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STATE OF NORTH DAKOTA

In the Supreme Court of the State of North Dakota

Timothy S. Dwyer, a/k/a Tim Dwyer, Jr., Plaintiff, Appellant, and Cross-Appellee, vs. 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.	**Supreme Court No: 20200188** McKenzie County District Court No. 27-2019-CV-00245

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

BRIEF OF APPELLEE INGRID A. SELL

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STATEMENT OF THE ISSUES PRESENTED

[01] Should the district court's grant of summary judgment be overturned or remanded, when there were no disputes of material facts and no textual ambiguities that have been properly raised, proven, or preserved for appeal?

[02] May the holder of a right of first offer nullify the plainly-worded requirements of an *inter vivos* trust, by unilaterally electing to accelerate the required installment payments, by usurping the trustees' authority to select parcels to be offered for sale, or by assigning his right of first offer, when doing so would harm the legally cognizable interests of the residuary beneficiaries?

STATEMENT OF THE CASE

[03] Tim Dwyer, Jr. filed the underlying declaratory judgment action to direct the actions and choices of the Co-Trustees and to raise objections to their performance of trust administration, including disputes regarding the interpretation of the Tim Dwyer Farm Trust ("Trust Agreement"). *See* N.D.C.C. § 32-23-04; N.D.C.C. § 59-10-01. The original complaint failed to join the grandchildren of the Settlor, and the Co-Trustees moved to correct the defect. *See Kauk v. Kauk*, 2017 ND 118, ¶ 8, 895 N.W.2d 295, 298; N.D.C.C. § 32-23-11.

[04] Following service of the amended complaint, I timely filed an answer and counterclaim. Appendix ("App") at 119-125. *See Peoples State Bank of Truman, Inc. v. Molstad Excavating, Inc.*, 2006 ND 183, ¶ 20, 721 N.W.2d 43, 48 (holding that where a third party beneficiary can demonstrate intent of contracting parties that she should be benefited by the contract, that beneficiary of a written agreement holds a legal right to

enforce the agreement). I joined the Co-Trustees in their Motion for Summary Judgment, which was granted in substantial part by the district court. App at 194-204.

[05] Tim Dwyer, Jr. appealed the district court's judgment to this court and filed his brief on February 5, 2021, and I, as appellee, submit this brief in opposition to his appeal, and in support of the district court's judgment.

STATEMENT OF THE FACTS

[06] I accept as accurate and incorporate herein by reference the findings of fact made by the district court. App at 198-99. To the extent they are inconsistent with the district court's findings of fact, I note my dissatisfaction with the appellant's statement of the facts pursuant to N.D. R. App. P. 28(c).

STANDARD OF REVIEW

[07] The standard of review for the grant or denial of declaratory relief is the abuse of discretion standard:

> Under section 32-23-06, N.D.C.C., entry of a declaratory judgment is discretionary with the district court. … This Court reviews a district court's determination of discretionary matters under an abuse of discretion standard. A district court abuses its discretion when it acts "in an arbitrary, unreasonable, or unconscionable manner or when it misinterprets or misapplies the law."

Kauk v. Kauk, 2017 ND 118, ¶ 10, 895 N.W.2d 295, 298-99.

[08] The standard of review for the relative grant and denial of summary judgment is *de novo* review:

> 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 undisputed facts, or if the only issues to be resolved are questions of law. On appeal this Court views the evidence in the light most favorable to the party opposing the motion. Whether the district court properly granted summary

> judgment is a question of law, which this Court reviews *de novo* on the entire record.

Potts v. City of Devils Lake, 2021 ND 2, ¶ 5, 953 N.W.2d 648, 650.

[09] The standard of review for interpreting written language within the four corners of a trust agreement is *de novo* review: "General rules of construction of written documents apply to the construction of trust instruments." *Langer v. Pender*, 2009 ND 51, ¶ 14, 764 N.W.2d 159, 163. "Construction of a written contract to determine its legal effect presents a question of law, which is fully reviewable." *Bakken v. Duchscher*, 2013 ND 33, ¶ 13, 827 N.W.2d 17, 21. Likewise, the determination of ambiguity within a legal instrument is also a question of law for which this court exercises *de novo* review. *Bendish v. Castillo*, 2012 ND 30, ¶ 16, 812 N.W.2d 398, 403; *Spagnolia v. Monasky*, 2003 ND 65, ¶ 10, 660 N.W.2d 223, 227.

[10] While the question of "[w]hether an ambiguity exists … is a question of law, [a district court's] resolution of the ambiguity is a finding of fact that will not be reversed on appeal unless it is clearly erroneous." *In re Estate of Grengs*, 2015 ND 152, ¶ 23, 864 N.W.2d 424, 430. "This Court does not make independent findings of fact or substitute [its] judgment for that of the district court." *Id.* at ¶ 35, 864 N.W.2d at 434. "The words 'unless clearly erroneous' … mean 'presumptively correct.'" *Alumni Ass'n of Univ. of N. Dakota v. Hart Agency, Inc.*, 283 N.W.2d 119, 121 (N.D. 1979). "Where the findings of fact made by the trial court are not challenged on appeal, this court limits its concern to the legal conclusions to be drawn from the facts as found." *Id.* at 121.

[11] The standard of review for interpretation and application of a North Dakota statute is *de novo* review. "The interpretation of a statute is a question of law, which is

fully reviewable on appeal." *Woodrock, Inc. v. McKenzie Cty.*, 2020 ND 182, ¶ 6, 948 N.W.2d 20, 22.

ARGUMENT

I. The entry of summary judgment by the trial court should be affirmed because there was no ambiguity raised or proved in the Trust Agreement, and no dispute made regarding material facts underlying the summary judgment.

A. Summary Judgment was properly granted because no genuine issue of material fact has been specifically pled, argued, or otherwise raised.

[12] Tim Dwyer, Jr. has claimed error in the district court's judgment on the basis that summary judgment was improperly granted and that the Trust Agreement was ambiguous. These arguments were never properly raised or preserved for appeal.

[13] The district court committed no error by granting summary judgment because "no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, and resolving any disputed facts would not alter the result." *Mandan Educ. Ass'n v. Mandan Pub. Sch. Dist. No. 1*, 2000 ND 92, ¶ 11, 610 N.W.2d 64, 68. All movants for summary judgment in this action represented that there were no issues of material fact:

> The party presenting a motion for summary judgment has the burden of clearly showing that there is no genuine issue as to any material fact raised by the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Summary judgment is not appropriate if the moving party is not entitled to judgment as a matter of law or if reasonable differences of opinion exist as to the inferences to be drawn from undisputed facts. Whenever the court must make a finding of fact, summary judgment is inappropriate.

