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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

APPEAL FROM THE DISTRICT COURT,
GRAND FORKS NORTH DAKOTA
NORTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE LAWRENCE E. JAHNKE, PRESIDING
SUMMARY JUDGMENT AND JURY VERDICT ON REMAND

BRIEF OF PLAINTIFF/APPELLEE KEVIN PIFER

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I.

JURISDICTIONAL STATEMENT

[1] Defendant/appellant, Barbara McDermott ("McDermott") omitted this from her brief.

[2] The district court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 27-05-06. The appeal was timely under N.D.R.App.P. 4(a). This Court has jurisdiction under N.D. Const. art. VI, §§ 2, 6, and N.D.C.C §§ 28-27-01, 28-27-02. The district court has ruled on all issues, the validity of the purchase option, as well as the damages for McDermott's interference with it, and there is nothing left for the district court to do.

II. STATEMENT OF ISSUES

[3] In a free society, is it legally possible for a person of sound mind who has the capacity to outright give the fee title to real property to hire an attorney to give a purchase option in the real property to a natural object of her affections where the optionee had no advance knowledge of, let alone involvement with the purchase option?

[4] Did the district court make a clearly erroneous finding of fact that the purchase option was intended to be a gift?

[5] Is one holding a power of attorney always automatically disqualified from receiving any gift or devise from the one giving the power of attorney, no matter the circumstances?

[6] Did the district court properly grant summary judgment for the optionee where there was absolutely no evidence whatsoever in the record that anything but a gift of the purchase option was intended and where there was absolutely no evidence whatsoever in the record of any prior knowledge of the purchase option by the optionee, let alone any type of overreaching?

[7] Did the jury properly award damages for unlawful interference with business based on a pattern jury instruction requested by both parties, based on clear recent North Dakota Supreme Court precedent and never later objected to by McDermott?

III. STATEMENT OF THE CASE

[8] This is an appeal from a summary judgment determining that a purchase option given by Dorothy Bevan to Kevin Pifer ("Pifer") is valid. The purchase option was recorded, Pifer's App. P. 8, Pifer recorded his notice of intent to exercise the purchase option in a timely fashion, Pifer's App. P. 15 and tendered the purchase option price, which was refused. Pifer's App PP. 118-120.

[9] Judge Jahnke granted Pifer's cross motion for summary judgment finding that there was absolutely no evidence to support any of the allegations of McDermott's answer to first amended complaint and counterclaim.

[10] McDermott attempted to appeal the judgment, but this Court dismissed the appeal and remanded to the district court because Pifer's claim for damages because of McDermott's intentional interference with his rights under the purchase option had not been resolved.

[11] On remand, the jury awarded Pifer $80,957.07. Pifer's App. P. 145.

[12] Notice of entry of the summary judgment and the judgment because of the jury verdict were both promptly served on McDermott. There are no remaining issues to be resolved by the district court.

[13] McDermott purports to appeal now from both the summary judgment determining that the purchase option was valid, as well as the jury verdict, not objecting to HOW the jury made its award, but simply saying that the jury verdict must be reversed "as a matter of law" because North Dakota law does not allow a jury verdict for intentional interference with business.

[14] The claim for interference with economic advantage has been part of the case since Pifer's first amended complaint, Pifer's App. P. 5.

[15] The jury also awarded Pifer $1,875.23 in interest because of McDermott's delay in returning the certified check Pifer used to attempt to pay the option purchase price. Pifer's App. P. 145.

[16] Judge Jahnke has not abused his discretion in issuing stays pending appeal and in protecting the rights of the parties pending the ruling of this Court in this frivolous appeal. Judge Jahnke has required McDermott to post a cash bond of $65,000, to deposit the $27,300 she received for cash rent for the property subject to the purchase option ("Property") during 2012 with the clerk of court, along with a signed quit claim deed from herself to Pifer. Judge Jahnke has required Pifer, on the other hand, to deposit with the clerk of court the $48,855 he received for cash rent for the Property for 2013 with the clerk of court.

[17] The rights of all concerned have been properly and adequately protected, pending the outcome of this appeal. There has been no abuse of discretion by Judge Jahnke.

[18] If the judgments are affirmed, Pifer's jury verdict can be paid from the money on deposit with the clerk, he can receive the $48,855 for the 2013 cash rent, and record the quit claim deed being held by the clerk.

