

SUPREME COURT OF THE STATE OF NORTH DAKOTA

No. 20170386

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Sandy Botteicher,

PLAINTIFF – APPELLANT,

and Alexandra Botteicher

PLAINTIFF,

vs.

Pam Becker, Darwin Becker and St. Benedict's Health Center,

DEFENDANTS – APPELLEES.

Appeal from the March 21, 2017 Order to Dismiss

Stark County

Southwest Judicial District

Honorable Judge Dann Greenwood

Stark Co. Case 2017-CV-00095

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**APPELLANT'S BRIEF**

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### Statement of the Issue

- I. Whether the District Court erred in dismissing the Plaintiffs' claim numbers 1, 2, 4, 5, 6, 7 and 9 on the grounds that they were barred by the doctrine of Res Judicata;
- II. Whether the District Court erred in dismissing the Plaintiff's Complaint on the grounds Sandy Bottiecher it lacked standing;
- III. Whether the District Court erred in dismissing the Plaintiffs' complaint on the grounds that Sandy Botteicher did not have any legal right or standing to control or even participate in burial decision concerning John Barth;
- IV. Whether the District Court erred in dismissing the Plaintiffs' complaint on the grounds that Sandy Botteicher did not meet the threshold element of intentional infliction of mental distress;
- V. Whether the District Court erred in dismissing the Plaintiff, Alexandra Botteicher's, claim for conversion on the grounds that she failed to state a claim upon which relief could be granted;
- VI. Whether the District Court erred in dismissing the Plaintiffs' complaint on the claims of fraud, misrepresentation, undue influence, taking advantage of vulnerable adult, and/or incapacity because each of the issues were raised or could have been raised in the probate action on the grounds that that they are barred by the doctrine of Res Judicata;
- VII. Whether the District Court erred when it found that the Plaintiff's action was frivolous in nature and, accordingly, awarded attorneys fees.

### Statement of Case

- [1] On or about February 3, 2017, the Appellant Sandy Botteicher and Plaintiff Alexandra Botteicher filed a Complaint against defendants Pam and Darwin Becker alleging persuasive and substantial evidence that Eleanor Barth either was incapable of understanding of what she was doing at the time of signing the Warranty Deed dated October 6, 2010, was under undue influence, induced by fraud/misrepresentation and/or coercion. App. Page 197.
- [2] Appellant's alleged in their Complaint that the Appellees, Pam Becker and Darwin Becker were in a confidential relationship with both John Barth and Eleanor Barth, who had the opportunity and actually exercised said opportunity to obtain advantage over John Barth and/or Eleanor Barth, that they used and handled the assets of John Barth and/or Eleanor Barth for their own profit and which were adverse to John Barth and/or Eleanor Barth and they exercised undue influence over them in order to obtain an advantage. App. Page 198.
- [3] Appellees, Pam Becker and Darwin Becker filed a Motion to Dismiss and for Sanctions on February 15, 2017. App. Pages 130-156.
- [4] Appellant, Sandy Botteicher and Plaintiff Alexandra Botteicher filed a Response to the Motion to Dismiss and for Sanctions and in the Alternative Request to Amend Complaint. App. Pages 77-89.
- [5] The Court issued an Order to Dismiss the Appellant's Complaint and ordered attorney's fees to the Plaintiff and Appellant on March 21, 2017. App. Page 18-27.
- [6] Sandy herein appeals said Order on Motion to Dismiss.