Krueger v. St. Joseph's Hosp., 305 N.W.2d 18, 22 (N.D. 1981); *see also Heinsohn v. William Clairmont, Inc.*, 333 N.W.2d 697, 702 (N.D. 1983); *Wood v. SatCom Mktg.*, LLC, 705 F.3d 823, 828 (8th Cir. 2013) (restating the rule that, "although the burden of

demonstrating the absence of any genuine issue of material fact rests on the movant, a nonmovant may not rest upon mere denials or allegations, but must instead set forth specific facts sufficient to raise a genuine issue for trial"). "Summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of their claim and on which they will bear the burden of proof at trial." *Hilton v. N. Dakota Educ. Ass'n*, 2002 ND 209, ¶ 23, 655 N.W.2d 60, 68.

[14] Tim Dwyer, Jr. never raised issues of fact to the trial court and never sought specific factual findings in his complaint or later pleadings: Indeed, the relief he sought by his declaratory action was that the court make conclusions of law that adopted an interpretation of the Trust Agreement that favored him. "Findings of fact are the realities as disclosed by the evidence as distinguished from their legal effect or consequences," and therefore "[w]here the ultimate conclusion can be arrived at only by applying rules of law[,] the result is a 'conclusion of law.'" *E. E. E., Inc. v. Hanson*, 318 N.W.2d 101, 104 (N.D. 1982).

[15] Tim Dwyer, Jr. has not provided this court with a single factual dispute that would have barred the trial court from ruling on the basis of summary judgment. *See*, *e.g.*, Tim Dwyer, Jr. Appellant Brief at ¶¶ 69, 77, 85. Tim Dwyer, Jr. did not provide the district court with any material factual disputes in his opposition to the initial summary judgment motion filed by Michael Dwyer, when it would have mattered. In fact, all of the references to the text of the Trust Agreement made in that brief by Tim Dwyer, Jr. advocated for the direct application of the plain wording of the Trust Agreement, arguing on legal grounds about interpretation, and never objected to summary judgment on the basis of ambiguity for which a trial was necessary to take parol evidence. *See* Docket

Index # 71 at ¶¶ 35-37, 40, 51, 57, 60, 62, 72, 79 (*inter alia*). At no point during this litigation has Tim Dwyer, Jr. raised a specific factual issue that required fact-finding in a trial: there is no mention of a specific factual dispute in his complaint, nor his brief to the district court on summary judgment, and not even to this court, even though it forms the core of his basis for appeal.

[16] Having lost on summary judgment at the district court level, Tim Dwyer, Jr. now argues for the first time that there were significant disputes regarding material facts in this matter, the resolution of which would have changed the outcome of the district court's ruling. Tim Dwyer, Jr. Appellant Brief at ¶ 85 (claiming that, "Because the Trust Agreement was silent as to any right of prepayment … there remains a genuine issue of material fact"). Even now, Tim Dwyer, Jr. cannot produce a single, credible factual issue on this record. Whether the language of the Trust Agreement either (a) requires Tim Dwyer, Jr. to pay according to the plain wording of the relevant provision or else (b) allows him to unilaterally set the terms of purchase for his own benefit and convenience remains a legal question, not a factual question. *See supra* at ¶ 9; *infra* at ¶ 20. The reality remains that there are not now, and never have been, genuine issues of material fact that preclude the grant of summary judgment. Tim Dwyer, Jr. has "failed to establish any evidence which would raise a genuine issue of fact, nor has he disclosed in his brief … what evidence would be presented, or even what additional evidence could be introduced if there were a trial … [and] he does not disclose what the evidence is or will be, or how it can alter what is contained in the [evidence] considered by the trial court." *See Greenberg v. Stewart*, 236 N.W.2d 862, 867 (N.D. 1975).

[17] Tim Dwyer, Jr. has cited to *Biby v. Union Nat. Bank of Minot*, 162 N.W.2d 370, 373 (N.D. 1968), which stated the rule that, "A party may concede that there is no genuine issue of fact, if the court should adopt his theory of the law, but at the same time maintain that there is an issue of fact to be determined if the court should adopt the legal theories of his opponent," which leads to the result 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." The problem for Tim Dwyer, Jr. is that he wholly failed to "maintain that there is an issue of fact to be determined." Under these circumstances, the court's resolution of this appeal is clear: Where opposing parties move for summary judgment and none of them raise any material factual disputes that require findings from the district court, then there is no genuine issue of fact for the trial court to resolve and summary judgment is therefore appropriate. *Id.*

B. There is no ambiguity in the trust document.

[18] After having never previously argued that there is relevant ambiguity in the Trust Agreement, Tim Dwyer, Jr. has now argued that it is ambiguous, and that the ambiguity presents outcome-determinative issues for appeal. Moreover, he argues now for spurious remedies to resolve this ambiguity of his own imagining. He is wrong about the existence of ambiguity, and he is wrong about the proper remedies to resolve the meaning of the Trust Agreement.

[19] A settlor's intent "must be ascertained from the writing alone, if possible," and if the operative language is unambiguous, a court must ascertain that intent "from the instrument itself." *EOG Res., Inc. v. Soo Line R. Co.*, 2015 ND 187, ¶ 15, 867 N.W.2d 308, 314. "The language of a contract is to govern its interpretation if the language is

clear and explicit and does not involve an absurdity." *Hallin v. Inland Oil & Gas Corp.*, 2017 ND 254, ¶ 9, 903 N.W.2d 61, 64 (quoting N.D.C.C. § 9-07-02). "[T]he entire instrument, taken by its four corners, must be read and considered to determine the true intent." *Gift v. Ehrichs*, 284 N.W.2d 435, 438 (N.D. 1979). "A contract must be interpreted to make it lawful, operative, definite, reasonable, and capable of being carried into effect." *City of Bismarck v. Mariner Const., Inc.*, 2006 ND 108, ¶ 11, 714 N.W.2d 484, 490.

[20] "If the intent of the parties can be ascertained from the agreement alone, interpretation of the contract is a question of law." *Spagnolia v. Monasky*, 2003 ND 65, ¶ 10, 660 N.W.2d 223, 227. Whether or not a contract is ambiguous is a question of law," but then "the resolution of an ambiguity with extrinsic evidence requires the trier of fact to make a finding of fact." *Moen v. Meidinger*, 547 N.W.2d 544, 547 (N.D. 1996). "Resolution of an ambiguity … by extrinsic evidence is a finding of fact, reviewed under the clearly erroneous standard." *EOG Res., Inc.*, *supra*, at ¶ 16, 867 N.W.2d at 314. "When a contract's language is plain and unambiguous and the parties' intentions can be ascertained from the writing alone, extrinsic evidence is not admissible to alter, vary, explain, or change the contract." *Hallin* at ¶ 9, 903 N.W.2d at 64-65. Whenever grantor intent "can be ascertained from the document itself, other rules of contract interpretation and the extrinsic evidence presented need not be considered." *Bakken* at ¶ 16, 827 N.W.2d at 22.

