

**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;  
Becky 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, Northwestern Judicial District  
The Honorable Daniel El-Dweek, Presiding**

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**BRIEF OF APPELLEES AND CROSS-APPELLANTS JANE DWYER MORGAN  
AND BARBARA DWYER RICE  
ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF THE ISSUES**

[¶1] Whether the district court erred in declaring that any land purchased by Timothy S. Dwyer A/K/A Tim Dwyer, Jr. (“Tim Dwyer Jr.”) from the Tim Dwyer Farm Trust (“Trust Agreement”) must be under the terms of a contract for deed without a right of prepayment.

[¶2] Whether the district court erred in declaring that the Co-Trustees have the discretionary authority to offer for sale to Tim Dwyer Jr. less than all of the land.

[¶3] Whether the district court erred in declaring that the Co-Trustees have the discretionary authority to withdraw all or some of the real property from any proposed sale if the appraised valuations do not meet their expectations.

[¶4] Whether the district court should be reversed, and summary judgment granted in favor of Tim Dwyer Jr.

[¶5] Whether the provisions of the Trust Agreement relevant to the above issues are ambiguous, thereby requiring that the district court be reversed and that this case be remanded for discovery and an evidentiary trial to determine the intended meaning of the disputed provisions of Article VII of the Trust Agreement.

## **ORAL ARGUMENT REQUESTED**

[¶6] Jane Dwyer Morgan and Barbara Dwyer Rice (the “Morgan and Rice Beneficiaries”) request oral argument. This appeal presents several serious issues involving multiple parties. The district court’s order is contrary to North Dakota law on principals of trust interpretation and summary judgment. The issue of relief to be granted requires the kind of discussion an oral argument will permit. Oral argument of this case will allow the complete development of these important issues.

## STATEMENT OF THE CASE

[¶7] The Morgan and Rice Beneficiaries adopt the Statement of the Case of Tim Dwyer Jr.

## STATEMENT OF THE FACTS

[¶8] The Morgan and Rice Beneficiaries adopt the Statement of the Facts of Tim Dwyer Jr.

## STANDARD OF REVIEW

[¶9] The Morgan and Rice Beneficiaries adopt the Standard of Review of Tim Dwyer Jr.

## ARGUMENT

### **I. Incorporation of Arguments of Tim Dwyer Jr. by Reference**

[¶10] Jane Dwyer Morgan and Barbara Dwyer Rice, each being sisters of Tim Dwyer Jr. and beneficiaries under the Trust Agreement, adopt the arguments of Tim Dwyer Jr. as briefly supplemented hereafter.

### **II. The Trust Does Not Prohibit Prepayment of the Contract for Deed.**

[¶11] There is no provision prohibiting prepayment of the contemplated contract for deed in Article VII of the Trust Agreement. Tim Dwyer Jr. App. 36. This is important, as there is a material distinction between intent as determined through provisions in a trust document with respect to the sale of property pursuant to a contract for deed, and the effect of specific provisions, or lack thereof, in an actual contract for deed. The former is a broad document seeking to effectuate a trustor's intent whereas the latter is a real estate document, governed by specific laws and rules with respect to interpretation. For this reason, the various cases cited by the parties with respect to how a fully drafted and signed contract for deed which is silent on the right of the vendee to prepay is to be

interpreted, is irrelevant in determining the intent or legal consequence of a provision in a trust. These cases provide no guidance and have no legal effect on whether the contract for deed financing contemplated by Tim Dwyer Sr. to allow his son Tim Dwyer Jr. to economically purchase and sustain the farm and ranch and continue the family operation precludes a right to prepay.

[¶12] Tim Dwyer Jr. argued at the district court that Article VII was unambiguous and that summary judgment should be granted in his favor, all prior to any discovery occurring in the case and prior to an evidentiary hearing occurring. On appeal, after the district court has ruled against him, Tim Dwyer Jr. argues that the district court should be reversed and that his summary judgment motion be granted. Alternatively he argues that the language at issue is ambiguous and that this matter should be remanded to the trial court to allow discovery and an evidentiary hearing to determine the intent of Tim Dwyer Sr. with respect to Article VII of the contract for deed. The Morgan and Rice Beneficiaries support this position.

