

CASE NO. A06-2473

STATE OF MINNESOTA
IN COURT OF APPEALS

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

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 herein,

Respondents.

BRIEF AND APPENDIX OF RESPONDENTS CREEK HOUSE TRUST, FREDERICK S. WEST, CURTIS C. WEST AND TERRY L. SLYE, TRUSTEES

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF ISSUES

1. Were Trustees entitled to summary judgment because the six-year statute of limitations in Minn. Stat. § 541.05 applied to Hempels' claims arising from a right of first refusal contract?

Yes. The district court granted summary judgment for Trustees on the grounds that Hempels' claims accrued in 1992, that the six-year statute of limitations in Minn. Stat. § 541.05 applied, and therefore the claims brought in 2005 were time-barred.

Most Apposite Authorities:

Minn. Stat. § 541.05

Park-Lake Car Wash, Inc. v. Springer, 352 N.W.2d 409 (Minn. 1984)

2. Were Trustees entitled to summary judgment because the "discovery rule" does not apply to Hempels' claims and does not toll the statute of limitations?

Yes. Hempels did not raise this issue before the district court, and the Court should not consider this argument for the first time on appeal. The district court's order granting summary judgment nevertheless should be affirmed because Minnesota does not apply the discovery rule to breach of contract claims.

Most Apposite Authorities:

Juster Steel v. Carlson Cos., 366 N.W.2d 616 (Minn. Ct. App. 1985)

3. Does the Marketable Title Act provide a 40-year statute of limitations for claims based a right of first refusal contract?

No. Hempels did not raise this issue before the district court, and the Court should not consider this argument for the first time on appeal. The district court's order granting

summary judgment should nevertheless be affirmed because the Marketable Title Act does not supercede the six year contract limitations period and has no bearing on Hempels' claim as a matter of law.

Most Apposite Authorities:

Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957)

4. Whether the district court was within its discretion to deny Hempels' motion to amend to assert claims against Jean V. West because Hempels failed to timely bring the motion and because the claims would not survive summary judgment?

Yes. The district court denied Hempels' motion to amend on the grounds that Hempels did not offer any explanation for their undue delay in asserting claims against Jean V. West and because the claims would be futile in any event. The district court should be affirmed.

Most Apposite Authorities:

Utecht v. Shopko Dep't Store, 324 N.W.2d 652 (Minn. 1982)

Bebo v. Delander, 632 N.W.2d 732 (Minn. Ct. App. 2001)

5. Were Trustees entitled to summary judgment on Hempels' declaratory judgment claim seeking a declaration that the right of first refusal continued to have present and/or future effect?

Yes. The district court properly dismissed Hempels' declaratory judgment claim because the underlying claims were time-barred and, because the right of first refusal does not run with the land and was never assigned by the grantor, the right of refusal had no further effect as between the parties to this lawsuit.

The district court should be affirmed.

Most Apposite Authorities:

Park-Lake Car Wash, Inc. v. Springer, 352 N.W.2d 409 (Minn. 1984)

STATEMENT OF THE CASE

This is an appeal from an entry of final judgment in Chisago County District Court, the Honorable Robert G. Rancourt presiding, for Defendant Creek House Trust, Frederick S. West, Curtis C. West and Terry L. Slye, trustees, (collectively, "Trustees") and Judith Anna Ingemann f/k/a Judith Anna Seymour ("Ingemann") in a three-count complaint brought against Trustees and Ingemann by Plaintiffs William J. Hempel and Kay L. Hempel ("Hempels").

The lawsuit concerns the Hempels' ability to enforce a right of first refusal created in a 1981 contract between Ingemann and Hempels' predecessors in title. Ingemann breached the right of first refusal contract in 1992 when she sold the Creek House Property to Jean V. West and William L. West ("Wests") without providing notice of Wests' offer to purchase to Hempels. Jean V. West subsequently conveyed the Creek House Property to the Creek House Trust, as a gift.

Hempels allegedly discovered the 1992 sale and breach of the right of first refusal in 2003 or 2004. Hempels then sued Trustees and Ingemann, alleging superior rights to the Creek House Property. Hempels' complaint contains three counts: (1) a claim for determination of adverse claims under Minn. Stat. § 559.01, in which Hempels assert that the Trustees hold the Creek House Property subject to the Hempels' superior right of first refusal, (2) a declaratory judgment claim in which Hempels seek specific performance, and (3) a breach of contract claim seeking specific performance, compelling the sale of the Creek House Property or, in the alternative, damages for Ingemann's alleged breach of contract.

Trustees moved for summary judgment on multiple grounds: (1) Hempels' claims were barred by the six-year statute of limitations for breach of contract claims in Minn. Stat. § 541.05, (2) Hempels' remaining claims were derivative of the breach of contract claim and therefore also barred, and (3) Hempels failed to establish the elements of their § 559.01 claim.

The district court granted Trustees' motion in its entirety. The district court held that (1) Hempels were not entitled to relief under § 559.01, (2) Hempels' claims for breach of the right of first refusal were claims for breach of contract, subject to the six-year statute of limitations in § 541.05, (3) Hempels' breach of contract claims accrued in 1992 when Ingemann failed to provide notice of the sale to Wests, (4) Hempels' claims were time-barred because they were not brought until 2005, (5) Hempels' lack of knowledge of the breach did not toll the statute of limitations, and (6) Hempels' remaining claims for declaratory judgment could not stand alone and were barred by the concurrent remedy rule. The district court also granted Ingemann's subsequent motion to dismiss on the same grounds.

While the summary judgment motion was pending, Hempels moved to amend the district court's scheduling order and to amend their complaint to assert claims against Jean V. West, after the deadline for such motions had passed. The district court denied the motion holding that Hempels knew about their claims against Jean V. West from the outset and offered no justification or excuse for their undue delay. The district court also held that any amendment asserting claims against Jean V. West would be futile as the claims would fail for the same reasons claims against the other parties failed.

This appeal followed. Hempels concede the district court properly dismissed their claim under Minn. Stat. § 559.01 but challenge the district court's dismissal of their breach of contract and declaratory judgment claims and the district court's denial of their motion to amend.

STATEMENT OF FACTS

A. Factual Background

In 1981, Defendant Judith Ingemann, formerly known as Judith Seymour ("Ingemann") owned two adjacent parcels of real estate located in Franconia Township. One of those parcels, improved with a house and located on a bluff ("Hempel Property"), is now owned by Plaintiffs William Hempel and Kay Hempel ("Hempels"). App. 24. The other parcel, known as the Creek House Property, adjoins the Hempel Property directly below the bluff and has a small one-room cabin with a screened porch, a small outbuilding, and a portable sauna. *Id.*

In 1981, Ingemann sold the Hempel Property to William and Nancy Harris. Ingemann retained the Creek House Property. As part of the sale, Ingemann entered into a separate agreement ("Right of First Refusal Agreement") with the Harrises. App. 84-85. That Right of First Refusal Agreement, dated February 3, 1981, purported to give the Harrises a right of first refusal to purchase the Creek House Property. *Id.* The Right of First Refusal Agreement provided in relevant part as follows:

If [Ingemann] receives a bona fide written offer for the purchase of the Subject Property or any portion thereof, [Ingemann] 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 Written notice of said offer shall be given by [Ingemann] to Harris and Harris shall have 2 weeks thereafter to exercise the said right of first refusal by giving written notice thereof to [Ingemann].

