

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA  
Supreme Court No. 20200188  
McKenzie County District Court No. 27-2019-CV-00245**

Timothy S. Dwyer a/k/a  
Tim Dwyer, Jr.,

Plaintiff, Appellant,  
and Cross-Appellee

v.

Margret Sell, Co-Trustee of the Tim  
Dwyer Farm Trust; John Dwyer, Co-  
Trustee of the Tim Dwyer Farm Trust;  
Peggy Dwyer Sell a/k/a Margret Sell;  
John W. Dwyer a/k/a John Dwyer;  
Jane Dwyer Morgan; Barbara Dwyer  
Rice;

Defendants, Appellees,  
and Cross-Appellants

and

Ruth Dwyer Coleman; Michael A.  
Dwyer; Molly Binger; Dan Dwyer;  
Tommy Dwyer; Sadie Bro; Dana Dwyer;  
Sarah Grossman; Johnny Coleman;  
Ingrid Kalinowski a/k/a Ingrid A. Sell;  
Jack Dwyer; Sam Coleman; Johnny  
Dwyer; Rachel Meuchel; Andy Dwyer;  
Josh Dwyer; Katie Montplaisir; Anne  
Dwyer; Billy Morgan; Katie Joraanstad;  
Mike Morgan; Judah Coleman; Beky  
Olson; Will Rice; Janna Schmidt; Paul  
Rice; Olin Sell; Charles Coleman; Patrick  
Sell; David Morgan; Joey Dwyer; Taylor  
Dwyer; Tessa Dwyer; Teddi Dwyer;  
Tianna Dwyer,

Defendants and Appellees

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**On Appeal from the Summary Judgment entered May 8, 2020 and  
Amended Judgment entered October 28, 2020  
Case No. 27-2019-CV-00245, County of McKenzie, Northwest Judicial District  
The Honorable Daniel El-Dweek, Presiding**

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**BRIEF OF APPELLANT AND CROSS-APPELLEE  
TIMOTHY S. DWYER A/K/A TIM DWYER, JR.  
ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- [¶1] I. Where instructions to sell land by a contract for deed are incomplete and ambiguous, the district court erred in declaring any land purchased by Tim Dwyer, Jr., or any other family member from the Tim Dwyer Farm Trust must be under the terms of a contract for deed without any right of prepayment.
- A. The language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.
  - B. Where a contract for deed is silent on a right to prepay, any attempted prohibition on prepayment would be void as a restraint on alienation under N.D.C.C. §47-02-26.
- [¶2] II. The district court erred in declaring the reservation of rights under Article IX of the Tim Dwyer Farm Trust Agreement in favor of the Dwyer descendants for access for hunting is invalid as a matter of law and, further, that portion of the Judgment declaring recreational activities could not be severed under this same statute was erroneous.
- [¶3] III. The district court erred in declaring under Article VII of the Revocable Living Trust Agreement the Trustees have the discretionary authority to offer for sale less than all of the Trust property to Tim Dwyer, Jr. and the further authority to withdraw all or some of the real property from any proposed sale if the appraised valuations do not meet their expectations.

## **ORAL ARGUMENT REQUESTED**

[¶4] Tim Dwyer, Jr., requests oral arguments. The disagreements between these family members interpreting the language from the Trust Agreement left by their father/grandfather more than fifteen years ago have occurred over an extended period of time and there are many parties with wide age differences having an interest in this action. The ultimate resolution of these differences will impact not only the family members who may purchase land from the Trust but also the beneficiaries of this Trust. Because of these considerations, it is believed that oral arguments would be helpful.

## STATEMENT OF THE CASE

[¶5] Appellant, Tim Dwyer, Jr., by a Complaint dated May 30, 2019, commenced this action seeking declaratory relief to resolve uncertainties and to determine the rights of the parties under the provisions of the Revocable Living Trust Agreement dated December 6, 2004, (“Trust Agreement”) from Trustor William Dwyer a/k/a Tim Dwyer (“Tim Dwyer, Sr.”) creating the Tim Dwyer Farm Trust (“Trust”). App. 18-48. Tim Dwyer, Jr., is one of the seven children of Tim Dwyer, Sr., all of whom are alive and are parties to this action.

[¶6] This action was originally brought against Margret Sell and John Dwyer, as Co-Trustees of the Trust (collectively the “Trustees”), and the other children of the Trustor, namely Margret Sell, John W. Dwyer, Jane Dwyer Morgan, Barbara Dwyer Rice, Ruth Dwyer Coleman, and Michael A. Dwyer.

[¶7] The Trustees filed an Answer and Counterclaim dated June 21, 2019. App. 49-55. Tim Dwyer, Jr., Answered this Counterclaim on July 30, 2019. App. 68-72.

[¶8] Barbara Dwyer Rice filed an Answer dated July 25, 2019. App. 66-67.

[¶9] All remaining thirty-three Appellees are the grandchildren of Tim Dwyer, Sr., and they are the ultimate beneficiaries of the Trust. When these grandchildren were not included as parties to the original action, and following objections by some of the children of the Trustor, all grandchildren were added as Defendants. App. 73. The Amended Summons and Amended Complaint adding these grandchildren as parties were dated October 2, 2019. App. 74-91.

[¶10] The Trustees filed an Answer to the Amended Complaint along with a Cross-Claim on October 21, 2019. App. 99-105. Jane Dwyer Morgan Answered this Cross-

Claim on November 12, 2019. App. 137-139. Molly Binger, Dana Dwyer, Johnny Dwyer, Olin Sell and Patrick Sell Answered this Cross-Claim on November 18, 2019. App. 155-158.

[¶11] Jane Dwyer Morgan filed an Answer dated October 8, 2019. App. 92-98. Michael A. Dwyer and Ruth Dwyer Coleman filed an Answer dated October 23, 2019. App. 106-110. Charles Coleman filed an Answer on October 24, 2019. App. 111-112. Sadie Bro filed an Answer on November 5, 2019. App. 132-134. Katie Montplaisir filed an Answer on November 5, 2019. App. 135-136.

[¶12] Ingrid Sell filed an Answer and Counterclaim on October 29, 2019. App. 119-125. Tim Dwyer, Jr., responded with his Answer to this Counterclaim dated November 4, 2019. App. 126-131.

[¶13] Molly Binger, Dana Dwyer, Johnny Dwyer, Olin Sell, and Patrick Sell filed an Answer and Counterclaim dated November 15, 2019. App. 140-154. Tim Dwyer, Jr., Answered this Counterclaim dated December 3, 2019. App. 175-179.

