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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No.: 20240029

Duane D. Durr, Plaintiff and Appellant, vs. Dawn M. Volden and Dan Durr, Defendants and Appellees.	District Court No.: 09-2021-CV-03715

ON APPEAL FROM THE ORDER OF JUDGMENT FOR DEFENDANT ENTERED ON NOVEMBER 6, 2023; THE JUDGMENT ENTERED ON NOVEMBER 27, 2023; AND NOTICE OF ENTRY OF JUDGMENT ENTERED ON NOVEMBER 28, 2023; FROM THE DISTRICT COURT FOR THE EAST CENTRAL JUDICIAL DISTRICT CASS COUNTY, NORTH DAKOTA, THE HONORABLE JOHN C. IRBY, PRESIDING.

BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[¶1] Whether the district court failed to address whether Dawn violated her independent fiduciary duties to keep adequate records and inform/report her self-dealings to Duane, as well as Duane's request for an accounting.

[¶2] Whether the district court erred in failing to find Dawn had an independent fiduciary duty to keep adequate records and inform or report Dawn's self-dealings to Duane requiring a heightened standard of care.

[¶3] Whether the attempted waiver of the statutory presumption of undue influence is against public policy and is unenforceable.

STATEMENT OF THE CASE

[¶4] This is an appeal arising from the district court's Order of Judgment for Defendant, Judgment, and Notice of Entry of Judgment which resulted in judgment in favor of Defendant/Appellee Dawn M. Volden ("***Dawn***") and against Plaintiff/Appellant Duane D. Durr ("***Duane***"). An additional Defendant, Dan Durr, was dismissed, prior to trial, by stipulation of the parties and order of the Court. The current appeal will not disrupt Dan Durr's dismissal from the case.

[¶5] The district court found in favor of Dawn concluding Duane failed to meet his burden to prove a breach of fiduciary duty by Dawn, that the questionable transactions Dawn entered into were authorized or permissive by Duane, and Duane did not meet his burden to prove self-dealing.

[¶6] The parties appeared for a three day trial on May 25, 30, and 31, 2023. The court entered its Order of Judgment for Defendant on November 6, 2023 and the corresponding Judgment on November 27, 2023. Notice of Entry of Judgement was issued on November 28, 2023.

[¶7] Duane commenced this appeal by filing a timely Notice of Appeal with the Clerk of the Supreme Court on January 24, 2024.

STATEMENT OF THE FACTS

[¶8] At the time of trial, Duane was 81 years old. (R208:15:5). Duane spent the bulk of his career, 50 years, working his way up the corporate ladder at Don's Car Wash and eventually taking the role as a part owner. (Id. at 15:15-21, 23-25 - 16:1).

[¶9] In November 2013, Duane began experiencing memory issues and was seeking treatment from Dr. Mike Lillestol. (R34:1:¶3). As part of these memory issues, Duane was having a hard time managing his bills. Id. Dr. Mike Lillestol referred Duane to Dr. Rodney Swenson, a clinical neuropsychologist, for testing. (R208:93:2-5). Dr. Rodney Swenson completed an assessment and report indicating Duane had a diagnosis of Mild Cognitive Impairment. Id. at 93:12-15. Dr. Mike Lillestol concurred with a diagnosis of Mild Cognitive Impairment, an illness which presents itself with memory issues and especially with recent memory issues. Id. at 93:16-23. In addition to Mild Cognitive Impairment, Duane was also diagnosed with Epilepsy or seizure disorder by Doctor Shaun Christenson. Id. at 96:17-22.

[¶10] Doctor Mike Lillestol further testified that between November of 2013 through September of 2020, it would have been difficult for Duane to have the capacity to contract. Id. at 94:12-15. Doctor Mike Lillestol also testified Duane would be easily influenced by others. Id. at 94:22-24.

[¶11] Duane has a stepdaughter, Dawn M. Volden. (R34:1:¶4). Duane was married to Dawn's mother, Margaret, until Margaret's death in 2009. Id. When Duane began developing cognitive difficulties and was neglecting his bills, Dawn started assisting Duane in ensuring his bills were paid and financial matters were addressed. Id. at ¶¶ 6,7.

On May 1, 2017, Duane appointed Dawn as attorney-in-fact under a general durable power of attorney. (R89:10). Prior to the current dispute, Duane testified he had a good relationship with Dawn and likened it to a father-daughter relationship. (R208:17:14-20). Until Dawn's resignation as attorney-in-fact under a general durable power of attorney, Dawn had control of Duane's checkbook for his checking account. (R34:2:¶¶7,8). In addition, Dawn had access to and was using Duane's credit cards. Id. at ¶11. While the general durable power of attorney contained a self-dealing or gifting provision, the agent was still subject to "the agent's overriding fiduciary duty." (R211:312:8-12).

[¶12] Duane moved to Touchmark, a senior living facility, in March of 2017. (R208:27:21-25-28:1-9). Duane continued to live at Touchmark until December of 2020. (R34:3:¶12). While Duane was a resident of Touchmark, most of his meals were included in his costs to live at Touchmark. Id. Mark E. Larson, expert witness for Duane, found Dawn had spent Duane's money, for personal purposes, in the amount of $5,457 for groceries and $9,461 for restaurants. (R209:148:9-18). Mark E. Larson allocated these costs to Dawn by ruling out most charges on Tuesday and Thursday, the days when Duane would usually go out to eat, by including restaurant charges to restaurants Duane stated he did not go to, when an expense exceeded what Duane would spend on a meal, and when an expense was incurred in a place Duane has never been (such as Idaho). Id. at 154:7-18.

