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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20200282
Towner County Number: 48-2018-CV-00045

Michael McDougall and Bonita McDougall,	Plaintiffs and Appellees,
v.	
Ag Country Farm Credit Services, PCA,	Defendant, Third Party Plaintiff, and Appellant,
and	
Any person in possession, and ALL persons unknown, claiming any estate or interest in, or lien or encumbrance upon, the real estate described in the Third Party Complaint.	Third-Party Defendants.

APPELLEE'S BRIEF

APPEAL FROM JUDGMENT, DATED OCTOBER 23, 2020, OF THE DISTRICT COURT OF TOWNER COUNTY, NORTH DAKOTA, NORTHEAST JUDICIAL DISTRICT, THE HONORABLE DONOVAN FOUGHTY PRESIDING

ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

[¶1] Kent and Erica McDougall were farmers and ranchers who began raising cattle in 2007. Trial Tr. 54:5-13. Michael and Bonita McDougall ("McDougalls") are the parents of Kent McDougall ("Kent"). Trial Tr. 525:1-6; Appendix 166.

[¶2] The trial court made substantial findings of fact in its Findings of Fact, Conclusions of Law, and Order for Judgment (Appendix 165-173). They are referenced extensively in this Statement of Facts.

[¶3] In 2013, Kent and Erica McDougall ("Erica") began financing their operation through AgCountry. Trial Tr. 62:16-21. They eventually executed and delivered eight different promissory notes to AgCountry. Appendix 166. "During the fall of 2015 through March 30, 2016, Kent and Erica McDougall repeatedly requested that AgCountry restructure its loans and assist them in obtaining operating funds." Appendix 166.

[¶4] Dean Aanderud, their loan officer at AgCountry, repeatedly suggested that the prospects for restructuring and refinancing the new loan were good. Kent and Erica were in frequent contact with Mr. Aanderud who consistently "represented that he was working on their financing request, it 'looked good', and they should hear something about their loan and refinancing request soon." Appendix 166.

[¶5] "On March 10, 2016, Kent McDougall wrote to Mr. Aanderud, indicating that a refinance does him no good if no new operating funds would be advanced to his operation." Appendix 166. During further discussions between Kent and Mr. Aanderud, AgCountry suggested that supplying "additional collateral would assist in moving the refinancing request forward." The collateral discussed was the "Home Quarter" which was owned by McDougalls. The trial court found that "[i]t is reasonable to conclude that

Aanderud knew his conversation with Kent McDougall [regarding the "Home Quarter"] would be relayed to Michael McDougall, as the title owner, in order for a mortgage upon the Home Quarter to occur." Appendix 166. No direct communication occurred between Michael McDougall and AgCountry. Appendix 166.

[¶6] "The eight promissory notes were modified through the execution of eight Promissory Note/Loan Agreement Modifications dated March 31, 2016", which extended the various payment dates on those promissory notes to June 1, 2016. An additional document was signed granting AgCountry a mortgage in the "Home Quarter." At the time the documents were executed, Kent and Erica were in default. Appendix 166. The documents signed that day were portrayed to Kent and Erica by Mr. Aanderud as "necessary to allow more time to finalize a refinance/operating fund loan." Appendix 166-167. Kent and Erica did not take title to the "Home Quarter" until April 5, 2016 because Michael McDougall had to pay off an existing mortgage on the parcel. Appendix 167. The warranty deed was recorded by AgCountry with the Towner County Recorder on April 5, 2016 at 4:10 p.m. AgCountry recorded its mortgage on the property at the same time. That same day, AgCountry sent Kent and Erica's accounts to special credit. Appendix 168-169. The special credit department at AgCountry is for troubled loans which have progressed beyond the ability of local branch employees to manage. Trial Tr. 232:19-21; 419:8-10.

[¶7] The next day (April 6, 2016), Kent called to check on the progress of the refinancing and was informed that Aanderud no longer worked for AgCountry. Kent and Erica met with Stacey Sem on April 7, 2016. Stacey Sem is a Senior Vice President – Produce Marketing for AgCountry and was Aanderud's direct supervisor. Trial Tr. 373:3-

21. During the course of that meeting, Sem told them that "they should have been sat down 'a long time ago' to discuss the financial situation and that there would be no refinance or further loans to them." Appendix 168-169. Eric Schoenherr, a senior loan officer in AgCountry's special credit department, took over the administration of their account at that time. Trial Tr. 281:17-18. On May 4, 2016, he informed them that their requested restructure was denied. Appendix 169.

[¶8] "The conversations between Mr. Aanderud and Kent and Erica McDougall were not consistent with internal AgCountry communications. While Mr. Aanderud was representing that the additional collateral (Home Quarter mortgage) would be used to move a refinance or operating loan forward, that things 'looked good,' were 'progressing' and they 'should know more next week,' it is clear AgCountry had already determined, by March 14th, 2016 (if not earlier) that there was no achievable refinance plan for Kent and Erica McDougall. Instead, AgCountry was working to 'shore up' their position and protect itself by obtaining more collateral." Appendix 167.

[¶9] AgCountry personnel, "Neal Sundet Eric Schoenherr, and Stacey Sem each testified at trial that AgCountry hadn't made a decision to deny Kent and Erica McDougall's request for refinancing or operating funds before March 31, 2016[.]" Appendix 167. However, this is contradicted by statements made by AgCountry personnel during that same time as noted by the trial court in its Findings of Fact:

1. September 15, 2015 email: Sundet and Sem state Aanderud should not let McDougall loan go past 90 days overdue.
2. December 21, 2015 email: Sundet states to Aanderud: "[i]f we cannot get it resolved in the next few days should we transfer to Special Credit?"
3. January 18, 2016 email: Sundet asking Aanderud if it was time to send McDougall to special credit and, if no progress that week, recommended to transfer them out of branch.

4. January 27, 2016 email: Sundet states McDougall account nearly 90 days overdue and "needs to get posted by Friday and if we don't have a written plan it will go to non-accrual."
5. February 3, 2016 email: Sem states, "I am also going to strongly recommend that you transfer to special credit at this time…"
6. March 14, 2016 email: Sundet expressed concern that "[w]e need the written plan to keep it out of [non-accrual] or should we ship this one to [special credit]?"
7. **March 14, 2016 email: Aanderud states "I'd prefer to get the additional collateral to shore this up before shipping him off though."** (emphasis added)
8. March 24, 2016 email: Sem states to Sundet, "I told Dean just to get a mortgage signed and do the title work later, don't wait…"

Appendix 167.

[¶10] "AgCountry's actual intent in securing the mortgage in the 'Home Quarter' was to add another asset upon which to collect the *existing* debt owed by Kent and Erica McDougall." Appendix 167. "AgCountry's witnesses testified at trial that it would be very difficult to obtain financing once a loan is in non-accrual status or if it is sent to special credit. But for the desire to obtain the Home Quarter mortgage, no other credible evidence was presented to [the trial court] to explain why Kent and Erica McDougall were not placed in non-accrual status or sent to special credit well before March 31, 2016." Appendix 167.

