

No. A06-2473

STATE OF MINNESOTA
IN COURT OF APPEALS

William J. Hempel and Kay L. Hempel, husband and wife,

Plaintiffs/Appellants,

vs.

Creek House Trust, Frederick S. West, Curtis C. West and Terry L. Slye, trustees Judith Anna Ingemann f/k/a Judith Anna Seymour and all other persons unknown claiming any right, title, estate, interest, or lien in the real property described in the complaint here,

Defendants/Respondents.

BRIEF OF APPELLANTS WILLIAM J. HEMPEL AND KAY L. HEMPEL

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STATEMENT OF THE LEGAL ISSUES

I. Whether the trial court erred in granting summary judgment, dismissing a claim for breach of a Right of First Refusal Agreement (“Right of First Refusal”) as time-barred under Minn. Stat. § 541.05, subd. 1(1), where the holders of the Right of First Refusal received no notice of an impending sale of the property, had no opportunity to exercise their Right of First Refusal and initiated litigation promptly once they learned of the transaction?

The trial court held: Summary judgment was granted on the theory that statute of limitations began to run at time of 1992 sale of property, even though plaintiffs had no knowledge of the sale and thus no opportunity to exercise their Right of First Refusal.

Apposite Cases:

Dyrdal v. Golden Nuggets, Inc., 689 N.W.2d 779 (Minn. 2004);

Electric Fetus Co. v. Gonyea, 2000 WL 1778906 (Minn. App. 2000);

McGehee v. Elliott, 849 N.E.2d 1180 (Ind. App. 2006); and

Webb v. Reames, 485 S.E.2d 384 (S. Car. App. 1997).

II. Whether the running of the statute of limitations should be tolled by the discovery rule, where the parties to the 1992 sale had contractual and equitable duties to provide notice but remained silent instead, depriving plaintiffs of any knowledge of the impending sale and any opportunity to exercise their Right of First Refusal?

The trial court held: The discovery rule was not argued below and thus not ruled on by the trial court, but can and should be considered by this Court under *Oanes v. Allstate Insur. Co.*, 617 N.W.2d 401, 403 (Minn. 2000).

Apposite Cases:

Gryczman v. 4550 Pico Partners, Ltd., 107 Cal.App. 4th 1 (Cal. App. 2003);

HSL Linda Gardens Properties, Ltd. v. Freeman, 859 P.2d 1339 (Ariz. App. 1993); and

Bruns v. Walters, 28 P.3d 646 (Ore. App. 2001).

III. Whether the running of the statute of limitations should be tolled by doctrine of fraudulent concealment, where the party bound by the Right of First Refusal had a contractual and equitable duty to provide notice, having superior knowledge of facts not known to the plaintiffs, but remained silent, depriving plaintiffs of any knowledge of impending sale and any opportunity to exercise their Right of First Refusal?

The trial court held: Fraudulent concealment was not argued below and thus not ruled on by the trial court, but can and should be considered by this Court under *Oanes v. Allstate Insur. Co.*, 617 N.W.2d 401, 403 (Minn. 2000).

Apposite Cases:

Schmucking v. Mayo, 183 Minn. 37, 235 N.W. 633 (Minn. 1931);

Boubelik v. Liberty State Bank, 553 N.W.2d 393 (Minn. 1996); and

Jacobs v. Farmland Mutual Ins. Co., 352 N.W.2d 803 (Minn. App. 1984).

IV. Whether the trial court erred in applying the six-year limitation period of Minn. Stat. § 541.05, subd. 1(1), which only applies if “no other limitation is expressly

prescribed,” when Minn. Stat. § 541.023; a forty-year statute, expressly governs any action affecting title or possession of real estate, where the action is brought “to enforce any right, claim, interest, incumbrance, or lien founded upon any instrument, event or transaction.”

The trial court held: Without directly addressing argument below that some other statute of limitations applied, trial court applied Minn. Stat. § 541.05, subd. 1(1).

Apposite authorities:

Minn. Stat. § 541.023; and

First Nat'l Bank of Elk River v. Indep. Mortgage Servs., 1996 WL 229236 (Minn. App. 1996).

V. Whether the trial court erred in denying a motion to amend to add claims against Jean West, including claims based on a 2004 transaction, on the grounds that the motion was too late and futile, based on the statute of limitations ruling and the defendants' claim that the 2004 transaction was a gift, not a sale?

The trial court held: The trial court denied the motion as untimely and futile.

Apposite cases:

Pfeiffer v. Ford Motor Co., 517 N.W.2d 76 (Minn. App. 1994).

VI. Whether the trial court erred in dismissing the claim for a declaratory judgment as to the *current* validity of the Right of First Refusal, based on a six-year statute of limitations?

The trial court held: The trial court dismissed all claims based on the statute of limitations, but did not explain how that could possibly bar a claim seeking a declaration of the *current* and future validity of the Right of First Refusal.

Apposite cases:

M.L. Gordon Sash & Door Co. v. Mormann, 271 N.W.2d 436 (Minn. 1978);

AG Services of America, Inc. v. Mary Schroeder, 693 N.W.2d 227 (Minn. App. 2005);

and

Harbal v. Federal Land Bank of St. Paul, 449 N.W.2d 442 (Minn. App. 1989).

STATEMENT OF THE CASE

I. INTRODUCTION

The summary judgment granted below was erroneous and should be reversed for multiple reasons: (1) the trial court's statute of limitations analysis incorrectly ignored the defendants' failure to disclose information which they had a duty to disclose, thus preventing any meaningful opportunity for the Hempels to exercise their right of first refusal¹; (2) the trial court applied the wrong statute of limitations; and (3) the trial court's limitations holding should have had no bearing on claims which relate to more recent events and even to the current and ongoing relationships between the parties.

¹ The significance for statute of limitations purposes of defendants' failure to disclose was not fully argued by the Hempels' trial counsel. Nevertheless, these critical issues, which mandate reversal of summary judgment, should be considered by this Court on appeal under *Oanes v. Allstate Insur. Co.*, 617 N.W.2d 401, 403 (Minn. 2000), in the interests of fairness and substantial justice.

