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**STATE OF MINNESOTA
IN COURT OF APPEALS**

FILED

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,

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INTRODUCTION

The briefs submitted by the two sets of Respondents in this matter do not support affirmance of the district court's summary judgment decision. Instead, by their statements and, even more eloquently, by their silence on certain points, they confirm the key reasons why reversal is warranted.

Significantly, neither Respondent Judith Ingemann ("Ingemann") nor the remaining Respondents (collectively, the "West Defendants") can cite to a single case in which the claim for breach of a right of first refusal has been time-barred *before* the right holder was given any notice whatsoever of a transaction triggering the right of first refusal. Although courts in other states which have considered this problem used different lines of reasoning, they all reached the same ultimate result: The holder of a right of first refusal is entitled to bring his claim within a reasonable time after first receiving notice. Minnesota law has not addressed this issue, and this Court should reach the same result that other states have.

The Respondents also cannot deny the basic principles of justice and fair play at stake here. The failure to give notice to the Hempels should not be both a wrongful act and the method of escaping the consequences of that wrongful act. Since notice is legally necessary to activate the dormant rights that the holder of a right of first refusal possesses and because, on a practical level, those rights are meaningless until the holder receives that notice, it simply is not fair to allow the parties failing to give notice to escape any liability, precisely *because* they failed to give that notice. Neither set of Respondents

offers any compelling reason why Minnesota should become the only state to reward that kind of duplicitous conduct.

In addition, the West Defendants are wholly unpersuasive in attempting to explain why the right of first refusal, which they had knowledge of when they bought the property, should be extinguished before the Hempels have ever had a chance to exercise it. The West Defendants took the property with both constructive and actual notice of the existence of the right, which is expressly made binding upon the assigns of the subject property. Under those circumstances, the right of first refusal does indeed “run with the land,” and the West Defendants are still bound by it even if claims arising out of the earlier transaction are time-barred.

For all these reasons, as well as those set forth in the Hempels’ initial brief, the judgment of the district court should be reversed, and the case remanded for completion of discovery and trial.

SUPPLEMENTAL STATEMENT OF FACTS

In light of attempts by the Respondents to imply that the Hempels should have known about the 1992 sale, it is worth noting that, although the Hempels did not know that Ingemann had sold the subject property, Ingemann herself was aware of the Hempels and their ownership of the Hempel Property. Ingemann initially met the Hempels years before the 1992 transaction and in fact showed them around the home on the property, which her mother had designed. (App. 112-13). Ingemann was aware that the property was sold to the Hempels in 1985. (*Id.*)

In fact, in 1985 Ingemann issued a Warranty Deed to Mr. and Mrs. Lande, who

had purchased the property from the Harrises, on a Contract for Deed. (App. 082). Because the Warranty Deed was issued at the time of the sale from the Landes to the Hempels, William Hempel's name and then current address appears on the Warranty Deed, not far from Ingemann's own signature. (App. 082).

ARGUMENT

I. This Court Should Consider All Of The Hempels' Arguments On Appeal.

The Hempels pointed out in their initial brief that, under the standards of *Oanes v. All State Insur. Co.*, 617 N.W.2d 401 (Minn. 2000), this is a proper case for the Court to exercise its discretion to consider arguments which were not raised below.¹ In response, the Respondents simply point to the general rule that issues not raised below should not be raised for the first time on appeal. The West Defendants go further, however, and claim that statute of limitations issues are not appropriate subjects for the exception to this rule. They cite several cases from the 1970's and 1980's.

Curiously, neither set of Respondents mentions the *Oanes* case, decided in 2000 by the Minnesota Supreme Court and the governing standard in this area. Even more curiously, the West Defendants do not address the fact that *Oanes* itself involved consideration for the first time on appeal of a statute of limitations argument. Clearly, the modern view in Minnesota is that limitations issues can, under the type of circumstances presented by this case, be raised and considered for the first time on appeal. In the

¹ This applies primarily to the arguments raised in Sections II C. and II D. of the Hempels' initial brief, relating to the discovery rule and the fraudulent omission theory. The other issues discussed in the Hempels' brief were raised in some fashion in the trial court. The question of when a cause of action accrues for breach of a right of first refusal was raised below by the West Defendants themselves.

exercise of its discretion, this Court should do so.