IV. STATEMENT OF FACTS

[19] And, as Judge Jahnke noted several times in his August 30, 2011, memorandum decision & order, after finding that the purchase option was "intended as a gift from Mrs. Bevan to Mr. Pifer," Pifer's App. P. 41; "The Defendant has presented absolutely nothing to indicate to the contrary", Pifer's App. P. 41 , "…aside from bare bones allegations, no evidence whatsoever has been presented to indicate that Kevin Pifer exercised influence or had input of any kind with regard to Mrs. Bevan's decision to grant him the Purchase Option which she did on February 16, 2004.", Pifer's App. P. 42 that "Although Ms. McDermott made rather straightforward accusations and insinuations throughout her deposition, she presented absolutely no evidence, substantive or otherwise, to support her statements.", Pifer's App. P. 42 , "Again, there has been nothing presented to contradict Mr. Hager, other than Ms. McDermott's own unsupported assertions.", Pifer's App. P. 42 , and on the issue of undue influence, "A review of the affidavit and deposition testimony of Mr. Hager, as well as the deposition testimony of Ms. Serene and Ms. McWilliams, has clearly rebutted any such presumption.", Pifer's App. P. 43, and on the issue of undue influence, "Again, other than a bare assertion, there

have been no facts or testimony presented by the Defendant to support that claim.", Pifer's App. P. 43, and again, "Other than Ms. McDermott's unfounded accusation that Mr. Hager was untruthful in his testimony, absolutely nothing has been presented to controvert Mr. Hager's opinion". Pifer's App. P. 43

[20] Judge Jahnke made his findings of fact and determined that there was no genuine issue of material fact concerning the mental capacity or intent of Mrs. Bevan or improper influence by Pifer in light of the "… mere unsubstantiated allegations which have fallen far short of showing the existence of a genuine issue of material fact", Pifer's App. P. 43 , and "… McDermott has presented absolutely nothing in the form of relevant testimony or documentary evidence to support her contention that the Purchase Option was intended as a revocable offer and contractual in nature". Pifer's App. P. 44.

[21] Judge Jahnke made these findings of fact and conclusions after a careful review of all deposition testimony, including that of Mrs. Bevan's attorney who drafted the Purchase Option and two close friends of Mrs. Bevan. That deposition testimony was summarized and made part of the record. Doc. #s 79-84. It is irrelevant that the option contain no recital of consideration, since, as Judge Jahnke found, to the extent that the option purchase price exceeded the fair market value of the land at the time the option was exercised, a gift was intended.

[22] The deed creating the joint tenancy is also irrelevant because it was not done until after the purchase option was recorded. Thus, the deed and the right of the surviving joint tenant, McDermott, are subject to Pifer's rights under the purchase option as a matter of real estate law and because the purchase option itself states "This agreement is binding upon the parties, their heirs and estates, and successors". Pifer's

App. P. 7. McDermott was given constructive notice, if not actual notice, of the purchase option, and its terms, before the joint deed to her was recorded, and the only significance of the joint deed is that the option purchase price must be paid to McDermott, rather than Dorothy Bevan's estate, the exact thing Pifer did. McDermott takes the Property by survivorship subject to the purchase option, just as she would have taken the Property subject to any mortgage granted by Dorothy Bevan, and recorded against the Property before the joint deed was recorded.

V. STATEMENT OF REVIEW

[23] Judge Jahnke's findings of fact must be affirmed unless clearly erroneous, or he has misapplied the law. His rulings concerning stays pending appeal and injunctions cannot be reversed unless he abused his discretion. McDermott has waived her right to argue about the jury award for damages for intentional interference with business because she herself requested the exact jury instruction given on that claim, and never later objected to it until now.

VI. STATEMENT OF UNCONTRADICTED FACTS

[24] These are the facts and they are uncontradicted and they and the other deposition testimony are part of the record. Doc #s 79-84.:

1. The Pifer and Bevan families are related and have co-existed in a friendly and helpful manner in the Larimore, ND area for generations.

2. By her April 26, 2001, will Dorothy Bevan gave a quarter section of her farmland in Niagara Township to Pifer's parents, or to Pifer himself, if his parents predeceased him.

3. McDermott is the daughter of Dorothy Bevan, who did not come to North Dakota from 1995 through 2008 to visit her mother.

4. McDermott took Mrs. Bevan from the Larimore Nursing Home in October of 2008, without prior authorization or proper notice.

5. During January or February of 2004, Mrs. Bevan hired attorney Don Hager of Larimore to give Pifer an option to purchase two adjacent quarters of Mrs. Bevan's farmland in Chester Township, Grand Forks County.

6. Mrs. Bevan knew what she was doing at the time, and in the opinion of her daughter, knew what she was doing for years later.