[¶14] Motions for Summary Judgment were made by several parties. The Motion from Michael A. Dwyer was dated October 23, 2019. App. 113-114. The Motion from Tim Dwyer, Jr., was dated November 20, 2019. App. 159-160. The Motion from Margret Sell, John Dwyer and the Trustees was dated December 18, 2019. App. 180-182. These Motions or the Briefs offered in support for or in opposition against these Motions were joined by several other parties.

[¶15] An Order Granting Defendant's Motion for Summary Judgment, In Part, was dated March 31, 2020. App. 196-204. This Order granted portions of the Motions for Summary Judgment made by Michael Dwyer and also Margret Sell, John Dwyer, and



the Trustees. This Order recognized that Tim Dwyer, Jr., has a right of first offer for the sale of any land sold from the Trust; that the Co-Trustees had the right to sell none, some, or all of the Trust land; that the Co-Trustees could withdraw land from the sale prior to the execution of a purchase agreement; that the sale to Tim Dwyer, Jr., or any other party was to be under the terms of a contract for deed as outlined in the Trust Agreement; that prepayment of the contract for deed would not be allowed; that any land not purchased by Tim Dwyer, Jr., would be offered to any other child of the Trustor who could purchase the land at the same value and upon the same terms and conditions in a contract for deed; that the attempted reservation of a right of access to the Dwyer descendants for outdoor recreational activities would be allowed but any severance of hunting rights would be prohibited; that the right of Tim Dwyer, Jr., to purchase land from the Trust is personal to him and cannot be assigned; and that no party was entitled to attorney's fees. Additional issues such as a division of appraisal fees and the proportion of land that other children of the Settlor had a right to buy other than Tim Dwyer, Jr., were considered as premature for decision and the motion as to those issues was denied.

[¶16] The Order for Judgment was dated May 8, 2020. App. 205-207. The Judgment was dated May 8, 2020. App. 208-210. The Notice of Entry of Judgment was dated May 21, 2020. App. 211-214.

[¶17] A Motion to Amend the Judgment was made by Margret Sell, John Dwyer, and the Trustees dated July 2, 2020. App. 215-216.

[¶18] The Notice of Appeal filed by Tim Dwyer, Jr., was dated July 15, 2020. App. 217-220. A Corrected Notice of Appeal from Tim Dwyer, Jr., was dated July 16, 2020. App. 221-224.

[¶19] The Notice of Cross-Appeal from Margret Sell, John Dwyer, and the Trustees was dated July 20, 2020. App. 225-227.

[¶20] The Notice of Cross-Appeal from Jane Dwyer Morgan and Barbara Dwyer Rice was dated July 27, 2020. App. 228-230.

[¶21] The North Dakota Supreme Court issued an Order for Remand entered August 11, 2020. App. 231-232.

[¶22] A Motion for Stay was made by Tim Dwyer, Jr., dated August 12, 2020. App. 276-277.

[¶23] The Order Granting Defendant's Motion to Modify the Judgment, In Part, and Granting Plaintiff's Motion to Stay was dated October 8, 2020. App. 287-288. This Order granted the Motion to Amend limited to clerical errors for the names of parties in the Judgment. This Order denied the request to amend the Judgment related to the severance of hunting rights. This further ordered that the execution of the Judgment entered in this matter would be stayed pending appeal without the posting of any bond.

[¶24] The Amended Judgment was dated October 28, 2020. App. 289-291. The Notice of Entry of Amended Judgment was dated October 28, 2020. App. 292.

[¶25] The Amended Notice of Appeal from Tim Dwyer, Jr., was dated October 29, 2020. App. 293-296.

[¶26] The Amended Notice of Cross-Appeal from Jane Dwyer Morgan and Barbara Dwyer Rice was dated December 22, 2010. App. 297-299.

## STATEMENT OF THE FACTS

[¶27] Tim Dwyer, Sr., was a long time farmer and rancher residing in McKenzie County. He was the father of seven children who are all parties to this action, including Tim Dwyer, Jr., Peggy Dwyer Sell a/k/a Margaret Sell, John W. Dwyer, Jane Dwyer Morgan, Barbara Dwyer Rice, Ruth Dwyer Coleman, and Michael A. Dwyer. He was also the grandfather of thirty-three grandchildren, all born before his death and all of whom have now been added as parties to this action. App. 162.

[¶28] During his lifetime, Tim Dwyer, Sr., acquired more than 7,000 surface acres all located in McKenzie County. All of this land was operated by him as one farm and ranch unit. App. 162-163.

[¶29] Later in his life Tim Dwyer, Sr., leased all land owned by him to Tim Dwyer, Jr. This lease arrangement began in 2004. App. 163.

[¶30] Because of his declining health, Tim Dwyer, Sr., started estate planning. This led to his signing the Trust Agreement dated December 6, 2004 establishing the Trust. App. 163. As a part of this same estate plan, also on December 6, 2004, Tim Dwyer, Sr., executed a warranty deed to the Trustees conveying more than 7,000 surface acres. App. 163.

[¶31] Approximately one month after establishing this Trust, Tim Dwyer, Sr., died on January 7, 2005, at the age of 87. App. 163.

[¶32] This Trust Agreement contained the following provision related to the continued leasing of land owned by the Trust and the rental to be paid by the tenant:

It is my specific direction to the Co-Trustees herein named that the tenant or tenants with whom I have entered a farm lease as Landlord during my lifetime shall continue to have the right to farm the surface of this property while it is held in trust. If the term of any lease that I have entered during

my lifetime expires, then and in that event my tenant therein named shall have an option to renew the lease based upon the fair market price for McKenzie County, North Dakota, less \$1.00 per acre because this land is located in western McKenzie County where the climate is drier and the land is less productive. In addition, the Tenant shall pay to the Landlord \$4.00 per acre or \$120.00 per animal unit per year, which ever is less, provided that the minimum number of animal units shall be 130 head. If the Tenant fails to exercise this right, then my Trustee shall lease to the highest bidder. App. 35.

[¶33] Tim Dwyer, Jr., has exercised his continued right to lease all of the Trust lands and he has remained the sole and only tenant of all lands owned by the Trust. App. 163.

[¶34] The Trust Agreement included an initial prohibition against the sale of any Trust lands for a period of time:

The land and any improvements located thereon shall not be sold for a period of seven years following my death. After seven years the land shall only be sold upon majority vote of all named beneficiaries (my children) provided that if any child has died, that child's children shall have but one vote in making this determination. App. 35.

