

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

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

Plaintiff, Appellant,
and Cross-Appellee

v.

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

Defendants, Appellees,
and Cross-Appellants

and

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

Defendants and Appellees

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

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

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Rule 28(i)(2) NDRAppP1

[¶1] This reply brief is submitted pursuant to Rule 28(i)(2) NDRAppP and includes the answer of Tim Dwyer, Jr., to the cross-appeal and brief filed on behalf of Margret Sell and John Dwyer, individually and as Co-Trustees of the Tim Dwyer Farm Trust (collectively the “Trustees”) and to the cross-appeal and brief filed on behalf of Jane Dwyer Morgan and Barbara Dwyer Rice.

LAW AND ARGUMENT

I. Did the district court err in declaring that although the Trustor’s intent was to reserve hunting rights in favor of the Dwyer descendants, the subsequent enactment of N.D.C.C. §47-05-17 has now prohibited the severance of those hunting rights from the land?

[¶2] The only issue raised in the Notice of Cross-Appeal from the Trustees was related to the preservation of hunting access by the Dwyer descendants. App. 225-227. Tim Dwyer, Jr., has no objection to the severance of the right of access for hunting as that was clearly the intent of his father. Similarly, no other party has objected. This issue arose because of the enactment of N.D.C.C. §47-05-17 subsequent to the creation of the Trust with no deed from the Trust prior to August 1, 2007. The enactment of this statute made it unclear whether this right of access for hunting would now be enforceable.

[¶3] The arguments from the Appellant’s brief of Tim Dwyer, Jr., in paragraphs 86 through 100 are incorporated herein by reference. It is the position of Tim Dwyer, Jr., this right of access had been established from the Trust language, the acceptance by the Trustees of the “terms and conditions” of the Trust (App. 40), and the conveyance to the Trust (App. 44-46), all of which took place prior to the effective date of this statute in 2007. Those arguments are also generally supported in the Appellees brief from the Andy Dwyer group.

[¶4] The language from Article IX of the Tim Dwyer Farm Trust Agreement states any conveyance from the Trust “shall reserve” this right of access. If this right of access had not been preserved prior to 2007, any reservation of rights to the Dwyer descendants for hunting now amounts to a severance well after the effective date of this statute. For those reasons, the arguments set forth by the Trustees on this issue must fail but the right of access should be considered valid as existing prior to August 1, 2007.

II. In this appeal, whether the district court properly granted summary judgment on all issues is a question of law which will be reviewed de novo on the entire record.

[¶5] There were competing motions for summary judgment presented to the district court from Tim Dwyer, Jr. (App. 159-160), Michael A. Dwyer (App. 113-114), and the Trustees (App. 180-182). All motions were primarily based upon the language of the Trust Agreement (App. 30-43) and earlier actions taken by the Trustees.

[¶6] In cases where cross-motions for summary judgment are presented it is proper for a party to assert that there are no genuine issues of material fact for purposes of that party’s motion only. *Balta v. North Dakota State Univ.* 370 N.W.2d 554, 557 (ND 1985) (citations omitted).

[¶7] Although Ingrid Sell in her brief cited *Biby v. Union National Bank of Minot*, 162 N.W.2d 370 (ND 1968) she failed to include all relevant language from that citation which reads:

The mere fact that both parties have moved for summary judgment does not establish that there is no material issue of fact to be determined. 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. Thus 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. We believe this to be the better rule, although we acknowledge that there is some authority to the effect that by making cross-motions for summary judgment both parties concede, for the purposes of such motion made by each, that there is no genuine issue of fact to be decided. We find that the 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 motion and may not be used against him to grant his opponent's motion for summary judgment. *Id at 373.*

[¶8] Each of the issues now appealed by Tim Dwyer, Jr., were included in the Amended Complaint. The relevant provisions of the Trust Agreement were set out in that Amended Complaint as were the prior actions or claims which had been made by the Trustees. For each of these issues there was a claim the Trust language or those actions had “created uncertainty and insecurity with respect to the rights, status and other legal relations of Tim Dwyer, Jr.” related to his efforts to purchase the Trust property. Amended Complaint, App. 74-89, ¶¶ 68, 74, 78 and 87.