7. One of Mrs. Bevan's good friends, Clyone Serene, also knew about the purchase option.

8. Attorney Hager drafted the purchase option according to the instructions of Mrs. Bevan, with no input or influence from Pifer.

9. Mrs. Bevan intended for the purchase option to be a gift, and intended no specific consideration for it.

10. The first knowledge Pifer had of the purchase option was when he was called to a meeting between Don Hager and Dorothy Bevan at attorney Hager's office in Larimore, North Dakota.

11. When Pifer learned of the meeting, he was afraid that Mrs. Bevan wanted to sell some of her farmland to him, and he was concerned he would not be able to pay for it.

12. All of the terms of the purchase option, including the purchase option price, were decided independently by Mrs. Bevan, with no input or influence from Pifer, and the purchase option was already prepared when Pifer arrived at the meeting.

13. When Pifer arrived for the meeting, Mrs. Bevan and attorney Hager were already there, and that's when Pifer first learned that Mrs. Bevan wanted to give him and option to purchase her two quarters of farmland in Chester Township.

14. Pifer indicated to both Mrs. Bevan and attorney Hager that the option purchase price might be somewhat below market value.

15. By her 2006 will, Mrs. Bevan removed the gift of the Niagara Township land to the Pifer family.

16. McDermott had no actual knowledge of the purchase option, until after her mother died in 2010, even though the purchase option was recorded with the Grand Forks Register of Deeds Office in 2004 immediately after it was signed.

17. Mrs. Bevan depended on persons in the Larimore area to help with any care she needed, including through powers of attorney she had given Pifer, and later to her good friend, Liz McWilliams, and others.

18. Over the years, Mrs. Bevan gave at least $64,000.00 to her daughter, McDermott, to help with housing arrangements, and buy a car, and as McDermott explained in her deposition, her mother always knew what she was doing, and McDermott never took advantage of her.

19. A copy of attorney Hager's affidavit, concerning his efforts to draft the purchase option for his client, Dorothy Bevan, was attached to the complaint and first amended complaint Pifer's App. PP. 28-31, to make sure that McDermott would know that her mother had hired an attorney to draft the purchase option, what her wishes were, that her attorney carried them out and that Pifer had nothing to do with the purchase option.

20. At her deposition, McDermott had no factual basis to dispute the fact that her mother had knowingly hired her own attorney and competently given Pifer the purchase option in February of 2004, except to say that "Don Hager is a liar", "There is no way my mother would have given Kevin Pifer any of my grandfather's land", and that "There must be some conflict of interest between Don Hager and other parties."

21. Pifer and McDermott both requested a jury instruction on intentional interference with business, McDermott never objected to the instruction until now in this appeal, the jury was so instructed, and thus it is too late for McDermott to argue that the

underlying theory of recovery in this appeal is not allowable "as a matter of law".

22. McDermott has deposited $65,000 with the clerk of court as a cash bond for a stay pending her first appeal, along with a signed quit claim deed from herself to Pifer for the Property.

23. McDermott has also deposited $27,300 with the clerk of court for the cash rent she collected for the Property during 2012 (approximately half the then going rate).

24. Pifer has deposited the $48,855 he received for cash rent for the Property for 2013.

25. The land will be farmed during 2013 without interference by McDermott, thanks to Judge Jahnke's temporary restraining orders and injunctions against McDermott.

VII. MCDERMOTT'S THEORY OF THE CASE AND OTHER IRRELEVANT CONSIDERATIONS

[25] McDermott's general theory of the case apparently was that if one is serving as a power of attorney, or offering assistance to another person, the assisted person cannot give a purchase option or anything else to the other. This would fly in the face of the notion that those who are granted a power of attorney, or are doing other favors for a grantor, would also be the natural objects of gifts, affection or bequests. If McDermott's theory held true, heirs or friends would be discouraged from or penalized for serving as powers of attorney, and could render no assistance to anyone from whom

they might receive a give or inherit property and worse still, the power of competent persons to gift their property as they might want would be constrained.

[26] McDermott appears to have given up this argument in this appeal along with arguments about fraud, undue influence, breach of fiduciary duty, etc., and instead now focuses on the theory that the purchase option was not a gift, purchase options generally cannot be made as a gift or accepted and exercised as such, and if there is a subsequent joint deed, the prior recorded purchase option is automatically invalidated. McDermott may also still cling to the theory that Dorothy Bevan did not have proper donative intent and that Judge Jahnke's finding about that is clearly erroneous. Although McDermott hired an attorney to prepare the joint deed, she never arranged to have her mother revoke the purchase option.

