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STATE OF NORTH DAKOTA
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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

JERRI L. AND LORI BETH SAPA,	)	**SUPREME COURT CASE NO.:**
	)	**20190283**
Petitioner and Appellant,	)	
	)	
vs.	)	
	)	**DISTRICT COURT NO.:**
GREGORY LOFTHUS,	)	**Civil No.: 50-2018-CV-00169**
	)	
Respondent and Appellee,	)	
	)	

BRIEF FOR THE APPELLANT

APPEAL FROM THE DISTRICT COURT OF WALSH COUNTY

NORTHEAST JUDICIAL DISTRICT

DISTRICT COURT NO. 50-2018-CV-00169

JUDGMENT

THE HONORABLE BARBARA WHELAN

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STATEMENT OF JURISDICTION

[¶ 1] The Appellants/Respondents, Jerri L. and Lori Beth Sapa, timely appealed the Judgment from the Honorable Barbara L. Whelan. The District Court had jurisdiction under N.D.C.C. § 29-32.1-01. This Supreme Court has appellate jurisdiction of decisions of the lower courts pursuant to N.D.C.C. § 29-28-03 and N.D.C.C. § 29-28-06.

[¶2]

STATEMENT OF THE ISSUES

I. The Sapas' Petition for cancellation of the *Contract for Deed* was brought to the District Court as an action in equity and the District Court erred in applying the law as it pertains to enforcement of that *Contract for Deed*.

   A. The District Court erred finding that the Defendant's breach of the *Contract for Deed* were excusable because the Contract was ambiguous

   B. Doctrine of Impossibility does not apply in this matter as the Defendant's failure to pay required taxes and insurance has a clearly outlined remedy for breech within the *Contract for Deed*, but waste does not.

II. That the District Court clearly erred by awarding the Defendant any portion of the proceeds from multiple insurance claims for the damage to the real property.

[¶3]

STATEMENT OF THE CASE

This action was commenced by the service of a *Summons* and *Complaint* on Defendant, Gregory Lofthus, on December 13, 2017 by Walsh County Sherriff's Department. On December 26, 2017, the Defendant served his *Answer and Counter Claim* upon the Plaintiffs. On January 12, 2018, the Plaintiffs served an *Answer to Defendant's Counterclaim* upon the Defendant. On July 10, 2018, the Defendant served a *Motion for Summary Judgment upon Plaintiffs*. On November 8, 2018, the Defendant's *Motion for Summary Judgement* was denied by the Honorable Barbara Whelan. The first day of Trial in this matter was held on January 29, 2019. The second day of Trial was postponed due to inclimate weather until March 8, 2019. Appellants were represented at trial by Attorney Darla J. Schuman. Defense Counsel elected to submit his Closing Argument orally. Plaintiffs' Counsel elected to was required to submit a written closing argument no later than March 15, 2019. On July 18, 2019 the Honorable Barbara L. Whelan issued her *Findings of Fact, Conclusion of Law, and Order for Judgment*, and *Judgment*. Appellants/Respondents, Jerri L. and Lori Beth Sapa, filed a timely appeal on September 13, 2019.

[¶4]

STATEMENT OF THE FACTS

Jerri and Lori Sapa purchased real property located at 70 3rd Avenue North, Edinburg, North Dakota, 58227 located in Wash County North Dakota in 2012. (Tr.12:22-23). The property purchased by the Sapas was previously owned by Lori Sapa's mother and was her family home. (Tr.12:22-25); (Tr.14:1-20). The Sapas used financing from North Star Community Credit Union

to purchase the property. (Tr.15:3-23). That on or about December 15, 2015, the Plaintiffs, Jerri L. and Lori Beth Sapa, as Sellers, entered into a *Contract for Deed* with Gregory Lofthus the Appellee, as Purchaser, for the aforementioned real property. (Tr.129:4-6). The *Contract* was first signed by the Defendant, Greg Lofthus, on November 24, 2015, in Walsh County, North Dakota, and signed by the Plaintiffs on December 15, 2015, in Cherry County, Nebraska. *Contract for Deed*, at P. 5. The *Contract* was drafted by the Hall & Currie Law Firm of Grafton, North Dakota. *Id*. Both parties were initially living out of state at the time of the initial drafting of the *Contract* but Mr. Lofthus returned to North Dakota in November 2015 to sign the Contract. Mr. Lofthus had almost three (3) weeks to review the *Contract for Deed* after he signed it prior to the Sapas' signing the document in Nebraska. *Contract for Deed*, at P. 5.

