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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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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 under Chapter 523D of the Iowa Code." (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

[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 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 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. However, no similar Code provision extends the application of 562A to chapter 523D facilities. 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 after amending chapter 231C to apply explicitly 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 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. The Reserve also falls under a specific exception the Landlord-Tenant Act

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. Plaintiff's claims should have been barred under the doctrine of non-mutual defensive collateral estoppel

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 after the plaintiffs in that case lost on the chapter 562A claims, after those plaintiffs lost a motion to reconsider, after those plaintiffs lost on an application for interlocutory appeal, and without 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,' 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." *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 not 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. Even if the Claims Are not Time Barred, Plaintiff Was Not Able to Substantiate Her Allegations

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 knows or reasonably should know 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

[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 not 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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