[27] The sole remaining and central issues are, then, whether Dorothy Bevan had the donative capacity to and intended to give the purchase option to Pifer during February of 2004 where the decision to do so was hers alone, where she hired an attorney to carry out her wishes, all without any prior knowledge or influence on the part of the beneficiary of the purchase option, Pifer, whose family had already been given one quarter of Mrs. Bevan's farmland by her April 26, 2001, will; and whether the joint deed defeats the purchase option.

[28] The fact that Pifer may have held Mrs. Bevan's power of attorney at the time is legally irrelevant, and if it were, would only show why Mrs. Bevan might want to give Pifer a purchase option. The same thing is true of the fact that Pifer was helping Mrs. Bevan manage her farmland before and during 2004.

[29] If Mrs. Bevan had brought up the issue of giving Pifer a purchase option to some of her land to him, his best possible response would have been "I am already serving as your power of attorney, and thus you will need to discuss this with your own attorney".

[30] Pifer never had a chance to do this because Mrs. Bevan had already made the decision to give Pifer the purchase option, and already knew enough to see her own attorney about doing so, did so, and Pifer knew nothing of the purchase option until he met with Mrs. Bevan and her attorney, Don Hager, together in Larimore, after Mrs. Bevan decided its terms and it was already prepared.

[31] There was no need for Mrs. Bevan to consult with McDermott about anything. McDermott had no expectation of receiving any land, and it was up to Mrs. Bevan to decide what she wanted to do with her own land.

[32] The purchase option was quickly recorded, Pifer's App. P. 8, and if McDermott had any expectancies, she could have checked the land records, and would have found the recorded purchase option. She did not know about the purchase option when she arranged to have her mother sign joint deeds to the Property in October of 2009, Pifer's App. P. 9, after Mrs. Bevan had suffered a stroke on July 4, 2008, and McDermott, after being absent from North Dakota for 13 years, spirited Mrs. Bevan away from the nursing home in Larimore, North Dakota to Kentucky, resulting in a FBI kidnapping investigation.

[33] It is irrelevant what the then or current fair market value of the Property was or is. It was up to Mrs. Bevan to decide the purchase option price, which she did in February of 2004. Pifer had even indicated to Mrs. Bevan and her attorney, Don Hager,

at the meeting where he first learned about the purchase option that the purchase option price might be a little below market value.

[34] No matter, it was up to Mrs. Bevan to choose the purchase option price, and could have simply given the land to Pifer at the time.

[35] McDermott argues that a purchase option cannot even exist unless there is a contemporaneous purchase agreement. But the two things are separate. North Dakota law recognizes purchase options. They create an interest in property. McDermott concedes that some courts recognize an equitable interest in the land subject to the purchase option. A purchase option would need to be disclosed as property in any bankruptcy case or claim of exemptions, and if it were valuable enough, could be pledged, sold or further conveyed.

[36] McDermott also suggests Mrs. Bevan needed to sign a deed. But this flies in the face of the fact that the purchase option could be exercised at any time within two years after Mrs. Bevan's death.

[37] The issue of gift tax returns was not properly raised below, is not part of the record, and is irrelevant.

[38] The purchase option was a present gift when it was drafted and recorded. By its terms, it survived Mrs. Bevan's death.

[39] The purchase option did not miraculously disappear when McDermott maneuvered Mrs. Bevan into giving McDermott a subsequent joint deed. Any interest McDermott received because of the deed was subject to the purchase option recorded five years before.

VIII. LAW AND ARGUMENT

A. Summary of Response.

[40] Unfortunately, family members are often dysfunctional, particularly where land or large sums of money are involved. McDermott's conduct in this case makes this a perfect example, and it's a credit to Judge Jahnke that he so carefully reviewed the record and all available evidence. It may be that McDermott believes that Don Hager is a liar or that there is no way Pifer should ever end up with some of her grandfather's land, but that accords McDermott no relief, particularly where she did so little to watch over her mother in North Dakota, all the while Pifer assisted her mother personally, and helped Mrs. Bevan take care of her land.

[41] Generally, in a free society one can do anything unless it is specifically prohibited or void against public policy. In unfree societies, to the contrary, everything is prohibited, unless it is specifically permitted.

[42] Thankfully, we live a free society, and as such, if someone wants to give someone else a purchase option in land, they can do it, unless to do so is specifically prohibited or void as against the public policy. McDermott cites no authority for the proposition that a citizen cannot hire an attorney to validly give a purchase option in land to another party, particularly where the optionee not only had no influence over the transaction, but as here, did not even know about the purchase option until it was already done, with the assistance of an attorney, and presented to him. McDermott cites nothing to support the argument that a purchase option in land cannot be given like any other type of property interest in the form of a gift. Judge Janke's factual determination that the purchase option was intended to be a gift and was a gift is not clearly erroneous and cannot be reversed.

