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CASE LAW AND LEGISLATIVE UPDATE

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Case Law

A. Lime Lounge, LLC and Thunder & Lightning, Inc. v. Zoning Board of Adjustment of the City of Des Moines, Iowa

Iowa Court of Appeals No. 18-0155. Filed February 6, 2019

The Plaintiff in this case operates a tavern in the East Village of Des Moines, Iowa. The tavern was granted a conditional use permit on August 31, 2011 which provided in part "Live outdoor music on any patio shall be limited to nonamplified performances. Any outdoor sound and music on any patio shall be limited to levels that will be considered background auditory in nature." The CUP also provided in paragraph 7 as follows: "The conditional use permit shall be subject to further amendment or revocation if the zoning enforcement officer determines that the operation of the business becomes a nuisance or exhibits a pattern of violating the conditions set forth in the conditional use permit." Over several years the tavern received numerous complaints regarding the noise level. In August of 2015 the CUP was amended to allow the tavern to have louder music on the patio. The CUP was amended to provide as follows: "Live outdoor music on any patio shall be limited to non-amplified performances. Any outdoor sound or music on any patio shall be limited to levels that would be considered background auditory in nature and shall be in accordance with a type "E" sound permit."

Complaints regarding the noise level on the outdoor patio continued over the next year with several police reports being filed regarding the noise level. In March of 2016, a hearing was held regarding whether or not the CUP should be revoked or amended. At that meeting, the tavern's representative contended the board had no jurisdiction over the matter as there are specific procedures required to revoke a type "E" sound permit. A board member of the Board of Adjustment asked the tavern owner "Is your argument that this Board doesn't have the right to pull the conditional use permit that we granted?" The tavern argued that the sole issue was a violation of the sound ordinance which the tavern asserted was to be dealt with in an administrative hearing pursuant to section 42-266 of the Municipal Code. After the board was presented with exhibits, complaints and comments offered by neighbors and police officers, and arguments made by the parties, the Board voted to revoke Lime Lounge's CUP.

On March 31, 2016, Lime Lounge filed a petition for a writ of certiorari. The tavern asserted the Board's ruling was illegal in a myriad of ways and asserted various violations of regulatory procedure, erroneous statutory interpretation, and violations of doctrines of res judicata and collateral estoppel. The district court found no illegality and annulled the writ. On appeal, the tavern made several legal arguments. The tavern argued that the board had no authority to revoke the CUP as it was actually a revocation of their liquor license, as well as the sound permit and there were certain administrative procedures that had to be followed to revoke both the liquor license as well as the sound permit. The Iowa Court of Appeals opined that the revocation of a CUP was different than revocation of a liquor license and/or a sound permit and held that a CUP by its very terms are subject to the permit holder's compliance with the conditions specified and "shall be subject to further amendment or revocation if the zoning enforcement officer

determines that the operation of the business becomes a nuisance or exhibits a pattern of violating the conditions set forth in the conditional use permit." It would defy logic to conclude the "further amendment or revocation" was not within the Board's authority.

The tavern also argued that they were not afforded the same level of fairness as in a court of law. The district court as well as the Iowa Court of Appeals found that there was adequate safe guards in place for the holder of the CUP. The decision of the district court on the writ was affirmed as the court of appeals concluded: "Here, the evidence included many noise complaints and several meter readings, several in excess of eighty-five decibels. Clearly the sound emitting from the Lime Lounge was unreasonably disturbing individuals and other businesses in the area. A city authorized sound permit did not authorize unlimited noise emitting from the premises. Having reviewed the record, we find there is substantial evidence from which the Board could make its findings."

B. Standard Water Control Systems, Inc. v. Michael D. Jones and Cori L. Jones
Iowa Court of Appeals No. 17-2009. Filed February 6, 2019

This case involves a foreclosure of a mechanic's lien by Standard Water Control Systems, Inc. The case has been on appeal and before the district court on numerous occasions. The Plaintiff was successful in having the court find that the mechanic's lien could be foreclosed in the amount of $4900, plus attorney fees and costs. The issue before the district court as well as the Iowa Court of Appeals was whether or not a homestead can be sold to recover attorney fees and costs entered as part of a judgment against a home in an action to foreclose a mechanic's lien. Iowa Code Section 561.16 provides that a homestead is subject to a judicial sale only when there is a special statutory declaration permitting such a sale. Iowa Code Section 561.21(3) allows for the homestead to be sold in a mechanic's lien foreclosure. However, that section only lists two types of debts for which a homestead may be sold - those for work done and those for materials furnished. It does not list attorney fees as one of the items that could be part of a judgment in a mechanic's lien foreclosure in which the homestead could be sold. The Iowa Court of Appeals found because Iowa Code Section 561.21(3) does not list attorneys fees the homestead could not be sold to recover attorneys fees, costs of the action or interest that may have been entered as a judgment against the home in a foreclosure action under Chapter 572. The district court found that homestead rights had been waived in previous actions regarding the same claim by the Defendant as the Defendant never raised the issue. The Iowa Court of Appeals reversed the district court finding the Joneses waived their homestead rights. The decision of the district court was affirmed in part with the Court of Appeals affirming district court's finding that Iowa Code Section 561.21(3) does not allow a homestead to be sold to recover attorney fees entered as part of a judgment against a home in an action to foreclose a mechanic's lien, but reversed the court's conclusion that the Joneses waived their homestead rights and remanded for further proceedings.

C. Ames 2304, LLC v. City of Ames, Zoning Board of Adjustment
Iowa Supreme Court No. 17-1149. Filed March 8, 2019

This case is a further review of a Court of Appeals decision affirming the district court which granted a writ of certiorari regarding the legality of the Board's denial of Ames 2304's permit for a proposed interior remodel.

The property which is the subject matter of this appeal is a legal nonconforming use wherein a single family home was converted to four one-bedroom apartments in 1928. It was grandfathered in as a legal nonconforming use. In April of 2016, Ames 2304 sought a building permit to remodel the property's interior. The proposal was to go from two one-bedroom units to one studio unit and one two-bedroom unit and on the second floor it was to convert two one-bedroom units to one studio apartment and one three-bedroom unit. The number of bedrooms would increase from four to seven. The Ames zoning enforcement officer determined that this was an increase in the intensity of the nonconforming use and therefore the proposal was not allowed under the Ames zoning ordinance. The zoning board of adjustment affirmed the decision of the zoning enforcement officer and on appeal the district court found that this was not an increase in intensity of the use of the nonconforming use and annulled the writ of certiorari. The court of appeals agreed with the district court. The Iowa Supreme Court on further review determined that the City's zoning ordinance does not adequately define what is an increase in intensity of use, but the Court found that there was no larger imprint on the property through the conversion of the two one-bedroom apartments on the first floor and the two one-bedroom apartments on the second floor. The two different configurations was not an increase in intensity of use and therefore affirmed the court of appeals.

