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IN THE IOWA SUPREME COURT

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

John E. Rottinghaus and Dessie Rottinghaus
Claimants/Appellants

vs.

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

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

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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 1,066 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.

ATTORNEYS FOR APPELLANTS/CLAIMANTS

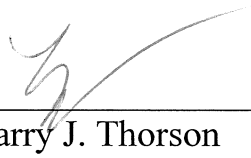

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ISSUES PRESENTED FOR REVIEW

A. Was Iowa Code §614.17A a Timely Raised Affirmative Defense?

McElroy v. State, 637 N.W.2d 488, 497 (Iowa 2001)

B. Can the Plain Language of the Statute be Asserted at Any Time?

Neal v. Annett Holdings, 814 N.W.2d 512, 519 (Iowa 2012)

State v. Armstrong, 203 N.W.2d 269, 272 (Iowa 1972)

West Lakes Properties, L.C. case 2017 WL 4317297

I. REPLY TO DEFENDANT'S ARGUMENT

A. Iowa Code §614.17A Was Not a Timely Raised Affirmative Defense

The Defendant presented an affirmative defense (Iowa Code §614.17A) to the cause of action by the Plaintiff only at the last minute (in its Motion for Summary Judgment). The initial pleadings in the case, contrary to standard pleading practice did not disclose any affirmative defense. The Defendant has never stated why it should be excused from the requirement to raise an affirmative defense in its pleadings but rather has tried to focus on whether the Plaintiff has done enough to resist this dilatory defense (or defenses if you count its initial stab at a defense which was Iowa Code §614.24).

The Defendant claims that the Plaintiff misreads the case of *McElroy v. State*, 637 N.W.2d 488, 497 (Iowa 2001) as to affirmative defenses and when they can be asserted. In the *McElroy* case, the Defendant not only did not timely file affirmative defenses but also failed to file a timely answer. *McElroy* at 493-494. The Court in general looked at the deadlines for filing and in that case that involved extensive discovery did not find an abuse of discretion on the part of the trial court to allow a late filed answer. *McElroy* p. 498. The Court looked at the role of excusable neglect and

good cause as reasons for a late answer and dilatory filing of affirmative defenses and stated the following:

> ""Excusable neglect" has been defined as "that neglect which might have been an act of a reasonably prudent person under the circumstances." 61A Am.Jur.2d *Pleading* § 235, at 224; *see Johnson Bank v. Brandon Apparel Group, Inc.*, 246 Wis.2d 840, 847, 632 N.W.2d 107, 111 (2001). Thus, if a defendant can assert reasonable grounds for failing to comply *495 with the applicable time requirements, excusable neglect is satisfied. *See Johnson Bank*, 632 N.W.2d at 111. In determining whether neglect in a certain case is excusable, the court must consider all of the surrounding facts and circumstances of the late filing. *Davis v. Immediate Med. Servs., Inc.*, 80 Ohio St.3d 10, 14, 684 N.E.2d 292, 296 (1997); 61A Am.Jur.2d *Pleading* § 227, at 219, § 235, at 223; 71 C.J.S. *Pleading* § 169, at 222.
>
> "Good cause" also considers the impact of the late answer under all of the circumstances. *See Millington v. Kuba*, 532 N.W.2d 787, 791-92 (Iowa 1995). Thus, another factor to consider in determining "good cause" is whether the plaintiff would suffer prejudice by the filing of the untimely answer. 61A Am.Jur.2d *Pleading* § 234, at 222. If the proposed answer would substantially change the issues in the case so as to cause unfair surprise to the plaintiff, the court will likely find prejudice. *Chao v. City of Waterloo*, 346 N.W.2d 822, 825-26 (Iowa 1984); *see Lynch v. City of Des Moines*, 454 N.W.2d 827, 838 (Iowa 1990); *Bennett v. City of Redfield*, 446 N.W.2d 467, 475 (Iowa 1989). However, if the proposed answer simply reiterated the theory the defendant had been advancing throughout the litigation, no prejudice will likely be found. *Chao*, 346 N.W.2d at 826. Furthermore, the court should consider whether the filing of the answer would further the interests of justice. *See Lynch*, 454 N.W.2d at 838; *Meier ex rel. Meier v. Champ's Sports Bar & Grill, Inc.*, 241 Wis.2d 605, 628, 623 N.W.2d 94, 105 (2001); 61A Am.Jur.2d *Pleading* § 233, at 221-22. Another consideration is whether the defendants presented a meritorious defense. *See* 61A Am.Jur.2d *Pleading* § 227, at 218; 71 C.J.S. *Pleading* § 169, at 222."

The Plaintiff has claimed prejudice from this litigation "tactic" if that is what it is. The failure to plead a proper affirmative defense obviously puts the Plaintiff at a severe disadvantage when a motion for summary judgment is filed requiring an answer within 15 days and further when discovery has run and not been conducted on a ground that was never asserted until the 11th hour in this case.

B. The Plain Language of the Statute Can be Asserted at Any Time

In the name of interpretation of the statutory language the Defendant asks the Court to change that language to avoid an "absurdity." Appellee's Brief p. 16. This is a strange argument from a party who a couple of pages later in their Brief (pp. 18-19) correctly state the law by quoting from *Neal v. Annett Holdings*, 814 N.W.2d 512, 519 (Iowa 2012) where the Iowa Supreme Court stated "[w]hen interpreting a statute, we will not look beyond the express terms of the statute if the text of the statute is plain and its meaning is clear." Iowa Code §614.17A is clear when it states that an action shall not be maintained if the "action is against the holder of the record title to the real estate in possession." Iowa Code §614.17A(1)(b). There is no action against the holder of the record title to the real estate in possession in this case but rather against the estate that ignored the right of first refusal. In the *West Lakes Properties, L.C.* case 2017 WL 4317297,

the case involved the record titleholder in possession of the property (West Lakes). The issue of an improper party raising this defense was not presented to the Court of Appeals in that case.

This is not some hidden language that the Claimants are is raising but is contained on the face of the statute. The Court should take judicial notice of the language of the statute and interpret it accordingly. *See State v. Armstrong*, 203 N.W.2d 269, 272 (Iowa 1972).

The Plaintiffs will not respond to each individual argument that the Estate is raising as "additional" grounds for supporting the Trial Court's entry of summary judgment except to say that those grounds: merger, statute of frauds, breach of contract, and statute of limitations were all urged in the Motion for Summary Judgment or at the hearing on that Motion and were implicitly rejected by the Trial Court or explicitly rejected in the case of the Doctrine of Merger as it was set forth by the Estate for any transfers after the 1973 Deed. (*See* Opinion, unnumbered p. 4, App. p. 95).

CONCLUSION

For the reasons set forth herein, the Plaintiffs pray that this Court overturn the summary judgment motion entered in favor of the Defendant and for such other relief as the Court deems just and equitable. The

Plaintiffs incorporate their arguments set forth in the original brief as well as this reply brief.

By: _____

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that on the 19th 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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