Id. Hempels' claims in this litigation all relate to their purported rights under the 1981 Right of First Refusal Agreement.

Harrises subsequently conveyed the Hempel Property to James and Mary Lande in 1982. App. 40-41. Harrises also specifically assigned their interest in the Right of First Refusal Agreement to the Landes as part of the transaction. *Id.* The Landes, in turn, conveyed the Hempel Property to Hempels in 1985. App. 43-44. The Landes also specifically assigned the Right of First Refusal Agreement to the Hempels at that time. *Id.*

In 1992, Ingemann sold the Creek House Property to William L. and Jean V. West (“West”).¹ App. 45-47. The closing took place on July 17, 1992. *Id.* On that date, Ingemann transferred the property by warranty deed to the Wests. *Id.* Unlike the series of transfers of the Hempel Property, there was no assignment of the Right of First Refusal Agreement to the Wests. *Id.* Ingemann instead executed a document dated July 17, 1992 stating that the right of first refusal in the Right of First Refusal Agreement had lapsed (“Lapse Statement”), as follows:

I, Judith A. Seymour, formerly known as, Judith Ann Ingemann, hereby state that Right of First Refusal has lapsed. 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. 49.

Ingemann did not provide the Hempels with any notice of her 1992 sale of the Creek House Property to the Wests. However, both the Warranty Deed conveying the

¹ At the time, Wests owned a house located on a parcel immediately to the east of the Creek House Property (“West Property”). App. 25. The Creek House Property is thus situated between the West Property and the Hempel Property. *Id.*

property from Ingemann to the Wests and the Lapse Statement were recorded in the Chisago County Recorder's Office on July 17 and July 22, 1992, respectively. App. 45, 49.

After the death of William L. West, Jean V. West conveyed her interest in the Creek House Property to the Creek House Trust. App. 51-61. The Trustees of the Creek House Trust did not make an offer to purchase the Creek House Property. App. 154. The Trustees did not pay anything for the Creek House Property. *Id.* Instead, Jean V. West gifted the property to the Trust for no consideration. *Id.*

To summarize, the Hempel Property and Creek House Property were originally both owned by Ingemann. She split the properties in 1981. The Hempel Property was transferred first to Harrises, then Landes, and ultimately Hempels. Each time the Hempel Property was transferred, rights in the Right of First Refusal Agreement were specifically assigned to the new owners. Ingemann retained the Creek House Property for eleven more years, then sold it to the Wests in 1992. Ingemann made no specific assignment of the Right of First Refusal Agreement to Wests. The Creek House Property was then, in 2004, transferred to its current owner, the Creek House Trust.

B. District Court Proceedings

In October 2005, more than 13 years after the sale of the Creek House Property to the Wests and more than 13 years after the Lapse Statement and the conveyance to the Wests were recorded in the public land records, Hempels commenced litigation against Ingemann and Trustees. App. 1. The Complaint identifies Jean V. West by name, but no claims were asserted against her and she was not a party. *Id.*

After taking the depositions of the Hempels, Trustees filed a motion for summary judgment on December 19, 2005 with a February 2006 hearing date.

On January 13, 2006, the district court held a scheduling conference and, based on that conference, issued a Scheduling Order on January 16, 2006. R. App. 001-2. The deadline set for joining additional parties, whether by amendment or third-party practice, was March 13, 2006. The discovery deadline was set for May 30, 2006. Trial was scheduled for August 2006.

The district court held a hearing on the summary judgment motion on February 27, 2006. App. 134. On May 8, 2006, before the court's summary judgment ruling, Hempels moved to amend the scheduling order and to amend their complaint to assert claims against Jean V. West. App. 141.

On May 12, 2006, the district court filed its order granting Trustees' summary judgment motion. App. 134-40. The court subsequently granted Ingemann's motion to dismiss on the same grounds. App. 163-64.

On May 22, 2006 the court heard Hempels motion to amend. The district court issued an order denying Hempels' motion on June 6, 2006. App. 157-61. This appeal followed.

C. Appellate Court Proceedings to Correct the Record on Appeal

After Hempels filed their appellate brief, Trustees noted a material misstatement in the transcript of the May 22, 2006 hearing. In reliance on this incorrect transcript, Hempels alleged in their brief that Trustees' counsel admitted during a hearing that Jean V. West was an assignee of Ingemann and, therefore, bound by the Right of First Refusal.

App. Br. at 25. The parties subsequently reviewed the tape of the proceeding and stipulated to an order from the district court correcting this material misstatement. R. App. 003-4. The district court entered this order on March 26, 2007 pursuant to Minn. R. Civ. App. P. 110.05. *Id.* Accordingly, the record has been corrected to provide as follows:

MS. AGRIMONTI: Thank you, Your Honor. Ms. West isn't an assignee of Ms. Ingemann. She is not an heir.

R. App. 004.

SUMMARY OF ARGUMENT

This lawsuit arises out of an ordinary right of first refusal contract. That contract contained the traditional, explicit requirement for Ingemann (as the owner of the property subject to the right of first refusal) to provide notice to the Hempels (as the current assignees of the right of first refusal contract) of any impending sale of the Creek House Property. Ingemann breached that provision in 1992 when she sold the property to Wests without notifying Hempels. There is no evidence in the record that the sale was concealed in any way. In fact, the deed was recorded along with a document stating that Ingemann could not locate whom she believed currently held the right of first refusal and that Ingemann believed that the right of first refusal therefore had lapsed.

The Hempels assert they did not learn about the sale of the Creek House Property until 2003 or 2004 when evaluating the marketability of their property. Hempels commenced this action in 2005.

The district court properly granted summary judgment on Hempels' breach of contract claims based on the six-year statute of limitations in Minn. Stat. § 541.05 which applies to breach of contract claims. Applying black letter law, the district court determined that Hempels' claims accrued in 1992 when Ingemann breached the contract, specifically the notice provision, and therefore the claims were time-barred.

Because Hempels' claim fails under a straightforward application of existing Minnesota law, Hempels ask the court to adopt a new rule to toll the statute of limitations prior to the time Hempels learned of the breach. Hempels' argument should be rejected first because the argument was not presented to the district court. Moreover, Minnesota

courts have consistently refused to apply the discovery rule in contract cases and this Court should do likewise.

