

IN THE IOWA SUPREME COURT

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Supreme Court No. 18-0261  
Black Hawk County No. ESPR059855

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John E. Rottinghaus and Dessie Rottinghaus  
Claimants/Appellants

vs.

Lincoln Savings Bank, Fiduciary of the Estate of Sandra R. Franken  
Defendant/Appellee

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CLAIMANTS-APPELLANTS  
JOHN E. ROTTINGHAUS AND DESSIE ROTTINGHAUS'  
BRIEF

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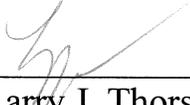
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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE  
REQUIREMENTS**

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) and 6.1103(4) because this Brief contains 2,940 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
  
2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Times New Roman 14 font.

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## STATEMENT OF ISSUE PRESENTED FOR REVIEW

### I. DID THE TRIAL COURT COMMIT ERR IN RULING THAT IOWA CODE §614.17A BARRED THE CLAIM OF MR. AND MRS. ROTTINGHAUS IN THE ESTATE OF SANDRA KRAMER?

1. Was Iowa Code §614.17A timely raised as a defense?
2. Was the Estate of Sandra Franken a proper party to raise Iowa Code §614.17A as a defense?
3. Does the language of Iowa Code §§614.17A or 614.24 bar the action by the Claimants?

*Adkinson Breeding*, 56 Iowa 26, 8 N.W. 685 (1881)

*Calamus Cmty. Sch. Dist. in Clinton Cty. v. Rusch*, 299 N.W.2d 489,490 (Iowa 1980)

*Fjords N., Inc. v. Hahn*, 710 N.W.2d 731, 736 (Iowa 2006)

*Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 202 (Iowa 2002)

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## **ROUTING STATEMENT**

This matter should be decided by the Supreme Court. It involves unique issues that have far ranging effects that have to this point in time only been examined and determined in a slip opinion by the Iowa Court of Appeals, *West Lake Properties, L.C. v. Greenspon Property Management, Inc.*, 2017 WL 4317297 (Iowa App. September 27, 2017). Such a determination has widespread significance for numerous rights of first refusal contained not only in distinct individual documents, but also in deeds, mortgages, and other documents that may grant a party the right to purchase a property (normally for the same price and on the same terms) as the seller is willing to sell to a third party. Iowa R. App. P. 6.1101(3).

## **STATEMENT OF THE CASE**

This action was brought by John E. Rottinghaus and Dessie Rottinghaus, as claimants against Michael D. Rottinghaus in the Estate of Sandra R. Franken, through their attorney at the time (Claim in Estate, App. pp. 14-15). The Claimants asked for a hearing on their claim. (Request for Hearing Upon Claim, App. p. 17). The claimed amount sought against the Estate was \$195,000.00 for the sale of property owned by the Decedent, Sandra Franken f/k/a Sandra Kipp. (See Exh. A attached to Claim, App. pp. 14-16). In summary, the Deed from Mr. and Mrs.

Rottinghaus to Sandra Franken and her husband at the time the Deed was signed (James Kipp) it reserved the right of first refusal to Mr. and Mrs. Rottinghaus to repurchase the property. (The Deed was signed December 21, 1973). The Estate filed a Notice of Disallowance of the Claim. (Disallowance, App. p. 18). This matter was scheduled for a non-jury trial on February 23, 2017. (Trial Scheduling Order, App. pp. 24-26). The Claimants filed a Motion to Disqualify Counsel for the Estate because both the same law firm had acted as attorneys for the Decedent and Mr. and Mrs. Rottinghaus for many years prior to the claim being made in this Estate. (*See* Motion to Disqualify Counsel, pp. 1-2, App. pp. 27-28; Affidavit of Dessie Rottinghaus, p. 1, App. p. 82). The attorneys for the Estate of Sandra Franken agreed to withdraw from this litigation which caused a delay in trying this matter. (Defendant's Response to Motion to Disqualify Counsel, pp. 1-2, App. pp. 33-34). The trial was reset for December 6, 2017 at 9:00 a.m. (Trial Scheduling Order March 21, 2017, App. p. 36).

The Estate filed a Motion for Summary Judgment on October 6, 2017, and for the first time argued that Iowa Code §614.17A provides a 10 year limitations period for bringing the type of claim that Mr. and Mrs.

Rottinghaus made in this case. (Defendant's Motion for Summary Judgment, App. pp. 39-40).

The Claimants resisted the Motion for Summary Judgment on October 25, 2017. (Claimants' Resistance to Defendant's Motion for Summary Judgment, App. pp. 73-74).