II. PROCEDURAL HISTORY

On November 15, 2005, William J. Hempel and Kay L. Hempel (collectively, “Hempels”) filed their Complaint against Creek House Trust, Frederick S. West, Curtis C. West, and Terry L. Slye trustees (collectively, the “West Defendants”), Judith Anna Ingemann f/k/a Judith Anna Seymour (“Ingemann”) and all other persons unknown claiming any right, title, estate, interest, or lien in the real property described in the Complaint. App. 001.

The Complaint describes the original formation of the Right of First Refusal in 1981, as well as the subsequent transfers of its benefits and obligations to their current owners. App. 002-003. The Complaint specifically alleges that the property in question “is subject to the Right of First Refusal.” App. 002. There are three separate Counts in the Complaint. Count I seeks a determination of adverse claims pursuant to Minn. Stat. § 559.01.² App. 004.

Count II seeks a declaratory judgment to resolve the existing controversy “as to the validity and terms of the Right of First Refusal,” through a determination of “the rights between Plaintiff and Defendants with respect to the Property.” App. 004.

Count III seeks specific performance or, in the alternative, damages for breach of contract. App. 005. The contractual breach is described as “without limitation, failing to provide Hempels with notice of the sale of the subject property.” App. 005. Specific performance is sought to require performance of “all obligations” under the Right of First Refusal. App. 005.

² The Hempels do not challenge the dismissal of Count I in this appeal.

On December 19, 2005, the Trustees filed a summary judgment motion. App. 019. The Trustees' primary argument was that all claims were essentially breach of contract claims based on the 1992 sale of the subject property, and that therefore the six year statute of limitations period from Minn. Stat. 541.05, subd. 1(1) barred the claims. App. 022, 028-031. The Trustees argued that the Hempels' claims were time-barred because they began to accrue no later than July 17, 1992, the date that Ingemann sold the subject property to William and Jean West. App. 028. The Trustees also argued that the so-called "discovery rule" was not available to toll the statute of limitations. App. 028. The Trustees further argued that all of the Hempels' remaining claims were derivative of the breach of contract claim, and therefore were all time-barred. App. 029-030.

The Trustees' briefing did not address in any detail the claim for a declaratory judgment as to the current "validity" of the Right of First Refusal. The brief makes a cursory assertion that the Right of First Refusal has now "lapsed," but the Trustees provided no analysis and cited no authority to support this proposition. App. 030.

In the Hempels' Memorandum in Response to the Trustees' Motion for Summary Judgment, the Hempels argued that even if the six-year limitations period applies to the 1992 transaction, their claims against subsequent owners of the property are not time-barred, and the Right of First Refusal would continue to exist and bind subsequent owners of the property. App. 076-079.

At oral argument, the Hempels also argued that because the Hempels' claims arose from a transaction relating to real estate, the six year limitations period did not apply, but rather a different limitations period applied. App. 188-189. The Hempels also pointed

out the incomplete discovery in the case (the summary judgment motion was argued only four months after the case commenced). App. 186.

On May 12, 2006, the Chisago County District Court (“trial court”) granted the Trustee Defendants’ motion for summary judgment, dismissing all claims against them in this matter. App. 134, 140. Ingemann did not join in their Motion and thereby was left as the remaining Defendant. App. 163.

The trial court found that the six-year limitations period applied and that because the Hempels did not commence their action within six years after the date Ingemann sold the property to the Wests, therefore the Hempels’ claims were time-barred. App. 138. Additionally, the trial court found that because the Hempels’ legal claims are time-barred, their equitable claim for declaratory relief cannot stand alone pursuant to the “concurrent remedy” rule. App. 139-140.

On May 9, 2006, shortly before the summary judgment decision was announced, the Hempels filed a Motion to Amend the Complaint and Scheduling Order. App. 141-142. The Motion requested that the Hempels’ Complaint be amended to add Jean V. West (who, with her late husband, had purchased the subject property from Ingemann) as a Defendant and to amend the Complaint to clarify that the declaratory relief sought would include an allegation that the 2004 transfer from Jean V. West to the Creek House Trust was in breach of the Right of First Refusal. App. 142. The Motion also requested that the Scheduling Order be amended to permit additional discovery and to extend the deadline date for adding additional parties from March 16, 2006, until the date of the Court’s Order on the Motion to Amend the Complaint. App. 142.

On June 6, 2006, the trial court denied the Hempels' Motion to Amend, holding that it would be a wasteful formality to grant the Motion to Amend and add Jean V. West as a defendant because a claim against Jean V. West could not survive summary judgment for the same reasons as stated in the Court's Order filed on May 12, 2006, as well as because, in the 2004 transaction, the Trustees "paid nothing for the property." App. 160-161. The trial court also found that the Hempels did not provide an adequate reason for their delay in adding Mrs. West as a Defendant. App. 159-160. The trial court did find, however, that there would have been no significant prejudice to the defendants by permitting the amendment. App. 161.

On July 24, 2006, Defendant Ingemann moved to dismiss the claims against her with prejudice in light of the Findings of Fact, Conclusions of Law and Order of the Court filed on May 12, 2006. App. 163-164. By Order filed on September 26, 2006, the trial court incorporated all of those Findings of Fact and Conclusions of Law into its September 26, 2006 Order and found that because there were no genuine issues of material fact against Ingemann, all of Plaintiffs' claims against Ingemann were dismissed. App. 164.

On November 9, 2006, Judgment was entered. App. 172-173. Plaintiffs filed this appeal on December 28, 2006. App. 174.

STATEMENT OF THE FACTS

I. THE CREATION OF THE RIGHT OF FIRST REFUSAL.

In 1981, Ingemann owned two adjacent parcels of real estate located in Franconia Township in Chisago County. In February of 1981, Ingemann sold one of the parcels to

William and Nancy Harris (“Parcel 1” or the “Hempel Property”) and retained the other parcel (“the subject property”). App. 024. In conjunction with the sale of Parcel 1, Ingemann entered into a Right of First Refusal with the Harrises, by which the Harrises and their heirs and assignees have a right of first refusal to purchase the subject property.³ App. 084-085.

