

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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

Plaintiff/Appellant,

v.

Margret Sell, Co-Trustee of the Tim Dwyer
Farm Trust; John Dwyer, Co-Trustee of the
Tim Dwyer Farm Trust; Peggy Dwyer Sell aka
Margret Sell; John W. Dwyer aka John Dwyer.
Jane Dwyer Morgan; Ruth Dwyer
Coleman; Michael A. Dwyer; Barbara
Dwyer Rice;

Defendant/Appellees
and Cross-Appellants,

and

Molly Binger; Dan Dwyer;
Tommy Dwyer; Sadie Bro; Dana Dwyer;
Sarah Grossman; Johnny Coleman; Ingrid
Kalinowski aka 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/Appellees.

Supreme Court No.: 20200188

McKenzie County Case No.:
27-2019-CV-00245

APPEAL FROM ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT, IN PART (DKT. #132); ORDER FOR JUDGMENT (DKT. #136);
ORDER GRANTING DEFENDANT'S MOTION TO MODIFY JUDGMENT, IN
PART, AND GRANTING MOTION FOR STAY (DKT. #202); AND AMENDED
JUDGMENT (DKT. #209), MCKENZIE COUNTY DISTRICT COURT, NORTHWEST
JUDICIAL DISTRICT, BY THE HONORABLE DANIEL EL-DWEEK

**BRIEF OF APPELLEES ANDY DWYER, JACK DWYER,
RACHEL MEUCHEL, DAN DWYER, TOMMY DWYER, AND JOEY DWYER**

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[¶ 1] Whether the district court erred in concluding N.D.C.C. § 47-05-17 prohibits enforcement of the reservation of hunting and recreation rights in the Dwyer Trust Agreement.

STATEMENT OF THE CASE

[¶ 2] Appellees Andy Dwyer, Jack Dwyer, Rachel Meuchel, Dan Dwyer, Tommy Dwyer, and Joey Dwyer (collectively “Appellees”) are beneficiaries of the Tim Dwyer Farm Trust, which arises under the Revokable Living Trust Agreement, dated December 6, 2004 (“Dwyer Trust Agreement”). The present brief focuses upon a single issue in this case: the reservation of hunting and recreation rights in the Dwyer Trust Agreement.

[¶ 3] Article IX of the Dwyer Trust Agreement, entitled “Hunting and Outdoor Recreation Activity,” provides in full:

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 recreation activities.

At the same time as the execution of the Dwyer Trust Agreement, Tim Dwyer transferred more than 7,000 acres of McKenzie County farmland to the Dwyer Farm Trust via Warranty Deed.

[¶ 4] As part of Appellant Tim Dwyer, Jr.’s Amended Complaint, Appellant sought a declaratory judgment from the district court providing the Co-Trustees of the Dwyer Farm Trust must include a reservation of hunting and recreation rights in any deed transferring title of the real estate owned by the trust. The Amended Complaint alleged declaratory relief was necessary to address ambiguity created by the adoption of N.D.C.C. § 47-05-17, which prohibits the severance of the right to hunt from the surface ownership rights after August 1, 2007.

[¶ 5] All of the parties who answered the Amended Complaint and appeared before the district court argued in favor of enforcement of the reservation. The Appellees specifically argued the reservation was enforceable, in part, because the Dwyer Trust Agreement

acquired its rights in the real estate prior to August 1, 2007. Despite the unanimity amongst the parties regarding the enforceability of the reservation, the district court declared it was unlawful under N.D.C.C. § 47-05-17.

[¶ 6] On appeal, this Court should conclude the district court erroneously declared the reservation of hunting and recreation activities in the Dwyer Farm Trust was invalid under N.D.C.C. § 47-05-17.

REQUEST FOR ORAL ARGUMENT

[¶ 7] Appellees request oral argument on this matter because the application of N.D.C.C. § 47-05-17 to the facts of this case is a matter of first impression for this Court.

STATEMENT OF FACTS

[¶ 8] The Appellees submit the present brief in support of the notices of appeal previously filed by Appellant Tim Dwyer, Jr. and Appellees Margret Sell and John Dwyer, as Co-Trustees of the Dwyer Farm Trust, and this brief focuses solely on the district court's decision regarding the reservation of hunting and recreation rights.

[¶ 9] The Dwyer Farm Trust was created by William Dwyer, a/k/a Tim Dwyer, through the execution of a Revocable Living Trust Agreement, dated December 6, 2004. App. 30-43. The Dwyer Farm Trust generally identified his children, grandchildren, and great-grandchildren as the beneficiaries of the trust. *Id.*

[¶ 10] In addition, the Dwyer Trust Agreement contained a specific provision protecting the rights of the beneficiaries of the Dwyer Farm Trust to use the real property for hunting and recreation. Specifically, Article IX of the Dwyer Trust Agreement, entitled "Hunting and Outdoor Recreational Activity," provides in full:

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 the

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.