[43] Dorothy Bevan could have simply given the land to Pifer. Thus, she could also have given him the right to purchase the land at a set price, within two years of her death.

[44] The rights of a land owner to deal with land, is practically unfettered under North Dakota law. In fact, the only limitations that come to mind are the limitations against leasing agricultural land for longer than a 10 year period or leasing city lots for a period longer than 99 years, N.D.C.C § 47-16-02, as well as the rule against perpetuities limiting "dead-hand" control of real property. N.D.C.C. § 47-02-27.1.

[45] But within these parameters, one can do what one wants with land. One can give it away, one can sell it on any terms agreed between the parties, give it away outright, or give it away in the form of a purchase option.

[46] McDermott cites no authority limiting the right of a land owner to gift a purchase option in land.

[47] The parties spent much time on proposed jury instructions. Pifer requested and got an instruction on intentional interference with business, based on the pattern jury instruction. Pifer's App. P. 100 McDermott requested the same instruction, Pifer's App. P. 111, and never objected to it before it went to the jury. Pifer's App. P. 136. The instruction is based on this courts recent ruling in Trade 'N Post, L.L.C. v Word Duty Free Americas, Inc., 2001 N.D. 116, 628 N.W. 2d 707 (N.D. 2001)

[48] McDermott does not argue on appeal that she objected to that instruction, or that it was improper. To reverse the jury verdict, McDermott must show that the jury instruction was improper, she objected to it, that the objection was overruled, and the instruction was given, despite the objection.

[49] Having requested and then not objected to the jury instruction on intentional interference with business, that instruction has become the law of the case, and it is too late to raise the objection now, either on the basis that the jury instruction was improper, or that the award of damages based on the jury instruction, or otherwise, must be reversed "as a matter of law".

[50] All of these objections and others are waived.

[51] Where there are no timely objections to jury instructions, they become the law of the case and any objections to them are waived. Walketzko v Herdegen, 226 N.W. 2nd 648 (N.D. 1975). See also Arneson v City of Fargo, 331 N.W. 2d 30 (N.D. 1983), discussing the general rule but also holding that when one requests an instruction, that party cannot later object to it.

[52] The purchase option was prepared by Mrs. Bevan's attorney. Her signature was notarized by him. Pifer quickly recorded the purchase option. Pifer's App. P. 8. Attorney Hager concluded that he could draft a validity enforceable purchase option. As such, it became an interest of record in the land described therein, and any subsequent party would take the land subject to the purchase option, including McDermott, who five years later recorded a warranty deed on October 22, 2009, Pifer's App. P. 9, and became the owner of the land by right of survivorship, upon the death of her mother, Pifer's App. P. 12, but subject to the purchase option.

[53] No consideration is required for a gift, and the recorded purchase option was not extinguished because of the later warranty deeds or events. The Purchase Option did not become impossible to perform. The only change is that the purchase option price would be paid not to Mrs. Bevan or her estate, but to McDermott as Mrs. Bevan's

successor in interest, something that has been done. Pifer's App. P. 120, Pifer accepted the Purchase Option by signing it, App. P. 25, by the recorded notice of intent to exercise it, Pifer's App. P.15, and by paying the option price.

[54] The simple fact that Mrs. Bevan had given Pifer a power of attorney in 2001, which was in place at the time of the purchase option, means nothing more than to suggest that Mrs. Bevan had good reason to give Pifer the purchase option.

[55] The fact of the later joint tenancy does not terminate the purchase option nor make it unenforceable. The surviving joint tenant simply takes the Property, as the surviving joint tenant, subject to the prior recorded purchase option and is entitled to the option price, rather than Mrs. Bevan's estate. The purchase option itself specifically states "This Agreement is binding upon the parties, their heirs and estates, and successors". Pifer's App. P. 7. Thus, any joint tenancy created by Mrs. Bevan is subject to the purchase option.

[56] The purchase option price has been paid, and thus Pifer is entitled to the quit claim deed said to be deposited by McDermott with the clerk of court, along with the $65,000.00 and $27,300 cash bonds, which will be available to pay the jury verdict, if the summary judgment and jury verdicts are affirmed.

[57] Judge Jahnke has made no clearly erroneous factual determinations, he has made no errors of law, he has not abused his discretion, this appeal should be summarily decided, and the judgments affirmed.

