IN THE SUPREME COURT OF IOWA

Supreme Court No. 17-0791

Jackson County No. 07491 EQCV 027767

RONALD D. KUNDE
Plaintiff-Appellant
vs.
ESTATE OF BOWMAN,
Defendant-Appellee

Appeal from the Iowa District Court for Jackson County

Honorable NANCY S. TABOR, Judge

APPELLEE'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED FEBRUARY 21, 2018

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QUESTIONS PRESENTED FOR FURTHER REVIEW:

I. Whether the Court of Appeals erred in holding that Plaintiff's promissory estoppel claim was not barred due to the fact that an express agreement relating to the subject matter in dispute existed between the parties?

II. Whether the Court of Appeals erred in holding that three-element promissory estoppel test in *McKee v. Isle of Capri,* 864 N.W.2d 518, 532 (Iowa 2015) was not applicable?

III. Whether the Court of Appeals erred in applying the four-element test in *Schoff v. Combined Ins. Co. of Amer.*, 604 N.W.2d 43, 48 (Iowa 1999) to the summary judgment record in this case?

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STATEMENT SUPPORTING FURTHER REVIEW

Further review of this case is warranted on five grounds. First, the Iowa Court of Appeals erred as a matter of law in holding that the promissory estoppel claim was not barred due to the fact that an express lease agreement existed between the parties regarding the subject matter of the promissory estoppel claim. *See Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777, 791 (Iowa 1985). "[A]n express contract and implied contract cannot coexist with respect to the same subject matter, and the former supersedes the latter."

Second, the majority opinion from the Court of Appeals in this case squarely "conflicts with a decision of this court," thus warranting further review. See Iowa R. App. P. 6.1103(b)(1). In *McKee,* the most recent case by this Court involving a promissory estoppel claim, a plaintiff is required to show: (1) a clear and definite oral agreement; (2) proof that plaintiff acted to his detriment in reliance thereon; and (3) a finding that the equities entitle the plaintiff to this relief. *Id.,* 864 N.W.2d 518, 532 (Iowa 2015).

However, the majority in the Court of Appeals decision, did not find *McKee* to be controlling. Slip. Op. p. 8-9. Rather, the majority reversed the district court's grant of summary judgment holding that a four-element test in *Schoff,* N.W.2d 43, 48 (Iowa 1999) was instead controlling. This four-element test requires:

> (1) a clear and definite promise;
>
> (2) the promise was made with the promisor's clear understanding that the promisee was seeking an assurance upon which the promisee could rely and without which he would not act;
>
> (3) the promisee acted to his substantial detriment in reasonable reliance on the promise; and
>
> (4) injustice can be avoided only by enforcement of the promise.

Third, as pointed out in the majority opinion, Iowa appellate cases have been completely inconsistent as to which elemental test should be applied in deciding claims based on promissory estoppel. Slip Op. p. 6-7. This further warrants a definitive opinion from this Court to resolve future inconsistencies.

Fourth, even if the majority opinion was correct and that Iowa law regarding promissory estoppel involves the application of a four-element test set forth in *Schoff,* summary judgment is still appropriate and should be granted based on the summary judgment record in this case.

Lastly, this case presents an opportunity for the Iowa Supreme Court to address and clarify a question of significant public importance involving an important and common legal doctrine and its interplay with common farm leases. Further review also presents an opportunity to bring closure to this case. *See* Iowa R. App. 6.1103(b)(3) and (4).

STATEMENT OF THE CASE

Nature of the Case: This case involves the claims of a farm tenant (Ronald Kunde ("Kunde") against his former landlord (Arthur Bowman ("Bowman")[1] after the yearly farm lease was terminated and Bowman's 102 acre homestead[2] was placed up for auction by his power of attorney (Diane

[1] Arthur Bowman died on March 14, 2016 and his estate was substituted in the case pursuant to Iowa R. Civ. P. 1.221 and Iowa Code 611.22.
[2] App. 171, *Engelkins dep. t.* p. 7, lines 5-7.

Engelkins ("Engelkins")[3] in order to spend down for Title 19 purposes after Bowman was placed in a nursing home due to dementia. App. 91-116 and 170-173

Among the claims originally asserted by Kunde was that he either had an oral contract or an oral option to purchase the farm from Bowman. Alternatively, Kunde also argued that the equitable claims of unjust enrichment promissory estoppel, and quantum meruit allowed him to also recover from Bowman.

This is Kunde's second appeal in this case. On August 6, 2015, after a jury verdict was returned in Kunde's favor, the District Court granted Bowman's motion for directed verdict and dismissed Kunde's case. After post-trial motions were denied, Kunde filed a timely notice of appeal on September 3, 2015.

