S.X. Corporation d/b/a Essex Corporation ("Essex") and before anyone other than Essex or its employees had any involvement

with or at The Reserve. (The Reserve's SUMF ¶ 43). While one Plaintiff (Erbstein) signed her Agreement later, it was at a time when Essex continued to be involved in marketing and sales at The Reserve. (*Id.*) For these reasons, to the extent Plaintiffs have any claim under section 714H, liability simply cannot rest with The Reserve.

Finally, each Plaintiff admitted to having read and signed their Agreements—some even had an attorney or other advisor to assist their analysis—that included the statement that "This Agreement will supersede any prior understandings and agreements and constitutes the entire agreement between us, and no oral representations or statements shall be considered a part hereof." (*Id.* ¶ 25). When an agreement is fully integrated in this fashion, "the parol evidence rule prevents the receipt of any extrinsic evidence to contradict (or even supplement) the terms of the written agreement." *Whalen v. Connelly*, 545 N.W.2d 284, 290 (Iowa 1996) (citing Restatement (Second) of Contracts § 213 (1981)). Notably, when considering fraud in the inducement claims in the context of a fully integrated agreement, the Iowa Supreme Court has held as follows:

> Although we have allowed fraudulent inducement claims to proceed despite an integration clause in a contract, we have done so only with regard to misrepresentations concerning facts or circumstances not included in the written contract.

Id. at 294, *accord GreatAmerica Leasing Corp. v. Gelfand*, No. 13-0333, 2013 WL 5761880, at *3 (Iowa Ct. App. Oct. 23, 2013) (quoting *Whalen* and affirming district court's summary judgment ruling disposing of fraud defense to claim of breach of contract where contract was fully integrated). Accordingly, any purported evidence of representations made by The Reserve (or others)—or beliefs as to the Agreement's meaning that were purportedly held by Plaintiffs—are not relevant and do not enter into the analysis. In the absence of such evidence, Plaintiffs' misplaced claims also fail for factual support. Plaintiffs' Count II must be dismissed.

V. PLAINTIFFS HAVE NO ADMISSIBLE EVIDENCE TO SUPPORT THEIR CLAIM OF BREACH OF FIDUCIARY DUTIES

The last count of Plaintiffs' Petition asserts a litany of purported breaches of fiduciary duty by The Reserve. Of course, to the extent Plaintiffs' claims are premised on activities occurring at the time they entered into their Application Agreements, and are not time barred, Plaintiffs are again attempting to recover from The Reserve for actions that would have been taken by Essex or its employees. Yet, it is apparent Plaintiffs have not and cannot articulate a basis for their breach of fiduciary duty claims, and the limited "factual" allegations they have made are not admissible and thus may not be relied upon at the summary judgment stage or at trial.

In four separate interrogatories directed to each Plaintiff, The Reserve asked each to describe with specificity the nature of their breach of fiduciary duties theory(ies). In response, each Plaintiff stated the following boilerplate answer to each of the interrogatories propounded:

> **ANSWER:** Plaintiff objects to this interrogatory on the grounds that it goes beyond the scope of permissible discovery and improperly invades the attorney work product privilege by asking Plaintiff to identify "all legal authorities" supporting its positions. Interrogatories seeking purely legal information are improper. *See, e.g., Gilmore v. City of Minneapolis,* No. 13-1019, 2014 WL 4722488, *6 (D. Minn. Sept. 22, 2014) (holding that interrogatory requesting the legal authority supporting a party's position goes beyond the permissible scope of discovery and constituted protected work product).
>
> Plaintiff further objects to this interrogatory on the grounds that it is vague, ambiguous, overbroad, unduly burdensome, and constitutes an abuse of the discovery process by improperly asking Plaintiff and her counsel to marshal all evidence of particular claims and allegations. Courts have held "that interrogatories seeking identification of all facts supporting a particular allegation are inherently improper." *Clean Earth Remediation and Const. Services, Inc. v. American Intern. Group, Inc.*, 245 F.R. D. 137, 141 (S.D. N.Y. 2007) (citing *Grynberg v. Total S.A.*, 03-cv-01280-WYD-BNB, 2006 WL 1186836 at *6-*7 (D.Col. May 3, 2006); *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 173 (S.D.N.Y.2004); *Thompson v. United Transp. Union*, Civ.A. 99-2288-JWL, 2000 WL 1375293 at *1 (D.Kan. Sept. 15, 2000); *Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 404-05 (D.Kan.1998); *Hilt v. SFC Inc.*, 170 F.R.D. 182, 186-87 (D.Kan.1997); and *First United Fund Ltd. V. American Banker, Inc.*, 127 Misc.2d 247, 251, 485 N.Y.S.2d 489, 493 (Sup.Ct.1985)). *See also Community Voice Line, LLC v. Great Lakes Communication Corp.*, 2013 WL 4048495, *8 (N.D. Iowa 2013) (stating that

> "blockbuster interrogatories demanding disclosure of each and every facts support a claim are "disfavored" and that interrogatories should not "purport to require that the answering party provide a narrative account of its entire case."). . . .

(The Reserve's App. at 132 (providing an example of Plaintiffs' discovery responses, which were repeated for each Plaintiff)). Plaintiffs' boilerplate objections were then followed by additional boilerplate "narrative" resulting in the sum of Plaintiffs' description of their breach of fiduciary duties claim stating as follows:

> Subject to and without waiving such objections, the following is Plaintiff's good faith effort to respond to this improper interrogatory. However Plaintiff is not purporting to identify every fact, document, or witness that supports its claims, and is not identifying "all legal authorities." With that understanding, Plaintiff states that residents are dependent on the The Reserve and its agent, Newbury, to protect the value of their investment (*i.e.*, Entrance Fee and Supplemental Amount) because the Reserve sets the prices for units, has approval authority over transfer prices, and is responsible for marketing units. [. . . With that understanding, Plaintiff [also] states that The Reserve has breached its fiduciary duties by destroying the value of Plaintiff's investment (Entrance Fee and Supplemental Amount) by transferring units for nominal prices and by leasing units without any buy-in whatsoever. . . . With that understanding, Plaintiff [also] states that The Reserve has breached its fiduciary duties by transferring units for nominal prices and by leasing units without any buy-in, thereby destroying the value of Plaintiff's investment, and by transferring Reserve-owned units over resident-owned units. . . . Subject to and without waiving said objections, Plaintiff states that [the] allegation speaks for itself. . . .] Relevant documents include the Application Agreement, Covenants of Occupancy, and Agency Agreements. Potential witnesses include Plaintiffs and various representatives of The Reserve, including Susan Ray, Ann Huffman, Patty Devens, Ken Kremer, Deb Lanpher, and Cindy Christian. Discovery is ongoing and this answer may be supplemented.

(*Id.* at 132-40 (same)).

In sum, Plaintiffs provided no substantive responses to The Reserve's interrogatories, instead simply repeating—implicitly or explicitly—the mere allegations of their Petition. Plaintiffs were also deposed by counsel for The Reserve and Essex. Once again, each was asked to detail the bases for their breach of fiduciary duties claims and were unable to do so, choosing instead to claim they were told certain things by unidentified people from which Plaintiffs had

drawn their own conclusions. (The Reserve's App. at 19-21, 43-45, 56-60, 79)[8] (citing excerpts from the transcripts of the depositions of D. Shirk at p. 51, l. 2 to p. 58, l. 11; Erbstein at p. 49, l. 11 to p. 56, 1. 15; Buck at p. 48, l. 21 to p. 63, l. 14; and Wilson at p. 56, l. 21 to p. 68, l. 10)). Plaintiffs cannot even articulate their claims, much less facts or circumstances that could overcome The Reserve's prospective defenses to this claim. *See, e.g.*, *Hanrahan v. Kruidenier*, 473 N.W.2d 184, 186 (Iowa 1991) (discussing the business judgment rule).

The Reserve understands that this Court must consider Plaintiffs' "evidence" and even their allegations in a light most favorable to them in considering The Reserve's present motion. However, "the court should only consider 'such facts as would be admissible in evidence'" in making this analysis. *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96-97 (Iowa 2012); *accord Howard v. Columbia Pub. Sch. Dist.*, 363 F.3d 797, 801 (8th Cir. 2004) (noting a non-moving party resisting a motion for summary judgment cannot rely on "unreasonable inferences or sheer speculation as fact" and the court is to "consider only admissible evidence and disregard portions of various affidavits and depositions that were made without personal knowledge, consist of hearsay, or purport to state legal conclusions as fact"). As this Court is well aware, "'[s]ummary judgment is not a dress rehearsal or practice run, it is the put up or shut up moment in a lawsuit, when a [nonmoving] party must show what evidence it has that would convince a trier of fact to accept its version of the events.'" *Nelson v. Lindaman*, 867 N.W.2d 1, 11 (Iowa 2015) (quoting *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005)).

As demonstrated, The Reserve has sought to discover the basis for Plaintiffs' claims, and all Plaintiffs have and can provide as support are rumor, innuendo, and conjecture. This

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[8] In finalizing this Memorandum, counsel for The Reserve discovered that some of the referenced pages from the Wilson deposition were inadvertently left out of The Reserve's Appendix. The Reserve will file a Supplemental Appendix to submit the missing pages.

speculation and conspiracy theorizing do not pass muster at the summary judgment stage, and certainly would not suffice to support a verdict at trial. Like the other counts of Plaintiffs' Petition, Count V is legally and factually unsupported and must be dismissed as a matter of law.

CONCLUSION

Plaintiffs must be prohibited from re-litigating the issues raised in *Raisch*, wherein the Court held that that "chapter 562A is not applicable to [Plaintiffs'] Agreement with The Reserve and Plaintiffs' claims under this chapter cannot stand as a matter of law." In addition, Iowa Code chapter 562A is inapplicable to Plaintiffs' Agreements with The Reserve and, as a result, Plaintiffs' claims that are premised on a violation of chapter 562A must fail as a matter of law.

Plaintiffs' additional claims must suffer the same ultimate fate. Their unconscionability claim, premised on Iowa Code chapter 562A, cannot exist apart from the other incorrect theories asserted as arising out of that chapter. Plaintiffs' attempt to take advantage of Iowa Code chapter 523D, which they otherwise argue has no application, is time-barred and factually unsupported. Likewise, their claimed breach of chapter 714H and allegations of breach of fiduciary duty are also untimely, rest on even more tenuous factual and legal ground, and certainly have no viability for trial. For all reasons expressed in this memorandum and The Reserve's related pleadings, Plaintiffs' Motion for Summary Judgment must be denied and Plaintiffs' Petition must be dismissed in its entirety.

WHEREFORE, The Reserve respectfully requests that the Court grant The Reserve's Motion for Summary Judgment, deny Plaintiffs' Motion for Summary Judgment, enter final judgment in favor of The Reserve on the entirety of Plaintiffs' Petition, and grant such other and further relief as the Court deems just and proper.

Date: August 24, 2017

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 24, 2017, the foregoing instrument was served upon all parties to the above case and/or to each of the attorneys of record herein at their respective addresses disclosed on the pleadings:

By: Electronic Filing and/or
_____ U.S. Mail _____ FAX
_____ Hand Delivered _____ Overnight Courier
_____ E-mail _____ Other _____

/s/ William J. Miller

ELECTRONICALLY FILED JAN 11, 2019 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-1037

CHERYL ALBAUGH,
in her capacity as Agent/Attorney-in-Fact for Shirley Voumard,
Plaintiff / Appellant,

v.

THE RESERVE,
a nonprofit corporation, d/b/a The Reserve on Walnut Creek,
Defendant / Appellee,

and

S.X. CORPORATION, d/b/a Essex Corporation,
Third-Party Defendant.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE MICHAEL D. HUPPERT

FINAL BRIEF OF APPELLEE AND REQUEST FOR ORAL ARGUMENT

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Auen v. Alcoholic Beverages Div., 679 N.W.2d 586 (Iowa 2004)
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Cases
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V. THE DISTRICT COURT CORRECTLY GRANTED THE RESERVE'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S BREACH OF IMPLIED COVENANT CLAIM (COUNT V)

Cases

Team Two, Inc. v. City of Des Moines, No. 12-1565, 2013 WL 1749909 (Iowa Ct. App. Apr. 24, 2013)

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VI. THE DISTRICT COURT CORRECTLY GRANTED THE RESERVE'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S UNCONSCIONABILITY CLAIM (COUNT VII)

Cases

Bartlett Grain Co. v. Sheeder, 829 N.W.2d 18 (Iowa Ct. App. 2013)

In re Estate of Frink, No. 6-433 / 05-1674, 2006 WL 301816 (Iowa Ct. App. Oct. 25, 2006)

In re Marriage of Shanks, 758 N.W.2d 506 (Iowa 2008)

TBS Holdings, L.L.C. v. Bd. of Adjustment for Iowa City, 913 N.W.2d 1 (Iowa 2018)

Other Authorities

Unif. Residential Landlord & Tenant Act 1972 § 1.303, cmts.

ROUTING STATEMENT

This case warrants retention by the Iowa Supreme Court because it presents substantial issues of first impression regarding the interpretation, construction, or application of Iowa Code chapter 523D, pertaining to senior adult congregate living facilities. Iowa R. App. P. 6.1101(2)(c). Other issues in the case, however, involve "application of existing legal principles" that are "appropriate for summary disposition." *Id.* 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Plaintiff-Appellant Cheryl Albaugh, in her capacity as Agent/Attorney-in-Fact for Shirley Voumard ("Voumard") seeks to avoid her contractual obligations with Defendant/Third-Party Plaintiff-Appellee The Reserve on Walnut Creek ("The Reserve") by claiming, among other arguments, that Iowa Code chapter 562A governs their relationship, making their contract unenforceable.

Course of Proceedings

On August 24, 2016, Plaintiff filed her lawsuit in the Iowa District Court for Polk County. Plaintiff's petition attacked an agreement that Voumard entered into with The Reserve, alleging that Iowa Code chapter 562A applied to The Reserve (Counts I, VII), violation of Iowa Code 523D

(Count II), violation of Iowa Code chapter 714H (Count III), breach of implied covenant of good faith and fair dealing (Count IV), breach of fiduciary duty (Count V), and impossibility/frustration of performance (Count VI). (App. at 8–22). The parties undertook a normal course of discovery prior to filing cross-motions for summary judgment.

Disposition in the District Court

On May 26, 2018, the district court (Huppert, J.) entered its ruling on the parties' cross-motions for summary judgment. The district court ruled in favor of The Reserve on all issues and dismissed, with prejudice, all of Plaintiff's claims. (*Id.* at 640–68). In turn, the district court entered summary judgment in favor of Third-Party Defendant S.X. Corporation, d/b/a Essex Corporation ("Essex") on the premise The Reserve's third-party claims were derivative from Plaintiff's dismissed claims. (*Id.*)

On June 14, 2018, Plaintiff filed her notice of appeal.

STATEMENT OF FACTS

I. The Reserve

The Reserve on Walnut Creek is a senior adult congregate living facility located in Urbandale, Iowa, that is owned and operated by The Reserve, a nonprofit corporation, and governed by a Board of Directors. (*Id.* at 516–17 (The Reserve's Statement of Undisputed Material Facts in Support of its

Combined Motion for Summary Judgment and Resistance to Plaintiff's Motion for Summary Judgment ("SUMF") ¶ 1)). As a senior adult congregate living facility, The Reserve provides housing and supportive services to residents with periodic charges in consideration of an entrance fee. (*Id.* at 417 (The Reserve's SUMF ¶ 2)). The supporting services provided by The Reserve to its senior (geriatric) residents include but are not limited to the following: maintenance, activity services, security, dining options, transportation, and some health care and personal care services. (*Id.* (The Reserve's SUMF ¶ 3)).

For example, Voumard's daughter and agent/attorney-in-fact, Plaintiff-Appellant Cheryl Albaugh ("Cheryl"), who was responsible (with her husband) for identifying The Reserve as a new home for Voumard, testified that she was aware of the following services being available at The Reserve, even if Voumard did not use or participate in each of those specific supportive services: blood pressure clinics, podiatry/toe nail clinics, transportation services, dining options/meal services, beauty salon services, and other social activities. (*Id.* (The Reserve's SUMF ¶ 4)). Additionally, The Reserve provides door-to-door trash pick-up and disposal for its residents, in-unit dining tray-service after hospitalization and at other times, if needed, and each unit is equipped with an emergency call system having a push button cord in

each bedroom and a pull cord in each bathroom of each unit which are monitored at all times. (*Id.* (The Reserve's SUMF ¶ 5)).

The Reserve also had a supportive relationship with Iowa Health Home Care – In Trust, which provided a complete range of home care services and medical equipment. (*Id.* at 418 (The Reserve's SUMF ¶ 6)). Currently, through The Reserve's relationship with a successor entity, UnityPoint at Home, a registered nurse with expertise in community and home-based care is provided on a regular basis and is available to every member at their request. (*Id.* (The Reserve's SUMF ¶ 7)). This nurse provides clinical consultation, disease and medication management and/or diagnosis related education, and facilitates and enhances communications with the members' physicians. (*Id.* (The Reserve's SUMF ¶ 8)). The nurse is also a liaison for pre-operative and post-operative care activities and ensures smooth transition from hospital to home for members through enhanced services like physical therapy, home health aide, and social work. (*Id.* (The Reserve's SUMF ¶ 9)). These services are provided in the member's home at The Reserve and promote safely aging in place during restoration or rehabilitation. (*Id.* (The Reserve's SUMF ¶ 10)).