B. A Purchase Option can be made by gift.

[58] "An option agreement is a contract where the owner of property (optionor or option-giver) gives another (optionee or option-holder) the right to buy the property at

a fixed price within a specified time on agreed terms." Matrix Properties Corp. v. TAG Investments, 2000 ND 88, ¶15, 609 N.W.2d 737. A purchase option is irrevocable for the life of the offer. Id. The life of the offer to purchase in this case was for two years after Mrs. Bevan's death. Pifer lawfully accepted the purchase option when he signed the agreement on February 16, 2004. Pifer's App. P. 7. Therefore, the purchase option was a valid and enforceable contract, accepted by Pifer, which was irrevocable for the life of the offer (for two years subsequent to Mrs. Bevan's death).

C. A purchase option, like any other item of real or personal property, can be the subject of a gift, and if it is a gift, then no consideration is necessary.

[59] A purchase option is in interest in real property that may be freely transferred or given. It is therefore apparent that real property, like personal property, can be the subject of a gift in which no consideration is necessary.

[60] If this Court determines that the presumption of consideration enumerated in N.D.C.C. § 9-05-10 does not apply, Pifer asserts that consideration is not necessary in this instance. The purchase option may be the subject of a gift for which no consideration is necessary.

D. The purchase option is not voidable simply because Pifer had a power of attorney for Dorothy Bevan when Mrs. Bevan gave him the purchase option.

[61] McDermott may still argue that because Pifer was Mrs. Bevan's attorney in fact at the time Mrs. Bevan granted Pifer the purchase option, the purchase option is voidable. This argument too is without merit. Merely because Pifer was acting as Mrs. Bevan's attorney in fact at the time the purchase option was given to Pifer, does not render the purchase option voidable as a matter of law.

[62] A power of attorney is a written instrument authorizing another to act as one's agent, and the agent holding the power of attorney is the attorney in fact. In re Estate of Littlejohn, 2005 ND 113, ¶7, 698 N.W.2d 923. Acting as a power of attorney creates an agency relationship and agency principles apply. Id.

[63] There is no merit to McDermott's argument that the purchase option is voidable as a matter of law because Pifer was acting as Mrs. Bevan's attorney in fact when the purchase option was executed. If this were the case, no one with expectancy would serve as a power of attorney, and those needing assistance would not be able to grant powers of attorney to those to whom they might give property by an inter-vivos gift or a devise. Matter of Estate of Ambers, 477 N.W.2d 218 (N.D. 1991).

E. Pifer has breached no fiduciary duties, and has engaged in no self dealing.

[64] McDermott also seems to have given up her argument that Pifer breached his fiduciary duties owed to Mrs. Bevan as her attorney in fact, and that Pifer engaged in self dealing. Such an argument would ignore the undisputed facts in this case which clearly demonstrate that Pifer has not breached any fiduciary duties or engaged in any form of self dealing.

F. McDermott had notice of the purchase option prior to the execution of the Joint Deeds in October of 2009, and takes subject to it.

[65] Once the purchase option was recorded with the Grand Forks County Recorder's Office, all persons having an interest in the Property received constructive notice of the purchase option, and anyone acquiring a record title interest in the land subject to the purchase option after the purchase option was recorded would take title subject to the purchase option. North Dakota 2009 Title Standard 6-01. The fact that McDermott maneuvered her mother into signing a joint deed to the Property five years

later in October of 2009 does not defeat the purchase option, or make the purchase option impossible to carry out.

[66] A person has constructive notice of an instrument when the instrument is recorded in the office of the county recorder for the county in which the property is located. See Hanson v. Zoller, 187 N.W.2d 47, 55 (N.D. 1971). A purchaser of land is charged with every fact shown by the land records and is presumed to know every other fact which an examination suggested by the records would have disclosed. 77 Am.Jur.2d, Vendor and Purchaser, § 388 (2011). A person is bound by every express encumbrance on his or her property which the person could have found in the records. Id. Constructive notice serves, for all intents and purposes, as record notice. Id. When a party properly records his or her interest in real property with the appropriate office, the party constructively notifies all of the world as to his or her claim, and the recording operates to alert all future grantees as to the rights of the recorder, and as the law assumes such grantee will search the office to discover the claim. Id.

[67] Accordingly, McDermott cannot claim that the joint deeds executed in October of 2009 defeat the purchase option. McDermott had constructive notice of the purchase option as Pifer properly recorded the purchase option shortly after execution in 2004. Accordingly, the purchase option is valid and enforceable, and the October 2009 conveyance does not defeat the purchase option.

G. McDermott has apparently given up the argument that the purchase option is voidable because there is presumption of undue influence and constructive fraud.