[¶35] Tim Dwyer, Jr., stated this prohibition was included in the Trust Agreement based upon discussions with his father who wanted to allow Tim Dwyer, Jr., adequate time to put his finances in order so he could buy all of the land held in the Trust when it would ultimately be offered for sale. This prohibition expired January 7, 2012. App. 163-164.

[¶36] The Trust Agreement further provided an outline as an alternative as to how land owned by the Trust could be sold and the sales terms:

Regardless of the prohibition upon sale of this land as stated herein, I hereby authorize my Co-Trustees to purchase, sell, or otherwise encumber the land, if in their sole discretion to do so, is necessary for the payment of debts or taxes and also, if the Co-Trustees believe to do so is in the best interest of the beneficiaries of this Trust.

My Co-Trustees are directed that in the event that this land is to be sold, TIM DWYER, JR., shall have the right to purchase all or any part of the land provided that the purchase price shall be determined upon the appraisal of two qualified appraisers as selected by the Co-Trustees and the proposed purchaser with the average of the two appraisals being the

sale price. If TIM DWYER, JR., agrees to purchase the land, he shall do so on a Contract for Deed extending for a period of 15 years at an interest rate of 4½ percent. The Contract for Deed entered for this property shall require equal annual installments of interest and principle. In the event that my son, Tim Dwyer, Jr., fails to exercise this first right to purchase, then any other child of mine shall have the right to purchase all or any part of the property based upon the same valuation. App. 36.

[¶37] After January 7, 2012, there was a family vote between the children of Tim Dwyer, Sr., as to the possible sale of land from the Trust. The majority of these family members at that time voted not to sell any Trust land. App. 164. There have been no other votes to sell any land held in this Trust.

[¶38] The attorneys for the Trustees on October 3, 2018, sent a letter to the attorney for Tim Dwyer, Jr., stating the Trustees had determined “that it is in the best interest of the Trust beneficiaries to sell some or all of the trust property.” App. 47-48. In this same letter, the Trustees reserved the right to wait for the appraisals to be completed and to then “determine which tracts, if not all of the land, they proposed to sell. At this time they know they want to keep the 80 acres where the farmstead is located.” App. 47-48.

[¶39] After receiving this notice, Tim Dwyer, Jr., gave notice to the Trustees of the exercise of his continued right to lease all lands owned by the Trust. App. 164. Tim Dwyer, Jr., has never waived his right to purchase land sold from the Trust. App. 169.

[¶40] Although the Trust Agreement describes the sale of the land by a contract for deed, no form of a contract for deed was provided by the Trustor and the Trustor left no instructions on terms commonly found in most contracts for deed, such as, the right to assign the vendee’s interest, the right to prepay, the payment of taxes, providing abstracts, and default remedies.

[¶41] Because the sales price would likely be a critical factor in determining what Trust land, if any, he would purchase, Tim Dwyer, Jr., on at least 5 instances prior to the commencement of this action offered to work with the attorney for the Trustees in developing a joint letter of instructions to the chosen appraisers which would be fair and reasonable. This included submitting a draft of a proposed letter of those instructions. App. 236, 262-266.

[¶42] After the failure of all efforts to mutually develop a plan for the sale of Trust lands, Tim Dwyer, Jr., commenced this action in May 2019 for declaratory relief to resolve uncertainties and to determine the rights of the parties caused by language found in the Trust Agreement.

[¶43] After this action was commenced, the Trustees on September 6, 2019, sent a letter of instructions to these appraisers. Those instructions were prepared solely by the Trustees with no opportunity for input from Tim Dwyer, Jr. or his attorney. App. 236, 267-271. Although Tim Dwyer, Jr., then requested that the Trustees withdraw this unilateral letter of instructions, no response was ever received from the Trustees. App. 236.

[¶44] Based solely upon instructions received from the Trustees, the appraiser chosen by the Trustees valued the Trust property at approximately \$7 million and the appraiser chosen by Tim Dwyer, Jr., valued the property at approximately \$5.5 million. The average of these appraisals was approximately \$6.25 million. App. 236.

[¶45] In response to the competing motions for summary judgment, the trial court on March 31, 2020 issued its Order determining: that the language of the Trust is unambiguous; that Tim Dwyer, Jr., has a right of first offer if the Trustees decide to sell

Trust land; that the Trustees may sell less than all of the Trust land and may withdraw land from any proposed sale prior to executing a purchase agreement; that any sale of land to Tim Dwyer, Jr., would be on a contract for deed as outlined in the Trust Agreement with no right of prepayment; that any land not purchased by Tim Dwyer, Jr., may be purchased by other Dwyer siblings at the same price and under a contract for deed with similar terms and conditions; that any sale of Trust land may not include a reservation of hunting rights; and that the right to Tim Dwyer, Jr., to purchase Trust property is personal to him and may not be assigned. App. 196-204.

[¶46] The Notice of Entry of Judgment was dated May 21, 2020. App. 211.

[¶47] The final work on the appraisals was completed on July 28, 2020. App. 234. Within one week after the finalization of the appraisals and during the pendency of this appeal, the Trustees served upon Tim Dwyer, Jr., an Offer to Sell (App. 240-246), and a proposed Contract for Deed (App. 247-257). The Offer to Sell had an expiration date of August 20, 2020, with a warning that any tracts not selected for purchase by Tim Dwyer, Jr., would then be offered to the other children of the Trustor.

[¶48] The Contract for Deed prepared by the Trustees stated “Buyer shall have no prepayment privileges” (App. 252) even though the Trustees knew this was one of the grounds of appeal brought by Tim Dwyer, Jr.

[¶49] The Offer to Sell and Contract for Deed prepared by the Trustees also stated the land would be sold “subject to the right of descendants of William Dwyer a/k/a Tim Dwyer to have access to the property for the purposes of hunting, hiking and other outdoor recreational activities” (App. 241 and 248) even though the Trustees knew the district court had ruled that access for hunting rights could not be reserved.

[¶50] In order to maintain the status quo of all parties pending this appeal, Tim Dwyer, Jr., moved for a stay (App. 276-277). Despite arguments from the Trustors and others that a bond of more than \$1 million should be required, the district court granted a stay without the requirement of any bond. App. 287-288.