II. Voumard's Agreement with The Reserve

Sometime in 2007, Cheryl and her husband, Dennis Albaugh ("Dennis"), realized that Cheryl's mother, Voumard, was having difficulty

maintaining her single-family home on the south side of Des Moines. Additionally, Voumard's neighborhood was changing around her, and Cheryl and Dennis were increasingly concerned for Voumard's safety living at home alone. (*Id.* at 422–23 (The Reserve's SUMF ¶ 32)). Cheryl and Dennis were aware of The Reserve because Dennis' mother was already a member there.

After considering other options for Voumard, Cheryl and Dennis presented The Reserve to her mother as the best option. (*Id.* at 423 (The Reserve's SUMF ¶ 33)). Voumard apparently agreed, and on September 27, 2007, signed a contract with The Reserve called an Application Agreement ("Agreement").[1] (*Id.* (The Reserve's SUMF ¶ 34) (Voumard's Agreement was attached to her petition as Exhibit 1)).

The Agreement provides that the resident/member could appoint a personal representative to receive "copies of [the Agreement], [The Reserve's] Articles of Incorporation, Bylaws, Covenants of Occupancy and all other notices, disclosures, or forms required to be delivered to the Applicant <u>under Chapter 523D of the Iowa Code</u>." (Emphasis added.) (*Id.* at 418–19 (The Reserve's SUMF ¶ 12)). Additionally, attached to and

[1] The material provisions of Voumard's Agreement were identical to those in the application agreements of other members, including those at issue in prior and parallel litigation brought against The Reserve, which is discussed in section II(B) of this brief. (App. at 423 (The Reserve's SUMF ¶ 34)).

incorporated into the Agreement were certain Covenants of Occupancy that have been amended from time to time. (*Id.* at 419 (The Reserve's SUMF ¶ 13)).

Pursuant to paragraph 3 of the Agreement and the original and amended Covenants of Occupancy, Voumard was obligated to pay The Reserve a monthly fee varying in amount as set forth in her Agreement. (*Id.*) More specifically, Voumard was obligated to:

> pay Monthly Charges in advance of the first day of each succeeding month until such Resident's Residential Membership is transferred as detailed in these Covenants of Occupancy; . . . and Monthly Charges and all other expenses due and payable by the Resident shall continue until the earlier of (i) the date such Resident's Residential Membership is transferred as provided in Article 7, or (ii) the date such Resident's Residential Membership is terminated as provided in Article 12.

(*Id.* (The Reserve's SUMF ¶ 14)).

Voumard and all other members at The Reserve are generally charged three fees depending on the circumstances: an Entrance Fee; a Supplemental Amount (both the Entrance Fee and Supplemental Amount are paid at the time a prospective member applies for Residential Membership at The Reserve); and a Monthly Charge that Voumard agreed to pay for the annual expenses of The Reserve. (*Id.* (The Reserve's SUMF ¶ 15)). The Entrance Fee and Supplemental Amount received from the first set of residential members assisted in constructing the physical structure of The Reserve. (*Id.* (The

Reserve's SUMF ¶ 16)). Subsequent Entrance Fees and/or Supplemental Amounts pass through The Reserve and are paid to a departing member upon the transfer of his or her unit to a new member. (*Id.* at 420 (The Reserve's SUMF ¶ 17)).

The Monthly Charge paid by Voumard is the same fee paid by all other residential members of The Reserve, with the only differences in the amount of fees arising from the type of unit in which the residential member resides. (*Id.* (The Reserve's SUMF ¶ 18)). These fees, including the fees paid by Voumard, pay for month-to-month expenses for operation of The Reserve, such as payroll for The Reserve's employees, and expenses associated with The Reserve's social programming and the other services and activities provided to its residential members. (*Id.* (The Reserve's SUMF ¶ 19)).

If a residential member of The Reserve fails to uphold his or her contractual obligations, such as payment of the fees described, that failure directly affects the other residential members by requiring, among other things, the other residential members to pay increased costs to "cover" for the amounts that have not been paid by another resident. (*Id.* (The Reserve's SUMF ¶ 20)). As a nonprofit corporation, all funds The Reserve collects or receives are necessarily spent on operating The Reserve at Walnut Creek for the benefit of its residential members. In other words, non-payment by a

residential member does not affect any "profit" to The Reserve (which is a nonprofit corporation), but only affects the resident's fellow members. (*Id.* (The Reserve's SUMF ¶ 21)). For this reason, The Reserve actively monitors payments by residential members and pursues remedies, where appropriate. (*Id.* (The Reserve's SUMF ¶ 22)).

All of the described circumstances are derived from Voumard's Agreement with The Reserve, which concludes with the following bold-faced language:

> **Applicant acknowledges that:**
>
> **i. Upon disbursement of such Entrance Fee and such Supplemental Amount to the uses and purposes of the Corporation the Corporation will have no further obligation to refund or return such Entrance Fee or Such Supplemental Amount to Applicant.**
>
> **ii. Applicant's ability to recover such Entrance Fee and such Supplemental Amount will depend entirely on the Applicant's ability to assign or transfer his Membership in the Corporation to another person or persons.**
>
> **iii. The Monthly Charge is subject to fluctuation.**
>
> **iv. Upon the transfer of Applicant's Membership in the Corporation to another person or persons there is no guarantee the Applicant will recover the entire Entrance Fee, the entire Supplemental Amount, or such other funds as may have accrued during Applicant's residency within the Development pursuant to Article 7 of the Covenants of Occupancy.**

> **v. Should Applicant default under the terms of the Covenants of Occupancy, which default is not cured in a manner deemed satisfactory by the Corporation, Applicant's Residential membership shall be terminated and all of Applicant's right, title and interest in and to such Entrance Fee, such Supplemental Amount, and such other funds as may have occurred during Applicant's residency within the Development pursuant to Article 7 of the Covenants of Occupancy shall be forfeited by Applicant and become the sole and separate property of the Corporation, and the Corporation shall have the right and authority to transfer Applicant's Apartment to an assignee or transferee. Upon such transfer, the Corporation, in its sole discretion, shall have the right to deduct all Monthly Charges by Applicant and other expenses due and payable upon transfer.**

(*Id.* at 420–21 (The Reserve's SUMF ¶ 23)). The Agreement also includes language stating, "This Agreement will supersede any prior understandings and agreements and constitutes the entire agreement between us, and no oral representations or statements shall be considered a part hereof." (*Id.* at 421 (The Reserve's SUMF ¶ 24)).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO THE RESERVE ON PLAINTIFF'S LANDLORD-TENANT CLAIM (COUNT I) BECAUSE CHAPTER 562A DOES NOT APPLY TO THE RESERVE.

A. Preservation of Error

The Reserve agrees Voumard preserved error in relation to Count I of her petition by addressing it in her motion for summary judgment and in resisting The Reserve's motion for summary judgment. Both Voumard and

The Reserve filed comprehensive briefing and associated documents relating to the parties' cross-motions for summary judgment, which were then ruled on by the district court.

B. Standard of Review

An appellate court reviews "orders granting summary judgment for correction of errors at law." *TBS Holdings, L.L.C. v. Bd. of Adjustment for Iowa City*, 913 N.W.2d 1, 10 (Iowa 2018) (citing *Johnson Propane, Heating & Cooling, Inc. v. Iowa Dep't of Transp.*, 891 N.W.2d 220, 224 (Iowa 2017). The Court should hold that summary judgment was proper if the record shows "that there is no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Iowa R. Civ. P. 1.981(3)). The court should review the record "in the light most favorable to the nonmoving party." *Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19, 36 (Iowa 2018) (quoting *Walderback v. Archdiocese of Dubuque, Inc.*, 730 N.W.2d 198, 199 (Iowa 2007)).

C. Iowa Code Chapter 562A Does not Apply to Senior Adult Congregate Living Facilities Such as The Reserve

The district court correctly held that Iowa Code chapter 562A is inapplicable to facilities organized under chapter 523D such as The Reserve. Iowa Code chapter 562A is known as the Uniform Residential Landlord and Tenant Act ("Landlord-Tenant Act"). Iowa Code § 562A.1. Iowa Code

chapter 523D is titled "Retirement Facilities." The Court correctly found that "the legislature did not otherwise intend for Iowa Code chapter 562A to be applicable to an arrangement governed by chapter 523D . . . ." (App. at 652).

The law and facts in the instant case demonstrate that The Reserve is a senior adult congregate living facility under Iowa Code chapter 523D and chapter 562A is not applicable to the Agreement between Voumard and The Reserve. Voumard's claims that The Reserve's Agreement and corresponding entrance fee, which is expressly permitted by specific provisions of chapter 523D, should nonetheless be prohibited by chapter 562A and that The Reserve's use of same has violated chapter 562A. Voumard's arguments under chapter 562A fail for several reasons.

1. The language and context of chapter 523D reveal the inapplicability of chapter 562A

"The goal of statutory construction is to determine legislative intent." *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590 (Iowa 2004). "To determine legislative intent, we look to the language used, the purpose of the statute, the policies and remedies implicated, and the consequences resulting from different interpretations." *Des Moines Flying Serv. v. Aerial Servs.*, 880 N.W.2d 212, 220 (Iowa 2016) (citing *Iowa Individual Health Benefit Reins. Ass'n v. State Univ. of Iowa*, 876 N.W.2d 800, 804–05 (Iowa 2016)). The court must "assess the entire statute and its enactment to 'give the statute its

proper meaning in context.'" *Id.* (quoting *Sanon v. City of Pella*, 865 N.W.2d 506, 511 (Iowa 2015)).

Iowa Code chapter 523D relates specifically to retirement facilities, such as The Reserve, which are described in the chapter as providing either "continuing care" services or "senior adult congregate living services." Accordingly, it is clear that The Reserve is excluded from the application of Iowa Code chapter 562A, and is instead governed by the provisions of Iowa Code chapter 523D.

More specifically, chapter 523D "applies to a provider who executes a contract to provide continuing care or senior adult congregate living services in a facility . . . if the contract requires or permits the payment of an entrance fee" for a facility located in Iowa. Iowa Code § 523D.2. A "resident" of such a facility "means an individual, sixty years of age or older, entitled to receive care in a . . . senior adult congregate living facility." *Id.* § 523D.1(9). "Senior adult congregate living services" means "housing and one or more supportive services furnished to a resident, with or without other periodic charges," including, but not limited to, "activity services, security, dining options, [and] transportation." *Id.* § 523D.1(11), (12). A "provider" is a person/entity "undertaking through a lease or other type of agreement to provide care" in either type of facility. *Id.* § 523D.1(8).

As noted, in interpreting or construing a statute, Iowa courts look to the context in which the words of a statute are used. *See U.S. Bank N.A. v. Lamb*, 874 N.W.2d 112, 117 (Iowa 2016). It is clear that chapter 523D sets forth a comprehensive regulatory framework that provides for its own remedies for violations of the chapter. *See* Iowa Code § 523D.7.

Chapter 523D ("Retirement Facilities") is located in a subtitle to the Iowa Code for chapters pertaining to "Insurance and Related Regulation." The Commissioner of the Insurance Division has the authority to "establish, publish, and enforce rules" such as those found in rule 191—24 that pertain to chapter 523D. *See* Iowa Code § 505.8. The Reserve is a senior adult congregate living facility operating under chapter 523D, (*see* App. at 9 (Petition ¶ 5)), and as such, The Reserve is subject to oversight by the Commissioner of Insurance and is required to make annual reports of its operations to the Iowa Division of Insurance. *See* Iowa Code § 523D.12.

Chapter 523D—read in conjunction with its administrative rules (Iowa Administrative Code rule 191—24.1 to .12) promulgated by the Iowa Division of Insurance—sets forth a comprehensive system of law and regulation pertaining to the operation of such a retirement facility. Notably, Plaintiff sought to take advantage of this very system via Count II of her Petition, by which she alleged "Upon information and belief, The Reserve

failed to provide disclosure statements compliant with Iowa Code Chapter 523D."[2] (App. at 16 (Petition ¶ 58)). Plaintiff's persistence in misdirecting the district court to Iowa chapter 562A as governing Voumard's relationship with The Reserve was specious and properly rejected in the district court's ruling. (App. at 651).

i. Specific statutory provisions control over general statutory provisions

The district court found that "the unambiguous statutory language [of Iowa Code section 523D.1(4)(a)–(b)] *belies* the plaintiff's argument that her monthly charges constitute rent and form the basis limiting the amount of her entrance fee." (*Id.* (emphasis added)). The district court reasoned that "[i]t is clear that the legislature never contemplated the use of an entrance fee as a rental deposit, since the former is clearly not bound by the two-month limit imposed by the latter." (*Id.*) This conclusion was clearly correct.

When the provisions of a general statute and a specific statute conflict, and the provisions cannot be logically reconciled, the "special or local provision prevails as an exception to the general provision." Iowa Code § 4.7; *accord Rojas v. Pine Ridge Farms, L.L.C.*, 779 N.W.2d 223, 231 (2010). Thus, where a specific law "addresses the particular matter at issue" (such as

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[2] Notably, Voumard has not appealed the district court's dismissal of Count II of her petition. (App. at 652–55).

chapter 523D in this case), the general law (such as the Landlord-Tenant Act found in chapter 562A), does not apply. *See In re Estate of Laughead*, 696 N.W.2d 312, 317 (Iowa 2005).

Chapter 523D sets forth a specific law governing retirement facilities that expressly permits and governs the agreements and fees at issue in this case and provides a statutory remedy for violations thereof. *See, e.g.*, Iowa Code §§ 523D.1(4), 523D.6(e), (l). The more general law governing landlord-tenant relationships (chapter 562A), which allegedly would not allow the fees at issue, cannot apply to The Reserve because the two provisions cannot be logically reconciled and effect cannot be given to both at the same time.

Plaintiff has argued that there is no reason why The Reserve cannot be governed by Iowa Code chapter 523D and by chapter 562A. As indicated above, Iowa Code chapter 523D expressly allows The Reserve to charge an Entrance Fee. The legislature could have called that payment a "rental deposit," making it subject to chapter 562A, but it chose not to do so because it clearly sees a significant difference in the two types of dwelling units. In fact, Plaintiff concedes that there is a conflict between the statutes. (*See* Plaintiff's Proof Brief at 45).

Additionally, Plaintiff has attempted, and fails again, to argue that The Reserve created this conflict when it "made its entrance fee refundable to the

resident and subject to forfeiture if the resident defaults . . . ." (*Id.*) Plaintiff is blatantly wrong. The Agreement between The Reserve and Voumard clearly states that the entrance fee is not refundable and only recoverable based "entirely on [Voumard's] ability to assign or transfer [her] Membership in the Corporation to another person or persons." (App. at 28). This is further evidence that the Entrance Fee does not constitute a rental deposit and that the agreement between The Reserve and Voumard is not subject to chapter 562A.

Moreover, under Plaintiff's theory of applying <u>both</u> chapters simultaneously, The Reserve would have been able to charge its residents an Entrance Fee, Supplemental Amount, <u>and</u> a "rental deposit." However, The Reserve did not do so because Iowa Code chapter 562A does not govern it.

Plaintiff has further alleged or suggested in her Petition that Voumard's alleged tenancy at The Reserve must be month-to-month and subject to termination with thirty days' written notice. That cannot be correct because if the provisions of chapter 562A were applicable, they would allow that type of termination by both the tenant and the landlord. In the instant case, The Reserve cannot simply terminate its residents' occupancy at the end of any month in light of the membership interest held by the residents, which entitles them to occupancy of their unit until specified conditions occur. Similarly, provisions in the Agreement that was signed by Voumard also delineate when

and how she can terminate or transfer her membership. The provisions cited by Plaintiff in the Landlord-Tenant Act are clearly not applicable to The Reserve and there was no issue of material fact as to whether they do. Plaintiff's claims under that statute fail as a matter of law as properly found by the district court.

ii. The legislature did not extend the provisions of chapter 562A to chapter 523D

It is also clear that the Iowa Legislature understands the discrete functions served by chapter 523D, and it has acknowledged the distinction between facilities that are regulated under chapter 523D and other facilities that may house older Iowans.[3] Nowhere is this more apparent than in a comparison in the legislature's treatment of three seemingly-similar geriatric facilities that actually serve different functions and are accordingly treated differently under the Iowa Code: (1) "elder group homes," established under Iowa Code chapter 231B; (2) "assisted living programs," established under

[3] *See, e.g.*, Iowa Code § 105.11(11) (listing the different types of care facilities established under Iowa law); HF 2058 (84 G.A.) (2012) (same); HF 2079 (83 G.A.) (2010) (same); HSB 547 (80 G.A.) (2001) (acknowledging chapter 523D provides "for the regulation of places which undertake to provide . . . senior adult congregate living services"; HSB 675 (78 G.A.) (1995) (noting chapter 523D provides "for the regulation of contracts to provide care to persons in a retirement facility."

Iowa Code chapter 231C; and (3) "senior adult congregate living facilities" established under Iowa Code chapter 523D (such as The Reserve).

"The legislature knows how to cross-reference" chapters or sections of the Iowa Code where it intends those chapters or sections to be incorporated in its legislation. *Des Moines Flying Serv.*, 880 N.W.2d at 221. Importantly, both chapter 231B ("elder group homes") and chapter 231C (assisted living) facilities are expressly subject to chapter 562A. *See* Iowa Code §§ 231B.18, 231C.19. <u>However, no similar Code provision extends the application of 562A to chapter 523D facilities</u>. Had the legislature intended chapter 562A to apply to chapter 523D senior adult congregate living facilities it would have incorporated application of that chapter by reference as it did for the other types of facilities.

Notably, the Iowa Legislature approved an extensive amendment to chapter 523D in 2004, one year <u>after</u> amending chapter 231C to apply explicitly chapter 562A to its provisions, and one year <u>before</u> passing the same amendment to chapter 231B. *Compare* 2004 Iowa Acts ch. 1104, *with* 2003 Iowa Acts ch. 166, *and* 2005 Iowa Acts ch. 62. Thus, the Iowa Legislature was aware of the issue at the time it approved the extensive amendments to chapter 523D but still chose not to subject facilities operating under chapter 523D, like The Reserve, to the provisions of chapter 562A.