The District Court decided based almost entirely on Iowa Code §614.17A (1) and the recent decision by the Iowa Court of Appeals, *West Lake Properties, L.C. v. Greenspon Property Management, Inc.*, 2017 WL 4317297 (Iowa App. September 27, 2017) that the right of first refusal was an interest in real estate and therefore falls within the scope of Iowa Code §614.17A. The result of this interpretation was that the Court found that the right of first refusal in the 1973 Deed was barred by Iowa Code §614.17A (Court Order January 19, 2018, App. pp. 97-96).

This appeal followed. (Notice of Appeal filed February 13, 2018, App. pp. 98-99).

### **STATEMENT OF THE FACTS**

Dessie Rottinghaus and her husband, John Rottinghaus, sold a portion of the farm owned by Dessie Rottinghaus to her sister-in-law, Sandra Kipp, and her husband, James Kipp, in 1973. (*See* Exh. A attached

to Defendant's Statement of Undisputed Material Facts, App. p. 50 and Inventory p. 1, App. p. 5). The Deed contained the following language:

“Grantees hereby agree that they will not sell or otherwise convey the premises described above to any person other than grantors without first giving grantors the opportunity to purchase the premises at a price equal to any bona fide offer to purchase the premises made by any other person. In the event any person offers to purchase the said premises from the grantees, the grantees shall notify the grantors immediately and grantors shall have fifteen (15) days to purchase the property at the same price as offered.”

The language was written by the attorneys for Mr. and Mrs.

Rottinghaus. Their attorney was Louis Beecher with the Beecher Law Firm in Waterloo, Iowa. (*See* Motion to Disqualify Counsel, pp. 1-2, App. pp. 27-28). In recent years their attorney at that same firm has been Theresa Hoffman. (Motion to Disqualify Counsel, p. 1, App. p. 27).

This case was in some respects unique because of the involvement of the same firm with both the Claimants and the Decedent for over 40 years.

An Estate was opened for Sandra Franken (f/k/a Sandra Kipp) in Black Hawk County. During the pendency of the Estate, the Executor decided to sell the property in question. The Executor did not notify the Claimants of the impending sale of the property and the first inkling Mr. and Mrs. Rottinghaus had of the sale was when the new buyers started to take down a fence near their property. (There is no claim by the Executor

that notice was given to the Rottinghauses). The Franken property was surrounded by the Rottinghaus property and so as to preserve the Rottinghaus property if the Franken (Kipp) property was ever sold they wanted the first right of refusal to match any third party offer for the property. (Tr. hearing November 16, 2017, pp. 13-14).

When Mr. and Mrs. Rottinghaus found out the property had been sold, they filed their claim in the Estate to get reimbursement for their lost right. The puzzling part of all this matter is that the attorney for the Estate from the Beecher firm did not let them know that this was occurring or about to occur. Unless they were notified of an offer, they had no right to exercise their right of first refusal. It is puzzling why the Estate attorney would not do this, in particular, since Mr. and Mrs. Rottinghaus had been in to see Theresa Hoffman recently about their estate plan. (D. Rottinghaus Affidavit, p. 1, App. p. 82). Mr. and Mrs. Rottinghaus filed the claim in the Estate when the sale was a *fait accompli*.

## ARGUMENT

### **I. The Trial Court erred in determining that Iowa Code §614.17A barred the claim of Mr. and Mrs. Rottinghaus in the Estate of Sandra Franken.**

#### **A. Preservation of Error**

All of the issues set forth herein have been preserved for appellate review, pursuant to Iowa R. App. P. 6.101, 6.102 and 6.103. The issues were raised, submitted, and decided by the District Court and all materially affect the final decision, therefore, establishing a basis for appellate review.

#### **B. Scope of Review**

The scope of review on a Motion for Summary Judgment is for correction of errors at law. *See Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 202 (Iowa 2002).

#### **C. Analysis**

1. Iowa Code §614.17A was not timely raised as a defense:

The Defendant, Estate of Sandra Franken, originally only raised Iowa Code §614.24(1) as a defense to this action and that Section was only raised as a defense in Defendant's Trial Brief filed September 6, 2016. (*See* Defendant's Brief,

pp. 2-3, App. pp. 20-21). Going back to the actual filing of the claim in this matter, a claim may not have been necessary because the cause of action arose after the Decedent's death – not prior to it. See *In re Estate of Harsh*, 207 Iowa 84, 218 N.W. 537 (1928); *Adkinson Breeding*, 56 Iowa 26, 8 N.W. 685 (1881). The claim in this matter is a claim at law in this probate proceeding. See Iowa Code §633.33.