On September 28, 2016, the Court of Appeals affirmed the District Court's decision that directed verdict on Kunde's

[3] Engelkins is Bowman's daughter and executor of his estate. She also acted as his power of attorney during the later years of Bowman's life assisting him with handling of his finances upon the passing of her mother who was Bowman's wife. App. 171, *Engelkins dep. t.,* p. 9, lines 13-20.

oral contract claims, but reversed and remanded back to the District Court for a new trial on Kunde's equitable claims.[4]

On remand from the Court of Appeals, Bowman filed a motion for summary judgment against Kunde's remaining equitable claims on March 24, 2017. On May 19, 2017, following briefing by the parties and a hearing, the District Court granted summary judgment and dismissed all of Kunde's remaining claims.

On May 19, 2017, Kunde filed a timely notice of appeal. Following briefing by the parties, this case was transferred on November 29, 2017 to the Court of Appeals' non-oral argument calendar.

Disposition from the Court of Appeals: On February 21, 2018, the Court of Appeals filed its opinion which affirmed the district court's dismissal of Kunde's equitable claims of unjust enrichment and quantum meruit holding that since the parties had an express agreement in the form of the written

[4] On October 7, 2016, Bowman's petition for rehearing was denied with discussion by the Court of Appeals on October 7, 2016. Both parties sought further review, but were denied by order dated November 22, 2016 and procedendo was issued on December 5, 2016.

lease agreement, that Kunde could not claim damages based upon unjust enrichment or quantum meruit.

However, the panel split on the issue of whether summary judgment was properly granted on Kunde's promissory estoppel claim. First, the panel did not find the written lease agreement to be preclusive to Kunde's promissory estoppel claim. Second, while noting the three-element test in *McKee*, the majority reversed the grant of summary judgment finding that the four-element test set in *Schroff* should have been applied in analyzing Kunde's promissory estoppel claim and that a material dispute of facts existed over the issue of whether a clear and definite promise was made to Kunde. The opinion is wrong for three reasons, all of which warrants this Court's review.

I. SINCE AN EXPRESS CONTRACT EXISTS ON THE SUBJECT MATTER, KUNDE'S PROMISSORY ESTOPPEL CLAIM FAILS AS A MATTER OF LAW

Preservation of Error: Error was preserved by the timely filing of this application for further review. Furthermore, as a successful party, Bowman is not required to "appeal from a finding or conclusion of law not prejudicial, no

matter how erroneous, unless the judgment itself is adverse. This rule also applies to cross-appeals." *Fankell v. Schober*, 350 N.W.2d 219, 221 (Iowa App. 1984). An erroneous decision by the district court can be affirmed on appeal based on a different ground that was properly raised at trial. *State ex rel. Miller v. Nat'l Farmers Org.*, 278 N.W.2d 905, 906 (Iowa 1979).

Standard of Review: Appellate review of grants of summary judgment is correction of errors at law. *Freeman v. Grain Processing Corp.,* 848 N.W.2d 58, 65 (Iowa 2014). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Rosauer Corp. v. Sapp Dev., L.L.C.,* 856 N.W.2d 906, 908 (Iowa 2014). The record is to be reviewed in the light most favorable to the nonmoving party. *See Shelby Cnty. Cookers, L.L.C. v. Util. Consultants Int'l, Inc.,* 857 N.W.2d 186, 189 (Iowa 2014). Summary judgment is correctly granted where the only issue to be decided is what legal consequences follow from otherwise undisputed facts.

See *Emmet Cty. State Bank v. Reutter*, 439 N.W.2d 651, 653 (Iowa 1989).

Merits. There were several yearly lease agreements between the parties involving Bowman's farm. App. 91-116. The Court of Appeals referred to the 2008 agreement as being representative of the agreements. Slip op. at 3. Besides the terms which provided that improvements made on the property were at Kunde's expense, paragraph 14 of these lease agreements is entitled "New Improvements" and stated that:

> All buildings, fences and improvements of every kind and nature that may be erected or established upon the real estate during the term of the lease by the tenant shall constitute additional rent and shall inure to the real estate, becoming the property of the landlord unless the landlord has agreed in writing prior to the erection that the tenant may remove the improvements at the end of the lease. App. 95.

Despite the written language contained in the agreement and despite the conduct of the parties,[5] Kunde asserts that he

[5] By Kunde's own admissions he did not tell anyone about the alleged agreement or promise to purchase from Bowman. App. 167-168. (*Kunde dep. tr.* p. 26 lines 1-25 and p. 27 lines 1-14.) Nor did Kunde ever seek to have such an agreement put in writing. App. 169 (*Kunde dep. tr.* p. 81, lines 17-18). Nor did Kunde ever ask that such agreement be put into the lease agreement. *Id.* lines 20-23. This is despite the fact that several lease agreement were in fact terminated by Bowman. *Id.* Furthermore, Bowman never made any statements to his attorney during the lease signings that he was planning on selling the farm to Kunde. App. 163 (*Atty Mommsen dep. tr.* p. 16, lines 1-25).

either had an agreement or a promise from Bowman to be able to purchase the entire farm in a date uncertain for *approximately* $3,000.00 per acre.[6] Kunde further asserts that but for such assurances; Kunde would not have made any improvement to the farm despite lease agreements stating that such improvements were at his expense.