[¶5] The *Contract for Deed* was recorded on June 15, 2016, as Document Number 286245 in the Office of the County Recorder in Walsh County, North Dakota, with Jerri L. and Lori Beth Sapa, as Sellers, and Gregory Lofthus, as Purchaser, of the real property in Walsh County, North Dakota, with an address of 70 3rd Avenue North, Edinburg, North Dakota, 58227.(See *Contract for Deed*, at 1). The real property was described as follows:

> A tract of land located in the SW¼ NW¼ of Section 22, Township 158, Range 56, more particularly described as follows: Beginning at a point 73 ½ rods due north from the west quarter stake of Section 22, Township 158, Range 56, thence proceeding due east 21 ½ Rods to the south edge of the Great Northern Railway Right-of-Way, thence in a southeasterly direction along the south edge of said Railway Right-of Way a distance of 83.09 feet to the point of beginning; thence continuing Southeast along the south edge of said Railway Right- of-Way a distance of 83 .91 feet to a point; thence due south a distance of 181.5 feet to a point; thence in a northwesterly direction on a line parallel to the south edge of said Railway Right-of-Way a distance of 83.91 feet to a point; thence due north a distance of 181.5 feet to the point of beginning; said tract of land containing 0.3125 acres more or less;
>
> AND
>
> A parcel in the SW¼ NW¼ of Section 22, Township 158, Range 56, Walsh County, North Dakota, described as follows:

> Beginning 73½ rods due North from the West Quarter stake of Section 22, Township 158, Range 56, and thence 21 ½ rods due East to the Railroad right- of-way from this point of beginning the tract of land hereby conveyed runs in a southeasterly direction along the Railroad right-of-way 297 feet; thence 181 ½ feet due South, thence 297 feet in a Northwesterly direction parallel to the Railroad Co. right-of-way, thence 181 ½ feet due North to the point of beginning. (See *Contract for Deed*, at 1-2).

[¶6] It was established at trial that there was a mutual mistake made in using this description of the real property in the *Contract for Deed*. The second parcel of land was not owned by the Plaintiffs but was owned by the estate of Lori Beth's father, Myron Geston. The legal description was accidentally added into the *Contract for Deed*. (Tr.21:25);(Tr.22:1-24);(Tr.23:1-11). The error in the description of the property was made by Attorney Stephen Currie, drafter of the *Contract for Deed.* This error was remedied by the original attorney for Mr. Lofthus in this case, Steven Ekman, by whiting out the legal description of the Geston Tract and the amended property description was accepted and filed by the Walsh County Office of County Recorder on June 15, 2016. (Tr. 178:13-18). This amendment was done without notice to the Plaintiffs. Attorney Nicholas Hall, who took over Mr. Currie's cases after his retirement, testified to this change of the *Contract for Deed* at trial. (Tr. 176) It was established at trial that neither of the parties believed that the Geston Tract was supposed be within the *Contract for Deed*. (Tr. Pgs. 5-9). Additionally, the Defendant was asked at trial if he was "concerned about the fact that its part of a *Contract for Deed*, that you may not get that parcel", Lofthus responded "No." (Tr. 130:10-12). There was no injury to the Defendant for this contractual mistake. Steven Ekman withdrew as Mr. Lofthus' attorney on August 23, 2019 in the middle of the case, and Attorney Todd Burianek was hired as new counsel.

[¶7] The *Contract for Deed* provided that monthly payments of $500 be made by the Defendant, Gregory Lofthus, to Jerri L. and Lori Beth Sapa. (See, *Contract for Deed* at 2) Only

upon the completion of the payments and fulfillment of the terms and conditions for the *Contract for Deed*, the Plaintiffs would then transfer title of the real property to the Defendant by warranty deed. (See, *Contract for Deed*, at 1)

[¶8] Despite the promises made in the *Contract for Deed*, last dated December 15, 2015, a default occurred under the terms and conditions of the *Contract for Deed*. Mr. Lofthus, as Purchaser, has not "quietly and peaceably" surrendered possession of said premises when he failed to make payments; failed to pay taxes and have the necessary insurance and as he agreed in the *Contract for Deed*. Default has occurred and the Plaintiffs/Sellers exhausted all their legal remedies, including bringing court action in Walsh County District Court for cancellation of the *Contract for Deed* and requesting specific performance.

[¶9] Mr. Lofthus has shown a pattern of not fulfilling his monetary obligations under the terms and conditions within the *Contract for Deed*. The monthly payments of 500 dollars were to commence January 20, 2016 and were due on the 20th of each month. (See *Contract for Deed*, at 2) Before June of 2017, Defendant's payments were monthly, but irregular in terms of the date paid. (Tr.35:22-23). Beginning in the summer of 2017, the parties to the *Contract for Deed* orally agreed to amend the due date of the payment to the 3rd of each month, to ease the financial burden to Mr. Lofthus as he was receiving a monthly government check at that time. (Tr.35:7-11) Even after this accommodation and as this lawsuit proceeded, Mr. Lofthus was later and later with multiple payments. Beginning in July of 2018, Mr. Lofthus missed six out of nine payments of 500 dollars totaling 3,000 dollars owed to the Plaintiffs. (Tr.60:9-10). He did not make any house payments while awaiting the Court's decision, forcing the Plaintiffs to continue pay the mortgage each month. (Tr.60:24-25) Nowhere in the *Contract for Deed* does it articulate that the *Contract* was open-ended, or at no point there was an oral modification by the parties that Mr. Lofthus could

make payments whenever he was able. (Tr.37:12-23) The agreement was to pay 500 dollars monthly to pay off the mortgage.