[21] This is especially true of the rule of *contra proferentem*, a canon of interpretation used as a last resort for intractably ambiguous provisions in bilateral contracts, which is therefore entirely out of place in the instant case where the drafting

party is the deceased Settlor. *See Kaler v. Kraemer*, 1999 ND 237, ¶ 19, 603 N.W.2d 698, 703 (noting that N.D.C.C. § 9-07-19 "expressly states … that a court should construe a contract against its drafter only when the uncertainty is not removed by application of other rules of contract interpretation"); *see also Lillegard v. Hutchinson*, 67 N.D. 44, 269 N.W. 43, 45 (1936) (holding that, "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion").

[22] The primary argument raised on appeal by Tim Dwyer Jr. is that the Trust Agreement is ambiguous and incomplete in specifying the method of sale for the Trust corpus. Tim Dwyer, Jr. Appellant Brief at page 17, heading I. After making so bold a claim, Tim Dwyer, Jr. never explains the supposed ambiguity in the language of the Trust Agreement, or the divergence in interpretation such ambiguity might allow. Instead, Tim Dwyer, Jr. merely questions whether the Trust is truly unambiguous. *Id.* at ¶ 69 (begging the question, "With so many gaps, was this language truly unambiguous?"). Elsewhere Tim Dwyer, Jr. alludes to a phantom ambiguity as a factual issue that would make summary judgment improper. *Id.* at ¶ 77 (claiming the district court's ruling that the Trust Agreement is unambiguous was not supported by the record, on the grounds that "information then available to the district court did not preclude the existence of a genuine issue of material fact").

[23] Tim Dwyer, Jr. misunderstands and misplaces the burden of proof for establishing ambiguity and raising factual issues that would support his prayer for declaratory relief. The duty does not lie with the district court judge to develop the legal or factual basis for a plaintiff's claim. "[W]ithout supportive reasoning or citations to

relevant authorities, an argument is without merit," and "a party waives an issue by not providing supporting argument." *Olander Contracting Co. v. Gail Wachter Investments*, 2002 ND 65, ¶ 27, 643 N.W.2d 29, 39. Tim Dwyer, Jr. has not propounded any passable legal theory for an alternative interpretation of the Trust Agreement and has otherwise "fail[ed] to establish the existence of a factual dispute," and thus, in the absence of these elements for which "he would bear the burden of proof at trial," the district court did not err by granting summary judgment for the defendants. *See Hilton*, *supra*, at ¶ 23, 655 N.W.2d at 68.

[24] The district court began its legal analysis with a determination that "There is no ambiguity in the trust document," and then proceeded to recite the clear intent of the Settlor expressed in the plain wording of the Trust Agreement, culminating in a ruling against Tim Dwyer, Jr. *See* App at 202-03. Tim Dwyer, Jr. has not explained how extrinsic facts would have resolved an ambiguity in his favor. Tim Dwyer, Jr. has not preserved for appeal any factual disputes or arguments for why extrinsic evidence must be taken. There is therefore no basis for his demand for reversal and remand for further proceedings.

[25] As there is no ambiguity that would require extrinsic evidence or pertain to factual disputes, the analysis simplifies into a purely legal interpretation of the Trust Agreement. The laws of North Dakota provide a panoply of interpretive canons to aid in that endeavor, but Tim Dwyer, Jr. claims that none of them are availing, and argues, by resort to *contra proferentem*, that it is the Settlor, as the source of the Trust Agreement, who is really to blame for the unfortunate position to which he has fallen victim.

[26] *Contra proferentem* only applies where there is a demonstrated ambiguity, and there is none here. It is used as a rough tool for an ambiguity so complex that other canons of interpretation are unavailing. And as a rough solution, it resolves ambiguity simply by penalizing the party who created the ambiguity in their poor draftsmanship. Tim Dwyer, Jr. has failed to show that the other canons of textual interpretation are ineffective to interpret the Trust Agreement, and yet his aim is to put the blame on someone else. The Co-Trustees are not responsible for the wording of the Trust Agreement, and they are not in privity to be held responsible on behalf of the Settlor. The beneficiaries of the Trust are not responsible for the wording of the Trust Agreement, so it makes no sense to strip them of their rights under the Trust or their inheritance simply because Tim Dwyer, Jr. does not like the terms for conveyance presented by the Trust. Tim Dwyer, Jr. has not joined Tim Dwyer, Sr., the party responsible for the contents of the Trust Agreement, but that is the party with whom his dispute truly lies.

C. Arguments that are not properly before this court must be dismissed.

[27] Even if Tim Dwyer, Jr. had conjured an ambiguity in the Trust Agreement or some other factual dispute for the sake of this appeal, it could not now be heard. It is not the function of the Supreme Court to review factual details for issues that were never previously contested by an unsuccessful plaintiff, but rather "to review the trial court's conclusion that no issues of fact remain" that are relevant to that plaintiff's claim. *Batla v. N. Dakota State Univ.*, 370 N.W.2d 554, 559 (N.D. 1985). Since Tim Dwyer, Jr. did not present to the trial court or otherwise preserve for appeal any objections regarding disputes of material fact, they cannot be heard on appeal. *Hieb v. Jelinek*, 497 N.W.2d 88, 93 (N.D. 1993); *State v. Tweed*, 491 N.W.2d 412 (N.D. 1992); *Gange v. Clerk of*

Burleigh County District Court, 429 N.W.2d 429 (N.D. 1988). "[A]n issue or contention not raised or considered in the lower court cannot be raised for the first time on appeal from judgment." *Rutherford v. BNSF Ry. Co.*, 2009 ND 88, ¶ 13, 765 N.W.2d 705, 710; *John T. Jones Const. Co. v. City of Grand Forks*, 2003 ND 109, ¶ 18, 665 N.W.2d 698, 705; *Heng v. Rotech Medical Corp.*, 2006 ND 176, ¶ 9, 720 N.W.2d 54; *but see Hillerson v. Bismarck Pub. Sch.*, 2013 ND 193, ¶ 41, 840 N.W.2d 65, 78. "Issues or contentions not adequately developed and presented at trial are not properly before this Court. The purpose of an appeal is to review the actions of the trial court, not to grant the appellant the opportunity to develop new theories of the case." *Niles v. Eldridge*, 2013 ND 52, ¶ 7, 828 N.W.2d 521, 525 (quoting *In Interest of A.G.*, 506 N.W.2d 402, 403 (N.D. 1993) and *Hansen v. Winkowitsch*, 463 N.W.2d 645, 646 (N.D. 1990)); *see also Matter of Estate of Brandt*, 2019 ND 87, ¶ 32, 924 N.W.2d 762, 773.