"[A]n express contract and implied contract cannot coexist with respect to the same subject matter, and the former supersedes the latter." *Chariton Feed & Grain, Inc. v. Harder, 369 N.W.2d 777, 791* (Iowa 1985). Furthermore, the law will "not imply a contract where there is an express contract." *McKee v. Isle of Capri Casinos, Inc.* 864 N.W.2d 518, 526 (Iowa 2015) citing *Scott v. Grinnell Mut. Reins. Co.*, 653 N.W.2d 556, 562 (Iowa 2002) and 1 Richard A. Lord, Williston on Contracts § 1:5, at 40 (4th ed.2007) ("The law may recognize an implied contract in the absence of an express contract on the same subject matter, but not where there is an express contract....").

[6] In a letter dated December 17, 2013 to Engelkins, Kunde's attorney stated that Bowman and Kunde had established a purchase price of "*approximately* $3,000.00 per acre". App. 174-175.

Accordingly, this case can be decided on the narrow ground that the equitable remedy of promissory estoppel is simply not available to Kunde because an express agreement existed between the parties involving the same subject matter.

In addressing this point, the Court of Appeals did not analysis whether paragraph 14 of the lease agreement bars Kunde's claim. However, by the plain language of this provision, the parties agreed in writing that such conduct of making improvement specifically constituted rent therefore the written agreement precludes Kunde's promissory estoppel claim.

Paragraph 16 of the lease provided that "no expense shall be incurred for or on account of the Landlord without first obtaining Landlord's written authorization." The Court of Appeals did not analysis this provision which again provides that the parties expressed any expense, which would include the expense of having to convey real estate to Kunde, needed to be in writing.

Lastly, the case cited by the majority in determining that an oral option and written lease can coexist did not involve the preclusion defense asserted by Bowman, but rather involved the application of the parol-evidence rule in the context of a *contract* enforcement claim, and not based on *promissory estoppel*. *See Levien Leasing Co. v. Dickey Co.*, 380 N.W.2d. 748, 751 (Iowa Ct. App. 1985). Therefore, recitation by the majority decision is misplaced and cuts against the sanctity of the written agreement to which the preclusion doctrine attempts to uphold. *See Smith v. Stonewell*, 125 N.W.2d. 795, 799-800 (Iowa 1964) ("It is not within the province, function, duty, or power of the court to alter, revise, modify, extend, rewrite or remake a contract by construction, or to make a new or different, contract for the parties, whether in the guise of construction or otherwise…").

II. PROMISSORY ESTOPPEL INVOLVING AN ALLEGED PROMISE TO CONVEY REAL ESTATE REQUIRES A "CLEAR AND DEFINITE ORAL AGREEMENT"

Preservation of Error / Standard of Review: Bowman refers to the previously statement regarding error preservation and standard of review.

Merits. As set forth in the Court of Appeals opinion, Iowa courts post *Schoff* have been inconsistent in which promissory estoppel test applies. Slip. Op. p. 7-8. *See also Loranger Constr. Corp. v. E.F. Hauserman Co.*, 376 Mass. 757, 761, 384 N.E.2d 176 (1978) (the expression 'promissory estoppel' ... tends to confusion rather than clarity"). *See also State v. Williams*, 895 N.W.2d. 856, 860 (Iowa 2017) (the doctrine of "*stare decisis* 'should not be invoked to maintain a clearly erroneous result." (citations omitted).

Although *Schoff* pronounces the four-element test, the factual circumstances in *Schoff* involved a promise not to terminate employment versus a claim involving a promise to convey real estate. Furthermore, an examination of the cases cited by *Schoff* do not support the requirement that a four-

element test is to be applied in the context of an alleged promise to convey real estate.[7]

Schoff cites to *National Bank v. Moeller*, 434 N.W.2d 887, 889 (Iowa 1989) as a case in which promissory estoppel was examined and contrasted as support for the four-element test. In *National Bank*, the court found that no Iowa court cases had "squarely defined" what was meant by a "clear and definite oral agreement." *Id.* Additionally, *National Bank* compared the cases of *In re Estate of Graham*, 295 N.W.2d 414, 418 (Iowa 1980); *Johnson v. Pattison*, 185 N.W.2d 790, 795 (Iowa 1971); *Miller v. Lawlor*, 245 Iowa 1144, 1154, 66 N.W.2d 267, 273 (1954), and even in doing so, the *National Bank* court still applied the three-element test.