[¶9] There were several affidavits submitted to the district court for consideration on these competing motions for summary judgment including those from Tim Dwyer, Jr., (App. 161-174), Michael Dwyer (App 115-118), Sean Foss (App 183-190), and Ruth Dwyer Coleman (App 191-193). Also, Jane Dwyer Morgan (App 61-65) and Barbara Dwyer Rice (App 66-67) had filed answers with personal comments on their thoughts on the intent of the Testator on these issues. These affidavits and responses from the children of the Trustor significantly differed in their opinions on critical issues now being considered on this appeal such as prepayment and the requirement to offer all Trust land for sale. The affidavit from Tim Dwyer, Jr., was based, in part, upon his past dealings with his father and the Trustees including his prior purchase of 560 acres from an option from his father (Trust Agreement, Article VIII, App. 36-37) and his being the

only tenant of the Trust property. When there are “battling affidavits” on significant issues, such as in this case the intent of the Testator on several key matters, summary judgment has been held to be improper. *Charles McCauley Pshp. v. Tyrone Twp.*, 2004 ND 214, ¶8, 689 N.W.2d 410 (2004).

[¶10] The parties have agreed the standard of review on an appeal to determine whether summary judgment was properly granted is a question of law which this Court reviews de novo on the entire record. In that review, Tim Dwyer, Jr., is entitled to have all evidence reviewed in the light most favorable to him and giving to him the benefit of all favorable inferences which can reasonably be drawn from this record. If reasonable differences of opinion exist as to the inferences to be drawn from these facts, summary judgment is not appropriate. *Williston Educ. Assn. v. Williston Pub. School Dist. No. 1*, 2016 ND 42, ¶15, 876 N.W.2d 437.

[¶11] A review of the record in this appeal will show the district court’s conclusion this Trust language was unambiguous was erroneous. Examples would include the obligation of the Trustees to offer for sale all of “the land” and the right to prepay any contract for deed.

[¶12] Paragraphs 101-114 of the Appellant’s brief are incorporated by reference as to the obligation of the Trustees to now offer all “the land” for sale. Neither the Trustees or Ingrid Sell in their briefs addressed the specific Trust Agreement language granting to Tim Dwyer, Jr. “the right to purchase all or any part of the land.” App. 36. If the Trustor had intended to give the Trustees any discretionary authority to sell less than all of the Trust property he would have also added “all or any part of” in each of those provisions. The Trustor elected not to add that language. Although the recognized

powers of Trustees are broad, those powers may only be exercised “except as limited by the terms of the trust.” N.D.C.C. §59-16-15. Here the Trustees had the Trust language limiting their authority to sell “the land” and not “all or any part of the land.”

[¶13] As to prepayment, there is a lack of specific directions or provisions on what should be included in that contract for deed. When a fair appraisal process has been completed, the financial terms shown in the Trust Agreement can be used to calculate an annual payment but there is no language prohibiting prepayment by the purchaser, whether that purchaser is Tim Dwyer, Jr., or any other family member.

[¶14] Tim Dwyer, Jr., supports the arguments set out by Jane Dwyer Morgan and Barbara Dwyer Rice in their brief that mere instructions in the Trust Agreement to sell property by a contract for deed are not sufficient to determine whether prepayment should be allowed. The intent of the Trustor cannot be determined from those instructions alone. The intent or desires of the Trustees should not be substituted for the intent of the Trustor.

[¶15] The right to prepay could be a critical factor for any Dwyer family member considering purchasing all or any part of the Trust land. As noted previously, if the Trust land sells for \$6.25 million to one purchaser, requiring payments for the full 15 year term at 4.5% interest would require \$8,729,419.50 in total payments or close to \$2.5 million more.