[¶11] AgCountry grades financing using five "C's" (Character/Management, Capital, Capacity, Risk Chain, and Collateral). Failure to meet any of the criteria would make it difficult to obtain financing. Mr. Schoenherr testified that Kent and Erica did not meet any of the five "C's" on March 31, 2016. This was true even after the mortgage was granted in the "Home Quarter." Appendix 167-168.

[¶12] "Other [corroborating] evidence includes AgCountry's trial testimony, consistent with Kent and Erica's testimony that Erica was readily providing financial information when Aanderud requested it, yet Aanderud's March 30, 2016 Credit Presentation used

only outdated information. The fact that up-to-date information was either not sought by Aanderud or not inputted into AgCountry's system (despite AgCountry's admission it was necessary) shows a lack of intent to actually put forth a feasible refinance or operating loan plan." Appendix 168.

[¶13] Aanderud also testified that his goal was to get new collateral. He "had a motive to obtain the Home Quarter mortgage without a refinance intent. He was under pressure for not properly servicing Kent and Erica McDougalls' accounts, as indicated by trial testimony, and AgCountry emails (*see, e.g.*, Neal Sundet email, Exhibit 13, p. 10 "the servicing of this account has been less than acceptable and it is our expectation that it will be serviced aggressively going forward"), and Sem's testimony that he asked Aanderud to resign or be terminated. Aanderud resigned from his position at AgCountry." Appendix 168.

[¶14] AgCountry foreclosed the mortgage on the "Home Quarter." AgCountry also possessed an assignment of rents in the "Home Quarter" which resulted in AgCountry obtaining a money judgment against McDougalls for 2017 and 2018 rent, a sum of $7,397.76. A sheriff's sale was held to sell the "Home Quarter." AgCountry determined that it would not bid more than $175,000 if anyone else bid on the property at the sheriff's sale which was conducted on July 25, 2019. No one bid that amount, so AgCountry purchased the property via credit bid of $400,000. Trial Tr. 352:20-23; 356:11-14; and 356:21-24. AgCountry received the sheriff's deed to the "Home Quarter" on October 8, 2019 and sold the property to an area farmer for $163,000 on January 16, 2020. Appendix 169.

ARGUMENT

A. McDougalls' Claims Are Not Barred by Collateral Estoppel.

[¶15] AgCountry's first issue on appeal is that the trial court erred in failing to hold that McDougalls' claims are barred by collateral estoppel. AgCountry has failed to show that all the elements of collateral estoppel exist in this matter and as such, their argument fails.

[¶16] AgCountry brought a motion for summary judgment in this matter before the first appeal arguing that collateral estoppel barred McDougalls' claims. The trial court ruled that collateral estoppel did not bar McDougalls' claims as "there is no judgment on the merits and [McDougalls] were not given a fair opportunity to be heard." Appendix 104. AgCountry appealed that ruling, making nearly identical arguments to those contained in their current appeal to this Court. Appellees' Appendix 218-225. This Court affirmed the trial court's order that collateral estoppel does not apply in this case. McDougall v. AgCountry, 2020 ND 6, ¶ 26, 937 N.W.2d 546 ("We reverse that part of the judgment dismissing the deceit and unjust enrichment claims, we affirm the judgment on the remaining claims, and remand for further proceedings consistent with this opinion."). This decision has now become law of the case and is a settled issue for purposes of this appeal. See Peoples State Bank of Truman, Inc. v. Molstad Excavating, Inc., 2006 ND 183, ¶ 10, 721 N.W.2d 43, citing Tom Beuchler Const., Inc. v. City of Williston, 413 N.W.2d 336, 339 (N.D.1987) ("[A]s generally used, the law of the case is defined as 'the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal question thus determined by the

appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same.'").

[¶17] If AgCountry is permitted to appeal the denial of this defense, it still loses because it cannot establish as a matter of law any of the necessary elements of collateral estoppel. This Court has explained the correct application of res judicata and collateral estoppel in the courts of this state.

> The doctrines of res judicata and collateral estoppel bar courts from relitigating claims and issues previously litigated. Riverwood Commercial Park, 2007 ND 36, ¶¶ 13–14, 729 N.W.2d 101. "The applicability of res judicata or collateral estoppel is a question of law, fully reviewable on appeal." Ungar v. North Dakota State Univ., 2006 ND 185, ¶ 10, 721 N.W.2d 16. We have explained the difference between res judicata and collateral estoppel:
>
> > (a) Res judicata, or claim preclusion, prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies. Thus, res judicata means a valid, existing final judgment from a court of competent jurisdiction is conclusive with regard to claims raised, or those that could have been raised and determined, as to [the] parties and their privies in all other actions. Res judicata applies even if subsequent claims are based upon a different legal theory. Collateral estoppel, or issue preclusion, forecloses relitigation of issues of either fact or law in a second action based on a different claim, which were necessarily litigated, or by logical and necessary implication must have been litigated, and decided in the prior action.
>
> Wolt v. Wolt, 2010 ND 33, ¶ 8, 778 N.W.2d 802 (quoting Hager v. City of Devils Lake, 2009 ND 180, ¶ 10, 773 N.W.2d 420). The "doctrines of res judicata claim preclusion and collateral estoppel issue preclusion 'should apply as fairness and justice require, and should not be applied so rigidly as to defeat the ends of justice.' " Skogen v. Hemen Twp. Bd., 2010 ND 92, ¶ 17, 782 N.W.2d 638 (quoting Riverwood Commercial Park, at ¶ 14). We have said the burden is on the party claiming res judicata to establish the defense. Robertson Lumber Co. v. Progressive Contractors, Inc., 160 N.W.2d 61, 76 (N.D.1968). See Witzke v. City of Bismarck, 2006 ND 160, ¶ 10, 718 N.W.2d 586 (party asserting estoppel has burden of establishing issue in second case was resolved in party's favor in prior proceeding).

Hanneman v. Nygaard, 2010 ND 113, ¶ 12, 784 N.W.2d 117.

[¶18] AgCountry has the burden of establishing collateral estoppel as a valid defense. The four factors required to find the existence of collateral estoppel are:

> Was the issue decided in the prior adjudication identical to the one presented in the action in question?; (2) Was there a final judgment on the merits?; (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?; and (4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?"

Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 384 (N.D. 1992).

[¶19] AgCountry cannot meet any of the factors to establish collateral estoppel. It cannot show 1) there is an identical issue; 2) a valid final judgment on the merits; 3) privity among the parties to the litigation; nor can AgCountry show that McDougalls were given 4) a fair opportunity to be heard on the issue. Finally, the fundamental question underpinning any collateral estoppel claim is that it "should not be applied so rigidly as to defeat the ends of justice." Hanneman, 2010 ND at ¶ 12.