### Statement of Facts

- [7] Sandy Botteicher and Pam Becker are biological sisters. Darwin Becker is married to Pam Becker. Sandy Botteicher and Pam Becker are biological children to John Barth and Eleanor Barth, who are both deceased. John Barth died on January 27, 2015. Eleanor Barth died on July 5, 2015.
- [8] The subject real property which is the subject matter of parts of the Appellant's Complaint is described as 464 25<sup>th</sup> Avenue E, Dickinson, North Dakota and Lot 2, Block 2, Dickinson Industrial 3<sup>rd</sup> Subdivision, City of Dickinson, Stark County, North Dakota. App. Page 194.
- [9] Pamela Becker obtained guardianship over the person of Eleanor Barth via Emergency Guardianship on January 22, 2015, Stark County Case Number: 45-2014-PR-00177.
- [10] Botteicher was not made aware of Pamela Becker's intentions of obtaining said guardianship. The first time she heard of this proceeding was when she discovered paperwork from the Sheriff's Department on March 18, 2015. The Plaintiff filed an Affidavit dated May 8, 2015, as well as an Opposition to Petition to Guardian and Conservator for Incapacitated Person.
- [11] From October 6, 2010 to January 15, 2014, several deeds and other documents were prepared and recorded regarding the property of John and Eleanor Barth. These include the following:
- A. A Warranty Deed dated October 6, 2010, prepared by attorney Bruce Selinger transferring title from John and Eleanor Barth to Sandy

Botteicher and Pamela Becker. This deed involved the Barth's house, warehouse and extra lot. App. Page 183-184.

- B. A Quit Claim Deed dated May 9, 2011, prepared by attorney Bruce Selinger transferring title from John and Eleanor Barth and Sandy Botteicher to Pamela Becker. This deed involved the Barth's warehouse and extra lot. App. Page 181-182.
- C. A Quit Claim Deed dated April 1, 2013, prepared by attorney Robert Keogh transferring title from Darwin and Pamela Becker to John Barth. App. Page 179-180.
- D. A Warranty Deed dated January 15, 2014, prepared by attorney Robert Keogh transferring title from John and Eleanor Barth to Darwin and Pamela Becker. This deed involved the Barth's warehouse and extra lot. App. Page 177-178.
- E. An Affidavit Establishing Death of Joint Tenant dated February 16, 2015, signed by Pamela Becker certifying that joint tenant John Barth died on January 27, 2015 and the remaining joint tenant was Eleanor Barth. App. Page 175-176.
- F. A Warranty Deed dated February 18, 2015, signed by Pamela Becker as Emergency Guardian for Eleanor Barth transferring real property to Eric Martin. This deed reserved any and all oil, gas, coal, gravel, minerals, etc. owned by the Grantor. App. Page 173-174.
- G. An Affidavit of Marketable Record Title dated February 18, 2015, signed by Pamela Becker alleging personal knowledge that John and Eleanor

Barth had an unbroken chain of title for the premises indicated. App. Page 171-172.

- [12] In Appellant's Complaint, she moved the Court to set aside the Warranty Deed dated October 6, 2010 and all subsequent related deeds. (Note: this pertains the house, warehouse and extra lot). App. Page 197.
- [13] In her Complaint, the Appellant alleged persuasive and substantial evidence that Eleanor Barth either was incapable of understanding of what she was doing at the time of signing the Warranty Deed dated October 6, 2010, was under undue influence, induced by fraud/misrepresentation and/or coercion. App. Page 197.
- [14] As outlined in paragraph 19 of the Complaint and summarized herein, medical records for Eleanor Barth reflect in part that Eleanor Barth was showing early signs of dementia as early as November of 2005. By March of 2006, she could not answer important medical questions. She was reported to be hard to live with as early as September of 2009 and started to show speech difficulties as early as November of 2009. In April of 2010, doctors reported new concerns of failing memory and Pamela Becker requested dementia medications. A Diagnosis of senile dementia - uncomplicated is added to chart and Dr. Anderson started her on Aricept. Eleanor Barth was hospitalized in June of 2010 and after release problems were significantly worse. In July of 2010, the family notes significant depression and Numenda added to medications. In August of 2010, at the direction of Dr. Anderson, she had to be taken to emergency room at St. Alexius in Bismarck, for emergency psychiatric evaluation. She was placed on Risperdal for psychosis and paranoia. Badlands Human Service Center did testing on her



cognitive skills and executive reasoning. Her executive reasoning scores were low. She was not to be left alone for any extended period of time. On October 7, 2010 Doctor reports patient forgetful and tendency to repeat herself. App. Page 197-198.