[¶13] In addition to the grocery and restaurant expenses for Dawn's own benefit, Mark E. Larson testified and reported Dawn dissipated Duane's funds, or derived a benefit from Duane in the amounts of $61,407 for Dawn's expenses; $92,639 for Dawn's house remodel; $8,638 for Dawn's vehicle expenses; $2,614 in avoidable expenses, $20 in late fees, and overdraft charges in the amount of $29. Id. at 148:9-18. This resulted in an

overarching cost to Duane of $180,264. Id. In Mark E. Larson's Revised Forensic Accounting Expert Witness Report, Mr. Larson noted difficulty in excluding authorized purchases with any certainty because Dawn, as attorney-in-fact, had failed to keep receipts. (R111:3). Mr. Larson's report noted "No credit card charge slips and no check register listings were maintained or retained, no notations or record of approvals of expenditures by Duane were made." Id. at n.2. Mr. Larson further identified "indicia of wrongdoing" when Dawn failed to keep records. (R209:156:4,13-14). Another issue discovered by Mr. Larson was that Dawn was only using an online effort to manage Duane's accounts, which did not allow a person to know which checks had already cleared Duane's account and that "Duane never really knew" the status of his accounts. Id. at 156:14-18.

[¶14] Dawn acknowledged having a duty to keep accurate records and to provide accounts of approved transactions. (R209:116:5-7). However, Dawn merely dropped off five totes of receipts at Duane's residence after the general durable power of attorney had already been revoked. Id. at 114:9-10. Dawn further testified that "auto-pay items weren't typically reviewed" with Duane. Id. at 22-23. Dawn also only reviewed the credit card purchases with Duane "more so in the beginning." Id. at 25. Dawn did not maintain a check register. Id. at 115:1-2. Dawn did not provide Duane with a list of expenditures. Id. at 116:11-21. Dawn admitted interest accumulated on Duane's credit cards because she failed to pay the balance in full. Id. at 135:16 - 136-20. Dawn also caused overdraft fees to accrue. Id. at 136:22-23.

[¶15] On June 27, 2017, Dawn and her husband entered into a purchase agreement with Duane to purchase Duane's home. (R91:5). Dawn acknowledged this purchase was a conflict of interest, that Duane was having memory problems at this time, and that Dawn

did not take Duane to his lawyer to review the purchase agreement. (R209:119:12-23). Dawn further testified the realtor represented both Dawn and Duane in the transaction. Id. at 118:6-9. However, the purchase agreement indicates the realtor only represented Dawn and her husband as the buyers. (R91:2:81-82). This was not a dual agency representation. Id. at 3:100. Dawn further testified she utilized a verbal agreement with Duane for Dawn to use Duane's money to renovate the home. (R209:120:6-17).

[¶16] While residing at Touchmark, a senior living facility Duane did not drive his vehicle. (R209:137:23-24). Despite this, Duane's credit card was charged approximately twice a month for gas purchases. Id. at 138:2-4. While Duane was in Touchmark, Dawn also began driving Duane's vehicle. Id. at 110:11-12. While driving Duane's vehicle, Dawn utilized Duane's accounts to pay $4,958 to BMO Harris to pay off her own car loan. Id. at 135:10-15.

[¶17] Dawn acknowledged owing a fiduciary duty to Duane. (R209:115:24-25-116:1-7). Despite understanding her duty to Duane, Dawn had no memory of what many of her charges on Duane's accounts were for or if they were authorized. Dawn could not describe what the following transactions concerned or if Duane was actually informed or consented to the same: Home Depot charge (Id. at 123:23-25-124:2-4); May 15-16 Menards charge (Id. at 124:8-11); May 18, 2017 and June 7, 2017 Mills Fleet Farm charge (Id. at 124:14-15, 18-21); May 21 Menards charge (Id. at 124:16-17); June 29 Lowe's charge (Id. at 125:6-7); August 2 Premium Lawn and Snow charge (Id. at 125:16-17); August 7 and September 27 Tim Cusey charge (Id. at 125:18-21, 25-126:1-5); Carpet World gift to Dawn in the amount of $4,000 (Id. at 126:14-21); charges for Dawn's floral company (Id. at 126:22-23-127:2-7); August 6, 2019 Home Depot charge (Id. at 127:11-13); C&J Clark (Id. at 127:14-15); an airline ticket related to

Dawn's floral company (Id. at 127:16-21); August 11, 2019 Lowe's charge (Id. at 127:22-23); August 11, 2019 Ikea charge (Id. at 127:24-25); Dawn's trip to Oklahoma (Id. at 128:2-10); August 15 and August 16 Home Depot charge (Id. at 128:11-14); August 17 Lowe's charge (Id. at 128:17-18); August 19 Menards charge (Id. at 128:19-20); August 26 Kohl's charge (Id. at 128:21-23); October 1, 2019 Karl's T.V. charge (Id. at 128:24-25-129:1-3); October 5, 2019 AB Wholesale charge (Id. at 129:4-5); November 15, 2019 charge for Dawn's house painter (Id. at 129:11-14); November 16 Runnings charge (Id. at 129:15-17); January 10, 2020, Silk Designer Gallery charge (Id. at 18-19); Rodan and Fields facial products in the amount of $600 (Id. at 129:20-25-130:1); PayPal XABEAT retreat for Dawn (Id. at 130: 2-8); April 9, 2020 Dream Products charge (Id. 130:9-10); June 27, 2020 Rejuv Medical facial charge for Dawn (Id. at 11-14); November 29 Sam's Club charge of $256 (Id. at 132:4-5); December 2 charge of $300 (Id. at 132:6-8); July 2, 2020 charge of $220 (Id. at 132:20-24); January 22, 2020 Metz Company charge of $123 (Id. at 134:8-10).

[¶18] The parties appeared for a three day trial on May 25 and May 30 - 31. The Court entered its Order of Judgment for Defendant on November 6, 2023 (R198) and the corresponding Judgment on November 27, 2023. (R205). Duane subsequently filed this appeal.