[¶13] This Court has recognized that it is appropriate for an appellant to take such a position. *Brown v. North Dakota State University*, 372 N.W.2d 879 (N.D. 1985). In *Brown*, both parties had filed motions for summary judgment with respect to interpreting a contract and whether it was ambiguous, and had taken the position that there were no material facts at issue, even after an evidentiary hearing. *Id.* At issue on appeal was whether the contract was ambiguous, which this Court held was an issue of law. *Id.* at 882; *see also Trust of Roger S. Linn Restated Trust Agreement*, 2019 ND 58, ¶10, 923 N.W.2d 815 (“Whether or not a trust is ambiguous is a question of law, fully reviewable on appeal.”). This Court also recognized that “[t]he mere fact that both parties have

moved for summary judgment does not establish that there are no genuine issues of fact to be determined.” *Brown*, 372 N.W.2d. at 881. Summary judgment was reversed and the case was remanded for a trial on its merits. *Id.* at 882.

[¶14] Similarly, in *Biby v. Union Nat. Bank of Minot*, 162 N.W.2d 370 (N.D. 1968), this Court found that “legal theories which any party advances in support of his own motion for summary judgment, and his assertion, in support of that motion, that there is no issue of fact, are urged only for the purposes of his own motion and may not be used against him to grant his opponent’s motion for summary judgment.” *Id.* at 371. Tim Dwyer Jr., in his Brief in Support of Motion for Summary Judgment by Plaintiff Timothy S. Dwyer A/K/A Tim Dwyer, Jr. and In Opposition to Motion for Summary Judgment by Defendant Michael A. Dwyer (“Brief”), referred to lengthy excerpts from the answers of the Morgan and Rice Beneficiaries with respect to interpretation of Article VII of the Trust Agreement consistent with Tim Dwyer Jr.’s interpretation, thereby establishing a basis for their being an ambiguity in the event the district court ruled against him. District Court Docket No. #71, at 19-20.

### **III. The Trust Requires Sale of the Trust Property as an Entire Unit.**

[¶15] The Trust Agreement also requires that the entire farm and ranch land be offered to Tim Dwyer Jr. once the Co-Trustees have made the decision to sell the land. In interpreting the Trust Agreement, the whole of the Trust Agreement must be “taken together so as to give effect to every part if reasonably practicable.” N.D.C.C. § 9-07-06. As explained in Tim Dwyer Jr.’s appellate brief, the Trust Agreement allows the Co-Trustees to sell “the land,” while giving Tim Dwyer Jr. “the right to purchase all or any part of the land.” Tim Dwyer Jr. Brief ¶104. This unambiguously requires the Co-

Trustees to offer to sell the property as a unit, while allowing Tim Dwyer Jr. to purchase some or all of the land. To interpret it otherwise would render the phrase “all or any part of the land” superfluous. The Court should interpret the Trust Agreement so as not to render any part of the Trust Agreement meaningless, reverse the district court, and grant judgment in favor of Tim Dwyer Jr.

[¶16] If it is not clear to this Court that the Trust Agreement requires the Co-Trustees to sell all the land as a unit, the Morgan and Rice Beneficiaries urge this Court to find the language is ambiguous as to whether the phrase “the land” should be interpreted as meaning “all or any part of the land.” This ambiguity requires the Court to reverse and remand for discovery and fact finding. As discussed above, the fact that the parties previously argued that there were no material facts in dispute does not preclude them from now arguing that there are material facts in dispute. The Brief also referenced excerpts from the answers of the Morgan and Rice Beneficiaries with respect to their understanding of the intent of their father with respect to Article VII on this issue, which is consistent with Tim Dwyer Jr.’s understanding, thereby establishing a basis for their being an ambiguity in the event the district court ruled against him. District Court Docket No. #71, at 12-13.

### **CONCLUSION**

[¶17] For the reasons argued herein or incorporated by reference, the Morgan and Rice Beneficiaries urge this Court to reverse the district court and to grant summary judgment in favor of Tim Dwyer Jr. Alternatively, they urge this Court to find as a matter of law that Article VII of the Trust Agreement is ambiguous, and to remand to the district court



to allow discovery to proceed and ultimately an evidentiary trial on the intended meaning of this provision.

Dated this 5<sup>th</sup> day of March, 2021

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)**

[¶18] This Brief contains 9 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/ James A Lodoen  
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## CERTIFICATE OF SERVICE

[¶19] I hereby certify that true and correct copies of the Response Brief of Appellee and Cross-Appellant Jane Dwyer Morgan and Barbara Dwyer Rice were on the 5<sup>th</sup> day of March, 2021, served electronically on the following:

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[¶20] I further served copies of the Brief upon the following persons on this date, by depositing a copy thereof in the United States mail at Kansas City, Missouri 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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