[15] Appellant's alleged in their complaint that the Appellees, Pam Becker and Darwin Becker were in a confidential relationship with both John Barth and Eleanor Barth, who had the opportunity and actually exercised said opportunity to obtain advantage over John Barth and/or Eleanor Barth, that they used and handled the assets of John Barth and/or Eleanor Barth for their own profit and which were adverse to John Barth and/or Eleanor Barth and they exercised undue influence over them in order to obtain an advantage. App. Page 198.

[16] Appellees, Pam Becker and Darwin Becker filed a Motion to Dismiss and for Sanctions on February 15, 2017. App. Pages 130-156.

[17] Appellant, Sandy Botteicher and Plaintiff Alexandra Botteicher filed a Response to the Motion to Dismiss and for Sanctions and in the Alternative Request to Amend Complaint. App. Pages 77-89.

[18] The Court issued an Order to Dismiss the Appellant's Complaint and ordered attorney's fees to the Plaintiff and Appellant on March 21, 2017. App. Page 18-27.

[19] Sandy herein appeals said Order on Motion to Dismiss.

## **Law and Argument**

### **Issue I**

**Whether the District Court erred in dismissing the Plaintiffs' claim numbers 1, 2, 4,**

**5, 6, 7 and 9 on the grounds that they were barred by the doctrine of Res Judicata**

[20] In the case of Simpson v. Chicago Pneumatic Tool Co., 2005 ND 55 ¶8, 693

N.W.2d 612, the North Dakota Supreme Court held that:

Through the doctrines of res judicata and collateral estoppel, courts bar litigation of claims and issues to promote the finality of judgments, which increases certainty, discourages multiple litigation, wards off wasteful delay and expense, and conserves judicial resources. Riemers v. Peters-Riemers, 2004 ND 153, ¶9, 684 N.W.2d 619. In Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 383 (N.D.1992) (internal citations omitted), this Court explained:

Although collateral estoppel is a branch of the broader of law of res judicata, the doctrines are not the same. Res judicata, or claim preclusion, is the more sweeping doctrine that prohibits the relitigation of claims or issues that were raised or could have been raised in a prior action between the same parties or their privies and which was resolved by final judgment in a court of competent jurisdiction. On the other hand, collateral estoppel, or issue preclusion, generally forecloses the relitigation, in a second action based on a different claim, of particular issues of either fact or law which were, or by logical and necessary implication must have been, litigated and determined in the prior suit.

For purposes of both res judicata and collateral estoppel, only parties or their

privies may take advantage of or be bound by a former judgment. *Id.* At 384. Privity exists if a person is “ ‘so identified in interest with another that he represents the same legal right.’ “ *Id.* (quoting 46 Am.Jur.2d Judgments § 532, at p. 683 (1969) (footnote omitted)). The applicability of res judicata or collateral estoppel is a question of law fully reviewable on appeal. Hofsommer, at 383.

[21] In the case of Paf-Par LLC v. Silberberg, 2017 NY Sip Op. 30205(U), Justice Singh of the New York County Commercial Division issued a decision holding that dismissal for lack of standing did not have Res Judicata effect on the merits, explaining:

Plaintiff’s Action is not barred by res judicata based on the decision of the First Department and the Court of Appeals in Paf-Par I. A dismissal premised on lack of standing is not a dismissal on the merits for res judicata purposes. This holding on res judicata grounds even applies where the court had already dismissed a party’s prior action on substantive grounds.

Additionally, dismissal for lack of standing is not intended to have any determinative effect on the merits of the action. Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a

different remedy. Defendant's reliance on *Landau v. LaRossa, Mitchell & Ross*, is misplaced. The Court of Appeals in *Landau* held that when the disposition of a case is based upon lack of standing only, the lower courts have not yet considered the merits of the claim. Similarly, once a claim is brought to a final conclusion. All other claims arising out of the same transaction or series of transactions are barred.