II. In An Issue Of First Impression In Minnesota, This Court Should Hold That The Limitations Period For Breach Of A Right Of First Refusal Does Not Begin To Run Until Notice Is Given.

As the Hempels pointed out in their initial brief, there are three possible ways to assess the impact of a complete lack of notice on the running of the statute of limitations. Perhaps the most straightforward of these is simply to hold that the cause of action does not begin to accrue until some form of notice is given. This is both fair, given the need for notice in order to have any meaningful opportunity to exercise a right of first refusal, and consistent with what Minnesota and other states have said about the nature of rights of first refusal.

Rights of first refusal are significantly different from other contract rights, such as options. The holder of a right of first refusal has no present right to do anything. He cannot force the property owner to sell the property unless and until two things have happened. First, the property owner must have received an acceptable offer to buy the property. Second, the property owner must have given notice to the holder of the right of first refusal. Only then does it ripen into an option. Without notice, there is nothing for the right holder to exercise.

This unique feature of a right of first refusal was recognized by the Minnesota Supreme Court and this Court in cases such as *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 784 (Minn. 2004) (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”), and *Electric Fetus Co. v. Gonyea*, 2000 WL 1778906, *3 (Minn. App. 2000) (App. 229-231)

(right of first refusal not triggered until notice is given). Indeed, even the West Defendants recognized this principle, acknowledging that “the option ripens when the owner of the property subject to the right of first refusal (*i.e.*, Ingemann) receives a bona fide offer *and then notifies the holder* of the right of first refusal (*i.e.*, Hempels) of that offer . . .” (West Defendants’ brief at 16) (emphasis added).

The Hempels cited numerous additional authorities holding that rights of first refusal do not ripen or mature until notice is given. The West Defendants address only one of those cases, *McGehee v. Elliott*, 849 N.E.2d 1180 (Ind. App. 2006). They rely on language in *McGehee* indicating that once there is a failure to give notice, the statute of limitations begins to govern the plaintiffs’ claim. This is *dicta* in *McGehee*, which did not concern statute of limitations issues. Even more tellingly, however, the Hempels’ claims would not be time-barred under Indiana law. Indiana is a “discovery rule” state, so the Hempels’ claims would clearly be timely under its law. *See Filip v. Block*, 858 N.E.2d 143 (Ind. App. 2006).

The Respondents do point out the general rule that the contract statute of limitations begins to run when the claim would survive a motion to dismiss. No Minnesota case states when a claim for breach of a right of first refusal would survive a motion to dismiss, nor does any Minnesota case specifically address the running of the statute of limitations for a right of first refusal. Because, as noted above, such rights are unique in contract law, a unique rule governing that limitations period is appropriate. Neither Ingemann nor the West Defendants supply the Court with any cases holding that a claim for breach of a right of first refusal can be time-barred without any notice to the

right holders. The Hempels are certainly aware of no such case.

Neither Ingemann nor the West Defendants even attempt to deny what the Hempels described as the bitter irony of allowing the failure of notice to be both a wrongful act and the method of escaping the consequences of that wrongful act. While it is true that statutes of limitations are designed to prevent the assertion of stale claims, it is equally true that they are designed to do so in a fair and just manner. Particularly where notice is an essential component of the ripening or triggering of a right, it is only fair and just to require notice to start the running of the statute of limitations.

III. Alternatively, The Statute Should Be Tolloed By Either The Discovery Rule Or Fraudulent Concealment By Omission.

If the Court disagrees that claims for breach of a right of first refusal should only accrue when notice is given, the Court can still preserve the Hempels' claim, by applying either the discovery rule or the doctrine of fraudulent concealment.

A. The discovery rule should be applied to rights of first refusal, given the importance of notice to the exercise of the right.

Ingemann and the West Defendants both vigorously oppose application of the discovery rule. They point out that Minnesota limitations law generally rejects the discovery rule. They cannot deny two key things, however. First, there is no Minnesota case law discussing the discovery rule in cases of rights of first refusal. Second, it would be grossly unfair to take away the Hempels' right under these circumstances.