1. This is not an identical issue.

[¶20] The first factor to establish a defense of collateral estoppel is the existence of an identical issue. AgCountry fails to identify the issue decided in the previous litigation and then contrasts that to the issue ruled upon in this judgment. AgCountry merely alleges that "the allegations in the McDougalls' amended complaint are all based on allegations of fraud or misrepresentation in the obtaining of a mortgage on the home quarter in April 2016." AgCountry brief at ¶ 35. That is an incorrect conclusion. McDougalls' Amended Complaint alleges that if they do not succeed on their deceit claim, they may still be entitled to unjust enrichment relief. (App. 132-133, Count 4, ¶¶ 44-46.) The Amended Complaint clearly contends that McDougalls are entitled to alternative relief if their action for deceit should fail. As this Court stated in McDougall I, should McDougalls not succeed "on their deceit claim after a trial on remand, it is possible there would be an

absence of a remedy at law and there may be sufficient evidence to support the unjust enrichment claim." McDougall v. AgCountry, 2020 ND 6, ¶ 24.

[¶21] "Under traditional res judicata principles, the doctrine is not applicable to issues not considered or decided in the prior proceeding, and the doctrine applies only when the issues in the prior and current proceedings are 'substantially identical.'" Gepner v. Fujicolor Processing, Inc. of Sioux Falls, South Dakota, U.S.A., 2001 ND 207, ¶ 20, 637 N.W.2d 681, citing Nodland v. Nokota Co., 314 N.W.2d 89, 92 (N.D.1981); see also Hofsommer, 488 N.W.2d at 384 (under the related doctrine of collateral estoppel, issues must be identical). Here, the issues raised and ruled upon are not identical, so collateral estoppel cannot apply.

[¶22] McDougalls assume that AgCountry is arguing that the bankruptcy court's previous denial of Kent and Erica's claim based on AgCountry's deceit bars McDougalls' claim of unjust enrichment. But, AgCountry does not identify the specific reason the bankruptcy court denied relief on the deceit claim. This is particularly important because the elements of a deceit claim and the elements of an unjust enrichment claim are completely different.[1] There is not a single shared element between the two claims. Whatever basis the bankruptcy court used to deny Kent and Erica's deceit claim has no

[1] The elements of a deceit, as contained in the jury instructions from this case are: "1) The suggestion as a fact of that which is not true by one who does not believe it to be true; 2) The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true; or 3) A promise made without any intention of performing." Appendix 157.

The elements of unjust enrichment are: "1. An enrichment; 2. An impoverishment; 3. A connection between the enrichment and the impoverishment; 4. Absence of a justification for the enrichment and impoverishment; and 5. An absence of a remedy provided by law." Apache Corp. v. MDU Resources Group, Inc., 1999 ND 247, ¶ 13, 603 N.W.2d 891.

relation to a determination of unjust enrichment. Therefore, because AgCountry cannot establish what the prior decided issue was, nor that it was a necessary element for McDougalls' claim of unjust enrichment, AgCountry cannot establish collateral estoppel as a valid defense.

2. There was no valid final judgment on the merits.

[¶23] The second factor to establish collateral estoppel is the existence of a final judgment on the merits. The judgment issued from the bankruptcy court denying relief to Kent and Erica was appealed, challenging an erroneous conclusion of law that no fraud existed. The appeal was dismissed because Kent and Erica were not the real parties in interest (they had no interest in the outcome of the litigation and by the time of the appeal; the Trustee was the real party in interest due to the conversion of the case from chapter 12 to chapter 7 bankruptcy). The appeal was dismissed "ab initio" as to McDougalls because the bankruptcy court had no jurisdiction to decide their claim against AgCountry. In re McDougall, 587 B.R. 87, 91 (8th Cir. B.A.P. 2018) ("[t]o the extent the McDougalls asserted before the bankruptcy court their rights concerning whether AgCountry holds a lien on the Home Quarter, the bankruptcy court had no jurisdiction over the dispute between the McDougalls and AgCountry.").

[¶24] Because Kent and Erica had no standing to pursue the claim to void AgCountry's mortgage, and because McDougalls were dismissed from the action from its beginning, there is no action on which to base collateral estoppel. When a party is dismissed from an action for lack of jurisdiction, it has no preclusive effect upon further legal actions by that party.

> To the extent that the dismissal in the original action was for lack of standing, there is no res judicata bar to a second action by a party with

> proper standing, but only a bar to another action by the same party alleging the same basis for standing (here, Triple Tee's claim of standing based on the purported 2000 assignment). See, e.g., Whitmore v. Arkansas, 495 U.S. 149, 154, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) ("[B]efore a federal court can consider the merits of a legal claim, the person seeking to invoke jurisdiction of the court must establish the requisite standing to sue."); Univ. of Pittsburgh v. Varian Med. Sys., Inc., 569 F.3d 1328, 1332 (Fed.Cir.2009) (concluding that dismissal for lack of standing due to failure to join co-owner of patent should not have been with prejudice, in order to allow second action to be brought with proper parties); Media Techs. Licensing, LLC v. Upper Deck Co., 334 F.3d 1366, 1370 (Fed.Cir.2003) ("[T]he district court erred in giving preclusive effect to the [earlier] judgment because its dismissal of [the earlier] complaint for lack of standing was not a final adjudication of the merits"); Restatement (Second) of Judgments § 20(1) (1982) ("A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claims: (a) When the judgment is one of dismissal for lack of jurisdiction....").

Gillig v. Nike, Inc., 602 F.3d 1354, 1361 (Fed. Cir. 2010).

[¶25] Therefore, because the bankruptcy court lacked jurisdiction to determine McDougalls' claim, any decision issued by the bankruptcy court related to this current matter was not a final decision on the merits. As such, AgCountry cannot meet the second requirement of the test to apply collateral estoppel.

3. No privity existed as between Kent and Erica and McDougalls nor were McDougalls given a fair opportunity to be heard on the matter.

[¶26] In order for collateral estoppel to apply to McDougalls, they must have been in privity with Kent and Erica in a previous lawsuit.

> "Privity exists if one is so identified in interest with another that he or she represents the same legal right." Kulczyk, 2017 ND 218, ¶ 11, 902 N.W.2d 485. This Court uses an expanded version of privity to include a person not technically a party to a judgment, "but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein." Id. (quoting Ungar v. N.D. State Univ., 2006 ND 185, ¶ 12, 721 N.W.2d 16). The right to participate in an action may be actively exercised by prosecuting the action, employing counsel, controlling the defense, filing of an answer, paying expenses or costs of the action, or doing such other acts that are generally done by parties. Kulczyk, at ¶ 11. Fundamental fairness underlies determinations of res judicata and privity. Id.; see also Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 384 (N.D.

> 1992). This Court has never applied res judicata to prevent litigation against one who was neither a party nor in privity with a party in prior litigation resulting in a final judgment. See, e.g., Kulczyk, at ¶¶ 18–19; SNAPS Holding Co. v. Leach, 2017 ND 140, ¶ 34, 895 N.W.2d 763; McColl Farms, LLC v. Pflaum, 2013 ND 169, ¶¶ 14–15, 837 N.W.2d 359.

Martin v. Marquee Pacific, LLC, 2018 ND 28, ¶ 19, 906 N.W.2d 65.

