

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Supreme Court No. 20230116

Jacob Ebel, John Ebel, and Ordeen Ebel,

Plaintiffs, Appellants
and Cross-Appellee

Case No. 26-2021-CV-00053

v.

**REPLY BRIEF OF APPELLEE/
CROSS-APPELLANT**

Yvonne Engelhart, as Personal Representative
of the Estate of Mark Lee Engelhardt; Mary
DuPuydt d/b/a DuPuydt Law Office and
Tom Gross,

Defendants and Appellees

and

Tom Gross,

Defendant, Appellee, and
Cross-Appellant.

Appeal from the district court's Order, entered April 19, 2023, and Judgment entered on
April 19, 2023, which were issued by the Honorable Bradley A. Cruff, District Court
Judge, McIntosh County, Southeast Judicial District.

Timothy P. Hill, ND ID #04535
Hill Law Office, PLLC
303 Roberts Street N
Fargo, ND 58102
Telephone: (701) 293-7612
Facsimile: (701) 293-7621
tim@hilllawoffice.com

ATTORNEYS FOR DEFENDANT, APPELLEE/CROSS APPELLANT

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

PARAGRAPH

INTRODUCTION.....1

1. The Estate created a binding contract with Gross..... 2-4

2. Ebels are not entitled to damages from Gross.....5

CONCLUSION6

TABLE OF AUTHORITIES

CASES:	PARAGRAPH
<u>Cooke v. Blood Systems, Inc.</u> , 320 N.W.2d 124 (N.D. 1982).....	4
<u>Dvorak v. Kuhn</u> , 175 N.W.2d 697 (N.D. 1970).....	4
<u>Estate of Ridl</u> , 455 N.W.2d 188 (N.D. 1990)	4
 STATUTES:	
N.D.C.C. §9-03-21	3

INTRODUCTION

[¶1] Appellant/Cross-Appellee (hereinafter “Ebels”) assert that Appellee/Cross-Appellant (hereinafter “Gross”) “intended to submit a bid”. (Ebels Reply Brief ¶1) Gross did submit a bid prior to the 2 p.m. deadline. (R148:11:16-18) The soil maps that he produced and handed to the attorney for the Estate contained the property for which he was bidding on and the price per acre. (R150:112:14-17) Any defects in his bid were waived by the Estate. The Estate’s attorney unequivocally accepted Gross’s bid by handing Gross the abstracts. (R:150:119:4-7)

1. The Estate created a binding contract with Gross.

[¶2] The District Court explicitly found the Estate’s Attorney was not an auctioneer and wouldn’t apply the rules associated with auctioneers. (R135:¶13) If the rules associated with auctions don’t apply, then one has to turn to the issue of whether a contract was created between the Estate and Gross who was the high bidder at the bid opening. The fact that he was the high bidder is undisputed. (R148:20:20-22) Ebels assert that “a personal representative does not “properly” sell property by baselessly ignoring contracts created with another party.” (Ebels Reply Brief ¶6) The Ebels provide no credible authority for this assertion or provide persuasive argument as to why the Estate’s attorney with acquiescence from the Personal Representative cannot modify the bidding process or waive defects.

[¶3] Ebels wrongly assert that a binding contract was created by the Estate’s attorney with the Ebels because she erroneously announced them as winners before quickly correcting herself. Her initial announcement was not an “unconditional acceptance”. It was not absolute and unqualified as prescribed by N.D.C.C. §9-03-21.

The Estate's attorney can hardly be said to have unconditionally accepted the bid of the Ebels when she immediately corrected herself and awarded the bid to Gross. This wasn't a delay of a matter of days but a matter of minutes. As the personal representative's attorney declared, there was no reason for the Estate to enter into a contract with a low bidder. (Engelhart Brief ¶13) The District Court did not need to declare Gross as the high bidder as the Estate had already done that.

¶4 An offer to be considered accepted must be accepted unconditionally. Cooke v. Blood Systems, Inc., 320 N.W.2d 124 (N.D. 1982)(Citations Omitted). The Estate's attorney made a mistake in fact and quickly remedied that error. See Dvorak v. Kuhn, 175 N.W.2d 697, 701 (N.D. 1970). The personal representative of an Estate and therefore its authorized agent, the Estate's attorney in this case, have the necessary duty to address Estate assets in the best interest of the Estate and its beneficiaries. Estate of Ridl, 455 N.W.2d 188 (N.D. 1990) In this case, the Estate has the interest in securing as much income for distribution as possible.

2. Ebels are not entitled to damages from Gross.

¶5 The only reason that the transaction wasn't culminated between Gross and the Estate is that the Ebels appealed the matter and therefore the funds were not transmitted. Contrary to the Ebels' assertions, Gross' bid was not late. In fact, he was the first bidder to show at the Estate attorney's offices for the bid opening. According to the Estate's attorney he was at the bid open approximately 50 minutes before the 2 p.m. deadline. (R148:11:3-4) He clearly wasn't there as an observer but rather an a legitimate bidder. If damages can be awarded for a party questioning a wining bid, then conversely the Ebels interfered with Gross' winning bid when they challenged it after the abstracts

turned over to Gross by the Estate's Attorney. Gross had every right to challenge the announcement of the winning bid and the Estate had every right to modify bid requirements or to waive defects. It is curious that the Ebels only assess liability for their perceived damages from Gross and not the Personal Representative. Naturally, the Ebels would not want damages incurred against a relative. (R150:82:1-10) The Decedent was a relative of Ordeen Ebel's wife and the Personal Representative is also his sister-in-law. (R150:82-4 and 22-24) The fact is their damages are speculative and not subject to enforcement.

CONCLUSION

[¶6] For the reasons outlined above, this Court should reverse and remand the matter to the District Court with instructions to direct the Estate to sell the subject property to Gross; and, affirming the District Court's dismissal of Ebel's declaratory judgment and tortious interference with contract claims.

Dated this 28th day of August, 2023.

HILL LAW OFFICE, PLLC

/s/ Timothy P. Hill

Timothy P. Hill
303 Roberts Street
Fargo, ND 58106-9043
(701) 293-7612
ND ID #04503

Attorney for Appellee
TOM GROSS

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for Appellee, in the above matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, the above brief was prepared with proportional type face and does not exceed 38 pages.

Respectfully submitted this 28th day of August, 2023.

HILL LAW OFFICE, PLLC

/s/ Timothy P. Hill

Timothy P. Hill
303 Roberts Street
Fargo, ND 58106-9043
(701) 293-7612
ND ID #04503

Attorney for Appellee
TOM GROSS

CERTIFICATE OF SERVICE Y ELECTRONIC MEANS

[¶1] I, ASHLEY ANDERSON, hereby certify that on the 9th day of August, 2023, I served the following document on Appellants and co-defendant, by electronic means by forwarding them to Appellants' attorney, Drew J. Hushka, at dhushka@vogellaw.com and upon Defendants, by electronic means through attorneys, James Maring, jmaring@serklandlaw.com and Lance E. Shurtleff, lance.shurtleff@dinsmore.com through ND Supreme Court Efile Portal.

Reply Brief of Appellee/Cross-Appellant

I declare under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Dated this 28th day of August, 2023 in the County of Cass, State of North Dakota.

/s/ Ashley Anderson
ASHLEY ANDERSON