Accordingly, the district court correctly concluded "[t]his is strong evidence that the absence of any such language within chapter 523D is indicative of the legislature's intent to not make chapter 562A applicable to arrangements otherwise governed by chapter 523D." (App. at 651). This Court must draw the same conclusion from the interplay of chapters 231B, 231C, and 523D: the legislature clearly knows how to invoke and apply chapter 562A when it desires to do so, but has chosen not to extend the provisions chapter 562A to facilities operating pursuant to chapter 523D. *Accord Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008) ("When interpreting laws, [the court is] guided by the rule of 'expressio unius est exclusio alterious.' 'This rule recognizes that 'legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.'" (citation omitted.)).

iii. Other jurisdictions have reached similar conclusions

Other courts that have encountered issues similar to those presented in this case have confirmed or concluded that agreements like the those at issue, including agreements created pursuant to statutes similar to Iowa Code chapter 523D, are permissible and not subject to the state's general landlord-tenant law. *See, e.g.*, *Emerson v. Adult Cmty. Total Servs., Inc.*, 842 F. Supp. 152, 156–57 (E.D. Pa.1994); *Jackim v. CC-Lake, Inc.*, 842 N.E.2d 1113,

1120–24 (Ill. Ct. App. 2006) (collecting cases); *Bower v. The Estaugh*, 369 A.2d 20, 22–24 (N.J. Super. Ct. App. Div. 1977) (concluding, in part, that the agreement at issue was not void as against public policy); *Sunrise Group Homes, Inc. v. Ferguson*, 777 P.2d 553, 555 (Wash. Ct. App. 1989).

For instance, in *Jackim*, the Appellate Court of Illinois was asked to determine if a life care contract, which was comparable to contracts for "continuing care" under Iowa Code chapter 523D, established a landlord-tenant relationship between the parties, making the contract subject to certain provisions of the general landlord-tenant law of Illinois. *See* 842 N.E.2d at 1120–24. Acknowledging "[t]he primary rule of statutory construction is to ascertain and give effect to the legislature's true intent and meaning" (the same principle applicable under Iowa law), the *Jackim* court concluded the landlord-tenant law did not apply. *See id.* at 1117–18. In reaching this conclusion, the *Jackim* court distinguished between the obligations of landlords and tenants and the statutorily mandated services provided by providers, such as The Reserve, to residential members, such as Voumard. *See id.* at 1118–20.

As in *Jackim*, Plaintiff is essentially asking this Court "to isolate a few of the characteristics of the parties' relationship and few of the terms of their contract in order to find that" the alleged requirements of Iowa's landlord-

tenant law apply. *See id.* at 1119. However, that argument is contrary to the statutory scheme established by the Iowa legislature in chapter 523D to govern relationships of the type at issue in this case.

Plaintiff attempts to analogize this case to a Wisconsin case—*M & I First Nat'l Bank v. Episcopal Homes Mgt., Inc.*, 536 N.W.2d 175 (Wis. Ct. App. 1995)—where the Wisconsin court of appeals held that an agreement similar to the one at issue in this case was a "rental agreement" subject to the landlord-tenant statute of the state. (*See* Appellant's Proof Brief at 30, 37–39). As the district court noted in its ruling, Plaintiff's reliance on this case is misplaced because Wisconsin does not have an equivalent of Iowa Code chapter 523D and the issue raised in this present case—"the interplay between the landlord-tenant statute and a statute governing retirement facilities"—was not addressed in the Wisconsin case. (App. at 650 n.8). Therefore, Plaintiff's argument that *M & I First Nat'l Bank* is persuasive in this case simply fails.

iv. Impractical and absurd results must be avoided

Plaintiff's claims regarding the landlord-tenant act must be also denied because if her arguments about the applicability of chapter 562A were correct, it would lead to the impractical and absurd result of upending the entire industry for senior adult congregate living facilities in Iowa. Such a result would be contrary to common sense, the Iowa Code, and other precepts of

Iowa law. *See United Fire & Cas. Co. v. Acker*, 541 N.W.2d 517, 519 (Iowa 1995) ("We will not construct a statute in a way that would produce impractical or absurd results."); *see also Rojas*, 779 N.W.2d at 231 (observing that when interpreting a statute, a court is to presume the legislature "included all parts of the statute for a purpose" and "avoid reading the statute in a way that would make any portion of it redundant or irrelevant").

Quite simply, chapter 523D or the administrative code that governs senior adult congregate living facilities do not prohibit the provisions about which Plaintiff now complains. The Agreement at issue is expressly permitted under Iowa law and is regulated by Iowa Code chapter 523D.

Plaintiff's claims under the more general chapter 562A fail as a matter of law and no issue of material fact arises as to whether Iowa Code chapter 562A applies to the Agreement between The Reserve and Voumard. For these reasons, this Court should deny Plaintiff's claims and affirm the district court's ruling that Iowa Code chapter 562A is inapplicable to the Agreement between The Reserve and Voumard.

II. THE DISTRICT COURT MAY BE AFFIRMED ON ADDITIONAL BASES SURROUNDING PLAINTIFF'S MISTAKEN RELIANCE ON THE LANDLORD-TENANT ACT

In analyzing the parties' claims, the district court reached two findings or conclusions by which it rejected additional arguments raised by The

Reserve in resisting Plaintiff's motion for summary judgment and moving for summary judgment in The Reserve's favor. Should this Court find error in the district court's analysis of the primary Landlord-Tenant Act arguments already discussed, it must nonetheless affirm summary judgment in favor of The Reserve on the other related grounds it raised in the district court. *Hawkeye Foodservice Distrib. v. Iowa Educators Corp.*, 812 N.W.2d 600, 609 (Iowa 2012) (alteration omitted) (quoting *Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 811-12 (Iowa 2000)) ("We first examine the basis upon which the trial court rendered its decision, affirming on that ground if possible. If we disagree with the basis for the court's ruling, we may still affirm if there is an alternative ground, raised in the district court and urged on appeal, that can support the court's decision."); *see also Iowa Pub. Serv. Co. v. Sioux City*, 116 N.W.2d 466, 469 (Iowa 1962) ("Iowa cases hold a party who wins his case . . . cannot appeal from a mere adverse finding since it is deemed not prejudicial to him.").

A. <u>The Reserve also falls under a specific exception the Landlord-Tenant Act</u>

The Reserve respectfully disagrees with the district court's finding that The Reserve does not also fall under an exception to the Landlord-Tenant Act stated in section 562A.5(1). (App. at 652).

In addition to being inconsistent with the legislature's statutory scheme

for facilities like The Reserve as described in Iowa Code chapter 523D, the Landlord-Tenant Act also excludes application of chapter 562A to Voumard's Agreement with The Reserve. *See* Iowa Code § 562A.5(1). More specifically, section 562A.5(1) excludes application of chapter 562A to "Residence at an institution, public or private, if incidental to . . . the provision of medical, geriatric . . . or similar services."

The Reserve, as a senior adult congregate living facility, provides just such a residence that is incidental to geriatric and similar services, such as the maintenance and security services, activity services, dining options, transportation, and health care and personal care services described by Cheryl during her deposition. (App. at 456–60, 465–66 (excerpts from the deposition transcript of Cheryl Albaugh at p. 23:16–25:5, 31:7–14 ("Cheryl Dep."); Gary Albaugh at p. 32:3–12, 53:20–54:11, 61:11–62:25) ("Gary Dep.")). The Reserve also provides door-to-door trash pick-up and disposal for its residents, in-unit dining tray-service after hospitalization and at other times, if needed, and each residential unit is equipped with an emergency call system having a push button cord in each bedroom and a pull cord in each bathroom of each unit which are monitored at all times. (*Id.* at 417 (The Reserve's SUMF ¶ 5)). In addition, through The Reserve's relationship with UnityPoint at Home, a registered nurse with expertise in community and home-based care

is provided on a regular basis, is available to every member at their request, and provides numerous health-related services. (*Id.* at 418 (The Reserve's SUMF ¶¶ 6–10)).

The district court took specific note of the "geriatric and other services" provided by The Reserve in analyzing the parties' cross-motions but concluded the statutory exemption stated in Iowa Code section 562A.5(1) does not apply. (*See Id.* at 562). The Reserve respectfully states the district court should have concluded otherwise, and this Court may affirm the district court's judgment on this ground. *See Hawkeye Foodservice Distrib.*, 812 N.W.2d at 609.

B. <u>Plaintiff's claims should have been barred under the doctrine of non-mutual defensive collateral estoppel</u>

The district court's ruling regarding the inapplicability of Iowa Code chapter 562A may be affirmed on an additional basis as well. On May 30, 2012, counsel for Voumard sued The Reserve on behalf of the estate of William R. Raisch and William F. Raisch, in his capacity as personal representative of his deceased father. (*See* App. at 468–76 (Petition in *Estate of Raisch v. The Reserve*, Iowa District Court for Polk County, Case No. LACL125314 ("*Raisch*")). On February 7, 2013, the district court (Schemmel, J.) was presented with the following question (on cross-motions for summary judgment) in *Raisch*: "whether Iowa's Uniform Residential

Landlord and Tenant Act, Iowa Code chapter 562A, is applicable to The Reserve and the Agreement, and thus whether Plaintiffs can properly bring claims for violation of such statute." (*Id.* at 487 (Raisch Petition ¶ 28)). The Court held that "chapter 562A is not applicable to [Plaintiff's] Agreement with The Reserve and the Plaintiffs' claims under this chapter cannot stand as a matter of law."[4] (*Id.* at 490).

The *Raisch* ruling was binding on Plaintiff in this case due to the doctrine of defensive collateral estoppel. *Ideal Mut. Ins. Co. v. Winker*, 319 N.W.2d 289, 296 (Iowa 1982).

It is black letter law in Iowa that parties are prohibited from litigating the same issue more than once. *See Goolsby v. Derby*, 189 N.W.2d 909, 915 (Iowa 1971); *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981). Pursuant to the doctrine of collateral estoppel (also known as issue preclusion), "once a court has decided an issue of fact or law necessary to its judgment, the same issue cannot be relitigated in later proceedings."

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[4] Undeterred by that definitive ruling, on September 2, 2016, another set of plaintiffs brought a claim against The Reserve alleging the exact same cause of action for violation of the Landlord-Tenant Act. The issue was again the subject of extensive summary judgment briefing between the parties and, on December 19, 2017, the Polk County District Court (Vaudt, J.) again entered an order dismissing the same claims as are at issue here, holding that Iowa Code chapter 562A does not apply to the agreements between the plaintiffs and The Reserve. (App. at 528–36).

Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 571 (Iowa 2006). Collateral estoppel is intended to "further 'the interest of judicial economy and efficiency by preventing unnecessary litigation,'" and to "protect litigants from the vexation of relitigating identical issues with identical parties . . . .'" *Id.* at 571–72 (quoting *Am. Family Mut. Ins. Co. v. Allied Mut. Ins. Co.*, 562 N.W.2d 159, 163 (Iowa 1997)).

Iowa courts recognize a difference between "defensive" and "offensive" collateral estoppel. *See Goolsby*, 189 N.W.2d at 913. The supreme court has explained the difference as follows:

> The phrase "defensive use" of the doctrine of collateral estoppel is used here to mean that a stranger to the judgment, ordinarily the defendant in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an element of his defense.
>
> On the other hand, the phrase "offensive use" or "affirmative use" of the doctrine is used to mean that a stranger to the judgment, ordinarily the plaintiff in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an essential element of his cause of action or claim.
>
> In other words, defensively a judgment is used as a "shield" and offensively as a "sword."

Id. Both offensive and defensive collateral estoppel have been utilized under Iowa law.

Generally, collateral estoppel applies where four elements are established: "1) there must be an identity of the issues; 2) the issue must have been raised and litigated in the prior action; 3) the issue must have been material and relevant to the disposition of the prior action; and 4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment." *Ray v. Union Pac. R.R. Co.*, 971 F. Supp. 2d 869, 892-93 (S.D. Iowa 2013) (citing *Haberer v. Woodbury Cnty.*, 188 F.3d 957, 961-62 (8th Cir. 1999); *Dolan v. State Farm Fire & Cas. Co.*, 573 N.W.2d 254, 256 (Iowa 1998)).

It is clear that all four elements are present in the instant case, and the *Raisch* ruling should have prevented Plaintiff from re-litigating the applicability of chapter 562A to The Reserve as a senior adult congregate living facility.

It is beyond dispute that the issues in this case are identical to those that were raised and litigated in *Raisch*; namely, whether Iowa Code chapter 562A applies to The Reserve and its Agreements with its members. (*See* App. at 489 (setting forth the *Raisch* plaintiffs' virtually identical claim for violation of Iowa Code chapter 562A)).

The second "requirement is generally satisfied if the parties to the original action disputed the issue and the trier of fact resolved it." *Hall v.*

Barrett, 412 N.W.2d 648, 651 (Iowa Ct. App. 1987). This second element does not require a trial on the merits; it can be satisfied by other means as well, including on a motion for summary judgment or by a dismissal with prejudice. *See Ideal Mut. Ins. Co.*, 319 N.W.2d at 296 (holding that issue preclusion was applicable after ruling on motion for summary judgment); *Buckingham v. Fed. Land Bank Ass'n*, 398 N.W.2d 873, 876 (Iowa 1987) (holding that issue preclusion was applicable after settlement and dismissal with prejudice). "Collateral estoppel may apply 'no matter how slight was the evidence on which a determination was made, in the first suit, of the issue to be collaterally concluded.'" *Hall*, 412 N.W.2d at 651 (citation omitted).

The parties settled the *Raisch* lawsuit <u>after</u> the plaintiffs in that case lost on the chapter 562A claims, <u>after</u> those plaintiffs lost a motion to reconsider, <u>after</u> those plaintiffs lost on an application for interlocutory appeal, and <u>without</u> the *Raisch* plaintiffs asking the district court to vacate the motion granting partial summary judgment to The Reserve. Regardless of whether a "final judgment" was entered in that case, collateral estoppel applies due to the *Raisch* court's final and conclusive ruling that chapter 562A does not apply to The Reserve as a matter of law. This conclusion is consistent with Iowa law regarding estoppel, *see Winnebago Indus., Inc.* at 571-72, and consistent with the reasoning and conclusion of the United States Court of

Appeals for the Eighth Circuit under similar circumstances. *See Royal Ins. Co. of Am. v. Kirksville College of Osteopathic Med.*, 304 F.3d 804, 808 (8th Cir. 2002).

It is also beyond dispute that the Iowa Code chapter 562A issues were material and relevant to the disposition in *Raisch* and that those issues were necessary and essential to the resulting judgment. Indeed, the court in *Raisch* described "the crux of the issue" as "whether Iowa's Uniform Residential Landlord and Tenant Act, Iowa Code chapter 562A, is applicable to The Reserve and the Agreement, and thus whether Plaintiffs can properly bring claims for violation of such statute." (App. at 487). Then, after consideration of fully briefed and argued cross-motions for summary judgment, the court in *Raisch* held that "chapter 562A is not applicable to [Plaintiffs'] Agreement with The Reserve and the Plaintiffs' claims under this chapter cannot stand as a matter of law." (*Id.* at 490; *see also id.* at 528–36 (similar holding)).

Therefore, each of the elements required for the application of collateral estoppel to Plaintiff in the instant case were satisfied.

In addition to the aforementioned prerequisites, Iowa courts traditionally required mutuality of the parties or privity between the parties before invoking the principles of collateral estoppel. *See Hunter*, 300 N.W.2d at 123. However, the mutuality/privity requirement has since been relaxed.

See id. ("this court has modified the traditional requirement of privity where the doctrine is invoked in a defensive manner"); *see also Opheim v. Am. Interinsurance Exch.*, 430 N.W.2d 118, 121 (Iowa 1988). More specifically:

> [n]either mutuality of parties nor privity is required where issue preclusion is applied defensively if the party against whom issue preclusion is invoked was so connected in interest with one of the parties in the former action as to have had a full and fair opportunity to litigate the relevant claim or issue and be properly bound by its resolution.

Dettmann v. Kruckenberg, 613 N.W.2d 238, 244 (Iowa 2000).

In fact, "where the four prerequisites of issue preclusion enumerated in *Hunter* have been established, and the nonmutual party against whom the doctrine is defensively invoked has a 'community of interest with, and adequate representation by, the losing party in the first action,' <u>the nonmutual party has had a full and fair opportunity to litigate the issue and is properly bound by its resolution in the former action.</u>" *Opheim*, 430 N.W.2d at 121 (emphasis added); *see also Goolsby*, 189 N.W.2d 916 ("courts have been more liberal with the exception to the mutuality rule where collateral estoppel is proposed for defensive purposes to bar an action.").

To determine whether non-mutual defensive issue preclusion applies, the key inquiry is <u>not</u> whether a stranger to the first action had an opportunity to litigate, but whether there was "'adequate representation by the losing party in the first action.'" *See West v. Ohrt*, No. 05-0040, 2006 WL 1278093, at *3

(Iowa Ct. App. May 10, 2006) (quoting *Opheim*, 430 N.W.2d at 121). Accordingly, Iowa courts have invoked non-mutual defensive issue preclusion to prohibit plaintiffs who were not parties to the first action from re-litigating issues decided in that action. *See Brown v. Kassouf*, 558 N.W.2d 161, 165 (Iowa 1997) (holding that non-mutual defensive issue preclusion prohibited re-litigating issue in subsequent lawsuit); *State ex rel. Casas v. Fellmer*, 521 N.W.2d 738, 742-43 (Iowa 1994) (same); *Opheim*, 430 N.W.2d at 121 (same); *Bryan v. Hall*, 367 N.W.2d 251, 255 (Iowa Ct. App. 1985) (same).