[¶27] As the BAP noted, Kent and Erica could not recover anything from AgCountry as they had conveyed the land to McDougalls and the outcome would make no difference to the bankruptcy estate. "Even if the mortgage were rescinded there is no property or assets that would enure to the Trustee or the bankruptcy estate." Appellees' Appendix 236.

[¶28] Additionally, Kent and Erica were seeking relief that would benefit the bankruptcy estate. McDougalls seek relief for themselves. They are not in privity as they are not seeking the same relief. Kent and Erica might have recovered and preserved the mortgage for the bankruptcy estate, which is directly contrary to McDougalls' requested relief. This is further bolstered by the fact that upon conversion of the bankruptcy case to chapter 7, the trustee became the "real party in interest." AgCountry would then need to contend that McDougalls are in privity with the bankruptcy trustee. As the BAP noted, only the trustee could have appealed the Bankruptcy Court judgment but chose not to do so. The trustee could have made the election not to appeal because there was nothing for him to gain by appeal. It is clear McDougalls have an injury to redress ("McDougalls have a cognizable injury related to AgCountry's lien that gives them standing to appeal the judgment.") Appellees' Appendix 238. But McDougalls were not a party entitled to make the claim or appeal the erroneous decision and, therefore, privity does not exist in this matter.

4. The application of collateral estoppel would defeat the ends of justice.

[¶29] Finally, the doctrine of collateral estoppel "should apply as fairness and justice require, and should not be applied so rigidly as to defeat the ends of justice." Skogen v. Hemen Twp. Bd., 2010 ND 92, ¶ 17, 782 N.W.2d 638 (quoting Riverwood Commercial Park, at ¶ 14). As the trial court stated in its Memoranda Decision and Order Regarding Motion and Countermotion for Summary Judgment:

> There is no authority to support an assertion that one must appeal a decision before they are relieved of the binding nature of a judgment, as AgCountry argues, where there is no binding judgment but a dismissal of the cause of action altogether. [McDougalls] may have presented evidence within a courtroom but at the end of the remanded proceedings, the result is that the merits of [McDougall's] claim was not ruled upon in any manner. Applying collateral estoppel would deprive [McDougall] of due process and oppose the interest of justice.

Appendix 105.

[¶30] McDougalls sought to be and thought they were parties to the bankruptcy. Had McDougalls had standing, it would give them not only the right to be heard and awarded relief but also to appeal if that relief is denied. They attempted that appeal only to be told that the court did not have jurisdiction to hear their claim. Inasmuch as McDougalls could not pursue their requested relief, it would be unfair to apply collateral estoppel to their claim.

[¶31] Therefore, because AgCountry cannot show a valid final judgment on the merits, privity among the parties to the litigation, nor that McDougalls were given a fair opportunity to be heard on the issue, its claim that collateral estoppel should have applied to McDougalls' action fails. Any application of collateral estoppel to McDougalls' claims would "defeat the ends of justice." Hanneman, 2010 ND at ¶ 12.

B. McDougalls Did Not Waive Claims for Deceit and Unjust Enrichment.

[¶32] AgCountry argues that McDougall waived their claims for equitable relief because they did not appeal AgCountry's equitable claim to foreclose the mortgage on the "Home Quarter." AgCountry raised this same argument in McDougall I.[2] This Court rejected AgCountry's argument by specifically determining that the foreclosure could proceed and that McDougalls' deceit and unjust enrichment claims were remanded to the trial court. McDougall v. AgCountry Farm Credit Services, PCA, 2020 ND 6, ¶¶ 19, 25. This has now become the law of the case and cannot be appealed again. See Peoples State Bank, 2006 ND 183, ¶ 10, 721 N.W.2d 43

[¶33] AgCountry attempts to frame their argument as a waiver issue but in reality, it is a mootness issue. The essence of AgCountry's argument is: "this appeal is moot because the foreclosure has since been completed and this Court cannot grant McDougall effective relief." That is a distortion of the law. McDougall sought to avoid AgCountry's lien encumbering their property. The fact that AgCountry foreclosed the property and took the value does not prevent McDougall from obtaining relief for the value misappropriated. Were AgCountry's supposition correct, a fleet-footed creditor could moot most appeals. In any case, it is irrelevant here. McDougalls' complaint not only asked for relief avoiding AgCountry's mortgage in their land but alternatively asked for a "monetary judgment . . . against AgCountry for the amount of the unpaid balance due on the mortgage against the Home Quarter" or "monetary judgment . . . against AgCountry for the amount of all damages they have incurred . . ." Appendix p. 12-31.

[2] "Having abandoned any argument that granting AgCountry a foreclosure judgment or a money judgment for enforcement of the assignment of rents against the McDougalls, they have for all intents and purposes waived the entire appeal because any reversal they can hope to gain will be entirely inconsistent with AgCountry's judgment on these points." Appellees' Appendix 226.

[¶34] This situation is identical to Peterbilt of Fargo, Inc. v. Red River Trucking, LLC, 2015 ND 140, 864 N.W.2d 276. There, Peterbilt obtained a judgment enforcing its lien and sold the truck to pay the disputed bill. Red River Trucking appealed the judgment, seeking damages for breach of contract. Peterbilt sought to dismiss the appeal as moot because it had foreclosed its lien in the truck and sold it by the time the appeal was heard. The conveyance of the property may become moot, but the substantive issues as to the amount of damages are not. The Court ruled the appeal was not moot even though Red River Trucking did not appeal the sale of the truck. Similarly, AgCountry's foreclosure of the land does not moot McDougall's entitlement to their damages as a result of AgCountry obtaining the mortgage and subsequent foreclosure.

C. The Trial Court Correctly Found That AgCountry was Unjustly Enriched.

[¶35] "Unjust enrichment is an equitable doctrine applied in the absence of an express or implied contract, to prevent one person from being unjustly enriched at the expense of another." Apache Corp. v. MDU Resources Group, Inc., 1999 ND 247, ¶ 13, 603 N.W.2d 891, citing Zuger v. North Dakota Ins. Guar. Ass'n, 494 N.W.2d 135, 138 (N.D. 1992). Five elements are required to find unjust enrichment: "1. An enrichment; 2. An impoverishment; 3. A connection between the enrichment and the impoverishment; 4. Absence of a justification for the enrichment and impoverishment; and 5. An absence of a remedy provided by law." Id., citing Albrecht v. Walter, 1997 ND 238, ¶ 23, 572 N.W.2d 809.

[¶36] While the conclusion of unjust enrichment is a legal determination, it is based upon the underlying fact finding of the court.

> As noted above, our review of a district court's findings of fact under the clearly erroneous standard is governed by N.D.R.Civ.P. 52(a)(6), and findings "must not be set aside unless clearly erroneous, and the reviewing

> court must give due regard to the trial court's opportunity to judge the witnesses' credibility." A district court's determination of whether the facts support a finding of unjust enrichment is fully reviewable on appeal. Estate of Moore, 2018 ND 221, ¶ 9, 918 N.W.2d 69; KLE Constr., LLC v. Twalker Dev., LLC, 2016 ND 229, ¶ 5, 887 N.W.2d 536.