The Right of First Refusal unequivocally provides a right of first refusal to the Harrises and their heirs and assigns and states in part:

If Seymour receives a bona fide written offer for the purchase of the Subject Property or any portion thereof, Seymour shall not accept such offer without first offering to sell the same to Harris on the same terms and conditions set forth in said offer less any real estate broker’s commission which Seymour would be obligated to pay if Seymour accepted said offer.

App. 084.

The Right of First Refusal is also explicit about the duty of the owner of the subject property to provide notice in the event of a proposed sale:

Written notice of said offer shall be given by Seymour to Harris and Harris shall have 2 weeks thereafter to exercise the said right of first refusal by giving written notice thereof to Seymour.

Id.

The parties also expressly contracted for the Right of First Refusal obligations and benefits to run, with, respectively, the subject property and the Hempel Property:

³ The Right of First Refusal is extremely important to the Hempel Property, which is very small, because of the need to build a new septic system to comply with new sanitary requirements established in the intervening 1998 Chisago County Sewage and Wastewater Treatment Ordinance. App. 220. Building the system on the existing Hempel Property would be difficult or impossible. App.130.

The right of first refusal hereby granted to Harris shall be binding upon Seymour and Seymour's heirs and assigns and shall inure to the benefit of Harris and Harris' heirs and assigns.

Id.

The Right of First Refusal was recorded on February 6, 1981 as document number 170297. App. 086.

On June 2, 1982, the Harrises sold Parcel 1 to James and Mary Lande ("Landes"). App. 040. As subsequent owners of Parcel 1, the Landes also received the benefit of the Right of First Refusal, pursuant to the language quoted above.

On April 25, 1985, the Hempels purchased Parcel 1 from the Landes by Warranty Deed. App. 043. The Right of First Refusal was assigned to the Hempels along with the Warranty Deed. App. 044. The attachment to the Warranty Deed expressly stated that:

The Grantors herein also assign and transfer to the Grantees all their rights in a certain Right of First Refusal Agreement dated February 3, 1981 by and between Judith Ann Seymour (Seymour) and William E. Harris and Nancy R. Harris, husband and wife (Harris), with respect to certain property located in Chisago County described in said Agreement, the Grantees rights in said Agreement having been transferred by Harris to the Grantors herein, James R. Lande and Mary L. Lande (Lande) in an Assignment of Contract for Deed between Harris and Lande dated June 2, 1982, filed April 18, 1985 as Document No. 189472.

Id.

The subject property is such that changes in ownership are not observable. The subject property is wooded, hidden from any road view. App. 193. The only buildings on the property are a one room cabin over a garage, an outhouse and a small sauna. App. 024.

II. THE 1992 SALE OF THE SUBJECT PROPERTY LACKED NOTICE TO THE HEMPELS.

On July 17, 1992, Ingemann sold the subject property to William and Jean West by Warranty Deed. App. 045. Ingemann did not first offer to sell the subject property to the Hempels and did not provide the Hempels with any notice of her sale of the property to the Wests. At the time, Seymour also executed a document (“Lapse Statement”) claiming that the Right of First Refusal had “lapsed” because “Said William R. Harris is now deceased and said Nancy R. Harris no longer resides at neighboring property and to the best of my ability can not locate her.” App. 049. The Lapse Statement does not purport to address how those facts, even if true, would cause the Right of First Refusal to lapse, given its express provisions for transfer of its benefits to subsequent owners of the Hempel Property and of its obligations to subsequent owners of the Subject Property.

Moreover, the Lapse Statement ignores the facts that the subsequent sales of the Hempel Property, from the Harrises to the Landes and from the Landes to the Hempels, were duly recorded and therefore matters of public record.

The warranty deed conveying the property from Seymour to the Wests and the Lapse Statement were recorded in the Chisago County Recorder’s Office on July 17, 1992 and July 22, 1992, respectively. App. 49 and 45.

At the closing of the sale on July 17, 1992, a son of William and Jean West, Curtis West, heard a conversation between Ingemann and her real estate agent concerning the Right of First Refusal. Generally, Curtis West recalls that Seymour inquired about the reason for the Lapse Statement and the agent advised Ingemann that it needed to be

signed for closing. App. 103-104. On November 7, 1995, Mr. William West died. App. 061.

Plaintiffs first learned of Ingemann's 1992 transfer of the subject property in December 2003 or January 2004 during a conversation with their attorneys. App. 110-111. The Hempels had contacted their attorneys to inquire about the marketability of their property, specifically questions involving the septic system. App. 128-129. During the Hempels' attorneys' investigation into the marketability of the property, the Hempels' attorneys discovered the 1992 transfer. App. 110-111, 128-129.

On October 20, 2004, Jean West conveyed and quit claimed the subject property to Frederick S. West, Curtis C. West and Terry L. Slye, as trustees of the Creek House Trust. App. 051. According to the deed, the transfer was made "For Valuable Consideration." *Id.* The deed further stated that "Consideration for this conveyance is less than \$500.00." *Id.* The deed was recorded on October 26, 2004. *Id.*

On August 12, 2005, the Hempels wrote a letter to Ingemann informing her that the Right of First Refusal had been assigned to them and that they had never received notice about her sale of the property to William and Jean West. App. 112-113. On September 3, 2005, the Hempels wrote a letter to Mrs. Jean West and the Creek House Trust informing them of the Hempels' right to the subject property pursuant to the Right of First Refusal. App. 114.

ARGUMENT

SUMMARY OF ARGUMENT

The bitter irony of this case is that one of the principal acts of wrongdoing by the defendants, failure to notify the Hempels of the proposed sale and of their consequent opportunity to match the offer to purchase the subject property, is also the underlying reason why defendants were able to get the case dismissed below: because they never told the Hempels about the sale (although they were obligated to do so), more than six years elapsed before the Hempels were aware of any wrongdoing, and the trial court held that this barred all claims, even those based on more current events.

As a California court stated in rejecting the position adopted by the trial court here, "...the failure to give plaintiff notice of the happening of a certain event was both the act causing the injury and the act that caused plaintiff not to discover the injury." *Gryczman v. 4550 Pico Partners, Ltd.*, 107 Cal.App. 4th 1, 6 (Cal. App. 2003). Allowing the defendants to build and exploit their own escape hatch in that manner is one primary error the trial court made below.