In the instant case, there is no question that the plaintiffs in *Raisch* fully and fairly litigated the chapter 562A issue on a fully briefed motion for summary judgment. *See Ideal Mut.*, 319 N.W.2d at 296 (holding that issue preclusion applies with equal force to issues decided on a motion for summary judgment). Additionally, it is clear that the plaintiffs in Raisch adequately represented Plaintiff's interests in the present action. *See West*, 2006 WL 1278093, at *3 (quoting *Opheim*, 430 N.W.2d at 121) (holding that the key inquiry is whether there was "'adequate representation by the losing party in the first action'"). Indeed, Plaintiff's counsel in the instant case also served as counsel for the plaintiffs in *Raisch*. *See Brown*, 558 N.W.2d at 165 (finding

adequate representation where parties shared the same attorney as the prior action).

Plaintiff's interests are also identical to the plaintiffs' interests in *Raisch*. In fact, Voumard was a member of The Reserve at the time *Raisch* was litigated, she and Plaintiff had actual or constructive knowledge of the lawsuit via The Reserve's board meetings and minutes, and they could have joined *Raisch* but apparently chose not to do so. Voumard and Plaintiff clearly shared a community of interest with the plaintiffs in *Raisch* such that they were adequately represented with regard to the matters at issue in the instant motions for summary judgment. *See Brown*, 558 N.W.2d at 165; *Casas*, 521 N.W.2d at 742-43; *Opheim*, 430 N.W.2d at 121; *Bryan*, 367 N.W.2d at 255.

In sum, Plaintiff should have been precluded from re-litigating the chapter 562A claims that were denied definitively in *Raisch*. While the district court missed the opportunity to dismiss Plaintiff's claim on this basis, this Court may now do so. *See Hawkeye Foodservice Distrib.*, 812 N.W.2d at 609.

III. THE DISTRICT COURT DID NOT ERR IN GRANTING THE RESERVE'S MOTION FOR SUMMARY JUDGMENT ON THE PLAINTIFF'S CONSUMER FRAUD CLAIM (COUNT III)

A. Preservation of Error

The Reserve agrees Voumard preserved error in relation to Count III of

her petition in light of her and The Reserve's comprehensive briefing on the parties' cross-motions for summary judgment, which were then ruled on by the district court.

B. Standard of Review

This Court's review is "for correction of errors at law." *TBS Holdings, L.L.C.*, 913 N.W.2d at 10; *see also infra* Section I.B.

C. Plaintiff's Consumer Fraud Claim is Barred by the Statute of Limitations

Iowa Code section 714H.5 states "An action pursuant to this chapter must be brought within two years of the occurrence of the last event giving rise to the cause of action under this chapter or within two years of the discovery of the violation of this chapter by the person bringing the action, whichever is later." Plaintiff's claim under chapter 714H focuses on alleged representations made to Voumard at the time she entered into her Agreement. As noted previously, the Agreement was executed in September 27, 2007. Any representations made would have been made or discovered far longer than two years before the filing of this lawsuit. Plaintiff's claims under chapter 714H are barred by the statute of limitations of Iowa Code section 714H.5.

In its ruling, the district court first evaluated the parties' arguments regarding what event triggered the statute of limitations and properly found

that Plaintiff's allegations regarding Voumard's understanding of the Agreement—that she would receive a refund and was unaware that The Reserve would change its marketing plan and unit prices—was "directly contradicted by the unambiguous language in the contract she executed at the time she became a member of the defendant." (App. at 657). The district court rejected Plaintiff's argument because the Agreement explicitly states "there is no guarantee the Applicant will recover the entire Entrance Fee, the entire Supplemental Amount, or such other funds as may have accrued during Applicant's residency within the Development . . . ." (*Id.* (quoting Agreement at 5)). The district court was correct in its finding because it is clear that Voumard and Plaintiff were fully aware of the unambiguous language of the Agreement at the time it was executed.

D. <u>Even if the Claims Are not Time Barred, Plaintiff Was Not Able to Substantiate Her Allegations</u>

Even if the claims were not barred, any allegation against The Reserve with respect to representations made to Voumard at the time she entered into her Agreement is misplaced. Voumard was an early member of The Reserve who signed her Agreement before anyone other than Essex or its employees were involved with or at The Reserve. (*Id.* at 29). For these reasons, to the extent Plaintiff has any claim under section 714H, liability simply cannot rest with The Reserve. The district court noted that an important part of the statute

is that the defendant has to "know[] or reasonably should know" that its actions are what the statute forbids. (*Id.* at 657 (quoting Iowa Code § 714H.3 (1) (2017))). Because Plaintiff generated no evidence that would allow for a conclusion that The Reserve violated the statute, the district court found that there was no issue of material fact.

Plaintiff now attempts to diminish the elements of the statute by omitting the "know or reasonably should know" part of it to try to persuade this Court that she met her burden. (Appellant's Proof Brief at 62) (quoting Iowa Code chapter 714H and omitting, "A person shall not engage in a practice or act the person <u>knows or reasonably should know</u> is an . . . ."). However, in addition to ignoring the statutory language, her attempt fails because she still cannot point to any evidence that would allow for the conclusion that The Reserve violated Iowa Code chapter 714H.

Finally, the Agreement included the statement that "This Agreement will supersede any prior understandings and agreements and constitutes the entire agreement between us, and no oral representations or statements shall be considered a part hereof." (App. at 30). When an agreement is fully integrated in this fashion, "the parol evidence rule prevents the receipt of any extrinsic evidence to contradict (or even supplement) the terms of the written agreement." *Whalen v. Connelly*, 545 N.W.2d 284, 290 (Iowa 1996) (citing

Restatement (Second) of Contracts § 213 (1981)). Notably, when considering fraud in the inducement claims in the context of a fully integrated agreement, the supreme court has held as follows:

> Although we have allowed fraudulent inducement claims to proceed despite an integration clause in a contract, we have done so only with regard to misrepresentations concerning facts or circumstances not included in the written contract.

Id. at 294; *accord GreatAmerica Leasing Corp. v. Gelfand*, No. 13-0333, 2013 WL 5761880, at *3 (Iowa Ct. App. Oct. 23, 2013) (quoting *Whalen* and affirming district court's summary judgment ruling disposing of fraud defense to claim of breach of contract where contract was fully integrated).

Accordingly, any purported evidence of representations made by The Reserve (or others)—or beliefs as to the Agreement's meaning that were purportedly held by Plaintiff or Voumard—are not relevant and do not enter into the analysis. In the absence of such evidence, Plaintiff's misplaced claims also fail for factual support.

The district court was correct when it found that Plaintiff generated no issue of material fact on her consumer fraud claim and appropriately granted The Reserve's motion for summary judgment. This Court must affirm the district court's ruling.

IV. THE DISTRICT COURT CORRECTLY GRANTED THE RESERVE'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIM (COUNT IV)

A. Preservation of Error

The Reserve agrees Voumard preserved error in relation to Count IV of her petition in light of her and The Reserve's comprehensive briefing on the parties' cross-motions for summary judgment, which were then ruled on by the district court.

B. Standard of Review

This Court's review is "for correction of errors at law." *TBS Holdings, L.L.C.*, 913 N.W.2d at 10; *see also infra* Section I.B.

C. Plaintiff Failed to Offer Admissible Evidence Showing Any Issue of Fact

The existence of a fiduciary relationship generally "turns on the facts of the case." *Cemen Tech, Inc. v. Three D Indus., L.L.C.*, 753 N.W.2d 1, 13 (Iowa 2008). However, there are situations in which summary judgment is appropriate on this issue. *Id.* ("It is true, as the district court noted, that the question of whether a fiduciary relationship exists in a given case may, in some cases, be decided by the court in a summary-judgment proceeding."). As such, it was appropriate for the district court to rule on this issue on summary judgment because Plaintiff failed to establish any issue of material

fact as to whether a fiduciary relationship existed.

In interrogatories directed to Plaintiff, The Reserve asked her to describe with specificity the nature of her breach of fiduciary duties theory. In response, Plaintiff stated boilerplate objections and answers to each of the interrogatories propounded. (*See* App. at 495–505 (providing an example of Plaintiff's discovery responses)). Plaintiff provided no substantive responses to the interrogatories, instead, at most, simply repeating the mere allegations of her Petition. Plaintiff could not even articulate the claims she was making, much less facts or circumstances that could overcome The Reserve's potential defenses to this claim. *See, e.g.*, *Hanrahan v. Kruidenier*, 473 N.W.2d 184, 186 (Iowa 1991) (discussing the business judgment rule).

In an attempt to resurrect her claim on appeal, Plaintiff tries to persuade this Court that a fiduciary relationship existed between Voumard and The Reserve by simply restating her argument that "The Reserve maintained significant control over the market . . . ." (Plaintiff's Proof Brief at 67). Plaintiff's allegations do not establish that any fiduciary duties were owed by The Reserve, or that any such fiduciary duties were breached by The Reserve. While The Reserve may assume some responsibility for marketing individual units under a separate "Agency Agreement," that was not at issue in this case. (*See, e.g.*, App. at 154–55 (Plaintiff's Appendix in Support of Motion for

Summary Judgment ("Plaintiff's App.") at 26–27, 64–65)). It is also clear that a member, not The Reserve, is ultimately responsible for setting his or her transfer price and accepting any offer for transfer. (*See, e.g.*, *id.* (Plaintiff's App. at 26, ¶ 5) (stating that any amount to be added to the transfer price for options is determined by the member)). The Reserve is not responsible for choosing or even vetting the prospective member outside of a cursory confirmation that she or he is age-qualified and able to pay the entrance fee as required by Iowa Code section 523D.1. Clearly, any oversight related to simply confirming the prospect's qualification to be a member pursuant to statute cannot does not give rise to the broad duty Plaintiff sought to ascribe to The Reserve.

Furthermore, when a relationship between two parties is at "arms length," no fiduciary duty exists. *See Pirkl v. Nw. Mut. Ins. Ass'n*, 348 N.W.2d 633, 635 (Iowa 1984). An "arms-length transaction" is one "negotiated by unrelated parties, each acting in his or her self interest . . . ." *Fannie Mae v. Sears*, No. 1 CA-CV 11-0095, 2011 WL 6292220, at *2 n.4 (Ariz. Ct. App. Dec. 15, 2011) (quoting Arms-Length Transaction, Black's Law Dictionary (6th ed. 1990)). As the district court reasoned in its ruling, the relationship between Voumard and The Reserve was an arms-length transaction because it "is clear that the parties were on equal footings as they

negotiated the arrangement that resulted in Ms. Voumard becoming an occupant of The Reserve." (App. at 659). Moreover, as the district court noted, the clear and unambiguous "no guarantee" language of the Agreement directly contradicts Plaintiff's fiduciary duty claim. (*See id.*). The district court's conclusions were correct and fatal to Plaintiff's claim.[5]

While the district court and this Court must consider Plaintiff's "evidence" and even her allegations in a light most favorable to her in considering The Reserve's motion for summary judgment, "the court should only consider 'such facts as would be admissible in evidence'" in making this analysis. *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96–97 (Iowa 2012); *accord Howard v. Columbia Pub. Sch. Dist.*, 363 F.3d 797, 801 (8th Cir. 2004) (noting a non-moving party resisting a motion for summary judgment cannot rely on "unreasonable inferences or sheer speculation as fact" and the court is to "consider only admissible evidence and disregard portions of various affidavits and depositions that were made without personal knowledge, consist of hearsay, or purport to state legal conclusions as fact"). As the supreme court has instructed, "'[s]ummary judgment is not a dress

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[5] These conclusions are in no way impacted by Judge Vaudt's determination to permit a similar claim by four different plaintiffs, making claims related to their specific circumstances, to proceed to trial in the *Buck* case. Furthermore, The Reserve respectfully posits that her ruling was in error, which presumably will be addressed on appeal in that case.

rehearsal or practice run, it is the put up or shut up moment in a lawsuit, when a [nonmoving] party must show what evidence it has that would convince a trier of fact to accept its version of the events.'" *Nelson v. Lindaman*, 867 N.W.2d 1, 11 (Iowa 2015) (quoting *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005)).

The Reserve sought to discover the basis for Plaintiff's claims, and all she could provide as support were allegations from her petition amounting to no more than rumor, innuendo, and conjecture. This speculation and conspiracy theorizing did not pass muster at the summary judgment stage and did not generate an issue of material fact. As the district court correctly found, "[i]t is incumbent upon the plaintiff in resisting the motion for summary judgment on this count to identify those facts within the record . . . regarding the claimed fiduciary relationship between Ms. Voumard and the defendant. This she has not done." (App. at 658).

Like the other counts of Plaintiff's petition, Count IV was legally and factually unsupported and the district court's ruling dismissing that count must be affirmed.

V. THE DISTRICT COURT CORRECTLY GRANTED THE RESERVE'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S BREACH OF IMPLIED COVENANT CLAIM (COUNT V)

A. Preservation of Error

The Reserve agrees Voumard preserved error in relation to Count V of her petition in light of her and The Reserve's comprehensive briefing on the parties' cross-motions for summary judgment, which were then ruled on by the district court.

B. Standard of Review

This Court's review is "for correction of errors at law." *TBS Holdings, L.L.C.*, 913 N.W.2d at 10; *see also infra* Section I.B.

C. Plaintiff Did Not Have or Establish an Independent Basis on Which to Base a Claim of Breach

Plaintiff's Count V alleges a breach of the "implied covenant of good faith and fair dealing," in which Plaintiff asserts that "The Reserve breached the implied covenant of good faith and fair dealing" in several ways. This claim is misplaced. The facts Plaintiff alleged, even if true, simply do not give rise to a breach of the implied covenant of good faith and fair dealing.

The implied covenant has recently been described as follows:

> The underlying principle is that there is an implied covenant that neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. This implied covenant generally operates

> upon an express condition of a contract, the occurrence of which is largely or exclusively within the control of one of the parties.

Team Two, Inc. v. City of Des Moines, No. 12-1565, 2013 WL 1749909, at *5 (Iowa Ct. App. Apr. 24, 2013) (internal quotation marks and citations omitted). Importantly, "the covenant does not give rise to new substantive terms that do not otherwise exist in the contract." *Bagelmann v. First Nat'l Bank*, 823 N.W.2d 18, 34 (Iowa 2012).

The district court correctly found that nothing in the Agreement between Voumard and The Reserve forms a basis for an implied covenant claim because "it is clear that the source of [the] recovery would be solely from [Voumard] and [The Reserve] is not obligated in any way to assist or facilitate the process by which those amounts are negotiated between Ms. Voumard and her prospective transferee." (App. at 661).

Plaintiff persists in claiming that the Agreement "provided that the entrance fee and supplemental amount would be returned to Voumard upon transfer of her membership to another qualified resident," but this is misleading and unsupported. (*See* Plaintiff's Proof Brief at 73). In fact, the Agreement states as follows:

> **Applicant's ability to recover such Entrance Fee and such Supplemental Amount will depend entirely on the Applicant's ability to assign or transfer his Membership in the Corporation to another person or persons.**

(App. at 28 (emphasis in original)). Therefore, Plaintiff's claims regarding Voumard's alleged expectations have no merit.

As demonstrated, Plaintiff can claim no independent rights under an implied covenant of fair dealing theory. Plaintiff's alleged breach of the implied covenant is inapplicable and the district court's ruling granting summary judgment to The Reserve should be affirmed.

VI. THE DISTRICT COURT CORRECTLY GRANTED THE RESERVE'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S UNCONSCIONABILITY CLAIM (COUNT VII)

A. Preservation of Error

The Reserve agrees Voumard preserved error in relation to Count VII of her petition in light of her and The Reserve's comprehensive briefing on the parties' cross-motions for summary judgment, which were then ruled on by the district court.

B. Standard of Review

This Court's review is "for correction of errors at law." *TBS Holdings, L.L.C.*, 913 N.W.2d at 10; *see also infra* Section I.B.

C. Plaintiff's Agreement is Not Unconscionable

As indicated previously, Count VII of Plaintiff's Petition fails as a matter of law for the same reasons as Count I. Voumard's Agreement is valid and not unconscionable based on it violating Iowa Code chapter 562A.

Even if the Agreement was governed by the Landlord-Tenant Act (which, as set forth above, it is not so governed), the Official Comment to the Uniform Residential and Landlord Tenant Act demonstrates that the Agreement with The Reserve is not unconscionable. That comment instructs that the "basic test" of unconscionability requires that the Agreement must be viewed "in light of the background and setting of the market" and at the "time of the making of the agreement." Unif. Residential Landlord & Tenant Act 1972 § 1.303, cmts.

Additionally, the Iowa Supreme Court has stated:

> There are two generally recognized components of unconscionability: procedural and substantive.
>
> The former includes the existence of factors such as 'sharp practices[,] the use of fine print and convoluted language, as well as a lack of understanding and an inequality of bargaining power.' *In re Marriage of Shanks*, 758 N.W.2d 506, 515 (Iowa 2008)
>
> The latter includes 'harsh, oppressive, and one-sided terms.' *Id.* Whether an agreement is unconscionable must be determined at the time it was made. *See* Iowa Code § 554.2302(1); *see also C & J Vantage*, 795 N.W.2d at 81.

See Bartlett Grain Co. v. Sheeder, 829 N.W.2d 18, 27 (Iowa Ct. App. 2013) (internal citations and quotation marks omitted). In examining the two components of unconscionability identified above—procedural and substantive unconscionability—it is apparent that the Agreement at issue was

in no way unconscionable at the time it was made.

