20130027
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APRIL 22, 2013
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

April 22, 2013

Kevin Pifer, Plaintiff - Appellee, v. Barbara McDermott, Defendant - Appellant.	))))))))	 Supreme Court No. 20130027 Grand Forks County Number: 18-2010-CV-01940

APPEAL FROM THE DISTRICT COURT,
GRAND FORKS, NORTH DAKOTA
NORTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE LAWRENCE JAHNKE, PRESIDING

BRIEF OF APPELLANT, BARBARA MCDERMOTT

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[¶2]<u>STATEMENT OF THE ISSUES</u>

I. Whether District Court erred in granting partial summary judgment on the issue of whether the purchase option is valid and enforceable.

   A. Whether the purchase option was a gift of property.

   B. Whether an option is a property right or interest that may be the subject of gift or that may be freely transferred or given like any other property.

   C. Whether District Court erred in deciding donative intent.

II. Whether District Court erred in allowing trial to proceed on improper theories of law and then denying Defendant's Motion for Judgment as a Matter of Law under Rule 50 of the North Dakota Rules of Civil Procedure.

   A. The issue of damages was not ripe because until judgment is final Defendant possesses all rights to the land.

   B. Plaintiff did not Properly Plead his Claim of Unlawful Interference with Business.

   C. Plaintiff's Claim for Interference with Business Fails as a Matter of Law.

III. Whether District Court erred in granting a Temporary Restraining Order that granted plaintiff use and possession of the land before final determination has been made that the land rightfully belongs to plaintiff without weighing the factors necessary to determine whether an injunction was an appropriate remedy.

   A. Whether the Court Abused its Discretion in Failing to Weigh Factors Necessary to Determine Whether or not Injunctive Relief was Appropriate.

   B. Whether the lower court abused its discretion in granting Pifer the right to enter upon and use land that has not yet been made his in a final determination on validity of the purchase option.

STATEMENT OF THE CASE

[¶3]Plaintiff Kevin Pifer "Pifer" commenced this lawsuit by serving a summons and complaint seeking to enforce a purchase option "Option" for sale of land between himself and Defendant's mother, Dorothy J. Bevan "Dorothy," who is now deceased. The Purchase Option Agreement, dated February 16, 2004 and recorded at Grand Forks County Recorder's Office "GFCRO" on February 18, 2004, purportedly gave Pifer "an exclusive option to purchase the [following] described property for the sum of $107,569.00:

> North Half (N½) of Section Four (4), Township One Hundred Fifty-one (151) North, Range Fifty-three (53) West, Grand Forks County, North Dakota."

The additional provisions of the Option were as follows:

> This option may be exercised by KEVIN PIFER at any time within two years following the OWNER's death. This does not preclude Owner from selling the property to Kevin Pifer during the Owner's lifetime.
> This option shall automatically expire after two years following OWNER's death, unless KEVIN PIFER shall file with the County Recorder within such two-year period, notice of his intent to exercise this option.
>
> Conveyance shall be by warranty deed, or deed of personal representative, if applicable.
>
> This agreement is binding upon the parties, their heirs and estates, and successors.

[¶4]On or about October 22, 2009, Dorothy executed a warranty deed creating joint tenancy with right of survivorship in the property that was the subject of the option with her daughter, Defendant Barbara McDermott "McDermott." The warranty deed was recorded on December 22, 2009. Dorothy died on June 24, 2010, at the age of 95.

[¶5]On July 27, 2010, Pifer recorded a Notice of Intent to Exercise Purchase Option at GFCRO. On September 8, 2010, Pifer's attorney sent a letter to McDermott's attorney seeking to exercise the Option and tendering a cashier's check in the amount of $107,569.00. That same day a reply letter was mailed to Pifer's attorney, notifying him that McDermott would not honor the Option. The cashier's check was subsequently returned, and this lawsuit commenced.

[¶6]Pifer sought declaratory relief, specific performance of the Option, and asserted an additional claim of Intentional Interference with Economic Advantage. McDermott countered that the Option was not a valid, binding, and enforceable contract because (1)there was no consideration for the option; and (2)the option could not be exercised on the grounds of legal impossibility or impracticability of performance because Dorothy conveyed her interest in the property during her lifetime, after the Option was signed, to herself and her daughter, McDermott, as joint tenants with right of survivorship, and upon Dorothy's death, McDermott became the record titleholder in fee of the property; the court should not be able to compel her to convey what is now her property. The parties filed competing motions for summary judgment, and district court heard oral argument on these motions July 11, 2011.

[¶7]On August 30, 2011, district court issued a Memorandum Decision and Order granting Pifer's cross-motion for summary declaratory judgment and concluded that the February 16, 2004 Option executed by Dorothy in favor of Pifer, is valid and enforceable. (D.117)(App.69). In support of this conclusion, the court agreed with "Plaintiff's contention that the below-market value Purchase Option was not intended by Dorothy to be contractual in nature, but rather a gift if exercised at any time between February 16,

2004, and two years after her death." (D.117:10, 13)(App.69). On September 8, 2011, the court issued an order for partial summary judgment compelling transfer of interest in land from McDermott to Pifer. (D.134)(App.82). Clerk of district court entered the Partial Summary Judgment in the register of civil actions on September 14, 2011. (D.135)(App.84).

[¶8]A trial on Damages was held November 13 through November 16, 2012, in Grand Forks County District Court. The issues presented at trial were (1) whether Barbara McDermott had unlawfully interfered with Kevin Pifer's business prospects by contesting the validity of the Option, and (2) whether Pifer was owed damages for the alleged interference. (Trial Tr.344:21-25;345:1-3). The jury awarded Pifer a Monetary Award Judgment of $80,957.07 for loss of cash rent, time value of cash rent revenue (interest), loss of grain bin rent, time value of grain bin revenue (interest), and loss of interest on borrowed funds to exercise the option for the years 2011 and 2012. (Tr.344:21-25;345;346:1-3).