A dismissal premised on lack of standing is not a dismissal on the merits for res judicata purposes. If applied to rigidly, res judicata has the potential to work considerable injustice. In properly seeking to deny a litigant two days in court, courts must be careful not to deprive him of one.

[22] The District Court in this case concluded that the Plaintiff's claims: 1 (Conflict of Interest against Pamela Becker); 2 (Vulnerable Adult); 4 (Violation of fiduciary duties as agent under Power of Attorney); 5 (Misrepresentation); 6 (Conversion against Darwin); 7 (Taking Advantage of Vulnerable Adult against Darwin); and 9 (Fraud, Misrepresentation, Undue Influence, Taking Advantage of Vulnerable Adult, Incapacity against Pam Becker and Darwin Becker) are all barred by the doctrine of res judicata. App. Page 19

[23] The applicable requirements of the doctrine of res judicata specifically 1) both cases involve the same parties or their privies; 2) there was a final judgment on the merits in the first action; **and** 3) the barred claim was or could have been presented in the first action. The moving party must prove all three elements for a

cause of action to be barred by said doctrine. (emphasis added).

[24] Throughout the Plaintiff's complaint she references the house, warehouse, silver, jewelry, proceeds from auction, Model A, 2005 Toyota, items in marital home and loss of rent. The Inventory and Appraisal dated January 4, 2016 did not include any of these assets. The Final Order Approving Final Account and Distribution dated September 24, 2016 also did not include any of these assets. Hence, there were no orders issued in the probate action addressing these assets.

[25] Sandy Botteicher first attempted to bring to the attention of the District Court her concerns regarding the handling of her mother's probate. She filed her Petition to Rescind Transaction on February 2, 2016, to reverse the Warranty Deed mentioned above in 12(H) on the grounds of the Decedent's poor mental health at the time the Warranty Deed was signed. The Personal Representative responded to her Petition with a Motion to Dismiss Petition. Her Petition was dismissed by the District Court without prejudice or litigation on March 15, 2016. She then filed a Petition for a Formal Testacy Proceeding and for the Removal of the Current Personal Representative on August 29, 2016. Said Petition was automatically denied by the District Court on October 31, 2016, again without litigation on the grounds that Botteicher could not provide an original Will for the decedent but only a photocopy. She then proceeded to Object to the Final Report and Accounting and requested an evidentiary hearing on September 15, 2016. The objection was made on the grounds that she had personal knowledge of items not included on the final report and accounting and that she had evidence that the original Last Will and Testament of the decedent was either lost, destroyed or

otherwise unavailable. A hearing was held but the District Court's ruling was based solely on pleadings on the record. The District Court ordered the Personal Representative to investigate and amend the final report. The District Court ultimately ruled that Botteicher, as an heir, had no standing to pursue in this action a petition to set aside deeds and that is the province of the Personal Representative. The Court further adopted the Amended Final Report and Account filed by the Personal Representative.

[26] Given the fact that Botteicher was not able to address any of the issues set forth in her variety of Petitions in her mother's probate and it was deemed she lacked standing to pursue anything further in the probate, she filed a separate matter against the Beckers. She filed the Complaint with the court on February 3, 2017. The District Court ultimately found that the issues brought forth in her Complaint should have been addressed in Eleanor Barth's probate. Sandy Botteicher was precluded effectively from bringing these issues up in the probate action.

## **Issue II**

### **Whether the District Court erred in dismissing the Plaintiff's Complaint on the grounds that Sandy Botteicher lacked standing**

[27] The District Court concluded that "Botteicher is not a person who "has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy." Rather, this Court concludes that for all of those claims it is/was the personal representative in the probate action who had standing to bring those claims." App. Pages 21-22.