[68] To be safe, we still address this issue. At the time the purchase option was executed N.D.C.C. § 59-01-16 was in effect. Section 59-01-16 enumerated a statutory

presumption of undue influence when a trustee or agent enters into a transaction with the beneficiary or principal. Of course, an agent must be afforded an opportunity to rebut this resumption of undue influence. Makedonsky v. North Dakota Dep't. of Human Servs., 2008 ND 49, ¶24, 746 N.W.2d 185. The determination of whether undue influence exists is a question of fact. In re Estate of Howser, 2002 ND 33, ¶9, 639 N.W.2d 485. Accordingly, summary judgment in Pifer's favor on this issue was appropriate.

[69] It also appears that the presumption does not apply in this case. This Court has declined to apply this presumption of undue influence merely because a person with a power of attorney benefits from the beneficiaries will or other gift. Matter of Estate of Ambers, 477 N.W.2d 218, 222 (N.D. 1991). This Court has also noted that if it were to adopt this presumption, "It would have the effect in some cases of unfairly burdening the party who takes care of the decedent during the later years in life." Id. (citing Estate of Polda, 349 N.W.2d 11, 14 (N.D. 1984)). This Court has declined to adopt this presumption of undue influence which would, in effect, punish the party who has cared for an elderly parent or other person. Id.

IX. MCDERMOTT HAS WAIVED THE RIGHT TO ARGUE THAT AN AWARD OF DAMAGES FOR INTENTIONAL INTERFERENCE WITH BUSINESS MUST BE DISSALLOWED "AS A MATTER OF LAW" AND IS ENTITLED TO NO RELIEF UNDER RULE 50

[70] McDermott does not argue about HOW the jury did its work, but only that whatever it did must be vacated "as a matter of law" because an award for intentional interference with business is not allowed under North Dakota Law.

[71] The complaint was amended by the first amended complaint to specifically make this claim. Pifer's App. P. 5.

[72] After McDermott's first appeal was dismissed, and on remand, Pifer made it crystal clear to McDermott that he was seeking a recovery for intentional interference with economic advantage, more specifically, that McDermott had interfered with Pifer's rights under the purchase option. Pifer's App. P. 91 .

[73] Pifer submitted a proposed pattern jury instruction C-24.10 on the claim. Pifer App. P. 100. So did McDermott. Pifer's App. P. 111 Judge Jahnke granted the instruction. Pifer's App. P. 136. At no time did McDermott object to the instruction before it went to the jury, Pifer's App. PP. 115-117, and even now, she does not object to the other elements of the jury trial award. See the jury's special verdict, Pifer's App. PP. 144-145.

[74] Pifer satisfied all of the elements required by the pattern jury instruction. He had every reason to assume that when he paid the option purchase price, by certified check, even bothering to have the check personally served on McDermott, Pifer's App. PP. 52-53, that the Property would be his, he would be able to begin farming it, and put up grain bins he had purchased for the Property, which continued to literally rot in storage. It is too late for McDermott to complain about a pattern jury instruction she herself requested, Pifer's App. P. 111 and failed to object to, Pifer's App. PP. 115-117 Arneson v. City of Fargo, 331 N.W. 2d 30 (ND 1983).

[75] Thus, McDermott is entitled to no relief under Rule 50, N.D.R. Civ. Other than simply citing the Rule, McDermott does not show why she was entitled to a

judgment as a matter of law, thus overruling the jury verdict and her specific consent that the jury be instructed about intentional interference with business.

X. JUDGE JAHNKE HAS NOT ABUSED HIS DISCRETION BY ANY TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION OR STAY PENDING APPEAL

[76] If anything, Judge Jahnke bent over backwards to protect the rights of McDermott, even after he found that there was absolutely no evidence to support any of the allegations in her answer and counterclaims.

[77] During 2012, McDermott was able to rent the Property, at approximately one-half the cash rent Pifer could have rented the Property for. Unfortunately, the jury only awarded Pifer damages for the cash rent actually received by McDermott, $27,300, Pifer's App. P.144, not the $48,825 Pifer could have rented the Property for during 2012, Pifer's App. P. 132.

[78] All of this was done against McDermott's strident efforts to wrongfully involve the Sheriff to keep Pifer from entering the Property, Pifer's App. P. 68, and then fencing and posting the Property Pifer's App. PP. 70-79, all to make sure that Pifer could not erect grain bins he had already purchased for the Property, hoping to install them in time for use during the 2012 harvest.

[79] Finally, after remand and the jury did its work, Judge Jahnke eventually agreed that Pifer would be in charge of renting the land for 2013, something he has done, but he was ordered to deposit with the clerk of court all money received by him for 2013 cash rent, something he has done.