[¶ 11] On the same date he executed the Dwyer Trust Agreement, Tim Dwyer also executed a Warranty Deed to transfer more than 7,000 surface acres of real property located in McKenzie County to the Dwyer Farm Trust. App. 44-46. The Warranty Deed was recorded with the McKenzie County Recorder on December 9, 2004. *Id.* Upon such recordation, the Dwyer Farm Trust became the record title owner of the real property, subject to the terms of the Dwyer Trust Agreement, including the reservation of hunting and recreation rights.

[¶ 12] Tim Dwyer died on January 7, 2005. App. 163. As explained in greater detail in the other parties' briefs, the Dwyer Trust Agreement contained specific provisions regarding the Co-Trustees' authority to lease or sell the real property following Tim Dwyer's death. *See* App. 34-37 (Articles VI-VIII of the Dwyer Trust Agreement).

[¶ 13] In 2007, after the creation of the Dwyer Farm Trust and transfer of the real property to the trust, the North Dakota State Legislature passed N.D.C.C. § 47-05-17. The statute originally provided:

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 towards 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 the effective date of this Act.*

N.D.C.C. § 47-05-17 (2007). The effective date of the statute was August 1, 2007. *Id.*

[¶ 14] Following the adoption of N.D.C.C. § 47-05-17, the Legislature amended the

statute during the 2009 session. The amended version, which remains in effect to this date, modified the last sentence of the statute to provide: “This section does not apply to deeds, instruments, or interests in property recorded before August 1, 2007.” N.D.C.C. § 47-05-17. Of course, as noted above, the Dwyer Farm Trust obtained its interest in the real property prior to August 1, 2007. *See* App. 44.

[¶ 15] As part of Appellant Tim Dwyer’s Amended Complaint, he sought declaratory relief related to the enforceability of the reservation of hunting and recreation rights under the Dwyer Trust Agreement in light of the adoption of N.D.C.C. § 47-05-17 and requiring the Co-Trustees to include the reservation in any future conveyance of the property. App. 26-28; 86-88.

[¶ 16] All of the parties who answered the Amended Complaint and appeared before the district court generally agreed with Appellant Tim Dwyer, Jr.’s request for relief related to the reservation of hunting and recreation rights. *See generally* App. 97-98; 104; 109; 120; 136; and 149.

[¶ 17] As detailed in the other parties’ motion papers, Appellant Tim Dwyer, Jr. and several of the Appellees-Cross Appellants filed motions for summary judgment before the district court. With respect to the reservation of hunting and recreation rights, the parties’ motions generally asked the district court to enter summary judgment affirming the validity of the reservation and requiring the Co-Trustees of the Dwyer Farm Trust to include the reservation in any conveyance of the underlying real property. The Appellees specifically argued the reservation was enforceable, in part, because the Dwyer Trust Agreement acquired its rights in the real estate prior to August 1, 2007, and such property was therefore outside the application of N.D.C.C. § 47-05-17.

[¶ 18] Despite the unanimity of the parties, the district court’s summary judgment decision declared the reservation was invalid as a matter of law. The court stated:

It is clear that the Trustor’s intent was to reserve hunting and other outdoor recreation to his descendants. However, none of the instruments were recorded prior to August 1, 2007. Therefore, NDCC 47-05-17 bars the severance of the right to access for hunting from the land in this matter. However, reservation of other outdoor activities is permitted and must be reserved by the co-trustees when making any conveyance.

App. 203. The Court further stated: “While the Trustor’s intent was to reserve hunting and other outdoor recreation rights, N.D.C.C. § 47-05-17 has prohibited the severance of hunting rights from the land.” App. 204.

[¶ 19] Following post-judgment proceedings, the district court ultimately entered an Amended Judgment that provides in relevant part:

3. The Court **declares** the reservation of rights under Article IX of the Tim Dwyer Trust Agreement for the beneficiaries to access the Trust’s real estate for hunting and recreation activities following any conveyance of the real estate is invalid as a matter of law under N.D.C.C. § 47-05-17.

App. 290 (emphasis in original).

STANDARD OF REVIEW

[¶ 20] The district court decided the reservation of hunting and recreation rights was invalid as a matter of law under N.D.C.C. § 47-05-17. Interpretation of a statute is a question of law which this Court reviews de novo on appeal. *Joyce v. Joyce*, 2020 ND 75, ¶ 18, 941 N.W.2d 546.

