IN THE IOWA SUPREME COURT

NO. 18-0261

John E. Rottinghaus and Dessie Rottinghaus,
Claimants/Appellants

v.

Estate of Sandra R. Franken,
Defendant/Appellee

APPEAL FROM THE IOWA DISTRICT COURT FOR
BLACK HAWK COUNTY
THE HONORABLE DAVID P. ODEKIRK
NO. ESPR059855

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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Iowa Code § 614.17A

Iowa Code § 614.24

Iowa Code § 622.32(3)

Iowa Code § 614.1(5)

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ROUTING STATEMENT

This case involves application of existing legal principles and thus should be routed to the Iowa Court of Appeals for consideration. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE FACTS

On December 21, 1973, Appellants John E. Rottinghaus and Dessie M. Rottinghuas (collectively, the "*Appellants*") executed a Warranty Deed conveying the property at issue in this case (the "*Real Estate*") to "James Kipp and Sandra Kipp, husband and wife." (App. p. 50). The deed contained the following language:

> 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."

Id.

On or about June 28, 2001, James Kipp died, leaving Sandra Kipp ("*Sandra*") as his surviving spouse. (App. p. 48 at ¶ 3). By operation of law, Sandra became the sole titleholder to the Real Estate. (App. p. 48 at ¶ 4). At some point between 2001 and 2005, Sandra re-married to Bennett Franken and apparently took Bennett's last name, and accordingly Sandra is sometimes referred to as "Sandra Franken f/k/a Sandra Kipp." (App. p. 48 at

¶ 5). On October 21, 2005, Sandra executed a Quit Claim Deed conveying the Real Estate from herself to herself and Bennett as joint tenants with rights of survivorship. (App. p. 48 at ¶ 6); (App. pp. 51–52). On December 23, 2010, Sandra and Bennett executed a Warranty Deed conveying the Real Estate from themselves to Sandra, individually, leaving Sandra as the sole titleholder. (App. p. 48 at ¶ 7); (App. pp. 53–54).

Sandra died on or about March 13, 2014, and her will bequeathed a life estate in the Real Estate to her husband, Bennett. (App. p. 48 at ¶ 8); (App. pp. 55–58). Bennett Franken died on or about October 26, 2015, and the life estate was accordingly extinguished, leaving Sandra's Estate (the "*Estate*" or the "*Appellee*") with title to the Real Estate. (App. p. 48 at ¶ 9). On or about April 14, 2016, the Estate entered into a purchase agreement with Cody N. Kayser to sell the Real Estate for $195,000.00. (App. p. 49 at ¶ 10); (App. pp. 59–67). On May 12, 2016, the Estate performed that agreement and conveyed the Real Estate via Court Officer Deed. (App. p. 49 at ¶ 11).

ARGUMENT

I. THE DISTRICT COURT PROPERLY DETERMINED IOWA CODE § 614.17A BARS APPELLANTS' CLAIM.

Appellants claim the District Court incorrectly granted summary judgment in favor of the Estate. Specifically, Appellants argue the District

Court: (1) erroneously held the Estate's defense under Iowa Code § 614.17A was timely raised; (2) improperly permitted the Estate to raise Iowa Code § 614.17A as a bar; and (3) erred by reading only the unambiguous text of Iowa Code § 614.17A and not importing the meaning of different text found in Iowa Code § 614.24. The Estate also understands Appellants to request the Iowa Court of Appeals overturn *West Lakes Properties, L.C. v. Greenspon Property Management, Inc.* 2017 WL 4317297 (Iowa Ct. App. Sept. 27, 2017).

As discussed herein, this Court should affirm the District Court's decision because the Estate timely raised Iowa Code § 614.17A as a defense. Moreover, the statute plainly bars Appellants' action at law to recover under Appellants' forty-year-old right of first refusal.

A. Standard of Review and Issue Preservation.

The standard of review for a district court's entry of summary judgment is well settled: "In reviewing the grant of summary judgment, the question is whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. . . . [The Court's] task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. [The Court] examine[s] the record in a light most

favorable to the party opposing the motion for summary judgment to determine if movant met his or her burden." *Bill Grunder's Sons Construction, Inc. v. Ganzer*, 686 N.W.2d 193, 196 (Iowa 2004).