### STANDARD OF REVIEW

[¶51] Tim Dwyer, Jr., claims the district court erred in granting summary judgment declaring land could only be sold from the Trust under the terms of a contract for deed with no right of prepayment; that land sold from the Trust could not reserve a right of access to the Dwyer descendants for hunting purposes; that the Trustees could offer less than all of the Trust land for sale; and that the Trustees could withdraw Trust land from any sale before a purchase agreement had been signed.

[¶52] The standard of review for summary judgment has been well established:

Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from the undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to the judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

*Hamilton v. Woll*, 2012 ND 238, ¶9, 823 N.W.2d 754

[¶53] Where a case is brought to the Supreme Court for trial de novo, although findings from the trial court are given appreciable weight they are not clothed with the



same presumption of correctness as in other cases. *Braaten v. Grabinski*, 77 ND 422, 43 N.W.2d 381 (1950).

## ARGUMENT

**I. Where instructions to sell land by a contract for deed are incomplete and ambiguous, the district court erred in declaring any land purchased by Tim Dwyer, Jr., or any other family member from the Trust must be under the terms of a contract for deed without any right of prepayment**

**A. The language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist**

[¶54] Whether or not Tim Dwyer, Jr., or any other purchaser may prepay a contract for the purchase of Trust land requires the interpretation of two sentences within Article VII of the Trust Agreement:

If TIM DWYER, JR., agrees to purchase the land, he shall do so on a Contract for Deed extending for a period of 15 years at an interest rate of 4½ percent. The Contract for Deed entered for this property shall require equal annual installments of interest and principle. App 36.

[¶55] Tim Dwyer, Jr., has recognized this language gave himself and his siblings a financial advantage in purchasing Trust property: no down payment was required which is extremely rare; the terms allowed, if necessary, payments over an extended 15 year time period; and interest rates were set at 4½% which was well under the commercial loan rates at that time approaching 7%. App. 167.

[¶56] If one fast forwards from when the Trust Agreement was signed in late 2004 to today there have been substantial changes in a number of related factors: land prices have risen dramatically; interest rates are at their lowest point in generations; and all possible purchasers within the Dwyer family are 16 years older.

[¶57] The sale of land by the Trust is simply the exchange of one asset – the land – for another equal asset – a bag of cash. There is a procedure within the Trust Agreement to

set the sales price by averaging fair appraisals. The average value for all Trust land based upon the appraisals completed under the unilateral instructions from the Trustees is approximately \$6.25 million. App. 236.

[¶58] The right to prepay a contract for deed could save any purchaser within the Dwyer family substantial funds. As an example, financing \$6.25 million for 15 years at 4.5% would have equal annual payments of \$581,961.30. The total payments would be \$8,729,419.50 or 39.67% more than the appraised price. Interest paid over the contract would total \$2,479,419.50. Any purchaser immediately paying cash could avoid those costs. A purchaser able to prepay by securing alternative financing at modern interest rates of say 3% would lower the equal annual payments to \$523,541.13 and the total payments over the life of the contract would be reduced by \$876,302.55.

[¶59] No party has argued that the Trustor could not have included language prohibiting prepayment if that had been his intent. In practice, contracts for deed typically expressly allow or prohibit prepayment. Instead, this Trust Agreement language is simply silent as to allowing or prohibiting prepayment. More importantly, the Trust Agreement, while stating that a contract for deed was to be used, failed to include a form of the agreement.

[¶60] The concept of prepaying a contract for deed or a note from a land purchase has been considered by a number of courts. An annotation from almost a century ago stated: “The rule appears to be well settled that in contracts for the sale of land, the vendor is not obliged to accept payment or performance of the conditions of sale by the vendee before the time fixed for performance, and that such a premature offer of performance by the purchaser is ineffective, and cannot serve as a valid tender to put

the vendor in default. “*Right of Purchaser Under Land Contract to Anticipate Time of Payment Fixed by Contract*, 17 A.L.R. 866 (1922). Many of the cases cited in this article go back as far as the 1850s.

[¶61] Although primarily a decision focused on creating a contract from a verbal agreement by partial performance, *Goetz v. Hubbell*, 66 ND 491, 266 N.W. 836 (1936), also dealt with a proposal to prepay a land contract. That case held that the seller was not bound to accept the purchase price in any manner or form than that described in the contract. *Id.*

[¶62] Not all states however, continue to follow this line of reasoning. In North Carolina, it has been held there was a right to prepay a note on a land sale when the note was silent as to any such right. *Hatcher v. Rose*, 329 NC 626, 407 S.E.2d 172 (1991). That case included an extended discussion on the effect of common law in determining any right of prepayment, including the following excerpts from Alexander, *Mortgage Prepayment: The Trial of Common Sense*, 72 Cornell L. Rev. 288 (1987):

For the past one hundred and fifty years legal scholarship has assumed that a borrower’s inability to prepay mortgage indebtedness without the lender’s consent was a principle embedded in the common law since its early beginnings. A reexamination of the leading cases and commentaries, however, reveals that this assumption is unjustified. *Id.* at 289.

and

Contrary to traditional wisdom, the common law prior to 1825 did not clearly deny the debtor the right to prepay his mortgage. *Id.* at 308.

[¶63] What then makes this case different to support arguments that prepayment of a contract for deed should be allowed? Very simply the Trust Agreement language not only lacks any language allowing or prohibiting prepayment, it significantly failed to provide a form of the agreement and there is no standardized form.

[¶64] In addition to being silent on whether a contract could be prepaid, there are other typical parts of a contract for deed which were not discussed in the Trust Agreement such as: Will the seller provide updated abstracts? Who will pay the real estate taxes? What happens upon a default?

[¶65] The lack of any form of a contract for deed has caused disagreements in other areas as well. There is also a question as to whether the vendee's interest in any such contract would be assignable. The Trustees have claimed the purchaser's interest could not be assigned and included in a later proposed contract for deed a clause stating "Buyer's interest in the property is not assignable." App. 252. Under existing case law, however, a vendee's interest is assignable unless there is a specific provision in the contract prohibiting assignment. *Semmler v. Beulah Coal Mining Co.*, 48 ND 1011, 188 N. W. 310 (1922). The Trust Agreement was silent and gave no directions as to any right to assign the vendee's interest.