- [28] According to the Court in Vaughn v. Dame Construction Co. (1990) 223 Cal.App.3d 144, 147, ordinarily, the person having the right to sue for injury to the property is the owner of the property. However, according the Court in Powers v. Ashton (1975) 45 Cal.App.3d 783, 788, the real party in interest is actually the party who has title to the particular cause of action than title to the property itself. Thus, the essential element of standing is injury to one's interest in the property rather than ownership of the property itself, although these interests are most often held by the same person. Nevertheless, it has often been recognized that the one who is not the owner of property may nonetheless be the real party in interest if that's person's interests in the property are injured or damaged. Vaughn v. Dame Construction Co. (1990) 223 Cal.App.3d 144, 148. Injury to an interest in property gives rise to a cause of action for that harm, which is itself a discrete property right called a "chose in action." Parker v. Walker (1992) 5 Cal.App.4th, 1173, 1182. See also CC Section 953. Thus, it is the owner of the chosen action who actually has standing to sue.
- [29] California Statute, CCP §377.30 (which provides that the survival right "passes to the decedent's successor in interest") also provides that the action is to be "commenced by the decedent's personal representative or, if none, by the decedent's successor in interest." Thus, where the property right passes by will or intestacy, a legatee or heir receives the interest, but – at least initially – only the personal representative has standing to bring the action. **However, following final distribution, the personal representative would be discharged, and the legatee or heir would acquire standing.** (Alternately, the chose in action could

be retained by the personal representative and the probate kept open until the litigation is completed). (Emphasis Added).

- [30] Since a distinction exists between who owns the chosen action and who may commence an action on that right, it is possible for different persons to hold these rights. And where different persons hold these rights, it is possible for a conflict to arise between them. This is particularly true in elder financial abuse cases where the trustee (where the victim is alive) or the personal representative or trustee (where the victim has died) may sometimes be the alleged abuser; that is, the person owning the right wishes to prosecute an action against the abuser, but the abuser is the real party in interest with the sole authority to commence such an action. In such a situation, the personal representative or trustee is unlikely to commence an action against himself. This problem has arisen in the general context of estate and trust administration. Landis v. First Nat. Bank (1937) 20 Cal.App.2d 198 and Olson v. Toy (1996) 46 Cal.App.4th 818. In such circumstances, an heir or beneficiary may plead "special circumstances" to avoid the general rule that the only person with standing is the personal representative or trustee. The analogous problem arose for the first time in the context of elder financial abuse in the case of Estate of Lowrie v. Lowrie (2004) 118 Cal.App.4th 220. There, the Second District decided that a beneficiary had standing to bring the action. However, the beneficiary was also the successor trustee to the alleged abuser and therefore had standing under the general rule when the abuser was disqualified as trustee pursuant to Probate Code §259. In *dictum*, the court suggested an even broader interpretation of standing might be justified and might



include persons with a mere expectancy or contingent interest [*Estate of Lowrie v. Lowrie* (2004) 118 Cal.App.4th 220, 230 and 231, footnote 12].

[31] Of the issues raised in the probate matter, the only ones that correlate with this proceeding is the issue of the various deeds and recorded documents and the missing items from the Final Report and Accounting and the Amended Final Report and Accounting. Botteicher was not given the opportunity in open court to vocalize her opinions on the matter. The District Court ruled almost solely on pleadings on record.

[32] The other issues outlined in the Plaintiffs' Complaint were not addressed in the probate action notwithstanding the following case law in support thereof:

- N.D. Const. Art. VI, 8
- Section 27-05-06(2) of the North Dakota Century Code
- Section 30.1-18-03 of the North Dakota Uniform Probate Code
- Section 30.1-18-06 of the North Dakota Uniform Probate Code
- Section 30.1-18-08 of the North Dakota Uniform Probate Code
- Section 30.1-18-09 of the North Dakota Uniform Probate Code
- Rule 1 of the North Dakota Rules of Civil Procedure
- Rule 13 of the North Dakota Rules of Civil Procedure
- In the Matter of Estate of Hugh Murphy, 554 N.W.2d 432 (N.D. 1996)
- In the Matter of the Estate of Ralph Bartelson 2015, ND 147, 864 N.W.2d 441

[33] Based on the forgoing, Botteicher attempted to prove she had standing on the matters addressed in her Complaint but was denied the right to litigate in open court.