[28] Tim Dwyer, Jr. made four claims of relief within his complaint and amended complaint: (i) that the Trust Agreement be interpreted to afford him unilateral discretion to select which lands he may purchase from the Co-Trustees, (ii) that the Trust be interpreted to deny the Co-Trustees their authority to select which lands to offer for purchase, (iii) that the Trust Agreement be interpreted to afford him the right to accelerate payments of the contract for deed in purchase of the property, and (iv) clarification of the beneficiaries' hunting access rights upon the land. App at 23-27, 84-88. In his answer to the Co-Trustees' counterclaim, Tim Dwyer, Jr. disputed the legal interpretations offered by the Co-Trustees (App at 69), but he admitted the basic facts they alleged (App at 68-70) and he admitted that "the language from the Trust Agreement speaks for itself" (App at 70). In his answer to my counterclaim, Tim Dwyer, Jr.

acknowledged that the Trust Agreement is authoritative in defining the legal rights of the parties to this action. App at 128 ¶ 9.

[29] In his brief on summary judgment, Tim Dwyer, Jr. cited interpretive rules applicable to an unambiguous instrument that did not require extrinsic evidence or *contra proferentem* to resolve. *See* Docket Index # 71 at ¶¶ 26-31, 36-38. His arguments were primarily to persuade the trial court of a legal interpretation of the text that favored him, and did not raise disputes about underlying facts or ambiguity. *Id.* at 35, 39-40, 44, 51.

[30] In stating the issues for appeal in his Notice of Appeal and Corrected Notice of Appeal, Tim Dwyer, Jr. reiterated the same disputes as had formed his original claims for relief, premised upon the interpretation of the Trust Agreement—namely, who selects the tracts of land that the Co-Trustees may offer for sale, whether Tim Dwyer, Jr. can unilaterally accelerate his payments under a contract for deed, and how to interpret the reservation of hunting rights in light of intervening statutory change. App at 219, 223.

[31] However, Tim Dwyer, Jr. abruptly changed his arguments in his appellant's brief. For the very first time in this entire litigation, Tim Dwyer, Jr. argued that what he had previously described as clearly-stated instructions had instead become "incomplete and ambiguous." Tim Dwyer, Jr. Appellant Brief at ¶ 1. He likewise raised a new (and incoherent) argument that his imagined ambiguities should be construed against the Co-Trustees and the beneficiaries of the Trust. Under these circumstances, it is wholly improper for Tim Dwyer, Jr. to argue on these completely new grounds now that his previous arguments failed at the district court. These arguments and his appeal must be dismissed.

II. The district court should be affirmed as there was no error made in resolving the substantive legal disputes of the parties within the court's order granting summary judgment.

A. The plain wording of the Trust Agreement uses mandatory language to require specific terms of sale that cannot be displaced at the whimsical convenience of Tim Dwyer, Jr.

[32] Tim Dwyer, Jr. has argued that the mandatory language of the Trust Agreement, which specifies the manner and terms for conveying the property within the Trust corpus, is insufficient to require adherence to the Settlor's stated intent. That intent should be supplanted, he argued, by his own personal preferences and financial convenience. The district court disagreed, and ruled that the unambiguous words of the Trust Agreement controlled. The district court's ruling must be upheld.

[33] "If the language of the contract is clear and unambiguous and the 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." *Northstar Founders, LLC v. Hayden Capital USA, LLC*, 2014 ND 200, ¶ 46, 855 N.W.2d 614, 632. "If a written contract is unambiguous, extrinsic evidence is not admissible to contradict the written language." *City of Bismarck v. Mariner Const., Inc.*, 2006 ND 108, ¶ 12, 714 N.W.2d 484, 490. Standardized language in a legal instrument should be interpreted according to its "established legal meaning" such that "contracts are interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing." *Wold v. Zavanna, LLC*, No. 4:12-CV-00043, 2013 WL 6858827, at *10 (D.N.D. Dec. 31, 2013), (citing *Bice v. Petro–Hunt, L.L.C.*, 2009 ND 124, 768 N.W.2d 496). When used in legal writing, the ordinary meaning of the word "shall" creates a mandatory duty that is

"generally imperative or mandatory ... excluding the idea of discretion, and ... operating to impose a duty." *State v. Norman*, 2003 ND 66, ¶ 20, 660 N.W.2d 549, 555 (quoting *Sweeney v. Sweeney*, 2002 ND 206, ¶ 17, 654 N.W.2d 407).

[34] The Trust Agreement provides quite specific directions for the sale of real property that was conveyed to the Co-Trustees, and the language used includes conditions that must be met for the sale to occur. First, the Trust Agreement directs the Co-Trustees that *if* land is to be sold from the Trust estate, *then* Tim Dwyer, Jr. must be given opportunity to exercise a right of "first offer" (*see Constellation Dev., LLC v. W. Tr. Co.*, 2016 ND 141, ¶ 14, 882 N.W.2d 238, 243), *provided that* the purchase price be determined by averaging the appraisals of two qualified appraisers. App at 36. These conditions constrain the otherwise unencumbered right of the Co-Trustees to dispose of Trust property into a clearly defined protocol. Second, the Trust Agreement requires that *if* Tim Dwyer, Jr. elects to purchase land offered by the Co-Trustees at this price, *then* "he <u>*shall*</u> do so on a Contract for Deed extending for a period of 15 years at an interest rate of 4 ½ percent," and further specifies that this contract for deed must set an annualized payment schedule with equal payments each year composed of principal and interest. App at 36 (emphasis added). These conditions constrain the terms under which Tim Dwyer, Jr. may purchase real estate from the Co-Trustees, and they use clear, unambiguous language to do so. That is to say, Tim Dwyer, Jr. lacks the right to purchase land from the Co-Trustees under his right of first offer unless he meets those conditions. Nothing further need have been said, and there is no need for specific exclusions of other means by which Tim Dwyer, Jr. might otherwise propose for purchasing such property.

[35] In the face of such compelling indication of the Settlor's intent, Tim Dwyer, Jr. spills a great deal of ink in his effort to argue that he is not required to follow the express terms of the Trust Agreement. *See*, *e.g.*, Docket Index # 71 at ¶ 62 ("It is the position of Tim Dwyer, Jr., that because this language is silent as to any prohibition on prepayment, then prepayment of the contract for deed principal and accumulated interest would be allowed."); Tim Dwyer, Jr. Appellant Brief at ¶¶ 59-64 (arguing for the first time on appeal that the Trust Agreement was required to have expressly prohibited by name his preferred alternative for conveyance and should have also provided a template contract for deed within the body of the Trust Agreement).

[36] The only case from North Dakota that Tim Dwyer, Jr. can cite on this question directly contradicts his argument. *Id.* at 61, citing *Goetz v. Hubbell*, 66 N.D. 491, 266 N.W. 836, 840 (1936) (holding that a vendor "is not bound to accept the purchase price in any other manner or form than that described in the contract" and "cannot be compelled to do so"). So, instead, he resorts to non-binding and inapplicable authority in order to misrepresent the clear language of the Settlor that set the terms for sale. Tim Dwyer, Jr. Appellant Brief at ¶ 62.