[¶66] This case involves the interpretation of the Trust Agreement signed December 6, 2004. App. 30-43. As to any such interpretation, the decision in *Langer v. Pender*, 2009 ND 51, ¶¶ 13-14, 764 N.W. 2d 159, stated:

This Court's primary objective in construing a trust instrument is to ascertain the settlor's intent. *Alerus Fin., N.A. v. Western State Bank*, 2008 ND 104, ¶21, 750 N.W.2d 412; *Matter of Estate of Schmidt*, 1997 ND 244, ¶13, 572 N.W. 2d 430. "When a trust instrument is unambiguous the settlor's intent is ascertained from the language of the trust document itself." *Hecker v. Stark County Soc. Serv. Bd.*, 527 N.W. 2d 226, 230 (ND 1994). "Whether or not a trust is ambiguous is a question of law, fully reviewable on appeal." *Id.*

General rules of construction of written documents apply to the construction of trust instruments. See *Alerus*, 2008 ND 104, ¶¶ 18-19, 750 N.W. 2d 412. In North Dakota, the interpretation of a contract is governed by N.D.C.C. ch. 9-07. Under N.D.C.C. §9-07-02, the contract language governs its interpretation "if the language is clear and explicit and does not

involve an absurdity.” Contracts are construed to give effect to the parties mutual intention at the time of contracting “so far as the same is ascertainable and lawful.” N.D.C.C. §9-07-03. The rules provided in N.D.C.C. ch 9-07 are applied “[f]or the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful...” N.D.C.C. §9-07-03. “When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible, subject, however, to the other provisions of [N.D.C.C. ch. 9-07].” N.D.C.C. §9-07-04. “The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others.” N.D.C.C. §9-07-06

[¶67] The key phrases within these two sentences of the Trust Agreement include: “shall do so on a contract for deed,” “for a period of 15 years,” “interest rate of 4½ percent”, and “shall require equal installments of interest and principle.”

[¶68] These terms combined with the average appraised value would simply be used as the basis for determining any annual payment. There could have been different amortization methods used such as equal annual principle payments plus interest or a fixed payment with a final balloon payment. Here the directions were simply to calculate equal annual payments as opposed to these other options. These directions do not, however, require payments to be made every year for 15 years.

[¶69] The district court found this language from the Trust Agreement to be unambiguous in determining there would be no right of prepayment in Tim Dwyer, Jr., or any other prospective purchaser. App. 204. The district court reached this conclusion despite not only no express language prohibiting prepayment but also there was no form of a contract for deed to review. With so many gaps, was this language truly unambiguous?

[¶70] The lack of any proposed form of a contract for deed has caused uncertainty. The right to prepay is certainly advantageous to any prospective purchaser who had no role

in preparing the Trust Agreement. Where there is any such uncertainty, N.D.C.C. §9-07-19 applies which reads:

**Uncertainty interpreted against party causing it – Presumption as to cause.** In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party, except in a contract between a public officer or body, as such, and a private party, and in such case it is presumed that all uncertainty was caused by the private party.

[¶71] What if, instead, the Trust Agreement simply said to sell the land at appraised value by means of a warranty deed? Without more, would that deed include mineral reservation language? In many cases underlying mineral interests are worth far more than the surface. If it becomes a question of what the Trustor might have intended, would that omission not have made those instructions ambiguous?

[¶72] It is anticipated the Trustees will likely argue allowing prepayment will result in significant tax issues for the Trust. In an affidavit which the Trustees offered, however, these Trustees have admitted that “the basis on the land has all been consumed in the past from the easement sales. As a result any sale of the land will result in a capital gain.” App. 286. There is no remaining tax basis and all principle payments will be subject to a capital gains tax.

[¶73] Similarly, the Trustees may argue that allowing prepayment may reduce the future return on investments to the Trust. Other courts have held, however, that “the fundamental purpose of the mortgage note in most instances is to secure a debt incurred in the purchase of land from which the debt arises rather than to secure investment income to the mortgagee.” *Mahoney v. Furches*, 503 Pa. 60, 468 A.2d 458 (1983).

[¶74] Whether or not a trust is ambiguous is a question of law, fully reviewable on appeal. An ambiguity exists when rational arguments can be made in support of contrary positions as to the term, phrase, or clause in question. *Trust of Roger S. Linn Restated Trust*, 2019 ND 58, ¶10, 923 N.W.2d 815.

[¶75] In determining whether summary judgment was appropriately granted, the evidence must be viewed in the light most favorable to Tim Dwyer, Jr., and he is to be given the benefit of all favorable inferences which can reasonably be drawn from the record. Upon this basis, as related to Tim Dwyer, Jr., this evidence and the inferences to be drawn from the record show: (1) although directed by the Trustor to use a contract for deed, the failure to provide a form of that contract now supports contrary positions and has raised uncertainties not caused by Tim Dwyer, Jr., and, (2) the failure to expressly prohibit prepayment infers that prepayment would be allowed to the benefit of Tim Dwyer, Jr., or any other family member purchasing Trust land.

[¶76] The use of a contract for deed would provide security for the Trust while allowing financial flexibility for any purchaser. Any contract for deed was not intended to provide an additional revenue stream for the beneficiaries. The appraisal process would allow the simple exchange of the land for an equivalent amount of cash.

[¶77] The decision by the district court that the sales procedure outlined in the Trust Agreement related to prepayment was unambiguous was not correct and not supported by the record. The information then available to the district court did not preclude the existence of a genuine issue of material fact as to whether Tim Dwyer, Jr., or any other prospective purchaser should be allowed the opportunity to prepay the contract. That

part of this decision and Judgment denying the right of any vendee to prepay a contract for deed for the purchase of Trust land should be reversed.

**B. Where a contract for deed is silent on a right to prepay, any attempted prohibition on prepayment would be void as a restraint on alienation under N.D.C.C. §47-02-26.**

[¶78] As described above, in this case there was no proposed form of a contract for deed provided by the Trustor and the Trust Agreement itself has no language allowing or prohibiting prepayment by the vendee. It is the position of Tim Dwyer, Jr., that under these circumstances if he purchases any portion or all of the Trust property, any imposition of a prohibition on prepayment would restrain his right to later alienate his interest in the property and would be void under this statute.

[¶79] As an example, Tim Dwyer, Jr., is now 64 years old. App. 169. He has four daughters, who are granddaughters of the Trustor, who are parties to this action. App. 162. The position of the Trustees is that if he should buy a portion or all of the Trust lands under a contract for deed, the term of that contract would require payments for the full 15 years. If one would assume in five years one or more of his daughters had married and wanted to build homes on land formerly held in this Trust, Tim Dwyer, Jr., would need to convey land to them in order for them to obtain construction financing which typically requires clear title.