In tracing the three-element test further to *Miller v. Lawlor*, it appears that the three-element test was not the result of the court's pronouncement of the elements of the independent cause of action based upon promissory estoppel,

[7] Both *Schoff* and *Kolkman v. Roth*, 656 N.W.2d 148 (Iowa 2003) rely on the Restatements of Contracts. The Restatements, like treatises and law review articles, are not "the law" but may be persuasive authority. *See Oberson v. Federated Mutual Ins. Co.*, 126 P.3d. 459, 462 (Mont. 2005) (noting that the Restatements were not adopted whole cloth, but to be used in light of state public policy and legislature statutory guidance.) *Cf. State v. Gaskin,* 866 N.W.2d. 1 (Iowa 2015) (in analyzing state constitutional claims in light of *stare decisis*).

but rather the elements were referred in the opinion as grounds urged by the defendant against the application of promissory estoppel. *Id.* 245 Iowa 1144, 1154, 66 N.W.2d 267, 273. In reviewing the case law cited by *Miller* court, the case of *Farwall v. Arnold*, 226 Iowa 977, 285 N.W. 664 (1939) traced the historical development of the statute of frauds and the practices to which the statue was designed to protect against. *Id.* (" The statute of frauds has been enacted by every state to prevent the successful culmination of just such litigation as is referred to above, and in particular to prevent predatory prowling upon the estates of decedents, by such testimony.").

Furthermore, *Farwall* cites to an even early decision of this court *Williamson v. Williamson*, 4 Clarke 279, 4 Iowa 279 (Iowa 1857) which addressed the part performance exception to the statue of frauds and held that any assertion involving a "parol contract, agreement or gift" is required to be established by "unequivocal and definite testimony" and that the "acts claimed to be done thereunder, be proven by equally "clear and definite" evidence and *"referable exclusively to said*

contract or gift." *Farwell*, 285 N.W. 664, 669 (emphasizing the phrase "referable exclusively to said contract or gift.")

Lastly, pre-*Schoff* Iowa cases involving promises relating to real estate have consistently applied a three-element test. See e.g *In Matter of Scheib Trust*, 457 N.W.2d 4 (Iowa Ct. App. 1990) (three part test used in the context of a consent to sale real estate out a trust); *Shell Oil Co.* v. *Kellison*, 158 N.W.2d 724 (1968) (three part test used in the context an alleged oral agreement to rescind a real estate purchase option).

Therefore, the application of a three-element test for promissory estoppel claims involving a potential conveyance of real estate furthers the important public policy of providing tranquility in title of real property and advances the protections of the statute of frauds.[8] The three-element test is also consistent with the historical case law development in Iowa versus mere reliance on the Restatements, which all supports the conclusion that an "across the board" or "one

[8] *But cf. Ohio Valley Plastics, Inc. v. National City Bank*, 687 N.E.2d 260, 263-264 (Indiana Ct. App. 1997) ("Regardless of whether the present cause of action is labeled as a breach of contract, misrepresentation, fraud, deceit, promissory estoppel, its substance is that of an action upon an agreement by a bank to loan money. Therefore, the Statute of Frauds applies.").

size fits all test" in analyzing promissory estoppel claims is subversive to these important public policy interests. Thus, the District Court correctly applied the three-element test in granting Bowman's motion for summary judgment.

III. EVEN IF A FOUR-ELEMENT TEST APPLIES, SUMMARY JUDGMENT SHOULD BE AFFIRMED

Preservation of Error / Standard of Review: Bowman refers to the previously statement regarding error preservation and standard of review.

Merits. First, in order to prevail on a claim based on promissory estoppel, a plaintiff is required to show "strict proof of all the elements." *Schoff*, 604 N.W.2d 43, 50. In regards to the first element under the four-element test, there is no "clear and definite promise" made by Bowman to Kunde.

A promise is "clear" when it is easily understood and is not ambiguous. *See Webster's Third New International Dictionary* 419 (unab. ed.1993). A promise is "definite" when the assertion is explicit and without any doubt or tentativeness." See *Schoff,* 604 N.W.2d 43, 50–51.

The promise asserted by Kunde is that Bowman promise to sell his farm to him for approximately $3000.00 per acre someday in the future. An approximation by its very definition is not clear or definite. *See* Black's Law Dictionary, 10th Edition (defining approximation as "a number, amount, weight, or quantity that is not exact but is nearly correct."). Second, a date uncertain is not definite. At most, Kunde is only able to show a precatory statement from Bowman.

Second, Kunde is unable to meet the second element that the promise was made with Bowman's clear understanding that Kunde was seeking assurance upon which he could rely and without which he would not act. *Schoff,* 604 N.W.2d 43, 50-51.