Iowa Code §633.34 provides that all actions (except as otherwise provided in the Probate Code) shall be governed by the Rules of Civil Procedure.

Iowa Code §633.444 provides that a personal representative must move or plead to the claim within 20 days as though the claim was a petition in a regular law action. The District Court properly determined that the “bar of limitations or statute of limitations” which was raised for the very first time in this Motion for Summary Judgment was primarily an affirmative defense. (Opinion unnumbered p. 4, App. p. 95).

However, the Court went on to find that this matter could be raised for the first time by a Motion for Summary Judgment. The District Court cited the case of *McElroy v.*

*State*, 637 N.W.2d 488, 497 (Iowa 2001) as authority to allow this type of dilatory assertion of an affirmative defense. The District Court did not engage in the type of analysis that the Supreme Court engaged in when deciding the *McElroy* case. In particular, the Supreme Court was deciding that two defenses that were unknown to the Defendant at the time an answer was due may be raised later in the District Court's discretion. *McElroy*, pp. 497-498.

The case now before the Court did not involve a new defense. Iowa Code §614.17A has been in the Code for over 20 years. That Code Section was raised as a defense in the Defendant's Memorandum of Authorities a year and three months after the Claimants filed their claim and a year and two months after the Estate disallowed the claim (without citing either Iowa Code §614.24(1) or Iowa Code §614.17A). (See Tr. pp. 8, 11-12, setting forth this argument to the District Court). In addition, Iowa R. Civ. P. 1.419 provides that:

“Any defense that a contract or writing sued on is void or voidable, or was delivered in escrow, or which alleges any matter in justification, excuse, release or discharge, or which admits the facts of the adverse pleading but seeks to avoid their legal effect, must be specially pleaded.”

2. The Estate is not proper party to raise Iowa Code §614.17A as a defense:

The next inquiry that the Court should undertake is whether the Estate is a proper party to assert the affirmative defense of Iowa Code §614.17A. By its very terms, the Code Section may only be raised by "...the holder of the record title to the real estate in possession." Iowa Code §614.17A(1)(b). In this instance, the Estate was not in possession of the property, the Estate had sold the property. (See Def's Statement of Undisputed Facts, ¶ 10, p. 3, App. p. 49). The Code Section makes the language above-quoted a requirement to assert this defense and in this case, the Estate does not qualify. *See Schroeder v. Buegel*, 371 N.W.2d 178, 179 (Iowa Ct. App. 1985).

3. The language of Iowa Code §614.17A (or §614.24) should not bar this action:

In order to determine that the affirmative defense provided by Iowa Code §614.17A applies to the language of the right of first refusal, the Court needs to make a determination as to whether the vague language used by Iowa

Code §614.17A of “an interest in or claim to real estate...” applies in this case.

The Court should view Iowa Code §§614.17A and 614.24 *in pari materia* because they are both part of the same chapter in the Iowa Code with the same purposes. *See Northwestern Bell Telephone Co. v. Hawkeye State Telephone Co.*, 165 N.W.2d 771, 773 (Iowa 1969).

The Court, if only faced with the language of Iowa Code §614.24(1), would have an easier time making that determination because the words “reversion” or “use restriction” have certain defined meanings under Iowa law which meaning would not apply to a right of first refusal. The Defendant abandoned Iowa Code §614.24(1) as a defense to this action and suddenly and belatedly switched to the claimed affirmative defense of Iowa Code §614.17A. Either Iowa Code §614.24(1) or Iowa Code §614.17A have the purpose to simplify title examination by shortening the title search. *See Calamus Cmty. Sch. Dist. in Clinton Cty. v. Rusch*, 299 N.W.2d 489,490 (Iowa 1980). It would seem that looking at Iowa Code §614.24 which predates Iowa Code §614.17A by

quite a number of years would be instructive as to the legislative intent and meaning of the language “interest or claim to real estate” as used in Iowa Code §614.17A(1).