There are several possible ways to correct that error. Any one of three somewhat related lines of analysis as to the running of the limitations period creates clear fact issues requiring reversal of summary judgment. First, no Minnesota case defines when the statute of limitations begins to run for the breach of a right of first refusal. However, Minnesota, like other states, recognizes that a right of first refusal is generally not triggered until some notice is conveyed to the holder of the right, and no case holds that a right of refusal claim can be time-barred before the holder receives any notice whatsoever

of a sale or offer bringing the right into play. This Court should determine that a claim for breach of a right of first refusal accrues when the right-holder receives notice.

Second, the Court could apply the discovery rule, adopted in California, to hold that the limitations period on a right of first refusal claim is tolled until the plaintiff knew or reasonably should have known of the sale of the property. While Minnesota law, as a general matter, does not use the discovery rule for statutes of limitations, it has never applied that general rule to a right of first refusal claim. The critical importance of notice to the holder of a right of first refusal and the obvious inequity in allowing the breach of the right of first refusal to also form the basis for the defense to that claim justifies this expansion of the discovery rule.

A third, related doctrine that would compel reversal is fraudulent concealment. A limitations period does not run during the time that the defendant fraudulently conceals the facts relating to the claim. Here, the superior knowledge the defendants had of facts unavailable to the Hempels, as well as the express contractual duty which the defendants had to provide notice to the Hempels makes their deliberate silence a form of fraudulent concealment.

In the alternative, the trial court should be reversed for applying the wrong statute altogether. No reported Minnesota case decides which statute of limitations applies to a right of first refusal, and the trial court simply assumed that the catch-all breach of contract limitations period applies. But that statute, Minn. Stat. § 541.05, subd. 1(1), applies only where no other, more specific statute applies. In this case, a different statute, Minn. Stat. § 541.023, applies a forty-year period to claims “to enforce any right, claim,

interest, incumbrance, or lien founded upon any instrument, event or transaction . . .”

That describes the Hempels’ claims precisely. This case is clearly timely under a forty-year statute.

Even if claims relating to the 1992 sale of the subject property were time-barred (which they should not be), the trial court erred in dismissing the entire lawsuit. The Hempels have a viable claim, as alleged in the proposed amended complaint, relating to the 2004 transfer of the property from Jean West to the West family’s Creek House Trust. It was error to deny the motion to amend to add that claim, and it was certainly error to hold that the claim was futile, based on the assumption that the transfer was without payment. The deed reflecting that sale expressly states that it was given for “valuable consideration,” and to decide that issue adverse to the Hempels without any further discovery was simply premature and wrong.

Finally, the trial court erred again in holding that its determination relating to the limitations period somehow allowed it to dismiss that portion of the declaratory judgment action relating to the current and ongoing validity of the Right of First Refusal. There is no limitation issue whatsoever as to that claim. The law is clear that a right of first refusal, which plaintiffs have never had the opportunity to exercise, remains viable against parties taking the subject property . That is the situation here, and thus there was no proper basis to dismiss the declaratory judgment action as to the validity of the Right of First Refusal.

I. STANDARD OF REVIEW

Summary judgment is only proper when it is shown that “there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. “A motion for summary judgment should be denied if reasonable persons might draw different conclusions from the evidence presented.” *Illinois Farmers Insur. Co. v. Tapemark Co.*, 273 N.W.2d 630, 633 (Minn. 1978). “Summary judgment is properly rendered only where there is no genuine issue of material fact in dispute and where a determination of the applicable law will resolve the controversy.” *Gaspord v. Washington County Planning Comm’n*, 252 N.W.2d 590 (Minn. 1977). The facts are viewed in the light most favorable to appellant, the party against whom summary judgment was granted.

The grant or denial of a motion to amend the complaint is reviewed for abuse of discretion. *LaSalle Cartage Co., Inc., v. Johnson Brothers Wholesale Liquor Co.*, 225 N.W.2d 233, 238 (Minn. 1974); *Seed v. Astra Genstar P’ship*, 2004 WL 771993, *2 (Minn. App. 2004) (unreported case attached as App. 223-228). However, the trial court must bear in mind that leave to amend “shall be freely given when justice so requires.” Minn. R. Civ. P. 15.01.

II. THE LACK OF NOTICE TO THE HEMPELS PREVENTS THE RUNNING OF THE STATUTE OF LIMITATIONS.

The central problem with the trial court’s limitations analysis is that it deprived the Hempels of any meaningful opportunity to exercise a valuable contractual right they acquired when they purchased their property. Rights of first refusal are not self-

executing, and, unlike traditional options, they are not even triggered until the holder of the right receives *notice* of any impending sale, giving rise to his right to match the offer. Put another way, a right of first refusal is meaningless without notice of an offer to purchase the property. This unique feature of rights of first refusal compels a more careful assessment of limitations issues than the trial court's routine application of boilerplate limitations law. For any of three reasons, this Court can and should hold that the lack of notice stops the running of the statute and gives rise to factual questions about timing of the lawsuit. This compels reversal.

A. The Court Should Consider The Lack Of Notice Issues.

The Hempels realize that the significance of lack of notice to the limitations issues was not clearly presented in the trial court by their then-trial counsel. They acknowledge the general reluctance of appellate courts to allow arguments not made below to be heard for the first time on appeal. That reluctance has never been an absolute bar, however, and the circumstances here justify utilizing the well-recognized exception to the general rule.

Minnesota recognizes an exception to that rule, “when the issue ‘is plainly decisive of the entire controversy on its merits, and where, as in a case involving undisputed facts, there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question.’” *Oanes*, 617 N.W.2d at 403 (emphasis omitted) *citing* *Watson v. United Servs. Auto. Ass’n*, 566 N.W.2d 683, 687 (Minn. 1997). “Factors favoring review include: the issue is a novel legal issue of first impression; the issue was raised prominently in briefing; the issue was ‘implicit in’ or

‘closely akin to’ the arguments below; and the issue is not dependent on any new or controverted facts.” *Watson*, 566 N.W.2d at 688.