[¶9] McDermott obtained a stay of execution on the judgment and proceedings to enforce it. (D.167). District court also granted Plaintiff's motion to extend or modify the temporary restraining order already in place, and ordered that Pifer should have full use and possession of the land in 2013, pending any appeal. (D.477). The Order also specified that Pifer could rent the land to his chosen tenant, but is required to deposit the rent amount with the Clerk of Court. (D.477:¶¶5-6).

STATEMENT OF THE FACTS:

[¶10]On February 16, 2004, Defendant's mother, Dorothy Bevan, signed an Option agreement giving Plaintiff, Pifer, an option to purchase her property located in

Chester Township, Grand Forks County, North Dakota, more specifically described as the North Half (N½) of Section Four (4), Township One hundred fifty-one (151) North, Range Fifty-three (53) West, within two years of her death at a price of $107,569.00. (D.3:¶IV)(App.19:¶IV;11). The Option contained no recital of consideration, nor was separate consideration paid by Pifer or exchanged between Pifer and Dorothy for the option. (App.11). The Option was filed at GFRCO on February 18, 2004. Id.

[¶11]On or about October 22, 2009, Dorothy executed a warranty deed creating joint tenancy with right of survivorship in the property that was the subject of the Option with her only child, Barbara McDermott. (D.12). The warranty deed was recorded at GFRCO on December 22, 2009. (Id.¶V). Dorothy died June 24, 2010, at the age of 95. (Id.¶4). On July 27, 2010, Pifer filed a Notice of Intent to Exercise Purchase Option at GFRCO. (Id. ¶IX, ¶22). On September 8, 2010, Pifer's attorney sent a letter to McDermott's attorney seeking to exercise the Option and tendering a cashier's check in the amount of $107,569.00. (D.3:¶XIII-XIV). Upon receipt of the September 8, 2010 letter from Pifer's attorney, McDermott's attorney mailed a reply letter indicating that McDermott would not honor the Option. (Id.¶XV). On September 15, 2010, Pifer's attorney demanded the check returned and this lawsuit commenced. (Id.¶XVI).

STANDARD OF REVIEW / /LAW AND ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF WHETHER THE PURCHASE OPTION IS VALID AND ENFORCEABLE.

[¶12]"Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be

resolved are questions of law." Finstad v. Ransom-Sargent Water Users, Inc., 2011 ND 215, ¶17, 812 N.W.2d 323 (quoting Missouri Breaks, LLC v. Burns, 2010 ND 221, ¶8, 791 N.W.2d 33, 38). "The party moving for summary judgment must show [that] no genuine issues of material fact exist and [that] the case is appropriate for judgment as a matter of law." Id. District court "must also consider the substantive evidentiary standard of proof when ruling on a motion for summary judgment." Citizens State Bank-Midwest v. Symington, 2010 ND 56, ¶18, 780 N.W.2d 676. "In considering the substantive standard of proof, the court must consider whether the trier of fact could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not." Id. (quoting Estate v. Stanton, 472 N.W.2d 741, 743 (N.D. 1991)).

[¶13]"[I]n considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion, and [that party] must be given the benefit of all favorable inferences which can be reasonably drawn from the evidence." Riverside Park Condominiums Unit Owners Ass'n v. Lucas, 2005 ND 26, ¶8, 691 N.W.2d 862, 869. "Whether the district court properly granted summary judgment is a question of law which [the Supreme Court] review[s] de novo on the entire record." Finstad, at ¶17. "[A] misinterpretation or misapplication of the law constitutes an abuse of discretion." Beaudoin v. South Texas Blood & Tissue Center, 2005 ND 120, ¶38, 699 N.W.2d 421 (citing Filler v. Bragg, 1997 ND 24, ¶9, 559 N.W.2d 225).

A. THE PURCHASE OPTION WAS NOT A VALID GIFT OF PROPERTY.

[¶14]In its ruling on the competing motions for summary judgment, district court found that the Option was not a contract devoid of proper consideration, but was a gift.

Because it was a gift, the court reasoned, the Option was valid and enforceable. This ruling is erroneous because the court based its finding of donative intent on the almost tertiary testimony of the lawyer that prepared the Option, and donative intent must be plainly found by the fact finder (in this case, the jury). Furthermore, determination that the Option was a gift is not the sine qua non for concluding that the Option in this case is valid and enforceable.

[¶15]"A valid gift requires an intention by the donor to then and there give the property to the donee, coupled with an actual or constructive delivery of the property to the donee and acceptance of the property by the donee." Makedonsky v. North Dakota Dep't of Human Srvs., 2008 ND 49, ¶11, 746 N.W.2d 185. Actual or constructive delivery must be "of a nature sufficient to divest the owner of all dominion over the property and to invest the donee therewith." In re Kasparis Estate, 71 N.W.2d at 567. Accord Guest v. Commissioner, 77 T.C. 9, 16 (1981) (citing Weil v. Commissioner, 31 B.T.A. 899 (1934), affid. 82 F.2d 561 (5th Cir. 1936), cert. denied 299 U.S. 552 (1936) (Requirements for a valid inter vivos gift are as follows: "(1)a donor competent to make the gift; (2)a donee capable of taking the gift; (3)a clear and unmistakable intention on the part of the donor to absolutely and irrevocably divest himself of the title, dominion, and control of the subject matter of the gift, in praesenti; (4)the irrevocable transfer of the present legal title and of the dominion and control of the entire gift to the donee, so that the donor can exercise no further act of dominion or control over it; (5)a delivery by the donor to the donee of the subject of the gift or of the most effectual means of commanding the dominion of it; (6)acceptance of the gift by the donee.").