STANDARD OF REVIEW

[¶19] Duane contends the district court failed to address three related issues regarding: (1) a request for accounting; (2) duty to keep adequate records; and (3) duty to inform and report. Since this Court is the only institution that can determine whether the district court failed to address these issues, Duane submits the standard of review is de novo.

These issues were preserved for review at at R1:2-4:¶¶11,13,15,18,21,23(A); R196:6,7,8,10,13,15:¶¶18,19,23,24,29,37,41.

[¶20] Duane contends the district court erred in failing to apply a presumption of undue influence and find an ineffective waiver of liability because N.D.C.C. § 03-02-05 overrode the contractual waiver of the presumption, requiring a heightened standard of care. In addition, a failure to disclose or report renders a waiver of liability unenforceable. Review of this issue involves contractual and statutory interpretation, both of which are subject to de novo review. See Irish Oil & Gas, Inc. v. Riemer, 2011 ND 22, ¶ 11, 794 N.W.2d 715 (contract); Wheeler v. Gardner, 2006 ND 24, ¶ 10, 708 N.W.2d 908 (statute). This issue was preserved for review at R196:7-10:¶¶24,25,30.

[¶21] Duane contends the contractual waiver of the presumption of undue influence is against public policy and therefore unenforceable. Issues of public policy are issues of law reviewed de novo. Osborne v. Brown & Saenger, Inc., 2017 ND 288, ¶¶ 8-16, 904 N.W.2d 34. Although this issue was not raised in the district court, this Court can address public policy issues sua sponte. See, e.g., Van Orden v. Van Orden, 515 P.3d 233, 244–45 (Idaho 2022); see also *Corbin on Contracts* § 79.6 (2018) ("The issue whether a contract is contrary to public policy is one that courts may address sua sponte").

REQUEST FOR ORAL ARGUMENT

[¶22] Oral argument will be helpful to the Court to address questions that may arise regarding the trial record, contract interpretation, and statutory interpretation. In addition, this appeal raises an issue of state policy to protect incapacitated and diminished persons from conflicts of interest and undue influence by fiduciaries, and appellant Duane wishes to be heard on this important matter.

ARGUMENT

I. The District Court Failed to Address Whether Dawn Violated Her Independent Fiduciary Duties to Keep Adequate Records and Inform/Report Her Self-Dealings to Duane, as Well as Duane's Request for an Accounting.

[¶23] In the district court, Duane clearly raised the issue of Dawn's related duties to keep adequate records and to inform and report her self-dealings to Duane. See R1:4:¶21 (alleging Dawn violated fiduciary duties and obligations as set forth under, inter alia, Chapter 59-16 of the North Dakota Century Code, which includes Section 59-16-10(1) (setting forth a trustee's duty to keep adequate records of the administration of the trust) and Section 59-16-13(2)(a) (setting forth a trustee's duties to keep beneficiaries informed "of the material facts necessary for them to protect their interests").

[¶24] Duane did not abandon these claims at the time of trial, and clearly preserved his request for the district court to address whether Dawn violated her duty to keep adequate records and to inform and report her self-dealings to Duane. See R196:6,7,10,13,15:¶¶18,19,23,29,37,41; see also id. at 8:¶24 (arguing that "a trustee must not take part in any transaction adverse to the beneficiary without obtaining the beneficiary's permission ***after full disclosure of all facts which might affect the beneficiary's own decision***") (quoting from Estate of Vizenor ex rel. Vizenor v. Brown, 2014 ND 143, ¶12, 851 N.W.2d 119) (in turn quoting from Burlington Northern & Sante Fe Ry. Co. v. Burlington Resources Oil & Gas Co., 1999 ND 39, ¶ 13, 590 N.W.2d 433) (emphasis added).

[¶25] The fact that this issue was before the district court is also implicit from the repeated requests set forth in the Complaint and the Post-Trial Brief for an accounting. See R1:2-4:¶¶11,13,15,18,23(A); R196:6:¶19.

[¶26] In addition, Duane asked the district court to order an accounting as a ***threshold*** matter for the very purpose of identifying the extent of Dawn's violations of her fiduciary duties. See R1:4:¶21 ("To the extent the accounting requested discloses the Dawn violated her duty as a fiduciary to Duane or the duties and obligations as set forth under Chapters 59-09, 59-10, 59-11, 59-12, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 of the North Dakota Century Code, Dawn must be required to reimburse Duane for said expenditures and any loss incurred by Dawn's breach of her duties as a fiduciary and any violations of her duties as a trustee under the above referenced chapters of the North Dakota Century Code.").

[¶27] The district court wholly failed to address Duane's threshold request for an accounting. Other than merely mentioning that Duane sought an accounting in the description of his causes of action, see R198:1:¶3, the district court's legal discussion is utterly devoid of any analysis of this request, and fails to give an explanation as to why the district court denied the request. See id. at 3-8:¶¶8-23.

[¶28] With respect to Duane's claims of the violation of Dawn's related duties to keep adequate records and to inform and report her self-dealings to Duane, the district court did not even include those claims in its summary of the causes of actions in Duane's Complaint. See id. at 1-2:¶3. The district court's legal analysis of the fiduciary duties that Dawn owed to Duane consists of a single sentence that does not explicitly address Dawn's duties to keep adequate records, or her duty to inform and report her self-dealings to Duane See id. at 4:¶10 ("While Dawn owed a fiduciary duty to Duane, the evidence is insufficient to show a breach of that duty.").

[¶29] Where a district court fails to address an issue raised by the parties, the proper remedy is a remand. See Mountrail Bethel Home v. Lovdahl, 2006 ND 180, ¶ 17, 720

N.W.2d 630 (remanding for further proceedings where the district court did not address a relevant issue raised by the parties); Weinreis v. Hill, 2005 ND 127, ¶ 12, 700 N.W.2d 692 (same); Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741, 754 (N.D. 1978) (same); see also Kruckenberg v. State, 2012 ND 162, ¶ 9, 820 N.W.2d 314 (reversing and remanding a case for a district court to address issues that it failed to address in the first instance after "concluding the district court failed to make sufficient findings and conclusions to allow proper appellate review of its decision").