Tellingly, *Oanes* involved the same type of issue as this case, when the statute of limitations begins to run. In *Oanes*, the Minnesota Supreme Court found that there were no disputes of fact which affected the legal question at issue and there was no disadvantage or advantage to either party in not having a prior lower court ruling. 617 N.W.2d at 403. Even though a holding that a claim is time-barred does not determine the merits of the case, it is dispositive on procedural grounds, and the *Oanes* Court held that it justified consideration of new arguments on appeal. *Id.*

The same factors weigh in favor of allowing review here. The broad issue the Hempels are raising in their appeal, when and how the limitations period runs where no notice was ever given under a right of first refusal, was argued *by the defendants* below and analyzed by the trial court. As claims arising under a right of first refusal, the limitations issues are novel ones in Minnesota. The Hempels did contest the running of the statute on other grounds (discussed below), but did not effectively present the reasons why the undisputed lack of notice prevented the running of the statute. Given the trial court’s determination of the limitations issues on summary judgment, no new facts are needed to demonstrate the existence of a material factual dispute sufficient to reverse that decision. Certainly the issue is raised “prominently” in this brief, giving defendants a full and fair opportunity to present their position to this Court. In the interests of justice, this Court should analyze fully the role of notice in determining the proper limitations period for a right of first refusal claim.

B. The Limitations Period For A Right of First Refusal Does Not Begin To Run Until The Holder's Rights Are Triggered By Notice.

As noted above, the exercise of a right of first refusal is quite different from most contract rights, including ordinary options or contracts to purchase real estate. The right of first refusal is entirely dormant unless and until the property owner receives an offer on the property, decides it would like to accept the offer and so notifies the holder of the right of first refusal. As the Minnesota Supreme Court recently held, a right of first refusal “ripens into an option when the owner receives a bona fide third party offer and notifies the holder of the right.” *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 784 (Minn. 2004).⁴ As this Court has stated:

The owner need not have entered into an actual purchase agreement to trigger the right of first refusal. Courts generally consider instead whether the owner made representations that gave the right-holder notice of his willingness to sell.

Electric Fetus Co. v. Gonyea, 2000 WL 1778906, *3 (Minn. App. 2000) (unreported case attached as App. 229-231). See also *McGehee v. Elliott*, 849 N.E.2d 1180, 1189 (Ind. App. 2006) (“[w]hen McGehee agreed to the right of first refusal, the Elliotts were granted a ‘dormant set of rights’ that did not entitle them to take any action until they received notice of the offer.”) (quoting *Beiger Heritage Corp. v. Estate of Kilbey*, 667 N.E.2d 184, 186 (Ind. App. 1996)); *Pincus v. Pabst Brewing Co.*, 893 F.2d 1544, 1553 (7th Cir. 1990) (holding that if Pabst representatives told the right-holder that Pabst was

⁴ Below, the Trustee Defendants cited and relied upon the Minnesota Court of Appeals decision, *Dyrdal v. Golden Nuggets, Inc.*, 672 N.W.2d 578 (Minn. App. 2003). App. 030. For some reason, they ignored the Minnesota Supreme Court’s decision, 689 N.W.2d 779, which clarifies the decision of the Court of Appeals and makes it clear that *notice* is necessary to trigger a right of first refusal.

prepared to accept the proposal, Pabst could not later argue that its managers had harbored secret doubts); *New Haven Trap Rock Co. v. Tata*, 177 A.2d 798, 800 (Conn. 1962) (holding notice triggers the option to purchase); *Vietor v. Sill*, 243 So.2d 198, 199 (Fla. Dist. Ct. App. 1971); *Stump and Associates, Inc. v. Cunningham Memorial Park, Inc.*, 419 S.E.2d 699, 706 (W. Va. 1992).

Here, the Hempels first received notice of the 1992 sale of the subject property years later, from their own attorney. App. 110-111. Their rights were therefore never “triggered” under *Electric Fetus* and never “ripened” under *Dyrdal*.

Although no Minnesota case addresses the running of the statute of limitations for breach of a right of first refusal, the underlying concepts laid out in *Dyrdal* and *Electric Fetus* show the way to the correct analysis. The lack of notice prevented the Hempels’ right of first refusal from ever maturing into a meaningful opportunity to purchase the subject property. The Right of First Refusal never ripened into an option. As the *McGehee* court stated, the Right of First Refusal did not entitle the Hempels “to take any action until they received notice of the offer.” 849 N.E.2d at 1189. In that context, the Hempels had no basis to bring a lawsuit, and the statute never started to run. *See Webb v. Reames*, 485 S.E.2d 384, 385 (S. Car. App. 1997) (“A case or controversy regarding the validity of the pre-emptive right at issue, and hence Webb’s claim for a declaratory judgment, did not accrue until Webb in her complaint notified the Bleases . . . of another person’s interest in purchasing the property . . .”).

If the Hempels had learned, from some other source, of the pending purchase back in 1992, that might have provided basis to bring suit, but only because it would also have

satisfied the missing element of notice. Under *Dyrdal*, any reasonable information about an impending sale can constitute notice sufficient to trigger a right of first refusal, even if the holder “may have to clarify or investigate uncertainties and ambiguities of essential terms . . .” 689 N.W.2d at 785. But without *any* notice, Hempels held no meaningful existing right to purchase the property. Their claim had not accrued, and the limitations period had not begun to run.

C. The Statute Of Limitations Was Tolloed Until The Hempels Discovered That The Property Had Been Sold To Another Party.

The lack of notice could also be used as a basis to apply the “discovery rule” to toll the running of the statute until such time as the Hempels knew or should have known of the facts constituting their cause of action under the Right of First Refusal. Although the standard rule in Minnesota, as noted by the trial court, is that discovery is not a prerequisite to the running of a limitations period, neither this Court nor the Supreme Court has yet considered the wisdom of applying that rule in the context of a right of first refusal, where the plaintiff *has* no meaningful rights in the absence of notice. Courts in other states, however, have addressed this situation and applied the discovery rule or similar doctrines. Minnesota should not blindly apply a general rule in situations where it is virtually certain to work an injustice.