Hempels also argue, again for the first time on appeal, that Ingemann's breach of the right of first refusal contract was fraudulently concealed, and that this should toll the statute of limitations. Hempels, however, have no factual support for fraudulent concealment and indeed make no effort in their brief to apply the elements to the facts of this case. There is no evidence of any intentionally false statement, intentional concealment, or other fraud. Nor is there any basis under the law, or the facts of this case, to toll the limitations period based on fraudulent omission.

The third new argument Hempels raise on appeal is that the Marketable Title Act ("MTA") was the proper and only statute of limitations defense available to the Trustees. The Court should reject this argument because the MTA does not supercede Minn. Stat. § 541.05 and does not apply to Hempels' claims.

Hempels also appeal from the district court's denial of Hempels' motion to amend the scheduling order and to amend the complaint to assert claims against Jean V. West. This decision is reviewed for abuse of discretion and should be affirmed. The district court properly denied Hempels' motion because Hempels knew about Jean V. West's prior ownership of the Creek House Property since commencement of the litigation and Hempels were unable to explain their undue delay to the district court six months later. Additionally, the district court determined that Hempels' claims against Jean V. West would fail to survive summary judgment and therefore amendment would be futile.

Finally, Hempels claim that the district court should not have dismissed Hempels' declaratory judgment claim with respect to the continued viability of the right of first refusal. The district court should be affirmed because the district court's rulings fully determined the rights between and among the parties.

ARGUMENT

I. STANDARD OF REVIEW

Rule 56 of the Minnesota Rules of Civil Procedure authorizes the district court to grant summary judgment when “there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such facts.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997); Minn. R. Civ. P. 56.03. Summary judgment may be reversed on appeal only if there is a genuine issue of material fact or if the district court misapplied the law. *Offerdahl v. University of Minnesota Hospitals and Clinics*, 426 N.W.2d 425, 427 (Minn. 1988).

The decision whether to grant a motion to amend is within the discretion of the trial court. *Utecht v. Shopko Dep’t Store*, 324 N.W.2d 652 (Minn. 1982). Accordingly, denial of a motion to amend may be reversed on appeal only for an abuse of discretion. *Id.*

II. HEMPELS’ CLAIMS ARE BARRED BY THE SIX-YEAR STATUTE OF LIMITATIONS IN MINN. STAT. 541.05

Minnesota precedent is straightforward regarding when contract actions accrue for purposes of applying the statute of limitations. This long-standing precedent is more than sufficient to enable this Court to address the issue pursuant to Minnesota law and affirm the district court. This Court should accordingly reject Hempels’ reliance on authority from other jurisdictions to explain how the statute of limitations should apply to a right of first refusal which, in the end, is simply a contract that can be breached like any other.

A. **A Right of First Refusal is a Contract and is Breached When Proper Notice of a Sale is Not Provided**

Hempels characterize rights of first refusal as unique and complex instruments in an attempt to convince the Court to apply different standards to rights of first refusal than normally applicable to contract claims. Significantly, Hempels do not dispute that a right of first refusal is a contract. Accordingly, regardless of how rights of first refusal actually function, they are contracts and can be breached. *See, Park-Lake Car Wash, Inc. v. Springer*, 352 N.W.2d 409, 411 (Minn. 1984) (“a right of first refusal is a binding option contract . . .”) (emphasis added).

As explained by the Minnesota Supreme Court, a right of first refusal contract creates a dormant option which may not be exercised until the option ripens. *Dyrdal v. Golden Nuggets, Inc.* 689 N.W.2d 779, 784 (Minn. 2004). Typically, as is the case here, 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 pursuant to the underlying terms of the agreement. *Id.* Only after notice is provided can the holder of the right of first refusal exercise its option and force the owner of the property to sell.

The notice provision is an integral part of the right of first refusal contract. Hempels assert that when Ingemann did not provide that notice to Hempels and sold the Property to the Wests, there was a breach. This is the proper analysis. Indeed, one of the foreign cases that Hempels cite supports this analysis. In *McGehee v. Elliott*, 849 N.E.2d 1180, 1189 (Ind. Ct. App. 2006), the court explains that breach of the right of first refusal

was complete when the seller sold the land subject to the right without giving the other party notice. Accordingly “the only time limitation at that point was the statute of limitations on a breach of contract action.” *Id.* Thus, courts have and will consider failure to provide notice of a sale to be an actionable breach.

B. Breach of Contract Standards

The statute of limitations analysis for accrual of a breach of contract claim is well-established. As an initial matter, Minnesota Statutes provide that a breach of contract claim must be brought within six years after the date of accrual, unless the Uniform Commercial Code provides otherwise. Minn. Stat. § 541.05, subd. 1(1) (2004); *see also Har-Mar, Inc. v. Thorsen & Thorshov, Inc.*, 300 Minn. 149, 218 N.W.2d 751 (1974).

It is undisputed that in Minnesota, “[a] cause of action accrues and the statute of limitations begins to run when the cause of action will survive a motion to dismiss for failure to state a claim upon which relief can be granted.” *Herrmann v. McMenemy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999). Therefore, a claim for breach of contract must be brought within six years of the date of breach or the claim is time-barred.²

C. Hempels’ Cause of Action Accrued in 1992

Ingemann’s failure to provide notice to Hempels occurred, according to Hempels’ own Complaint, in 1992 by Ingemann’s “fail[ure] to provide Hempels with notice of the

² The statute provides exceptions for other periods specifically provided by the Uniform Commercial Code, which is not applicable. Hempels contend that the Marketable Title Act provides a 40 year statute of limitations, but as discussed in § IV, below, that argument is also without merit. No other limitations period applies.

sale of the subject property from [Ingemann] to West.” App. 5. The sale closed on July 17, 1992, after which point it would have been impossible for Ingemann to perform the contract—she could neither provide notice prior to sale nor could she convey the Creek House Property to Hempels.

At least by July 17, 1992, then, Hempels could have initiated a breach of contract action against Ingemann and that action would have survived a motion to dismiss. Therefore, Hempels’ cause of action accrued for purposes of the statute of limitations no later than July 17, 1992 and had to be brought by July 17, 1998. Because Hempels did not commence their action in this time frame, Hempels’ cause of action is barred by the six-year statute of limitations in Minn. Stat. § 541.05.

The district court held that the “right of first refusal Agreement herein is a contract . . . claim for breach of the Agreement must have been brought within six years of the date of breach or the claim is time-barred . . . As a matter of law the Plaintiffs’ cause of action for breach of contract accrued for purposes of the statute of limitations no later than July of 1992 . . . Because the Plaintiffs did not commence their breach of contract claim within the six year limitation period . . . their claim is time barred.” App. 169-70. The district court’s decision should be affirmed.