[¶80] If there was no right in Tim Dwyer, Jr., to prepay so portions of this land could be deeded to his daughters free from this contract for deed, this would restrain his right for the future use of this property. Obviously, the only alternative his family would have under those circumstances would be to wait for the running of the full term of the contract. By that time, Tim Dwyer, Jr., would be about 80 years old and it would be



unlikely his daughters would be willing to wait 10 years or longer to obtain clear title to the land in order to build these homes.

[¶81] The North Dakota rule on any such restraint on alienation is set out in N.D.C.C. §47-02-26 which reads:

**Restraints on alienation – When void.** Conditions restraining alienation, when repugnant to the interest created, are void.

[¶82] Although this statute has been effective for decades there has been limited case law in North Dakota related to this statute. It has been held, however, that any limitation on the right of alienation, even the slightest, would be a condition repugnant to the interest created and would be void. *Holien v. Trydahl*, 134 N.W.2d 851, 856 (ND 1965).

[¶83] There was also a decision related to “due on sale” provisions in a mortgage. *Northwestern Fed. Sav. & Loan Ass’n. v. Ternes*, 315 N.W.2d 296 (ND 1982). This case generally held that such a provision within a mortgage was valid and enforceable pursuant to federal law and regulations. No claim was made in that case that such a clause was prohibited by any state statute. *Id.* This case repeatedly emphasized that terms of the mortgage, including the “due on sale” clause, were obtained and entered into voluntarily between the contracting parties.

[¶84] Also, in relation to any restraint on alienation, it has been recognized that one of the incidents of ownership of property is the right to convey it. *Dennison v. North Dakota Department of Human Services*, 2002 ND 39, ¶14, 640 N.W.2d 447. Other states have also considered arguments of restraints on alienation involving land contracts and mortgages. The decision in *Mahoney* regarded a promissory note on a land sale which was silent related to any right of prepayment. This decision stated:

When the mortgagee takes a mortgage note for investment purposes, the usual effect will be to restrain the mortgagor from alienating the land, securing the note for the duration of the mortgage, since the mortgagor cannot pass clear title to that land until the note is satisfied. Co-terminus with this result is the possibility that the mortgagee can directly control or restrain the mortgagors inability to subdivide and sell portions of the mortgage tract merely on the basis of his security interest in the land. Taking cognizance of the general policy of this Commonwealth and elsewhere against restraints on alienation, we find it would be against such policy to presume, simply from the absence of a clause so allowing, that a mortgagor could not pay off his debt and alienate his land as he so desires. Instead, we think it wiser to raise a presumption of a right to prepayment of the note where a mortgage is silent as to that right. This presumption could be rebutted by showing a contrary intent mutually manifested by the parties. Such a presumption would not work a hardship on the mortgagee since, in virtually all instances, he is drafter of the mortgage note and can thus include within the note a clause stating that the note is not subject to prepayment...Having seen the alternative, we think the more reasonable rule is to place the burden upon the person who has drafted the instrument to demonstrate that the parties intended to allow the land to be secured for the duration of the mortgage note. We therefore hold that where a mortgage note is silent as the right of prepayment, there arises a presumption that the debt may be prepaid. *503 Pa. at 65-66.*

[¶85] In this case, no party has argued that if the Trust Agreement had clearly and specifically stated that prepayment would not be allowed that it would violate any statute or public policy. Such a provision could have very easily been added to the Trust language if that had been the intent of the Trustor. Because the Trust Agreement was silent as to any right of prepayment and now viewing the evidence in the light most favorable to Tim Dwyer, Jr., and giving him the benefit of all favorable inferences, there remains a genuine issue of material fact and for purposes of these motions there should be a presumption in favor of prepayment. The decision by the district court prohibiting prepayment should now be reversed.

II. **The district court erred in declaring the reservation of rights under Article IX of the Tim Dwyer Farm Trust Agreement in favor of the Dwyer descendants for access for hunting is invalid as a matter of law and, further, that portion of the Judgment declaring recreational activities could not be severed under this same statute was erroneous.**

[¶86] The land conveyed by the Trustor to the Dwyer Trust was a vast holding comprising over 7,000 acres. These lands are representative of most lands in western McKenzie County, having not only economic value for farming and ranching but also abundant opportunities for enjoying the outdoors.

[¶87] The Trustor clearly recognized with a new owner or owners, future access to those lands by his descendants would likely be limited or prohibited. The Trustor addressed these concerns by including Article IX in the Trust Agreement, which reads:

HUNTING AND OUTDOOR RECREATIONAL ACTIVITY. In addition to the above, my Co-Trustees and any successor Co-Trustee as well as any person receiving a conveyance from this Trust shall reserve unto all of my descendants the right to have access to the subject property pursuant to guidelines established by the Co-Trustees of this Trust and the owner or tenant of the property for purposes of hunting, hiking and other outdoor recreational activity. App 37.

[¶88] The deed from the Trustor to the Trust made no provision for severing any right of access for hunting, hiking or recreational activities. App 44-46.

[¶89] A little more than two years following the signing of the Trust Agreement and this deed, the 2007 legislative session passed N.D.C.C. §47-05-17 prohibiting the future severance of hunting access from the surface estate, which reads:

**Severance of the right of access for hunting access prohibited.** The right of access to land to shoot, shoot at, pursue, take, attempt to take, or kill any game animals or game birds; search for or attempt to locate or flush any game animals and game birds; lure, call or attempt to attract game animals or game birds; hide for the purpose of taking or attempting to take game animals or game birds; and walk, crawl, or advance toward wildlife while possessing implements or equipment useful in the taking of game animals or game birds may not be severed from the surface estate.

This section does not apply to deeds, instruments or interests in property recorded before August 1, 2007.

[¶90] This law became effective August 1, 2007. As the surface owners, the Trustees took no express action prior to the effective date to sever from the surface estate a right of access for hunting in favor of the Dwyer descendants.

[¶91] After receiving notice that Trust land was going to be sold (App. 47-48), Tim Dwyer, Jr., knew the right of access for hunting was valuable and would be a consideration for the appraisers to consider in determining land valuations. Because of the failure of the Trustees to take any preventive action to previously sever a right of access for hunting purposes in favor of the Dwyer descendants, but knowing his father's clear desire to provide this future access, in order to resolve these lingering questions and uncertainties, Tim Dwyer, Jr., included this as a claim requesting a declaration that all lands sold from the Trust would be subject to a reserved right of hunting access for the Dwyer descendants. App. 86-89.