Tornabeni v. Wold, 2018 ND 253, ¶ 16, 920 N.W.2d 454, 459. To the extent AgCountry challenges the court's findings of fact upon which the conclusion of unjust enrichment is based, that is subject to the clearly erroneous standard. Id., at ¶ 19.

1. AgCountry was enriched and McDougalls were impoverished.

[¶37] The trial court correctly found that an enrichment and an impoverishment had occurred. AgCountry received a mortgage on the "Home Quarter" and a judgment for the rents on that property. Appendix 169. AgCountry was enriched inasmuch as it received the value of the real estate and rents. Likewise, McDougalls were impoverished. "They lost their land without the understood value of preserving their son's farming operation through a refinance or operating loan. They were impoverished by a decreased value to their remaining portion of land, carved out of the Home Quarter by AgCountry, loss of their equity in the Home Quarter itself and loss of rents from the Home Quarter." Appendix 170. These are findings of fact and are not clearly erroneous.

[¶38] AgCountry's argument that the transfer of the "Home Quarter" was a gift and, therefore, no impoverishment exists is incorrect. McDougalls specifically earmarked that property to Kent and Erica in order to receive financing for their farming operation. It was not a gratuitous gift. "Michael McDougall testified he would not have transferred the Home Quarter if he knew Kent and Erica McDougall still would not qualify for a refinance or operating loan." Appendix 166.

2. There is a connection between the enrichment and impoverishment.

[¶39] The connection between the enrichment and impoverishment is direct and obvious. AgCountry's enrichment is directly and solely attributable to McDougalls' impoverishment arising out of the value/equity in the "Home Quarter" being transferred from McDougalls to AgCountry.

[¶40] AgCountry's argument is that there is no direct communication of AgCountry's misrepresentations to McDougalls and, therefore, there is no "legal" connection to McDougalls' transfer of the "Home Quarter". No such requirement for direct communication exists.

> The elements of deceit/fraud do not require that the deceitful/fraudulent statement be made directly to the plaintiff. Rather, as articulated in the Second Restatement of Torts:
>
> > (a) The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.
>
> RESTATEMENT (SECOND) OF TORTS § 533 (1977). Accordingly, the limitation on a plaintiff's ability to assert a cause of action for deceit/fraud stems from his or her ability to prove intent and reliance in the absence of direct communication. Thus, Valor's argument must fail.

Valor Healthcare, Inc. v. Pinkerton, 2008 WL 5396622, *3 (W.D. Ark.).

[¶41] The Eighth Circuit ruled similarly.

> The maker of a fraudulent misrepresentation is liable to " 'those whom he has reason to expect [the misrepresentation] to reach and influence, although he does not make the misrepresentation with that intent or purpose.' " Id. (alteration in original) (quoting Restatement (Second) of Torts § 533 cmt. d (1977)). An objective standard applies to whether one has "reason to expect" reliance by another: " 'The maker of the misrepresentation must have information that would lead a reasonable man to conclude that there is an especial likelihood that it will reach those persons and will influence their conduct.' " Id. (quoting Restatement

> (Second) of Torts § 533 cmt. d (1977)). "[T]he fact that the maker has an advantage to gain, even though it is in some other transaction, by furnishing the misrepresentation for repetition to the third person is of great significance in determining whether he has reason to expect that the original recipient should so repeat it." Restatement (Second) of Torts § 533 cmt. e (1977) (emphasis added).
>
> In summary, "a speaker may be liable to indirect recipients of a fraudulent misrepresentation if the speaker 'intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.' " Cromeans v. Morgan Keegan & Co., No. 2:12–CV–04269–NKL, 2014 WL 1901197, at *5 (W.D.Mo. May 13, 2014) (applying § 533 as adopted by Missouri courts) (quoting Restatement (Second) of Torts § 533 (1977)). This presumes that there is an "initial, direct recipient of this information" who repeated the speaker's communication to the third party. Cf. First Horizon Home Loan Corp. v. Apostle (In re Apostle), 467 B.R. 433, 441 (Bankr.W.D.Mich.2012) ("But, to whom was this [material] misrepresentation made? Somewhat surprisingly, the initial, direct recipient of this information was not identified at trial, although the court infers that the completed closing statement was initially submitted by Apostle to the escrow or title agent who handled the closing.").

Brown v. Louisiana-Pacific Corp., 820 F.3d 339, 445-46 (8th Cir. 2016).

[¶42] AgCountry's reliance on Thimjon Farms P'ship v. First Int'l Bank & Tr., 2013 ND 160, 837 N.W.2d 327 for the proposition that direct communication must exist to find a connection in unjust enrichment cases is misplaced. In Thimjon, this Court considered the law as stated in Restatement (Second) of Torts § 533 but did not expressly adopt or reject the concept.

> While the position from the Restatement (Second) of Torts given in Clark and used in Hawley may support the proposition that the defendant's misrepresentation need not be made directly to the plaintiff, it does not lead to the conclusion that a cause of action for deceit exists absent actual reliance on the misrepresentation by the plaintiff. On the contrary, without agreeing that Restatement section 533 represents the status of current North Dakota law, we note commentary suggests actual reliance by the plaintiff is necessary for a successful claim. The defendant must make the misrepresentation with the intent it will be repeated or communicated to another "or must have information that gives him special reason to expect that it will be communicated to others, and will influence their conduct." Restatement (Second) of Torts § 533 cmt. d (2012). The court in Clark quoted other commentary

explaining the requirement that the misrepresentation must actually be communicated to the plaintiff:

> "Virtually any misrepresentation is capable of being transmitted or repeated to third persons, and if sufficiently convincing may create an obvious risk that they may act in reliance upon it. This risk is not enough for the liability covered in this section. The maker of the misrepresentation must have information that would lead a reasonable man to conclude that there is an especial likelihood that it will reach those persons and will influence their conduct."

Clark, 546 N.W.2d at 593 (quoting Restatement (Second) of Torts § 531 cmt. d (1977)). First International's misrepresentations were never communicated to Thimjon or Hagemeister. They cannot show any misrepresentations influenced their conduct. The district court was within its discretion when it concluded the claim was futile and denied Thimjon's and Hagemeister's motions to amend their complaints to add claims for deceit.

Id. at ¶ 33.

[¶43] In this case, the trial court specifically found that a connection existed between AgCountry's enrichment and McDougalls' impoverishment in its Findings of Fact, Conclusions of Law, and Order for Judgment:

> There is a clear connection between AgCountry's enrichment and McDougalls' impoverishment. The McDougalls' impoverishment is based upon representations made by AgCountry, via Aanderud, to Kent and Erica McDougall, which were then relayed to McDougalls to effectuate a transfer of the same. But for AgCountry's representations of refinancing or further loans to Kenta and Erica McDougall, McDougalls would not have transferred the Home Quarter Mortgage to AgCountry would not have occurred [sic]
>
> McDougalls' impoverishment is a direct result of AgCountry's refusal to release the mortgage after AgCountry denied the operating loan.

Appendix 170.