First, with respect to the procedural component, the Agreement explicitly informed Plaintiff of her obligations to pay continued monthly charges even in the event that she was no longer able to occupy her unit. This notice was not buried in fine print or hidden from normal view, but instead it was contained within the paragraph governing "Occupancy/Monthly Charges" in the Agreements (*see* App. at 26–28), and it was also prominently noted in the Covenants of Occupancy attached to and incorporated within each Agreement (*see id.* at 25–28).

Second, as the supreme court made clear in *Bartlett Grain Co.*, unconscionability, and substantive unconscionability in particular, is an onerous standard for Plaintiff to meet:

> 'A contract is unconscionable where no person in his or her right senses would make it on the one hand, and no honest and fair person would accept it on the other hand.' *C & J Vantage*, 795 N.W.2d at 80.
>
> [T]he doctrine of unconscionability does not exist to rescue parties from bad bargains.' *Id.*; *see also Home Fed. Sav. & Loan Ass'n of Algona v. Campney*, 357 N.W.2d 613, 619 (1984) (quoting comment 1 to this section of the UCC, which provides that '[t]he principle is one of the prevention of oppression and unfair surprise ... and not ... disturbance of allocation of risks because of superior bargaining power').

See 829 N.W.2d at 27 (emphasis added). Plaintiff simply did not meet this standard in this case, as the district court found, because "there is nothing in

the record to suggest [Voumard] was unable to understand the operative terms of the agreement; likewise, there is no indication that she did not have ample opportunity to read the agreement prior to its execution." (App. at 665; *accord id.* at 659 (noting it was "clear that the parties were on equal footings as they negotiated the arrangement that resulted in Ms. Voumard becoming an occupant of The Reserve.")).

At the time Voumard entered into her Agreement with The Reserve, senior adult congregate living facilities governed by chapter 523D were popular and most, including The Reserve, had waiting lists for certain types of units. (*Id.* at 423 (The Reserve's SUMF ¶ 35)). Indeed, Plaintiff's mother-in-law was already a member at The Reserve, which was a motivating factor for Voumard's move from her single-family home to her new home at The Reserve. (*Id.* (The Reserve's SUMF ¶ 33)). Thus, her Agreement is clearly <u>not</u> so "one-sided" that "no person in his or her right senses" would make it, and therefore, it is not unconscionable under Iowa law. Further, the model used by The Reserve, which includes payment of both an Entrance Fee and Monthly Charges by the residents, is expressly allowed by Iowa Code chapter 523D, which further shows that the Agreement is not unconscionable under Iowa law.

Furthermore, it was undisputed that Voumard signed the Agreement after she read—or had the opportunity to read—there provisions. Furthermore, she consulted or had the opportunity to consult her daughter/agent and son-in-law, an attorney, and/or a financial or other advisor. She was not a disadvantaged or uneducated individual who was taken advantage of in a shady transaction.

Indeed, the Court found that nothing in the record suggested that anyone at The Reserve engaged in "fraudulent or deceptive practices . . . to induce Ms. Voumard's assent to the agreement . . . [or] that Ms. Voumard was under any compulsion to sign . . . ." (*Id.* at 665). Therefore, the only conclusion that can be drawn from Plaintiff's claim is that she is dissatisfied that Voumard entered into a bad bargain, which is in and of itself insufficient to generate an issue of fact on unconscionability. *See In re Estate of Frink*, No. 6-433 / 05-1674, 2006 WL 301816, at *6 (Iowa Ct. App. Oct. 25, 2006) ("His heirs' dissatisfaction with the bargain he made does not rise to the level of unconscionability at the time the contract was executed.").

For all of the foregoing reasons, the district court was correct in its ruling finding in favor of The Reserve and dismissing Plaintiff's unconscionability claim. No issue of material fact exists as to Plaintiff's Count VII issue, and this Court must affirm the district court's ruling.

CONCLUSION

The district court correctly ruled in favor of The Reserve and against Plaintiff on the parties' cross-motions for summary judgment because Plaintiff generated no issue of material fact on any claim. Voumard's Agreement was not governed by the Landlord-Tenant Act and nothing about the Agreement or the circumstances give rise to a legitimate basis for her to avoid her contractual obligations. This Court must affirm the district court's ruling and the dismissal of the entirety of Plaintiff's claims.

REQUEST FOR ORAL ARGUMENT

The Reserve respectfully requests to be heard in oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because this brief contains 11,194 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

This brief complies with the typeface requirements and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and (f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point, Times New Roman font.

Date: January 11, 2019

/s/ William J. Miller
William J. Miller

CERTIFICATE OF FILING

The undersigned hereby certifies that Appellee's Final Brief and Request for Oral Argument was electronically filed on January 11, 2019, in accordance with Chapter 16 of the Iowa Rules of Court.

/s/ William J. Miller
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that Appellee's Final Brief and Request for Oral Argument was electronically filed on January 11, 2019, and thus served on:

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CHIPPING AWAY AT THE DAM: *ANASTASOFF V. UNITED STATES* AND THE FUTURE OF UNPUBLISHED OPINIONS IN THE UNITED STATES COURTS OF APPEALS AND BEYOND

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I. INTRODUCTION

The disposition of cases by unpublished opinions in the United States Courts of Appeals has had broad effects on the appellate system, especially during the last half of the twentieth century. It would be difficult to find a single attorney, judge, or other member of the legal profession who has not somehow dealt with an unpublished opinion. For judges, the unpublished opinion has

necessary reform and vilified by others as a deprivation of important legal rights.[1] Attorneys regularly find opinions marked "unpublished," often barring use of the opinion due to rules that effectively limit citation and destroy the opinion's precedential worth.[2] These same theoretical and practical considerations affect others as well, whether they are the support staff of a judge or attorney, or another member of the legal community who is otherwise affected when an opinion is marked "unpublished."

Not only has the disposition of cases in this manner had a broad effect in recent judicial history, but, by all indications, the practice will continue to be influential in the new century.[3] In 1999 alone, seventy-eight percent of the 26,727 dispositions of the federal courts of appeals were by unpublished opinions.[4] A simple calculation of these numbers reveals that approximately 21,000 opinions in the courts of appeals were disposed of by unpublished opinions in that year alone.[5] The effect this staggering amount of unpublished opinions has on the judicial system takes on a new level of urgency considering the result created when a court of appeals labels an opinion unpublished.

In the majority of the courts of appeals, circuit rules restrict the citation of unpublished opinions, rendering the opinions nonprecedential beyond the context of the intraparty conflict.[6] The practical effects of these restrictions are numerous, and will be discussed in more detail in the course of this Note.[7] This restriction has caused tension, as well as dissension, among members of the judiciary, and outright concern among some commentators.[8] As one commentator has noted, "judges themselves do not agree on the propriety of selective publication and citations" and "[c]ommentators are likewise divided."[9] However, despite the tension between the supporters and detractors of unpublished opinions, the arguments between the two groups, volleyed in both judicial opinions and legal scholarship, until recently, had amounted to a stalemate. Both sides acknowledged the valid arguments on the alternative side of the issue but could offer no prevailing argument; the impasse rested for want

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1. *See* discussion *infra* Part III.
2. *See* discussion *infra* Part II.
3. *See* Richard S. Arnold, *The Future of the Federal Courts*, 60 MO. L. REV. 533, 535 (1995) [hereinafter Arnold, *Federal Courts*] (reporting that the litigation explosion has yet to reach its end).
4. *Table S-3, U.S. Courts of Appeals—Types of Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs*, 1999 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1999: ANNUAL REPORT OF THE DIRECTOR 49.
5. *Id.*
6. *See infra* notes 33-39 and accompanying text.
7. *See* discussion *infra* Part II.
8. *See* discussion *infra* Part III.
9. Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913, 932 (1995) (footnote omitted).

of an agreeable solution.[10]

Recently, the issue took an entirely new turn. On August 22, 2000, the Eighth Circuit Court of Appeals handed down its opinion in *Anastasoff v. United States*.[11] In *Anastasoff*, a somewhat unremarkable tax case hinging upon the proper application of the mailbox rule, a panel led by Chief Judge Richard Arnold bypassed the impasse, ruling that the Eighth Circuit's rule limiting citation of unpublished opinions is outright unconstitutional because it violates Article III of the United States Constitution.[12] In the wake of *Anastasoff*, entirely new dimensions to the issues surrounding unpublished opinions have been introduced.

For supporters and detractors alike, a crack in the dam limiting the use of unpublished opinions appeared. Those who support unpublished opinions waited nervously to see if the force of a single panel's opinion was enough to burst the dam and bring about the difficulties warned against in countless papers and studies in support of unpublished opinions.[13] For critics of the current rules, a victory was achieved, but the same concerns lingered.[14] The crack in the dam threatened an appellate system that had not been challenged by the changes that would come, at the very least in the Eighth Circuit, due to the proclaimed unconstitutionality of the rule. Four months later, the crack created by *Anastasoff* was patched.[15] Yet, as with any great force held back by a temporary brace, the unpublished opinion debate simply waits to burst forth again. For those without a distinct opinion on the issue, both threatened but perhaps excited by the possibilities presented in the aftermath of *Anastasoff*, what does *Anastasoff* mean?

This Note will chart the development of the role of unpublished opinions, the arguments for and against the courts' rules limiting their citation and precedential value, and the future of unpublished opinions and the rules limiting citation post-*Anastasoff*. Part I of the Note provides a short overview of the

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10. *See id.* at 939 (discussing possible variations of a general rule to satisfy the concerns of critics on both sides of the issue).

11. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000).

12. *Id.* at 900; *see* U.S. CONST. art. III, § 1, cl. 1 ("The judicial Power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish."). The court found the rule would allow the court to avoid the precedential effect of prior decisions thereby expanding judicial power beyond Article III. Anastasoff v. United States, 223 F.3d at 900.

13. *See* discussion *infra* Part III.A.

14. *See* discussion *infra* Part III.B.

15. *See* Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000) (en banc) *vacating as moot* 223 F.3d 898 (8th Cir.) (holding the court would not pass judgment as to its previous finding that the rule against the use of unpublished opinions is unconstitutional because the case was moot).

historical progression of the use of written, recorded opinions and the subsequent development of unpublished opinions and rules dictating their use. Part II focuses on the controversy surrounding these rules. With a proper context set, Part III describes the disposition of *Anastasoff v. United States*,[16] the latest and most important statement on the issue made by the judicial branch. Finally, the last part of the Note offers some thoughts on the future of the issue, a future that is wide open. The author hopes this Note will provide a context for the debate as well as insight into its future.

II. THE HISTORICAL RISE AND ONGOING ROLE OF UNPUBLISHED OPINIONS

As a proper beginning to this discussion, it is best to chart the development of the role of the unpublished opinion and the rules that have carved their place in the courts of appeals and, subsequently, other courts. Concern over the volume of judicial dispositions has vexed the bar, the bench, and commentators for centuries, and perhaps even longer.[17] According to one commentator, one of the first warnings came from England through Lord Coke.[18] "Faced with roughly thirty volumes of reported decisions in 1777 . . . [, he] warned judges not to report all decisions."[19] Whether Coke's prescient advice was heeded is unrecorded. Across the ocean, similar concerns over the volume of reported opinions had yet to begin because formal reporting was not the standard.[20]

Recordation of opinions in the United States began developing slowly sometime after Coke's admonition.[21] In 1894, the *Federal Reporter* began reporting the cases of the United States Courts of Appeals.[22] Not surprisingly, by 1915, "[s]imilar concerns about the growing wealth of case law appeared on this side of the Atlantic Ocean."[23] Unlike England, the United States had no individual such as Lord Coke to warn the bench to slow its reported output, but did have the Judicial Conference of the United States,[24] which soon found that a response was needed to the mounting concern over the number of published

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16. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000).

17. Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 121 (1994).

18. *Id.* (citing 2 Coke's Rep. iii-iv (1777)).

19. *Id.* (citing 2 Coke's Rep. iii-iv (1777)).

20. Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 34 (1959).

21. *Id.*

22. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 184 (1999).

23. Martineau, *supra* note 17, at 121 (citing Maurice A. Young, *The Unofficially Reported Case as Authority*, 1 OHIO ST. L.J. 135, 136-37 (1935)).

24. Martineau, *supra* note 17, at 121 (citing the 1964 Report of the Proceedings of the Judicial Conference of the United States 11).

opinions in the United States.[25]

This growing concern prompted the Judicial Conference to convene in the mid-1960s with unpublished opinions as one item on its agenda.[26] The precise impetus for the consideration of the issue is difficult to determine because the number of unpublished opinions produced before 1964 is unknown.[27] However, with a mounting case load and mounting opinion production, the Judicial Conference convened in 1964 and resolved "[t]hat the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct."[28] Gradually, the suggestion of the Judicial Conference was implemented within the circuits by the development of "procedures for reducing the number of published opinions."[29]

Unfortunately, the initial attempts at regulation proved insufficient to stem the tide of publication.[30] This prompted the Federal Judicial Center to recommend the Judicial Conference request "each circuit to review its publication practices and make modifications aimed at reducing the number of opinions published and restricting citation of unpublished decisions."[31] Meanwhile, the Advisory Council on Appellate Jurisdiction, a related arm of the Center, presented a report entitled *Standards for Publication of Judicial Opinions*.[32] This report laid out a number of criteria by which courts could decide the merits of publishing a particular opinion.[33] In tandem, the initial Judicial Conference resolution and subsequent action by the Federal Judicial Center inspired the development of various criteria to guide judicial decision-making on publication and, later, the development of various rules regarding the

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25. *See* Donna Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals*, FED. JUD. CTR. at 6 (1985).

26. *See id.* (citing William L. Reynolds & William M. Richman, *The Nonprecedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1168-69 nn.12-13 (1978)).

27. *See* Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 308 (1990) (reporting the general assumption that the total was "relatively small").

28. Martin, *supra* note 22, at 184 (quoting *Reports of the Proceedings of the Judicial Conference of the United States*, JUD. CONF. U.S. 11 (1964)).

29. Songer, *supra* note 27, at 308.

30. *Id.*

31. Stienstra, *supra* note 25, at 6-7 (citing *Recommendation and Report to the April 1972 Session of the Judicial Conference of the United States on the Publication of Courts of Appeals Opinions*, BOARD FED. JUD. CTR. (1972)).

32. *Id.* at 7 (citing *Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice*, FED. JUD. CTR. (1973)).

33. *Id.*

subsequent use of the opinions within the circuits.[34]

The rules promulgated by the circuits split in directions matching the character of their respective circuits and the needs and opinions of the legal community within them.[35] However, general areas of difference can clearly be observed. In nine of the thirteen circuits, full and open citation to unpublished opinions is barred by the rules.[36] In two additional circuits, citation also is limited unless the opinion is of a very specific type.[37] Of these eleven circuits, nine allow the use of unpublished opinions to establish res judicata or collateral estoppel or if the subsequent case otherwise relates back to the earlier case.[38]

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34. Songer, *supra* note 27, at 308.

35. Stienstra, *supra* note 25, at 8.

36. *See* 1ST CIR. R. 36(a); *see also* 1ST CIR. R. 36.2(b)(6) (providing citations to unpublished opinions are proper in related cases, but barring citation to an unpublished opinion in all other cases); 3D CIR. I.O.P. 5.3 (providing an unreported opinion will be designated as "not precedential" on the face of the opinion); 4TH CIR. R. 36(c) (providing citation to unpublished opinions should only be used to establish res judicata, estoppel, the law of the case, or if the unpublished opinion has precedential value to a material issue and "there is no published opinion that would serve as well"); 6TH CIR. R. 28(g) (providing citation to unpublished opinions should only be used to establish res judicata, estoppel, the law of the case, or if the unpublished opinion has precedential value to a material issue and "there is no published opinion that would serve as well"); 8TH CIR. R. 28A(i) (providing citation to unpublished opinions should only be used to establish res judicata, estoppel, the law of the case, or if the unpublished opinion has precedential value to a material issue and "there is no published opinion that would serve as well"); 9TH CIR. R. 36-3 (barring citations to unpublished opinions unless used for "doctrines of law of the case, res judicata, or collateral estoppel"); 10TH CIR. R. 36.3 (providing citations to unpublished opinions are only binding for law of the case, res judicata, and collateral estoppel, but the unpublished opinion may be cited if it has persuasive value for a material issue that has not been addressed in a published opinion and "it would assist the court in its disposition"); 11TH CIR. R. 36-2 (providing unpublished opinions have no binding precedent, but "[t]hey may be cited as persuasive authority"); FED. CIR. R. 47.6(b) (providing nonprecedential opinions must not be cited as precedent, but can be cited for issue preclusion, judicial estoppel, or law of the case).

37. *See* 7TH CIR. R. 53(b)(1)(iii), (b)(2)(iv) (creating a distinction in definition and citation of court opinions—published and precedential—as opposed to court orders—unpublished and not precedential); *compare* 5TH CIR. R. 47.5.3 (stating that opinions decided before January 1, 1996 are precedent), *with* 5TH CIR. R. 47.5.4 (providing unpublished opinions decided after January 1, 1996 are not precedent).