III. THE DISCOVERY RULE DOES NOT TOLL THE STATUTE OF LIMITATIONS FOR HEMPELS’ BREACH OF CONTRACT CLAIM

Unable to show that their claim is timely under existing law, Hempels ask this Court to adopt new law. Specifically, Hempels seek adoption of the “discovery rule”, which would delay accrual of their claim long enough to fit within the six-year statute of

limitations. The Court should refuse to adopt Hempels' rationale because Minnesota courts consistently reject application of the discovery rule, particularly in the context of contracts such as at issue here.

A. Hempels Failed to Raise Issue Below and Should Not Be Heard for First Time on Appeal

As a well-accepted principle of Minnesota appellate procedure, a reviewing court “must generally consider ‘only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.’” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), quoting *Thayer v. American Fin. Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982). According to the Minnesota Supreme court in *Thiele*, this principle is particularly applicable to statute of limitations issues: “this court ‘will not consider the applicability of the statute of limitations on appeal, even though the question was raised below, if it was not passed on by the trial court.’” *Id.*, quoting *Rehberger v. Project Plumbing Co.*, 295 Minn. 577, 578, 205 N.W.2d 126, 127 (1973).

The court also rejects arguments “raising the same general issue litigated below but under a different theory.” *Id.*, quoting *Pomush v. McGroarty*, 285 N.W.2d 91, 93 (Minn. 1979). Hempels candidly acknowledge that they did not raise the specific issue regarding the discovery rule at the district court level, although Hempels did raise the same general issue in that Hempels disputed that the statute of limitations should apply. App. Br. at 2, 17. Because Hempels failed to present the argument to the district court for review, this Court should refuse to consider it.

B. The Court Should Reject Hempels' Argument to Apply the Discovery Rule

Hempels are not the first plaintiffs to attempt to convince a Minnesota court to adopt the discovery rule in an effort to revive what would otherwise be a stale claim. But Minnesota courts have consistently rejected attempts to broaden the already lengthy six-year breach of contract statute of limitations though the discovery rule, which delays accrual of the claim, and this Court should do likewise.

As the Minnesota Supreme Court explained in *Antone v. Mirviss*, there are generally “three types of accrual rules based on the damages element. The first rule is the traditional “occurrence” rule, which assumes that nominal damages occur, the cause of action accrues, and the statute of limitations begins to run, simultaneously with the performance of the negligent or wrongful act.” 720 N.W.2d at 335. “At the other end of the spectrum is the ‘discovery’ rule, under which the cause of action accrues and the statute of limitations begins to run only when the plaintiff knows or should know of the injury.” *Id.* The most “significant disadvantage of the discovery rule is that it provides ‘open-ended liability.’” *Id.*

Minnesota adopts neither extreme. Instead, “Minnesota has taken the middle ground by adopting the “damage” rule of accrual, under which the cause of action accrues and the statute of limitations begins to run when “ ‘some’ damage has occurred as a result” *Id.* at 335-36. In *Herrmann v. McMenemy & Severson*, when the Minnesota Supreme Court confirmed adoption of the middle ground of the “some

damage” rule,³ the Court acknowledged arguments that it was “unfair” to bar a claim pursuant to the statute of limitations when the plaintiff was unaware of the action. 590 N.W.2d at 643 & n.17. The Court then rejected those arguments based on Minnesota’s long-standing precedent and rejection of the discovery rule. *Id.*

“Under our statutes it has been determined that ignorance of a cause of action not involving continuing negligence or trespass, or fraud on the part of the defendant, does not toll the accrual of a cause of actions.” *Dalton v. Dow Chemical Co.*, 280 Minn. 147, 153, 158 N.W.2d 580, 584 (1968). Instead, “[w]e have consistently held that the statute begins to run when the cause of action accrues, that is, when the plaintiff can allege sufficient facts to survive a motion to dismiss for failure to state a claim upon which relief can be granted.” *Antone*, 720 N.W.2d at 335.

Minnesota courts have repeatedly refused to adopt the broad discovery rule the Hempels advocate. In *Juster Steel v. Carlson Companies*, 366 N.W.2d 616 (Minn. Ct. App. 1985), for example, this Court specifically addressed whether the six-year statute of limitations for breach of contract claims in Minn. Stat. § 541.05(1) was subject to tolling until discovery of the breach. The Court rejected the argument, explaining “[i]t is generally accepted that ignorance or lack of knowledge of the existence of a cause of

³ Under the “some damage” rule, Hempels cause of action accrued no later than the date of Ingemann’s sale to the Wests, July 17, 1992. It was at this point that Hempels lost the opportunity to purchase the property for which Hempels’ predecessors specifically contracted – i.e., the benefit of the bargain. This was also the point at which Hempels could have obtained the relief of specific performance.

action does not toll the * * * limitations period for contract claims.” *Juster Steel*, 366 N.W.2d at 618 (ellipses in original).

Minnesota courts also recognize that creation and application of statutes of limitations are the province of the legislature, particularly when it comes to extensions and tolling. “There are no exceptions to statutes of limitations unless expressly provided. The courts cannot engraft on such statutes exceptions not contained therein, however inequitable the enforcement of the statute without such exceptions may be.” *State v. Bies* 258 Minn. 139, 145 n.1, 103 N.W.2d 228, 234 n.1 (Minn. 1960) (citations omitted); see also *Herrmann*, 590 N.W.2d at 643 (reversing Court of Appeals’ adoption of the discovery rule and stating: “We have declined to adopt the discovery rule in the past and neither [appellants] argument nor the court of appeals decision provide any justification for doing so now.”). If the Minnesota legislature had intended the discovery rule to apply to the breach of a right of first refusal, it would have made it explicit in the statute.

Hempels’ arguments ignore the public policy concerns underlying the legislative establishment of statutes of limitations. Protecting a plaintiff’s cause of action is not the purpose of statutes of limitation. Instead, the Court in *Dalton* explained, “[t]he purposes of statutes of limitations are the repose of the defendant and the fair and effective administration of justice.” 280 Minn. at 153 n.2, 158 N.W.2d at 584 n.2.

Moreover, Hempels’ reliance on foreign cases to support their argument for adoption of a discovery rule is misplaced and only demonstrates the magnitude of the change they are seeking in Minnesota law. The main foreign jurisdiction relied upon by Hempels, California, follows the minority rule. *Gryszman v. 4550 Pico Partners, Ltd.*,

107 Cal.App.4th 1, 3-4 (2003). Significantly, California has since 1983 extended the discovery rule to apply to a wide variety of breach of contract cases. *April Enterprises v KTTV*, 147 Cal.App.3d 805, 831-32 (1983). Essentially, anytime “breaches [of contract] which can be, and are, committed in secret” the discovery rule applies. *Id.* The California court acknowledged that the trend in California⁴ was a steady expansion of application of the discovery rule that threatened to “swallow” the normal accrual rules entirely. *Id.* at 828. That expansive application of the discovery rule is the foundation for the *Gryczman* decision.

