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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-1288**

William J. Hempel, et al.,  
Appellants,

vs.

Creek House Trust, et al.,  
Respondents,

Judith Anna Ingemann f/k/a Judith Ann Seymour,  
Respondent.

**Filed July 7, 2009  
Affirmed; motion granted  
Kalitowski, Judge**

Chisago County District Court  
File No. 13-CV-05-915

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Considered and decided by Stauber, Presiding Judge; Kalitowski, Judge; and  
Bjorkman, Judge.

## UNPUBLISHED OPINION

**KALITOWSKI**, Judge

This is an appeal from summary judgment following this court's remand in *Hempel v. Creek House Trust*, 743 N.W.2d 305 (Minn. App. 2007). On remand, the district court granted respondents' motion for summary judgment, concluding that a right of first refusal held by appellants William J. and Kay L. Hempel gave them no right or claim upon the property known as the Creek House Property.

Appellants contend that the district court erred by not concluding that the right of first refusal remains an encumbrance on the Creek House Property. Respondents move to strike an argument raised in appellants' reply brief on the ground that it is a new argument raised for the first time. We affirm and grant respondents' motion to strike.

## DECISION

On appeal from summary judgment we ask whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Hempel v. Creek House Trust*, 743 N.W.2d 305, 310 (Minn. App. 2007).

A right of first refusal is a contract that gives the holder a contractual right to meet the terms of a third party offer. *Hempel*, 743 N.W.2d at 310. A right of first refusal does not convey to its holder title to the subject property. *Id.* at 313. Instead, a right of first refusal gives to its holder a right which "ripens into an option to purchase the subject property" and even then remains only a right in personam. *Id.* at 312. A party holding a right of first refusal is damaged when the contract is breached. *Id.* at 311.

On remand, the district court determined that there are no genuine issues of material fact and concluded that the trust is entitled to judgment as a matter of law. First, the district court noted that the right of first refusal states that it binds “heirs and assigns.” The record indicates that the right of first refusal at issue was assignable and that appellants were validly assigned the right of first refusal to purchase the Creek House Property. But the district court found that it was undisputed that respondent trustees are not the heirs or assigns of their predecessor in title, William and Jean West (the Wests), and that the Wests are not the heirs or assigns of their predecessor in title, Judith Anna Ingemann. Thus, the district court properly concluded that respondent trustees are not subject to the right of first refusal under the plain language of the right of first refusal.

Second, the district court concluded that a right of first refusal is a contractual right, not an interest in land, and therefore does not run with the Creek House Property to impose obligations on owners successive to Ingemann. Appellants challenge this conclusion, arguing that their right of first refusal is an encumbrance that runs with the Creek House Property. We disagree.

No Minnesota authority expressly holds that a right of first refusal is an encumbrance that passes with conveyance of property. Appellants’ reliance on the definition of encumbrance in *Fritz v. Pusey* is not persuasive because *Fritz* defined “encumbrance” within the context of the covenant against encumbrances and did not discuss rights of first refusal. See *Fritz v. Pusey*, 31 Minn. 368, 369, 18 N.W. 94, 95 (1884), cited in *Crowley v. C.N. Nelson Lumber Co.*, 66 Minn. 400, 407-08, 69 N.W.

321, 324 (1896) (holding that a contingent right of dower is an encumbrance). *Fritz* defined an encumbrance to include “any right or interest in the land which may subsist in third persons to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance.” 31 Minn. at 369, 18 N.W. at 95. Here, the right of first refusal at issue contains no language that it passes with conveyance of the Creek House Property.

This court previously determined that the right of first refusal at issue here did not give appellants an interest in the subject property. *Hempel*, 743 N.W.2d at 312-13. Therefore, on these facts, we conclude that the district court properly found that the right of first refusal here was a contractual right that did not run with the Creek House Property.

### **Motion to Strike**

The purpose of a reply brief is strictly to rebut new arguments asserted in respondent’s brief. Minn. R. Civ. App. P. 128.02, subd. 4; *id.* 1967 advisory comm. note. In their reply brief, appellants argued that their right of first refusal was an “appurtenance and hereditament” that passed to the Wests when Ingemann conveyed the Creek House Property. Appellants did not present this argument in their principal brief. Because appellants did not raise this issue in their principal brief and because this argument did not rebut a new matter raised in respondents’ brief, the argument is waived. Therefore, we grant respondents’ motion to strike this argument from appellants’ reply brief.

**Affirmed; motion granted.**