While Minnesota does not utilize the discovery rule in ordinary breach of contract cases, the right of first refusal is not an ordinary right. As described above and in the Hempels' first brief, it is a dormant right until notice is given.

Put another way, the Hempels never had a right which they could actually exercise, because they never received notice. In most contracts, both parties are presumed to be aware of the current nature and status of their rights and are thus much more likely to know when those rights have been breached. The holder of a right of first refusal, however, has no way of knowing that his rights are anything other than completely dormant, unless and until he receives notice. That puts the right holder in a different position from the normal contracting party and justifies the application of the discovery rule, even when it does not generally apply to contracting parties. No Minnesota case has addressed this situation, so there is no holding to the contrary.

It would also be extremely unfair to deprive the Hempels of a right they never had any meaningful opportunity to exercise. While the Respondents attempt to suggest that the Hempels may somehow be at fault here, there is no basis for making that finding, and certainly not as a matter of law on this record. As the Hempels point out, the property in question is wooded. There is no particular reason why the Hempels should have noticed a different set of owners.

Conversely, there *is* record evidence indicating that Ingemann knew of the Hempels' identity and ownership of the property and had a responsibility to seek them out and honor their right of first refusal. Finally, neither Respondent challenges the clear law indicating that the holder of a right of first refusal has no duty to periodically check public record filings to see if his right has been breached. *Gryczman v. 4550 Pico Partners, Ltd.*, 107 Cal. App. 4th 1, 4-5 (Cal. App. 2003); *HSL Linda Gardens Properties, Ltd. v. Freeman*, 859 P.2d 1339, 1340 (Ariz. App. 1993).

B. Under certain circumstances, fraudulent concealment can be based on the failure to speak.

The third way in which the Court can address the issues raised by the lack of notice to the Hempels is the doctrine of fraudulent concealment. The Respondents point out that normally fraudulent concealment, like other species of fraud, requires affirmative misstatements. There are recognized exceptions to that general rule, however, and one of them applies to this factual setting.

Fraudulent concealment is simply a type of fraud. Minnesota courts have long recognized (and the Respondents do not deny) that under some circumstances fraud includes a failure to speak up. One of those circumstances occurs when the defendant has a duty to speak, as for example “one who has special knowledge of material facts to which the other party does not have access.” *Boubelik v. Liberty State Bank*, 553 N.W.2d 393, 398 (Minn. 1996). That describes both the West Defendants and Ingemann.

They knew something that the Hempels did not know, namely, that the West Defendants had made an offer to Ingemann which Ingemann had decided to accept. That should have led to the giving of notice and the ripening of the Hempels’ right of first refusal. But neither the West Defendants nor Ingemann bothered to do anything to put the Hempels on notice. Many cases hold that silence is a form of fraud and fraudulent concealment sufficient to toll a statute of limitations. *See, e.g., Ramsey v. Culpepper*, 738 F.2d 1092, 1096 (10th Cir. 1984) (“in a confidential relationship where there exists a duty to speak, . . . mere silence constitutes fraudulent concealment”), citing *Hardin v. Farris*, 530 P.2d 407, 410 (N.Mex. 1974); *State v. Vickers*, 970 S.W.2d 444, 447-48 (Tenn. 1998)

(holding that jury must decide claim that “the statute of limitations was allegedly tolled by . . . the continuing nondisclosure”); *Cook v. Avien, Inc.*, 573 F.2d 685, 693 (1st Cir. 1978).

IV. The Right Of First Refusal Remains In Force Today, Even If Suit On The Earlier Transactions Is Time-Barred.

The current status of the right of first refusal, if indeed the claims based on earlier transactions are time-barred, was decided by the trial court without any analysis or citation to authority. The trial court stated in a conclusion of law that Jean West was not an “assign” of Ingemann (App. 161), but without explaining why. When the issue is analyzed, it is clear that the only reasonable interpretation of the right of first refusal is that it continues to bind the West Defendants, when the Hempels have never had an opportunity to exercise their right, and when the West Defendants took the property with knowledge of it. At a minimum, factual disputes preclude summary judgment.

A. The correction of the record does not strengthen the West Defendants’ position.

As the West Defendants point out, the transcript of one of the hearings in the trial court was erroneous, and the Wests’ counsel did not concede that her clients were in fact assigns of Ingemann. That counsel took the opposite position does not, of course, make it so. There still must be a basis in fact and law to support the West Defendants’ position, and there is not. The lack of a concession in the record below, which has now been corrected, is essentially irrelevant.