Error was preserved on Appellants' first and third arguments. However, Appellants' second argument—that the Estate is not the proper party to assert Iowa Code § 614.17A as a defense—was not presented to the District Court, and accordingly was not preserved. *E.g.*, *Valley Brook Development, Inc. v. City of Bettendorf*, 580 N.W.2d 730, 731 (Iowa 1998).

B. The District Court Correctly Determined Iowa Code § 614.17A Bars Appellants' Claim.

Appellants contend the District Court erred in three ways: (1) the District Court incorrectly held Iowa Code § 614.17A could be raised for the first time in a motion for summary judgment; (2) the District Court failed to *sua sponte* consider whether the Estate was entitled to raise Iowa Code § 614.17A as a defense; and (3) the District Court erred by reading only Iowa Code § 614.17A's plain text rather than incorporating terms defined elsewhere in Iowa law but which do not appear in the statute. *See generally Appellants' Proof Brief*, at 13–21. Appellants also appear to urge the Court overturn the 2017 case *West Lakes Properties, L.C. v. Greenspon Property Management, Inc.* because that case did not analyze the legislature's 1991

enactment of Iowa Code § 614.17A in light of the 1982 Marshall Treatise. *Appellants' Proof Brief*, at 22.

All of Appellants' arguments fail because they are squarely contradicted by Iowa law. First, the District Court correctly applied existing Iowa Supreme Court precedent to hold that "failure to plead an affirmative defense is not fatal when it is raised for the first time in a motion for summary judgment." (App. p. 95) (citing *McElroy v. State*, 637 N.w.2d 488, 497 (Iowa 1970)). Next, Appellants failed to argue in the District Court that the Estate is not the proper party to raise Iowa Code § 614.17A as a defense. Even if Appellants had not forfeited the argument by failing to preserve error, the argument fails because it results in a plainly absurd construction of Iowa law. Finally, the District Court properly applied the plain text of Iowa Code § 614.17A and the *West Lakes* case to hold Appellants' action at law to recover under an unenforceable right of first refusal is barred.

1. The District Court Correctly Determined Iowa Code § 614.17A was Timely Raised.

Appellants first argue the District Court erred in holding that "failure to plead an affirmative defense is not fatal when it is raised for the first time in a motion for summary judgment." (App. p. 95). Appellants focus on the District Court's citation to *McElroy v. State*—a case in which the Iowa Supreme Court stated "a defendant may first raise an affirmative defense in

a motion for summary judgment as long as the plaintiff is not prejudiced"—and argues the facts of *McElroy* are distinguishable because the argument raised in that case was based on new developments in case law. 637 N.W.2d 488, 497 (Iowa 2001).

Initially, Appellants' argument falters because the statement of law in *McElroy* has nothing to do with the facts of the case, and instead appears in the Iowa Supreme Court's discussion of the legal standard applicable to affirmative defenses. It is therefore immaterial whether the specific facts in *McElroy* are distinguishable, and a fair reading of the Supreme Court's opinion provides no basis for Appellants' contention that the language quoted in the District Court's order had anything to do with newly discovered affirmative defenses. Even if new case law *was* important to the quoted language from *McElroy*, Appellee notes the *West Lakes* case was decided while this case was pending in the District Court.

And even if *McElroy*'s specific facts are distinguishable, a litany of Iowa law supports the District Court's conclusion. *See, e.g.*, *Stahl v. Preston Mut. Ins. Ass'n*, 517 N.W.2d 201, 202 (Iowa 1994) ("A limitations of action defense may be raised by affirmative defense and motion for summary judgment."); *Taylor v. Farm Bureau Mutual Ins. Co.*, 2008 WL 4525496, at

*8 (Iowa App. Oct. 1, 2008); *Ralston v. American Family Mut. Ins. Co.*, 2004 WL 2952677, at *3 (Iowa App. Dec. 22, 2004)

While "[f]ailure to plead an affirmative defense normally results in waiver of the defense," Iowa courts are clear that "[t]he waiver requirement comes from the delay in asserting the affirmative defense *until the plaintiff has tried the case*, not from the procedural requirement of raising it in a pleading." *Taylor*, 2008 WL 4525496, at *7 (citing *Smith v. State*, 646 N.W.2d 412, 416 (Iowa 2002) (Cady, J., dissenting)) (emphasis added). In *Taylor*, the Court of Appeals held the defendant's failure to plead an affirmative defense in its Answer was not fatal because the defendant raised the defense in other pretrial proceedings, including a motion for summary judgment. *Id.* at *8. Nothing in the record supports a claim that Appellants are prejudiced by the Estate raising a statutory defense to their claim.