[¶30] The need for a remand can be dispensed with only if the record is otherwise adequate to support the district court's decision. See, e.g., Caster v. State, 2019 ND 187, ¶ 6, 931 N.W.2d 223 ("When presented with conclusory or missing findings of fact, this Court ordinarily remands unless we can discern the rationale for the result reached by the district court through inference or deduction.").

[¶31] The record in this case is not adequate to support the district court's failure to address Duane's request for an accounting, or his claims that Dawn violated her related duties to keep adequate records and to inform and report her self-dealings to him.

[¶32] First, although Dawn testified that she provided Duane with an account of her conduct, R209:116:8-10, she appears to be referring to the documents she provided Duane shortly after she resigned from her role as his power of attorney in September 2020. See id. at 114:9-10; R210:291-294. A disclosure of records, with no accompanying explanation, only ***after*** the relationship had ended certainly cannot satisfy a fiduciary's duty to fully disclose self-dealings at the time they were made.

[¶33] Second, the record is replete with instances where Dawn testified about specific transactions but without indicating whether they were disclosed to or approved by Duane at the time they were made. See R209:114:19-25 (admitting larger purchases on credit

cards were only "walk[ed] through more so in the beginning"); id. at 116:11-21 (admitting she did not provide Duane with a list of expenditures); id. at 126:22-127:7; 129:4-7; 129:18-19 (admitting she charged expenses to her floral business but without testifying that all were disclosed to Duane at the time they were made); id. at 129:20-130:1 (claiming that roughly $600 worth of facial products was a gift from Duane but without indicating it was disclosed to him at the time); id. at 134:11-19; 245:3-5 (admitting that a $730.18 charge to Wags Stay N Play was a personal expense for kenneling her dogs without indicating it was disclosed to Duane or approved by him at the time); id. at 214:7-19 (testifying she talked to Duane about once a month about "bills" but without indicating she disclosed or discussed her self-gifting on those occasions); id. at 238:18-22 (claiming a $600 check was a gift to her, but admitting that she does not even know what the purported gift was for); id. at 242:23-243:1 (claiming an $800 payment was a gift but only that "I believe I talked with him about it"); R210:252:25-253:4 (discussing Rodan Fields charge for skin products but without indicating if she disclosed or discussed it with Duane at the time); id. at 255:3-9 (discussing two charges for Rejuv Medical Aesthetic that appear to be self-gifts not disclosed to Duane at the time they were made); see also id. R209:127-134 (discussing multiple transactions that Dawn was unsure about concerning disclosures).

[¶34] In addition, Dawn testified very specifically to those instances when she had discussed a gift with Duane at the time it was made, see R209:240:3-5, raising the inference that the lack of specifics about other self-gifting instances indicates they were not disclosed to or approved by Duane. The trial record also shows just how easy it would have been for Dawn to satisfy her fiduciary duties to inform and report, keep

adequate records, and document Duane's consent to the self-gifting, simply by having Duane sign a check for the self-gifts at the time they were made. R210:300:15-301:1.

[¶35] Third, the district court's order for judgment dismissed the entirety of the forensic accountant's testimony because he admitted to some inaccuracies that had been corrected and due to faults in Duane's memory, which influenced the report. See R198:3:¶9. The district court did not otherwise explain why it was dismissing the forensic analysis out-of-hand, which identified indicia of Dawn's wrongdoing through the forensic analysis itself, independent of any reliance on Duane's testimony. See R209:156. In addition, the district court did not at all address the forensic accountant's testimony relevant to Dawn's separate and independent duty to keep adequate records, which itself hindered the forensic analysis. Id. at 156-157; 172:16-25; 175:23-176:1; 201:12-202:9.

[¶36] Finally, the district court did not address at all the testimony from the attorney who drafted the power of attorney, which indicated that the self-dealing/gifting provision of Article 2 (t) of the power of attorney was "still going to be subject to the agent's overriding fiduciary duty." R211:312:8-12. This "overriding fiduciary duty" necessarily included Dawn's related duties to keep adequate records and fully disclose her self-dealings to Duane. See N.D.C.C. §§ 59-16-10 & 59-16-13 (setting forth the fiduciary duties to keep adequate records and to inform and report); N.D.C.C. § 3–02–05 (indicating general authorizations "however broad" do not permit a fiduciary to violate the duties set forth in Chapter 59); Burlington Northern, 1999 ND 39, ¶¶ 17-23, 590 N.W.2d 433 (holding that a self-dealing provision did not excuse a fiduciary from its separate duty to fully and fairly disclose all relevant facts to the principal). This matter should be remanded to the district court with instruction to address the separate claims

involving breach of a separate fiduciary duty of record keeping and reporting and request for an accounting.

II. The District Court Erred in Failing to Find Dawn Had an Independent Fiduciary Duty to Keep Adequate Records and Inform or Report Dawn's Self-Dealings to Duane Which Required a Heightened Standard of Care.

[¶37] Even though the durable power of attorney may have given Dawn the right to self-deal, the self-dealing provision did not dispense with the necessity for Dawn to fully and fairly disclose all relevant facts to Duane regarding her self-dealings.