With regard to a right of first refusal, as long as the terms are specific, the right does not interfere with the transfer of interests in real estate. “[that] statute applies to claims based on three types of provisions (reversion interests, reverted interests, and use restrictions) contained in one or four types of instruments (deed, conveyance, contract, or will).” (Referring to Iowa Code §614.24). *Fjords N., Inc. v. Hahn*, 710 N.W.2d 731, 736 (Iowa 2006). The statute defines “use restriction” as “a limitation or prohibition on the rights of a landowner to make use of the landowner’s real estate, including but not limited to limitations or prohibitions on commercial uses, rental use, parking and storage of recreational vehicles and their attachments, ownership of pets, outdoor domestic uses, construction and use of accessory structures, building dimensions and colors, building construction materials, and landscaping.” Iowa Code §614.24 (2015). For the purposes of the statute, the term does not

include positive easements or cost sharing agreements between adjacent property owners. *Id.* The statute does not define “reversion” or reverted interest.” However, a treatise explains the terms:

The ordinary “use” was a limitation on the use of land, and a “reversion” was a right of the grantor, or his assigns, to retake the land at any time in the future if a designated event occurred or did not occur. For example, a provision in a grant that the land granted be used only for certain purposes, or not be used for forbidden purposes, constituted a “use,” while a provision that upon the happening or nonhappening of a certain event title would “revert,” constituted a “reversion.”

Marshall, Iowa Title Opinions and Standards, Second Edition, 1982, §12.3(A), p. 270.

Based on these definitions, the right of first refusal contained in the subject deed does not meet the definitions of “reversion” or “use restriction.” First, the right of first refusal is not a reversion. The Claimants do not have the right to “retake” the property upon the occurrence of any designated event. Title in the property does not “revert” to the grantor upon the happening or nonhappening of any event. The grantor simply has the right to match any sale price. The

distinction makes sense in light purposes of either Iowa Code §614.17A or Iowa Code §614.24.

A classic reversion requires a prospective buyer to take title subject to the risk that at some time in the past the “triggering event” for reversion occurred thereby divesting the prospective seller of title. *See Long v. Crum*, 267 N.W.2d 407, 409 (Iowa 1978). On the other hand, the plain language in the deed at issue does not divest title. While specific performance is often the appropriate remedy to enforce a right of first refusal, the Iowa Court of Appeals has also acknowledged that monetary damages may be appropriate if damages are adequate. *Mercy Hosp. v. McNulty*, No. 14-0241, 2015 WL 576016, at \*4 (Iowa Ct. App. Feb. 11, 2015). Again, the right of first refusal at issue does not divest title upon the occurrence of any event and therefore does not constitute a “reversion” under the terms of the statute.

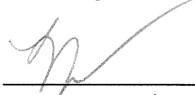
Similarly, the right of first refusal is not a “use restriction.” The right does not limit the grantee’s use of the property in any manner. A right of first refusal does place certain limitations on a property owner’s ability to sell the

property. Williston on Contracts § 67:85 (4<sup>th</sup> ed.) (2014). However, the statutory definition limits the property rights restricted by a “use restriction” to only those rights of a landowner to “make use” of the real estate. The statutory examples make no reference to rights related to the sale of the property. While the right of first refusal places certain restrictions on a property owner’s right to freely alienate the property (no sale to a third party without honoring the right of first refusal), it does not outright restrict the owner’s ability to sell the property or to maximize the property value in any such sale. The right of first refusal also does not place the same risks on a potential third party buyer as a traditional use restriction would. While a use restriction would potentially place limits on the use of the property in perpetuity, the right of first refusal at issue applies only until the grantee first attempts to sell the property and at that time, the grantor would exercise the right and re-purchase the property, or the third-party purchaser would purchase the property free of any subsequent restrictions.

The analysis contained in a recently decided case of *West Lake Properties, L.C. v. Greenspon Property Management, Inc.*, 2017 WL 4317297 (Iowa App. September 27, 2017) does not analyze the right of first refusal in light of either the property examination standards of The Marshall Treatise nor the other statutory provision that the Defendant estate originally claimed applied as a bar in the case (Iowa Code §614.24). The Claimants should be able to enforce their rights of first refusal or be compensated for violation of those rights.

### CONCLUSION

The Claimants pray that the summary judgment entered by the District Court against the Claimants be reversed and the case remanded to District Court for the reasons set forth above herein and for such other relief as the Court deems just and equitable.

By: 

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ATTORNEYS FOR APPELLANTS/CLAIMANTS

## REQUEST FOR ORAL ARGUMENT

Appellants, John E. Rottinghaus and Dessie Rottinghaus, request oral argument on the issue appealed in this case. Notice of this request is hereby given to the Appellee.

By:



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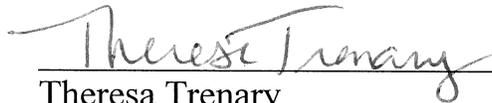
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## CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that on the 19<sup>th</sup> day of June, 2018, I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

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