[¶16]"It is a general rule that when a claim of a gift is not asserted until after the death of the alleged donor the evidence must be clear and convincing of every element requisite to constitute a gift." In re Kasparis Estate, 71 N.W.2d at 567. In Lindvig v. Lindvig, 385 N.W.2d 466, 477 (N.D. 1986), the Supreme Court affirmed that the requirement that the donor relinquish all control over the property as a prerequisite to a finding of a valid gift by stating:

> "There must be an intention on the part of the donor to relinquish the right of dominion on one hand and to create it on the other, and the delivery must be not only of possession but also of the dominion and control of the property. To have the effect of a valid gift, therefore, the transfer of possession and title must be absolute and go into immediate effect, so far as the donor can make it so by intent and delivery, and must be so complete that if he again resumes control over it without consent of the donee he becomes liable as a trespasser."

385 N.W.2d 466, 477 (N.D. 1986) (citing Zeman v. Mikolasek, 25 N.W.2d 272, 279 (N.D. 1946) (quoting Ramsdell v. Warner, 48 N.D. 96, 102, 183 N.W. 281, 283 (1921)). *See also* Schrank v. Meade, 145 N.W.2d 514, 518 (N.D. 1966); Hagerott v. Davis, 17 N.W.2d 15, 24-25 (N.D. 1944).

[¶17]The Option in this case does not meet legal definition and elements required for a valid gift. Dorothy never entered into a purchase agreement with Pifer, nor did she sign a deed transferring property title to Pifer while she was alive. Dorothy (and now her estate) never took any affirmative steps to "deliver" the property to Pifer or "divest" herself of "the title, dominion, and control" over the property.

[¶18]Further, if the Option was in fact a "gift," then Dorothy would have been required to file a gift tax return. According to Revenue Ruling 80-186, 1980-2 C.B. 280, a transfer to a related party of an option to purchase real property is a completed gift and subject to gift tax on the date the option is transferred, not the date it is exercised,

provided that the option is binding and enforceable under state law on the date of the transfer. (Emphasis added.) *See also* Rev. Rul. 98-21(May 4, 1998), Baumer v. United States, 685 F.2d 1318 (11th Cir. 1982). Dorothy never filed a gift tax return in the year the Option was created, nor in any subsequent years. (D.352;353;358).

[¶19]This Court has previously stated that:

> If a gift be imperfect and something remains to be done by the donor to effect an intention to make a gift or create a trust, a court of equity leaves the parties where it finds them. It would not aid in completing an incomplete transaction or enforcing that which rests only in an unexecuted intention.

Schrank v. Meade, 145 N.W.2d 514, 518 (N.D. 1966). It was improper for the court to determine the donative intent of Dorothy, especially since there was no indication in the document that she intended the land as a gift.

B. AN OPTION IS NOT A PROPERTY RIGHT OR INTEREST; AN OPTION IS THE GIVING OF A PRIVILEGE (OR RIGHT) TO PURCHASE PROPERTY FROM ITS OWNER AT SOME FUTURE DATE AND TIME SUBJECT TO CERTAIN CONDITIONS OR UPON AGREED TERMS.

[¶20]The Option was nothing more than a non-binding, revocable offer that never ripened into a legally binding and enforceable contract for sale and purchase of land between Dorothy and Pifer.

[¶21]"An option to purchase property is a mere privilege given by the owner to the optionee and does not constitute the optionee a purchaser of said property nor give him any right to or interest in the property until he accepts that privilege by exercising his right of option within the time specified and before it is cancelled." Hultberg v. City of Garrison, 56 N.W.2d 319, 322 (N.D. 1952). "The owner does not sell the property, but sells to the other party the right, at the optionee's election, to demand the conveyance in

the manner specified." Matrix Props. Corp. v. TAG Invs., 2000 ND 88, ¶15, 609 N.W.2d 737 (citing Wessels v. Whetstone, 338 N.W.2d 830, 832 (N.D. 1983)).

[¶22]Here, district court's partial summary judgment ruling effectively adopted Pifer's reasoning that a "Purchase Option is an interest in real property, and as such, can be the subject of a gift, like any other property," (D.111). "The question as to whether an option amounts to an interest in land is one upon which there is disagreement among the authorities." Knight v. Chamberlain, 315 P.2d 273, 274 (Utah 1957); Compare Hultberg, 56 N.W.2d at 321-323, Kern v. Kelner, 27 N.W.2d 567, 571 (N.D. 1947) with Horgan v. Russell, 140 N.W. 99 (N.D. 1913). There exists some authority in other jurisdictions supporting the proposition that an optionee may acquire equitable interest in the property that is the subject of the option and where specific performance may be allowed. In M.L. Gordon Sash & Door Co. v. Mormann, 271 N.W.2d 436, 440 (Minn. 1978), Minnesota Supreme Court stated, "notwithstanding the general rule, the holder of an option may under certain circumstances have an interest that equity will protect."

[¶23]In Cwiakala v. Giunta, 92 A.2d 849 (N.J. Super. Ct. Ch. Div. 1952), the court stated that a purchaser of property who was aware of a previously executed option to purchase was subject to the purchase option. In this case, McDermott was not aware of the option to purchase, nor did she purchase the property from her mother. West Virginia Supreme Court of Appeals declared, "Before payment or tender of the purchase money within the time stipulated in an option contract, such contract does not vest in the person to whom the offer of sale is made any title to the land, either legal or equitable." American Canadian Expeditions, Ltd. v. Gauley River Corp., 655 S.E.2d 188, 191 (W. Va. 2007) (quoting Rease v. Kittle, 49 S.E. 150 (W. Va. 1904)) (emphasis added).