[¶38] The fiduciary duty to provide a beneficiary with all relevant facts is well-established. See, e.g., Meyer v. McCormick, Inc., 445 N.W.2d 21, 23 (N.D. 1989) ("Thus, a trustee may not participate in a transaction with the trust which is adverse to a beneficiary, unless the beneficiary permits him to do so with 'full knowledge.'"); Manikowske v. Manikowske, 136 N.W.2d 457, 464 (N.D. 1965) ("A trustee may not take part in any transaction concerning the trust in which he has an interest, present or contingent, adverse to that of his beneficiary, unless the beneficiary had full knowledge of the motives of the trustee and of all other facts concerning the transactions which might affect his decision without the use of any influence on the part of the trustee."); Mehus v. Mehus, 278 N.W.2d 625, 634 (N.D. 1979) ("If [a fiduciary] is to receive the benefits from a good faith transaction with [the] principal or beneficiary, [the fiduciary] must also assume the burden of developing a record sufficient to satisfy the requirements of law. If [the fiduciary] fails to meet that burden, ... [the fiduciary] suffers the risk of losing the benefits of the transaction."); see also N.D.C.C. § 59-16-13 (setting forth a trustee's duty to keep beneficiaries informed "of the material facts necessary for them to protect their interests").

[¶39] In other words, the fiduciary's duty to inform/duty of full disclosure is a separate and independent duty that still applies even when the fiduciary is authorized to self-deal. See Burlington Northern, 1999 ND 39, 590 N.W.2d 433. In Burlington Northern, notwithstanding this contractual right to self-deal, the Court applied N.D.C.C. § 03-02-05 to conclude this was an "authority expressed in general terms" and therefore did not preclude the fiduciary from being bound by its obligations to fully disclose to the principal, as well as the presumption of undue influence. 1999 ND 39, ¶ 26, 590 N.W.2d 433.

[¶40] The Court's analysis started from the premise that an authority to self-deal stated in general terms did not preclude a fiduciary from still being bound by the duties imposed by Section 59-01-09 through 59-01-19, which included the duty of full disclosure (now found at Section 59-16-13):

> Section 3–02–05(3), N.D.C.C., says "[a]n authority expressed in general terms, however broad, does not authorize an agent ... [t]o do any act which a trustee is forbidden to do by the provisions of sections 59–01–09 to 59–01–19, inclusive." Under N.D.C.C. Ch. 59–01, a trustee must act with the highest good faith toward the beneficiary and not obtain any advantage over the beneficiary by the slightest concealment, see N.D.C.C. § 59–01–09, and a trustee must not take part in any transaction adverse to the beneficiary without obtaining the beneficiary's permission after full disclosure of all facts which might affect the beneficiary's own decision. See N.D.C.C. § 59–01–11. Section 59–01–16, N.D.C.C., establishes a presumption all transactions between a trustee and the beneficiary are entered into without sufficient consideration and under undue influence.
>
> Here, the management agreement created a principal-agent relationship between Burlington Northern and Meridian and expressly authorized Meridian to deal "for its own account" with Burlington Northern's oil and gas rights. The issue is whether that authority was expressed in general terms, thus rendering the enumerated trustee duties in N.D.C.C. ch. 59–01 applicable to Meridian.

Id. at ¶¶ 12-14, 590 N.W.2d 433.

[¶41] The Court then noted that a contractual agreement between parties that involves a fiduciary relationship "must be interpreted in light of the principles which are applicable to the relation of principal and agent [where] [t]he existence of the fiduciary relationship between the parties, and the duty of the agent not to act for the principal contrary to orders, modify all agency agreements and create rules which are *sui generis*." Id. at ¶ 16, 590 N.W.2d 433.

[¶42] Significantly, the Court emphasized that "[t]he prohibition against self-dealing lies at the heart of the fiduciary relationship." Id. at ¶ 17, 590 N.W.2d 433. In discussing and describing the depth of the fiduciary relationship, the Court stated:

> In Thomas, [532 N.W.2d 676] at 687 quoting Birnbaum v. Birnbaum, 117 A.D.2d 409, 503 N.Y.S.2d 451, 456 (N.Y.Sup.Ct.1986), we explained:
>
> One of the most stringent precepts in the law is that a fiduciary shall not engage in self-dealing and when he is so charged, his actions will be scrutinized most carefully. When a fiduciary engages in self-dealing, there is inevitably a conflict of interest: as fiduciary he is bound to secure the greatest advantage for the beneficiaries; yet to do so might work to his personal disadvantage.
>
> Restatement (Second) of Agency § 389, expresses the general rule that, unless otherwise agreed, an agent may not self-deal with a principal's property without the principal's knowledge. Official comment b to that section explains the rule applies to an agent's self-dealing, and "[u]nless the terms of ... an [agency] agreement provide otherwise, an agent acting as an adverse party, ***even though with the knowledge of the principal that he is so doing, is subject to the duty stated in Section 390 to reveal to the principal all the material facts which he knows or which he should know, and to deal fairly with the principal.***"
>
> Restatement (Second) of Agency § 390, outlines the duties of an agent to a principal when self-dealing with a principal's property with the principal's knowledge:
>
> An agent who, to the knowledge of the principal, acts on his own account in a transaction in which he is employed has a duty to deal fairly with the principal and ***to disclose to him all facts which the agent knows or should know would reasonably affect the principal's judgment, unless the principal has manifested that he knows such facts or that he does not care to know them.***

> Comment a to that section explains what an agent must disclose to the principal:
>
> Before dealing with the principal on his own account, however, an agent has a duty, not only to make no misstatements of fact, ***but also to disclose to the principal all relevant facts fully and completely.*** A fact is relevant if it is one which the agent should realize would be likely to affect the judgment of the principal in giving his consent to the agent to enter into the particular transaction on the specified terms. ***Hence, the disclosure must include not only the fact that the agent is acting on his own account (see § 389), but also all other facts which he should realize have or are likely to have a bearing upon the desirability of the transaction from the viewpoint of the principal***. This includes, in the case of sales to him by the principal, not only the price which can be obtained, but also all facts affecting the desirability of sale, such as the likelihood of a higher price being obtained later, the possibilities of dealing with the property in another way, and all other matters which a disinterested and skillful agent advising the principal would think reasonably relevant.
>
> Agency law generally recognizes a principal's authorization to an agent and the agent's duties to the principal are determined by the parties' agreement and the nature of the fiduciary relationship. ***Under Restatement (Second) of Agency §§ 389 and 390, however, even if the principal consents to self-dealing by the agent, the agent must fully and completely disclose all relevant facts to the principal unless the agreement provides otherwise.*** Restatement (Second) of Agency § 389, comment e and § 390, comment g explain the agent has the burden to show compliance with the duties imposed by those sections.