LAW AND ARGUMENT

[¶ 21] This Court should reverse the district court’s decision and hold the reservation of hunting and recreation rights under the Dwyer Trust Agreement is valid as a matter of law. This Court should reach such decision because the Dwyer Farm Trust acquired its interest

in the property before August 1, 2007, and the trust is therefore not subject to the prohibition contained in N.D.C.C. § 47-05-17.

I. The District Court Erred in Concluding the Reservation of Hunting and Recreation Rights Was Invalid under N.D.C.C. § 47-05-17.

[¶ 22] This Court should conclude the district court erred in concluding the reservation of hunting and recreation rights in the Dwyer Trust Agreement was invalid as a matter of law under N.D.C.C. § 47-05-17. This Court should conclude the reservation was valid because the Dwyer Farm Trust acquired its interest in the underlying property before August 1, 2007, and it is therefore outside the scope of N.D.C.C. § 47-05-17.

[¶ 23] As quoted above, Article IX of the Dwyer Trust Agreement, entitled “Hunting and Outdoor Recreational Activity,” provides in full:

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 the 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.

[¶ 24] The Dwyer Trust Agreement was executed on December 6, 2004. App. 40. On December 9, 2004, the parties recorded a Warranty Deed from Tim and Eva Dwyer, individually, to the Dwyer Farm Trust, thereby transferring the real property underlying this action. App. 44-46. Based upon the recordation of this deed, the Dwyer Farm Trust obtained a legal interest of record in the real property. *See, e.g.* N.D.C.C. § 47-19-19 (“The record of any instrument shall be notice of the contents of the instrument, as it appears of record, as to all persons.”). At the time the Dwyer Farm Trust obtained its interest in the real property, such interest was subject to the reservation of hunting and recreation rights in the Dwyer Trust Agreement.

[¶ 25] In 2007, more than two years after the Dwyer Farm Trust had acquired its interest in the real property, the North Dakota State Legislature passed N.D.C.C. § 47-05-17. The statute originally provided:

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 towards 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 the effective date of this Act.*

N.D.C.C. § 47-05-17 (2007). The effective date of the statute was August 1, 2007. *Id.*

[¶ 26] Following the adoption of N.D.C.C. § 47-05-17, the North Dakota Legislature amended the statute during the 2009 session. The amended version, which remains in effect to this date, modified the last sentence of the statute to provide: “This section does not apply to deeds, instruments, or interests in property recorded before August 1, 2007.” N.D.C.C. § 47-05-17.

[¶ 27] Notably, N.D.C.C. § 47-05-17 does not provide that a severance of hunting rights is only valid if the reservation itself is recorded before August 1, 2007. Had the North Dakota Legislature wished to invalidate any severance of hunting rights that had not been recorded before August 1, 2007, it could have done so. Rather, the statute provides it does not apply to “interests in property recorded before August 1, 2007.” The Dwyer Farm Trust acquired its interest in the real property as the result of a Warranty Deed recorded before August 1, 2007. As a result, this Court should conclude N.D.C.C. § 47-05-17 does not apply to the Dwyer Farm Trust’s interest in the property.

[¶ 28] In applying N.D.C.C. § 47-05-17, the district court apparently focused upon the fact that the Dwyer Farm Trust had not actually conveyed any real property via an

instrument containing the reservation of hunting and recreation rights prior to August 1, 2007, and the court therefore concluded the reservation was invalid. However, the district court failed to consider the fact that the Dwyer Farm Trust had undisputedly acquired its “interest” prior to August 1, 2007.

[¶ 29] This Court should further recognize the logic behind the Legislature’s approach to this issue. By providing for forward-looking application of N.D.C.C. § 47-05-17, the Legislature ensured that current owners of real property would not lose their existing right to sever and/or reserve hunting rights from the general surface rights. Thus, the Legislature drew a figurative line in the sand. On one side were the owners of real property prior to August 1, 2007, who retained the existing right to sever or reserve hunting rights as part of a future conveyance, as they had historically enjoyed that right prior to such date. On the other side were the purchasers of real property after August 1, 2007, who acquired such property with notice that they would be unable to reserve or sever hunting rights as part of any future conveyance.

[¶ 30] This Court should recognize the right of an owner to control who may enter real property for hunting is one stick in the bundle of sticks to which property rights are often analogized. *See, e.g. Northern States Power Company by Board of Directors v. Mikkelson*, 2020 ND 54, ¶ 21, 940 N.W.2d 308 (J. Tufte, Dissenting) (discussing a condemnation action to provide for a transmission line easement) (quoting *Interest of D.D.*, 2018 ND 201, ¶ 10, 916 N.W.2d 765); *Sanford v. Sanford*, 301 N.W.2d 118, 122 (N.D. 1980) (“[O]wnership of real property may be compared to a bundle of sticks wherein each stick represents a separate right or privilege of ownership. These rights are inherent in ownership

of real property and consist of the right to use real property, to sell it, to give it away, to lease it, and the right to refuse to exercise these rights.”).

