IN THE SUPREME COURT OF IOWA

No. 18-0261

JOHN E. ROTTINGHAUS AND DESSIE ROTTINGHAUS,
Claimants-Appellants
vs.
LINCOLN SAVINGS BANK, FIDUCIARY OF THE ESTATE OF SANDRA F. FRANKEN,
Defendant-Appellee

APPEAL FROM THE IOWA DISTRICT COURT OF BLACKHAWK COUNTY
HON. DAVID P. ODEKIRK

COURT OF APPEALS DECISION FILED MAY 1, 2019

APPELLEE LINCOLN SAVINGS BANK'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes Page(s)

Rules Page(s)

STATEMENT OF THE CASE

Appellants John and Dessie Rottinghaus seek further review of the May 1, 2019 Court of Appeals decision affirming the District Court's order granting summary judgment against the Appellants. The sole issue raised by Appellants is whether a right of first refusal is an "interest in or claim to real estate" within the meaning of Iowa Code §614.17A. The District Court and Court of Appeals both agreed that it is.

Further Review should be denied because there are no grounds upon which to grant review, and the Court of Appeals' decision was correct.

STATEMENT OF THE FACTS

Appellants' Application for Further Review provides an accurate accounting of the facts. Only three additional facts need to be added. First, despite receiving the deed in 1973, Appellants never recorded a written statement in compliance with Iowa Code § 614.17A(2)(a). Second, the decedent—Sandra Franken a/k/a Sandra Kipp—never signed the deed. Finally, on October 21, 2005, the decedent conveyed the real estate to herself and her second husband, Bennet Franken, without permitting Appellants to exercise their right of first refusal.

SCOPE OF REVIEW

This Court reviews decisions on summary judgment motions for corrections of error at law. *Residential Coop., Inc. v. Iowa City Bd. of Review*, 863 N.W.2d 644, 647 (Iowa 2015).

ARGUMENT

A. No Grounds Exist Under Rule 6.1103 to Grant Further Review.

Further review is inappropriate because, pursuant to the Rules of Appellate Procedure, no grounds for further review are present. Rule 6.1103(b) provides four grounds upon which this Court will grant further review: (1) contradictory lower court rulings; (2) a matter of constitutional or unsettled law; (3) a question involving changes to legal principles; or (4) a matter of broad public importance. Iowa R. App. P. 6.1103(b). None of these grounds are present in this case. Accordingly, because no grounds for further review are present and, as explained below, because the Court of Appeals' decision is correct on the merits, this Application for Further Review should be denied.

B. The Court of Appeals Correctly Held a Right of First Refusal is an "Interest In or Claim To Real Estate."

Consistent with this Court's precedent and virtually every other state to consider the issue, the Court of Appeals correctly held a right of first

refusal is an interest in property, and is therefore subject to Iowa Code § 614.17A. Appellants urge this Court to ignore this overwhelming precedent and hold a right of first refusal is not a property interest. Appellants' entire argument hinges on a throwaway sentence fragment of dictum in an assumption from a case dealing with Iowa's anti-lapse statute.[1] *See* Application for Further Review, at 5–6. Appellants highlight *Tuecke v. Tuecke*, 131 N.W. 794, 796 (Iowa 1964), in which the Iowa Supreme Court admittedly wrote "an option to purchase is not an interest in real estate until exercised." Notably, Appellants omit the rest of the sentence: "*It may be conceded* that an option to purchase is not an interest in real estate until exercised; but the question *before us here* is whether it is 'property' within the meaning of the anti-lapse statute." *Id.* (emphasis added). In other words, the sentence fragment from the *Tuecke* Court is of no serious precedential value.

Instead, where this Court has actually considered whether a right of first refusal amounts to an interest in real estate, the Court has answered that

[1] Appellants attempt to inject confusion in the statute's clear language by discussing "use restrictions" and "reversions," even though these are discussed in their own statute. Iowa Code § 614.24. Appellants state: "the right of first refusal is not a reversion" based off the definitions provided in Iowa Code § 614.24. *See* Application for Further Review, at 6. Appellee does not assert a ROFT is a "reversion" for the purposes of § 614.24. Whether a ROFR may or may not be covered under § 614.24 is immaterial to issue of whether a ROFR is a property interest within the meaning of § 614.17A.

question in the affirmative. In *Henderson v. Millis*, this Court held a right of first refusal (and other preemptive rights) are subject to the Rule Against Perpetuities. *Henderson v. Millis*, 373 N.W.2d 497, 505 (Iowa 1985). Iowa's Rule Against Perpetuities then, as now, applies *only* to "[a] nonvested *interest in property*." Iowa Code § 558.68. Accordingly, this Court has impliedly held that a right of first refusal is an interest in property because that conclusion is logically necessary to the holding in *Henderson*.