Id. at ¶¶ 17-21, 590 N.W.2d 433 (emphasis added).

[¶43] Thus, Burlington Northern stands for the proposition that a fiduciary who has the consent of the beneficiary to self-deal is still not relieved of the separate duty to fully and completely disclose all relevant facts to the beneficiary, unless the agreement between the fiduciary and the beneficiary also expressly relieves the fiduciary of that obligation. In Burlington Northern, the Court concluded by noting that, although the management agreement at issue authorized the agent to self-deal, it was otherwise silent about the agent's duties to the principal when self-dealing, and thus did not eviscerate the agent's duty of full disclosure:

> The management agreement authorizes Meridian to deal for its own account with Burlington Northern's oil and gas rights, but the agreement is silent about Meridian's duties to Burlington Northern while self-dealing. Although the agreement's authorization for Meridian to lease for its own account is tempered by the requirement that Meridian exercise ordinary business judgment, ***the agreement nevertheless does not specifically dispense with the necessity for Meridian to fully and fairly disclose all relevant facts to Burlington Northern*** and does not provide Meridian with unlimited authority to self-deal. Cf. Miller & Co. v. Crider, 196 F.Supp. 424, 425, 427–28 (W.D. Ky. 1961) (finding no breach of fiduciary duty where agreement authorized agent to "sell or purchase and re-sell to such customers as it may choose within its sole discretion" and agent's purchases were made with principal's full knowledge of actual and prospective sales by agent).

Id. at ¶ 23, 590 N.W.2d 433 (emphasis added). The Court then held that the agreement's authorization to allow self-dealing was merely a general authorization under N.D.C.C. § 03-02-05, and thus did not eliminate the agent's fiduciary duties set forth in Sections 59-01-09 through 59-01-19, which included the presumption of undue influence under Section 59-01-16 (now 59–18–01.1). Id. at ¶ 26, 590 N.W.2d 433.

[¶44] Other courts have similarly held that "contractual releases between a fiduciary and a beneficiary are unenforceable if the fiduciary fails to make sufficient disclosures to allow the beneficiary to fairly determine whether to release her claims." Osborn v. Griffin, 865 F.3d 417, 442 (6th Cir. 2017) (citing Masterson v. Pergament, 203 F.2d 315, 322 (6th Cir. 1953); Mazak Corp. v. King, 496 Fed.Appx. 507, 511 (6th Cir. 2012); Hale v. Moore, 289 S.W.3d 567, 582–83 (Ky. Ct. App. 2008)).

[¶45] Similarly, here, although the durable power of attorney may have given Dawn the power to self-deal, there is nothing in the agreement that can be construed as relieving her of her separate and independent duty of full disclosure. And while Duane could have "waive[d] the right to a trustee's report or other information required to be furnished under this section," N.D.C.C. § 59-16-13(g), he did not. Thus, the general provision permitting Dawn to self-deal did not excuse her from her obligation to fully disclose her

self-dealings to Duane because the agreement "***does not specifically dispense with the necessity for [Dawn] to fully and fairly disclose all relevant facts to [Duane].***" Burlington Northern, 1999 ND 39 at ¶ 23, 590 N.W.2d 433 (emphasis added). The purported waiver of the presumption of undue influence is unenforceable as to transactions Dawn entered into without providing sufficient information or accountings to Duane. Duane respectfully requests the district court's decision be reversed and remanded with instruction to the district court to apply the presumption of undue influence.

[¶46] Along the same vein, the durable power of attorney also purported to waive the agent's liability for all claims arising out of acts or omissions of the agent except for "willful misconduct and gross negligence". (R89:7:e). In failing to apply the presumption of undue influence, the district court relied on this purported waiver of liability in rendering its order: "Dawn's conduct for transactions under the Power of Attorney would impose liability only if they involved willful misconduct or gross negligence." (R198:¶13).

[¶47] However, Dawn's failure to fully disclose self-dealing and in failing to continually report the same to Duane affects this purported waiver. An agreement releasing a fiduciary of some or all duties or conflicts of interests is not effective when the fiduciary violates the duty of disclosure. See Wal-Mart Stores, Inc. v. Coughlin,369 Ark. 365, 371–73, 255 S.W.3d 424, 429–30 (2007) (collecting cases from several jurisdictions standing for the proposition that a release of liability of a fiduciary of duties or conflicts of interest is not effective when a the fiduciary violates the separate duty of disclosure).

[¶48] Here, the purported release in the power of attorney is ineffective to release Dawn from her duty to account and fully disclose the extent of her self dealing. An agent cannot

rely on a general, blanket release of liability, but fail to maintain its independent duty to account and disclose self-dealings to the principal. The district court's decision should be reversed and remanded with instruction for the district court to apply the heightened standard of care and address liability and damages concerning Dawn's breach of her fiduciary duty to keep adequate records and to fully disclose self-dealings to Duane.

III. The Attempted Waiver of the Statutory Presumption of Undue Influence is Against Public Policy and is Unenforceable.

[¶49] As argued above, the purported waiver of the presumption of undue influence is unenforceable entirely, or at the very least, inapplicable as to the duty to report and account under N.D.C.C. § 03-02-05 and this Court's decision in Burlington Northern. But even if not unenforceable for that reason, this Court should still hold the waiver of the presumption of undue influence unenforceable as against public policy.