This concept binds the promissor to a gratuitous promise where, "in reliance upon the promise, the promisee had suffered a substantial loss, expended money or incurred liability that he would not have suffered, expended or incurred except for the promise." *In Matter of Graham's Estate,* 295 N.W.2d. 414, 419 (1980). In other words, Kunde would have to show strict proof that no other reason existed for him to

make the improvements to the farm. The summary judgment record in this matter provides two reasonable explanations as to why Kunde would make the improvements. First, as the tenant, Kunde received the benefits of making the improvements. Second, the making of such improvements was given in consideration of the lease.[9]

Third, Kunde is unable to show strict proof that he acted to his substantial detriment in reasonable reliance on the promise. Unlike *Kolkman v. Roth,*[10] by making the improvements, Kunde did not have to sell his house or change his employment. App. 184. *Id.* 656 N.W.2d 148, 151 (Iowa 2003).

Lastly, Kunde is unable to show strict proof that injustice can be avoided only by enforcement of the promise. Absent from both opinions from the Court of Appeals are the

[9] Kunde attempts to diminish the notion that the improvements were given in consideration for the lease by claiming that incorporation of the improvements into the lease were made at his suggestion. App. 186 *Kunde tr. t.* p. 139, lines 4-14. Kunde equivocates whether he knew exactly that Bowman had issues with his prior tenant regarding maintenance. Therefore, a reasonable explanation as to why the improvements were specifically listed was to induce Bowman into a lease. *Id.* If preponderance of the evidence was the standard, a material dispute of fact may exist on this question, but the standard here is "strict proof."

[10] *Kolkman* involved the promissory estoppel exception to the statue of frauds involving an oral lease agreement which tenant stated he was promise to be able live rent free "until he retired or couldn't work anymore." *Id.* at 150-151.

undisputed facts relating to the circumstances of the parties.

At the time that Kunde asserted his claims in 2013, Art Bowman was 85 years old, suffered from dementia and was in a nursing home. The farm in question sold at auction for $6,850.00 per acre.[11] The decision to sell Bowman's homestead at auction was made by Engelkins due to Title 19 qualification purposes. His estate plans were for his homestead to pass to his two children.[12]

In essence, what Kunde is asking the court to do is force Bowman to make a gift to him.[13] In examining the summary judgment record, Kunde is unable to show "strict proof" that injustice can be avoided only by the enforcement of the alleged promise to convey.

[11] Based on Kunde's claim, this would result in Kunde having a potential gross profit of $3,850.00 per acres on 102 acres, for a $392,700 gross profit. A windfall.
[12] App. 163, *Atty. Mommsen dep. t.* p. 15, lines 1-25, p. 16, line 24-25, p. 17, line 1.
[13] Kunde admitted that he is not seeking reimbursement, but wants the farm. App. 180 *Kunde trial tr.*, p. 113, lines 2-7 (Q: So Mr. Kunde, you're claiming today that you want reimbursement for those types of actions that you took on the property, right? A: No, my claim is not for reimbursement, my claim is to go through with the agreement…).

CONCLUSION

For all of the reasons discussed above, the Estate of Bowman respectfully requests that upon granting further review, this Court vacate the decision of the Court of Appeals of February 21, 2018, and affirm the decision of the District Court.

REQUEST FOR ORAL ARGUMENT

The Estate of Bowman respectfully requests the privilege of oral argument if further review is granted.

CERTIFICATE OF COST AND CERTIFICATE OF SERVICE

The undersigned hereby certifies that the cost of printing this Brief was the sum of $0.00.

It is hereby certified that on the 10th day of March, 2018, the undersigned party, or person acting on its behalf did file via EDMS the foregoing document which gives notice thereof to the following :

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/s/ Bradley T. Boffeli — 3/10/18
Bradley T. Boffeli AT 0010247 — Date

IN THE COURT OF APPEALS OF IOWA

No. 17-0791
Filed February 21, 2018

RONALD DWIGHT KUNDE,
Plaintiff-Appellant,

vs.

ESTATE OF BOWMAN,
Defendants-Appellees.

Appeal from the Iowa District Court for Jackson County, Nancy S. Tabor, Judge.

Appeal from the grant of the defendant's motion for summary judgment. **REVERSED AND REMANDED.**

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Considered by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Tabor, J., takes no part.

MCDONALD, Judge.

This case involves an option to purchase farmland allegedly orally granted by one farmer to his neighbor. At issue in this case is whether the district court erred in granting the defendant's motion for summary judgment and dismissing the plaintiff's claim for promissory estoppel, quantum meruit, and unjust enrichment.

This is the second time this matter has been before the court. In our prior opinion, we succinctly set forth the material facts:

> Farmer Ronald Kunde claimed neighbor Arthur Bowman granted him an oral option to purchase his farm for approximately $3000 an acre at an unspecified time in the future. Kunde leased the Bowman farm and made substantial improvements to the property, which he alleged were consideration for the option to purchase.

Kunde v. Bowman, No. 15-1483, 2016 WL 5408356, at *1 (Iowa Ct. App. Sept. 28, 2016).