[¶10] That said *Contract for Deed* provided that if there was any default in the Defendant's payment of principal or interest, or in any other part of the *Contract for Deed*, the Plaintiffs could cancel and terminate the Contract, and that all right, equitable title, and interest of said Defendant would thereupon terminate. The Contract provides that:

> "But should default be made in the payment of principal and interest due hereunder, or of any part hereof, or should Purchaser fail to pay taxes or assessments upon said land, premiums upon said insurance, or to perform any of the covenants, agreements, terms or conditions herein contained to be by Purchaser kept or performed, the Seller, may, at Seller's option, by written notice declare this contract canceled and terminated, and all rights, title and interest acquired thereunder by Purchaser, shalt thereupon cease and terminate, and all improvements made upon the premises, and all payments made hereunder shall belong to Seller as liquidated damages for breach of this contract by Purchaser, such notice to be in accordance with the statute in such case made and provided, Neither the extension of time of payment of any sum of money to be paid hereunder, nor any waiver by the Seller of the right to declare this contract forfeited by reason of any breach thereof, shall in any manner affect the right of Seller to cancel this contract because of defaults subsequently maturing, and no extension of time shall be valid unless evidenced by duly signed instrument. Further, after service of notice and failure to remove, within the period allowed by law, the default therein specified, Purchaser hereby specifically agrees, upon demand of Seller, quietly and peaceably to surrender possession of said premises, and every part thereof. It being understood that until such default, Purchaser is to have possession of said premises. Alternate legal remedies, including court action for cancellation or specific performance, are available at the option of Seller. "

[¶11] Despite the promises made in the *Contract for Deed* by Mr. Lofthus, he defaulted under the Terms and Conditions. Mr. Lofthus, as Purchaser, has not, as he promised in the *Contract* should a default occur, "quietly and peaceably to surrender possession of said premises, and every part thereof." Mr. Lofthus resided on the real property in dispute without making a single payment through the Judge's decision in July 18, 2019. (Tr.124:6-7)

[¶12] The *Contract for Deed* provided that the Defendant would personally pay all property taxes and special assessments upon said premises for each year commencing in the year 2016, in addition to the 500 dollar a month payment going towards the principal amount and interest owed on the real property.(See *Contract for Deed*, at 2);(Tr.38:21-25) Mr. Lofthus only paid the taxes on the property in 2016 and has not paid taxes on the property since then. (Tr.38:21-25);(Tr.39:19-25);(Tr.40:1-3). These taxes and special assessments were being paid unknowingly by the Plaintiffs' escrow account at North Star Community Credit Union because they were not being paid in a timely manner by the Defendant as required by the *Contact for Deed*. They were added onto the Plaintiffs outstanding mortgage balance(Tr.41:14-21). Defendant's payment of the taxes through the Plaintiffs' escrow was not discussed with or authorized by the Plaintiffs through an oral modification of the *Contract*. (Tr.41:22-24) The Defendant was required to pay the taxes directly to the County of Walsh Treasurers' Office out of his own funds in a timely manner prior to penalty attaches. (See *Contract for Deed*, at 2). The Defendant testified at trial he could not pay the taxes because they were already taken out of Plaintiff's escrow account. (Tr.153:4-23) However the Defendant could have easily reimbursed the Plaintiffs, had he communicated with them.

[¶13] The *Contract for Deed* provided specific requirements for Defendant to follow when acquiring insurance on the above-described real property.(See *Contract for Deed*, at 3) Defendant failed to secure separate, fire, windstorm, hail, and extended coverages for the above-described real property as required in the *Contract for Deed*.(Tr.43:1-3) Defendant added himself to Plaintiffs' insurance policy as an insured on the property through Farmer's Union Mutual Insurance Company without Plaintiffs' permission or knowledge.(Tr.43:17-24) Defendant did not provide

his own property or renter's insurance to the Plaintiffs as was required in the *Contract*; nor did he directly pay the yearly premium(s) on Plaintiffs' property insurance. (Tr.45:5-7)