[¶44] The connection between the enrichment and impoverishment is further bolstered by the fact that AgCountry intended McDougalls to rely on its statements ("Aanderud knew his conversation with Kent McDougall would be relayed to Michael McDougall, as the title owner, in order for a mortgage upon the Home Quarter to occur."). Appendix

166. McDougalls then explicitly relied on AgCountry's statements to transfer the "Home Quarter" to Kent and Erica ("Micahel McDougall testified he would not have transferred the Home Quarter if he knew Kent and Erica McDougall still would not qualify for a refinance or operating loan."). Appendix 166.

3. No justification exists between the enrichment and the impoverishment.

[¶45] AgCountry cannot show that its enrichment and McDougalls' impoverishment is justified. North Dakota case law addressing the issue of the justification prong states that "[t]he doctrine of unjust enrichment serves as a basis for requiring restitution of benefits conferred in the absence of an express or implied in fact contract." Midland Diesel Service & Engine Co. v. Sivertson, 307 N.W.2d 555, 557 (N.D. 1981) citing Beck v. Lind, 235 N.W.2d 239, 250 (N.D. 1975). "The doctrine is invoked 'when a person has and retains money or benefits which in justice and equity belong to another.'" Id. citing Schlichenmayer v. Luithle, 221 N.W.2d 77, 83 (N.D. 1974). The complainant need only show that the recipient of the benefit "has, without justification, obtained a benefit at the direct expense of the former, who then has no legal means of retrieving it." Id. "The essential element in recovering under the theory is the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value." Id., citing Hayden v. Medcenter One, Inc., 2013 N.D. 46, ¶ 14, 828 N.W.2d 775.

[¶46] The case of Midland Diesel Service & Engine Co. v. Sivertson, 307 N.W.2d 555, 557 (N.D. 1981) is illustrative of the issue of retaining a benefit without paying for its value. In that case, a man purchased a diesel engine from a merchant on credit to install in a truck titled in his father's name. The truck was used for a trucking business operated by the purchaser in a partnership with his father. No payments were ever made for the diesel engine. The trucking business went into bankruptcy and the father took possession

of the truck. The merchant sued the father for unjust enrichment. The court ruled that the father was unjustly enriched by retaining possession of the engine without payment.

[¶47] Similarly, in Schroeder v. Buchholz, 2001 ND 36, ¶¶ 14-18, 622 N.W.2d 202, this court found a lack of justification.

> The value of the Buchholz property has increased, due in large part to the efforts and contributions of the Schroeders. The Schroeders assisted Dennis Buchholz with his business, which was operated on the property. The Schroeders shared costs, expenses, and labor for improvements with Buchholz. The Schroeders' purchase of a well and pressure tank system to service both houses, the jointly installed and serviced heating system, and the Schroeders' purchase of lumber and materials to convert the barn into a shop are evidence of an impoverishment. The time, labor, and materials provided by the Schroeders for the overall improvement of the whole property are further evidence of an impoverishment. We conclude the district court's findings and conclusions aptly set forth an enrichment of Dennis Buchholz, an impoverishment of the Schroeders, and a connection between the enrichment and impoverishment.
>
> Unjust enrichment requires a finding by the court of the absence of a justification for the enrichment. The district court concluded the **Schroeders expected a right to reside on the property for life.** Although a reasonable interpretation of the facts may suggest the Schroeders' efforts and contributions were a token of familial love and affection, the district court's conclusion is equally sustainable [emphasis added]. In light of the Schroeders' payment of half the purchase price, their contributions to the improvement of the property, the testimony indicating the Schroeders did not provide substantial gifts to their other children, and all the evidence before the court, we conclude the absence of a justification for the enrichment is supported by the district court's findings.

Schroeder v. Buchholz, 2001 ND 36, ¶¶ 14-18, 622 N.W.2d 202

[¶48] Here, AgCountry was enriched at McDougalls' expense and no justification exists for that enrichment. McDougalls' sole purpose in transferring the "Home Quarter" to Kent and Erica was for AgCountry to provide new financing. "Michael McDougall testified he would not have transferred the Home Quarter if he knew Kent and Erica McDougall still would not qualify for a refinance or operating loan." Appendix 166. AgCountry never had any intention of advancing additional funds to Kent and Erica.

AgCountry received a valuable piece of real estate in exchange for a brief extension of Kent and Erica's loan maturity dates, which was of no value to McDougalls. Kent informed AgCountry in his e-mail that an extension of his loans had no value to him either absent new financing. Had McDougalls known that no value would actually be given, they never would have transferred the "Home Quarter." This is not a case of a gift of familial love and affection, as is discussed in Schroeder above. McDougalls had a clear objective in mind. They transferred the property in expectation of new financing to Kent and Erica. This was not a gratuitous gift.

[¶49] The justification for the enrichment and impoverishment is measured as between McDougalls and AgCountry. AgCountry was enriched; McDougalls were impoverished. What did McDougalls receive that justified their impoverishment? McDougalls acted upon a promise of a new operating loan that was not delivered. There is no justification for their impoverishment.

[¶50] It is unjust for AgCountry, as a third party who gained from the actions of McDougalls, to retain the benefit of that action without some compensation to McDougalls, particularly as the transaction only came about as a result of AgCountry's misrepresentations. The transaction between Kent and Erica and AgCountry exchanged a mortgage in the "Home Quarter" for an extension on their loan due dates. Whatever "adequate legal consideration for a contract" may have existed from AgCountry to Kent and Erica, it was not a justification to McDougalls for the loss of the "Home Quarter." They were not a party to the contract, and their only reason to be involved was to help Kent and Erica secure the promised additional financing from AgCountry.

4. McDougalls do not have an adequate remedy provided by law.

[¶51] McDougalls have no other adequate remedy to recover the value lost as a result of the mortgage imposed upon the real estate. McDougalls have no contractual relationship with AgCountry, and the jury failed to find in McDougalls' favor on their claim for deceit.

[¶52] Unjust enrichment claims are generally not available where a claimant has a remedy at law. McColl Farms, LLC v. Pflaum, 2013 N.D. 169, ¶ 19-20, 837 N.W.2d 359. North Dakota courts have also found that in cases where a legal remedy exists, if an equitable remedy may be more appropriate or is better for rendering complete justice, an unjust enrichment claim may be sustained.