[¶24]The Option did not constitute a contract for sale or conveyance of Dorothy's property to Pifer, irrespective of what Dorothy's intentions actually were at the time. All that Dorothy handed to Pifer was future opportunity to purchase her land (from her estate) within two years after her death (or at any time during her life if Dorothy so elected) at the price of $107,569.00. The Purchase Option Agreement never ripened into a legally enforceable land sale contract. McDermott challenges Pifer's assertion that an Option is an "interest in real property that may be freely transferred or given." (D.78:8).

[¶25]In the context of determining whether a grantor intends a present transfer of title to land, this Court has previously stated "if the intent is not to transfer the interest until the grantor's death, there is no present delivery and the conveyance is merely an ineffective attempt at a testamentary transfer." Matter of Estate of Dittus, 497 N.W.2d 415, 417 (N.D. 1993). Accordingly, McDermott asserts that the "giving" of the Option was "an ineffective attempt at a testamentary transfer" by Dorothy to Pifer. The Option itself did not constitute a conveyance of a property interest. If Dorothy wanted Pifer to have her land after she died, she should have made a devise in her will, executed a life estate, placed the land in trust, or taken other action that would allow Pifer to have a vested interest in the property at the time the Option was executed. She did not.

C. THE SUBSEQUENT CONVEYANCE OF THE PROPERTY BY DOROTHY CREATING A JOINT TENANCY WITH RIGHT OF SURVIVORSHIP HAD THE EFFECT OF TERMINATING DOROTHY'S INTEREST (AND HER ESTATE'S INTEREST) IN THE PROPERTY UPON HER DEATH; THUS, THE OPTION BECAME A NULLITY, AND LEGALLY IMPOSSIBLE FOR PIFER TO ACCEPT.

[¶26]Under the law of joint tenancy, "[u]pon the death of one joint tenant, the title to the joint tenancy property vests immediately in the surviving joint tenant." Sabot v. Fox, 272 N.W.2d 280, 281 (N.D. 1978). "The law is clear in North Dakota that joint

tenancy property does not pass through the decedent joint tenant's estate, but rather passes to the survivor by reason of the original joint tenancy deed." Schmidt v. Schmidt, 254 N.W.2d 102, 104 (N.D. 1977). "The joint tenant who survives does not take the moiety of the other tenant from him or as his successor, but takes it by right under the conveyance or instrument by which the joint tenancy was created." Hagen v. Schluchter, 126 N.W.2d 899, 901 (N.D. 1964). Immediately upon Dorothy's death, McDermott became sole owner, in fee simple, of the land at issue. Furthermore, "[j]oint tenancy is not an estate of inheritance; a joint tenant who dies leaving a surviving tenant has no interest which he may devise." In re Kasparis Estate, 71 N.W.2d at 564 (citing Hoeffner v. Hoeffner, 59 N.E.2d 684 (Ill. 1945)). If there is no interest to devise, there certainly can be no interest to sell or convey to Pifer.

[¶27]District court, in its Memorandum Decision and Order, noted the undisputed fact that "On December 22, 2009, a warranty deed to the property in question was recorded with the Grand Forks County Recorder." (D.117,4:5-6). However, it failed to address significance of this fact. The Option contained no provisions or language that placed restriction on Dorothy's ability to sell or convey the land as she wished while alive. She did so in October 2009, when she created joint tenancy with right of survivorship in the land with McDermott, by warranty deed. This indicates a contrary intent by Dorothy to devise her land to her daughter, not Pifer.

[¶28]The Option did not legally bind McDermott to sell her property to Pifer for $107,569.00, and there was no separate consideration paid by Pifer to make the Option irrevocable. It is not disputed that the purchase option agreement in this case contained no recital of consideration, and Pifer did not allege or assert so. "It is general hornbook

law that an option is a continuing offer which, <u>if supported by consideration</u>, becomes a legally binding promise to keep the offer open through the time specified in the option." <u>Estate of Jorstad</u>, 447 N.W.2d 283, 286 (N.D. 1989) (emphasis added). Alternatively, "an option <u>supported by consideration</u> is irrevocable for the life of the offer." <u>Id.</u> (emphasis added). Without consideration, an option to purchase is merely a revocable offer. <u>Id.</u> Dorothy, or her "heirs and estates, and successors," could withdraw or revoke the Option at any time, without liability.

[¶29]North Dakota case law is clear that an Option requires consideration in order to be irrevocable, even when the parties are family members. In <u>Estate of Jorstad</u>, the Jorstads signed an option contract giving their two sons the right to purchase real estate for a set price within one year after the death of both parents. <u>Id</u>.284. When the sons attempted to exercise the Option, their sisters objected, stating the option was revocable because the sons had not given consideration. <u>Id</u>.285. District court found that the sons had given consideration for the Option by remaining on the farm and farming it. <u>Id</u>. The North Dakota Supreme Court affirmed, reiterating requirement of consideration in order for a purchase option to be irrevocable. <u>Id</u>.285-86.