D. Joseph Goche v. WMG, L.C.
Iowa Court of Appeals No. 18-0793. Filed March 6, 2019

The court in this case addresses the doctrine of merger of a contract into a deed and fulfillment of a contract and issues regarding reformation. A limited liability company of which four siblings were members: Joseph Goche, Michael Goche, Jeanne Goche-Horihan and Renee Afshar had a special meeting in February 2017 regarding removal of Joseph as the manager of the company and distribution of the real property. The resolution of the LLC provided as follows: "Members and Managers acknowledge, consent, and agree that the Parcels shall be distributed to the Members via warranty deed and subject to existing liens for real estate taxes and special assessments." The deed from WMG, L.C. to Joseph contained the following language: "The grantor hereby covenants with grantees, and successors in interest, that it holds the real estate by title in fee simple; that it has good and lawful authority to sell and convey the real estate; that the real estate is free and clear of all liens and encumbrances, except as may be above stated; and it covenants to Warrant and Defend the real estate against the lawful claims of all persons, except as may be above stated." The property that was received by Joseph had unpaid property taxes, as well as drainage assessments in the total amount of $32,216.59 which Joseph paid. He brought this action on a breach-of-warranty deed claim. The district

court granted partial summary judgment to Joseph and awarded him $32,216.59 in damages. WMG appealed that decision. The issue before the court was whether or not the contract which stated that the deed would be subject to bills, unpaid real estate taxes and special assessments merged into the deed which was granted by WMG to Joseph. The doctrine of merger states that the terms of the conveyance of real estate, absent a showing to the contrary, are "deemed to have merged in a subsequent deed." So the previous agreement between the parties merged into that deed and the deed speaks for itself has notable exceptions. Here, the issue is whether or not the lower court should have allowed evidence to be taken for the showing to the contrary which would overcome the presumption of merger. The Court of Appeals found that the district court should have taken these additional questions and should not have granted summary judgment and reversed the decision of the district court.

E. Mary DeHaai v. City of Monroe and Parties in Possession
Iowa Court of Appeals No. 18-0126. Filed March 20, 2019

DeHaai has owned and lived in the residence and adjoining lot fronting on American Street in the City of Monroe for forty-three years. Immediately south of DeHaai's property line, the City of Monroe owns a sixty-foot wide strip of land which contains American Street with a strip of land on either side of the street. The City's ownership was established via a recorded quitclaim deed dated 1965. The City of Monroe's ordinance provides as follows: "abutting property owners have a duty to maintain all property outside the lot and property lines and inside the curb lines upon the public streets….Maintenance includes timely mowing, trimming trees and shrubs and picking up litter." City of Monroe Ordinance 135.10. DeHaai brought this action seeking to quiet title to the land lying between the south boundaries of the lot she owns and the physical boundaries of American Street. In the petition she alleged she cared for, maintained, mowed, and otherwise exercised sole dominion and control of the land for over forty years. The City of Monroe filed a motion to dismiss claiming DeHaai failed to adequately plead all the elements of adverse possession. The district court granted the motion to dismiss. To establish adverse possession in Iowa, the party must establish hostile, actual, open, exclusive and continuous possession under claim of right or color of title for at least ten years. The doctrine of adverse possession is strictly construed. Even though Iowa is a notice state in the pleadings, there are not sufficient facts alleged in the petition to allow for adverse possession. Permissive use of land is not considered to be hostile under claim of right and with the duty that the City of Monroe imposes on abutting land owners to care for that area, a city's motion to dismiss is appropriate. The Court of Appeals affirmed the district court.

F. Great Western Bank v. Conrad D. Clement; Manaco, Corp., and Parties in Possession / Sue Ann Dougan v Wayne Joseph Mlady
Iowa Court of Appeals No. 18-0925. Filed March 20, 2019

Conrad Clement, the debtor, owned certain property in Howard County subject to a mortgage held by Great Western Bank. Clement failed to pay the amounts due on the note secured by the mortgage and the bank commenced its foreclosure action. A motion

for default was entered by the bank in January of 2017 and on March 24, 2017 the district court entered a decree granting the bank's request to foreclose upon the farm property that secured Clement's mortgage. The decree provided in part as follows: "The court notes that the subject real estate is agricultural real estate and, as such, there shall be a one-year redemption following sheriff's sale, exclusive to the Defendant, Conrad D. Clement only." A sheriff's sale was held on May 22, 2017 and the property was purchased by Wayne Mlady.

Almost eleven months later, Sue Ann Dougan was assigned the right to redeem from Clement and filed a petition in the case essentially seeking entry of a declaratory judgment in her favor. Dougan tendered to the district court more than the sum due pursuant to 628.13 and .18 to redeem the property. She requested the district court ratify and confirm the redemption in accordance with the terms determined by the court. Mlady resisted that petition. At a hearing held in April 2018, the court determined that because the decree stated that the redemption rights were exclusive to Clement, that only Clement could redeem the property. In addition, because that language was not appealed in the original foreclosure action, it was the law of the case.

The Iowa court of appeals reviewed Iowa Code Section 628 which provides a right of redemption for mortgage debtors and creditors. Iowa Code Section 628.25, entitled "Transfer of debtor's right," explicitly states: "The rights of a debtor in relation to redemption are transferable, and the assignee has the like power to redeem." In the case of *Hartman Mfg. Co. v. Luse*, 96 N.W. 972, 973 (Iowa 1903) the court explained the rights of redemption "Ownership is always transferable. It's transfer necessarily carries the statutory right of redemption. The practical effect of such transfer is that when the distressed, and perhaps helpless, owner of real estate is approaching the end of its period of redemption, he may barter to another the remnant of his rights, both contractual and statutory. In such a case the right of redemption carries the only value which the ownership has. Such value is potential and can be realized only by the exercise of the right of redemption. The exercise of such right saves the ownership. If the owner is not able to exercise such right, then neither ownership nor right of redemption has any value." Iowa Code Section 628.3 provides that "The debtor may redeem real property at any time within one year from the day of sale, and will, in the meantime, be entitled to the possession thereof; and for the first six months thereafter such *right of redemption is exclusive.* Dougan argued on appeal that the foreclosure decree's use of the word "exclusive" concerning Clement's right of redemption did not mean he could not assign his right as provided in Iowa Code Section 628.25. The Iowa Court of Appeals agreed and found that the assignment was valid. The district court's action was reversed.

G. Tech Professional Centre Condominium Association v. Apex Holdings, LLC and Jens Baker

Iowa Court of Appeals No. 18-0042. Filed April 3, 2019

An owner of two condominiums modified the exterior doors and windows of the units to allow for a day care center to be operated in the condominiums. The condominium association sued the owner and the owner's registered agent for breach of

association rules, bylaws and the statute governing condominiums. At trial the district court ruled in favor of the association and ordered the owner to return the units to their original condition. The court also declined to grant the association's request for attorneys fees.

The association's condominium declaration and bylaws state that "Unit owners are not to make structural modifications or alternations in [their] unit installations located therein without receiving prior written approval from the Association." Facts of the case make it clear that the owner of the two condominium units did not seek the approval of the Association and went ahead and removed two sets of windows, installed new entrance doors to the units, and made the existing doors "nonoperable." The Association after seeing that the work had been done ordered Apex to cease and desist with the renovations. Apex ignored the order, completed the construction, and paid the contractor $5,095.48.

This action was filed by the Association as a "petition at law", alleging that Apex breached the Association bylaws and violated Iowa Code Chapter 499B "by making significant exterior alterations to the building without the … Association's approval." Following trial, the district court determined Apex violated the Association bylaws and Chapter 499B by failing to notify the Association of its proposed changes to the building. The court ordered Apex to "place the exterior of the condominium building in its condition prior to the exterior renovation done to the building in 2016" "no later than ninety days from the date of this order." The attorney fees were denied to the Association.

On appeal, the owner of the units tries to argue that because the Association was no longer in existence as a corporation that they do not have the ability to enforce the bylaws. The Court of Appeals rejected that argument and also the agreement regarding laches which is the defense applied to preclude enforcement of the bylaws. Laches is an equitable doctrine premised on unreasonable delay in asserting a right, which causes disadvantage or prejudice to another. It is an affirmative defense and had to be plead. In this case, Laches was not plead.