[¶92] Tim Dwyer, Jr., has no objection to the severance of this right of access for hunting. No other party has objected to this request and all parties have supported the severance of a right of access for hunting purposes in favor of the Dwyer descendants for all lands sold from the Trust.

[¶93] The district court ruled that severance of a right of access for hunting would now be prohibited under N.D.C.C. §47-05-17. App. 204.

[¶94] The Judgment (App. 208-210) and Amended Judgment (App. 289-291) described any reservation of rights for hunting and recreation would be invalid as a matter of law under N.D.C.C. §47-05-17. Neither of these documents were prepared by Tim Dwyer, Jr.

[¶95] The contractual requirement to reserve a right of access for hunting, hiking and other outdoor recreational activities was included in the Trust Agreement. The Trustees signed the Trust Agreement accepting “the terms and conditions” of the Trust Agreement in 2004. App. 40.

[¶96] North Dakota law imposes upon the Trustees the duties to administer the Trust in good faith. N.D.C.C. §59-16-01. As Trustees, they had the obligation to administer the Trust as a prudent person would by considering the purposes, terms, distributional requirements, and other circumstances of the Trust. In satisfying this standard, a Trustee is to exercise reasonable care, skill and caution. N.D.C.C. §59-16-04.

[¶97] Tim Dwyer, Jr., brought this request for declaratory relief for two purposes. First, the Trust Agreement made it abundantly clear that the Trustor, as father and grandfather of all of the parties to this action, specifically intended to preserve and protect a right of access in favor of his descendants for all purposes of hunting, hiking, and other outdoor recreational activities. Second, as a potential purchaser of some or all of the Trust lands, Tim Dwyer, Jr., knew that the severance of these rights could appreciably impact the valuation of the land making it more affordable for purchase by either himself or any of the other Dwyer siblings.

[¶98] The signing of the Trust Agreement, including Article IX, followed by both the signature acceptances by the Trustees of the Trust “terms and conditions” and the recording of the deed to the Trustees effectively then created a contractual right of access for hunting purposes in favor the Dwyer descendants. This right was created prior to August 1, 2007.

[¶99] As to that portion of the Judgment invalidating any right of access for “recreation activities” the district court never made any such declaration. The severance of a right of access for hiking and other outdoor recreational activities is not prohibited under N.D.C.C. §47-05-17, or any other statute. The inclusion in the Judgment and Amended Judgment of language prohibiting access for “recreation activities” was obviously an error made by those who prepared these documents and should be reversed.

[¶100] In addition to correcting this obvious error, that portion of the order from the district court prohibiting the severance of a right of access for hunting in favor of the Dwyer descendants must also be reversed after giving all parties to this proceeding the benefit of all favorable inferences which can be drawn from this record.

**III. The district court erred in declaring under Article VII of the Revocable Living Trust Agreement the Trustees have the discretionary authority to offer for sale less than all of the Trust property to Tim Dwyer, Jr. and the further authority to withdraw all or some of the real property from any proposed sale if the appraised valuations do not meet their expectations.**

[¶101] The letter from the attorney for the Trustees dated October 3, 2018 recognized Tim Dwyer, Jr.’s right of first offer to buy land sold from the Trust. This letter went on to state:

After the appraisals are complete and a proposed purchase price established, Tim Dwyer, Jr., can let the Co-Trustees know which tracts, if not all of the land, he would like to purchase and the Co-Trustees can determine which tracts, if not all of the land, they propose to sell. At this time they know they want to keep the 80 acres where the farmstead is located. Depending on the appraised value, they may want to retain other land as well but propose that all of it be appraised at this time so everyone can make an informed decision on how they want to proceed. App 47-48.

[¶102] All land held in this Trust had been owned and operated by Tim Dwyer, Sr., as one unit. App. 163. When he leased the land to Tim Dwyer, Jr., it included all land owned by him. App. 163.

[¶103] When the Trustees gave notice that the 80 acre farmstead tract would be excluded from any sale, it was a cause for concern for Tim Dwyer, Jr. That farmstead includes shelter belts, wind protection, feeding areas, spring water and other essentials for ranching on other lands held within this Trust. App. 166. There was also the possibility other lands would be withdrawn from any sale if the appraised valuations did not meet the expectations of the Trustees.

[¶104] It is the position of Tim Dwyer, Jr., that actions of the Trustees in triggering this sale require a determination that the Trustees are now bound by Trust Agreement language to first offer him the sale of all Trust lands. Samples of language supporting this position are found within Article VII including:

- *The land and any improvements located thereon shall not be sold for a period of seven years following my death.*
- *After seven years the land shall only be sold upon majority vote of all named beneficiaries...*
- *Regardless of the prohibition upon sale of this land as stated herein, I hereby authorize my Co-Trustees to purchase, sell, or otherwise encumber the land, if in their sole discretion to do so, is necessary for the payment of debts or taxes and also, if the Co-Trustees believe to do so is in the best interest of the beneficiaries of this Trust.*
- *My Co-Trustees are directed that in the event that this land is to be sold, TIM DWYER, JR., shall have the right to purchase all or any part of the land..*
- *If TIM DWYER, JR., agrees to purchase the land... App. 35-36.*

[¶105] What then is the legal interpretation of “the land?” Words within a contract are to be interpreted under N.D.C.C. §9-07-09, as follows:

**9-07-09. Words to be interpreted in ordinary sense.** The words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

[¶106] It is important to note that the Trustor in giving these instructions did not direct or allow the Trustees to sell “some” or “a portion” but, rather, simply “the land.” In clear contrast, Tim Dwyer, Jr., was given the “right to purchase all or any part of the land.” App. 36. If the Trustor had given similar directions to the Trustees, this would not now be an issue.

[¶107] “The land” has no words of limitation. This Court has held there was no error by a district court in interpreting an undefined term within a contract by applying the ordinary meaning of the phrase. *Huether v. Nodak Mut. Ins. Co.* 2015 ND 272, 871 N.W.2d 444.