[80] This has been a bad faith effort on the part of McDermott to simply frustrate Pifer at every turn, run up his damages as much as possible, and create as much work as possible for Judge Jahnke, as well this Court.

[81] Put simply, Dorothy Bevan had the right to give Pifer the Property out right and thus had the right to, through the help of an attorney, give Pifer the purchase option. She never had any shred of evidence or a legal theory to invalidate the purchase option.

[82] The damages the jury awarded last November for intentional interference with business are proper because McDermott herself requested the pattern jury instruction on intentional interference with business, she got it, did not object to the instruction until now, and this appeal, like McDermott's answer and counter claims is frivolous.

XI. CONCLUSION AND PRECISE RELIEF SOUGHT

[83] McDermott seems to have given up any arguments that there was any fraud, undue influence, over reaching, breach of any fiduciary duty or any other wrongdoing on the part of Pifer to Mrs. Bevan. McDermott instead focuses on an argument that a purchase option cannot be made as a gift, and that Judge Jahnke's factual determination that Mrs. Bevan intended a gift is somehow clearly erroneous. McDermott cites no authority that a gift of a purchase option is prohibited or somehow void as against public policy.

[84] As Judge Jahnke so eloquently held, and stated in so many different ways, McDermott presented no evidence whatsoever to invalidate the purchase option under any possible factual scenario or legal theory.

[85] McDermott also clings to the argument that the joint deed somehow invalidates the recorded purchase option, where the recorded purchase option itself, was never invalidated. The purchase option itself says it will be binding on "…the parties, their heirs and estates, and successors". If this argument were good, then a joint deed could just as well invalidate a prior recorded mortgage given by the grantor in a joint deed. The argument would be that the surviving joint tenant now owns the property, free and clear of the mortgage, just as McDermott argues that she became the surviving joint tenant, and therefore owns the Property free of her mother's purchase option given to Pifer.

[86] McDermott has not challenged any of the evidence that went to the jury, nor any of the specific jury instructions. She has, therefore, waived her right to argue that the jury verdict is improper because of the way it was done, or because of the underlying legal theories do not support it.

[87] The history of this case demonstrates the bad faith and civil disobedience of McDermott and her efforts to delay proceedings wherever possible, including improperly involving the local sheriff, Pifer's App P. 68 and arranging to post and fence property, Pifer's App. PP. 70-79 in disrespect of Judge Jahnke's ruling, and outside the bounds of any stay pending appeal. The fact that she ordered transcripts of the hearing on the Cross Motions for Summary Judgment, and then again concerning the hearing on her Motion for Stay Pending Appeal, shows that she uses every available means to create additional delay and expense for everyone. Ordering transcripts twice delayed the briefing schedules to this Court, and noteworthy is the fact that McDermott has made not one reference to either of them. McDermott has manipulated the court below, the rules,

and now this Court, to simply create additional delay and damages for Pifer, and work for everyone.

[88] Taking this into account, Pifer respectfully requests that the Court summarily affirm the judgments below, determine this appeal to be frivolous and award Pifer his costs and attorney fees.

Dated this 20th day of May 2013.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Plaintiff/Appellee, Kevin Pifer, in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellant Procedure, that the Brief of Appellee was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 6,927.

Dated this 20th day of May 2013.

_____

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AFFIDAVIT OF SERVICE BY ELECTRONIC MEANS

Kevin Pifer
v.
Barbara McDermott
District Court File No.: 18-2011-CV-01940
Supreme Court File No.: 20130027

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

Lesha K. Ladwig, being duly sworn, deposes and says that she is a resident of the City of Fargo, State of North Dakota, is of legal age; and that she served the within:

BRIEF OF PLAINTIFF/APPELLEE KEVIN PIFER

APPENDIX OF PLAINTIFF/APPELLEE KEVIN PIFER

on May 21, 2013, by sending a true and correct copy thereof by electronic means to the following e-mail addresses, to-wit:

E-mail Address: **supclerkofcourt@ndcourts.gov**

Clerk of the Supreme Court
North Dakota Supreme Court
600 E Boulevard Ave.
Dept. 180
Bismarck, ND 58505-0040

E-mail Address: **dewayne@wedefendyou.net**

DeWayne Johnston
221 South 4th St.
Grand Forks, ND 58201

To the best of affiant's knowledge, the e-mail addresses above given are the actual addresses of the parties intended to be so served as published in the North Dakota Supreme Court's online directory.

Lesha K. Ladwig

Subscribed and sworn to before me this 21st day of May, 2013.

(SEAL)

Notary Public