The last issue before the court was whether or not the Association had the right to have an injunction placed on the work requiring the owner to place the property back into its previous condition. The Court found that the action was plead as a petition at law and that injunctive relief was not appropriate. The court went ahead and awarded damages to the Association in the amount of $5,095.48 which was the amount paid to have the word done on the property.

The denial of attorneys' fees was affirmed by the court of appeals finding that the amendment to the bylaws allowing for attorney fees was placed in the bylaws after the work had been performed by the contractor on the condominium owner's units. There was no abuse of discretion in the court's ruling to deny the attorney fees.

H. Winger Contracting Company v. Cargill, Inc. et al.
Iowa Supreme Court No. 17-1169. Filed April 12, 2019

The issue before the court is whether or not mechanic's liens arising from the providing of materials and labor to a lessee attach to the property of the lessor under the facts and circumstances of this case. The case also presents the question of whether a construction mortgage lien ultimately obtained by the owner of the land on the leasehold and property of the lessor has priority over later-filed mechanic's liens. In this case, Cargill leased to an entity certain property to build a facility to provide chlor-alkali to Cargill. The lease provision contained provisions indicating that all the improvements constructed on the leased land by the tenant would be the property of the tenant and had to be removed at the end of the lease term. It also contained provision in the lease under paragraph 22.14, "that nothing in the lease should be construed "as creating a partnership, joint venture, or association" between Cargill and the tenant and that neither party was responsible for any of the debts or obligations of the other party." The construction commenced on the property and the Plaintiff was a sub-contractor. The tenant obtained a loan from the Iowa Finance Authority to construct the facility which was guaranteed by Cargill. The project failed and the sub-contractors filed this action seeking to enforce mechanic's liens against the interests of the landlord. The lower court ruled that the interest of the sub-contractors did not attach to the property of the landlord mortgage lien and the lessees property had priority over the mechanic's liens. There has been previous case law in Iowa under the *Romp* and *Stroh* cases where under certain circumstances a sub-contractor filed mechanic's lien against the interests of the lessee might attach to the interest of the lessor. However, under an amendment to Iowa Code Section 572.2 the definition of owner has now been limited to mean the record titleholder of the property. The Iowa Supreme Court looked at the issue and determined that the threshold issue in this case is whether a mechanic's lien on the underlying fee interest may attach under the current version of Iowa Code Section 572.2(1) for the contractor. If the answer to the question is no, there is no need to consider whether the mechanic's liens attach under the theories in *Romp* and *Stroh.* Based upon review of the statute, the Iowa Supreme Court held that Cargill has a better argument. The amendments of 2007 and 2012 narrowed the definition of owner and eliminate contracts with agents as the basis for mechanic's liens on the property of the owner. Under their interpretation of the legislative action *Romp* and *Stroh* are no longer good law. The Iowa Supreme Court found that the language of the statute does not allow the attachment of mechanic's liens to fee simple interest of Cargill.

The court also found the construction mortgage lien was superior to the interest of the mechanic's lien even though the interest of the mortgage holder was now held by Cargill. There was no merger of the fee simple interests with the lessee's interest. The decision of the district court was affirmed.

I. Obduskey v. McCarthy & Holthus, LLP
United States Supreme Court No.17-1307. Filed March 20, 2019

This case involves the law firm of McCarthy & Holthus which tried to carry out a nonjudicial foreclosure on a Colorado home owned by petitioner Dennis Obduskey. Obduskey received a letter from the law firm and responded with a letter invoking the Fair Debt Collection Practices Act which provides that if a consumer disputes the amount of a debt, a "debt collector" must "cease collection" until it "obtains verification of the debt" and mails a copy to the debtor. Instead, the law firm initiated a nonjudicial foreclosure action. The debtor sued, alleging that the law firm failed to comply with the FDCPA's verification procedure. The District Court dismissed on the ground that the law firm was not a "debt collector" within the meaning of the FDCPA. The Tenth Circuit affirmed, as well as the U.S. Supreme Court. The U.S. Supreme Court held that a business engaged in no more than nonjudicial foreclosure proceedings is not a "debt collector" under the FDCPA, except for the limited purposes of §1692f(6). The court found that because the law firm was not a debt collector under §1692a(6) and the provisions of §1692f(6) were not applicable in this case, therefore the law firm was not a debt collector.

J. John E. Rottinghaus and Dessie Rottinghaus v. Lincoln Savings Bank, Fiduciary of the Estate of Sandra R. Franken
Iowa Court of Appeals No. 18-0261. Filed May 1, 2019

In 1973, John and Dessie Rottinghaus sold certain real estate to James and Sandra Kipp. The deed contained the following "right-of-first-refusal" provision: "Grantees hereby agree that they will not sell or otherwise convey the premises described above to any person other than grantors without first giving grantors the opportunity to purchase the premises at a price equal to any bona fide offer to purchase the premises made by any other person. In the event any person offers to purchase the said premises from the grantees, the grantees shall notify the grantors immediately and grantors shall have fifteen (15) days to purchase the property at the same price as offered." Sandra Kipp eventually became the sole owner of the property. After she died, her estate sold the property to a third party. The sale took place in 2016.

The Rottinghauses filed a probate claim in her estate for the breach of the right of first refusal contained in the 1973 contract with the Kipps. The estate moved for summary judgment, relying in part on Iowa Code section 614.17A(2017) which provides in part: "[A]n action shall not be maintained in a court, either at law or in equity, in order to recover or establish an interest in or claim to real estate of . . . [t]he action is based upon a claim arising more than ten years earlier or existing for more than ten years." The Iowa Court of Appeals affirmed the district court relying upon the case of *West Lakes Properties, L.C.* v. *Greenspon.* The Court found that because the claim arose more than ten years ago and nothing was preserved, Iowa Code section 614.17A was applicable and the state court decision was affirmed. Judge Vogel issued a dissent finding that this was simply a breach of contract claim and not subject to Iowa Code section 614.17A. Judge Vogel goes through an analysis of what was the purpose of 614.17A. She found that

614.17A was enacted to transfer an interest in real estate adverse to the record title holder. She found that the interest of Rottinghaus was not an interest in the real estate because they were never given any right to exercise the right. Applying section 614.17A as a statute of limitations for the Rottinghauses' breach of contract claim goes beyond the statute's purpose of simplifying land transfers and record titles.

K. Arthur John Chumbley v. Lyman Enterprises, L.C.
Iowa Court of Appeals No. 18-0379. Filed May 15, 2019.

Lyman Enterprises, L.C. hired Chumbley to do certain work on property owned by Lyman Enterprises, L.C. There was a dispute about the amount owed for labor and materials furnished by Chumbley and Chumbley brought this action to foreclose on a mechanic's lien. At the district court level, the district court determined that $38,927.20 was still owed to Chumbley and that Chumbley was entitled to reasonable attorneys fees pursuant to Iowa Code section 572.32(1). On appeal, the Iowa Court of Appeals affirmed the amount to be paid for labor and materials, but because the district court determined that attorneys fees in mechanic's liens actions is mandatory under 572.32, that the case would be remanded and reversed in part. The legislature has amended 572.32 to make an award attorney fees discretionary rather than mandatory .