Finally, the Estate notes the contradiction in Appellants' Brief, where Appellants discuss at length a defense the Estate raised for the first time in a *trial brief* while arguing a defense raised in a motion for summary judgment is untimely. *Compare Appellants' Proof Brief*, at 15–16 (arguing the Estate's Iowa Code § 614.17A defense raised in the motion for summary judgment is untimely), *with id.* at 17–22 (discussing the Estate's Iowa Code § 614.24 defense raised in its trial brief).

Accordingly, the District Court correctly held the Estate timely raised Iowa Code § 614.17A as a defense in its motion for summary judgment.

2. Appellants forfeited their argument that Iowa Code § 614.17A cannot be argued by Appellee.

Appellants next argue this Court should inquire "whether the Estate is a proper party to assert the affirmative defense of Iowa Code § 614.17A." *Appellants' Proof Brief*, at 16. Appellants make this argument for the first time in their Brief, having failed to raise it in the District Court. "[A]n appellant cannot urge a theory [to an appellate court] not advanced in district court." *Valley Brook Development, Inc.*, 580 N.W.2d at 731. Accordingly, Appellants have not preserved this issue for review.

However, even if the Court considers this argument, Appellants' construction of Iowa Code § 614.17A would create absurd results. "[C]ourts should interpret the statute in a reasonable fashion to avoid absurd results . . . . The court should give effect to the spirit of the law rather than the letter, especially so where adherence to the letter would result in absurdity, or injustice, or would lead to contradiction, or would defeat the plain purpose of the act." *Brakke v. Iowa Dep't of Natural Resources*, 897 N.W.2d 522, 534, 538 (Iowa 2017) (citing *Case v. Olson*, 14 N.W.2d 717, 719 (Iowa 1944)).

Appellants' interpretation of Iowa Code § 614.17A would plainly result in absurdity. Under Appellants' construction, Iowa Code § 614.17A means a right of first refusal is unenforceable after ten years and prevents the holder of such a right from suing for damages after that ten-year period expires. However, Appellants believe, even after the right becomes unenforceable "at law or in equity," *see* Iowa Code § 614.17A, the right springs back into existence once the property is transferred and the landowner is no longer the "holder of the record title." How Appellants conclude the Iowa legislature intended this absurd result is not explained.

The logical end to Appellants' contention is a landowner wishing to sell property subject to an apparently unenforceable right of first refusal must prosecute a quiet title action before conveying the property. That result, and the construction urged by Appellants, would plainly defeat the "goal of improving the system for transferring real property" enacted in Iowa Code § 614.17A. *West Lakes Properties, L.C. v. Greenspon Property Management, Inc.*, 2017 WL 4317297, at *2 (Iowa Ct. App. Sept. 27, 2017). Accordingly, even if Appellants did not forfeit this second argument, this Court should reject it.

3. Iowa Code § 614.17A unambiguously bars Appellants' action.

Appellants' final arguments rely essentially on this Court ignoring Iowa Code § 614.17A altogether, and instead deciding this case as if Iowa Code § 614.24 governs. *See Appellants' Proof Brief*, at 17–22. Specifically, Appellants argue "the Court needs to make a determination as to whether the vague language used by Iowa Code § 614.17A of 'an interest in or claim to real estate . . .' applies in this case." *Appellants' Proof Brief* at 17. Fortunately, the Iowa Court of Appeals has already squarely held a "right of first refusal falls within the scope of [Iowa Code § 614.17A] as an 'interest in' real estate." *West Lakes Properties, L.C.*, 2017 WL 4317297, at *2 (citing Rest. (Third) of Property, Servitudes § 3.4 cmt. b); *see also id.* at *2 n.3 (noting that conclusion "is in line with a majority of the jurisdictions that have considered the nature of the right of first refusal").