[¶14] That on October 27, 2017, the residence and property were heavily damaged by a nearby fire. (Tr.47:10-12) Plaintiffs, as legal title owners, maintained insurance coverage on the real property through Farmer's Union Mutual Insurance to protect their significant financial interest in the property.(Tr.43:4-16) Jerri and Lori Beth Sapa received two insurances checks from their claim from the fire damage. The first was for 4,618.40 dollars. (Tr.47:14-16) Plaintiffs also received a second check for 10,001.58 dollars. *Id.* The first insurance check was made payable to Plaintiffs, North Star Community Credit Union, and Gregory Lofthus. A-29. The second check was made out to Plaintiffs and Gregory Lofthus. A-30. When the fire occurred damaging the above real property, that was the first time that they realized Mr. Loftus had been put on their insurance policy without their express permission or consent. (Tr.43:17-24) Both of these checks were never cashed and were reissued in January of 2019. (Tr.47:21-25)

[¶15] That *Contract for Deed* provides that, "Purchaser shall allow no waste on or of the premises."(See Contract for Deed, at 3) Lofthus has further violated the terms of the *Contract for Deed* by allowing waste on or of the premises. Lofthus, as Purchaser, has failed to allow Steamatic of the Red River Valley to repair and restore the smoke and water damage of the residence from the October 27, 2017, fire. (Tr.49:2-20) Steamatic was hired by the insurance company to complete the requisite work.(Tr.49:13-15) Defendant impeded their work by limiting their inspection of the damage in the entire residence on November 3, 2017.(Tr.49:16-20) Steamatic estimated the damage to the dwelling and contents at $4,408.33.A-32. The damage to the property was going to be addressed by professionals at no cost to the Defendant.(Tr.50:22-25) Defendant further refused to let Steamatic back on the property to complete the restoration including but not limited to:

Deodorizing the main level of the home; Cleaning the HV AC/ Air Ducts; tearing out laminate and vinyl flooring in dining room; tearing out exterior wall of dining room for wet insulation inspection; fully cleaning all structure within main level home; and cleaning all exposed contents within the home. A-32 Instead, the Defendant asked the Plaintiffs' insurance company, without authorization from the Plaintiffs, to reimburse him for his time to clean the home which was twenty hours at $27.72 per hour for a total of $554.40.(Tr.53:17-21) It is unknown if any cleaning was completed. With the damage that was documented by Steamatic, the Defendant could not have professionally cleaned and repaired the fire damage for that limited amount of money. The Plaintiffs had serious concerns regarding not only the initial amount of serious damage to the structure and interior of the residence, but the continued deterioration of the unrepaired damage. [¶16] On June 29, 2018, and while this legal action was pending, the residence on the real property was once again damaged when a tree on the property fell on the roof of the home during a windstorm. (Tr.51:23-24) Lofthus did not allow the Plaintiffs to enter the property or inspect the damage to the home.(Tr.52:7-13) After the damage occurred to said property, Defendant filed a insurance claim with Farmers Union Mutual Insurance Company through Plaintiffs' insurance policy again without their consent and knowledge.(Tr.52:3-6) The claim was filed under Plaintiffs' names, not under Defendant's name.(Tr.52:25);(Tr.53) Farmers Union Mutual Insurance Company issued a check with Plaintiffs' and Defendant's name on it for 1,498.05 dollars on July 18, 2018. (Tr.53:1-3) The Defendant did not have any written or oral permission at any time to file an insurance claim through Farmers Union Mutual Insurance Company under Plaintiffs' names. (Tr.52-53) This check was ordered to remain in trust.

[¶17]

STATEMENT OF THE STANDARD OF REVIEW

"Cancellation of a Contract for Deed by action, however, is an action in equity, and this Court will not interfere with the district court's decision on equity unless an abuse of discretion is clearly established." *Beckstrand v. Beckstrand,* 2017 N.D. 20, ¶9, 890 N.W.2d 213. "A court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, or when its decision is not the product of a rational mental process leading to a reasoned determination." *Id*. The interpretation of the Contract for Deed is a question of law, but whether the defending party has breached the terms of the contract is a finding of fact, which won't be reversed on appeal unless it is found to be clearly erroneous. *WFND, LLC v. Fargo Marc, LLC,* 2007 N.D. 67, ¶13, 730 N.W.2d 841, 849. The Supreme Court held that they "will not interfere with the district court's decision on equity unless an abuse of discretion is clearly established." *Id.*

[¶18] In an appeal from a bench trial, the district court's findings of fact are reviewed under the "clearly erroneous standard of review and its conclusions of law are fully reviewable." *W. Energy Corp. v. Stauffer*, 2019 ND 26, ¶ 5, 921 N.W.2d 431. A finding of fact is clearly erroneous if there is no evidence to support it, it is induced by an erroneous view of the law, or if after reviewing all of the evidence, this Court is convinced a mistake has been made. *Swenson v. Mahlum,* 2019 N.D. 144, ¶ 17, 927 N.W.2d 850, 855 (N.D. 2019)

ARGUMENT

I. THE SAPAS' PETITION FOR CANCELLATION OF THE CONTRACT FOR DEED WAS BROUGHT TO THE DISTRICT COURT AS AN ACTION IN EQUITY AND THE DISTRICT COURT ERRED IN APPLYING THE LAW AS IT PERTAINS TO ENFORCEMENT OF THAT CONTRACT FOR DEED.