L. Wells Fargo Bank, N.A. v. Jason C. Thomas, et al.
Iowa Court of Appeals No. 18-0488. Filed June 5, 2019

Larry Humphrey executed a note and a mortgage loan with his wife to Wells Fargo Bank, N.A. Larry died in March of 2017 and the note was in default. No estate was opened for Larry. This action was commenced by Wells Fargo in a petition of foreclosure seeking judgment in rem and to quiet title to the mortgaged real estate. The petition named Jason Thomas and "all known and unknown claimants and all persons known or unknown claiming any right, title or interest and all of their heirs, spouses, assigns, grantees, legatees, devisees and all of the above named defendants." A guardian ad litem was appointed for the unknown heirs. Wells Fargo published notice of the foreclosure in a local newspaper once weekly for three consecutive weeks, and provided notice to the GAL. The court granted the default judgment against Thomas and the other named defendants, but refused to find against the unknown heirs finding that notice by publication "is insufficient to put unknown heirs on notice of the foreclosure action.

Wells Fargo appeals the denial of its petition to quiet title to the unknown heirs. The Court of Appeals relied upon Iowa Land Title Standards. Standard 7.8(1) states: "If a foreclosure court had in rem jurisdiction of the persons with an interest in the estate of a deceased borrower, and entered a decree of foreclosure, there is generally no need to open an estate for the deceased borrower. Under the doctrine of res judicata, a title problem can only arise in such a case if a person in interest objects to the procedure in the foreclosure case and the court upholds the objection." Additionally, Standard 7.8(4) states, when there is no estate, "the foreclosure should name as defendants all known persons who are reasonably believed to have a right to inherit the property, and also all unknown persons with an interest in the estate." The Iowa Court of Appeals found that

the notice was proper by publication and also relied upon *U.S. Bank Nat'l Ass'n* v. *Parrott*. The decision of the district court was reversed and remanded.

M. John Barton Goplerud, et al. v. Dallas County, Iowa, Dallas County Board of Adjustment, and NAPA Valley Owners Association
Iowa Court of Appeals No. 18-0784. Filed June 19, 2019

In May of 2014 the Gopleruds who lived in the Napa Valley Estates housing division in Dallas County, Iowa filed an application with the Dallas County Department of Planning and Development for a building permit for a combined carriage house and garage on their property. The Department issued the building permit. The carriage house was constructed and a Certificate of Zoning Compliance and Occupancy Permit was issued by the Department on February 13, 2015. The Gopleruds were subsequently sued by the Napa Valley Owners Association which claimed the occupied carriage house did not meet the restrictive covenants of the homeowners association. While the suit was pending, the NVOA contacted the Department in Dallas County stating that they believed that the Gopleruds were in violation of the Dallas County zoning ordinances, as two single-family residences on one lot were not permitted in the R-2 Zoning District where the house was located. The Dallas County Zoning Department issued a Notice of Violation to the Gopleruds on January 10, 2017, stating that they were in violation of the zoning ordinance and it had to be abated by March 10, 2017. In order to abate the violation, the Gopleruds were informed they needed to (1) cease and desist using the building as a residence, (2) modify the building to comply with the occupancy permit, and (3) use the building in compliance with zoning regulations. The Gopleruds appealed the Notice of Violation to the Board. After a hearing, the Board issued a decision stating that because the accessory building had more than 51% of the total square footage of the building for residential use, it was in violation of the zoning ordinance. The Gopleruds then filed a petition for writ of certiorari, requesting a stay or restraining order, and request for declaratory ruling against Dallas County, the Board and the NVOA. Dallas County filed a pre-answer motion to dismiss, claiming the Board's decision was not a final decision on the issue of whether the Gopleruds violated Dallas County ordinances. This pre-answer motion to dismiss was denied. However, a hearing was held on whether the court should issue the writ of certiorari pursuant to Iowa R. Civ. P. 1.1406. The lower court, as well as the Iowa Court of Appeals rendered a decision as to when a person is aggrieved by a decision of the County Board of Adjustment they may then file a petition for writ of certiorari. Under Section 335.18 of the Iowa Code, a person "aggrieved by any decision of the board of adjustment" may file a petition for writ of certiorari "setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality." Proof that a party is aggrieved by agency action as shown by evidence of (1) a specific personal and legal interest in the subject matter of the agency decision and (2) a specific and injurious effect on this interest by the decision. Dallas County indicated they were not injured by the decision of the notice of the department in the notice of violation. The Iowa Court of Appeals disagreed that in that the notice of violation presents the Plaintiffs with two alternative consequences, both of which are negative which would be to move the carriage house or modify it so it could no longer be used as a residence. There was also potential for a large fine. The Court of Appeals determined that there was

claims there was specific, personal and legal interest in the subject matter of the agency decision and a specific and injurious effect on the interest by the decision. The district court's action was reversed.

N. Jade E. Robinson and Shannon K. Robinson v. William A. Welp and Joyce A. Welp

Iowa Court of Appeals No. 17-1801. Filed July 3, 2019

The Welp's owned certain property in Marshall County. As part of the sale process to the Robinsons, a disclosure statement was completed pursuant to Iowa Code Section 558A. One of the questions was is there a problem with mice, bats, snakes, spiders, roaches, etc. The form provided a "Yes", "No" or "Unknown" and the Welps marked it "No". The Robinsons moved in to the property early and they found several snakes on the property. The Robinsons had pest control come out to take care of the issue. After the Robinsons moved into the property and purchased the property they found numerous snakes all around the property and inside the property. After certain work was done on the property, the contractor indicated he could not determine whether or not there were additional snakes in the house, as it was possible there were still snakes in the walls. The Robinsons then filed this lawsuit against the Welps, alleging they did not disclose the snake problem and there was also an issue regarding the in-ground pool leaking. At trial, the Welps testified that they were aware that there were snakes on the property over the years, but did not consider it a problem. The district court found that they breached the contract and disclosure form by failing to note the snake problem and they would award damages in the amount of $64,216.42, which was the amount based upon Campbell's estimate to eradicate the snakes for $55,000.00, $1,000.00 per month living expenses for two months, as well as $7,216.42 to reimburse the Robinsons for the money already used to eradicate the problem. There were also attorneys' fees awarded of $53,535.00 and expenses of $1,677.17. The issue for the Iowa Court of Appeals was whether or not there was a breach of the duty to disclose. Iowa Code Section 558A.301 requires the seller to make disclosures "in good faith". The Court of Appeals agreed with the district court that checking "no" to the question "Is there a problem with . . . snakes?" was a violation of their duty. The defendant's tried to argue that the question was in the present tense - "is" there a snake problem rather than had there been a snake problem. The Iowa Court of Appeals disagreed with that interpretation of Iowa Code Section 558A and the disclosure form. They found that the Welps had actual knowledge of the snake issue and failed to disclose it and therefore they breached the disclosure form as well as Iowa Code Section 558A. Attorneys fees were appropriate and the amount of attorneys fees is generally under the discretion of the court. Case was remanded to determine whether or not appellate attorneys fees should be awarded.