### **Issue III**

#### **Whether the District Court erred in dismissing the Plaintiffs' Complaint on the grounds that Sandy Botteicher did not have any legal right or standing to control or even participate in burial decision concerning John Barth**

[34] North Dakota Century Code Section 23-06-03 addresses the duty of burial. Section 23-06-31 addresses cremation or other lawful disposition of a body - Authorization document - Immunity. It provides as follows:

“1. A **legally competent** adult may prepare a written statement directing the cremation or other lawful disposition of that adult's own remains pursuant to section 23-06-03...” (emphasis added).

[35] Said statute does not address who shall have the right to direct the cremation of a family member. Opposing counsel cites many cases pertaining to cremation however said cases do not apply in this case. For example, said cases dealt with

- a. decedent's children vs. decedent's husband - nothing discussed regarding the decedent's husband being under a guardianship;
- b. decedent's mother vs. decedent's girlfriend's children;
- c. decedent's parents vs. decedent's siblings;
- d. decedent's father vs. decedent's sister.
- e. decedent's spouse vs. decedent's sister.

[36] In the case of Lubin vs. Sydenham Hospital, Inc., 181 Misc. 870 (N.Y. Misc. 1943), the New York Supreme Court held that:

In the absence of testamentary disposition to the contrary, a surviving spouse or next of kin has the right to the possession of the body of a deceased person for the purposes of burial, sepulture or other lawful disposition which they see fit.

There is no right of property in a dead body in the ordinary sense, but it is regarded as property so far as necessary to entitle the surviving spouse and next of kin to legal protection of their rights in respect thereto.

[37] In this action, John Barth died leaving a spouse who had been legally deemed incompetent by a competent court wherein one of two of John's daughters, Pamela Becker, was appointed as Co-Guardian of Eleanor Barth. As such, John died leaving an incompetent spouse and two children. As a child of a decedent, whose spouse has been legally deemed incompetent, Botteicher had a right to bury her father.

[38] As outlined in the Complaint, Pamela Becker, upon the death of her father, approached the funeral home acting as agent for her father and made arrangements for his cremation. Becker had not notified her sister of their father's passing. Botteicher learned of it by means on an obituary in the local newspaper. Upon attempting to her father's remains, she was informed she could not do so without the express permission of Pamela Becker, which she never received.

## **Issue IV**

### **Whether the District Court erred in dismissing the Plaintiffs' complaint on the grounds that Sandy Botteicher did not meet the threshold element of intentional infliction of mental distress**

[39] In the case of Rekosh vs. Parks, 316 Ill. App. 3d 58, 63, 735 N.E.2d 765, 771 (2000), an action was brought against the ex-wife of the decedent, namely June Parks, along with the funeral home wherein the decedent was cremated. Upon analysis as to the standing of the claims against Parks and the funeral home, the parties had to allege facts to establish that (1) the defendant's conduct was extreme and outrageous; (2) the defendant either intended that his conduct should inflict severe emotional distress or knew that there was a high probability that his conduct would cause severe emotional distress; and (3) the defendant's conduct in fact caused severe emotional distress. The Court determined that:

“...the allegation of severe emotional distress resulting from the conduct of June Parks and the Funeral Home, when viewed in a light most favorable to the plaintiffs, is sufficiently supported by factual allegations. We have determined that all three elements of intentional infliction of emotional distress have been sufficiently pleaded by plaintiffs against defendants June Parks and the Funeral Home.”

The allegations against the Funeral Home were made on the grounds that June Parks, ex-wife of the decedent, had forged the signature of the decedent's son

on the cremation authorization form, which was witnessed by the Funeral Home. The Funeral Home then proceeded with the process of cremating the decedent and handing over his remains to June Parks, who in turn disposed of them in her backyard without the knowledge or consent of the decedent's son.