[¶19] In November and December of 2015, the Plaintiffs and Defendant executed a *Contract for Deed*, for the purchase of the Plaintiffs' family home in Edinburg, North Dakota. *Contract for Deed*, last dated December 15, 2015. Pursuant to *Contract for Deed*, the Plaintiffs retained legal title to the property until the Defendant paid them $24,000 dollars and fulfilled all the essential terms within the Contract. *Contract for Deed*, at Pgs. 1-3. The Sapas retained the legal title and held it "in trust for the purchaser [Lofthus] and as security for the purchaser's compliance with the conditions of the contract." *Johnson v. Finkle*, 837 N.W.2d 132, 136-37, ¶17 (N.D. 2013). The Defendant, Gregory Lofthus held "equitable title and generally has the right to the use and possession of the property." *Id.* Lofthus would not receive the "full title in fee simple does not vest until the entire purchase price is paid and the terms of the contract have been met." *Id.*

[¶20] "An action to foreclose a land contract is one of three distinct methods for cancelling a contract for deed, the other two being cancellation by a statutory proceeding and cancellation by action. *Beckstrand v. Beckstrand*, 2017 N.D. 20, ¶ 10, 890 N.W.2d 213, 217 (N.D. 2017). The Sapas brought an action for cancellation of the *Contact for Deed*, an action in equity. After a two day trial, the Court issued its Judgment, on July of 2019. A-65.

[¶21] The N.D. Supreme Court has consistently held when interpreting a contract, the Court should look "if executed documents are unambiguous, parole evidence is not admissible to

contradict the terms of the written agreement." *In re Estate of Dionne*, 2009 ND 172, ¶ 16, 772 N.W.2d 891. It is the Plaintiffs' contention that the *Contract for Deed* for the purchase of the home is unambiguous in its original terms including those for the purchase price of the home, required monthly payment, interest to be accrued, as well as the insurance and taxes all payable by the Defendant.

[¶22] "The elements for a prima facie case for breach of contract are: (1) the existence of a contract; (2) breach of the contract; and (3) damages which flow from the breach." *Swenson v. Mahlum*, 2019 N.D. 144, ¶19, 927 N.W.2d 850, 856(quoting *WFND, LLC v. Fargo Marc, LLC*, 2007 ND 67, ¶ 13, 730 N.W.2d 841). "A breach of contract is the nonperformance of a contractual duty when it is due." *Bakke v. Magi-Touch Carpet One Floor & Home, Inc*., 2018 ND 273, ¶ 13, 920 N.W.2d 726. "The burden of proving the elements of a breach of contract is on the party asserting the breach." *WFND*, 730 N.W.2d at ¶ 13. The interpretation of the Contract is limited to its language as it will "govern its interpretation if the language is clear and explicit and does not involve an absurdity." *N.D.C.C.* § 9-07-02 (2019). In the interpretation of the Contract, "words are given their plain, ordinary, and commonly understood meaning, unless they are used by the parties in a technical sense or special meaning is given by usage." *N.D.C.C.* § 9-07-09 (2019). "If the parties' intent can be ascertained from the language alone, the interpretation of the contract to determine its legal effect is a question of law, which is fully reviewable on appeal." *N.D.C.C.* § 9-07-04; *see also Swenson v. Mahlum*, 2019 N.D. 144, ¶20, 927 N.W.2d 850, 856

[¶23] The North Dakota Supreme Court has held that they have "well-established rules for interpreting written contracts." *Flaten v. Couture*, 2018 N.D. 136, ¶14, 912 N.W.2d 330, 335. The Supreme Court reviews and interprets the *Contract for Deed* to see the "mutual intention of the parties at the time of contracting." *Id*.; *N.D.C.C.* § 9–07–04 (2019). "If the parties' intentions can

be ascertained from the writing alone, then the interpretation of the contract is entirely a question of law, and we will independently examine and construe the contract to determine if the district court erred in its interpretation of it." *Id*. The Supreme Court also looks at the "circumstances under which the contact was made and the matter to which it relates." *Id*. However, the caselaw is very clear that even if the terms of the contact are broad, they would only look at those "things concerning which it appears that the parties intended to contract." *Id.* "When the language of a contract is plain and unambiguous and the parties' intentions can be ascertained from the writing alone, extrinsic evidence is inadmissible to alter, vary, explain, or change the document." *Flaten v. Couture*, 2018 N.D. 136, ¶14, 912 N.W.2d 330, 335-36 (N.D. 2018)(quoting Burk v. State, 2017 ND 25, ¶9, 890 N.W.2d 535). In a contract that is clear and unambiguous, and its intent is "apparent from its face, there is no room for further interpretation, and extrinsic evidence may not be used to vary or contradict the terms of the agreement or to create an ambiguity." Id.(quoting *Limberg v. Sanford Med. Ctr. Fargo* , 2016 ND 140, ¶ 17, 881 N.W.2d 658)