[¶30]The Option in this case cannot be transformed into a binding executory contract of sale, because the option, if valid, is no longer an obligation of the estate. The property now belongs to McDermott. A basic assumption on which the Option was based was that Dorothy was the exclusive record title owner of the land, and upon her death, the land would be part of her estate. Pifer would only have the right to purchase the land if 1)Dorothy desired to sell the land to him while she was alive, or 2)Dorothy died still owning the property and the property became part of her estate. Valid and

sufficient tender to exercise the Option would be to Dorothy's estate or to her heirs who inherited the land from the estate. See e.g., Judson v. Solomons, 185 S.E.2d 821, 824-25 (S.C. 1971). Prior to her death, however, Dorothy elected—and had every right—to create joint tenancy with her daughter, which had the effect of terminating Dorothy's interest in the land upon her death. McDermott, individually, is not bound to honor the Option, as the land was never part of Dorothy's estate. Performance of the Option has been made legally impossible. The Option, therefore, was terminated or revoked by operation of law; the Court cannot and should not compel McDermott to sell what is rightfully her land to Pifer under the terms of the 2004 Option. McDermott was not a party to the Option; therefore, she should not be held legally accountable, individually, for honoring the agreement.

[¶31]Under principles of contract law, "[a]n offeree's power of acceptance is terminated when the offer takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect." Restatement (Second) of Contracts § 43 (1981). The recording of the warranty deed effectively provided constructive notice to Pifer that the option (i.e., offer to sell the property) was withdrawn, and Dorothy no longer wished to sell her property to Pifer. Dorothy's estate no longer owns the land; it is impossible for Pifer to purchase the land from the estate. "When a contract has but a single object, and such object is...wholly impossible of performance...the entire contract is void." N.D.C.C.§9-04-03. McDermott asserts that she has no legal obligation, individually, to recognize the Option that was an agreement solely between her mother and Pifer.

II. THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW UNDER RULE 50 OF THE NORTH DAKOTA RULES OF CIVIL PROCEDURE.

[¶32]"On appeal the district court's decision on a motion for judgment as a matter of law is fully reviewable." Minto Grain, LLC v. Tibert, 2009 ND 213, ¶8, 776 N.W.2d 549. In order "[t]o determine whether the district court erred in granting a motion for judgment as a matter of law under N.D.R.Civ.P.50(b), this Court examines the trial record and applies the 'same standard' as the district court was required to apply initially." Id. The standard the Court is to apply is "whether the evidence favoring the verdict is so insufficient, reasonable minds could reach only one conclusion as to the verdict." Id.¶7.7

A. DEFENDANT DID NOT PROPERLY PLEAD HIS CLAIM OF UNLAWFUL INTERFERENCE WITH BUSINESS.

[¶33]Pifer filed his First Amended Complaint on October 29, 2010. The first time that Pifer presented his claim of Interference with Business was in *Plaintiff's Supplemental Brief Identifing (sic) Concerning Unresolved Issues with Dismissal of Appeal and Request for Evidentiary Hearing*, May 10, 2012. (D.333:1). Defendant submitted her *Motion to Vacate the Order on Partial Summary Judgment and Motion to Reconsider Defendant's Motion for Summary Judgment* August 10, 2012 where McDermott makes her first objection that Pifer has never pled Unlawful Interference with Business. (D.347;348:17). Pifer gave no answer to defendant's objection to the deficiencies in his pleadings. (D.374). In McDermott's response, she renewed her objection to Pifer's objectionable procedural forays. (D.376:5). This was again ignored by Pifer. McDermott raised the objection again in her *Brief in Support of Motion in Limine*. (D.388:2). Pifer again ignored the objection. (D.389). At the Final

Dispositional Conference on November 5, 2012, McDermott's counsel raised the objection yet again, and the Court acknowledged the frequent objections along this line that McDermott has made. (Tr. of Final Dispositional Conf.13:22;14:2-12).

[¶34]Pifer's counsel's own words at that hearing indicated that Pifer's counsel did not understand he was arguing something he had not pled, as he assured the Court, "An unpled claim. I can't be hearing this right. The reason for the First Amended Complaint was that we added a count for intentional interference with economic advantage." (Id.14:5-7). Pifer's counsel failed to see then, or previously, that his argument was in violation of simple procedural tenets. The objection was raised again in McDermott's Motion for Judgment As a Matter of Law and Motion for Judgment Notwithstanding the Verdict. (D.432;452).

[¶35]Pifer was made aware of his procedural defect through McDermott's objections on five occasions before close of trial. Pifer then scrambled to fix his mistake by filing a motion to Amend Complaint to Conform to the Evidence. (D.465). District court properly denied this motion. (D.478).

[¶36]Pifer, in supplement to his claim for breach of contract against McDermott, initially asserted claim for *Intentional* Interference with Economic Advantage. Apparently after realizing that such a claim at law does not exist in North Dakota, Pifer changed his claim to Interference with Business or Prospective Business Elements. While Pifer may fail to see the difference between the claim he pled and the claim he put before the court, there is a vast difference between claiming the defendant is liable for an intentional tort, and claiming the defendant has violated a tort requiring merely knowledge or negligent behavior.

[¶37]Discussing the related tort of intentionally inducing a breach of contract, the California Supreme Court stated: "The act of inducing the breach must be an intentional one. If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts." Imperial Ice Co. v. Rossier, 112 P.2d 631, 633 (Cal. 1941). Restatement of Torts explains, "The essential thing is the **purpose** to cause the result. If the actor does not have this purpose, his conduct does not subject him to liability under this rule even if it has the unintended effect of deterring the third person from dealing with the other." See Rest., Torts§766, com.(d) (emphasis added).