[37] The preferences and desires of Tim Dwyer, Jr. do not control the legal interpretation of the Trust Agreement's language; the Settlor's intent must control. Having worked a lifetime to acquire the property he conveyed to the Co-Trustees, North Dakota law granted Tim Dwyer, Sr. the right to "dispose of his property as he wishes without regard to the desires of prospective beneficiaries or the views of juries or courts so long as the terms of the [trust] are not prohibited by law or opposed to public policy." *In re Estate of Dion*, 2001 ND 53, ¶ 29, 623 N.W.2d 720, 728 (quoting *Stormon v. Weiss*,

65 N.W.2d 475, 505 (N.D. 1954)); *accord* Tim Dwyer, Jr. Appellant Brief at ¶ 85 (acknowledging that no party to this action has claimed prohibition of accelerated payment is prohibited by law or opposed to public policy). In stark contrast, Tim Dwyer, Jr. has absolutely no legal right to dictate terms for how he may purchase that property. The Trust Agreement was a solemn charge from the Settlor to the Co-Trustees, and the Trust Agreement memorializes the terms of that agreement. "Ultimately, when parties enter a contract, they make their own law, and the duties between them are established by the contract." *Jones v. Pringle & Herigstad, P.C.*, 546 N.W.2d 837, 842 (N.D. 1996). The district court was correct to honor the Settlor's intent so clearly indicated, and to dismiss the arguments made by Tim Dwyer, Jr. to displace that intent with his own.

B. The plain wording of the Trust Agreement, especially when read in the light of governing statute, provides broad discretion to the Co-Trustees, including the authority to select which portions of property to offer for sale, whereas there is no legal basis to provide Tim Dwyer, Jr. with the discretion to demand which land will be offered for sale.

[38] Within the plain words of the Trust Agreement, the Settlor granted broad powers to the Co-Trustees to aid their administration of the Trust for the benefit of all the beneficiaries, and specifically incorporated "all powers conferred by law" as a baseline threshold for their legal authority. App at 38. With that incorporation read into the Trust Agreement, N.D.C.C. § 59-16-16 provides the Co-Trustees with the powers to "exchange, partition, or otherwise change the character of trust property," and to "subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries." Beyond these powers, conferred by statute and reiterated by incorporating language into the Trust Agreement, Settlor also endowed the Trustees with the powers to "hold and retain as long as they

deem desirable any property which they may receive," and to "collect, defend against, compromise or settle any claim." App at 38, 121-122. In sum, the Trust Agreement uses plain language without limitations to grant the Co-Trustees broad authority over the property held in trust, and as such the Co-Trustees have "broad and general authority" to convey the real estate conveyed to them by the Settlor. *In re Estate of Littlejohn*, 2005 ND 113, ¶¶ 9-11, 698 N.W.2d 923, 926-27; *see generally In re Estate of Johnson*, 2015 ND 110, ¶¶ 14-17, 863 N.W.2d 215, 220-221.

[39] In contrast, Tim Dwyer, Jr. has sought to force a strained reading of the Trust that would convert a generalized word with multiple potential referents into a specialized term of art—namely, "the land." He presumes that such a term of art would confer on him the right given to the Co-Trustees to choose which parcels are to be offered for sale. For instance, in his brief on summary judgment, immediately after stating the rule that words should be given their ordinary, popular meaning, Tim Dwyer, Jr. quite astoundingly asserted that, "There can be no other interpretation of 'the land' than simply all of the land held in this Trust." Docket Index # 71 at ¶ 37. No legal reasoning was provided to support that statement; all that was offered in support were vague references to extrinsic evidence of the Settlor's intent. *Id.* at 39. Based on this unnatural interpretation, Tim Dwyer, Jr. concluded that the section of the Trust Agreement governing sale must have provided him with the unilateral right to select which portions of the Trust property he would like to purchase—not from the specified lands offered for sale by the Co-Trustees, but from the entirety of the Trust corpus. *Id.* at ¶¶ 40-44.

[40] Where a relevant word or term is not defined by the instrument itself, the courts are to "apply the plain, ordinary meaning of the term in interpreting the contract."

Grinnell Mut. Reinsurance Co. v. Thompson, 2010 ND 22, ¶ 10, 778 N.W.2d 526, 531. "We give words their plain, ordinary, and commonly understood meaning, unless contrary intention plainly appears." *Northstar Founders, LLC v. Hayden Capital USA, LLC*, 2014 ND 200, ¶ 45, 855 N.W.2d 614, 631-32 (citing N.D.C.C. § 9-07-09); *see also City of Bismarck v. Mariner Const., Inc*., 2006 ND 108, ¶ 11, 714 N.W.2d 484, 490 ("Words in a contract must be construed in their ordinary and popular sense.").

[41] Unlike the use of the word "shall" in the section above, there is no specialized meaning assigned by common legal practice to the word "land", even when it is preceded by a definite article. Therefore, if there is to be a specialized meaning for the word as a defined term, it must emerge from the Trust Agreement itself. A plain reading reveals that there is no specialized usage within the four corners of the document. Article XIII refers to "the property" and "any property" to describe the Trust corpus, and Article IX uses the term "the subject property." App at 37-39. Article VII refers to "described farmland" in reference to the lands conveyed by the Trust Agreement, while also referring to "this property" and "the land" when describing the real estate corpus of the Trust which Tim Dwyer, Jr. has rented on the gratuitous terms stated there. App at 34-35. If there is a term of art in the Trust Agreement to describe all the Trust corpus to be held by the Co-Trustees and offered to Tim Dwyer, Jr., it is the term "trust estate," used only once, at the beginning of the document. App at 30.

[42] It should not be surprising, therefore, that the provisions of the Trust Agreement that govern sale of the Trust corpus with a right of first offer to Tim Dwyer, Jr. would include several different and sundry terms to refer to property held by the Co-Trustees that would be offered for sale—to wit: "this land," "the land," "this property,"

and "the property." These terms are used interchangeably, and without discernable pattern to confer special significance. It is therefore without legal foundation that Tim Dwyer, Jr. claims that these haphazard references should somehow coalesce to grant him the sole discretion—over and against the authority of the Co-Trustees—to determine which delineation of real property should be offered up for sale from the Trust corpus. Throughout this case, Tim Dwyer, Jr. has not provided any "rational arguments" to support an alternative interpretation of the Trust Agreement that are sufficient to contradict the plain meaning interpretation of the Trust Agreement. *See Jones v. Pringle & Herigstad, P.C.*, 546 N.W.2d 837, 843 (N.D. 1996). The district court was right to dismiss Tim Dwyer, Jr.'s incorrect reading of the Trust Agreement and to grant summary judgment on this issue to the Co-Trustees and beneficiaries of the Trust. That judgment must be affirmed.

C. Tim Dwyer, Jr.'s right of first offer is personal and specific to him, and cannot be assigned or alienated in violation of settlor intent.

[43] The Settlor's very specific list of instructions for the sale of the Trust corpus does not end with specifying the 15-year contract for deed that is the sole means by which Tim Dwyer, Jr. can exercise his right of first offer. It also provides for a next step, in the event Tim Dwyer, Jr. does not choose to purchase the land in this way when it is offered by the Co-Trustees: "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 at 36 (emphasis added).