38. *See* 1ST CIR. R. 36(a), 36.2(b)(6) (providing citations to unpublished opinions are proper in related cases); 4TH CIR. R. 36(c) (providing citations to unpublished opinions shall only be allowed in limited circumstances, including res judicata and collateral estoppel); 6TH CIR. R. 28(g) (providing citations to unpublished opinions shall only be allowed in limited circumstances, including res judicata and collateral estoppel); 8TH CIR. R. 28A(i) (providing citations to unpublished opinions shall only be allowed in limited circumstances, including res judicata and collateral estoppel); 9TH CIR. R. 36-3 (barring citations to unpublished opinions unless used for "doctrines of law of the case, res judicata, or collateral estoppel"); 10TH CIR. R. 36.3 (providing citations to unpublished opinions are binding only in limited circumstances, including res judicata and collateral estoppel); FED. CIR. R. 47.6(b) (providing nonprecedential opinions must not be cited as precedent, but can be cited for issue preclusion, judicial estoppel, or law of the case). In

This rule effectively limits the use of unpublished opinions to only those situations in which the opinion serves as evidence of a prior disposition. In addition, six of the eleven circuits also allow the use of unpublished opinions to be used as persuasive authority or in the absence of another opinion stating the appropriate precedent.[39] Although this rule allows broader use, it still bars the full use of the opinion or otherwise limits its use to contexts in which the opinion can only apply as an example of the precedent.[40] Finally, two circuits have no rule limiting citation—silence that may be interpreted as allowing full citation.[41] Except for these two circuits, the circuit rules bar full citation of unpublished opinions except for very limited, enumerated situations.

III. THE ARGUMENTS SURROUNDING THE RULES ON UNPUBLISHED OPINIONS

The arguments for and against the rules limiting citation of unpublished opinions are plentiful and have been discussed in a number of different contexts by a multitude of judges and commentators.[42] A short overview of these positions will be helpful to set the overall context in which the debate has

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addition, for those opinions the circuit considers unpublished, both the Fifth and Seventh Circuits also subscribe to the rule that citation to unpublished opinions should be limited. *See* 5TH CIR. R. 47.5.3, .5.4 (providing unpublished opinions issued before January 1, 1996 are precedent, but should normally be cited only in limited circumstances, including res judicata and collateral estoppel and unpublished opinions decided after January 1, 1996 are only precedent for res judicata, collateral estoppel, or law of the case); 7TH CIR. R. 53(b)(1)(iii), (b)(2)(iv) (providing unpublished opinion may only be cited for res judicata, collateral estoppel, or law of the case).

39. *See* 4TH CIR. R. 36(c) (providing citations to unpublished opinions may be used if the unpublished opinion has precedential value to a material issue in a case and "there is no published opinion that would serve as well"); 5TH CIR. R. 47.5.4 ("An unpublished opinion may, however, be persuasive."); 6TH CIR. R. 28(g) (providing citations to unpublished opinions may be used if the unpublished opinion has precedential value to a material issue in a case and "there is no published opinion that would serve as well"); 8TH CIR. R. 28A(i) (providing citations to unpublished opinions may be used if the unpublished opinion has precedential value to a material issue in a case and "there is no published opinion that would serve as well"); 10TH CIR. R. 36.3(B)(1) (providing citations to unpublished opinions may be used if the unpublished opinion has persuasive value for a material issue that has not been addressed in a published opinion); 11TH CIR. R. 36-2 (providing unpublished opinions "may be cited as persuasive authority").

40. *See* rules cited *supra* note 38.

41. The Court of Appeals for the District of Columbia rules provide for the circulation of unpublished opinions but do not reference citation to them. *See* D.C. CIR. R. 36. The Second Circuit no longer has a rule augmenting the Federal Rules of Appellate Procedure regarding unpublished opinions. *See* Stienstra, *supra* note 25, at 8 (discussing the previous Second Circuit rule restricting citation as well as other instances when the absence of a circuit rule was interpreted to allow full citation to unpublished opinions).

42. *See generally* William L. Reynolds & William M. Richman, *The Nonprecedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1167 (1978) (providing one of the first and most comprehensive discussions of the arguments on both sides of the issue of citing unpublished opinions).

developed, especially because many of these arguments reappear in the background of the *Anastasoff* panel opinion.[43] At least three key justifications for the use of unpublished opinions and the rules related to them have developed through the literature.

A. *The Arguments in Favor of Limiting Citation of Unpublished Opinions*

One commentator traced the historical justifications for limiting citation to unpublished opinions to reducing costs and avoiding unfairness.[44] This theory focuses on two concerns.[45] The first concern is that a market for unpublished opinions will develop if such opinions are given precedential value, thereby hindering judicial efficiency and access to the judicial system by those persons who cannot afford to take part in the new publication scheme.[46] The theory rests on the presumption that if unpublished opinions can be openly cited, some source may be compelled to ensure that the opinions are formally published, accessible, and cross-referenced like the current system of regional or specialized reporters.[47] As the system is now, both public and private libraries striving to remain current are required to spend significant amounts of money.[48] Creating even more publications to add to the shelves and update regularly would create a substantial burden on these outlets.[49]

The second concern of this theory, directly related to the first, is that allowing citation to unpublished opinions may promote unfairness.[50] This view foresees that "[p]rohibiting citation benefits the parties and attorneys by saving time and resources because repeat litigants may develop a library."[51] On the other hand, those persons who are not repeat litigants might be faced with expending additional time and resources in an effort to keep pace with a repeat

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43. *See generally* Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) (discussing various arguments concerning unpublished opinions).

44. Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 242 (1998).

45. *Id.*

46. *See id.* (suggesting citation to unpublished opinions would destroy the advantages of selective publication giving repeat litigants an unfair advantage over less sophisticated parties).

47. Elizabeth M. Horton, Note, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 U.C.L.A. L. REV. 1691, 1694 (1995) (citing Alice I. Youmans et al., *Questions & Answers*, 83 L. LIBR. J. 195, 204 (1991)).

48. Phillip Nichols, Jr., *Introduction to Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 916 (1986) (discussing the "rabbit-like multiplication" of reporters on library shelves, and the refusal of publishers like West to publish unofficial reporters).

49. *Id.* at 916.

50. Carpenter, *supra* note 44, at 242.

51. *Id.*

litigant's ability to access otherwise unpublished opinions.[52] A potential perpetrator of such a scheme would be the federal government, particularly federal agencies, which would be able to develop its own system of cataloging unpublished opinions to the detriment of its opponents.[53]

Every supporter or critic of the role of unpublished opinions balances the needs of the system against the fairness to the litigants. The "access" line of supporters, namely those previously discussed, exemplifies a view placing utmost importance on fairness.[54] Another voice in support of the rules comes from the judiciary itself. Support for the judiciary's principal argument for the rules rests primarily upon the needs of the system.[55]

The judiciary's first-hand experience with the rules leads many to tip the scale in favor of maintaining the integrity of the system despite sacrificing a body of law that could otherwise be used by litigants.[56] Many "judges assert that the development of the law is not impeded when redundant, straightforward, or unimportant cases are unaccompanied by full, published opinions."[57] In the judicial argument view, opinions which are marked unpublished are so marked in accordance with guidelines devised to block the publication of routine cases with unspectacular issues in favor of emphasizing relatively novel cases which truly deserve publication and continued citation.[58] As one judge has stated the matter:

> The true reason behind the selective publication policy is that it is wrong to ask publishers to publish, libraries to collect, and scholars to read opinions that merely labor the obvious, so far as they deal with the law at all, rehashing conclusions already reached in authoritative decisions of the same court or the Supreme Court.[59]

One final, less cited source for support of the rules blends the views of commentators and members of the judiciary.[60] This argument proposes that if the system does not "discourage citations to unpublished opinions, then we are creating a type of second-class precedent."[61] This theory predicts that a failure to

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52. *See id.* at 252.

53. *See id.* at 252-53 (providing an example of the potential advantage of federal agencies in developing a collection of unpublished opinions).

54. *See, e.g., id.* (discussing one facet of the fairness debate).

55. Nichols, *supra* note 48, at 916.

56. *Id.*

57. Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 789-90 (1995).

58. Martin, *supra* note 22, at 191.

59. Nichols, *supra* note 48, at 916.

60. *See* Martin, *supra* note 22, at 193 (arguing that unpublished opinions should be published but not cited to).

61. *Id.* at 193-94.

view unpublished opinions as nonprecedential would create a second-class form of precedent hampered by the inherent pressures of the burdened appellate system.[62] A general fear, stated by many commentators, is that because judicial resources are stretched, unpublished opinions receive less attention than opinions that are destined to be published.[63] This may result in opinions that are not fully reasoned and not well written.[64] Removing the rules limiting citation to such opinions may not alleviate the problem. Judges may feel additional scrutiny as more published opinions are produced more quickly, causing exceptional published opinions and unexceptional unpublished opinions to be averaged into a body of inferior precedents. Although this is far from an assured outcome, some judges admit to concentrating a greater amount of time on opinions set for publication.[65] Depending on one's viewpoint, this may be an admirable or a deplorable practice. Either way, removing the barriers to citation may cause a general decline in the quality of written opinions and the precedents therein.

Ultimately, the arguments in support of the rules fall into three general categories: access, quantity, and quality. By suppressing citation, the rules as developed have alleviated these three concerns, making dispositions nonprecedential and all but worthless to anyone other than the parties involved in the particular case or statisticians studying the issue.[66] Access is preserved because the current networks for publication, although costly, can reasonably handle the number of published opinions while maintaining their current cost.[67] Quantity is naturally alleviated because there are simply fewer full-opinion dispositions that can be cited, reflecting the system's lack of concern for full consideration of "settled" issues.[68] Finally, quality is maintained because those opinions that are published receive the utmost attention.[69] Whether each of these values outweighs the arguments against the rules for citation is a battle that will continue in the aftermath of the *Anastasoff* disposition.

B. *The Arguments in Opposition to Limiting Citation of Unpublished Opinions*

Indeed, there are also a number of critics of the development of the rules relating to publication and the prevention of citation. The criticisms are plentiful,

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62. *See id.*
63. Horton, *supra* note 47, at 1700.
64. *Id.*
65. Martin, *supra* note 22, at 190.
66. *Id.*
67. *Id.* at 191.
68. *Id.* at 190.
69. *Id.*

as is shown by one commentator's list of at least twelve different concerns.[70] Some of the most vocal criticisms of the rules have come from the bench itself as judges have posited arguments incorporating this galaxy of concerns. As one judge opined, "despite the policy in the majority of the Circuits, I remain convinced of the unsoundness of the no-citation rule."[71]

As noted previously, one of the principal arguments in support of unpublished opinions and the rules limiting citation is centered on accessibility and fairness to litigants.[72] Two primary arguments are advanced to counter these concerns. First, although increased expenses may hamper accessibility and fairness or create increased competitive advantages for repeat litigants, such inequities are already present in the system and are no excuse for limiting the use of unpublished opinions.[73] Moreover, any alteration in the current balance between cost and access is unlikely to make a vital difference.[74] This argument does not posit a solution to what many might consider a larger defect inherent in the publication system—it merely acknowledges the nature of the system and otherwise welcomes the change that increased access to unpublished opinions would create.

The second argument also does not provide an absolute solution, but it does provide an explanation showing that there is a measure of hope for equalizing access. This argument considers expanding informational technologies as the key to increasing access among litigants.[75] Although technologies such as Westlaw and LEXIS may be costly, new mediums of communication, whether they are other competing publishers, the Internet, CD-ROMs, or other media, force prices down and thereby increase access.[76] Ultimately, this argument foresees that access problems may become a thing of

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70. *See* Carpenter, *supra* note 44, at 236 (listing secrecy in the judicial branch of government, judicial precedent as a foundation of the common law, quality of analyses in deciding cases, creation of a "shadow body of law," the accountability of appellate courts to the bar and the public, the accountability of trial courts to the appellate courts, the bar, and the public, equal access to the common law, freedom of speech, the right to petition the judicial branch for redress of grievances, the nature and function of the United States Constitution, and consistency in deciding cases).

71. *In re* Rules of the United States Court of Appeals for the Tenth Circuit, Adopted Nov. 18, 1986, 955 F.2d 36, 38, n.4 (10th Cir. 1992) (Holloway, C.J., dissenting).

72. *See* discussion *supra* Part III.A.

73. *See generally* Dragich, *supra* note 57, at 787 (observing the effects on the cost of litigation resulting from the rules relating to unpublished opinions).

74. *See generally id.* (noting the inability of mere rules dictating the use of unpublished opinions to alleviate inequities in the system).

75. *See* Martineau, *supra* note 17, at 144-45 (describing the growing influence of commercial electronic database programs such as Westlaw and LEXIS to the point that "computer based systems have to a large degree destroyed the effectiveness of rules restricting publication").

76. *See id.*

the past based upon the strength of technology in the future.[77]

Another of the principal arguments in favor of the rules—that the courts should not repeat dispositions of cases that are all but identical—is countered by the reality that almost no single case is truly identical to one previously considered.[78] Nearly every case has some twist of procedure or facts that could potentially apply in future cases in which the current rules would bar its precedential value.[79] Those same nuances can also play an important role in showing litigants and commentators the courts' views on particular areas of the law.[80] Although unpublished opinions are rarely not published in some form, the possibility that opinions can slip through the cracks may deprive court watchers of the opportunity to determine the courts' view on a particular law or area of law. As one judge observed:

> To be sure, there are many cases that look like previous cases, and that are almost identical. In each instance, however, it is possible to think of conceivable reasons why the previous case can be distinguished, and when a court decides that it cannot be, it is necessarily holding that the proffered distinctions lack merit under the law.[81]

Opponents of the rules limiting citation also counter arguments in favor of quantity and quality.[82] Just as some of the principal defenders of the rules on those grounds are members of the judiciary, some of the principal detractors are as well. As one judge reflected,

> Those in favor of this shortcut argue that the pressure of appeals requires it. I think the practice of not publishing these opinions is deleterious because it may lead to a sloppiness in analysis in the appellate courts: counsel are not present to suggest corrections, and the absence of the discipline of writing and rewriting may lead the panel, which is not conversant with the day-to-day details of a litigation, to overlook certain practical aspects of the problem.[83]

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77. *See id.*

78. Richard S. Arnold, *Unpublished Decisions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 222-23 (1999) [hereinafter Arnold, *Unpublished Decisions*].

79. *Id.*

80. Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Decisions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 947-48 (1989).

81. Arnold, *Unpublished Decisions*, *supra* note 78, at 222. This comment was made by Richard S. Arnold, United States Circuit Judge for the Eighth Circuit. *Id.* at 219.

82. *See* Dragich, *supra* note 57, at 787 (arguing that selective publication does not solve the problem of too much law).

83. Jack B. Weinstein, *Factors in Determining the Degree of Public Availability of Judicial Opinions*, 2 N.Y.U. ENVTL. L.J. 244, 245 (1993). This comment was made by Jack B.

Thus, the overloaded nature of the judicial system creates a benefit: increased scrutiny leading to better developed opinions and more lasting contributions to the legal canon. This same benefit "leads to better, more consistent opinions because it holds judges accountable to the public which they serve. This accountability, in turn, dispels the perception of the judiciary as a self-regulating, secret society, and it legitimizes the judicial branch of the government in the eyes of its citizens."[84]

Finally, there is one less often cited argument in opposition to the rules that ties directly to two other previously mentioned detractions. As one commentator observed, "[s]tability, certainty, and predictability are prerequisites to the consent of the public to be governed by law, including judge-made law."[85] As noted, unpublished opinions and rules limiting the citation of such opinions remove a good measure of accountability from the system.[86] Litigants, commentators, and judges may be barred from revisiting and reanalyzing previously considered areas that are in need of revision. The rules on unpublished opinions remove the stability, certainty, and predictability which otherwise ensure continued efficiency and functionality within the system.[87]

Those commentators opposed to citation of unpublished opinions thus present a network of counterarguments to the arguments advanced in favor of the rules. Access to the system may not be affected because a market for all opinions, published or unpublished, already exists whether by print or electronic media.[88] Despite the growing cost of such services, the system as a whole maintains these services, and all litigants face the costs associated with their use.[89] Concerns about access are ultimately issues to be taken up in another context, not within a debate over published and unpublished opinions that have similar accessibility for all parties. Quality and quantity concerns are countered by arguments that consider the evil of an overloaded system to be a virtue that forces judges to be more deliberate in their dispositions.[90] Again, these arguments remain even after *Anastasoff*. Yet understanding the milieu created by the arguments supporting and opposing the rules properly sets the stage for the Eighth Circuit's *Anastasoff* disposition.

Weinstein, Senior Judge for the United States District Court for the Eastern District of New York. *Id.* at 244.

84. Carpenter, *supra* note 44, at 248.

85. Dragich, *supra* note 57, at 777.

86. *See* discussion *supra* Part III.

87. Dragich, *supra* note 57, at 777.

88. *See supra* text accompanying notes 62-67.

89. *Id.*

90. *See* Weinstein, *supra* note 83, at 245 (observing the absence of the discipline of writing may lead to sloppiness in appellate courts' analyses).