Further, in enacting statutes, the Iowa Legislature assumes a right of first refusal is an interest in real property. For example, in the context the Department of Transportation's management of rights-of-way, the Iowa legislature enacted Iowa Code § 307.36, discussing "options, easements, rights of first refusal, or *other property interests* less than fee title." Iowa Code § 307.36 (emphasis added). Accordingly, in addition to this Court, the Iowa legislature treats rights of first refusal as a property interest.

Finally, virtually every state to consider the issue has determined a right of first refusal is an interest in property. *See, e.g.*, *Crowell v. Delafield Farmers Mut. Fire Ins. Co.*, 463 N.W.2d 737, 740 (Minn. 1990) ("The right of first refusal . . . is a property right of some significance."); *North Bay Council, Inc., Boy Scouts of Am. v. Grinnell*, 461 A.2d 114, 117 (N.H. 1983) ("Preemptive rights are subject to the Rule Against Perpetuities."); *Ferrero*

Const. Co. v. Dennis Rourke Corp., 536 A.2d 1137, 1140 (Md. 1988) (listing over twenty additional states which hold a right of first refusal is a property interest).

These authorities were all considered and applied in the 2017 Court of Appeals case, *West Lakes Props., L.C. v. Greenspon Prop. Mgmt., Inc*., in which the Court of Appeals squarely held a right of first refusal "falls within the scope of the statute as an interest in real estate." *West Lakes Props., L.C. v. Greenspon Prop. Mgmt., Inc*., No: 16-1463, 2017 WL 4317297, at *2 (Iowa Ct. App. Sept. 27, 2017). Similarly, the Court of Appeals below considered these precedents and the reasoning of the *West Lakes* case and correctly concluded a right of first refusal is an interest in real estate, and is therefore subject to Iowa Code § 614.17A.

C. The Court of Appeals Correctly Held an Otherwise-Invalid Right of First Refusal is not Somehow Revived by Calling it an Action for Breach of Contract

As explained above, a right of first refusal is an "interest in or claim to real estate," and as such is terminated by Iowa Code § 614.17A after ten years (subject to exceptions). Appellants argue that, even if all of their rights as to the real estate are terminated, the legislature nonetheless silently intended for terminated rights of first refusal to be revived after termination

as a breach of contract. This position is unsupported by the statute's text, its purpose, and is doctrinally unsound.

First, Appellants' position runs directly counter to § 614.17A's text. The plain purpose of that provision is to terminate any "interest in or claim to real estate" after ten years unless the claimant files a statement with the county recorder. *See, e.g.*, *West Lakes*, 2017 WL 4317297, at *3 (holding that a ROFR which had been recorded in 1997 but not extended in 2007 become unenforceable after the failure to extend). Appellants contend that is true of a right of first refusal insofar as it concerns an interest in real estate, but that a contractual right of first refusal nonetheless lives on even after the ten-year period expires under § 614.17A. In addition to being purely atextual, this interpretation would render § 614.17A virtually meaningless.

Additionally, Appellants' interpretation would result in every right of first refusal over ten years old being both invalid—terminated by Iowa Code § 614.17A—and valid, waiting only for the underlying property to be transferred before springing back to life. Surely the Iowa legislature meant for a terminated interest in property to remain terminated. Taking Appellant's interpretation to its logical end, it would force a landowner who is wishing to sell property subject to an apparently unenforceable ROFR to prosecute a quiet title action before being able to convey the property.

Further, Appellants' absurd interpretation would frustrate the purpose of Iowa's Marketable Title Act and introduce dramatic expense and delay to real estate transactions. *See Chicago & N.W. Ry. Co. v. City of Osage*, 176 N.W.2d 788, 793 (Iowa 1970). The statutes comprising the Iowa Marketable Title Act are "designed to shorten the period of search required to establish real estate and give effect and stability to record titles by rendering them marketable and alienable—in substance to improve and render less complicated the land transfer system." *Id.* If Appellants are correct and rights of first refusals somehow spring back to life, a property owner contemplating the sale of real estate subject to a terminated right of first refusal would have to bring a declaratory action to establish such right is terminated. An interpretation requiring a property owner undergo litigation is contrary to the purpose of Iowa's Marketable Title Act as well as the purpose of § 614.17A and demonstrates the absurdity of Appellants' contention.

For these reasons, the Court of Appeals rejected Appellants' attempt to upend Iowa's title transfer system and instead correctly held Iowa Code § 614.17A's plain language means what it says—a right of first refusal is invalid as against the grantor and the property after ten years unless extended according to the statute's directions.