[¶16] The Trustees have admitted there remains a zero tax basis in the land. Capital gains taxes cannot be avoided and will be essentially the same if the purchase price is paid in one lump sum or over a period of years. There is a risk the Trust could face even more taxes if the capital gain tax rate is increased in future years. By allowing

prepayment, the Trust would have the net proceeds available for investment over that same 15 year period.

[¶17] For all of these issues there were multiple motions for summary judgment for consideration by the district court. There were opposing views and arguments on the interpretation of Trust language. In making his motion for summary judgment, Tim Dwyer, Jr., as authorized from the authorities cited in these briefs, maintained there were issues of fact to be determined if the district court was to adopt the legal theories of his opponent. Any claim made by Tim Dwyer, Jr., that there was no issue of fact to support his own pending motion could not and should not have been used against him in the district court or on this appeal.

III. Any dispute on the validity of the appraisals is a matter to be resolved in the district court.

[¶18] This action was commenced by Tim Dwyer, Jr., after it became apparent the Trustees would dictate rather than negotiate the terms of any sale of Trust property.

[¶19] As an example, rather than negotiate the terms of a joint letter of instructions to the appraisers as proposed by Tim Dwyer, Jr., on May 22, 2019, (App. 262-266), the Trustees unilaterally sent the appraisers a letter of instructions with only their input. App. 267-271. These instructions included “cherry picked” sales of other lands for comparative purposes and their unsubstantiated opinion that several of the parcels had “potential for development” (App. 268-269) with the obvious intention of obtaining inflated values for Trust properties.

[¶20] Although this letter of instructions from the Trustees was dated September 6, 2019, the appraisals were not completed until June 25, 2020 and July 28, 2020. App.

279-280. The Trustees have offered no explanation for the delay in having the appraisals completed.

[¶21] This action was commenced in May 2019 well prior to any order for appraisals. After receiving a copy of these instructions, the attorney for Tim Dwyer, Jr., sent a letter to the attorney for the Trustees shortly thereafter on September 25, 2019, which addressed concerns about these instructions. This letter concluded by stating:

For these reasons we are requesting that the co-trustees withdraw these “final instructions” to the appraisers. As noted back in our letter from May, our office remains open to working with you to work on instructions that are neutral, reasonable and fair and which will result in completed appraisals which are not going to be challenged by any party for being biased or prejudicial. If the co-trustees move forward and secure appraisals based only on these “final instructions” as they now exist, then the co-trustees do so with notice from this letter that those appraisals will then likely be challenged by Tim Dwyer, Jr. as being biased and prejudicial. It would seem to be better to address these concerns now rather than later after the Trust had obtained expensive and unusable appraisals. App. 275.

[¶22] The issue to determine whether these appraisals are fair and reasonable is one which has not yet been presented to the district court and should not now be considered as part of this appeal. Unfortunately, the actions of the Trustees in securing these appraisals is not an isolated incidence but is representative of their past dealings with Trust property that may lead to litigation for years or generations related to Trust property and benefits.

CONCLUSION

[¶23] For all reasons set forth herein and those incorporated by reference from the Appellant’s brief filed earlier by Tim Dwyer, Jr., it is the request of Tim Dwyer, Jr., that the judgment entered by the district court now be reversed with directions to grant summary judgment in favor of Tim Dwyer, Jr. Alternatively, this decision should be

reversed and remanded for further proceedings related to discovery or a trial on the merits to determine the intent of the Trustor on these same issues.

Dated this 15th day of March, 2021.

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

[¶24] This Brief contains 11 pages, excluding the parts of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify this Brief complies with the type face requirements of N.D.R.App.P. 32 and the type style requirements of that Rule, because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Time New Roman, 12 point font.

By: /s/ Dwight C. Eiken
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CERTIFICATE OF SERVICE

[¶25] I hereby certify that a true and correct copy of the Reply Brief of Appellant Timothy S. Dwyer a/k/a Tim Dwyer, Jr., was on the 15th day of March, 2021, served electronically on the following:

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

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