IV. A CRACK IN THE DAM: *ANASTASOFF v. UNITED STATES*

A. *The Panel Opinion*

In May 2000, a panel of three judges of the United States Court of Appeals for the Eighth Circuit heard oral arguments in *Anastasoff v. United States*,[91] an appeal from the United States District Court for the Eastern District of Missouri.[92] At issue in the case was the operation of the mailbox rule[93] within the context of a tax filing.[94] Faye Anastasoff, a taxpayer seeking a refund of taxes she had overpaid in 1993, mailed her claim filing before the three-year deadline imposed under the relevant United States Code section.[95] The rule typically "saves claims like Ms. Anastasoff's that would have been timely if received when mailed; they are deemed received when postmarked."[96] However, the Internal Revenue Service (IRS) did not process Ms. Anastasoff's filing until one day after the deadline imposed by the Code.[97] For this reason, her claim was precluded and she was barred from recovering her overpaid taxes.[98]

In response to the denial of her claim, Ms. Anastasoff filed suit, claiming her filing was timely by operation of the mailbox rule.[99] The district court disagreed.[100] Not surprisingly, the decision was appealed.[101] Her appeal was assigned to a three-judge panel that included Judge Richard Arnold, one of a number of judges on record as opposing unpublished opinions.[102]

Although the oral argument in the *Anastasoff* case was apparently relatively standard, one event stuck out. In the midst of the questions posed to the attorney for Ms. Anastasoff, Gregory Hewett, Judge Arnold presented an unexpected query.[103] Judge Arnold's question focused on *Christie v. United States*,[104] an unpublished opinion produced by another Eighth Circuit panel.[105] In

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91. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000).
92. *Id.* at 899.
93. 26 U.S.C. § 7502 (1994) (providing the postmark date is the date of delivery for certain provisions of internal revenue laws).
94. Anastasoff v. United States, 223 F.3d at 899.
95. *Id.* (citing 26 U.S.C. § 7502 (1994)).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *See id.*; Arnold, *supra* note 3, at 538; *see also* discussion *supra* Part III.B.
103. Tony Mauro, *Stealth Decisions Under Fire*, LEGAL TIMES, Sept. 4, 2000, at 6.
104. Christie v. United States, No. 91-2375 MN, 1992 U.S. App. LEXIS 38446, at *1 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished opinion).
105. *Id.*; *see* Mauro, *supra* note 103, at 6. Judge Arnold asked Hewett how his position squared with the *Christie* decision. *Id.*

Christie, the panel rejected the argument, now advanced by Ms. Anastasoff, that the mailbox rule should apply to "fulfill its remedial purpose, [that is], to save taxpayers from the vagaries of the postal system."[106] Hewett was apparently somewhat stunned by Judge Arnold's question.[107] He cautiously reminded Judge Arnold that *Christie* was an unpublished opinion and by rule of the Circuit was "'not binding on [the] court.'"[108] Judge Arnold was not satisfied with such a technicality. He stated his disagreement with Hewett's answer, at the same time disagreeing with the Eighth Circuit's rule limiting citation.[109] After this short diversion, the oral argument continued normally.[110]

Three months later, the panel rendered its opinion, deciding in favor of the United States "[b]ecause of the unpublished *Christie* precedent that favored the IRS position."[111] The opinion rested on a masterful exposition of the pratfalls, dangers, and, ultimately, unconstitutionality, of unpublished opinions.[112] Not surprisingly, Judge Arnold wrote the opinion of the court.[113] The opinion allocated approximately 225 words to the task of deciding the actual case at hand, finding that, because of the *Christie* precedent, Ms. Anastasoff's claim was properly found invalid, affirming the earlier opinions of the district court and the IRS.[114] The rest of the opinion, nearly 2900 words, focused on the constitutionality of the rules limiting the citation of unpublished opinions and, more specifically, a direct repudiation of the Eighth Circuit rule.[115]

Judge Arnold's argument focused on Article III of the Constitution and the powers delegated to the judgeships it authorizes.[116] The opinion also considered the doctrine of precedent at length: its derivation, its history, and its importance to the legal system.[117] Melding these two points together, Judge Arnold began by observing that "[t]he doctrine of precedent was well-established by the time the Framers gathered in Philadelphia. . . . [I]t was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past

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106. Anastasoff v. United States, 223 F.3d at 899 (citing Christie v. United States, No. 91-2375 MN, 1992 U.S. App. LEXIS 38446, *1 (per curiam) (unpublished opinion)).

107. *See* Mauro, *supra* note 103, at 6 (presenting the discussion between Hewett and Judge Arnold).

108. *Id.*

109. *Id.* Judge Arnold stated that the practice of a court deciding a case one day and ignoring its holding the next day was unconstitutional. *Id.*

110. *Id.*

111. *Id.*; *see* Anastasoff v. United States, 223 F.3d at 898-905.

112. Mauro, *supra* note 103, at 6; *see* Anastasoff v. United States, 223 F.3d at 898-905.

113. Anastasoff v. United States, 223 F.3d at 898-905.

114. *Id.* at 899.

115. *See id.*

116. *Id.*; *see* U.S. CONST. art. III, § 1, cl. 1.

117. Anastasoff v. United States, 223 F.3d at 900.

struggles for liberty."[118] As Judge Arnold explained, precedent was the backbone of the judicial process, the lifeblood of the first judges observing and applying the law and every judge since them.[119] Most importantly, adherence to precedent was a principal impliedly codified in Article III because "[t]he Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases."[120] To not apply those opinions in subsequent cases was "a dangerous union with the legislative power."[121] Judge Arnold detected such a dangerous union in the rules regulating the use of unpublished opinions.[122] For that reason, the *Anastasoff* panel concluded that any rule lessening the precedential value of an opinion of an Article III judge violated Article III and was unconstitutional.[123]

However, Judge Arnold was careful to describe some limits to the panel's statement.[124] With these limitations, Judge Arnold appeared to be making a preemptive strike against those critics who might conclude that the panel opinion went too far in its consideration of the rules limiting citation.[125] First, he acknowledged that there were legitimate reasons for courts to continue labeling opinions as unpublished and not physically publishing the opinions in one of the standard regional or subject matter reporters.[126] The opinion was not focused on the failure to print opinions, but instead on the failure to properly value opinions whether marked "for publication" or "not for publication."[127] With this point, Judge Arnold countered any argument that the *Anastasoff* rule would only exacerbate the crisis of volume plaguing the federal court system.[128]

On a second, perhaps lesser point, Judge Arnold sought to sooth any accusation that the opinion was an indictment of a secret judicial society.[129] In Judge Arnold's view, the presumption that such a secret society existed was inaccurate.[130] The panel opinion was not responding to such an inaccuracy.[131] Instead, the panel was simply recognizing the precedential value of all judicial

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118. *Id.* (citations omitted).
119. *Id.*
120. *Id.* at 902.
121. *Id.* at 903.
122. *Id.*
123. *Id.* at 905.
124. *Id.* at 904-05.
125. *See id.*
126. *Id.* at 904.
127. *See id.* (distinguishing unpublished from secret).
128. Arnold, *Unpublished Decisions*, *supra* note 78, at 221-22.
129. *See* Anastasoff v. United States, 223 F.3d at 904 (stressing that appellate court decisions are available to the public).
130. *See id.*
131. *See id.*

opinions.[132]

Third, and perhaps most importantly, Judge Arnold made the bold assertion that those who argue, "it is simply unrealistic to ascribe precedential value to every decision" should no longer fall back on such an excuse.[133] The solution to this problem was to create additional judgeships or for judges "to take enough time to do a competent job with each case."[134] Whereas Judge Arnold sought to alleviate concerns in his other points, this third point was a clear indictment of what many considered the true source of much of the unpublished opinion controversy: the lack of judges to counteract the crisis of volume.[135] Judge Arnold stated what many thought: the best, truest solution to the problem is for Congress to add additional judgeships.[136] Perhaps then, some of the pressures upon judges to rush their opinions or simply stamp them "unpublished" might dissipate.

Finally, Judge Arnold assured that the court did not intend to create "some rigid doctrine of eternal adherence to precedents."[137] Instead, "[i]f the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed."[138] *Anastasoff* did not stand for undying adherence to precedent; it stood for undying respect for precedent if the precedent was still valid.[139]

B. *The Immediate Aftermath of the Panel Opinion*

The *Anastasoff* opinion was subject to almost immediate attention.[140] Most of this attention came in the form of praise for Judge Arnold's willingness to consider the constitutionality of unpublished opinions and the rules limiting citation and pinpoint some of the fundamental flaws of the system.[141] The first, and perhaps the best, compliment stated in response to Judge Arnold's opinion was a concurrence, written by his colleague on the panel, Circuit Judge Gerald Heaney.[142] Judge Heaney observed that Judge Arnold's opinion "has done the

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132. *See id.* (stressing that some cases can and should be overruled but it is the role of the en banc court, not a single panel).

133. *Id.*

134. *Id.*

135. Arnold, *Federal Courts*, *supra* note 3, at 542.

136. Anastasoff v. United States, 223 F.3d at 904. "We do not have enough time to do a decent enough job, the argument runs . . . . [T]he remedy is not to create an underground body of law . . . . [It] is to create enough judgeships to handle the volume . . . ." *Id.*

137. *Id.*

138. *Id.* at 904-05.

139. *See id.*

140. Mauro, *supra* note 103, at 6.

141. *See id.*

142. Anastasoff v. United States, 223 F.3d at 905 (Heaney, J., concurring).

public, the court, and the bar a great service by writing so fully and cogently on the precedential effect of unpublished decisions."[143] Additional reactions to the *Anastasoff* opinion soon followed and were typically glowing.

One commentator hailed the opinion as "a brilliant and very important opinion that captures the crux of what is wrong with unpublished opinions" and predicted that "[i]t will have a huge impact nationwide."[144] As another commentator stated, the reasoning in the opinion "calls into question every federal district or circuit rule that purports to relegate some decisions to nonprecedential status."[145] Still another commentator concluded that the opinion was "exactly the right step forward necessary in improving the accountability of the courts."[146] Perhaps of paramount importance, "[i]t would be a foolhardy lawyer in the [Eighth] Circuit—or other circuits—who did not go through the unpublished opinions from now on."[147]

Those opposing the rules limiting the citation of unpublished opinions seemed to have won out. The opinion of the panel constitutionalized the issue in a way that had not previously been explored.[148] Judge Arnold's careful opinion laid out a cogent argument for the fundamental unconstitutionality of preventing the use of unpublished opinions as precedent.[149] A crack in the dam had appeared. All that was left was for the pressure of subsequent citations of the *Anastasoff* opinion on the federal appellate, federal district, and state court levels to burst any lingering impediment to full and open use of unpublished opinions.

Such citations came relatively fast and furious. As of October 1, 2001, *Anastasoff* has been cited by at least thirty-five courts in any number of broad contexts.[150] However, despite its quick use by a number of courts, en banc

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143. *Id.* (Heaney, J., concurring).

144. Mauro, *supra* note 103, at 6 (quoting Arthur Bryant, Executive Director of Trial Lawyers for Public Justice).

145. John Borger & Chad Oldfather, *The Uncertain Status of Unpublished Opinions*, 57 BENCH & B. MINNESOTA 36, 37 (2000).

146. Donald Alpin & Michael Triplett, *Litigation: Attorneys Say Unpublished Opinions Ruling Will Have Effect on Employment Law Practice*, DAILY LAB. REP., Aug. 29, 2000, at B-1 (quoting Professor Michael E. Tigar).

147. Mauro, *supra* note 103, at 6 (quoting Professor William Reynolds of the University of Maryland Law School).

148. *See* Anastasoff v. United States, 223 F.3d at 899-904.

149. *See id.*

150. *See* Andrews v. Neer, 253 F.3d 1052, 1057 n.3 (8th Cir. 2001) (citing *Anastasoff* but noting that the Eighth Circuit's rule against citation "continues to govern in this Circuit, and we urge the parties appearing before this Court to comply with its terms"); Hart v. Massanari, No. 99-56472, 2001 WL 1111647, at *1 (9th Cir. Sept. 24, 2001) (disagreeing with *Anastasoff* but acknowledging that the opinion, "while vacated, continues to have persuasive force"); Lederman v. Cragun's Pine Beach Resort, 247 F.3d 812, 816 n.3 (8th Cir. 2001) (citing *Anastasoff* but declining to fully consider the Minnesota rule barring citation to unpublished opinions); Rogerson v. Hot

Springs Adver. & Promotion Comm'n, 237 F.3d 929, 931 n.2 (8th Cir. 2001) (Arnold, J.) (finding the court had "no occasion here to apply the specific rationale" of the *Anastasoff* opinion because the parties had not briefed the issue and the court refused to "raise the issue on [its] own motion"); Williams v. Dallas Area Rapid Transit, 256 F.3d 260, 260 (5th Cir. 2001) (Smith, J., dissenting) (using *Anastasoff* to support the argument that the denial of rehearing en banc deprived the court of the "opportunity to revisit the questionable practice of denying precedential status to unpublished opinions"); United States v. Goldman, 228 F.3d 942, 944 (8th Cir. 2000) (citing *Anastasoff* for the proposition that a "panel must follow [an unpublished opinion] as precedent"); *In re* Arzt, 252 B.R. 138, 143 (B.A.P. 8th Cir. 2000) (applying the *Anastasoff* decision merely seven days after it was rendered); Amgen, Inc. v. Hoechst Marion Roussel, Inc., 126 F. Supp. 2d 69, 135-36 n.40 (D. Mass. 2001) (citing *Anastasoff* to support the court's citation of unpublished opinions); Bechtold v. Massanari, 152 F. Supp. 2d 1340, 1346 n.6 (M.D. Fla. 2001) (citing *Anastasoff* as evidence of "the propriety of citing unpublished decisions"); Berthoff v. United States, 140 F. Supp. 2d 50, 53 n.4 (D. Mass. 2001) (citing *Anastasoff* as support for citing unpublished opinions); Doe v. Baxter Healthcare Corp., No. CIV. 4-96-CV-10738, CIV. 4-96-CV-10843, 2001 WL 740112, at *5 n.10 (S.D. Iowa March 19, 2001) (unpublished opinion) (citing *Anastasoff* to explain the court's choice to introduce the case context with an unpublished opinion); Gonzalez v. United States, 135 F. Supp. 2d 112, 122 n.10 (D. Mass. 2001) (citing *Anastasoff* as support for citing unpublished opinions); Holland v. Horn, 150 F. Supp. 2d 706, 719 n.8 (E.D. Pa. 2001) (recognizing the Eighth Circuit's consideration of the unpublished opinion issue in *Anastasoff*, but observing that the Third Circuit "has yet to raise such an issue regarding unpublished decisions"); Lewis v. Rosenfeld, 145 F. Supp. 2d 341, 345 n.8 (S.D.N.Y. 2001) (refusing to allow the use of an unpublished opinion despite the defendant's citation of *Anastasoff*); MacNeill Eng'g Co. v. Trisport, Ltd., 126 F. Supp. 2d 51, 58-59 n.3 (D. Mass. 2001) (citing *Anastasoff* "for the propriety of citing an unpublished opinion"); McGuinness v. Pepe, 150 F. Supp. 2d 227, 235 n.16 (D. Mass. 2001) (citing *Anastasoff* as support for citing unpublished opinions); Musto v. Halter, 135 F. Supp. 2d 220, 232 n.8 (D. Mass. 2001) (citing *Anastasoff* as support for citing unpublished opinions); Newell v. Rolling Hills Apartments, 134 F. Supp. 2d 1026, 1040-41 (N.D. Iowa 2001) (implying that an unpublished opinion could still be used as precedent even though the *Anastasoff* panel decision was vacated); Schmier v. United States Court of Appeals for the Ninth Circuit, 136 F. Supp. 2d 1048, 1052 (N.D. Cal. 2001) (rebuking a challenge to the Ninth Circuit's rule against full citation to unpublished opinions by citing the *Anastasoff* description of the required standing for such a challenge); Suboh v. City of Revere, 141 F. Supp. 2d 124, 143 n.18 (D. Mass. 2001) (citing *Anastasoff* as support for citing unpublished opinions); Alvarenga-Villalobos v. Reno, 133 F. Supp. 2d 1164, 1168 (N.D. Cal. 2000) (referring to *Anastasoff* while discussing the "simmering controversy about the constitutionality of prohibitions against citation to unpublished opinions"); Cmty. Visual Communications, Inc. v. City of San Antonio, 148 F. Supp. 2d 764, 773-76 (W.D. Tex. 2000) (providing a long discussion about the *Anastasoff* opinion to support the observation that "this Court notes the beginning of a possible trend and finds the discussion of the issue worth consideration by this circuit"); Conant v. City of Hibbing, 131 F. Supp. 2d 1129, 1135 n.2 (D. Minn. 2000) (citing *Anastasoff* in support of citing a Table Decision); Encore Video, Inc. v. City of San Antonio, No. CIV.A.SA-97-CA1139FB, 2000 WL 33348240, at *8-10 (W.D. Tex. Oct. 2, 2000) (unpublished opinion) (providing a long discussion about the *Anastasoff* opinion to support the observation that "this Court notes the beginning of a possible trend and finds the discussion of the issue worth consideration by this circuit"); Gordon v. Ottumwa Cmty. Sch. Dist., 115 F. Supp. 2d 1077, 1087 n.9 (S.D. Iowa 2000) (inferring that the Iowa Supreme Court might consider an unpublished opinion as more than simply persuasive under Iowa Rule of Appellate Procedure 14(e), based on the *Anastasoff* precedent); Luciano v. United States, No. 00-CV-1725(FB), 2000 WL 1597771, at *1 (E.D.N.Y. Oct. 23, 2000) (unpublished opinion) (citing *Anastasoff* as authority

review, and perhaps even Supreme Court review, loomed large over the opinion.[151] Not only was the portion of the opinion considering precedent groundbreaking, the core of the case—the issue raised by Ms. Anastasoff and previously decided in the *Christie* case—was likewise contentious.[152] In fact, the same complimentary concurrence produced by Judge Heaney was prompted in part by his plea for en banc consideration of the core mailbox rule issue.[153] Not surprisingly, en banc review was granted.[154]