Subsequent to the alleged grant of the option to purchase, Bowman sold the property to a third person. *See id.* Kunde sued Bowman, asserting claims for breach of contract and "equitable claims." *See id.* The jury found in favor of Kunde on his breach of contract claim and awarded damages, but the jury made no findings on the equitable claims pursuant to the district court's instructions. *See id.* The district court granted Bowman's motion for judgment notwithstanding the verdict and denied Kunde's motion for new trial. In our prior opinion, this court affirmed the district court, determining there was not substantial evidence to support the jury's verdict on the contract claim. Specifically, this court found there was no agreement on the essential terms of the purported option to purchase. *See id.* at *2 ("The record lacks substantial evidence to support essential terms of the contract, most notably the deadline for exercising the option to purchase the

Bowman farm."). This court remanded the matter for new trial on Kunde's remaining equitable claims. *See id.*

After remand, Bowman sought summary judgment on the equitable claims. The summary judgment record showed Kunde entered into a series of written farm lease agreements with Bowman. Several of the written farm lease agreements included addendums governing the allocation of expenses for improvements. The 2008 lease addendum is representative:

1. Any construction, removal, or maintenance of property fence lines will be rentor's expense.
2. Fence materials will be the landlord's expense (including farm fence lines).
3. Any construction, creation, or maintenance of cropland water ways or drainage areas will [be] rentor's expense.
4. Normal maintenance of the outbuilding will be at rentor's expense. This includes demolition of obsolete buildings.
5. Materials for maintenance of the outbuildings will be landlord's expense. Tenant agrees to consult and discuss all repairs with the landlord prior to ordering of materials.
6. Tenant agrees that all pasture and outside building areas will be cleaned and all trash removed from the premises.
7. Any land moving equipment utilized for excavation or repairs will be rentor's expense.

The district court granted Bowman's motion for summary judgment on all claims. With respect to the estoppel claim, the district court concluded our prior decision holding there was no agreement on material terms was the law of the case and required dismissal of the estoppel claim for similar reasons. The district court also concluded "the lease agreements do constitute an express contract between the parties on the same subject matter . . . Thus, no implied contract can be found from these facts. Without an implied contract, Kunde's reliance on promissory estoppel fails." On the quantum meruit and unjust enrichment claims, the district court found the claims must also fail without an implied contract theory.

The court also articulated that the leases set forth Kunde's rights and obligations to the farmland and that he was compensated for improvements under the lease by possession of the land and the net income produced by the crops he grew. Kunde now appeals.

This court reviews the district court's summary judgment ruling for the correction of legal error. *See Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 657 (Iowa 2008). "A party is entitled to summary judgment when the record shows no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Id.*; Iowa R. Civ. P. 1.981(3). When determining whether there is a genuine issue of material facts, we view the record in the light most favorable to the nonmoving party. *See Kern*, 757 N.W.2d at 657.

We first address Kunde's claims for quantum meruit and unjust enrichment. Kunde's theory with respect to these claims is he should be reimbursed for the improvements he made to the property. Like the district court, we conclude these claims fail as a matter of law. Bowman and Kunde had express agreements governing improvements to the leasehold and allocating the expenses for the same. Iowa adheres to "the principle that the remedy of unjust enrichment or quantum meruit is based upon the concept of implied contract, and that in this jurisdiction the law will not imply a contract where there is an express contract." *Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777, 791 (Iowa 1985). "An express contract and an implied contract cannot coexist with respect to the same subject matter, and the former supersedes the latter." *See Legg v. West Bank*, 873 N.W.2d 763, 771 (Iowa 2016) (quoting *Chariton Feed & Grain,* 369 N.W.2d at

791). An express agreement regarding improvements and expenses precludes Kunde's equitable claims for recovery of the same.

We next address Kunde's claim for promissory estoppel. In this claim, Kunde contends Bowman should be estopped from denying the option to purchase the leased property and further contends he is entitled to expectation damages related to the lost opportunity to purchase the property. Unlike Kunde's other claims, the existence of the written farm lease agreements does not preclude recovery. It is established that an option to purchase need not be included in a written lease agreement. *See Levien Leasing Co. v. Dickey Co.*, 380 N.W.2d 748, 753 (Iowa Ct. App. 1985) (discussing a possible lease and separate option contract on the same property). The summary judgment record, when viewed in the light most favorable to Kunde, showed the parties intended the lease agreements and the option to purchase to be separate and distinct. There is thus a genuine issue of material fact to be resolved by the finder of fact. The district court erred in concluding otherwise.

The district court also erred in holding our prior decision precluded Kunde's promissory estoppel claim as a matter of law. To fully address this issue, we must first address the development of the doctrine.

