

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

June 4, 2013

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

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

REPLY BRIEF OF APPELLANT, BARBARA MCDERMOTT

DEWAYNE JOHNSTON (ND ID # 05763)
 ATTORNEY FOR APPELLANT
 JOHNSTON LAW OFFICE
 221 SOUTH 4TH STREET
 GRAND FORKS, ND 58201
 Ph. (701) 775-0082
 DEWAYNE@WEDEFENDYOU.NET

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LAW & ARGUMENT

I. APPELLANT IS NOT MRS. BEVAN'S HEIR OR SUCCESSOR OF THE PROPERTY AND IS NOT BOUND BY THE PURCHASE AGREEMENT.

[¶2] Kevin argues that because the purchase option states “*This Agreement is binding upon the parties, their heirs and estates, and successors*” the joint tenancy between Mrs. Bevan and Barbara is subject to the purchase option. This provision in the purchase option does not apply to the joint tenancy with right of survivorship because Barbara was neither Mrs. Bevan’s heir nor her successor of the property at issue. “[J]oint 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). It is well settled law in North Dakota that:

[u]pon the death of one joint tenant, the title to the joint tenancy property vests immediately in the surviving joint tenant. Cranston v. Winters, 238 N.W.2d 647, 651 (N.D.1976). The joint tenancy interest passes to the remaining joint tenant by right of survivorship. It does not pass by will because the joint tenant who dies leaving a surviving tenant has no interest which he may devise. In re Kaspari’s Estate, 71 N.W.2d 558, 564 (N.D. 1955).

Sabot v. Fox, 272 N.W.2d 280, 281 (N.D. 1978).

[¶3] Because property held in joint tenancy with a right of survivorship passes by the right of survivorship rather than through the deceased joint tenant’s estate, the surviving joint tenant is neither an heir nor a successor of the deceased tenant. Hagen v. Schluchter, 126 N.W.2d 899, 901 (N.D. 1964). Therefore, McDermott is not an heir or successor of Mrs. Bevan in relation to the land at issue and the phrase contained in the purchase option does not apply.

II. APPELLANT IS NOT BARRED FROM RELIEF UNDER RULE 50.

[¶4] Kevin incorrectly asserts that Barbara is not entitled to relief under N.D.R.Civ.P. 50 because she did not object to jury instructions. Barbara submitted her jury instruction for Intentional Interference with Business while maintaining her objection that the claim was never properly pled: “[t]hough Defendant maintains that Pifer has not ever pled his recent claim for Interference with Business, if the Court is to allow him to go forward with the claim, Plaintiff must abide by the case law and jury instructions surrounding Interference with Business.” (D.404:1).

[¶5] Not objecting to jury instructions does not prevent Barbara from relief under Rule 50. Rule 50 provides: “A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the moving party to the judgment.” N.D.R.Civ.P. 50(a)(2). The rule does not provide that a jury instruction must have been objected to in order for the motion to be granted.

[¶6] Further, jury instructions are not an issue of this appeal. The district court erred in denying defendant’s motion for judgment as a matter of law under Rule 50 for three reasons: (1) Kevin did not properly plead his claim of unlawful interference with business; (2) Kevin’s claim for interference with business fails as a matter of law as he failed to prove its elements; and (3) as there was not a final judgment in this matter, Barbara did not commit a tort, therefore, an award of damages fails as a matter of law.

Respectfully submitted this 4th day of June, 2013.

JOHNSTON LAW OFFICE

/s/DeWayne Johnston

DeWayne Johnston (ND Bar ID # 05763)

dewayne@wedefendyou.net

221 South 4th Street

Grand Forks, ND 58201

Ph. (701) 775-0082/ Fax (701) 775-2230

Attorney for Appellant

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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. REPLY BRIEF OF APPELLANT

was served by **EMAIL PURSUANT TO N.D. SUP.CT.ADMIN. ORDER 14** on this 4th day of June, 2013 to the following:

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

Dated this 4th day of June, 2013.

JOHNSTON LAW OFFICE

/s/ DeWayne Johnston
DeWayne Johnston (ND #5763)
dewayne@wedefendyou.net
221 South 4th Street
Grand Forks, ND 58201
Telephone: 701-775-0082
Fax: 701-775-2230
Attorney for Appellant