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for citation of an unpublished opinion); Massachusetts Hous. Fin. Agency v. Evora, 255 B.R. 336, 343 n.3 (D. Mass. 2000) (citing *Anastasoff* as a source "[f]or the propriety of citing an unpublished opinion"); Snell v. Allianz Life Ins. Co. of N. Am., No. Civ. 97-2784 RLE, 2000 WL 1336640, at *7 n.8 (D. Minn. Sept. 8, 2000) (citing *Anastasoff* for "invalidating [Eighth] Circuit Rule 28(A)(I) [sic], which authorizes the issuance of unpublished opinions as nonprecedential, and extending precedential weight to a prior, unpublished opinion"); United States v. Carrillo, 123 F. Supp. 2d 1223, 1247 n.4 (D. Colo. 2000) (noting Tenth Circuit Rule 36.3 was analogous to the Eighth Circuit rule which had been struck down in *Anastasoff*); *In re* Mays, 256 B.R. 555, 558 n.6, (Bankr. D.N.J. 2000) (citing *Anastasoff* in the court's proclamation that "[i]n the absence of any local rules prohibiting otherwise, attorneys may rely on unpublished opinions"); *In re* Norkus, 256 B.R. 298, 305 n.8 (Bankr. S.D. Iowa 2000) (citing *Anastasoff* as authority to cite an unpublished per curiam opinion as a method for establishing precedent); Griffy's Landscape Maint., LLC v. United States, No. 01-309C, 2001 WL 945389, at *7 (Fed. Cl. Aug. 17, 2001) (citing *Anastasoff* for the proposition that "[b]oth the propriety and the need for [unpublished opinion] rules have recently come into question"); Geske v. Marcolina, 624 N.W.2d 813, 818 n.4 (Minn. Ct. App. 2001) (citing *Anastasoff* for its discussion of the precedential value of unpublished opinions); Weyerhauser Co. v. Commercial Union Ins. Co., No. 67694-1, 2000 WL 1867610, at *12 n.12 (Wash. Dec. 21, 2000) (en banc) (noting *Anastasoff* as support for finding the reasoning of two unpublished opinions compelling) [Author's note: The Washington Supreme Court cited *Anastasoff* in the original version of its opinion in *Weyerhauser*, found at the Westlaw citation provided. However, the court's subsequent, amended opinion eliminated the citation to *Anastasoff*. Weyerhauser Co. v. Commercial Union Ins. Co., 15 P.3d 115, 129 (Wash. 2000). A citation to the original opinion is included here to notify the reader that the Washington Supreme Court has cited *Anastasoff* favorably in at least one context.]; Dwyer v. J. I. Kislak Mortgage Corp., 13 P.3d 240, 244 (Wash. Ct. App. 2000) (citing, but not applying, *Anastasoff* in consideration of Washington Rule of Appellate Procedure 10.4(h)). For another survey of these cases, see Jason B. Binimow, *Precedential Effect of Unpublished Decisions*, 2000 A.L.R. 5th 17 (2000). Iowa practioners should note that, although not cited explicitly, it is quite likely that *Anastasoff* prompted the recent softening of Iowa Supreme Court Rule 10. *In re* Iowa Rules of Appellate Procedure 14, 21 & 25 & Supreme Court Rule 10 (Aug. 31, 2001), *available at* http://www.judicial.state.ia.us/orders/orders/citation_of_unpublished_opinions_-_rule_amendments.doc.

151. Mauro, *supra* note 103, at 6.

152. Anastasoff v. United States, 223 F.3d 898, 899 (8th Cir. 2000); *see* Christie v. United States, No. 91-2375 MN, 1992 U.S. App. LEXIS 38446, at *5-7 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished opinion) (holding the physical delivery rule applied to the Christie's failed claim for a return).

153. Anastasoff v. United States, 223 F.3d at 905 (Heaney, J., concurring).

154. *See* Anastasoff v. United States, 235 F.3d 1054 (8th Cir.) (en banc).

C. *The En Banc Opinion*

Despite the well-written exposition on precedent and unpublished opinions and the determination that a rule limiting their citation was unconstitutional, the en banc court negated the *Anastasoff* principle.[155] As he had with the panel opinion, Judge Arnold authored the en banc statement of the Circuit.[156] Explaining that the panel was faced with two conflicting circuit courts' precedents in its initial disposition, Judge Arnold first noted that the earlier panel had considered that the opinion stating the proper application of the mailbox rule was one to be made by the en banc court.[157] In the meantime, the United States had agreed to pay back Ms. Anastasoff the money she lost due to her late claim, and the IRS adopted the rule of another case contradicting *Christie*.[158]

The question now posed for the court was whether the appeal was moot.[159] Ms. Anastasoff argued it was not, first and foremost because "the issue of the status of unpublished opinions is of great importance to the bar and bench."[160] On the second part, there was the important issue of the availability of attorney's fees.[161] Unfortunately for Ms. Anastasoff, her arguments were not persuasive. The en banc court decided that the case was moot.[162]

In the opinion, however, Judge Arnold carefully chiseled around the issue of unpublished opinions to avoid an absolute repudiation of the argument earlier advanced by the panel.[163] He first observed that there was no longer a dispute over the overpaid taxes owed to Ms. Anastasoff or the rule to apply in subsequent mailbox rule situations.[164] Further, any claim for attorney's fees could be made in the district court on remand.[165] The core controversy in Ms. Anastasoff's case had disappeared.[166] As far as the role of unpublished opinions, Judge Arnold was unequivocal:

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155. *See id.*
156. *See id.*
157. *Id.* at 1055; *compare* Christie v. United States, No. 91-2375 MN, 1992 U.S. App. LEXIS 38446, at *1 (per curiam) (unpublished opinion) (holding the mailbox rule only applies to taxes filed timely and not refunds for overpayment filed late), *with* Weisbart v. United States, 222 F.3d 93 (2d Cir. 2000) (holding the tax refunds enjoyed the benefit of the mailbox rule).
158. Anastasoff v. United States, 235 F.3d at 1055-56 (citing Weisbart v. United States, 222 F.3d at 93).
159. *Id.* at 1056.
160. *Id.*
161. *Id.*
162. *Id.*
163. *See id.*
164. *Id.*
165. *Id.*
166. *See id.*

> The controversy over the status of unpublished opinions is, to be sure, of great interest and importance, but this sort of factor will not save a case from becoming moot. We sit to decide cases, not issues, and whether unpublished opinions have precedential effect no longer has any relevance for the decision of this tax refund case.[167]

In the same way he had boldly asserted the unconstitutionality of the Eighth Circuit rule in the panel decision, Judge Arnold likewise made a bold retreat from the issue.[168] Yet, in his actual disposition—finding the case moot, vacating and remanding the panel opinion, and requesting the district court also declare the case moot—Judge Arnold left one glimmer of hope: "The constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit."[169] Ultimately, the court left the door open for future considerations of the issue, maintaining its viability and fostering ongoing debate.

V. AFTER *ANASTASOFF*: WHAT IS THE FUTURE OF UNPUBLISHED OPINIONS?

A. *The Reverberating Effect of* Anastasoff

Although the en banc court vacated the *Anastasoff* panel opinion, the debate over unpublished opinions and citation to those opinions is ongoing. For this reason, it is important to conclude with some thoughts on the debate to inform future considerations of the issue. Certainly the issue remains viable in the Eighth Circuit.[170] The almost immediate citation of the *Anastasoff* panel statement shows that it already had impact in the Eighth Circuit just days after its disposition.[171] Luckily, Judge Arnold's en banc opinion did not bury the question of the constitutionality of the rules limiting citation. Instead, the opinion effectively sent a signal for future cases, acknowledging that the issue is still open. This leaves a tantalizing opportunity for the issue to be revisited soon. If it is, the arguments for and against the Eighth Circuit rule raised by Judge Arnold and other judges and commentators might serve as a blueprint for countering arguments for or against the rule.

Moreover, additional citations to the opinion by other courts suggest that a number of courts were also clinging to the *Anastasoff* opinion as a foundation for striking at rules limiting the use of unpublished opinions.[172] Some of these courts

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167. *Id.*
168. *Id.*
169. *Id.*
170. *See id.*
171. *See In re* Arzt, 252 B.R. 138, 143 (B.A.P. 8th Cir. 2000) (applying *Anastasoff* a mere seven days after the opinion); *see also supra* note 145.
172. *See supra* note 150.

cited *Anastasoff* for the rule it provided, some courts used it as a basis for their own repudiations of their circuit or court rules, and some simply cited it for the persuasive argument presented, acknowledging the authoritativeness of Judge Arnold's opinion.[173] Although the *Anastasoff* panel opinion has no precedential value, the opinion and the statement found within the opinion maintain their importance in the long term beyond any effect as a precedential rule.

Indeed, given time and effect, it is possible the crack in the dam created by *Anastasoff* was sufficient to undermine and perhaps eliminate rules limiting the precedential value of unpublished opinions. The rules of eleven circuits and countless additional courts might still be considered threatened.[174] Other judges, in contexts beyond written opinions, have stated skepticism over the rules limiting citation.[175] As with the Eighth Circuit, Judge Arnold's blueprint might also be used as ammunition against additional courts' rules limiting citation.

Of course, there remain still lingering doubts over the propriety of lifting restrictions on the citation of unpublished opinions. Despite the positive reaction to *Anastasoff*, many of the arguments in favor of the rules limiting citation remain.[176] Moreover, those in favor of upholding rules limiting full citation continue to hold a hard line against any change. Just as quickly as others rushed to support the opinion, at least one commentator replied with a bevy of criticism leveled at Judge Arnold's panel opinion.[177] Undoubtedly, the debate surrounding unpublished opinions is alive and well.

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173. *See, e.g.*, Gordon v. Ottumwa Cmty. Sch. Dist., 115 F. Supp. 2d 1077, 1087 n.9 (S.D. Iowa 2000) (inferring that the Iowa Supreme Court might consider an unpublished opinion as more than simply persuasive under its own rule of appellate procedure, Rule 14(c), from the *Anastasoff* opinion); Massachusetts Hous. Fin. Agency v. Evora, 255 B.R. 336, 343 n.3 (D. Mass. 2000) (citing *Anastasoff* as a source "[f]or the propriety of citing an unpublished opinion"); Dwyer v. J. I. Kislak Mortgage Corp., 13 P.3d 240, 244 (Wash. Ct. App. 2000) (citing, but not applying, *Anastasoff*, in consideration of Washington Rule of Appellate Procedure 10.4(h)).

174. *See supra* notes 36-39 and accompanying text.

175. *See* Weinstein, *supra* note 83, at 244. In his article on judicial opinions, Judge Weinstein, Senior Judge for the Eastern District of New York, suggests spending time polishing some opinions for publication is inefficient and unpublished opinions facilitate negotiation and settlement. *Id.* *In re* Rules of the United States Court of Appeals for the Tenth Circuit, Adopted Nov. 18, 1986, 955 F.2d 36 (10th Cir. 1992).

176. *See* discussion *supra* Part III.A.

177. *See* Evan P. Schultz, *Gone Hunting – Judge Richard Arnold of the 8th Circuit Has Taken Aim at Unpublished Opinions, But Missed His Mark*, LEGAL TIMES, September 11, 2000, at 78 (arguing the *Anastasoff* panel opinion was faulty in that Judge Arnold failed to consider the distinction between cases at law and equity, the similarity between the rules relating to unpublished opinions and those relating to citation of United States Supreme Court denials of *certiorari*, and the difference between opinions which are simply marked unpublished as opposed to truly unpublished opinions).

B. *Lingering Arguments: Strengthening the* Anastasoff *Argument*

Between the two extremes of hearty support and heartfelt detraction is the argument that, despite the well-reasoned *Anastasoff* opinion, it did not consider all of the other arguments, especially other constitutional arguments, for or against the non-citation rules. One key argument focuses on the due process guarantees extended by the Fifth and Fourteenth Amendments.[178] As one commentator observed, "the Supreme Court has frequently held" these clauses "forbid any governmental statutes, laws, rules, or policies from being so vague and uncertain that persons of ordinary intelligence cannot determine what conduct is required or prohibited."[179]

Arguably, the rules limiting citation violate due process in addition to Article III because they remove necessary certainty from the law by restricting their effectiveness as precedent.[180] The opinions might be accessed, but those opinions cannot be depended upon as the law. An individual citizen, or perhaps an individual practitioner, may have difficulty determining "what conduct is required or prohibited" because the precedent may be vague.[181] This result contravenes the due process guarantee.[182]

C. *Unpublished Opinions in the United States Supreme Court*

Additional speculation may be had into what result might come from a consideration of the unpublished opinions debate by the United States Supreme Court. The *Anastasoff* opinion came perilously close to being presented for the Court's consideration. Save the IRS' willingness to pay Ms. Anastasoff despite her late filing, the issue very well might have been presented for certiorari.[183] If the issue were to reach the Supreme Court, what would be the likely outcome?

Obviously, there is no clear way to pinpoint what result the Supreme Court

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178. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

179. George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 487 (1986); *see also* Lance A. Wade, Note, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695 (2001) (discussing fully the due process concerns raised by the rules relating to unpublished decisions).

180. *See* Weaver, *supra* note 179, at 488 (discussing vague laws and how they violate due process because "it is like a secret law to which no one has access").

181. *Id.* at 487.

182. *Id.* at 488.

183. The IRS' willingness to settle the claim very well may have been due to the much-ballyhooed attempts at making the IRS more "customer friendly." *See, e.g.*, Jeanne Sahadi, *A Kinder, Gentler IRS? New Reforms Benefit the Consumer, But Experts Say It's Only the Beginning*, (March 7, 1999), *available at* http://cnnfn.cnn.com/1999/03/07/taxes/irs_reform/. One's mind boggles at the interesting outcomes that might have resulted had the IRS maintained its stereotypical hard-line stance in this particular case.

might reach. However, there are some clues that assist in making a reasoned prediction. First, there are two cases where the Court has been faced with the issue but avoided making any opinion.[184] In both cases, the Court could have effectively disposed of the issue yet failed to do so for unknown reasons. In the absence of any case-based consideration, any speculation must focus on the views of the individual Justices.

Justice John Paul Stevens made the clearest statement by a current Justice on the issue in his dissent in *County of Los Angeles v. Kling*.[185] In *Kling*, Justice Stevens took to task the Ninth Circuit Court of Appeals, which had previously disposed of an issue before it in a very brief statement because "the members of the panel decided that the issues presented by this case did not warrant discussion in a published opinion that could be 'cited [in accordance with the Circuit's rules.]'"[186] In response to this action, Justice Stevens replied, "the decision not to publish the opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong."[187] Although such a statement does not guarantee that Justice Stevens would be opposed to any rule relating to unpublished opinions brought before the Court today, it does indicate he has some reservations in regards to any rules limiting citation.

On the other side of the issue, Justice Ruth Bader Ginsburg, while she was still a judge on Court of Appeals for the District of Columbia Circuit, argued that, although judges have an obligation to reason why they decide as they do, such an obligation does not preclude sound arguments for restricting the use of unpublished opinions.[188] Again, Justice Ginsburg's opinion, presented over fifteen years ago, is far from a clear statement in favor of the rules within the context of a Court opinion. However, this statement indicates that at least one of the Justices may be more likely to uphold a rule limiting citation at issue.

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184. In *Browder v. Director, Department of Corrections*, 434 U.S. 257 (1978), the Supreme Court "did not mention the no-citation question, although it had granted certiorari [sic] on the issue." *In re* Rules of the United States Court of Appeals for the Tenth Circuit, Adopted Nov. 18, 1986, 955 F.2d 36, 37 n.1 (10th Cir. 1992). In *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976), the Court "denied leave for the petitioners to file petitions for writs of mandamus and prohibition after the Seventh Circuit struck the petitioners' citation of an unpublished decision." *Id.*

185. County of Los Angeles v. Kling, 474 U.S. 936 (1985) (Stevens, J., dissenting). Although the late Justice Brennan is not a member of the current Court, it is interesting to observe that he joined Stevens' dissent "substantially for the reasons stated by Justice Stevens." *Id.* at 941 (Brennan, J., dissenting).

186. *Id.* at 938 (quoting App. to Pet. for Cert. at A-2 n.**).

187. *Id.* at 938 n.1.

188. *See generally* Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 U. FLA. L. REV. 205, 221 (1985) (discussing the rules related to unpublished opinions and stating both support and criticism).

D. *Is There a Way to Compromise?*

Perhaps the best solution to the debate over the role of unpublished opinions would be to develop a general rule for all courts. Yet, the development of a uniform, constitutional rule to satisfy all critics is as contentious as the rules currently in effect. One commentator has argued that "[t]he best rule . . . appears to be the free citation of unpublished opinions as persuasive authority. Those rules that prohibit only the citation of unpublished opinions as precedent are the most desirable."[189] Another commentator has posited that "[a]n optimum uniform rule would create a presumption in favor of publication and would require that a nonpublication choice be panel-unanimous. It would also list an objective set of criteria for mandatory publication."[190] Again, as with the general debate over the rules limiting the citation of unpublished opinions, at least two sides of the issue appear. Moreover, some might argue that the system already has erected checks upon the publication decision by way of various courts' chosen publication criteria.[191] Arguably, these factors are an effective compromise that provides independent factors upon which to make a reasoned publication decision. Clearly, the possibility of a general rule is as contentious as the current debate over the role of unpublished opinions and is likely to prompt even greater debate as myriad courts and viewpoints fight to attain representation in any resulting rule.

VI. CONCLUSION

Ultimately, perhaps the greatest benefit of the *Anastasoff* case is that it has reawakened an interesting and important debate about an issue that has a broad effect on judges, practitioners, and anyone else having even the most minor role in the court system. Although the crack in the dam was a relatively minor one, and one that was quickly patched, the debate has been stirred and is sure to remain at issue again for some time. Perhaps the issue will have to be resolved by the Supreme Court. Perhaps it will simply simmer and fade into the background as it has in the past. Either way, some will continue to chip away at the dam while their opponents come along behind and try to patch any cracks created.

William J. Miller

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189. Weaver, *supra* note 179, at 492.

190. *See* Baker, *supra* note 9, at 939 (discussing possible variations of a general rule to satisfy the concerns of critics on both sides of the issue).

191. *See* Songer, *supra* note 27, at 308-09 (discussing various criteria developed to aid the publication decision).