[¶24] The *Contract for Deed* in this case was drafted in late 2015. See *Contract for Deed*, last signed December 15, 2015, at P. 2. The primary terms of sale were that the house and land in Edinburgh, North Dakota, were to be purchased by Mr. Lofthus for 24,000 dollars with 3% interest. *Id.* Mr. Lofthus was to pay $1,000 down and then pay $500 a month with the first monthly payment due on January 20, 2016. *Id*. The *Contract* was first signed by the Defendant, Greg Lofthus, on November 24, 2015, in Walsh County, North Dakota, and signed by the Sapas on December 15, 2015, in Cherry County, Nebraska. *Contract for Deed*, at P. 5. The *Contract* was drafted by the Hall & Currie Law Firm of Grafton, North Dakota. *Id*. Both parties were initially living out of state at the time of the initial drafting of the contract but Mr. Lofthus returned to North Dakota in November 2015 to sign the contract. Mr. Lofthus had almost three (3) weeks to review the

Contract for Deed even after he signed it prior to the Sapas' signing the document in Nebraska. *Contract for Deed*, at P. 5. Mr. Lofthus could have suggested amendments and/or consulted an "independent counsel" if he had concerns about the contract and its terms. There was no testimony from Mr. Lofthus at trial that he didn't understand the terms of the contract when he signed the contract nor that he was subjected to undue influence and forced to sign the Contract for Deed on November 24, 2015. *Contract for Deed*, at P. 5.

A. The District Court erred finding that the Defendant's breaches of the *Contract for Deed* were excusable because the Contract was ambiguous.

[¶ 25] The Defendant's argument at trial, accepted by the Trial Court, was that he was excused from paying property taxes or obtain a separate property insurance as he believed both were impossible, therefore the performance of those duties under the *Contract for Deed* were discharged. (Tr. 222-223) However, this is not the correct application of the law. The Supreme Court indicated that the Purchaser has to be without fault in this matter and that there cannot be another remedy within the Contract. The language for the *Contract for Deed* in this case clearly addressed this issue and provides a remedy when the Defendant/Purchaser failed to pay any item within the Contract:

> Should the Purchaser fail to pay any item to be paid by Purchaser, the same may be paid by Seller and shall be forthwith payable, with interest thereon at the rate provided under this contract, as an additional amount due Seller under this contract.
>
> *Contract for Deed*, last dated December 15, 2015, at Page 3.

[¶26] The *Contract for Deed* stated the taxes for the home were, "to pay, before penalty attaches thereto, all taxes due and payable in the year 2016, and in subsequent years, and all special assessments heretofore or hereafter levied upon said premises." *Contract for Deed*, at Page 2. The

fact that they were prepaid by the Plaintiffs' Credit Union as part of their mortgage does not forgive or excuse the tax debt. Under the Contract, the Defendant simply had to pay the required amount owed directly to the Sellers with any applicable interest, after notifying them of his inability to pay the Walsh County directly. Exhibit 12-A shows that the Defendant has not paid $1498.07 in real estate taxes since 2016. The Plaintiffs should be reimbursed under the *Contract for Deed* with interest.

B. Doctrine of Impossibility does not apply in this matter as the Defendant's failure to pay required taxes and insurance has a clearly outlined remedy for breech within the *Contract for Deed* .

[¶27] The Doctrine of Impossibility or Impracticality is described as "[w]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." *Red River Wings, Inc. v. Hoot, Inc.,* 2008 N.D.117, ¶56, 751 N.W.2d 206, 226-27(quoting Restatement (Second) of Contracts § 261 (1981). This doctrine does not apply if either the frustration or the impossibility is caused by a party to the contract. *Id.* The Supreme Court held that to establish the Doctrine of Impossibility, the Defendant must show "its performance is strictly impossible or impracticable `because of extreme and unreasonable difficulty, expense, injury or loss,' and that [a third-party's actions] rendered [the defendant's] performance not only subjectively but also objectively impossible or impracticable. In other words, [the defendant] must show that it cannot perform <u>*and*</u> that performance could not be completed by anyone." *Silbernagel v. Silbernagel*, 2011 N.D. 140, ¶19, 800 N.W.2d 320, 329(emphasis added*) N.D. Century Code* § 9-04-03 which explores the impossibility of performance holds that if the contract has one object

and it is, "unlawful in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable" the entire contract is void." *N.D. Cent. Code* § 9-04-03 (2019). If the Defendant's argument is impossibility of performance and the Court agrees with that assessment, then the entire *Contract for Deed* should have been found to be void. The Defendant did not present evidence at trial which met the requirements of this Doctrine. His out-right refusal to obtain insurance and pay taxes and keeping both issues a secret from the Sapas was clearly self-serving for his financial benefit and to the financial detriment of the Sapas.