[44] This provision, especially when read in context with the remainder of the Trust Agreement, protects the rights of the other children of the Settlor, who have a

special (albeit secondary) preferential right to purchase land from within the Trust corpus. In effect, the other children of the Settlor maintain a joint and several right of second offer, preferential against all others. As a result, this provision is effective to restrict the right of first offer to only Tim Dwyer, Jr. personally, and such right cannot be assigned or otherwise alienated from Tim Dwyer, Jr. Therefore, to allow Tim Dwyer, Jr. to alienate his right to first offer would have the effect of denying his siblings their benefit under the Trust Agreement and would frustrate settlor intent.

[45] The court is bound to interpret the Trust Agreement so as to ascertain the Settlor's intent as it was expressed in the words of the Trust Agreement, and that intent "controls the legal effect of his dispositions." *In re Estate of Grengs*, 2015 ND 152, ¶ 23, 864 N.W.2d 424, 430. While restrictions on assignment of contractual benefits are not generally favored at common law, this court has respected restrictions on such assignment when there was evidence of intent within the contractual agreement to restrict assignment of a benefit conferred by the contract. *Estate of Pladson v. Traill Cty. Soc. Servs.*, 2005 ND 213, ¶ 15, 707 N.W.2d 473, 479. This court has also long recognized the well-accepted legal distinction between, on the one hand, assignment of impersonal, fungible benefits, and, on the other hand, rights and duties that are distinctly personal in nature. *Dixon-Reo Co. v. Horton Motor Co.*, 49 N.D. 304, 191 N.W. 780, 782 (1922); *see also Striegel v. Dakota Hills, Inc.*, 365 N.W.2d 491, 494 (N.D. 1985) (holding that the legal owner of real estate subject to a contract for deed is "the person intended to be protected by the validity of a contractual prohibition against assignment").

[46] A right of first offer is presumed to be personal to the named individual where, as here, the prospective buyers have a personal connection to specific land. In

Stuart v. Stammen, 1999 ND 38, 590 N.W.2d 224, when a preferential right of first offer was breached by a sale of subject property that had precluded the exercise of the right, the proper remedy was specific performance, because of the parties' distinct, personal connection to a unique piece of land. 1999 ND 38, ¶ 20, 590 N.W.2d 224, 229; *see also Constellation Dev., LLC v. W. Tr. Co.*, 2016 ND 141, ¶ 14, 882 N.W.2d 238, 243. The trust property is personally connected to all of the Settlor's children, and if Tim Dwyer, Jr. is allowed to assign his right of first offer, that would frustrate the Settlor's intent to provide a secondary right of first offer to his other children. The primary right of first offer enjoyed by Tim Dwyer, Jr. is a personal one, and is limited to him alone.

[47] North Dakota, like Nebraska and Minnesota, has adopted the Uniform Probate Code for the interpretation of Trusts. *See* N.D.C.C. § 59-09-12 & N.D.C.C. § 30.1-09.1-01. Both Nebraska and Minnesota have examined situations similar to this case, and both ruled that a restriction on assignment was proper. "Although generally the law supports assignability of rights, it does not permit assignments for matters of personal trust or confidence," and thus, "in the absence of language indicating that a right of first refusal is assignable or would pass to the grantee's heirs, the right is personal." *Jones v. Stahr*, 16 Neb. App. 596, 602, 746 N.W.2d 394, 399 (2008). It is not necessary that a written agreement include "specific terms to preclude assignment" so long as it contains "something expressing [the] intent that the contract not be assignable." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 272 (Minn. 2004) (upholding "[well-established] precedent that parties may agree that their contractual rights and obligations are not to be assigned"); *accord Vetter v. Sec. Cont'l Ins. Co.*, 567 N.W.2d 516, 521

(Minn. 1997) (holding that assignment of contractual rights are allowed "in the absence of a contractual provision to the contrary").

[48] In addition to the express language in a granting instrument, policy favoring free assignment will also be rebutted "where the contract involves a matter of personal trust or confidence." *Physical Distribution Servs., Inc. v. R.R. Donnelley & Sons Co.*, 561 F.3d 792, 794 (8th Cir. 2009); *see also Ocean Acc. & Guarantee Corp. v. Sw. Bell Tel. Co.*, 100 F.2d 441, 444 (8th Cir. 1939) (holding that where "the personal character of one of the parties is an important element" there is no right to assignment); *Henry H. Cross Co. v. Texhoma Oil & Ref. Co.*, 32 F.2d 442, 447 (8th Cir. 1929) (ruling that contracts that involve personal, confidential relationships form an exception to the general rule favoring assignment where the contractual language is silent regarding assignment); *Imperial Ref. Co. v. Kanotex Ref. Co.*, 29 F.2d 193, 199 (8th Cir. 1928).

[49] Tim Dwyer, Jr. has argued that assignment is permitted, on the basis that he believes the Trust Agreement is silent on the issue, and he cites *Semmler v. Beulah*, 48 ND 1011, 188 N.W. 310, 312 (1922) for the proposition that "a vendee's interest is assignable unless there is a specific provision in the contract prohibiting assignment." Tim Dwyer, Jr. Appellant Brief at ¶ 65. However, *Semmler* is in accordance with the cases cited *supra*: "This equitable estate possessed by the vendee may be sold and assigned *in the absence of restriction in the contract*." 188 N.W. at 312 (emphasis added).

[50] The only explicit use of the term "assign" in the Trust Agreement is an express prohibition. App at 38 ("No beneficiary shall have any right or power to sell, *assign*, anticipate or dispose of his or her interest") (emphasis added). The express terms

and broader textual context of the Trust Agreement together indicate a prohibition on assignment of Tim Dwyer, Jr.'s right of first offer, and underscore the Settlor's personal connection to the beneficiaries who enjoy the right of first (and second) offer, preferential against unrelated third parties. Article VII of the Trust Agreement specifies Tim Dwyer, Jr. twice by name in creating the right of first offer, and grants the residual, secondary right of purchase to his other children. This right of purchase is so personally specific that it is not even extended to Settlor's grandchildren, let alone unrelated third parties.

[51] Were Tim Dwyer, Jr. to assign the right of purchase to another under his right of first offer, that action would deprive his siblings of their rights to purchase those portions of the Trust property that he is unwilling or unable to purchase himself. The same can be said of a delegation of his duties under the contract for deed envisioned by the Trust Agreement. The language of the Trust Agreement is clear: there is absolutely no basis to allow assignment of Tim Dwyer, Jr.'s right of first offer.

D. Tim Dwyer, Jr. has no legal right that is negatively affected by following settlor intent, since he has no vested right in the property of the Trust.