[¶50] Pursuant to North Dakota statute, there is a presumption that transactions between a trustee and beneficiary during the course of the fiduciary relationship "by which the trustee obtains any advantage from the trust's beneficiary is presumed to be entered by the trust's beneficiary without sufficient consideration and under undue influence." N.D.C.C. § 59-18-01.1. The district court should have applied this presumption of undue influence to the type of durable power of attorney agreement involved here between Duane and Dawn. See In re Est. of Bartelson, 2015 ND 147, ¶ 18, 864 N.W.2d 441. There the Court held the application of the presumption was mandatory. Id. at ¶ 16. ("Under North Dakota law, a presumption of undue influence ***must*** be applied to any transaction between a trustee and the trustee's beneficiary in which the trustee gains an advantage.") (emphasis added).

[¶51] Duane and Dawn purportedly contracted out of the presumption of undue influence in Article 2, section t of their agreement. That provision, hereinafter referred to

as the "self-dealing" provision, stated in relevant part that Duane "specifically endorse[s] these [self-dealing] transfers to my Agent [Dawn] without a presumption of undue influence (including the presumption provided under NDCC § 59-01-16 and similar sections), especially if my Agent is a descendant of mine and the transfer is equal to my descendants by right of representation[.]" R89:4.

[¶52] The Court should hold this attempt to negate the statutory presumption of undue influence is against public policy and unenforceable.[1]

[¶53] Section 09-08-01 of the North Dakota Century Code provides that "[a]ny provision of a contract is unlawful if it is: 1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or 3. Otherwise

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[1] While the argument that Dawn should have the burden of proving the legitimacy and consent for the various transactions was raised at the district court, appellant concedes the public policy argument regarding the contract provision that purportedly waives the statutory presumption of undue influence was not raised in the district court. Numerous courts, however, recognize that the question of whether a contract violates public policy is an issue the courts may raise sua sponte. See, e.g., Van Orden v. Van Orden, 515 P.3d 233, 244–45 (Idaho 2022); Toushin v. Ruggiero, 189 N.E.3d 1012, 1031 (Ill. App. Ct. 2021); Daigle & Assocs. v. Farm Fam. Cas. Ins. Co., No. 1:17-CV-00034-DBH, 2018 WL 6683297, at *6 (D. Me. Dec. 19, 2018) (citing several cases for the principle that courts may sua sponte raise a public policy argument); see also *Corbin on Contracts* § 79.6 (2018) ("The issue whether a contract is contrary to public policy is one that courts may address sua sponte").

contrary to good morals." In Johnson v. Peterbilt of Fargo, Inc., 438 N.W.2d 162 (N.D. 1989), this Court stated:

> Public policy, with respect to contract provisions, is a principle of law whereby a contract provision will not be enforced if it has a tendency to be injurious to the public or against the public good. Ness v. Fargo, 64 N.D. 231, 251 N.W. 843 (1933). Whether a particular provision is against public policy is generally provided for by statute or by the State Constitution. However, when a contract provision is inconsistent with fair and honorable dealing, contrary to sound policy and offensive to good morals, courts have the authority to declare the provision void as against public policy. Sec. 9–08–01, N.D.C.C. See also Mees v. Grewer, 63 N.D. 74, 245 N.W. 813 (1932).

Id. at 163–64.

[¶54] This Court has also stated that "[p]arties to a contract cannot waive rights which are protected by statutes that promote public policies." Spectrum Emergency Care, Inc. v. St. Joseph's Hosp. & Health Ctr., 479 N.W.2d 848, 853 (N.D. 1992). In addition, the Court recognizes that statutes promoting public policies "must be interpreted in furtherance of their purposes." Id. (citing Aanenson v. Bastien, 438 N.W.2d 151, 153 (N.D. 1989); Larson v. Wells County Water Resource Board, 385 N.W.2d 480 (N.D. 1986)). Finally, North Dakota recognizes a "general state policy to protect incapacitated parents from conflicts of interest and undue influence by fiduciaries." Dahly v. Anderson, 2012 ND 183, ¶ 17, 820 N.W.2d 719 (citing Makedonsky v. North Dakota Dep't of Human Servs., 2008 ND 49, ¶ 12, 746 N.W.2d 185).

[¶55] The attempt to contract out of the presumption of undue influence violated the state's policy to protect incapacitated persons from undue influence by fiduciaries, and was contrary to the express provision of law establishing a presumption of undue influence for fiduciaries under N.D.C.C. § 59-18-01.1. Even if not expressly prohibited, the provision was still either contrary to the statute's purpose or otherwise contrary to good morals and should be deemed unenforceable.

[¶56] In Mees v. Grewer, 63 N.D. 74, 245 N.W. 813 (1932), this Court held that a "contract is illegal if its object or tendency is to cause unfaithful conduct by a fiduciary." 245 N.W. at 814 (quoting Hoge v. George, 27 Wyo. 423, 200 P. 96, 101, 18 A.L.R. 469). This Court noted that public policy against such contracts does not "necessarily depend upon whether the fiduciary intended to gain an advantage to himself" or even whether the principal "suffer[ed] as a result of the agreement" but rather just from the fact that "it affords the agent an opportunity, and subjects him to the temptation." Id. "The test is the evil tendency of the contract, not its actual result. If the transaction is inconsistent with fair and honorable dealing, and contrary to sound policy, it contravenes good morals." Id.; see also Luedke v. Oleen, 72 N.D. 1, 4 N.W.2d 201, 207-208 (N.D. 1942) (holding that a contract entered into by the promoter of a corporation and the proposed board of directors of the corporation, containing provisions contrary to the best interests of the corporation, was against public policy and therefore unenforceable).