[¶108] The Century Code also allows a contract to be explained by other available information. N.D.C.C. §9-07-12 reads:

**Contract explained by reference to circumstances.** A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.

[¶109] As described above, this farm/ranch property has a history of being operated within this family as a single unit. Positions taken by other Dwyer siblings support the argument that all Trust land should now be offered for sale. Barbara Dwyer Rice stated:

My father, Tim Dwyer, Sr., worked his whole life to put the farm together and would want it to be sold as a farm. App. 66-67

Jane Dwyer Morgan stated:

She believes it was the intention of her father, William Dwyer a/k/a Tim Dwyer, Sr., that when the land owned by the Tim Dwyer Farm Trust was offered for sale to Plaintiff, that all the land was to be offered for sale, and that he would never allow for the farmstead to be sold separately from the rest of the farm property. App. 95.

[¶110] Similarly, there was no right given the Trustees to withdraw land from a sale if the appraisals fail to meet their expectations. If that was a legitimate concern, the



Trustees could have handled this differently by first obtaining an independent appraisal to see if land prices were what they thought they were before declaring the land was to be sold.

[¶111] The general rules of construction of written documents apply to trust instruments. *Langer* at ¶¶14-15. The primary objective in construing a trust instrument is to ascertain the settlor's intent. *Matter of Estate of Schmidt*, at ¶13. An ambiguity exists when rational arguments can be made in support of contrary positions as to the meaning of the term, phrase, or clause in question. *Trust of Roger S. Linn Restated Trust*, at ¶10.

[¶112] Although Trustees have broad powers in dealing with property held by a Trust, those powers are not unlimited. A trustee may exercise any such powers "...except as limited by the terms of the trust." N.D.C.C. §59-16-15. In this case, the Trust Agreement language expressly directed the Trustees sell "the land" and their powers were limited accordingly.

[¶113] If the Trustor had wanted to grant to the Trustees the right to offer "all or any part of the land" for sale, he could have easily done so. The Trustor did, however, give that exact right to Tim Dwyer, Jr., to pick and choose which tracts, or all of the land, he wanted to buy.

[¶114] Tim Dwyer, Jr., is again entitled to all inferences which can reasonably be drawn from this record. Those inferences are that property within the Trust has historically been owned and operated as an entirety and that is how it should now be offered for sale. These arguments supporting contrary positions as to the meaning of the clause "the land" created an ambiguity making summary judgment inappropriate. That

decision allowing the Trustees the unlimited discretion to pick and choose which Trust lands to sell should now be reversed.

### CONCLUSION

[¶115] Tim Dwyer, Jr., also had sought summary judgment on these very same issues. App. 159-160. He had requested the district court determine that any contract for deed for the sale of Trust land would allow prepayment; that any deed from the Trust would reserve a right of access for hunting, hiking and other outdoor recreational activities in favor of the Dwyer descendants; and that the Trustees must offer all Trust land for sale without the right to later withdraw lands depending upon the appraised valuation. This motion was supported by Jane Dwyer Morgan.

[¶116] The mere fact that opposing parties had moved for summary judgment does not establish that there is no material issue of fact to be determined. A party may concede there is no genuine issue or fact if the court adopts its theory of law, but at the same time maintain there is an issue of fact if the court should adopt the theories of the opponent. The better rule is that both motions for summary judgment should be denied if the court finds that there is a material issue of fact if the legal theory of either party is not followed. *Biby v. Union Nat'l. Bank*, 162 N.W.2d 370, 373 (ND 1968); *Brown v. North Dakota State University*, 372 N.W.2d 879 (1985).

[¶117] In now considering whether summary judgment was appropriately granted, Tim Dwyer, Jr., is entitled to have the evidence viewed most favorably to him and he is to be given the benefit of all favorable inferences which can be drawn from this record.

[¶118] Tim Dwyer, Jr., believes the Trust Agreement language was ambiguous for failing to allow or prohibit any possible purchaser a right of prepayment and also for

failing to provide a form of the contract for deed. The reservation of a right of access for hunting was created prior to the deadline of August 1, 2007. Further, references to the sale of “the land” from the Trust was similarly ambiguous and uncertain.

[¶119] For all of these reasons the decision of the district court granting summary judgment should be reversed with directions to enter judgment in favor of the motion made by Tim Dwyer, Jr., or, alternatively, Tim Dwyer, Jr., would then respectfully request this Court reverse the summary judgment which has been entered and remand for further proceedings on these same issues.

Dated this 5th day of February, 2021.

By: /s/ Dwight C. Eiken  
Dwight C. Eiken (#03297)

By: /s/ Seymour R. Jordan  
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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

[¶120] This Brief contains 38 pages, excluding the parts of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify this Brief complies with the type face requirements of N.D.R.App.P. 32 and the type style requirements of that Rule, because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Time New Roman, 12 point font.

By: /s/ Dwight C. Eiken  
Dwight C. Eiken (#03297)

**CERTIFICATE OF SERVICE**

[¶121] I hereby certify that true and correct copies of the Brief of Appellant Timothy S. Dwyer a/k/a Tim Dwyer, Jr., and Appendix were on the 5<sup>th</sup> day of February, 2021, served electronically on the following:

Margret Sell, Co-Trustee of the Tim Dwyer Farm Trust; John Dwyer, Co-Trustee of the Tim Dwyer Farm Trust; Peggy Dwyer Sell a/k/a Margret Sell; John W. Dwyer a/k/a John Dwyer, by and through their attorney  
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[¶122] I further served copies of the Brief and Appendix upon the following persons on this date, by depositing a copy thereof in the United States mail at Williston, North

Dakota, enclosed in an envelope addressed to the following named persons at the address following their names with postage prepaid, by first class mail:

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Tianna Dwyer, 15991 Bennie Peer Road, Sidney, MT 59270

By: /s/ Dwight C. Eiken

Dwight C. Eiken (#03297)

## CERTIFICATE OF SERVICE

[¶121] I hereby certify that a true and correct copy of the Brief of Appellant Timothy S. Dwyer a/k/a Tim Dwyer, Jr., with corrected page numbers 3, 4, 5, 37, and 38 was on the 10<sup>th</sup> day of February, 2021, served electronically on the following:

Margret Sell, Co-Trustee of the Tim Dwyer Farm Trust; John Dwyer, Co-Trustee of the Tim Dwyer Farm Trust; Peggy Dwyer Sell a/k/a Margret Sell; John W. Dwyer a/k/a John Dwyer, by and through their attorney  
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[¶122] I further served copies of the Brief with corrected page numbers 3, 4, 5, 37, and 38 upon the following persons on this date, by depositing a copy thereof in the United States mail at Williston, North Dakota, enclosed in an envelope addressed to the

following named persons at the address following their names with postage prepaid, by  
first class mail:

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By: /s/ Dwight C. Eiken

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