Even if the Iowa Court of Appeals had not already directly addressed that issue, Appellants' argument that Iowa Code § 614.24 should control is erroneous. Appellants appear to argue their right of first refusal would not be barred by Iowa Code § 614.24 because it is not a "reversion" or "use restriction" as defined in that statute and other Iowa law. *See Appellants' Proof Brief*, at 17–21 ("Based on [definitions in Iowa Code § 614.24], the right of first refusal . . . does not meet the definitions of 'reversion' or 'use

restriction.'"). Assuming without conceding that is true, the attempted distinction is irrelevant. Because a right of first refusal is an interest in real estate, Iowa Code § 614.17A plainly applies and this Court need not determine whether Iowa Code § 614.24 *also* bars Appellants' claim. *See, e.g.*, *Walters v. Sporer*, 905 N.W.2d 70, 82 (Neb. 2017) ("[A] right of first refusal is also a nonvested property interest."); *Smith v. Wedgewood Builders Corp.*, 590 A.2d 186, 189 (N.H. 1991); *Ferrero Construction Co. v. Dennis Rourke Corp.*, 536 A.2d 1137, 1139 (Md. 1988).

Appellants spend their final paragraph arguing the Iowa Court of Appeals erred in *West Lakes* by not analyzing "either the property examination standards of The Marshall Treatise nor [Iowa Code § 614.24]." *Appellants' Proof Brief*, at 22. The Estate submits the *West Lakes* Court's examination of the statute's plain language was proper. *E.g.*, *Neal v. Annett Holdings*, 814 N.W.2d 512, 519 (Iowa 2012) ("When interpreting a statute, we will not look beyond the express terms of the statute if the text of the statute is plain and its meaning clear."); *see also West Lakes Properties, L.C.*, 2017 WL 4317297, at *3 ("[I]t is not for courts to overlook the language of a statute to reach a particular result."). Contrary to Appellants' contention, the Estate submits this Court should not view the Marshall Treatise, last published in 1982, as controlling the interpretation of an

unambiguous statute enacted in 1991. And even if the Court views the Marshall Treatise as somehow relevant, the language Appellants quote from that treatise discusses the interpretation of use restrictions and reversions—terms which appear in Iowa Code § 614.24 but not in Iowa Code § 614.17A. *See* MADSEN, MARSHALL'S IOWA TITLE OPINIONS AND STANDARDS § 12.3(A) (2d ed. 1982).

For these reasons, the District Court correctly applied Iowa Code § 614.17A, and its judgment should be affirmed.

4. Alternatively, the District Court Correctly Held Summary Judgment Was Proper for Other Reasons Not Discussed in its Order.

Even if this Court determines the District Court erred in relying on Iowa Code § 614.17A, the District Court's judgment should be affirmed on one or more of the alternative grounds raised in the Estate's motion for summary judgment. *See, e.g.*, *Regent Insurance Co. v. Estes Co.*, 564 N.W.2d 846, 848 (Iowa 1997) ("Although we disagree with the theory upon which the district court granted summary judgment, the motion was nonetheless properly sustained based on an alternative ground that had been presented to the district court. It is well established that [appellee] may seek to save the judgment on that basis."); *see also* (App. pp. 41–46); (App. pp. 68–72); (App. pp. 87–91). First, Appellants' "contract claim" was merged

with the deed by operation of Iowa law. Second, the Statute of Frauds bars Appellants' claim. Third, as a matter of law, Appellants cannot prove a breach of contract. Finally, assuming Appellants' contract claim survived, the statute of limitations on that claim for breach of a written contract has run.

a. Appellants' "Contract Claim" Was Merged with the Deed

Appellants' claim fails because any contract for a right of first refusal was merged with the deed. "It is fundamental that when a deed is accepted in compliance with the terms of a real estate contract, the contract is merged in the deed." *Payton v. DiGiacomo*, 874 N.W.2d 673, 676 (Iowa App. 2015) (citing *Dickerson v. Morse*, 212 N.W. 933, 934 (Iowa 1927)). An exception applies where there are collateral agreements or conditions *not* incorporated in the deed. *Id.* (citing *Phelan v. Peeters*, 152 N.W.2d 601, 602 (Iowa 1967)) (emphasis added). "The burden of proof to show the parties did *not* intend the contract would merge into the deed is on the party challenging the merger." *Id.* (emphasis added).