[40] Paragraphs [40] through [45] of Plaintiff's Complaint sets forth allegations that support the finding of intentional infliction of emotional harm. The allegations support the finding that Pamela Becker's actions were extreme and outrageous that was intentional and reckless and that caused severe emotional distress. Said allegations state as follows:

"[40] At the direction of Pamela Becker, the Plaintiff was denied access to the funeral home or John Barth's ashes after the cremation. John Barth was cremated without any notification or discussion with the Plaintiff. Plaintiff had equal rights to the body which was denied.

[41] At the direction of Pamela Becker, no one was allowed near the ashes of John Barth and accordingly the Plaintiff was denied an opportunity to say good bye to her father.

[42] At the direction of Pamela Becker, there was no services provided for John Barth nor was there a memorial held for John Barth. There was a joint memorial held after Eleanor Barth died.

[43] Pamela Becker failed to inform the Plaintiff or any immediate family members of John Barth's impending death or that she had made the unilateral decision to cremate him within 34 hours of his death without informing her. The plaintiff did not get to view her

father's body and did not get to say goodbye. She learned of his death via newspaper and by the time the notice of death was published John Barth's body had already been cremated. A joint memorial was done at the Veterans Administration after Eleanor Barth died. Plaintiff was advised that her father's ashes were on a shelf in a locked room at funeral home but could not see said ashes without the permission of Pam Becker, which was never received.

[44] After these events occurred, Plaintiff started suffering mental and physical anguish which resulted in being prescribed two (2) different medications. Plaintiff lost her job of 20 years due to the stress of this event and the effects of the medications. Plaintiff couldn't focus on work, was forgetting things and making mistakes.

[45] Had Eleanor Barth been in the rightful mind at the time of her husband, John Barth's death, she would not have allowed this. Pamela Becker took it upon herself to sign the required documents in order to cremate the remains of John Barth." App. Pages 202-203.

[41] The forgoing conduct by Pamela Becker can only be described as extreme and outrageous. Not allowing one access to one's father's remains; not providing any notice of the death or cremation of one's father. If such behavior or conduct does not rise to the level of extreme and/or

outrageous, it is hard to fathom what would. Plaintiff has a right to asset this cause of action against Pamela Becker.

#### **Issue V**

**Whether the District Court erred in dismissing the Plaintiff, Alexandra Botteicher’s, claim for conversion on the grounds that she failed to state a claim upon which relief could be granted**

[42] The North Dakota Supreme Court in the case of Van Sickle v. Hallmark & Assoc., Inc., 2008 ND 12, ¶ 21, 744 N.W.2d 532 states that:

Conversion is a “tortious detention or destruction of personal property, or a wrongful exercise of dominion or control over the property inconsistent with or in defiance of the rights of the owner.” Ritter, Laber and Assocs., Inc. v Koch Oil, Inc., 2004, ND 117 ¶ 11, 680 N.W. 2d634. The key element of a claim for conversion is that the plaintiff was wrongfully deprived of his property, and there must be “an intent to exercise control or interfere with the use of property to such a degree as to require a forced sale of the plaintiff’s interest in the goods to the defendant.”

[43] The District Court, upon review of the Complaint, found “it does not appear that there are any specific allegations that Beckers detained, destroyed, or exercised dominion or control over Alexandra Botteicher’s 2005 Toyota. Neither is there any specific allegation that Beckers deprived Alexandra Botteicher of her property with “an intent to exercise control or interfere with the use of property to such a degree as to require a forced sale of the plaintiff’s interest in the goods to the defendant.” Furthermore, this Court does not believe that, even by inference,

the allegations can be interpreted so as to conclude that they state a claim upon which relief can be granted.” App. Pages 25-26.

[44] The Plaintiff Alexandra Botteicher disagrees and reasserts paragraphs [67] through [70] of the Plaintiffs’ complaint:

“[67] Prior to Eleanor Barth’s death, a 2005 Toyota belonging to Plaintiff Alexander Botteicher was removed from the property after Pam Becker and Darwin Becker took possession of the subject real property. This occurred sometime between July and August of 2014.

[68] No notice was provided that they were removing said vehicle. Said vehicle did not belong to them in any form or fashion.