[52] If and when Tim Dwyer, Jr. accepts the Co-Trustees' offer to purchase lands from the Trust corpus, he will enjoy the same right to possess and use the property that he currently enjoys as lessee. *Zent v. Zent*, 281 N.W.2d 41, 45 (N.D. 1979). Therefore, compliance with the conditions placed on him by the method of sale described in the Trust Agreement will not harm his use and enjoyment of the land he may purchase. No limitation has been made to Tim Dwyer, Jr.'s current interest or rights in the property within the grant of rights afforded him by the Trust Agreement.

[53] Because Tim Dwyer, Jr. currently holds no legal claim to own the property before title has been perfected according to the schedule set by Settlor in the Trust Agreement, he has no legal right that is affected by the conditions required by the Trust Agreement:

> When a vendor sells real estate under a contract for deed he retains legal title, while the vendee acquires equitable title to the property. Under a contract for deed, the vendor retains the legal title to the property and holds it in trust for the purchaser and as security for the purchaser's compliance with the conditions of the contract. The purchaser holds equitable title and generally has the right to the use and possession of the property. The equitable title merges in the legal title when the terms of the contract for deed have been completed and the warranty deed is entered. The full title does not vest until the entire purchase price is paid and the terms of the contract have been met.… A vendee under a contract for deed … may transfer equitable interests in real property.

Hokanson v. Zeigler, 2017 ND 197, ¶¶ 19-20, 900 N.W.2d 48, 56 (internal marks and citations omitted); *see also Zent v. Zent*, 281 N.W.2d 41, 45 (N.D. 1979) ("Under a contract for purchase of real property, the purchaser is generally regarded as the beneficial owner in equity while the vendor holds legal title in trust for the purchaser" and "as security for the payment of the entire purchase price."); *Semmler v. Beulah Coal Mining Co.*, 48 N.D. 1011, 188 N.W. 310, 312 (1922).

[54] Tim Dwyer currently has no vested right to convey any of the land conveyed in trust by the Settlor to the Co-Trustees. As a purchasor under a contract for deed, Tim Dwyer, Jr. will not have perfected legal title until he has made all payments required by the Trust Agreement. Until he has perfected title, it cannot be said that he holds legal title in the real property, and without legal title, he will have no right to alienate the property by conveyance during that time either. He has no right until he holds legal title to convey

the Trust lands and so there is no vested right that has been affected by the requirements of the Trust Agreement, as validated in the district court's judgment.

[55] Since Tim Dwyer, Jr. has no legal title to alienate, and the Trust does not limit his right to sell the land once he acquires legal title, there is no restraint placed on his right to alienate a property interest, and N.D.C.C. § 47-02-26 is completely inapplicable to this case. *See Holien v. Trydahl*, 134 N.W.2d 851, 855 (N.D. 1965) (stating "the general rule is that, where an estate in fee simple in real estate is given by will, an attempted testamentary restraint on the devisee's power of alienation is void as repugnant to the nature of the estate given," and that "any restraint upon alienation by an owner in fee, which restrains such fee owner from selling to anyone except other devisees, is void"). Restraints on alienation of property held in fee simple estate are void because "the right of alienation is an inherent and inseparable quality of fee-simple estate." *Id.* at 856; *accord Dennison v. N. Dakota Dep't of Human Servs.*, 2002 ND 39, ¶ 14, 640 N.W.2d 447, 453. Tim Dwyer, Jr. was not granted fee simple absolute ownership of the Trust lands, a contract for deed will not grant him fee simple ownership during the pendency of the contract, and the Trust Agreement does not limit his disposition of the purchased property once title is perfected.

[56] Bearing this reality in mind, it is therefore curious to read the protestations made by Tim Dwyer, Jr. regarding the limitations on his presumed rights to convey land to his daughters. Tim Dwyer, Jr. Appellant Brief at ¶¶ 79-80. He argues that compliance with the terms of the Trust agreement "would restrain his right for the future use of this property," leaving as the "only alternative" that Tim Dwyer Jr. would have to wait for the contractual period, in compliance with the contract for deed described in the Trust.

[57] If delay were truly a concern for Tim Dwyer, Jr., he could have evinced willingness to purchase in 2018, when sale was first broached by the Co-Trustees. *See* App at 47-48, 283. As it is, he claims the reason that he seeks to prepay and hasten his acquisition of title is to convey it out of his ownership and then promptly have it encumbered with a bank mortgage. Tim Dwyer, Jr. Appellant Brief at ¶ 79; *but see* App at 284 (describing settlor intent regarding the risk of bank mortgage lending). Tim Dwyer, Jr.'s frustration and impatience occasioned by compliance with the terms of the Trust Agreement are not legally actionable harms.

E. The beneficiaries of the Trust would be negatively affected if settlor intent is subverted as proposed by Tim Dwyer, Jr.

[58] In contrast to the accommodation of his own preferences and convenience that Tim Dwyer, Jr. believes should be judicially enforced upon the Co-Trustees and other beneficiaries, his arguments indicate he holds the rights of those other beneficiaries in small regard. A grant of this appeal to benefit Tim Dwyer, Jr. would unfairly prejudice and harm the rest of the Trust's beneficiaries, to whom his interests are adverse.

[59] In his answer to my counterclaim, Tim Dwyer, Jr. denied that his interest was adverse to all the other beneficiaries of the Trust. *Compare* App at 122, ¶ 9 *and* App at 128, ¶ 9. However, by filing his declaratory judgment action, Tim Dwyer, Jr. had to acknowledge that his pecuniary interests as a lessee and putative purchaser of the Trust property are adverse to the interests of the Co-Trustees and the Trust's beneficiaries: A controversy between persons whose interests are adverse is a prerequisite for a declaratory judgment action, and "must be present to enable a district court to order declaratory relief." *Kauk v. Kauk*, 2017 ND 118, ¶ 9, 895 N.W.2d 295, 298.

[60] Nevertheless, the rights of all the Trust's beneficiaries are worthy of vindication. As grandchildren of the Settlor, the residuary beneficiaries can demonstrate the Settlor's intent that they should be benefited by the Trust Agreement, and thus I have the legal right to enforce the express terms of the Trust Agreement and Settlor's intent. *Peoples State Bank of Truman, Inc. v. Molstad Excavating, Inc.*, 2006 ND 183, ¶ 20, 721 N.W.2d 43, 48.

[61] Tim Dwyer, Jr. has challenged the legitimacy of the beneficiaries' interest in receiving the distributions envisioned by the express terms of the Trust Agreement, which will be disbursed from the installment payments made pursuant to its terms and the contract for deed. He has no legal basis from the law of North Dakota on which to rely, so his brief made increasingly desperate arguments to conceal his efforts for improper gain at the expense of the Trust's beneficiaries.