B. The West Defendants are “assigns” for purposes of the right of first refusal.

It is undisputed that the right of first refusal was intended to impact future owners of the two parcels. It expressly states that the right “shall be binding upon [Ingemann’s] heirs and assigns and shall inure to the benefit of [the initial buyer of the Hempel Property’s] heirs and assigns.” (App. 089). The West Defendants attempt to argue that the language does not bind them, because they are not the “assigns” of Ingemann. There is no merit to that contention. As Minnesota courts have long recognized, “assign” is an extremely general term:

To assign, is “to make over a right to another,” and an assignment is a *transfer of property*.

Hoag v. Mendenhall, 19 Minn. 335 (Minn. 1872). (Emphasis in original). In other words, Ingemann’s “assigns” are simply those persons to whom she transferred the property.

That is also the only logical interpretation of the right of first refusal. Presumably, the West Defendants contend that assignment of the property itself is not enough, and that a separate, second assignment, specifically naming the right of first refusal, is needed. Such an implied requirement would make the contractual promise absurdly easy to evade. If the right of first refusal did not run automatically to the subsequent owner when the property was assigned, Ingemann and any subsequent owner could defeat it simply by ignoring it, *i.e.*, failing to assign expressly the right of first refusal itself in the transaction documents. That would provide the owners of what became the Hempel Property with no protection whatsoever. This would be particularly true, moreover, if the

failure to give notice could be used, as it was here, to deny the Hempels any meaningful opportunity to exercise the right upon a sale.

Given the normal definition of the term “assigns” and “assign,” as well as the need to actually *bind* subsequent owners of the property to a right which is supposed to “be binding upon” them, a construction which denotes the West Defendants as “assigns” is appropriate and proper. William and Jean West therefore assumed the obligations of the right of first refusal when they purchased the subject property; they were Ingemann’s “assigns.” By the same token, the Creek House Trust’s trustees assumed those same obligations as the “assigns” of William and Jean West.

Even if some other construction were advanced by the West Defendants which was also reasonable and logical (none has appeared thus far), at best the issue would be ambiguous, and therefore not susceptible to summary judgment. Because the West Defendants are the “assigns” of Ingemann, the right of first refusal remains binding upon them.

C. The right of first refusal was intended to run with the land.

The West Defendants also take the position that the right of first refusal cannot possibly “run with the land,” because it is simply a contract right. There is no merit to this contention either. Contract rights can certainly run with the land through subsequent transfers of ownership, if they are intended to do so. Many cases, reviewing rights of first refusal, hold that they were indeed intended to run with the land, particularly when they are stated to be binding on subsequent assigns or transferees. *See, e.g., Megargel Willbrand & Co., LLC v. Fampat Limited Partnership*, 210 S.W.3rd 205, 210-11 (Mo.

App. 2006) (“A right of first refusal that is contained in a lease is regarded as a covenant that runs with the land”); *Randolph v. Reisig*, 727 N.W.2d 388, 391 (Mich. App. 2007) (Right of first refusal runs with the land where it provides both that it “shall run with the land” and that it shall bind future “assigns.”); *No-Pink, Inc. v. Ellison*, 2001 WL 721397 (Mich. App. 2001) (Right of first refusal in a lease is a covenant running with the land) (attached at App. 235-237); *CIT Group Equipment Financing, Inc. v. Alberto*, 130 F.R.D. 657, 661 (N.D. Ill. 1990) (“Cox’s rights of first refusal were apparently never triggered and could not have expired . . . the mere transfer of the Property does not terminate Cox’s rights under the Lease”); *Estate of Renee F. Weisz v. Nassif Co.*, 1986 WL 401771 (Va. Cir. 1986) (attached at App. 238-239) (Right of first refusal binding on subsequent owner based on reference to “successors and assigns”).