Minnesota has already rejected the California approach. Even when Minnesota courts have confronted breach of contract cases in which the breaches were committed in secret, Minnesota has held fast and rejected the discovery rule. *See, e.g., Herrmann*, 590 N.W.2d at 643-44 (1999) (rejecting application of the discovery rule even when the allegation at issue was failure to advise client of an illegal transaction clients otherwise would not have known about).

Hempels also rely on *HSL Linda Gardens Properties, Ltd. v. Freeman*, in which an Arizona appellate court held that a cause of action for violation of a right of first

⁴ This Court should be particularly cautious in adopting any rule from California. One of the reasons California has such an expansive discovery rule may be to alleviate California’s inherently shorter statutes of limitations. It is well-known that Minnesota has one of the most generous sets of statutes of limitations in the country. California, by contrast, has only a four year statute of limitations for breach of a written contract. *Gryczman*, 107 Cal.App.4th at 4 n.2. Minnesota’s statute is six years, one of the longest. Minn. Stat. § 541.05. (Ironically, if the plaintiff in *Gryczman* has been in Minnesota, his cause of action would have been timely as it was brought within 6 years of the breach.)

refusal did not accrue when the property was sold and the right violated. 859 P.2d 1339 (Ariz. Ct. App. 1993). Instead, the court applied general principles of Arizona law,⁵ which principles are similar to California law as stated in *Gryczman* and *April Enterprises*. The Arizona court frankly acknowledges that applying the discovery rule to breach of contract as a general matter “departs from the prevailing view.” *Id.* at 1341.

Hempels also argue that a case from Oregon, *Bruns v. Walters*, 28 P.3d 646 (Or. Ct. App. 2001), supports their argument that the discovery rule applies. But in *Bruns*, the issue before the court was when the equitable doctrine of laches began to run. The statute of limitations was not an issue. Indeed, it does not appear that the plaintiff in *Bruns* asserted a breach of contract action. Yet court in *Bruns* also acknowledges, in dicta, that the statute of limitations for a breach of contract action “runs from the date of the breach.” *Id.* at 366 n.9. This case provides no basis for this Court to abandon long-standing Minnesota precedent rejecting the discovery rule.

To adopt the discovery rule as Hempels request would have the effect of resurrecting an unknown number of stale claims. Minnesota has consistently rejected application of the discovery rule in such a broad fashion and this Court should adhere to

⁵ Under Arizona law, “Ordinarily, a claim is not thought to accrue, and thus the [statute of limitations] does not begin to run, until plaintiff discovers or by the exercise of reasonable diligence should discover that the claim exists.” *HSL Linda Gardens*, 859 P.2d at 1340. In Arizona, therefore, the discovery rule is the default. This is beyond even the generally liberal California law, which limits the discovery rule to breaches of contract that occur in secret. *See April Enterprises*, 147 Cal.App.3d at 831-32.

the prevailing Minnesota view set down in *Dalton* and *Herrmann* and affirm the district court's finding that the claim accrued no later than June 17, 1992.⁶

C. **The Doctrine of Fraudulent Concealment Does Not Toll the Statute of Limitations in This Case**

In another new argument raised for the first time on this appeal,⁷ Hempels contend that even if the discovery rule does not apply, the date of accrual of the cause of action should be extended based on fraudulent concealment. Hempels do not, indeed because they cannot, allege any facts that would support such a claim. There is no record evidence to show that that the Wests and/or Ingemann fraudulently concealed the violation of the right of first refusal and subsequent sale. Hempels' argument lacks factual support. Accordingly, even if this Court considers this argument, the district court must be affirmed.

There are few exceptions to the rule that, for purposes of the statute of limitations, causes of action accrue when the action would survive a motion to dismiss. One of the

⁶ Even the facts in *HSL Linda Gardens* are quite distinct from those presented by the Hempels in this case. 859 P.2d at 1340. Significantly, the plaintiff in *HSL Linda Gardens* exercised a great deal more due diligence than Hempels have. *Id.* First, the plaintiff did have a title report run on the property at issue. But for reasons that are unclear from the court's opinion, the title search was run in error and did not reveal the right of first refusal. *Id.* Second, the plaintiff specifically inquired about the right from the owner. But the owner and/or his agent denied owning any such right. *Id.* Accordingly, plaintiff even in the exercise of all reasonable diligence would not have discovered the breach. Hempels had every opportunity to check the public records or inquire, in person, of their next-door neighbors. Pursuing either alternative would have revealed that Ingemann no longer owned the Creek House Property.

⁷ This argument, therefore, should not be considered. *Thiele*, 425 N.W.2d at 582.

exceptions is when the existence of that cause of action is fraudulently concealed. *See, e.g., Williamson v. Prasciunas*, 661 N.W.2d 645, 650 (Minn. Ct. App. 2003). The elements of fraudulent concealment, which are not identified by Hempels nor applied, are as follows:

- (1) a statement or statements that concealed plaintiff's potential cause of action,
- (2) the statement or statements were intentionally false, and
- (3) the concealment could not have been discovered by reasonable diligence.

Id.

It is telling that Hempels do not cite, much less attempt to apply, the elements of fraudulent concealment to the facts of this case. There is simply no record evidence to support any of the elements. There is no alleged statement by Ingemann to Hempels that allegedly concealed the breach.⁸ Nor does the record support any conclusion that Ingemann made any intentionally false statements, to Hempels or otherwise. And any concealment would be extremely simple to discover with even minimal diligence - either

⁸ The only potential statement in the record at all from Ingemann is the document she signed in connection with the sale to Wests that stated that she believed the owners of the right of first refusal, Mr. and Mrs. Harris, were deceased and could not be located, respectively, and therefore that the right of first refusal had lapsed. App. 49. Of course, this statement was not made to Hempels. Moreover, Hempels did not become aware of the document until 2003 or 2004. Accordingly, Hempels do not, and cannot, allege they relied on this statement to assume their rights were extinguished. Furthermore, there is nothing in the record that would support the second element - that the statement was intentionally false. Neither Ingemann nor the drafter of the document were ever deposed.

by consulting the public land records where the deed to Wests was recorded,⁹ or by walking next door and knocking on the door or leaving a note for the owners.

Hempels try to expand the scope of the traditional fraudulent concealment exception, usually applied to a material *misstatement*, to fraudulent *omission*. No Minnesota case makes that leap and delays accrual of a cause of action based on fraudulent omission as opposed to an affirmative misrepresentation.