[¶38]In considering Intentional Interference with Economic Advantage, it is not enough that the actor intended to perform the acts which caused the result—he or she must have intended to cause the result itself. Although these views were expressed in the context of the tort of inducing breach of contract, the expansion into the broader wrongs of interfering with contractual relations or prospective economic advantage has not altered the requirement that the defendant act with culpable intent. *See* Seaman's Direct Buying Service, Inc. v. Standard Oil Co., 36 Cal.3d 752, 766, 206 Cal.Rptr. 354 (1984). "[T]o prevail on a cause of action for intentional interference with prospective economic advantage, plaintiff must plead and prove 'intentional acts on the part of the defendant designed to disrupt the relationship.'" Id. quoting Buckaloo v. Johnson, 537 P.2d 865, 872 (Cal. 1975).

[¶39]These are two very different claims; one requires the plaintiff show that McDermott *intended* to interfere with Pifer's business, and the other requires mere knowledge of the business relationship or expectancy. Pifer pled a much higher standard

of culpability in his initial pleadings, and provided no compelling reason, nor had he even formally attempted, to amend his complaint for a second time until after the jury trial.

B. PLAINTIFF'S CLAIM FOR INTERFERENCE WITH BUSINESS FAILS AS A MATTER OF LAW.

[¶40]Intentional Interference with Business requires a plaintiff to "prove the following essential elements: (1)the existence of a valid business relationship or expectancy; (2)knowledge by the interferer of the relationship or expectancy; (3)an independently tortious or otherwise unlawful act of interference by the interferer; (4)proof that the interference caused the harm sustained; and (5)actual damages to the party whose relationship or expectancy was disrupted." Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc., 2001 ND 116, ¶38, 628 N.W.2d 707.

> By independently tortious we do not mean that the plaintiff must be able to prove an independent tort. Rather, we mean only that the plaintiff must prove that the defendant's conduct would be actionable under a recognized tort. Thus, for example, a plaintiff may recover for tortious interference from a defendant who makes fraudulent statements about the plaintiff to a third person without proving that the third person was actually defrauded. If, on the other hand, the defendant's statements are not intended to deceive…then they are not actionable.

Trade 'N Post, L.L.C., 2001 ND 116 at ¶42 quoting Wal-Mart Stores, Inc. v. Sturges, 44 Tex.Sup.Ct.J. 486, No. 98-1107, 2001 WL 228139, at *4 (Tex. Mar.8, 2001).

[¶41]New York Court of Appeals has stated, in discussion of the companion torts of Interference with Contract and Interference with Business:

> The degree of protection available to a plaintiff for a competitor's tortious interference with contract is defined by the nature of the plaintiff's enforceable legal rights. Thus, where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior. Where there has been no breach of an existing contract, but

> only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant.

Carvel Corp. v. Noonan Et Al., 3 N.Y.3d 182, 189, 818 N.E.2d 1100, 1103 (2004); *see also* Speakers of Sport, Inc., 178 F.3d at 867 (**"the tort of interference with business relationships should be confined to cases in which the defendant employed unlawful means to stiff a competitor"**) (emphasis added).

[¶42]Defendant has failed to show that a business relationship or expectancy can be formed off of a gift. The Court has made it clear that it believes the "gift" contained in this Purchase Option consists of the Fair Market Value of the property. Fair Market Value does not include profits that could be derived over any number of years; the fair market value of property is the price a willing buyer would pay for that property on a given day in a competitive market. If the gift that Pifer was deprived of was really the fair market value of the property, then all Pifer could be entitled to is the title to the property, given final determination of the Court at the highest level, and the opportunity to sell that property on the day he receives it. If the value of the property had decreased from the day that Pifer attempted to exercise the Option, then he might have claim against McDermott for lost value. But the fair market value of the property has actually increased since that day, so any amount Pifer receives from the property after final determination more than fulfills the promises of the "gift" from Dorothy Bevan.

[¶43]The Court made it clear the Option was not a contract, so Pifer could not claim traditional contract expectancies off of the option. If Pifer received this windfall of a gift from Dorothy, he couldn't then claim additional "gifting" from McDermott.

[¶44]Plaintiff has failed to show that Defendant is a business competitor of Plaintiff's. The cases that apply the elements of Interference with Business do not consist

of private parties versus business owners. See, e.g., Wal-Mart Stores, Inc. v. Sturges, 44 Tex.Sup.Ct.J. 486, No. 98-1107, 2001 WL 228139, at *1 (Tex. Mar.8, 2001); *see also* Schneider v. Schaaf, 1999 ND 235, ¶26, 603 N.W.2d 869; Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc., 2001 ND 116, ¶38, 628 N.W.2d 707. This tort was not intended for a person that is merely defending the right to hold rightfully owned property against a person that claims to have an option to take that property. Pifer has tried to fashion McDermott into a "business competitor," one who has maliciously or knowingly interfered with his "business advantage." But plaintiff has failed to prove that defendant is anything more than a landowner seeking to quiet title the land her mother gave her. Plaintiff has failed to prove this element of Interference with Business.

[¶45]Plaintiff has failed to show that Defendant committed an unlawful or independently tortious act. The most important element of Interference with Business that a plaintiff must prove is independently tortious or otherwise unlawful act. As the Supreme Court clearly stated in Trade 'N Post: "We hold that, in order to recover in tort for unlawful interference with business for actions by a business competitor, the plaintiff must establish that the interfering conduct was independently tortious or otherwise in violation of state law." Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc., 2001 ND 116, ¶43, 628 N.W.2d 707.

[¶46]Pifer tried to establish this element through a theory of continuing trespass, saying that McDermott was not entitled to post signs or fences on her own land. The Supreme Court of North Dakota defined trespass as: "an 'intentional harm,'" where a person "intentionally and without a consensual or other privilege...enters land in possession of another or any part thereof or causes a thing or third person so to do."