[¶57] In Burlington Northern, this Court interpreted a specific provision in a management agreement that allowed a fiduciary to deal with the principal's oil and gas rights "for its own account," i.e., self-deal. 1999 ND 39, ¶3, 590 N.W.2d 433. Notwithstanding this contractual right to self-deal, the Court applied N.D.C.C. § 03-02-05 to conclude this was an "authority expressed in general terms" and therefore did not preclude the fiduciary from being bound by its obligations under N.D.C.C. § 59-01-09 through 59-01-19, which included both the duty to fully disclose to the principal, as well as the presumption of undue influence under N.D.C.C. § 59-01-16 (now Section 59-18-01.1). Id. at ¶1. Importantly, the Court found two important limits on the right to self deal: (1) the fiduciary's duty of full and complete disclosure of all material

facts, and (2) the application of the statutory presumption of undue influence. Id. at ¶¶ 17-23.

[¶58] If the right to self-deal is not limited by either the duty to disclose or the statutory presumption of undue influence, it leaves incapacitated persons at the whim of foxes constantly tempted to raid the henhouse at the beneficiary's expense, with little or no protection afforded to the most vulnerable person in the transaction. Duane respectfully submits that such attempts to generally contract out of the presumption of undue influence in every possible transaction are against public policy and should not be enforced.

[¶59] As illustrated above, there were many transactions in which Dawn used Duane's funds for personal purposes or could not state whether or not the transactions were for personal purposes. Moreover, many of these transactions occurred without a record describing the purpose of the transaction, whether such transaction was simultaneously disclosed to Duane or whether Duane consented to such transaction. Such transactions also took place at a time when "it would have been difficult" for Duane to have the "capacity to contract". (R208:94:12-15). Without a presumption of undue influence, deriving from Dawn's fiduciary duty owed to Duane, or a simultaneous disclosure of self-dealing transactions from agent to principal, Duane has no ability to protect himself against financial exploitation.

[¶60] This point is only further exemplified by the district court's order. Duane's expert forensic accountant testified the difficulty in pinpointing Duane's damages due to Dawn's failure to keep records. (R111:3:n.2). Despite a lack of an accounting by Dawn, the Court found "the inaccuracies in some areas of the report cast doubt on the accuracy of the entire report and the conclusions to be drawn from that report." (R198:3:¶9). An agent

should not be allowed to use a waiver of the presumption of undue influence as a sword, while simultaneously using their own lack of records of self-dealing as a shield.

[¶61] Duane requests this matter be reversed and remanded with instruction to the district to apply the presumption of undue influence.

CONCLUSION

[¶62] Remand is necessary where the district court failed to address Duane's explicit demands and arguments for Dawn's disclosure of financial information and a breach of Dawn's duty to provide the same.

[¶63] The district erred in failing to address and find Dawn had violated her fiduciary duty to account and report her self dealings to Duane at the time they occurred. The district court's decision must be reversed and remanded with instruction to determine the liability and damages resulting from Dawn's failure to follow her fiduciary duty to account and disclose to Duane and to apply a heightened standard of care.

[¶64] A general, blanket waiver of the presumption of undue influence in a general durable power of attorney cannot be enforceable in North Dakota. Allowing such a waiver serves to only leave principals, sometimes incapacitated principals, with no ability to advocate for themselves in a situation of financial exploitation. The district court's decision must be reversed and remanded with instruction to apply the presumption of undue influence.

[¶65] The Appellant respectfully prays that the Court grant the relief requested.

[signature to follow]

Dated this 4th day of March, 2024

/s/ Jesse D. Maier

_____

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CERTIFICATE OF COMPLIANCE

[¶66] The undersigned, as attorney for Duane Durr, Plaintiff/Appellant in the above-captioned matter, and as the author of the Brief of Appellant, hereby certifies that said brief is in compliance with N.D.R.App.P. 32(a)(8)(A) and contains 29 pages.

Dated this 4th day of March, 2024.

/s/ Jesse D. Maier

_____

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No.: 20240029

Duane D. Durr, Plaintiff and Appellant, vs. Dawn M. Volden, Defendant and Appellee.	))))))))	CIVIL NO. 09-2021-CV-03715 (Cass County District Court) **DECLARATION OF SERVICE**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

[¶1] Hayley Fingarson, being sworn says that she is of legal age, a resident of Fargo, Cass County, North Dakota, not a party to nor interested in the action, and that she served the following documents:

1. **Brief of Appellant - Oral Argument Requested**

upon the following persons:

Benjamin J. Williams **ben@kennellybusinesslaw.com**
Attorney for Defendant/Appellee

Cash Hennessy Aaland **officemanager@aalandlaw.com**
Attorney for Defendant Dan Durr

[¶2] Via electronic means on the 4th day of March, 2024, by electronically serving, through the North Dakota Supreme Court E-Filing Portal and email, the same to the persons above named at the above-referenced email addresses. That she knows the persons served to be the persons named in the papers served and the persons intended to be served.

[¶3] I declare under penalty of perjury that the foregoing is true and correct. Executed on the 4th day of March, 2024.

/s/ Hayley Fingarson
Hayley Fingarson, Affiant
Fargo, ND

20240029
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 6, 2024
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No.: 20240029

Duane D. Durr, Plaintiff and Appellant, vs. Dawn M. Volden and Dan Durr, Defendants and Appellees.	CIVIL NO. 09-2021-CV-03715 (Cass County District Court) **DECLARATION OF SERVICE**

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1. **Title Page of Brief of Appellant - Oral Argument Requested**

upon the following persons:

Benjamin J. Williams **ben@kennellybusinesslaw.com**
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Cash Hennessy Aaland **officemanager@aalandlaw.com**
Attorney for Defendant Dan Durr

[¶2] Via electronic means on the 5th day of March, 2024, by electronically serving, through the North Dakota Supreme Court E-Filing Portal and email, the same to the persons above named at the above-referenced email addresses. That she knows the persons served to be the persons named in the papers served and the persons intended to be served.

[¶3] I declare under penalty of perjury that the foregoing is true and correct. Executed on the 5th day of March, 2024.

/s/ Hayley Fingarson
Hayley Fingarson, Affiant
Fargo, ND