Even if a fraudulent omission could give rise to a claim of fraudulent concealment, the grounds are not present here. A fraudulent omission “based on the concealment of a material fact occurs when one party knowingly conceals a material fact that is ‘peculiarly within his own knowledge,’ and the other party relies on the presumption that the fact does not exist.” *Flynn v. American Home Products Corp.*, 627 N.W.2d 342, 350 (Minn. Ct. App. 2001) (quotation omitted) (emphasis added). There is no evidence in the record that Ingemann (or anyone else) knowingly concealed anything regarding the transaction at issue. To make any other assumption is to engage in speculation. To the contrary, Ingemann publicly disclosed the existence of the transaction and her belief that the right of first refusal had lapsed because one of the owners died and the other’s address was unknown. Everything Hempels needed to know to support their cause of action was available in the public land records of Chisago County. App. 49-60. Nor did Wests conceal their presence on the Creek House Property.

⁹ Hempels acknowledge that recorded deeds and other documents are “matters of public record.” App. Br. at 11.

Hempels also argue that Wests had an affirmative duty to disclose the transaction to Hempels on the grounds that Wests were Ingemann's assigns. As explained above, this argument was based on a mistake in the record that has subsequently been corrected. As the parties' stipulation and the district court order expressly provide, Creek House Trust's attorney did not admit that Jean V. West was an assignee of Ingemann. Indeed, just the opposite was stated. R. App. 004 ("Ms. West isn't an assignee of Ms. Ingemann. She is not an heir."). There is nothing in the record that supports the allegation that Wests were assigns of Ingemann and had any duty to Hempels.

This Court should affirm the district court's proper application of the six-year statute of limitations in all respects.

IV. THE MARKETABLE TITLE ACT DOES NOT APPLY

Unable to meet the six-year-statute of limitations provided by Minn. Stat. § 541.05, Hempels contend that it does not apply at all. Instead, they argue, for the very first time, the Marketable Title Act, Minn. Stat. §541.023, provides the only limitations period and that period is 40 years, and therefore their claim is timely.¹⁰ The Court should refuse to adopt such an unfounded argument because 1) Hempels concede their claim sounds in contract and 2) the MTA does not apply to a contract claim.

¹⁰ Hempels' briefing below contained no reference to the MTA. During oral argument on the summary judgment motion Hempels made only vague references to 15 and 30 year statutes of limitations. App. 189, 193. Because Hempels raise the MTA for the first time on appeal, this Court should not consider it. *Thiele*, 425 N.W.2d at 582.

The fact that Hempels' claims are based on a contract cannot be reasonably disputed. The Hempels allege that the "right of first refusal" originated pursuant to "an agreement" dated February 3, 1981. App. 002. The Hempels recite the terms of this "agreement," the notices required by the "agreement," and the assignments of the "agreement" which allegedly provide recourse against defendants. App. 002-3. The Hempels seek the Court's determination that their agreement—the right of first refusal—is valid and enforceable, and that they are entitled to specific performance of that agreement. *Id.* In Count III, labeled "specific performance/breach of contract/damages," the Hempels allege that defendant Ingemann "breached" the duties set out in the right of first refusal, thus entitling the Hempels to specific performance, or, alternatively, damages. App. 005

When evaluating the timeliness of such contract claims relating to real estate, including agreements which convey an interest in real estate, Minnesota courts routinely apply the "general contract statute of limitations," Minn. Stat. §541.05, subd. 1. *See, e.g., Johnson v. Freberg*, 207 Minn. 61, 289 N.W.835 (1940) (applying six-year statute of limitations to claim of breach of obligation to pay note and mortgage;) *Block v. Litchy*, 428 N.W.2d 850 (Minn. Ct. App. 1988) (applying Minn. Stat. § 541.05, subd. 1 to claim of unjust enrichment based upon overpayments of land contract;) *Juster Steed*, 366 N.W.2d at 161 (applying Minn. Stat. § 541.05, subd. 1 to breach of contract claim arising out of purchase agreement for real estate.)

Despite the Hempels' admissions (a) that their claim originated in an agreement and (b) that their claimed damages were caused by Ingemann's breach of that agreement

in 1992, the Hempels nevertheless argue that Minn. Stat. §541.05, subd. 1, the “general contract statute of limitations[,] should not govern.” App. Br. at 26. In lieu of looking to the “general contract statute of limitations,” argue the Hempels, this Court should look to the MTA. According to the Hempels, their cause of action is “timely” under the MTA, which provides a “forty year statute of limitations for actions affecting the possession or title of real estate.” App. Br. at 26. The Hempels’ analysis does not withstand scrutiny.

The Marketable Title Act is a statutory process to eliminate “stale” real estate claims. The statute presumes abandonment of claims to title based on events, an instrument, or a transaction occurring more than 40 years prior to commencement of the action, unless within 40 years of the recording of the interest (1) a notice is registered, or (2) the interest holder can establish “possession” that provides notice to the title owners of the possessors’ interest in the property and is inconsistent with the title of the record owner. Minn. Stat. § 541.023 (1)-(6) (2006)

As the Supreme Court stated, “It is plain that the legislature intended to relieve a title from the servitude of provisions contained in ancient records which ‘fetter the marketability of real estate.’” *Wichelman v. Messner*, 250 Minn. 88, 99, 83 N.W.2d 800, 812, *see, also, Hersh Props., LLC v. McDonald's Corp.*, 588 N.W.2d 728, 734 (1999.) The MTA accomplishes this goal by deeming sufficiently ancient claims (specifically, those more than 40 years old) conclusively “abandoned,” so that such ancient claims do not fetter title.

The purpose of the Marketable Title Act is to “confirm the continuation of an interest in property” as well as eliminating stale claims to an interest in real estate.

Lindberg v. Fasching, 667 N.W.2d 481, 485 (Minn. Ct. app. 2003). Typically, the MTA applies in actions between persons/entities with an interest in property to determine whether one interest has been “abandoned” within the meaning of the MTA. *See, Id.* (dispute between owners of dominant and servient estates over easement rights); *Henly v. Chisago County*, 370 N.W.2d 920 (Minn. Ct. App. 1985) (dispute between township and landowner asserting title to that road).

The Hempels do not have such an “interest.” Indeed, the Hempels have no “interest” whatsoever in the Creek House Property.¹¹ They have not (and cannot) show that their claimed contract right, the right of first refusal, is an interest in the Creek House Property. Even if the Hempels had a fully developed option, they still would have no interest in the Property. An option to purchase real estate is considered an *in personam* right and therefore is not an interest in real estate. *Shaughnessy v. Eldsmo*, 222 Minn. 141, 145, 23 N.W.2d 362, 365 (1946) (noting that an option “[a]t best is but an irrevocable right or privilege of purchase and does not come within [the Statute of Frauds.]”).