In this case, the only evidence of a "contract" for a right of first refusal appears in the 1973 deed itself, which transferred the property from Appellants to James Kipp and Sandra. (App. p. 50). Accordingly, there is no need to determine whether any collateral agreements or conditions are

present. Instead, the deed contains the full "agreement" of the parties, and accordingly "the contract is merged in the deed" and there can be no recovery for breach of contract. *Payton*, 874 N.W.2d at 676.

b. Appellants' Claim is Barred by the Statute of Frauds

In addition to the doctrine of merger, Appellants are precluded from relief by the Statute of Frauds. The Iowa Statute of Frauds provides that evidence of a contract "for the creation of any interest in lands" is incompetent "unless it be in writing *and signed by the party charged*." Iowa Code § 622.32(3) (emphasis added). The deed purportedly creating the contractual right of first refusal in this case is in writing, but it was not signed by the Decedent Sandra Franken a/k/a Sandra Kipp. (App. p. 50). Instead, the language in the deed was signed by Sandra's late husband James Kipp. *Id.* The only evidence of any contractual right of first refusal is the deed. Because the deed was not signed by the Decedent, it is incompetent to establish the existence or terms of the alleged contract. *See* Iowa Code § 622.32(3).

c. Appellants Cannot Prove Breach of Contract as a Matter of Law

Even if Iowa Code § 614.17A does not directly bar Appellants' claim, and even if the Court holds the merger doctrine and Statute of Frauds do not apply, Iowa Code § 614.17A nonetheless indirectly bars Appellants' claim

because it precludes them from "establish[ing] a . . . claim to real estate." Iowa Code § 614.17A provides that an action may not be maintained "to recover or establish an interest in or claim to real estate." In order to prove a breach of contract, Appellants must first prove "(1) the existence of a contract; [and] (2) the terms and conditions of the contract." *Iowa Arboretum, Inc. v. Iowa 4-H Foundation*, 886 N.W.2d 695, 706 (Iowa 2016).

But in this case, proving the existence of and terms and conditions of the right of first refusal necessarily requires Appellants to first "establish" a right of first refusal exists. Iowa Code § 614.17A plainly prohibits Appellants from "establish[ing] an interest in or claim to real estate," and accordingly Appellants cannot prove a breach of contract as a matter of law.

d. Appellants' Contract Claim is Barred by Iowa Code § 614.1(5)

Finally, even if the Court holds Iowa Code § 614.17A is completely inapplicable in this case, Iowa Code § 614.1(5) bars Appellants' claim. Iowa Code § 614.1(5) requires an action for breach of written contract be brought within ten years of the date on which the contract is breached. The right of first refusal in this case requires the grantees (i.e., the Kipps) "not sell *or otherwise convey* the premises . . . to any person . . . without first giving grantors the opportunity to purchase the premises." (App. p. 50). Appellants admit that, "[o]n October 21, 2005, [the Decedent] . . . *conveyed the Real*

Estate" to herself and her second husband, Bennett Franken. (App. p. 48 at ¶ 6); (App. p. 85 at ¶ 6). Appellants' breach of contract action for the alleged violation of their right of first refusal accrued on October 21, 2005. Appellants filed their claim on July 6, 2016, well over 10 years after the right of first refusal was breached. Accordingly, Appellants' breach of contract claim is barred by Iowa Code § 614.1(5).

CONCLUSION

WHEREFORE, Appellee respectfully requests that this Court determine the District Court correctly concluded Iowa Code § 614.17A barred Appellants' claim, and affirm the District Court's award of summary judgment in favor of Appellee and against Appellants.

REQUEST FOR NONORAL SUBMISSION

Appellee submits oral argument is not necessary in this case.

Respectfully Submitted,

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that on June 21, 2018, I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System which will send notification of electronic filing to the following opposing counsel. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules:

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/s/ Jared F. Knight
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CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This brief complies with the limitation on the volume of type set forth in Iowa R. App. P. 6.903(1)(g)(1). It contains 3,605 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f). It has been prepared in a proportionally spaced typeface, using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Jared F. Knight
JARED F. KNIGHT

Date: June 21, 2018