[¶28] The Defendant allowed the Plaintiffs' to unwittingly pay the real estate taxes and insurance with no notice. The Defendant testified that he could not obtain his own insurance for the property. At this point, it would have been logical under the terms of the *Contract for Deed* to notify Sellers of the issue. Lofthus was aware and understood that he needed to obtain separate insurance from the 500 dollar monthly payment because he attempted to obtain separate insurance from the Sapa's in 2016. (Tr. 131:1-9) This demonstrates that it was his understanding from the beginning to obtain separate insurance from the Plaintiffs. When his preliminary efforts to obtain insurance were obstructed, he didn't perform any follow through on different types of insurance he could obtain to fulfill his contractual obligations.

[¶29] This theory of impossibility used at trial could have been a potential defense strategy, however sufficient evidence required to prove that obtaining insurance was impossible was not presented at trial. Defendant's testimony was not direct evidence of a third-party denial of coverage and the Defendant's Exhibit Number 2, Homeowner's Declarations in January of 2016 did show that he could get insurance. There was no direct evidence shown as to why the Defendant's policy was cancelled or any third-party evidence and/or testimony presented from Farmer's Union Insurance or any other insurance agency at trial as to why the policy was cancelled

or impossible to obtain. Further, there was no evidence presented by the Defendant that additional or secondary fire and casualty coverage was not possible. This was the Defendant's burden to prove. All the evidence presented at trial, without objection from the Defendant, was that the Defendant has failed to pay the taxes and insurance on the property. The Plaintiffs had no choice but to pay taxes and pay for full insurance coverage to secure the safety and security of their property from the commencement of this *Contract* in 2016 in the amount of $4,863.07. See Exhibit 12-A, filed 3/8/2019. Ironically, the Defendant despite not paying for the house in its entirety or any of the insurance and taxes is now demanding the Court give him the balance of the proceeds of the Plaintiffs' insurance claims as well as the real property in Fee Simple. The District Court clearly erred by awarding Mr. Lofthus part of the insurance proceeds in paragraph 29 of the Judgment. Mr. Lofthus damaged his own interests and the Sapas' by not allowing any repairs to the home to be made by professionals after both the fire and tree damage. Had the repairs been allowed to be made in a timely manner, the home would have been satisfactorily fixed and the property would have retained its value from the repairs. Therefore, it is not equitable to award Mr. Lofthus any of the insurance proceeds due to the fact that the condition of the property and refusing to let anyone on the property is the direct causal reason the property is in a state of disrepair. [¶30] The Defendant's lack of communication with the Sellers regarding important issues known initially only by the Defendant was rampant throughout this contracting period. This is especially true if the benefit was found to be to the Defendant's advantage, such as the error regarding the additional tract property in the *Contract for Deed*. The Defendant testified at trial that he knew about the Geston Tract the entire time because he was paying the taxes on the Tract property starting in 2016.(Tr.129) The Plaintiffs testified that they should have been more proactive in their monitoring of this *Contact*. However, the Defendant is family and they allowed some issues such

as no or slow payments to slide from the very beginning because they were trying to help out the Defendant who was Ms. Sapa's cousin and her long-time friend. It was not until 2017, when the Plaintiffs found out through a third party that the Defendant sold their $800 "skid steer" forks stored on the "tract property" without their permission that the legal issues began. Once the Defendant continued to deny the illegal sale despite mounting evidence to the contrary and his refusal to let them on the property even as a family member, the Plaintiffs realized that something was not right. It was only then they talked to their Credit Union and realized that they were still paying the taxes on the property through the Credit Union even though it wasn't required under their Mortgage. The Defendant also never obtained the required fire/casualty insurance despite his repeated claims that he was in the process of buying it to Mrs. Sapa.(Tr.45:2-7) The Plaintiffs were not even aware of the Defendant's lack of insurance until the fire occurred in the Fall of 2017. (Tr.43)

[¶31] The Defendant is not a good-faith purchaser in this matter. He has failed to abide by the terms of the Contract in almost every aspect. Initially, He and his Defense counsel attempted to make the argument that the Defendant believed that the $500 payment was really $399 and the remainder $101 was to be put towards the tax and insurance. That is clearly untrue as the Plaintiffs' provided evidence in rebuttal including Defendant's text message that showed the Defendant knew from 2015 the basic terms of buying the house alone was $500 a month. A-49. The Defendant also admitted that he signed the *Contract for Deed* in two different places that clearly separated the monthly house payments with the additional payment of tax and insurance *Contract for Deed*, at Pages 2,5.