In *Lilyerd v. Carlson*, 499 N.W.2d 803 (Minn. 1993), the Minnesota Supreme Court recognized the enforceability of a statutory right of first refusal against a subsequent purchaser. PCA, a mortgagee, acquired an interest in the property when the owner went into bankruptcy. It sold its interest to Carlson without offering the Lilyerds their statutory right of first refusal. The Court held that Carlson was bound by the right of first refusal as a subsequent acquiror of the property.

It is thus frequently the case that rights of first refusal do indeed run with the land or otherwise bind subsequent owners, particularly when the document states an intention to bind assigns or other subsequent owners in the land. That is true here.

D. Other policies support keeping the right of first refusal in force.

As noted in the Hempels’ opening brief, Minnesota recognizes the survivability of

rights of first refusal in a variety of circumstances, including both a statutory right of first refusal scheme and the case of *M.L. Gordon Sash & Door Co. v. Mormann*, 271 N.W.2d 436 (Minn. 1978). The West Defendants respond that this is not a statutory right of first refusal and that the facts in the *M. L. Gordon* case were unique and narrow.

While it is true that this case does not arise under the right of first refusal statute, it is useful to recognize the analogous provisions of the statute, as a persuasive indication of the appropriateness of binding a subsequent owner to a right of first refusal, where, as here, the subsequent owner took the property with knowledge of the right of first refusal and the right holder never had the opportunity to exercise it. Further, the Minnesota Supreme Court has cautioned against reading rights of first refusal so narrowly that they lose their intended purpose. *Lilyerd*, 499 N.W.2d at 809.

Similarly, while the facts in *M.L. Gordon* may be unique, the facts in all cases are ultimately unique. There are equally strong reasons in this case why the right of first refusal should continue in force. The Hempels should not be deprived of a right they never had a chance to exercise, when the West Defendants, as buyers with knowledge of the right of first refusal, made no attempt to identify, locate or contact the Hempels, despite their duty to do so.

The importance of respecting recorded instruments relating to a piece of property calls for survival of the right of first refusal here. The right of first refusal was a recorded document, and the West Defendants had constructive knowledge of it, in addition to actual knowledge. Normally, parties to a real estate transaction are not permitted to simply ignore a recorded instrument, in the hopes that it will just fade out of existence if

they do so.

Equitable considerations also come into play. Courts hold that where the owner of a right of first refusal has never had a chance to exercise it, it remains in force as to subsequent owners. *See, e.g., Creque v. Texaco Antilles Ltd.*, 409 F.3d 150, 155 n.4 (3rd Cir. 2005) (“As the conveyance was not a triggering event, it would be inequitable to permit TCI to avoid complying with the right of first refusal should it ever decide to sell the property.”) *See also, Winberg v. Cimfel*, 532 N.W.2d 35, 40-41 (Neb. 1995) (Holding that right of first refusal was not “merged” out of existence by a separate sale transaction where it was previously recorded, and that subsequent owners of the property were not bona fide purchasers where they knew of the right of first refusal, leading to the right of first refusal remaining in force).

Finally, at least one case holds that the question of whether the right is binding on subsequent holders is a fact dispute which precludes summary judgment. *Shower v. Fischer*, 737 P.2d 291, 295 (Wash. App. 1987) (requiring a trial on the issue of the transferability of a right of first refusal).

The right of first refusal in this case was clearly intended to be binding on subsequent owners of the property. The Hempels were clearly intended to benefit from it. Even if the 1992 transaction or the 2004 transaction is somehow immune from challenge at this point, the Hempels’ right should still survive. Certainly there is no basis for a summary judgment decision depriving them of it.

V. Summary Judgment Should Be Reversed For Additional Reasons Stated In The Hempels' Initial Brief.

As the Hempels argued in their initial brief, summary judgment should also be reversed based on the applicability of the Marketable Title Act and the trial court's error in denying the Hempels' motion to amend the complaint to add Jean West as a defendant. The Hempels continue to maintain those positions, but rest upon their earlier arguments.

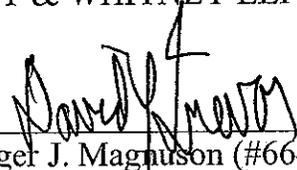
CONCLUSION

For the reasons expressed herein and in their initial brief, the Hempels respectfully request that the summary judgment of the district court and all orders subsumed therein be reversed, and that the case be remanded for further proceedings.

Dated: April 11, 2007

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