[62] He began his argument section with a tabulation of the financial stake in this case. Tim Dwyer, Jr. Appellant Brief at ¶¶ 57-58 (noting that the ability to accelerate installment payments would save him "a bag of cash" if he could avoid paying the interest rate specified in the Trust Agreement). He later argued, without support from the text of the Trust Agreement or the law of North Dakota, that it was not Settlor's intent that the beneficiaries would receive the proceeds of the sale of the Trust corpus. *Id.* at ¶ 76 (claiming that the interest rate and duration of the contract for deed "was not intended to provide an additional revenue stream for the beneficiaries"). This is plainly contradicted by the terms of the Trust itself. App at 36 (instructing that distribution of principal "and any accumulated interest" should be made to the Settlor's grandchildren). Perhaps recognizing the speciousness of his arguments and the paucity of legal support,

Tim Dwyer, Jr. twice cites to a 1983 opinion from Pennsylvania: *Mahoney v. Furches*, 503 Pa. 60, 468 A.2d 458 (1983). *See* Tim Dwyer, Jr. Appellant Brief at ¶¶ 73, 84.

[63] In *Mahoney*, the Pennsylvania Supreme Court rejected the rule followed by other states which presumed prepayment was prohibited unless expressly allowed, and chose instead to create a presumption that prepayment was allowed unless prohibited by the terms of the contract. 503 Pa. at 64-66, 468 A.2d at 461; *see also First Philadelphia Realty Corp. v. Albany Sav. Bank*, 609 F. Supp. 207, 210 (E.D. Pa. 1985) (noting that the *Mahoney* court acknowledged "specific language may rebut the presumption").

[64] Even so, other states have refused to follow *Mahoney*. *See*, *e.g.*, *Trilon Plaza, Inc. v. Comptroller of State of New York*, 788 A.2d 146, 152 (D.C. 2001) (restating the "perfect tender in time" rule to hold "The law gave the lender the right to expect performance of the loan agreement according to its terms, and the right to expect the agreed flow of payments, including interest, over the fifteen-year term of the loan," and "[t]hat right is not affected by the debtor's election to pay the loan in advance of maturity"). This court has ruled likewise. *Goetz v. Hubbell*, 66 N.D. 491, 266 N.W. 836, 840 (1936) (holding that a vendor "is not bound to accept the purchase price in any other manner or form than that described in the contract" and "cannot be compelled to do so").

[65] More to the point, it is plain to even a casual reader that the Trust Agreement expresses the Settlor's clear intent to bless his grandchildren financially from the fruits of his life's work. It is therefore disingenuous of Tim Dwyer, Jr. to argue contrarywise and to do all he has to take that blessing unto himself. If Tim Dwyer, Jr. does not wish to shoulder the weighty burden of the contract for deed, he is under no compulsion to purchase the property, and there are six other children of the Settlor who would be happy

to accept the terms of the purchase in his place. Instead, he has done his level best to take the value of the Settlor's estate to himself alone.

[66] Tim Dwyer, Jr. has not challenged those terms of the Trust Agreement that benefit him, only those that would benefit others in his extended family. For the last sixteen years, Tim Dwyer, Jr. has enjoyed generous terms at the expense of the other beneficiaries because those are the terms granted him by the Settlor. He benefits from rental rates well below the market rate, and not one of the 33 residuary beneficiaries has challenged him on this, because the beneficiaries defer to the language of the Trust Agreement. When it came time for Tim to own up to his obligations under the Trust, he objected on spurious grounds to sidestep the clearly-stated intention of the Settlor. When the Co-Trustees offered to sell him some or all of the land they held in trust (leaving any unsold portions to be rented by him), he demanded that they acquiesce to his demands, and filed this lawsuit when they refused. After a year of litigation in the district court, he lost, and should have accepted his obligations under the Trust. Instead, Tim Dwyer, Jr. cost everyone even more time and expense, and prolonged his lucrative rental terms in the meanwhile—all just to file an appeal that is little more than a 35-page violation of N.D. R. App. P. 28(l) ("All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings, and free from burdensome, irrelevant or immaterial matters."). *See* Tim Dwyer, Jr. Appellant Brief at ¶¶ 63, 64, 71.

CONCLUSION

[67] For all the foregoing reasons, this appeal must be dismissed, and the judgment of the district court must be affirmed.

Respectfully submitted,

/s/ Ingrid A. Sell

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

[68] I hereby certify that this document complies with the page limitations of N.D. R. App. P. 32(a). There are 37 pages in this document, and the document uses a proportionally-spaced typeface using Times New Roman, 12-point font.

/s/ Ingrid A. Sell
INGRID A. SELL, ESQ.

CERTIFICATE OF SERVICE

[69] I hereby certify that, in compliance with N.D. R. App. P. 31(b), on March 2, 2021, I served true and correct copies of this "Brief of Appellee Ingrid A. Sell" upon all parties to this action, addressed to the counsel of record for represented parties and to the personal address of all unrepresented parties. Electronic copies were sent by e-mail service for all parties whose e-mail address had been provided; otherwise, service was by first class mail.

/s/ Ingrid A. Sell
INGRID A. SELL, ESQ.

In the Supreme Court of the State of North Dakota

Timothy S. Dwyer, a/k/a Tim Dwyer, Jr.,	)	
	)	
Plaintiff, Appellant, and Cross-Appellee,	)	
	)	
vs.	)	
	)	**Supreme Court No: 20200188**
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,	)	McKenzie County District Court No. 27-2019-CV-00245
	)	
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.	)	

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

CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

[01] I hereby certify that, in compliance with N.D. R. App. P. 31(b), on March 2, 2021, I served true and correct copies of the "Brief of Appellee Ingrid A. Sell" upon the following parties by electronic service, via my e-mail address of record:

Timothy S. Dwyer, Plaintiff, Appellant, and Cross-Appellee
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[02] I further certify that, in compliance with N.D. R. App. P. 31(b), on March 2, 2021, I served true and correct copies of the "Brief of Appellee Ingrid A. Sell" upon the following parties within an envelope, sent by first class mail, postage prepaid:

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Billy Morgan, Defendant and Appellee, sent to
12260 Danbury Way, Rosemount, MN 55068

Paul Rice, Defendant and Appellee, sent to
3556 52nd Avenue NE, Maddock, ND 58348

Will Rice, Defendant and Appellee, sent to
3556 52nd Avenue NE, Maddock, ND 58348

Judah Coleman, Defendant and Appellee, sent to
832 Crescent Lane, Bismarck, ND 58501

David Morgan, Defendant and Appellee, sent to
4785 Dodd Road, Eagan, MN 55123

Janna Schmidt, Defendant and Appellee, sent to
318 22nd Avenue N, Fargo, ND 58102

Taylor Dwyer, Defendant and Appellee, sent to
15991 Bennie Peer Road, Sidney, MT 59270

Tessa Dwyer, Defendant and Appellee, sent to
15991 Bennie Peer Road, Sidney, MT 59270

Teddi Dwyer, Defendant and Appellee, sent to
15991 Bennie Peer Road, Sidney, MT 59270

Tianna Dwyer, Defendant and Appellee, sent to
15991 Bennie Peer Road, Sidney, MT 59270

Respectfully submitted:

/s/ Ingrid A. Sell
INGRID A. SELL, ESQ.