D. Even Without Section 614.17A, the Estate is Entitled to Summary Judgment.

Even if this Court determines Iowa Code § 614.17A does not apply, this Court must affirm because the Estate is nonetheless entitled to summary judgment on Appellants' claim. This Court must affirm a lower court of any basis properly raised before the court, even if the Court of Appeals did not rule on such basis. *See State v. Vincik*, 436 N.W.2d 350, 354 (Iowa 1989) ("It does not matter that the district court did not rely on this ground . . . , for the ruling will be upheld if sustainable on any grounds appearing in the record."); *Benton v. Nelson*, 502 N.W.2d 268, 291 (Iowa Ct. App. 1993) ("[The Court of Appeals is] bound to affirm the trial court for any reason whether argued or not."). Before the District Court, the Estate raised three alternative arguments in support of summary judgment, all of which entitle the Estate to judgment as a matter of law.

1. Appellant's Contract Claim Merged with the 1973 Deed.

Assuming Appellants have a valid breach of contract claim notwithstanding Iowa Code § 614.17A's plain language, any such contractual right merged with the 1973 deed. It is settled law that "when a deed is accepted in compliance with the terms of a real estate contract," the contract merges with the deed itself. *Payton v. DiGiacomo*, 847 N.W.2d 673,

676 (Iowa Ct. App. 2015) (citing *Dickerson v. Morse*, 212 N.W. 933, 934 (Iowa 1927). A litigant challenging such a merger has the burden to prove "the parties did not intend the contract would merge into the deed." *Id.*

In this case, the right of first refusal was incorporated into the 1973 deed itself, and no provision in the right establishes an intent for a separate contractual obligation to exist outside of the deed. Further, Appellants made no record of any evidence tending to prove the parties did not intend a merger. Accordingly, under Iowa's merger doctrine, Appellants' claim for breach of contract fails because there is no independent contract; instead, any rights Appellants' may have had merged with the deed.

2. Appellants' Claim is Barred by Iowa's Statute of Frauds.

The Estate is entitled to summary judgment because Appellants' claim is barred by Iowa's Statute of Frauds. That statute provides that no evidence of a contract "for the creation or transfer of any interests in lands" shall be competent "unless it be in writing *and signed by the party charged*." Iowa Code § 622.32. Assuming Appellants have some remaining contractual rights to assert notwithstanding Iowa Code § 614.17A, any evidence of a purported contract is incompetent as a matter of law because the record demonstrates Sandra—i.e., "the party charged"—did *not* sign the deed. Instead, only Sandra's first husband, James Kipp, signed the portion of the

deed creating the supposed contractual right. Accordingly, since neither the right of first refusal nor any other part of the deed was signed by the Decedent, Appellants are barred from enforcing any alleged contractual obligations against the Estate.

3. Appellants' Breach of Contract Claim is Time Barred by Iowa Code §614.1(5).

Even if this Court rejects all of the foregoing arguments, Appellants' claim is nonetheless time-barred by the statute of limitations. Iowa Code §614.1(5) provides that causes of action for a breach of a written contract must be brought within ten years of the date of the breach. The right of first refusal in this case requires the grantees "not sell *or otherwise convey* the premises . . . to any person . . . without first giving the grantors the opportunity to purchase the premises." App. 16. On October 21, 2005, the Decedent conveyed the real estate to herself and her second husband, Bennet Franken. App. 48, 51–52. It is undisputed the Decedent did not notify Appellants of this transfer. App. 48, 85. Accordingly, assuming Appellants' have any breach of contract claim, such claim arose on October 21, 2005 when the Decedent conveyed the real estate to herself and her second husband in violation of the right of first refusal. When Appellants filed their breach of contract claim on July 6, 2016, the ten-year limitations period had

run. Accordingly, any contractual claim Appellants may have had is barred by the statute of limitations.

CONCLUSION

Further review is not appropriate in this case. The Court of Appeals correctly affirmed the District Court's order granting summary judgment in favor of Lincoln Savings Bank. Appellants failed to extend their right of first refusal as required by Iowa Code § 614.17A, and under the plain language of that statute the right of first refusal terminated. For this reason, and for the numerous alternative reasons discussed herein, further review should be denied.

CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This Resistance complies with the limitation on the volume of type set forth in Iowa R. App. P. 6.903(1)(g)(1). It contains 2479 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This Resistance 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/ Brian J. Fagan Date: May 28, 2019

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

The undersigned certifies that on May 28, 2019, the foregoing document was electronically filed with the Clerk of the Supreme Court using the Electronic Document Management System which will send notification of electronic filing to all counsel of record.

/s/ Brian J. Fagan