1. Minnesota’s general limitations rules do not address rights of first refusal.

There is no case law in Minnesota regarding the applicability of the discovery rule in a case involving a right of first refusal. The cases cited by the trial court and defendants in the briefing below fail to support a conclusion that ignorance or lack of

knowledge of the existence of a cause of action does not toll the limitation period involving a right of first refusal. *See e.g., Park-Lake Car Wash, Inc. v. Springer*, 352 N.W.2d 409, 411 (Minn. 1984) (no statute of limitations issue and the lessor gave notice of a bona fide offer.)

2. Other states recognize the justice of the discovery rule for right of first refusal claims.

The case most squarely on point with this situation was decided recently in California. It emphatically upheld the appropriateness of the discovery rule in this context. In *Gryczman*, 107 Cal. App. at 3-4, Pico entered into a contract with Builder's Depot, Inc., which gave Builders Depot, Inc. the right of first refusal to purchase property owned by Pico. The contract required Pico to give written notice upon Pico's receipt of a bona fide offer to purchase from a third party. *Id.* Pico then conveyed the property to a third party without giving notice to Builder's Depot. The Court held that "the discovery rule may be applied to breaches [of contract] which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time." *Id.* at 4-5; *citing April Enterprises, Inc. v. KTTV*, 147 Cal.App.3d 805 (Cal. App. 1983). The discovery rule was the correct one because not only did the breach occur "within the privacy of [defendant's] own offices' but the act which constituted the breach – failure to give notice of the option offer – was the very act which prevented plaintiff from discovering the breach." *Id.* at 5.

The Court also rejected the notion that the recording of the sale to the third party constituted notice to the holder of the right of first refusal. *Id.* ("it is unreasonable to

expect a contracting party 'to continually monitor whether the other party is performing some act inconsistent with one of the many possible terms in a contract . . . especially . . . when the breaching party can commit the offending act secretly, within the privacy of its own offices.'"). See also *HSL Linda Gardens Properties, Ltd. v. Freeman*, 859 P.2d 1339, 1340 n. 1 (Ariz. App. 1993) (same).⁵

Other courts agree with the basic premise that a Right of First Refusal claim is tolled in the absence of notice, using similar analyses. See, e.g., *HSL Linda Gardens, supra*; *Bruns v. Walters*, 28 P.3d 646, 649-50 (Ore. App. 2001) (analyzing issues under related doctrine of laches and applying discovery rule).

Applying the discovery rule here, summary judgment must be reversed. The defendants acted within closed doors and their action which constituted the breach - failure to give notice to the Hempels as required by the Right of First Refusal - is precisely why the Hempels remained unaware that they even had a claim. No facts were alleged - let alone facts sufficient to support summary judgment - to show that the Hempels knew of the purchase, should have known of the purchase or had negligently slept on their rights. As noted above, the recording of documents relating to the 1992 purchase is not notice to the Hempels. See e.g. *Gryczman*, 107 Cal.App. 4th at 4-5; *HSL Linda Gardens*, 859 P.2d at 1340. The defendants should not be able to profit from their breach and the Hempels' resulting ignorance which the defendants themselves created by their own omissions and actions.

⁵ Of course, even constant monitoring of the county recorder's office would not provide the right of first refusal holder with *timely* notice. Meaningful notice should be given *before* the sale, when an acceptable offer is first received by the property owner.

D. The Statute of Limitations Was Tolloed By Defendants' Fraudulent Omission.

The failure to give notice to the Hempels provides a third basis for reversing summary judgment: fraudulent concealment. "The rule . . . is that when a party against whom a cause of action exists in favor of another, by fraudulent concealment prevents such other from obtaining knowledge thereof, the statute of limitations will commence to run only from the time the cause of action is discovered or might have been discovered by the exercise of diligence." *Schmucking v. Mayo*, 183 Minn. 37, 38-39, 235 N.W. 633 (Minn. 1931); *Couillard v. Charles T. Miller Hospital, Inc.*, 253 Minn. 418, 428, 92 N.W.2d 96, 103 (Minn. 1958) ("when the defendant by fraud prevents the plaintiff from learning of his cause of action, the statute of limitations does not begin to run until the plaintiff could by reasonable diligence have discovered the cause of action.") (*dictum*).

In this case, Ingemann, Mrs. West and Creek House Trust each effectively defrauded the Hempels, by not telling them about the impending sale when they had a duty to speak. This silence prevented the Hempels from learning that they had a cause of action. It is clear that both sides of the 1992 transaction had an affirmative duty to tell the Hempels about the proposed sale. Ingemann, as the seller, had a contractual duty to inform the current holder of the Right of First Refusal. The buyers had a duty to provide notice as well. A potential purchaser has the duty to affirmatively inquire to determine whether the right holder wants to exercise his right of first refusal. *Stuart v. Stammen*, 590 N.W.2d 224, 229 (N.D. 1999); *see also Harbal v. Federal Land Bank of St. Paul*, 449 N.W.2d 442, 447 (Minn. App. 1989) (holding that a subsequent purchaser was

charged with knowledge of the right of first refusal). Ingemann's, Mrs. West's and the Trustees' failure to inform the Hempels that they had either received or made an offer on the subject property long delayed the Hempels from discovering that they had a cause of action.

While fraudulent concealment often involves an affirmative misrepresentation, under certain conditions, where the defendant has a duty to speak, a material omission also constitutes fraud. *Boubelik v. Liberty State Bank*, 553 N.W.2d 393 (Minn. 1996); *Jacobs v. Farmland Mutual Ins. Co.*, 352 N.W.2d 803 (Minn. App. 1984). One of the recognized "special circumstances" in which silence is a form of fraud involves "one who has special knowledge of material facts to which the other party does not have access." *Boubelik*, 553 N.W.2d at 398; *Jacobs*, 352 N.W.2d at 806. Such a person "may have a duty to disclose these facts to the other party." *Id.*

In this case Ingemann and Ingemann's assigns did indeed have a duty to disclose; they had expressly contracted to assume such a duty. The Trustees' attorney admitted that Mrs. West was an assignee of Ms. Ingemann. App. 218. Moreover, they clearly had special knowledge of the 1992 offer to purchase the subject property; the Wests had made that offer, and Ingemann had received it. Finally, the Hempels had no information of the offer, of its terms or of the resulting sale. Under these circumstances, the failure to inform the Hempels was fraudulent concealment, tolling the statute of limitations. This rule should be particularly applicable here, where the Right of First Refusal required written notice of the offer as an explicit contractual duty, and such notice is essential to any exercise of the right.