O. Cheryl Albaugh v. The Reserve

Iowa Supreme Court No. 18-1037. Filed June 28, 2019

Cheryl Albaugh's mother (Shirley Voumard) moved into The Reserve at Walnut Creek in October of 2007. Requirements to move into The Reserve were that the person had to pay an entrance fee and in this case a supplemental amount upon signing the

agreement. By doing so, they would be able to live in the facility and would have certain benefits including healthcare, meals, etc. Albaugh paid a $64,975 entrance fee, as well as a $63,557 supplemental fee, moved into the property and in August of 2014 it became clear that Voumard could not live in the facility on her own. She had dementia. She moved out of the property and Albaugh requested that they refund the entrance fee and supplemental amount. They declined to do so. This lawsuit was filed by Albaugh. She tried to argue that the agreement between her mother and The Reserve violated the Iowa Uniform Residential Landlord and Tenant Act. She also claimed that there were violations of the Retirement Facility Act under Iowa Code 523D, as well as other violations under common law. The issue before the Iowa District Court, as well as the Iowa Supreme Court was whether or not this type of arrangement was intended to be governed by the Iowa Uniform Residential Landlord and Tenant Act under Iowa Code Section 562A or governed by the retirement act under Iowa Code 523D. The district court granted the defendant's motion for summary judgment finding that the Residential Landlord and Tenant Act was not applicable and the Iowa Supreme Court agreed through an analysis of the statutory language involved. The Supreme Court concluded that the plain statutory language makes clear the legislation did not intend the fees permitted by Chapter 523D be subject to the rental deposit provisions under the Iowa Uniform Residential Landlord and Tenant Act. The plaintiff tried to argue that the rental deposit was limited to two months' rent under Iowa Code Section 562A.6(12). The Iowa Supreme Court found that the plain statutory language makes it clear the legislature did not intend that fees permitted by Chapter 523D be subject to the rental deposit provisions of the Iowa Uniform Residential Landlord and Tenant Act. The motion for summary judgment granted to the defendants was affirmed by the Iowa Supreme Court. There was a dissent filed by Justice Appel concurring where Justice Wiggins joined the dissent.

P. Marc Steffes, Mercedes Steffes, Lance Freed and Jill Freed v. Terrace Park Dock and Property Owners Association, et al.
Iowa Court of Appeals No. 18-0348. Filed May 15, 2019

Steffes owns property in the Terrace Park subdivision of West Okoboji. They applied for membership in the Terrace Park Dock and Property Owners Association. The Association maintains five docks for the development and the Association was formed in 1975 to secure those dock permits. The Association bylaws provide that: "Only those persons . . . owning a parcel or parcels of land in the following described properties shall be eligible as members of the Association: All parcels of land in the original plat of Terrace Park and the Replat of Terrace Park, Dickinson County, Iowa." The Appellants' property boundaries do not match up with any of the lots shown in either plat, as the property had been replatted several times since the original plats. The Association denied their membership and the district court affirmed that denial. Over the course of several decades, the property in question was a part of Block 7 of Terrace Park and also in the 1908 plat Lot A in Terrace Park. It was then replatted and has not been referenced as an original lot in the original plat. The application was denied by the Association. On appeal, the Iowa Court of Appeals determined that the language of the Association bylaws was unambiguous. The 1989 amendment does not restrict membership in the

Association to owners of lots of record as delineated in the 1905 Plat or the 1908 Replat. It therefore allowed the plaintiffs to become members of the Association.

Q. Slashfrog, LLC d/b/a All Day Homes v. Ethan Quick and Jordan Quick
Iowa Court of Appeals No. 19-0031. Filed November 27, 2019

Slashfrog, LLC entered into a purchase agreement with the Quicks to purchase a 12 unit apartment complex; two single family units and a commercial duplex. The Agreement was entered into on January 30, 2017, and was to close on June 30, 2017. The purchase price of the property was $630,000. The Defendants, the Quicks, were not represented by counsel. After the Agreement was entered into fire damage on the commercial duplex caused work that had to be performed on the commercial duplex prior to the closing in June of 2017. During the course of the work Slashfrog wrote Quicks asserting failure to complete the scope of work repairs. Slashfrog indicated they would go ahead and close with a $30,000 reduction in the total purchase price. Quicks rejected that proposal. There was also an argument by Slashfrog that the Quicks had recently entered into undisclosed leases of the property extending past the closing date in violation of the Agreement. The Agreement provided that no new leases would be executed unless first approved by the Buyer of the property. Quicks indicated that they were in full compliance of the Agreement and that any leases could be terminated prior to the June 30, 2017, closing date. The closing did not occur on June 30 and Slashfrog sent a formal notice of default to the Quicks. The Quicks responded with their own letter stating Slashfrog was in default. Slashfrog claimed that the Quicks breached the contract. Slashfrog sought monetary damages in a suit filed on July 26, 2017. Quicks answered and filed a counterclaim alleging breach of contract and unconscionability. On October 1, 2018, the Court granted summary judgment for Slashfrog rejecting Quicks' counterclaim that the Agreement was unconscionable. During the trial on the remaining issues, Slashfrog withdrew its claim of fraudulent inducement and on December 7, 2018 the Court entered a ruling finding both parties materially breached the Agreement without excuse and dismissing both parties' breach-of-contract clams. An appeal then ensued by both Slashfrog and the Quicks.

The Court found no error on the summary judgment that determined that the Quicks' claim for unconscionability was not founded. The Court found that there was no evidence of unconscionability. The doctrine of unconscionability encompasses both procedural abuses arising from the contract's formation and substantive abuses related to the contract's terms. Procedural unconscionability involves an advantaged party's exploitation of a disadvantaged party's lack of understanding, unequal bargaining power between the parties as well as the use of fine print and convoluted language. Substantive unconscionability involves whether or not the substantive terms of the Agreement are so harsh or oppressive that no person in his or her right senses would make it. Finally, whether an Agreement is unconscionable must be determined at the time it was entered into by the parties. The Court determined that the unconscionability argument of Quick occurred after the parties entered into the Purchase Agreement. The Court found that the allegations do not support a claim of unconscionability because their concerns appeared

after the Purchase Agreement was executed. The Court of Appeals affirmed the dismissal of the Quicks' unconscionability claim.

On the breach of contract claims the Court went through an analysis of the elements of a breach of contract claim which states that a party asserting the breach must prove it "performed all the terms and conditions required under the contract." The elements of a breach of contract are (1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all the terms and conditions required under the contract; (4) the defendants breached the contract in some particular way and (5) that plaintiff has suffered damages as a result of the breach. A party's own breach must be material to defend its breach of contract claim. The Court in this case found both parties breached the contract. The Court found that both parties' breach of contract claims failed because both parties materially breached the Agreement. The Court found that Slashfrog breached the Agreement by insisting that the Quicks complied with a scope of work and time is of the essence Agreement which both were groundless.

The Court found that Slashfrog breached the Agreement by asserting the scope of work and time of essence arguments. These assertions breached the duty of good faith and fair dealing under the Agreement.

The Quicks breached the Agreement in that no leases for the property will extend beyond the date of closing which had not otherwise been disclosed to Slashfrog. The Court found that this breach has a material breach of the agreement.

The Court of Appeals modified the District Court's ruling and awarded the Quicks the earnest money deposit because they had substantially performed the agreement.

R. JAR Farms, LTD, et al. v Certified Materials, Inc.
Iowa Court of Appeals No. 18-1240. Filed July 3, 2019

JAR Farms, LTD brought this action to establish a prescriptive easement over portions of property owned by Certified Materials, Inc. JAR Farms, LTD owned both a North 40 parcel, as well as a South 300 parcel. For JAR Farms, LTD to gain access to the South 300 parcel, the owner had to have access across a lane that was adjacent to the JAR North 40 to the East which also joined the Westerly side of the Certified Materials, Inc. parcel. Apparently, when Certified Materials purchased the property, they determined that the lane had drifted away from a thirty-foot ingress/egress easement that had been entered into between the previous parties who were owners of the property. There were certain electrical line easement poles that prohibited a large truck from gaining access to the JAR Farms parcel without going onto the property owned by Certified Materials, Inc. Certified Materials, Inc. constructed a fence on the westerly portion of their property. JAR Farms brought this action seeking a prescriptive easement, as well as a preliminary injunction to prevent the construction of the fence. The preliminary injunction was granted, but later dismissed and the court found that there was a prescriptive easement across the Certified Material's property. Certified Materials appealed the district court ruling.