The Iowa Supreme Court recognized and set forth the elements of a promissory-estoppel claim in the seminal decision *Miller v. Lawlor*, 66 N.W.2d 267, 272 (Iowa 1954). The elements were: (1) "A clear and definite oral agreement;" (2) "That plaintiff acted to his detriment *solely* in reliance on said agreement;" and (3) "That a weighing of all the equities entitles plaintiff to the equitable relief of estoppel." *Id.* at 273. The given rationale for recognizing the claim was

"'[p]romissory estoppel' is . . . a recognized species of consideration." *Id.* at 272. In other words, promissory estoppel was a consideration substitute. *Miller* remained controlling law until 1999.

In 1999, in *Schoff v. Combined Insurance Company of America*, 604 N.W.2d 43, 48 (Iowa 1999), the supreme court moved away from the theory that promissory estoppel was merely a consideration substitute, recognizing the consideration-substitute theory had been subject to doctrinal criticism. *See, e.g.,* Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 Willamette L. Rev. 263, 380 (1996) ("Particularly troublesome is the requirement of a 'clear and definite agreement,' which appears to be a reversion to the antediluvian notion that promissory estoppel is only a substitute for consideration and requires a complete, integrated agreement rather than reliance on a promise."). In expanding the doctrinal foundations of promissory estoppel, the *Schoff* court identified the following elements of the claim: "(1) a clear and definite promise; (2) the promise was made with the promisor's clear understanding that the promisee was seeking an assurance upon which the promisee could rely and without which he would not act; (3) the promisee acted to his substantial detriment in reasonable reliance on the promise; and (4) the injustice can be avoided only be enforcement of the promise." *Id.* at 49. The court stated a promise is "[a] declaration . . . to do or forbear a certain specific act." *Id.* at 50–51. "A promise is 'clear' when it is easily understood and is not ambiguous." *Id.* at 51. A promise is "definite" when the assertion is explicit and without any doubt or tentativeness. *Id.*

The supreme court reaffirmed *Schoff* several years later in *Kolkman v. Roth*, 656 N.W.2d 148, 153 (Iowa 2003). In that case, the court traced the development

of promissory estoppel and found "promissory estoppel is not only a substitute for consideration, but is also recognized as an exception to the statute of frauds even in cases where the promise may be supported by consideration." *Kolkman*, 656 N.W.2d at 153. The doctrine "focuses on reliance." *Id.* When affirming the *Schoff* test, the court noted "[t]he doctrine of promissory estoppel does not eviscerate the statute of frauds, but only applies to circumvent the statute when necessary to prevent an injustice." *Id.* at 156. "We require strict proof of all the elements. This includes strict proof of a promise that justifies reliance by the promisee." *Id.*

Since *Kolkman*, our courts have been inconsistent in analyzing claims of promissory estoppel. Some of our cases have used the three-element test set forth in *Miller* but rejected in *Schoff*. *See, e.g., McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 532 (Iowa 2015); *Bundy v. Memberselect Ins. Co.*, No. 16-1189, 2017 WL 104964, at *3 (Iowa Ct. App. Jan. 11, 2017); *In re Marriage of Renes*, No. 12-1136, 2013 WL 1453061, at *1 (Iowa Ct. App. Apr. 10, 2013); *In re Marriage of Smith*, No. 08-0819, 2009 WL 928790, at *3 (Iowa Ct. App. Apr. 8, 2009); *In re Marriage of Streif*, No. 07-0540, 2007 WL 2965153, at *3 (Iowa Ct. App. Oct. 12, 2007); *In re Marriage of Ruby*, No. 06-0670, 2007 WL 108892, at *2 (Iowa Ct. App. Jan. 18, 2007); *Wasker v. McDonald*, No. 04-1521, 2006 WL 126773, at *6 (Iowa Ct. App. Jan. 19, 2006); *In re Marriage of Arns*, No. 03-0724, 2004 WL 573801, at *3 (Iowa Ct. App. Mar. 24, 2004); *Campbell v. Waverly Tire Co.*, No. 02-1948, 2003 WL 23008846, at *4 (Iowa Ct. App. Dec. 24, 2003); *In re Marriage of Barry*, No. 02-0240, 2003 WL 1968635, at *3 (Iowa Ct. App. Apr. 30, 2003). Some of our cases have used the four-element test set forth in *Schoff* and *Kolkman*. *See, e.g., In re Estate of Beitz*, No. 14-1492, 2015 WL 3624475, at *1–