> There is authority from other jurisdictions and some North Dakota case law that for a party to be entitled to equitable relief, that relief must be *better* adjusted to rendering complete justice than a legal remedy. A & A Metal Bldgs. v. I–S, Inc., 274 N.W.2d 183 (N.D.1978); Graven v. Backus, 163 N.W.2d 320, 327 (N.D.1968) ["... that the plaintiff may have a remedy at law by an action for damages does not prohibit an equity court from assuming jurisdiction if the equitable remedy is *better* adapted to render a more perfect and complete justice than the remedy at law."] [emphasis added]; Warren Tool Co. v. Stephenson, 11 Mich.App. 274, 161 N.W.2d 133, 147 (1968) ["... the existence of a legal remedy does not prevent equity from decreeing a *more complete* remedy."] [emphasis added]. The modern phraseology trend in North Dakota cases and among scholars is that if there is a legal remedy *equally* adjusted to rendering complete justice, the court will not generally apply equitable relief. Omlid v. Sweeney, 484 N.W.2d 486, 490 (N.D.1992) ["A fundamental principle of equity is that a 'party is not entitled to equitable relief if there is a remedy provided by law which is *equally* adjusted to rendering complete justice.' "] [emphasis added]; D.C. Trautman Co. v. Fargo Excavating Co., 380 N.W.2d 644 (N.D.1986); State v. Hooker, 87 N.W.2d 337 (N.D.1957); McGurren v. City of Fargo, 66 N.W.2d 207 (N.D.1954) ["But a legal remedy in order to be adequate in the sense involved in determining the jurisdiction of equity must be as practical and *as efficient* to the ends of justice and its prompt administration as the remedy in equity."] [emphasis added]; Dobbs, Handbook on the Law of Remedies § 2.5, p. 57 (1973). No matter how one chooses to phrase it ["better" or "equal"], the result is the same.

In Re Estate of Hill, 492 N.W.2d 288, n.3 (N.D. 1992). See also Raarum Estates v. Murex Petroleum Corp., 2015 WL 5692151 (D.N.D.).

[¶53] This Court has said that "[a] party with an **adequate** remedy at law generally is not entitled to an equitable remedy." Smestad v. Harris, 2011 ND 91, ¶ 14, 796 N.W.2d 662, 666. (Citing *Erickson v. Brown*, 2008 ND 57, ¶ 39, 747 N.W.2d 34.) (Emphasis added). The remedy must be adequate, not just a hypothetical remedy. This Court explained this principle.

> [W]hen there is no adequate legal remedy, or when the equitable remedy is better adjusted to render complete justice. See D.C. Trautman Co. v. Fargo Excavating Co., 380 N.W.2d 644, 645 (N.D.1986) ("[a] party is not entitled to equitable relief if there is a remedy provided by law which is equally adjusted to rendering complete justice"); A & A Metal Bldgs. v. I–S, Inc., 274 N.W.2d 183, 188 (N.D.1978) ("[a] court has equitable jurisdiction to provide a remedy where none exists at law"); Ziebarth v. Kalenze, 238 N.W.2d 261, 267 (N.D.1976) ("**the existence of a remedy at law does not preclude equitable relief if the equitable remedy is better adapted to render more perfect and complete justice**"); Graven v. Backus, 163 N.W.2d 320, 327 (N.D.1968) ("if the equitable remedy is better adapted to render more perfect and complete justice than" the legal remedy, it should be implemented).

Burr v. Trinity Med. Ctr., 492 N.W.2d 904, 908 (N.D. 1992). (Emphasis added.)

[¶54] AgCountry has failed to meet its burden of proof on this point that an adequate remedy exists at law. It merely alleges, without citation, that Kent and Erica's debt would be non-dischargeable in bankruptcy as to McDougalls. Not only is that statement not true on its face, but AgCountry has also not shown anything to establish the non-dischargeability of the claim; a breach of warranty alone is not a basis for finding a debt is not dischargeable under 11 U.S.C. § 523 or § 727. AgCountry acts as if it is entitled to a presumption that a debt discharged in bankruptcy is non-dischargeable simply because it raises the allegation. AgCountry fails to cite all of the necessary elements. Quite the

contrary, the court found that Kent and Erica attempted to put McDougalls in the same position they had been before Kent and Erica carelessly granted AgCountry the mortgage. "Michael McDougall testified he would not have transferred the Home Quarter if he knew Kent and Erica McDougall still would not qualify for a refinance or operating loan." Appendix 166, ¶ 7. Immediately following notice that AgCountry would not refinance Kent and Erica, they took "immediate action . . . to deed the "Home Quarter" back to McDougalls." Appendix 168-9, ¶ 18-19. Given these findings of fact, it is incomprehensible as to how the court could conclude that Kent and Erica committed some sort of behavior that would justify denial of discharge of the debt arising out of the warranty deed to McDougalls.

[¶55] The test is not just whether the claimant has a remedy, but an adequate remedy. The other legal remedies available to McDougalls are insufficient and inadequate. McDougalls would have possessed an unsecured claim in Kent and Erica's chapter 7 bankruptcy case that essentially replaced AgCountry's unsecured claim in that bankruptcy. AgCountry, due to their fraudulent inducement causing the transfer of the "Home Quarter," became a secured creditor at McDougalls' expense. There is no remedy available in bankruptcy court that will make up for McDougalls' changed position from owning the "Home Quarter" to an unsecured creditor. Further, any claim for unsecured debt they could file in Kent and Erica's bankruptcy would be discharged, just as AgCountry's claim would have been had it not surreptitiously taken the "Home Quarter." It is particularly ironic that AgCountry argues that McDougalls could have attempted to have Kent and Erica's debt declared to be non-dischargeable as the entire sequence of events arises from AgCountry's misrepresentations.

[¶56] McDougalls' only remedy would be to pursue an insolvent debtor. This is the same position as the appellant in the Midland Diesel case discussed above. The Court in that case determined that even in cases of alternative remedies or the option to pursue an insolvent debtor, the remedies may not be adequate and an unjust enrichment claim sustainable. Midland Diesel, 307 N.W.2d at 558. This Court has held that courts err when they dismiss an "unjust enrichment claim solely based on [the] determination that a remedy at law was available. [underlining added]" McColl Farms, 2013 ND 169, ¶20, 837 N.W.2d 359. The remedy must be adequate. That is particularly poignant in this case. McDougalls transferred land (for sake argument valued at $400,000) to allow AgCountry to have security for an additional amount ($400,000). As a result, AgCountry's unsecured claim in Kent and Erica's bankruptcy case was reduced by $400,000 and McDougalls now had a $400,000 unsecured claim in the bankruptcy case. Is the allowance of an unsecured claim in a bankruptcy case of $400,000 an adequate remedy for loss of $400,000 in real estate? It depends on whether unsecured claims will be paid 100%. Instinctively, it is not an adequate remedy. If McDougalls were to be paid 100% of their claim in bankruptcy, they would not be pursuing that same $400,000 from AgCountry and logically, AgCountry would not have fought so hard to keep the collateral if it could have gotten paid the same amount for that claim in the bankruptcy. McDougalls do not have an adequate remedy.

D. Prejudgment Interest was Properly Awarded from April 6, 2016.

[¶57] AgCountry argues that the trial court improperly awarded prejudgment interest on the award. "In an action for the breach of an obligation not arising from contract and in every case of oppression, fraud, or malice, interest may be given in the discretion of the

court or jury." N.D.C.C. § 32-03-05. This Court "review[s] decisions applying this statute under the abuse of discretion standard and, in this context, a court abuses its discretion 'if it misinterprets or misapplies the law.'" PHI Financial Services, Inc. v. Johnston Law Office, P.C., 2016 ND 20, ¶ 32, 874 N.W.2d 910, citing Roise v. Kurtz, 1998 ND 228, ¶ 24, 587 N.W.2d 573.