Certified Materials acquired a four-acre parcel in May 2015. In 2016, it began construction of a chain link fence along the boundary it shares with of JAR Farms North 40. The gravel access lane used by JAR Farms strays from the thirty-foot easement that was granted on the Certified Materials land. JAR Farms filed this action seeking an injunction to stop the construction of the fence and also a determination that it is entitled to prescriptive easement.

Under Iowa law, an easement by prescription is created when a person uses another's land under a claim of right or color of title, openly, notoriously, continuously, and hostilely for ten years or more. In this case, there was no color of title so that the claim of JAR Farms was based on a claim of right. To prove the proof of easement the evidence must be clear, convincing and satisfactory. The issue in this case was whether or not Certified Materials and its predecessor had express notice of the claim of adverse possession under the prescriptive easement theory. This express notice requirement exists to help place the true owner of land on notice of the adverse use of the land by another. The requirement ensures that the landowner knows another's use of the property is claimed as a right hostile to the landowner's interest in the land. Otherwise, the landowner may incorrectly assume the other's use results merely from the landowner's willingness to accommodate the other's desire or need to use the land. The notice must be actual or from known facts of such nature as to impose a duty to make inquiry which would reveal the existence of an easement. The law imputes to a purchaser such knowledge as he would have acquired by the exercise of ordinary diligence. Thus, where the easement is open and visible, the purchaser of the servient tenement will be charged with notice. Certified Materials argued that they did not have notice of the claim of right. A claim of right must be established by certain acts, including maintaining and improving land, to claim the ownership. Here, there was nothing to indicate that JAR Farms did anything to improve this easement area, other than occasionally putting rock on part of the lane. Other cases dealing with the notice of claim of right have dealt with substantial improvements made by the person asserting the prescriptive easement which clearly would indicate a claim of ownership and notice to the owner of the property where the prescriptive easement crosses. Here the court found that JAR Farms failed to establish by clear and convincing evidence that express notice was given to of any claim of right to any portion of the land now owned by Certified Materials. The lack of this requisite element is fatal to JAR Farms claim to a prescriptive easement. Therefore the Court of Appeals reversed the district court on this issue.

The Court also addressed the issue of whether or not a real estate case such as this type of case images should be used in the appeal brief. The Court in several footnotes provided as follows:

"This appeal brings to mind the words of Judge Posner:

> Appellate lawyering is an oververbalized activity. There is, as we have remarked before, little appreciation of the power of images even in cases, such as trademark cases, in which visual impressions have controlling

> legal significance. The appellate lawyer's adage might be, a word is worth a thousand pictures. 'Tain't so. The court stated that here, the parties spent pages upon pages in their briefs setting forth legal descriptions of the properties involved but did not include any diagrams or maps. The legal descriptions, one a page long, look like Greek to anyone but a title examiner. A judge responding to a survey commented: "The use of pictures, maps, and diagrams not only breaks up what a be dry legal analysis; it also helps us better understand the case as it was presented to the trier of fact. Although our Rules of Appellate Procedure are silent on the use of images in Appellate Briefs, they certainly do not prohibit the inclusion of the pictures, maps, charts, and other visual images. Inclusion of visuals in the brief eliminates the distraction to the reader of having to leave the brief, open the appendix, and scroll to see the image."

S. David and Rachael Sokol v. Robert and Eileen Morrissey
Iowa Court of Appeals No. 18-1200. Filed July 24, 2019

This case deals with an issue involving the building of a home by the Defendants, Robert and Eileen Morrissey. The Plaintiffs, the Sokols, purchased the home a number of years ago. There has been various litigation regarding this matter, but the issue before the court in this case, was whether or not the Defendant Morrissey, as the builder-vendor, breached the implied warranty of good and workerlike construction. The five elements of this implied warranty are as follows:

> (1) the house was constructed to be occupied as a home; (2) the house was purchased from the builder-vendor, who constructed it for the purpose of sale; (3) the house was not constructed in a good and work[er]like manner; (4) the buyer was unaware of the defect [and had no reasonable means of discovery it]; and (5) the buyer suffered damages.

This case has been before the district court on a couple of other issues and on appeal, but the issue before the Iowa Court of Appeals is whether or not the district court's determination that the buyer was aware of the defect at the time of the purchase was proper. In this case the Sokols had made an offer to purchase the property and had an inspector do an inspection of the property prior to the purchase. A number of defects were discovered after the purchase and this case ensued where the Plaintiffs were seeking damages against the builder-vendor. The issue before the court in this particular appeal was whether or not the district court's determination that the buyers were aware of the defects and they had ways to visually discover them was proper. The Court of Appeals found that this particular element is heavily fact based. In this case the district court meticulously sorted through the trial testimony. It then decided the Sokols had not met their burden to show they were without reasonable means to discover the defects they now allege. It pinpointed evidence from Baker, the Sokols' expert witness, undermining their position that they could not have reasonably discovered the problems before completing the home purchase. The Court of Appeals affirmed the district court finding that the one element of breach of implied warranty of good and workerlike construction

had not been met in that the buyer had not proven it was unaware of the defect and had no reason or means of discovering it.

T. JLL LLC v. City of Cedar Falls, et al.
Iowa Court of Appeals No. 18-1171. Filed July 24, 2019

In this case the City of Cedar Falls sought to condemn a property from JLL LLC. A compensation commission assessed damages at $527,197. JLL appealed the appraisement of damages to the district court and a jury awarded JLL $630,000. JLL filed an application for attorneys fees of $147,690 and $78,999.67 in costs. The court awarded attorney fees of $141,345; $15,000 for the cost of an appraisal; and statutory expert witness fees of $150 for each of the three experts. JLL appealed the issue regarding what costs could be assessed against the City. Iowa Code §6B.33 does indeed require an acquiring agency to "pay all costs occasioned by the appeal." But, according to the Iowa Court of Appeals, as well as other decisions, costs do not include all litigation expenses, as JLL contends. The court determined that costs in other fee-shifting statutes demonstrate reimbursement for litigation expenses to those allowed as taxable court costs. The court determined that the request for $51,000 for its appraiser's written/oral appraisal report of $43,000 plus the additional $8000 review appraisal of the City's appraisal was not proper. The district court awarded $15,000 for the appraisal finding that the additional costs were not costs that were allowed to be assessed under the appropriate statute. The court found that in the *Soward* case, the express mention of attorney fees [and one appraisal fee] implies exclusion of all other expenses. The only other expenses that were allowed were expert witness fees of $150 per expert, as allowed under Iowa Code § 622.72 to be taxed as taxable costs. The decision of the district court was therefore affirmed.

U. Roberta R. Countryman, Trustee of the Ronald W. Woodbury Generation Skipping Trust v. Charles B. Lex
Iowa Court of Appeals No. 18-0979. Filed July 24, 2019

Countryman owned farmland in Webster County, Iowa. She alleged that Lex permitted trees to grow over the private tile on [the trust's] land with the result that the roots of the trees entered and obstructed the private tile, preventing it from carrying drainage waters from [the trust's] land to the county tile. The district court ordered Lex to replace the obstructed tile with new 12-inch plastic, corrugated, non-porous tile. The court also ordered damages for crop losses to Countryman. Lex contended the district court should not have found an easement "on subsurface tiling from the trust property onto [his] property. His belief was that Countryman failed to prove an easement by: (1) express grant or reservation, (2) prescription, (3) necessity, or (4) implication. Countryman counters that the trust had a statutory and common law "right to drain its land via subsurface drainage tile across Lex's land to the county's main tile." Countryman implies the right arises independently of the four types of easements enumerated by Lex. The Iowa Court of Appeals agreed with Countryman and affirmed the decision of the district court.