[¶ 31] Had the Legislature taken the opposite approach and simply decreed that, as of August 1, 2007, property owners no longer had the right to sever hunting rights from surface rights, such action would have likely constituted a constitutional taking as a matter of law. The Legislature would have been effectively removing one of the sticks from real property owners’ bundle without providing any just compensation. Of course, the Legislature was wise enough to avoid this course by providing N.D.C.C. § 47-05-17 only applied prospectively after August 1, 2007 and not to parties with “interests” in real property prior to such date.

[¶ 32] As applied to the Dwyer Farm Trust, because the trust acquired its interest of record prior to August 1, 2007, this Court should conclude the trust did not lose its right to sever hunting rights from surface rights by the passage of N.D.C.C. § 47-05-17. Therefore, this Court should conclude the district court erred as a matter of law by declaring the reservation of hunting and recreation rights in the Dwyer Trust Agreement invalid as a matter of law under N.D.C.C. § 47-05-17. This Court should reverse and remand the district court’s entry of summary judgment on this issue and direct the court to enter judgment affirming the reservation.

CONCLUSION

[¶ 33] This Court should reverse the district court’s decision and hold the reservation of hunting and recreation rights under the Dwyer Trust Agreement is valid as a matter of law. This Court should reach such decision because the Dwyer Farm Trust acquired its interest

in the property before August 1, 2007, and the trust is therefore not subject to the prohibition contained in N.D.C.C. § 47-05-17.

Dated this 4th day of March, 2021.

O'KEEFFE, O'BRIEN, LYSON & FOSS, LTD.

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Joey Dwyer

CERTIFICATE OF COMPLIANCE

[¶ 1] The undersigned hereby certifies the Appellants' Brief is in compliance with N.D.R.App.P. 32 and contains 15 pages.

Dated this 4th day of March, 2021.

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by sending a true and correct copy thereof VIA E-MAIL to the parties listed below:

<p><i>Attorneys for Plaintiff Timothy S. Dwyer aka Tim Dwyer, Jr.</i></p> <p>Seymour R. Jordan srj@nefflawnd.com</p> <p>Dwight C. Eiken nefflaw@nemont.net</p>	<p><i>Attorneys for Defendants Margret Sell and John Dwyer (Co-Trustees), Peggy Dwyer Sell aka Margret Sell and John W. Dwyer aka John Dwyer</i></p> <p>Craig E. Johnson cjohnson@jrmlawfirm.com</p>
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AND

by placing a true and correct copy thereof in an envelope addressed as follows upon:

<p>Sadie Bro 12309 28th Street NW Bismarck, ND 58503</p>	<p>Charles Coleman 9025 Apple Creek Road Bismarck, ND 58504</p>
<p>Sarah Grossman 9442 225th Street West Lakeville, MN 55044</p>	<p>Johnny Coleman 9050 Apple Creek Road Bismarck, ND 58504</p>
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Katie Joraanstad 2018 9 ½ Street North Fargo, ND 58102	Mike Morgan 1047 132 nd Street SW Brainerd, MN 56401
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[2] To the best of affiant's knowledge, information and belief, such address as given above was the actual address of the party intended to be so served.

[3] Pursuant to N.D.R.Civ.P. 11(a)(2), I declare under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on the 4th day of March, 2021 at Fargo, North Dakota, USA.

/s/ Tricia A. Fossen
Tricia A. Fossen

by sending a true and correct copy thereof VIA E-MAIL to the parties listed below:

<p><i>Attorneys for Plaintiff Timothy S. Dwyer aka Tim Dwyer, Jr.</i></p> <p>Seymour R. Jordan srj@nefflawnd.com</p> <p>Dwight C. Eiken nefflaw@nemont.net</p>	<p><i>Attorneys for Defendants Margret Sell and John Dwyer (Co-Trustees), Peggy Dwyer Sell aka Margret Sell and John W. Dwyer aka John Dwyer</i></p> <p>Craig E. Johnson cjohnson@jrmlawfirm.com</p>
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<p><i>Attorneys for Defendants Molly Binger, Dana Dwyer, Johnny Dwyer, Olin Sell and Patrick Sell</i></p> <p>Klay C. (KC) Ahrens Admitted Pro Hac Vice kahrens@hjlawfirm.com</p> <p>Joseph M. Barnett jbarnett@hjlawfirm.com</p>	

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[2] To the best of affiant's knowledge, information and belief, such address as given above was the actual address of the party intended to be so served.

[3] Pursuant to N.D.R.Civ.P. 11(a)(2), I declare under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on the 5th day of March, 2021 at Fargo, North Dakota, USA.

/s/ Mandy Seigel
Mandy Seigel