Moreover, Hempels’ attempt to utilize the MTA to expand the time in which they can attack record title of Creek House Property, from 6 years to 40 years, is at odds with the very purposes of the MTA to prevent “ancient records from fettering the

¹¹ Consistent with this fact, the Hempels filed no notice of lis pendens against the Creek House Property. *See* Minn. Stat. § 557.02 (party may file notice of lis pendens in any action in which “title to, or any interest in or lien upon real property is involved or affected.”).

marketability of real estate.” *Hersh Props.*, 588 N.W.2d at 734, quoting Minn. Stat. § 541.023, subd. 5. Under the Hempels’ theory, the time period for mounting challenges to title would be extended—the opposite of MTA’s stated goal of enhancing marketability. Under the Hempels’ perverse construction of the MTA, they would have 40 years in which to seek enforcement of the right-of-first refusal agreement.

The MTA also expressly provides that it 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. Contrary to Hempels’ assertions, the analysis is not complex.

A contract claim, such as the right of first refusal, is subject to Minn. Stat. § 541.05 subd. 1. This contract limitations statute provides that its six-year limitation governs actions based upon “contract or other obligation, expressed or implied, as to which no other limitation is expressly prescribed[.]” The MTA does not contain any “express[.]” limitation for actions based upon “contract or other obligation.” To the contrary, a reading of subdivision 3 of the MTA makes it clear that any limitations on actions in the MTA is purposefully subordinate to any other statute of limitations. Hempels have provided no authority to suggest otherwise.¹²

¹² The Hempels seek comfort in *First National Bank of Elk River v. Independent Mortgage Servs.*, No. CX-95-1919, 1996 WL 229236 (Minn. Ct. App. 1996), an unpublished decision. Unpublished opinions are not precedential. Minn. Stat. § 480A.08(3). If anything, this case contradicts Hempels’ claims because it confirms that contract claims are not subject to the MTA.

V. **THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING HEMPELS' MOTION TO AMEND**

In addition to the appeal from the summary judgment decision, Hempels also appeal from the denial of their motion to amend to add Jean V. West as a defendant six months after Hempels first named her in the Complaint and after Trustees' summary judgment motion was under advisement. The decision whether to grant a motion to amend is within the discretion of the trial court. *Utecht*, 324 N.W.2d 652. Accordingly, denial of a motion to amend may be reversed on appeal only for an abuse of discretion. *Id.* The district court's thorough five-page analysis of the issues presented in that motion leaves no doubt the district court properly exercised its discretion. The district court's denial of the motion to amend must be affirmed.

A. **Motion to Amend Standards**

A party may amend a pleading by leave of court. Minn. R. Civ. P. 15.01. "A motion to amend a complaint is properly denied when the additional claim could not survive summary judgment." *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. Ct. App. 2001); *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 290 (Minn. 1992). "In addition, the liberality to be shown in the allowance of amendments to pleadings depends in part upon the stage of the action and in a great measure upon the facts and circumstance of the particular case." *Bebo*, 632 N.W.2d at 741; *Tomlinson Lumber Sales v. J.D. Harrold Co.*, 263 Minn. 470, 474-75, 117 N.W.2d 203, 207 (1962) ("the liberality to be shown in the allowance of amendments depends in part upon the stage of the action") (quotation omitted). It is not an abuse of discretion to deny a motion to amend based on the moving

party's lack of diligence. *Willmar Gas Co. v. Duininck*, 239 Minn. 173, 58 N.W.2d 197 (1953).

B. Hempels Have No Explanation for Undue Delay

Hempels learned about Jean V. West's purchase of the Property from Ingemann, brought a lawsuit, identified Jean V. West by name in the Complaint, yet waited six months before seeking to amend the Complaint to add Jean V. West as a defendant. The motion was made after the amendment deadline in the Scheduling Order and after Trustees' summary judgment motion had been briefed and heard. Even if delay were the only grounds for denial—and it is not—the district court was well within its discretion when it denied the Hempels' motion.

Hempels provided no explanation for their undue delay and general lack of diligence in seeking to bring claims against Jean V. West. Hempels offer no explanation on appeal, either. Because Hempels cannot dispute that they lacked justification for their delay, they argue that the district court erred in denying Hempels' motion because undue delay can never be a sufficient basis to deny a motion to amend. Hempels' argument contravenes Minnesota law, as parties seeking to amend a pleading must move with reasonable diligence. *See Willmar Gas Co.*, 239 Minn. at 176, 58 N.W.2d at 199.

The district court's order must also be affirmed because Hempels' amendment motion conflicted with the court's Scheduling Order, which imposed a deadline of March 13, 2006 to join third-parties to the action. R. App. 002. The court has even greater authority than in the motion to amend context to refuse to alter a scheduling order. Indeed, Rule 16.02 provides "A schedule shall not be modified except by leave of court

upon a showing of good cause.” Minn. R. Civ. P. 16.02. Hempels have made no showing of good cause as they have repeatedly failed to explain their lack of diligence and delay in asserting claims against Jean V. West.

C. Hempels’ Motion to Amend Was Futile

The district court’s denial of the motion to amend was also proper because amendment would have been futile. By the time of the district court’s ruling on the motion to amend, it had entered its order granting summary judgment. The district court reasoned that Jean V. West would be entitled to summary judgment on the same statute of limitations analysis applicable to the other defendants. Significantly, the court ruled that the right of first refusal was not binding on Jean V. West because she was neither an heir nor assign of Ingemann’s. App. 161 (“Also, Jean West is not an “heir” or “assignee” of Defendant Ingemann, as is required under the right of first refusal agreement.”).

Hempels argue on appeal that the district court erred because the right of first refusal obligations transferred to Jean V. West as part of Ingemann’s sale to the Wests. App. Br. at 30. Hempels do not, however, explain how this transfer of obligations was effected. Instead, Hempels simply argue that the right of first refusal is binding on Jean V. West as an “heir” or “assign” of Ingemann. The only evidence Hempels cite in support of their argument that Jean V. West was an assign was to argument of counsel during the motion to amend hearing. The record has since been corrected to reflect that counsel made no such admission and, instead, argued that Jean V. West was not an assign of Ingemann. R. App. 003-4. There is no assignment from Ingemann to Jean V. West in

the record.¹³ Jean V. West therefore cannot be the assign of Ingemann. Because the right of first refusal is binding, by its own terms, only upon heirs and assigns, it did not extend to Jean V. West.

The court also held that the right of first refusal was not breached by Jean V. West's subsequent transfer to the Creek House Trust because the right of first refusal by its terms applies only when there is a "bona fide written offer to purchase" the property. Here, Jean V. West transferred the property to the Creek House Trust as a gift. Hempels cite to standard boilerplate language in the deed effecting the transfer and assert that the transfer was a sale and not a gift. Hempels also argue that the district court erred in denying the motion to amend "on the assumption the transfer was without payment" and that it was "premature and wrong" to decide the issue without further discovery. App. Br. at 15. Hempels' argument conveniently fails to reference the only record evidence that goes directly to the issue — the affidavit of Curtis West, submitted in opposition to Hempels' motion to amend. It provides in pertinent part:

The Trustees of the Creek House Trust did not make an offer to purchase the Creek House Trust Property, nor did we pay anything for the Creek House Trust Property. Instead, the grantor, Jean V. West, gifted the property to the Trust for no consideration.