Iowa Code section 468.621 authorizes "[o]wners of land" to "drain the land in the general course of natural drainage by constructing or reconstructing open or covered drains, discharging the drains in any natural watercourse or depression so the water will be carried into some other natural watercourse." The provision has survived in largely the same form for more than a century. Here the tile drain moved from Countryman's property across Lex's property to a county drain tile system. The court found there is little dispute that the trust property was at a higher elevation than Lex's property and the general course of natural drainage was from the southern portion of the trust property through the Lex property. Testimony at the district court level indicated that the waterflow went from the trust property across Lex's property. The tile in question had been beneath both properties for a long time with an expert pegged construction of the line to at least in the 1970s. The court found that the defendant obstructed the tile line to prevent the natural flow of water and the general law regarding this issue of obstruction is as follows:

> "The general principle of law is 'that the owner of the upper or dominant estate has a legal and natural easement in the lower or servient estate for the drainage of surface waters, that the natural flow or passage of the waters cannot be interrupted or prevented by the servient owner to the detriment or injury of the dominant proprietor and that the owner of the dominant estate may cast an additional quantity of surface water upon the servient estate; if in so doing, he does not thereby do substantial damage to the servient estate."

The Court of Appeals affirmed the district court finding that Lex obstructed the natural waterway to the detriment of the trust.

V. Jorge Oscar Sanchez and Eligio Sanchez Estrella v. RR&A Holdings, LLC

Iowa Court of Appeals No. 18-1607. Filed August 21, 2019

RR&A Holdings, LLC sold certain property in Marshall County to the Plaintiffs, Sanchez and Estrella. The contract contained the standard forfeiture clause, as well as Time is of the Essence clause and provided for a purchase price with a down payment and a balloon payment due with monthly payments during the term of the contract. There were certain modifications made to the contract which extended the balloon payment date. Payments were late on occasion and not made, as well as the balloon payment. In January of 2018, RR&A served the Sanchezes with a notice of forfeiture, alleging they defaulted on the contract by failing to make the monthly payments and failing to make the balloon payment when it became due. The notice reflected an unpaid balance, including interest, of $87,922.01 and included a spreadsheet from the accountant. The notice gave the Sanchezes thirty days to cure the default, after which the contract would be forfeited. The Sanchezes petitioned the court to enjoin the forfeiture, alleging the forfeiture (1) incorrectly stated the contract date between the parties, (2) failed to provide a detailed accounting of the missed payments, and (3) failed to provide the correct amount needed to remedy the alleged missed payments. They alleged RR&A was claiming more money than what was owed. On March 8, RR&A recorded an affidavit in

support of the forfeiture and then thereafter served a thirty-day notice of "Termination of Non-Residential Tenancy and Demand for Possession". They moved to stay the termination of the tenancy until the court resolved the litigation. That stay was granted. After a one-day trial, the district court found that the Sanchezes "failed to perform their payment obligations arising from the real estate contract from the beginning". They rejected the Sanchezes' arguments regarding the sufficiency of the notice of forfeiture. Even though the notice referred to the contract by the wrong date, it provided the correct document reference number as required under Iowa Code §656.2, which does not state that the notice had to state the date of the contract. The Court also found there is no misapplication of the payments and therefore reaffirmed the forfeiture.

On appeal, the Sanchezes alleged that the contract forfeiture does not identify which payments the Sanchezes failed to make under the contract and the court went through an analysis that "[E]quity abhors a forfeiture", therefore "forfeiture statutes are to be construed strictly against a forfeiture, with the burden to show full and strict compliance with the statutory procedures upon the party seeking forfeiture." Even though 'forfeitures are not favored does not mean they will never be enforced.". Here the court found that under the requirements of Iowa Code §656 had been met by the contract vendors. The Sanchezes also asked the district court to give them additional time to cure the forfeiture which was denied by the district court. The Court of Appeals went through analysis of Iowa Code §656.4 which provides a vendee thirty days after completed service of the notice of forfeiture to perform the breached terms identified in the forfeiture notice. The district court denied the request for additional time by the Sanchezes' stating as follows:

> The plaintiffs want an opportunity to cure their default now. Fifteen months have passed since the default, and six months have passed since the deadline set by the Notice of Default. Even if the parties and the court were in agreement about the amount of the default, there would be no equity in allowing the plaintiffs to restore their good standing by now making a payment due fifteen months ago when no payments have been made in the last year.

The court affirmed the district court.

W. Gregory Ragsdale v. David Wireman
Iowa Court of Appeals No. 18-1437. Filed August 21, 2019

Ragsdale purchased property from Richard and Anita Wright which property is landlocked property adjacent to the property owned by David Wireman. In 1988, the Wright's filed an application to condemn a strip of land owned by Wireman and another landowner to allow them to gain access to their land. This particular process was allowed by Iowa Code §471. Twenty-eight years later, Ragsdale purchased the Wrights' property. He sued Wireman, alleging Wireman trespassed on the tract of land that was subject to the condemnation proceedings. He sought a declaratory judgment and injunctive relief excluding Wireman and the general public from this tract of land that

was the access to his land locked property. Wireman filed an answer denying Ragsdale's claims and counterclaim alleging Ragsdale had "no right, estate, lien, or interest in [his] land south of and adjacent to the roadway created by the condemnation proceeding." The district court agreed with Wireman in finding that the roadway was for public use and could not be restricted to private use for Ragsdale. The court reasoned:

> "Section 471.4(2), Code of Iowa 1987, grants upon owners of land without a way to the land the right to take private property for public use. This section sets forth the location and dimensions of the property which may be condemned for public use and rights and responsibilities regarding this property after condemnation has been completed."

The court determined that the statute was clear that the condemnation was for public purposes and not for private purposes. Condemnation cannot be used for private purposes but only for public use. Iowa Const. art. 1, § 18 states that "Private property shall not be taken for public use without just compensation…."). Even though the condemnation application made reference to a "driveway", "private driveway", and "easement", that terminology cannot convert the access road into anything other than a public way. The court therefore found that the road in question was for public use and not private use.

X. S & A 786, LLC d/b/a Downtown Pantry v. City of Des Moines Zoning Board of Adjustment

Iowa Court of Appeals No. 18-1109. Filed September 25, 2019

A conditional use permit was granted to Downtown Pantry allowing it to sell food and alcoholic beverages under a CUP originally issued in 2010. The Pantry has a location at Sixth Avenue and Walnut Street in Des Moines, Iowa. The CUP issued on November 26, 2013 restricted the sale of liquor or wine as far as the location in the store as well as how much revenue could be obtained from the sale of wine and liquor. The Conditional Use Permit also stated that the conditional use permit is subject to amendment or revocation if the operation of the business becomes a nuisance or exhibits a pattern of violating the conditions set forth in the conditional use permit. After operating for a number of years, the Neighborhood Inspection Zoning Administrator SuAnn Donovan sent a letter to the Pantry's owners stating she was seeking a reconsideration of the CUP because the business had become a nuisance. She indicated that reports from the City of Des Moines Police Department, security guards with the Financial Center and area residents [cite] loitering, alcohol sales to intoxicated persons and criminal behavior and patrons causing problems for the people in the area and residents in the Fleming Building which create an attractive nuisance in the neighborhood. A hearing before the Board of Adjustment resulted in the revocation of the CUP. The owners of the Pantry appealed that decision through a writ of certiorari stating there was not evidence to support the allegation that there was a nuisance.