McDermott v. Sway, 78 N.D. 521, 529–30, 50 N.W.2d 235, 240 (1951). The key element here is "land in possession of another." McDermott owns this land, and owned it the day she posted rabbit fences and signs. Though the Court may have issued its decision regarding the Option, the automatic stay was in effect at the time she posted signs and fences. According to Striegel, the property remains in the possession and ownership of McDermott until final determination has been made by the highest court. Striegel v. Dakota Hills, Inc., 365 N.W.2d 491 (1985). McDermott cannot, by law, trespass on her own land. The plaintiff has failed to establish any unlawful or independently tortious act on the part of the defendant, so his claim for Interference with Business must fail as a matter of law.

C. PLAINTIFF'S AWARD OF DAMAGES FAILS AS A MATTER OF LAW.

[¶47]The North Dakota Supreme Court upheld that until there is a final Judgment, a party should not be divessted of the right to the use and possession of land in Striegel et al. v. Dakota Hills Inc. et al., 373 N.W.2d 785 (N.D. 1984). That case involved cancellation of a contract for deed on the purchase of a campground. Id.786. The plaintiffs received a partial summary judgment which cancelled the contract for deed, but other claims remained unresolved in district court. Id. In dismissing the appeal, Justice Pederson stated as follows:

> We understand that there has been an execution on the partial summary judgment placing the campground property into the Striegels' [the plaintiffs'] possession. **Because the judgment was not final, it was improper to execute on it. The trial court should, therefore, take whatever steps are necessary to place the parties in the same position they were prior to the improper execution**.

Id.787 (emphasis added).

[¶48]In the instant case, McDermott promptly signed a Quit Claim deed once partial summary judgment was entered against her as required by N.D.R.Civ.P.62(g). District Court ordered the stay of proceedings while the appeal was taken. (D. 190). This court heard the matter and determined that issues remained outstanding and remanded the matter back to the District Court. (D.342). A trial was held on damages and a verdict entered on November 14, 2012. (D.437). This appeal was commenced and District Court again stayed the proceedings pending the outcome of appeal and final judgment. (D.478). McDermott has done nothing but comply with the law in exercising her right to determine proper ownership of the property in question. *Cf.* Matrix Properties Corp. v. TAG Investments, 2002 ND 86, 644 N.W.2d 601, 609 (stating a seller wrongly occupies real property and wrongly delays the conveyance thereof is liable for the value of use lost to the conveyee). In Matrix this court indicated that damages would start to toll from the affirmance of the lower court judgment, the date of final judgment. Id. It is improper to assess damages against McDermott in this matter. The award of damages must be set aside.

III. THE DISTRICT COURT ERRED IN GRANTING PIFER THE USE AND POSSESSION OF THE LAND IN QUESTION FOR THE 2013 GROWING SEASON.

[¶49]Regarding the standard of review on preliminary injunctions, the Supreme Court has stated: "The decision to grant or deny a preliminary injunction is within the discretion of the trial court, and its determination will not be disturbed on appeal unless it appears that the court clearly abused its discretion." Schauer v. Jamestown College, 323 N.W.2d 114, 115 (N.D.1982). "A trial court abuses its discretion when it acts in an

arbitrary, unreasonable, or unconscionable manner." Schwarting v. Schwarting, 354 N.W.2d 706, 708 (N.D.1984).

A. THE COURT ABUSED ITS DISCRETION IN FAILING TO WEIGH THE FACTORS NECESSARY TO DETERMINE WHETHER AN INJUNCTIVE RELIEF WAS APPROPRIATE.

[¶50]In F-M Asphalt, Inc., the Supreme Court addressed the factors district court must weigh before issuing an injunction as: "1)substantial probability of succeeding on the merit; 2)irreparable injury; 3)harm to other interested parties; 4)effect on the public interest." F-M Asphalt, Inc. v. N. Dakota State Highway Dept., 384 N.W.2d 663, 664-65 (N.D. 1986) (citing e.g., the Eighth Circuit's summary of these factors in Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109 (8th Cir.1981)).

[¶51]Pifer characterized his post-trial request for injunctive relief as a continuance of the first temporary restraining order issued by the district court, but such a characterization could not have been further from the truth. (D.446). Pifer's original request sought to replace McDermott's tenant farmer with his own, citing the four factors as his support. (D.270). For the element requiring a likelihood of prevailing on the merits, Pifer stated that he would likely prevail because of "the Supreme Court's refusal to address the merits of the Defendant's appeal. If the Supreme Court had thought there was merit to the appeal, it likely would have said so…" (D.270:3). This element fails on its own logic, as the very phrase "refusal to address the merits" means that this Court did not address the merits.

[¶52]Regarding likelihood of irreparable injury, Pifer tried to lead the district court to believe that the land was empty and uncared for, and would suffer "irreparable injury" through this disuse (Id.), when he knew that the land had a farming tenant

actively working and caring for the land—knowledge proved because he tried to contact and threaten that tenant before requesting temporary injunction from the district court. (D.302). Pifer also asserted that any harm to other interested parties, the third factor to be weighed, was "greatly overshadowed by the irreparable injury facing Pifer." (D.270:4). Pifer also assured the Court that no direct public interest was involved. Id.

[¶53]Based on this flimsy reasoning, district court issued the temporary restraining order until McDermott quickly filed her motion to vacate that order. (D.299-302). District court then held a hearing in chambers, the result of which was nearly nothing that Pifer had originally requested. (D.321). In that Order, district court basically denied Pifer's original application, and allowed McDermott's tenant to stay on the land, pursuant to a deposit to Clerk of Court of the cash rent for 2012, and Pifer was allowed to erect grain bins, subject to his own financial liability should he not prevail at appeal. Id.