Once silence is recognized as a basis for fraudulent concealment here, summary judgment was clearly not justified. The statute is tolled until the Hempels could have learned of the sale through “reasonable diligence,” clearly a fact issue.

III. THE FORTY-YEAR PERIOD IN THE MARKETABLE TITLE ACT IS THE APPLICABLE LIMITATION PERIOD.

As the Hempels argued below, the general contract statute of limitations should not govern these claims. App. 188-189. The Hempels’ cause of action is timely under the Marketable Title Act, Minn. Stat. § 541.023, which provides a forty-year statute of limitations for actions affecting the possession or title of real estate. The Marketable Title Act provides that “no action affecting the possession or title of any real estate shall be commenced . . . to enforce any right, claim, interest, incumbrance, or lien founded upon any instrument, event or transaction which was executed or occurred more than 40 years prior to the commencement of such action . . .” Minn. Stat. § 541.023.

On its face, the Marketable Title Act applies. This is an action to determine both possession and title to the subject property. If the Hempels prevail on their claims for specific performance, they will be entitled to purchase, own and possess the property. Moreover, in the language of the statute, their “claim” is based on a “transaction” which occurred less than 40 years before this lawsuit was commenced.

The relationship between the contract statute, Minn. Stat. § 541.05, and the Marketable Title Act, is complex. The Marketable Title Act states that “[t]his section does not extend the right to commence any action beyond the date at which such right would be extinguished by any other statute.” Minn. Stat. 541.023, subd. 3. Minnesota

Statute 541.05, contains a similar provision which states that it only applies if “no other limitation is expressly prescribed.”

First Nat’l Bank of Elk River v. Indep. Mortgage Servs., 1996 WL 229236 (Minn. App. 1996) (unreported case attached as App. 232-234). directly addresses the interplay between the limitations periods. In *First National*, a bank brought an action against an independent mortgage company for declaratory judgment, asserting that it owned mortgages claimed by the mortgage company; the mortgage company counterclaimed for the value of the mortgages. *Id.* at *1. The bank originally assigned the mortgages in 1987, and the mortgage company attempted to claim them in 1993. *Id.* The Court of Appeals held that the Marketable Title Act was the applicable statute, not Minn. Stat. 541.05, because the claim sought a judgment that affected an interest, right or title to real estate. *Id.* at *2.

Similarly, the Hempels brought their claim to determine an interest in real estate. The claims in the Hempels’ Complaint all involve resolution of the right to the subject property. The Hempels claim they have a right and an interest in the subject property pursuant to the Right of First Refusal. The relief the Hempels seek in part is specific performance and a declaratory judgment that the Hempels be allowed to purchase the subject property pursuant to the provisions of their Right of First Refusal. Therefore, because the Hempels’ claims were brought to resolve who has an interest and right to the subject property, the 40-year limitations period found in Minn. Stat. § 541.023 applies.

The trial court simply assumed that the Hempels’ action was governed by the six-year contract statute of limitations, citing *Park-Lake Wash, Inc.*, 352 N.W.2d at 411. But

Park-Lake involved an agreement between lessor and lessee; it did not involve an agreement that ran with the land between property owners, and it did not address statute of limitations issues. The right of first refusal at issue in *Park-Lake* was provided by a lease between a property owner and a lessee. *See Park-Lake*, 352 N.W.2d at 410. Neither *Park-Lake* nor any other Minnesota case mandates use of the six-year statute for rights of first refusal.

More importantly, the trial court's analysis does not address the statutory language. The Marketable Title Act does not limit itself to existing interests in real estate; it governs "action[s] affecting the possession or title of any real estate." An action might affect title or possession based on a "claim" which arises from a "transaction."

The Hempels' claims fit within the Marketable Title Act, and thus are not time-barred, because this action does indeed affect title and possession of the subject property. Through their Right of First Refusal, the Hempels have a right to buy and to possess the subject property. Indeed, a right of first refusal is a limit on the subject property owner's rights to that very property. Lord, 25 Williston on Contracts 67.85 (4th ed. 2002) (a right of first refusal "is not a true option but is a valuable prerogative. It limits the right of the owner to dispose freely of its property . . ."); 3 Holmes, Corbin on Contracts § 11.3 (rev. ed. 1996). Here there is a dispute over who properly has ownership of the subject property, a dispute that properly falls within the 40-year limitations period of the Marketable Title Act.

IV. THE HEMPELS HAVE VIABLE CLAIMS BASED ON THE 2004 TRANSACTION.

Even if the statute of limitations somehow bars claims based on the 1992 sale of the property, the trial court erred in refusing to grant the motion to amend to add claims based on the 2004 transfer of the property from the Jean West to the Creek House Trust. The motion was not unduly delayed, particularly under the liberal standards of Rule 15, and it was not futile.

A. The Motion To Amend Was Not Unduly Late.

The trial court was incorrect in determining that the Hempels should not be allowed to add Mrs. West as a Defendant and raise claims relating to the 2004 transaction because of “undue delay.” Undue delay, alone, is an insufficient basis to deny a motion to amend a pleading. *United States v. Int’l Business Machines Corp.*, 66 F.R.D. 223, 229 (S.D. N.Y. 1975) (“Delay, inexcusable or excusable, is not alone sufficient to warrant denial of leave to amend.”) (quoting *Fli-Fab, Inc. v. United States*, 16 F.R.D. 553, 556 (D. R.I. 1954)); *see also Hanson v. Hunt Oil Co.*, 398 F.2d 578 (8th Cir. 1968). In this case, the Hempels brought their motion to amend the complaint only six months after the filing of their Complaint.

Of course, because defendants had not yet submitted to depositions, there would be no duplication of effort in allowing the amendment. The trial court itself recognized this, holding that the defendants would not be prejudiced by allowing the amendment.

B. The Motion To Amend Was Not Futile.

The trial court also held that the motion to amend was futile, because the claims were barred by the statute of limitations, and the 2004 transaction was a gift, not a sale, and therefore did not trigger the Right of First Refusal. Neither analysis is correct. The errors in the court's limitations analysis are set forth above. As shown below, the trial court was also wrong in determining, at this preliminary phase, that the 2004 transaction was not a sale.