II. THAT THE DISTRICT COURT CLEARLY ERRED BY AWARDING THE DEFENDANT ANY PORTION OF THE PROCEEDS FROM MULTIPLE INSURANCE CLAIMS FOR THE DAMAGE ON THE REAL PROPERTY.

[¶32] Mr. Lofthus is not entitled to any part of the proceeds stemming from the insurance claims on the property, as ordered by the District Court. Mr. Lofthus violated many Terms and Conditions of the *Contract*, including not purchasing separate insurance as dictated in the *Contract for Deed*. He also did not help pay for the insurance purchased by the Plaintiffs, or have any legal monetary interest in their insurance policy.

[¶33] The District Court erred by declaring that 115 dollars of the 500 dollar monthly payment went towards both taxes on the property and the insurance. The *Contract for Deed* clearly shows that the financial obligations of the insurance and taxes are in addition to paying the 500 dollars a month. The District Court construed the *Contract for Deed* to mean the 500 dollars was all encompassing of the financial obligations under the Terms and Conditions. When in fact, the Sapas' escrow account was put in place merely as a matter of convenience and ease of administrability, to prevent Lori Beth Sapa from having to write multiple checks to multiple organizations. Her escrow account did not add any financial burden to Mr. Lofthus's payments because he was set at a fixed payment of 500 dollars until 23,000 dollars (24,000 dollars minus the down payment of 1,000 dollars) was met. The Sapas' financial obligations were completely separate from Lofthus's obligations under the *Contract for Deed*. Lofthus paid 500 dollars a month to the Sapas' joint checking account, once again, administrability purposes, and not because he had a financial interest in the account. (Tr.33:17-23)

[¶34]

CONCLUSION

[¶] Based on all the above-stated reasons, the Appellants/Respondents, Jerri L. and Lori Beth Sapa respectfully request the Supreme Court reverse the District Court's *Judgment* and award the property in dispute to the Plaintiffs in fee simple, to award all insurance proceeds to the Plaintiffs, ask that the Court order Mr. Lofthus and all other tenants to peaceably leave the property at issue and the Plaintiffs be reimbursed by Mr. Lofthus for taxes paid on the property in dispute.

Dated this 27th day of December 2019.

/s/ Darla J. Schuman

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellants, Jerri and Lori Beth Sapa, in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellant Procedure, the Brief of Appellant contains 23 total pages

Dated this 27th day of December 2019.

/s/ Darla J. Schuman

_____

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

JERRI L. AND LORI BETH SAPA,	)	**Civil No.: 50-2018-CV-00169**
	)	
PLAINTIFFS/APPELLANTS,	)	
	)	**CERTIFICATE OF SERVICE**
vs.	)	**BY E-FILING PORTAL**
	)	
GREGORY LOFTHUS,	)	
	)	
DEFENDANT/APPELLEE.	)	

[¶1.] I, Darla J. Schuman, hereby certify that on the 27th of December, 2019, I served the attached Appellant's Brief on Mr. Todd Burianek, Attorney for Defendant/Appellee, by electronically transmitting to the following email address by the E-Filing Port of the North Dakota Supreme Court filing system: burianek@polarcomm.com, the last known email address of Mr. Todd Burianek. Attorney at Law, 53 West 5th Street, Grafton, ND, 58237, that being his last address known to Affiant.

[¶2.] This service by the Plaintiff/Appellant bears the return email address of lawfirmmaildjs@aol.com and was filed from the offices of Darla J. Schuman, Schuman Law Office, 2860 10th Avenue North, Suite 500, Grand Forks, ND 58203.

Dated this 27th of December, 2019.

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

JERRI L. AND LORI BETH SAPA,)	**Civil No.: 50-2018-CV-00169**
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PLAINTIFFS/APPELLANTS,)	
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)	
DEFENDANT/APPELLEE.)	

[¶1.] I, Darla J. Schuman, hereby certify that on the 20th of December, 2019, I served the attached Appellant's Brief and Appendix for Appellant on Mr. Todd Burianek, Attorney for Defendant/Appellee, by electronically transmitting to the following email address by the E-Filing Port of the North Dakota Supreme Court filing system: burianek@polarcomm.com, the last known email address of Mr. Todd Burianek. Attorney at Law, 53 West 5th Street, Grafton, ND, 58237, that being his last address known to Affiant.

[¶2.] This service by the Plaintiff/Appellant bears the return email address of lawfirmmaildjs@aol.com and was filed from the offices of Darla J. Schuman, Schuman Law Office, 2860 10th Avenue North, Suite 500, Grand Forks, ND 58203.

Dated this 20th of December, 2019.

/s/ DARLA J. SCHUMAN

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