¹³ That Jean V. West is not an "heir" of Ingemann is patently obvious. Minnesota Statutes define "heirs" as "those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent." Minn. Stat. § 524.1-201(21). Ingemann is not dead. Jean V. West therefore can not be Ingemann's heir, nor is there any evidence she would be in the event of Ingemann's death.

App. 154. The district court's decision was based on fact, not assumption. Because Jean V. West did not breach the right of first refusal, even if it did apply to her, any amendment adding claims against Jean V. West would be futile. The district court's denial of the motion to amend was well within its discretion and should be affirmed.

VI. RIGHT OF FIRST REFUSAL DOES NOT BIND CURRENT OWNERS OF CREEK HOUSE PROPERTY

Hempels' final point of contention is that Hempels' claims should not have been dismissed because the right of first refusal may have some future effect.¹⁴ Once the district court dismissed the contract and Section 559.01 claims, there was no basis upon which Hempels could claim any future rights under the right of first refusal agreement vis-à-vis the Trustees and Ingemann. The court directly addressed these issues in its orders granting Trustees' summary judgment motion and denying Hempels' motion to amend.

¹⁴ Hempels' declaratory judgment claim (Count II of their Complaint) also specifically requested a declaration that Hempels were entitled to specific performance of the right of first refusal. Hempels do not directly pursue this argument on appeal, but as the district court held, the "concurrent remedy rule" is an independent basis for affirming the dismissal of the declaratory judgment claim. A. 139-40.

Under the "concurrent remedy rule," courts have found that "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy." *U.S. ex rel. Zissler v. Regents of the Univ. of Minnesota*, 992 F.Supp. 1097, 1110 (D. Minn. 1998), quoting *Cope v. Anderson*, 331 U.S. 461, 464, 67 S.Ct. 1340, 1341, 91 L.Ed. 1602 (1947). "Specific performance is an equitable remedy addressed to the sound discretion of the trial court." *Flynn v. Sawyer*, 272 N.W.2d 904, 910 (Minn. 1978). Accordingly, because Hempels' legal remedy for breach of the right of first refusal contract is barred by the statute of limitations, Hempels' equitable remedy of specific performance is also barred by the concurrent remedy rule.

The only way that Hempels' right of first refusal could have any prospective effect against the parties is if the right of first refusal, by its own terms, is operative. But the right of first refusal explicitly states that it is binding only upon Ingemann's heirs and assigns. As explained in Section V(C) above, Ingemann did not assign the right of first refusal to Wests. Because the present owners of the Creek House Property are not Ingemann's heirs or assigns, the right of first refusal has been extinguished.

Hempels try to avoid this obvious conclusion contending that the right of first refusal runs with the land. There is no Minnesota authority, however, that holds that rights of first refusal run with the land. To the contrary, rights of first refusal are not interests in land, they are creatures of contract. *See Park-Lake Car Wash*, 352 N.W.2d at 411 ("a right of first refusal is a binding option contract . . ."). And the agreement itself limits its binding effect to Ingemann's heirs and assigns, none of whom are the owners of the Creek House Property.¹⁵

Hempels cite *M. L. Gordon Sash & Door Co. v. Mormann*, 271 N.W.2d 436 (Minn. 1978) in support of their argument. *Gordon* can provide little guidance to this Court because it does not address a statute of limitations defense and is therefore not controlling law in this situation. In fact, because of the complexity of its facts and the narrowness of its holding, the case has almost no application to this case at all. The

¹⁵ Hempels' argument regarding whether subsequent purchasers take with notice of a recorded interest are immaterial. It does not matter in this context whether Jean V. West or the Creek House Trust knew of the right of first refusal. Even if they did, as long as they were not "heirs or assigns" of Ingemann, it did not encumber their ability to convey the property. None of the cases cited by Hempels change this result.

Gordon court stated at the outset of its analysis that “the general rule [is] that an option to purchase land conveys no interest in the property.” *Id.* at 440. The Trustees have no quarrel with this general rule. The court then stated that “we might apply the general rule” (*i.e.*, refuse to enforce the option) if not for the very specific and unique facts of that case which compelled a different result. *Id.* (emphasis added). In fact, solely because of those unique circumstances, the court refused to apply the general rule. In a narrowly tailored opinion, including a holding that the contract at issue was not actually “a true option agreement”, the court held that “[u]nder all of these circumstances we hold that [the prospective purchaser] has an equitable interest in the property superior to Gordon’s rights as a judgment creditor.” *Id.*

The *Gordon* case does not address rights of first refusal which have yet to ripen into an option – such as is the situation here – rights that are never properly exercised, or statutes of limitations. Indeed, in *Gordon*, the creation of the option contract in 1975 and the final resolution of the case in 1978 took less than three years – well inside the six-year statute of limitations.

Harba v. Federal Land Bank of St. Paul, 449 N.W.2d 442, 447 (Minn. Ct. App. 1989) and *AG Services of America v. Schroeder*, 693 N.W.2d 227 (Minn. Ct. App. 2005) are similarly unavailing as they analyze the effect of rights of first refusal created to help family farmers redeem their land following foreclosure under a specific statutory framework that is inapplicable here. See Minn. Stat. § 500.24, et. seq.

Finally, as the district court explained, Hempels are not entitled to a declaratory judgment because their underlying claims have been extinguished. “A party seeking a

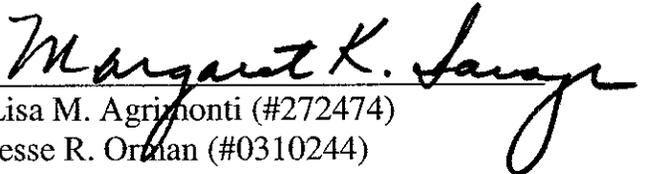
declaratory judgment must have an independent, underlying cause of action based on a common-law or statutory right.” *Alliance for Metropolitan Stability v. Metropolitan Council*, 671 N.W.2d 905, 916 (Minn. Ct. App. 2003). Hempels’ other claims, for breach of contract and relief under Minn. Stat. § 559.01, have been dismissed. Accordingly, because the “Uniform Declaratory Judgments Act . . . is not an express independent source of jurisdiction” and because it “cannot create a cause of action that does not otherwise exist,” Hempels’ cannot maintain their declaratory judgment claims. *Id.* at 915-16.

CONCLUSION

The district court properly granted summary judgment on all claims. This Court should affirm. The Court should refuse to accept Hempels' novel arguments raised for the first time on appeal and, in part, based on non-Minnesota law. The district court thoroughly and properly analyzed the Hempels' claims and determined summary judgment was warranted. The Trustees respectfully request that the Court of Appeals affirm the judgment.

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