To make such a determination, the trial court would have had to find that there was no possible basis on which the amended complaint could survive a motion for summary judgment. *See Seed*, 2004 WL 771993, *2; *Pfeiffer v. Ford Motor Co.*, 517 N.W.2d 76, 80 (Minn. App. 1994). That exacting standard was not met.

First, contrary to the arguments of the defendants below, the Right of First Refusal obligations were transferred to the buyers as part of the transactions.⁶ The Right of First Refusal bound not only the original signatories of the contract, but also their respective "heirs and assigns." The Wests, and later the Creek House Trust, were "assigns" of Ingemann and remained bound by the Right of First Refusal. Indeed, the Trustees' attorney admitted that Mrs. West was an assignee of Ms. Ingemann. App. 218. Hempels, as assigns of Harris, had a right of first refusal on the property. By the terms of the contract, the Right of First Refusal was binding upon Ingemann's heirs and assigns – first William and Jean West, and then the Creek House Trustees and Trust.

⁶ The trial court noted this argument by defendants but did not rule on it.

William and Jean West as assigns of Ingemann were bound by the terms of the Right of First Refusal. The Wests could not transfer the subject property without first giving notice to the Hempels. Jean West breached the Right of First Refusal agreement on October 20, 2004, when she conveyed and quit claimed the subject property to Frederick S. West, Curtis C. West and Terry L. Slye, as trustees of the Creek House Trust. App. 096.

The trial court viewed this transfer as a gift, but the deed itself states that it was for “valuable consideration.” *Id.* The deed goes on to state that “consideration for this conveyance is less than \$500.00.” *Id.* Therefore, the property was conveyed for some consideration, and such a conveyance is in effect a sale. Black’s Law Dictionary defines “sale” as “transfer of property or title for a price.” Black’s Law Dictionary, 8th Ed. at 1364..

The defendants may claim that the statements in the deed are false and do not reflect the reality of the transaction, but that is not a determination to be made on a summary judgment motion or motion to amend. Only further discovery, perhaps followed by a trial, can determine whether the 2004 transaction was a sale which triggered the Right of First Refusal. *See e.g. Jackson v. Valvo*, 579 N.Y.S.2d 300, 301 (N.Y. App. Div. 1992) (“Whether the transaction was a sale that triggered the right of first refusal, or a gift that did not, is a question of fact that must be resolved upon trial.”).

The Hempels had a claim against Mrs. West and Creek House Trust on October 20, 2004, when the subject property was again sold without notice to the Hempels. Even if, as the trial court found, the six-year limitations period found in Minn. Stat. 541.05,

applies to the Hempels' claims, the Hempels' claims against Mrs. Jean West and Creek House Trust survive.

V. THE CURRENT OWNERS OF THE SUBJECT PROPERTY REMAIN BOUND BY THE RIGHT OF FIRST REFUSAL.

Perhaps the oddest and most clearly erroneous of the trial court's rulings was its dismissal of all claims based on the statute of limitations, even though at least one claim related not to past events at all, but rather to the present and the future. The Hempels sought a declaratory judgment as to the current validity of the Right of First Refusal. The trial court's summary judgment order, which dismisses all claims, including this one, makes no attempt to explain why the Hempels are not entitled to a declaration of their current rights.

Certainly there is an actual justiciable controversy. The Hempels contend that their Right of First Refusal has not been extinguished. The Creek House Trust contends, without significant analysis or explanation, that the Right of First Refusal has lapsed. The trial court did not make a finding that the Hempels' Right of First Refusal was no longer binding on the owners of the subject property, but nevertheless dismissed all claims.

In addition to the contractual basis for binding the subsequent owners to the Right of First Refusal, as described above, the Right of First Refusal remains a recorded incumbrance on the property. As such, all subsequent owners take the property with at least constructive knowledge of the Right of First Refusal. It is therefore binding on them. *See Harbal*, 449 N.W.2d at 447-48 (holding that subsequent purchaser was

charged with knowledge of the right of first refusal); *M.L. Gordon Sash & Door Co. v. Mormann*, 271 N.W.2d 436, 441 (Minn. 1978) (option holder could assert a superior interest against a third party purchaser who acquired the property with knowledge of the option). *See also AG Services of America, Inc. v. Mary Schroeder*, 693 N.W.2d 227 (Minn. App. 2005) (holder of statutory right of first refusal retained right to exercise it against subsequent purchasers).

Although the West Defendants assert that the Right of First Refusal has lapsed, the Lapse Statement does not serve to wipe away the obligations of Jean West or Creek House Trust under the Right of First Refusal. The Right of First Refusal was recorded, and West and the Creek House Trust should have made an inquiry to determine if the owner of the right wished to exercise it. The reasons given in the Lapse Statement for Ingemann's belief that the Right of First Refusal had lapsed were insufficient on their face for a reasonable person to believe that the right had indeed lapsed. That one of the original owners had died and the other had moved does not eliminate the right. Instead, it strongly suggests that someone else owns the property and the Right of First Refusal, which should have led the seller and buyers in the 1992 transaction to find the new owners and honor their rights.

Summary judgment should be reversed as to the declaratory judgment claims relating to the current validity of the Right of First Refusal.

CONCLUSION

For the reasons expressed herein, the Hempels respectfully request that the judgment appealed from be reversed.

Dated: February 13, 2007

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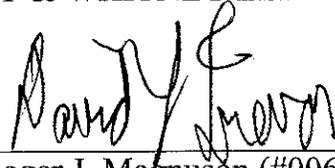
CERTIFICATE OF COMPLIANCE

The undersigned, David Y. Trevor, hereby certifies pursuant to Minn. R. Civ. App. P. 132.01, subd. 3(a), that the word count of the attached Brief of Appellants William J. Hempel and Kay L. Hempel, exclusive of pages containing the Table of Contents and the Table of Authorities, is 8,975 words. The Brief complies with the typeface requirements of the rule and was prepared, and the word count was made, using Microsoft Word 2000.

Dated: February 13, 2007

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