[¶54]After trial, Pifer sought to "continue" the temporary injunction, as it was set to lapse on December 31, 2012, based on Pifer's understanding that McDermott intended to file an appeal, and that the "appeal process, particularly if McDermott orders a trial transcript, will consume most, if not all of the growing season." (D.447:2). Pifer made no attempt to cure defects of his previous application, but simply pled to district court his desire that there "will be no dispute about who is in charge of the land for 2013 for rental purposes…" Id. This is not sufficient justification to strip McDermott of her right to use and possess the land as she sees fit—barring any wasteful behavior as on the part of McDermott—until a final determination has been made by the highest court as to the rights of the parties.

[¶55]District court abused its discretion in failing to weigh any of the required factors before issuing its most recent injunction against McDermott and in favor of Pifer. (D.447). The lower court characterized the injunction as continuation of the Order issued on May 25, 2012, but the current order does not "continue" any of the rights or restrictions existing in the earlier order. Id. The lower court completely dismantled the earlier order, because it kicked McDermott's tenant off of the land in favor of Pifer's tenant, and completely barred McDermott from even entering the land "until there is a final judgment addressing the issue of the validity of the purchase option." (Id.¶1). The lower court did not weigh any of the factors necessary to issue the present injunction, and in doing so, acted arbitrarily and capriciously in favor of Pifer.

B. THE LOWER COURT ABUSED ITS DISCRETION IN GRANTING TO PIFER THE RIGHT TO ENTER UPON AND USE LAND THAT HAS NOT YET BEEN MADE HIS IN A FINAL DETERMINATION ON THE VALIDITY OF THE PURCHASE OPTION.

[¶56]The parties in this case should be placed in the position they were in prior to entry of the restraining order and order to show cause, which means that that order should be vacated and Pifer must cease and desist interference with McDermott's land. Until entry of a final judgment in this case, after exhaustion of McDermott's right to appeal, the land remains McDermott's and she can do with it as she pleases, barring waste.

[¶57]Additionally, Plaintiff gave no indication of what type of crop he intended to plant, and McDermott vehemently protested any possible intention to plant potatoes on the land. (D.460). McDermott's main fear was that Pifer intended to lease to a tenant that will plant potatoes, because, though potatoes yield high rental value for a one-year span, they completely ruin the soil for years after. Id. Pifer has offered no assurances

that he will not cause the land irreparable injury, and it must be stated again, the land does not yet belong to Pifer.

[¶58]Pifer took the position very early that he could execute on the partial summary declaratory judgment entered in this case. He was wrong as a matter of law, and District Court erred in following his legal reasoning. As noted above, the North Dakota Supreme Court faced an on-point situation in Striegel et al. v. Dakota Hills Inc. et al., 373 N.W.2d at 785.

[¶59]Because the Supreme Court has ruled in this case that Rule 54(b) certification should not have been granted, the partial summary declaratory judgment in this case is, like the partial summary judgment in Striegel, is not final and Pifer had no basis on which to execute. The North Dakota Supreme Court subsequently affirmed its holding in Striegel regarding an attempt to execute on an interlocutory judgment by indicating that any statements made insinuating authority to execute on such a judgment lacking Rule 54(b) certification are squarely misplaced. Citizens State Bank-Midwest v. Symington, 2010 ND 56, ¶15, 780 N.W.2d 676.

[¶60]As such, the parties in this case should be placed in the position they were prior to entry of the restraining order and order to show cause, which means that that order should be vacated during pendency of appeal, and Pifer must cease and desist his interference with McDermott's land. Until entry of final judgment in this case, and the exhaustion of appeals, the land remains McDermott's and she can do with it as she pleases.

CONCLUSION

[¶61]District court erred in determining that the Option in this case was valid and enforceable against McDermott. As such, McDermott respectfully requests that this Court reverse the partial summary judgment of the district court compelling transfer of her interest in land, set aside the damage award against her, and direct the district court to enter summary judgment in her favor as a final judgment.

Respectfully submitted this 22nd day of April, 2013.

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IN THE NORTH DAKOTA SUPREME COURT

Kevin Pifer	)	
	)	Supreme Court No. 20110287
Plaintiff/Appellee	)	
	)	Grand Forks County No.
v.	)	18-2010-CV-01940
	)	
Barbara McDermott,	)	**CERTIFICATE OF SERVICE**
	)	
Defendant/Appellant	)	

I, **DEWAYNE JOHNSTON**, attorney for the Appellant, and an officer of the court, hereby certifies that a true and correct copy of the foregoing:

1. **BRIEF OF APPELLANT (corrected); and**
2. **APPENDIX OF APPELLANT (corrected)**

were served by **EMAIL PURSUANT TO N.D. SUP.CT.ADMIN. ORDER 14** on this 24th day of April, 2013 to the following:

Mr. Roger Minch
Serkland Law Firm
P.O. Box 6017
Fargo, ND 58108-6017
rminch@serklandlaw.com

Dated this 24th day of April, 2013.

JOHNSTON LAW OFFICE

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20130027
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APRIL 22, 2013
STATE OF NORTH DAKOTA

IN THE NORTH DAKOTA SUPREME COURT

Kevin Pifer	)	
	)	Supreme Court No. 20110287
Plaintiff/Appellee	)	
	)	Grand Forks County No.
v.	)	18-2010-CV-01940
	)	
Barbara McDermott,	)	**CERTIFICATE OF SERVICE**
	)	
Defendant/Appellant	)	

I, **DEWAYNE JOHNSTON**, attorney for the Appellant, and officer of the court, hereby certify that a true and correct copy of the foregoing:

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2. **APPENDIX OF APPELLANT**

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