There was testimony from several individuals that the Pantry sold alcohol and single serving bottles to individuals who then became intoxicated outside the Pantry and

loitering in the area. There was no evidence of any violations by the Pantry and a supporter of the Pantry argued that revocation was targeting the homeless and there is a lack of resources for the homeless. On appeal, the district court reversed the Board of Adjustment finding that there was not substantial evidence to support the nuisance claim and that the revocation of the CUP was arbitrary and unreasonable. The district court found that Downtown Pantry never received a citation from the city for selling to an intoxicated person and had never received a citation for any wrongdoing. The court also found that the revocation was arbitrary and unreasonable stating that:

> This court finds it is unreasonable, arbitrary, and capricious to revoke Downtown Pantry's CUP permitting it to sell liquor, beer, and wine. An action is arbitrary and unreasonable when it is "not authorized by the statute authorizing the board's power or that is contrary to or unsupported by the required facts." Revoking Downtown Pantry's CUP to sell alcohol will not eliminate alcohol sales in the immediate area nor will it likely eliminate the nuisance. The Board acknowledged as much, stating "[a]ll you're doing is pushing poor people and homeless people to some other location, probably downtown. You're not solving the problem." Hy-Vee sells a much wider variety of the same types of alcoholic products a few blocks away. There was no evidence that Hy-Vee refuses to sell alcohol to people who may subsequently consume alcohol publicly, loiter downtown in a nearby area furnished with multiple public benches, or engage in any other illegal acts in the area.

The decision of the Board of Adjustment was reversed. The Court of Appeals affirmed District Court decision.

Y. Farm Credit Services of America, FLCA v. Braaksma
Iowa Court of Appeals No. 18-0514. Filed October 23, 2019

Farm Credit Services of America brought this action to foreclose on two notes secured by mortgages on agricultural land. Prior to the summary judgment hearing Braaksma's filed a motion to continue the matter under Iowa Code §654.15 alleging that there had been excessive rain in the spring and as a result of those climatic conditions resulted in lower yields. One of the prerequisites for §654.15(1)(a) motion was admission to some indebtedness and breach of their obligations. Prior to the hearing that was set by the court allowing the summary-judgment hearing, the Braaksma's filed an answer admitting all of Farm Credit's allegations. After a telephonic hearing, the district court denied the motion for continuance, finding:

> Said motion was not timely nor made in good faith. Only upon review of Plaintiff's resistance did Braaksma amend [its] answer admitting to the allegations of petition. The Motion itself was deficient in presenting any credible evidence that any rainfall caused the troubles of Braaksma. The Motion to Continue was filed as a last ditch effort to delay these proceedings."

The court also granted Farm Credit's motion for summary judgment.

This appeal was made by the Braaksmas arguing that the district court should have held an evidentiary hearing on their motion to continue before granting Farm Credit's motion for summary judgment. The district court as well as the Iowa Court of Appeals held that the motion to continue was not timely and that it was not filed in good faith. The court also found that there was an evidentiary hearing at the time of the motion for summary judgment that did satisfy the statute and therefore the decision of the Iowa District Court was affirmed by the Iowa Court of Appeals. The Iowa Court of Appeals stated that the district court did not abuse its discretion in finding the record made at the hearing was sufficient to decide the Braaksmas did not file their motion to continue in good faith.

Z. Douglas D. Hickman and Susan A. Hickman v. Ringgold County, Iowa
Iowa Court of Appeals No. 19-0123. Filed November 6, 2019

The county served a notice of intent to condemn 0.7 acres of land owned by the Plaintiffs. The Hickman's were informed their land was needing to be acquired by Ringgold County for the construction of a new road for the future location of a new concrete batch plant. The Hickman's filed this lawsuit challenging the county's proposed action and alleged the condemnation was "in violation of [Iowa Code] section 6A.22(2)(a)(3)" because it was "solely for the purpose of facilitating the incidental private use of the Central Iowa Ready-Mix cement plant." Following a bench trial, the district court dismissed the Hickman's petition. The Hickmans moved for enlarged findings of fact which was denied and this appeal followed. Iowa Code section 6A.22(1) states:

> In addition to the limitations in section 6A.21, the authority of an acquiring agency to condemn any private property through eminent domain may only be exercised for a public purpose, public use, or public improvement. The provision provides several definitions of "public use," "public purpose," or "public improvement," including the following: "private use that is incidental to the public use of the property, provided that no property shall be condemned solely for the purpose of facilitating such incidental private use."

The issue before the court was whether or not the incidental benefit to the concrete plant was enough to find the condemnation to be improper and illegal. The court found that the county was substantially authorized to upgrade the road. Iowa Code § 306.27 states that:

> "[T]he boards of supervisors as to secondary roads on their own motion may change the course of any part of any road . . . to straighten a road, or to cut off dangerous corners, turns or intersections on the highway, or to widen a road above statutory width. . ."

According to the County supervisor, the road in question needed to be upgraded. If the upgrade to the road had been solely for the purposes of economic development, that would have been improper, but with the authority of the board of supervisors to upgrade roads, the court found that the condemnation was not inappropriate.

AA. 129 State, L.L.C. and Patricia J. Brown as Trustees v. Howard 209, L.C.
Iowa Court of Appeals No. 19-0667. Filed February 5, 2020

This appeal from the District Court in Story County presents the question of whether a Petition alleging the violation of a use restriction was timely filed. Howard 209, L.C. obtained title to certain property in an Ames subdivision and leased it to third parties. The lease violated a restrictive covenant requiring the property to be "occupied and used as the primary residence of the then current titleholders" and prohibiting the property from being "used and occupied as property for which rental income [was] to be received." The covenant was included in a 2007 warranty deed.

129 State, L.L.C. as a titleholder of real property within that subdivision sued Howard 209 for injunctive relief. Howard 209 moved for summary judgment arguing that the Petition was barred by the ten-year statute of limitations under Iowa Code Section 614.17A which states in part, "An action shall not be maintained to recover or establish an interest in or claim to real estate if it is based upon a claim arising more than ten years earlier or existing for more than ten years." 129 State filed a cross-motion for summary judgment arguing that the provisions of Iowa Code section 614.24 were applicable which is a twenty-one year statute of limitations dealing with restrictive covenants. Iowa Code section 614.24 provides in part, "No action based upon any claim arising or existing by reason of the provisions of any deed providing for any use restrictions in and to the land therein described shall be maintained against the holder of the record title to such real estate in possession after twenty-one years from the recording of such deed. The district court concluded that the twenty-one limitation period was applicable and therefore the restrictive covenant was still in existence and granted the summary judgment of 129 and enjoined Howard 209 from leasing the property to third parties. This appeal then ensued where Howard 209 contends that the ten year statute of limitations of 614.17A is applicable.

The Appeals Court went through an analysis of 614.17A into 614.24 and *West Lakes* which dealt with the applicability of 614.17A to a right of first refusal. The Iowa Court of Appeals affirmed the district court finding that the 614.24 statute was the operative statue of limitations. The court found that because 129'x petition falls squarely within the twenty-one year limitations period set forth in section 614.24, the district court did not err in concluding the petition was timely and in granting 129's cross motion for summary judgment.

NEW LEGISLATION

A. SF 532 - New Construction Notice

B. SF 475 - Remote Notaries

C. HF 701 - NonConforming Uses

D. SF 638 - Standings Bill, Groundwater Hazard Statements

E. HF 768 - Beginning Farm Credit

F. HF 778 - Farmland Capital Gains Exception

G. SF 93 - Abandoned Buildings

H. SF 412 - Residential Contractors

I. SF 341 - Service Dogs

J. SF 447 - Building Restrictions