2 (Iowa Ct. App. Jun. 10, 2015); *Stenoien v. Stenoien*, No. 13-1044, 2014 WL 3749374, at *9 (Iowa Ct. App. July 30, 2014); *Jongma v. Grand Pork, Inc.*, No. 08-1640, 2009 WL 3381518, at *5 (Iowa Ct. App. Oct. 21, 2009); *Moonsammy v. Mercy Hosp.*, No. 08-1638, 2009 WL 2525500, at *5 (Iowa Ct. App. Aug. 19, 2009); *Chamberlain L.L.C. v. City of Ames*, No. 06-1487, 2007 WL 4322186, at *6 (Iowa Ct. App. Dec. 12, 2007); *Akers v. Oak Hill Plantation, L.C*., No. 07-0318, 2007 WL 4191959, at *2 (Iowa Ct. App. Nov. 29, 2007); *Callahan Const., Inc. v. Weidemann*, No. 05-1207, 2006 WL 1750375, at *4–5 (Iowa Ct. App. Jun. 28, 2006). While other cases cite the four-part test but use the clear-and-definite-agreement standard from *Miller* rather than the clear-and-definite-promise standard from *Schoff* and *Kolkman*. *See, e.g., Mujkic v. Lynx, Inc.*, No. 14-0636, 2015 WL 1055307, at *6 (Iowa Ct. App. Mar. 11, 2015); *Deck v. Betka*, No. 12-0822, 2013 WL 99123, at *1 (Iowa Ct. App. Jan. 9, 2013); *Byl v. Van Beek*, No. 11-0802, 2012 WL 299529, at *2 (Iowa Ct. App. Feb. 1, 2012).

After reviewing the precedents, this court is convinced the four-part test set forth in *Schoff* and *Kolkman* is the controlling authority notwithstanding the supreme court's recent use of the three-part test in *McKee*. *McKee* cited *Schoff* for this proposition, but *McKee* cited the portion of *Schoff* discussing the prior standard, *See McKee*, 864 N.W.2d at 532, which the *Schoff* court then rejected later in the opinion. *McKee's* recitation of the three-element test seems inadvertent in contrast to the deliberate expansion of the doctrine in *Schoff* and *Kolkman*. Under *Schoff* and *Kolkman*, Iowa courts no longer treat promissory estoppel as a mere consideration substitute. Instead, the claim allows for a remedy upon strict proof of each of the four elements, including a clear and definite promise even

where the promise does not rise to a clear and definite agreement that would otherwise establish a contract but for the lack of consideration. *See Kolkman*, 656 N.W.2d at 153.

With that background, we turn to the case at hand. The district court concluded our prior opinion was preclusive because it held there was not a clear and definite agreement on material terms to a contract. As noted above, however, it is immaterial whether the parties had a clear and definite agreement. What is material is whether one party made "a clear and definite promise." *See id.* at 156 (finding promissory estoppel requires "strict proof of a promise that justifies reliance by the promisee."); *Dixon v. Wells Fargo Bank, N.A.*, 798 F.Supp.2d 336, 343 (D. Mass. 2011) ("[Promissory estoppel] now 'provides a remedy for many promises or agreements that fail the test of enforceability under many traditional contract doctrines' but whose enforcement is 'necessary to avoid injustice.'" (internal citations omitted)); *Kiely v. St. Germain*, 670 P.2d 764, 767 (Colo. 1983) ("[P]romissory estoppel is not defined totally in terms of contract principles. . . . It is often appropriate when parties have not mutually agreed on all the essential terms of a proposed transaction."); *Rosnick v. Dinsmore*, 457 N.W.2d 793, 749 (Neb. 1990) ("[T]here is no requirement of 'definiteness' in an action based upon promissory estoppel. . . . Promissory estoppel only requires that reliance be reasonable and foreseeable."); *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 275 (Wis. 1965) ("We deem it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach of contract action.").

Here, when the correct elements are analyzed, there is a disputed issue of material fact. Kunde contends Bowman made an explicit promise to sell the

property for $3000 per acre. He also contends this can be inferred from Bowman's statements. The promise was not conditioned upon any event. The summary judgment record shows Kunde may have undertaken improvements to the property in reliance on that promise. While there may ultimately be insufficient evidence in support of the claim, when the summary judgment record is viewed in the light most favorable to Kunde, there is at least a disputed issue of material fact to be resolved at trial.

For these reasons, we conclude the trial court erred in granting the summary judgment motion as to the promissory estoppel claim.

REVERSED AND REMANDED.

Potterfield, J., concurs; Vaitheswaran, P.J., dissents.

VAITHESWARAN, Presiding Judge (dissenting)

I respectfully dissent. The district court cited and applied the Iowa Supreme Court's most recent pronouncement on the elements of promissory estoppel, *McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 532 (Iowa 2015). *McKee* sets forth the elements of the theory as "(1) a clear and definite oral agreement; (2) proof that plaintiff acted to his detriment in reliance thereon; and (3) a finding that the equities entitle the plaintiff to this relief." *Id.* (quoting *Schoff v. Combine Ins. Co. of Am.*, 604 N.W.2d 43, 48 (Iowa 1999)); *see also Budny v. MemberSelect Ins. Co.*, No. 16-1189, 2017 WL 104964, at *3 (Iowa Ct. App. Jan. 11, 2017). Under this recitation of the elements, I would conclude the district court correctly granted Bowman summary judgment on the promissory estoppel claim.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
17-0791	Kunde v. Estate of Bowman

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