[¶58] Here, the trial court did not abuse its discretion as it did not misinterpret or misapply the law. The right to recovery became vested in McDougalls on the date they transferred the "Home Quarter" to Kent and Erica (April 5, 2016) which is the same date that AgCountry recorded a mortgage on the property. As of that date, McDougalls lost their rents from and equity in the land.

[¶59] April 5, 2016 is also the date when AgCountry received its value. AgCountry bolstered their recovery and recognized value by virtue of the mortgage. AgCountry placed significant value on the property, as shown by their valuation at the foreclosure sale. If there was any delay in AgCountry receiving funds from liquidating the property, it was due to their decisions in how and when to sell the "Home Quarter". AgCountry's delays should not affect the determination of the date it received value. As such, it is an appropriate date to begin calculating pre-judgment interest and is not an abuse of the trial court's discretion.

[¶60] AgCountry relies on the case of United Hosp. v. D'Annunzio, 514 N.W.2d 681 (N.D. 1994) to support its claim that the award of prejudgment interest in inappropriate. That case is distinguishable. United Hospital addressed an ambiguous statute and its application to the state's obligation to provide medical care for prisoners. This Court denied an award of prejudgment interest because the claims for unjust enrichment in that

case were uncertain and unliquidated. No award existed until this Court found that a claim under that particular ambiguous statute was actionable. This case is distinguishable as the time of McDougalls' injury is ascertainable, possessed a liquidated value as determined by AgCountry's own foreclosure sale value, and no ambiguous statute requires the input of this Court in determining the rights of the parties in interest. As such, United Hospital has little application to this case.

[¶61] AgCountry also relies on the case of Midland Diesel Service & Engine Co. v. Sivertson, 307 N.W.2d 555 (N.D. 1981). The procedural posture of that case distinguishes it from the trial court decision in this case. In Midland Diesel, the trial court entered a judgment based on a claim of unjust enrichment but did not award prejudgment interest. This Court found that denying prejudgment interest was not an abuse of discretion. In this case, the trial court found that an award of prejudgment interest was appropriate. N.D.C.C. § 32-03-05 grants the trial court that discretion. AgCountry has failed to meet its burden of proving that the trial court abused its discretion awarding prejudgment interest. As such, the trial court's decision should be sustained.

E. The Trial Court's Award of Costs and Disbursements to McDougalls Was Not an Abuse of Discretion.

[¶62] AgCountry's final argument on appeal is that the trial court erred in its award of costs and disbursements to McDougalls. AgCountry takes issue with $1,890.15 for deposition costs incurred in the bankruptcy proceedings, $3,803.35 for trial transcripts of the bankruptcy proceedings, and other unspecified costs related to the previous appeal in this matter. The trial court's award of such costs and disbursements to McDougalls are appropriate and not an abuse of discretion.

[¶63] N.D.C.C. § 28-26-06 controls the taxation of costs and disbursements in favor of the prevailing party from actions proceeding in state courts. Fees allowed include "[t]he necessary expenses of taking depositions and of procuring evidence necessarily used or obtained for use on the trial[.]" N.D.C.C. § 28-26-06(2).

[¶64] "A trial court's decision on fees and costs will not be overturned on appeal unless an abuse of discretion is shown. A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner. [citations omitted]." Braunberger v. Interstate Engineering, Inc., 2000 ND 45, ¶ 16, 607 N.W.2d 904. "An abuse of discretion is never assumed; the burden is upon the party seeking relief to affirmatively establish it." Peterson v. Ramsey County, 1997 ND 92, ¶ 18, 563 N.W.2d 103, citing Grinaker v. Grinaker, 553 N.W.2d 204, 207 (N.D.1996).

[¶65] Here, AgCountry has failed to meet its burden to show that the trial court abused its discretion by acting in an arbitrary, unreasonable, or unconscionable manner. AgCountry's point appears to be that some of the taxed costs were incurred in the bankruptcy proceeding. The standards for award of costs and disbursements are fairly liberal. In fact, deposition costs may be taxed whether the deposition is actually used in trial or not. Patterson v. Hutchens, 529 N.W.2d 561, 567 (N.D. 1995) citing Fleck v. ANG Coal Gasificaiton Co., 522 N.W.2d 445 (N.D. 1994), see also Lacher v. Anderson, 526 N.W.2d 108, 112 (N.D. 1994). The Court in Lacher, in examining the language of N.D.C.C. § 28-26-06, found that:

> [T]he Legislature, in authorizing recovery of expenses for depositions "used or obtained for use on the trial," did not thereby intend to limit those expenses to depositions actually introduced into evidence at trial. The word "used" has a broader connotation. When a party takes a "discovery" deposition, there may be many possible intended "uses" at trial.

Id.

[¶66] N.D.C.C. § 28-26-06 allows taxation of deposition costs "necessarily used or obtained for use on the trial." The depositions of AgCountry personnel were taken in the bankruptcy case but were used at every stage of the state court proceedings. This approach saved time and expense by preventing duplicative deposition costs. Similarly, the transcripts of testimony given at the bankruptcy trial were used to monitor the consistency of testimony given at trial in the state court proceedings. These expenditures were important and necessary to develop the factual record at the state court trial. The costs have not been taxed in any other proceeding, so there is no double recovery of any of these costs. Rather, this taxation of costs represents the final outcome for all the underlying litigation, making it the appropriate venue for an award of costs. This issue has been raised before numerous courts throughout the country. Those courts have held that the mere fact that costs were incurred in a separate proceeding does not preclude them from being taxed in related litigation. See Sprint Communications Co., L.P. v. Time Warner Cable, Inc., 334 F.R.D. 443, 447 (D. Kan. 2019). The applicable standard is whether the costs were incurred in obtaining evidence for use at trial. Here, the depositions taken in the bankruptcy case were taken for use at trial and were, in fact, used at trial in this matter. As such, the trial court's taxation of those costs is not an abuse of discretion.

CONCLUSION

[¶67] Michael and Bonita McDougall respectfully request that the court affirm the decision of the district court in all respects.

STATEMENT REGARDING ORAL ARGUMENT

[¶68] McDougalls requested oral argument in this matter pursuant to N.D.R.App.P. 28(h). Oral argument is requested only as necessary to respond to Appellant's oral argument and whatever arguments it may raise in its reply brief. If this matter were fully submitted to this Court as of the submission of this brief, and no reply brief or argument were submitted by Appellant, no oral argument would be necessary or requested by McDougall.

Dated this 6th day of April, 2021.

/s/ Patrick J. Sinner

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Dated this 1st day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2021, the following document:

Appellee's Brief

was filed electronically with the Clerk of Court through North Dakota Supreme Court E-Filing Portal and a copy of the above listed document was sent electronically to the following:

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Dated this 1st day of April, 2021.

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I hereby certify that on April 6, 2021, the following document:

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was filed electronically with the Clerk of Court through North Dakota Supreme Court E-Filing Portal and a copy of the above listed document was sent electronically to the following:

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