[69] Neither Defendant has disclosed nor will they disclose where said vehicle is and the Plaintiff asks that they immediately return said vehicle to its rightful owner.

[70] As a direct and proximate result of Defendants Pam Becker and Darwin Becker’s actions, Plaintiff Alexander Botteicher has been damaged in an amount to be proven at time of trial” App. Page 207.

[45] Plaintiff Alexandra Botteicher alleges ownership over said vehicle, the wrongful taking of said vehicle by Defendants, wrongful withholding of said vehicle by Defendants by refusing to disclose its location after they exercised sole control and dominion over said vehicle. Defendants blatant refusal to release control over the vehicle that they do not own after requests to do so is conversion. They have and continue to act contrary and in defiance of Alexandra’s ownership right to said vehicle.



## Issue VI

**Whether the District Court erred in dismissing the Plaintiffs' complaint on the claims of fraud, misrepresentation, undue influence, taking advantage of vulnerable adult, and/or incapacity on the grounds that each of the issues were raised or could have been raised in the probate action such that they are barred by the doctrine of**

### **Res Judicata**

[46] Plaintiff's Complaint does reference certain actions/inactions on behalf of Defendants that she believes to have been fraudulent. If the Court does not believe that the Complaint sufficiently alleges fraud, the proper recourse would be for the Court to allow the Plaintiff to Amend her Complaint to provide more specificity. However, this is more properly handled by a motion under Rule 12(e) motion for more definite statement versus a dismissal for failure to state a claim under Rule 12(b)(6). Courts prefer judgment based upon merits and not on the grounds that more specificity is needed.

[47] This aside, the issue of Res Judicata has been addressed in paragraphs 21 through 27 above.

## Issue VII

**Whether the District Court erred when it found that the Plaintiff's action was frivolous in nature.**

[48] Section 28-26-01(2) of the North Dakota Century Code state:

“In civil actions the court shall, upon a finding that a claim for relief was frivolous, award reasonable actual and statutory costs, including reasonable attorney's fees to the prevailing party. Such costs must be awarded regardless of

the good faith of the attorney or party making the claim for relief **if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in that person's favor**, providing the prevailing party has in responsive pleading alleged the frivolous nature of the claim. This subsection does not require the award of costs or fees against an attorney or party advancing a claim unwarranted under existing law, if it is supported by a good-faith argument for an extension, modification, or reversal of the existing law.” (emphasis added).

[49] Further, in the case of Strand v. Cass County, 2008, ND 149, the Supreme Court found that:

“The plain language of this statute required courts in civil actions to award costs and fees, including attorney’s fees, upon finding a claim for relief was frivolous, providing the prevailing party pled the alleged frivolousness of the claim N.D.C.C. § 28-26-01(2). “Frivolous claims are those which have ‘such a complete absence of actual facts or law that a reasonable person could not have expected that a court would render judgment in [that person’s] favor’” Deacon’s Development, LLP, v. Lab, 2006 ND 172, ¶12 719 N.W. 2d 379 (citing Peterson v. Zerr, 477 N.W.2d 230, 236 (N.D. 1991) and N.D.C.C. § 28-26-01(2)).”

[50] The District Court ruled that the Plaintiff’s Complaint is frivolous. Plaintiff’s claims are not frivolous. There is no such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in her favor. The probate action did not address the assets and/or transactions and/or claims made in Plaintiff’s Complaint. No Court has previously

ruled on any of Plaintiff's causes of action. The Plaintiff has standing to bring a separate claim against the Defendants and her stated causes of action are supported factually and legally.

[51] By not being allowed to raise these issues in the probate action, the only other available recourse for Plaintiff was to initiate a separate lawsuit and she is entitled to do so.

### CONCLUSION

[52] In light of the foregoing, it is Appellant's position that the District Court erred in Dismissing the complaint on the grounds it was frivolous and awarding attorney fees. As such, the Appellant respectfully requests that the Supreme Court Remand this case to the District Court reversing its decision.

[53] Dated this 1 day of January, 2018.

[54]

  
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