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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA

4201 2ND Ave. W., LLC, d.b.a. Safari Fuels 105, Plaintiff and Appellant, vs. First State Bank & Trust, Defendant and Appellee, and First State Bank & Trust, Third-Party Plaintiff and Appellee, vs. 4201 2nd Ave. W., LLC, Third-Party Defendant and Appellant, and Safari Fuels Management, LLC, Topped Off Coffee, LLC, Third-Party Defendants and Appellant, and City of Williston, Third-Party Defendants and Appellees.	Supreme Court No. 20220309 Williams County District Court Case No.: 53-2021-CV-00979

APPELLANT 4201 2nd AVE. W., LLC, D/B/A/ SAFARI FUELS 105
BRIEF APPEAL FROM NORTHWEST JUDICIAL DISTRICT COURT'S JUDGMENT DATED JULY 29, 2022
HONORABLE KIRSTEN M. SJUE, DISTRICT JUDGE

ORAL ARGUMENT REQUESTED

APPELLANT'S BRIEF

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¶(4) Whether upon remand 4201 is entitled to recover its attorney's fees provided for under the Pledge Agreement as a matter of contract interpretation as a matter of law. (*de novo* review)

APPELLANTS' STATEMENT OF THE CASE

¶(5) This action was commenced by service of the Summons and Complaint captioned 4201 2nd Ave. W., LLC d.b.a. Safari Fuels 105 ("4201") Plaintiff vs. First State Bank & Trust, Defendant ("First State") by service made August 23, 2021, which Complaint sought equitable declaratory relief on the issue whether First State Bank held any current enforceable lien in and to the liquor license obtained by 4201.

¶(6) First State Bank filed an Answer and Counterclaim September 13, 2021, together with the service of a third-party Complaint with First State Bank as Plaintiff naming and joining 4201, Safari Fuels Management, LLC ("Safari"), Topped Off Coffee, LLC ("Topped Off") and City of Williston ("City") as third-party Defendants. The third-party action concerned First State's claim and delivery action for numerous items of personal property which was located on the convenience store property operated by 4201 d.b.a. Safari. The City was added as a party to enjoin the City from granting 4201's application to move the liquor license to a new business location after First State foreclosed its mortgage given by a non-party land owner (OK Tire) foreclosed upon by First State in a prior mortgage foreclosure action, and to hold the status of the subject liquor license and other personal property until such time as the main action for determination of the status of First State's claimed lien had been determined in this action.

¶(7) After Service of the Answer by the City of Williston and Answer by 4201 and the other Third-Party Defendants, First State Bank, by Motion filed December 23, 2021, sought an expedited Order granting a temporary and preliminary injunction to prevent the subject liquor license from timing out or otherwise being cancelled by the City, pending the full adjudication of the declaratory relief action initially brought by 4201 in this action. The District Court held an expedited hearing on First State's Motion for injunctive relief and by

Order dated and entered December 29, 2021 did grant First State's Motion for injunctive relief to stay the status of the subject liquor license until such time as the issue, whether First State Bank still held a valid and enforceable lien in and to the subject liquor license and other personal property, had survived the prior foreclosing action, was adjudicated.

¶(8) A trial was held to the Court on all claims and third-party claims March 10, 2022, the Honorable District Judge Kirsten Sjue presiding, with all parties appearing together with their respective counsel of record.

¶(9) Post trial briefs and proposed findings were submitted by the parties, and after review, the trial court, by Findings and Order dated July 29, 2021, did publish its Findings and Conclusions of Law, holding, First State Bank had not waived, nor was prevented, by application of *res judicata,* collateral estoppel or waiver, lost its claimed right to hold and foreclose its claimed lien, in and to, the subject liquor license and other claimed personal property; and that such rights, had survived the prior foreclosure action. Further, the trial court ruled to allow the Bank the right to now foreclose such lien, to foreclosure and pursue to establish a deficiency judgment, in the prior foreclosure action, and awarded attorney's fees and costs in favor of First State Bank.

¶(10) Judgment pursuant to the Order in this action is dated September 9, 2021 and Notice of Entry of Judgment was filed and served September 13, 2022.

¶(11) Notice of Appeal by 4201 d.b.a. Safari and on behalf of all Third-Party Defendants (except the City) was filed and served October 18, 2022.

¶(12) This matter is now on appeal to the North Dakota Supreme Court.

APPELLANTS' STATEMENT OF FACTS

¶(13) 4201's action for equitable declaratory relief has its roots in the 2016 civil action for foreclosure, Civil No. 53-2016-CV-01477, captioned, *First National Bank & Trust Company of Williston v. OK Tire Store Williston, Racers Store 102, L.L.C., et al.;* (hereinafter "foreclosure") which action involved the foreclosure of a Promissory Note and real estate Mortgage for the truck stop-convenience store under a Ground Lease with OK Tire and operated by Racers Store 102, L.L.C., ("Racers") in North Williston. The lawsuit was a straight vanilla flavored foreclosure, with the only wrinkle being the real estate mortgaged by Racers Store 102, L.L.C., to collateralize the loan, was a mortgage lien given for a 99 year lease from the landowner of record (OK Tire Store of Williston). The financing package negotiated between the Bank and Racers involved the usual mortgage lien, personal guaranty by the managing member majority owner of Racers, Charles Horning, UCC-1 filing for store inventory, equipment and proceeds from all sales of inventory sold such as gas, chips, pop and liquor. To sell beer and liquor, a license was required, and Racers held City of Williston Liquor License No. 125 ("liquor license"). The Racers Store 102, L.L.C. in Williston, was a stand-alone Limited Liability Company and was one of four Racers branded store locations set up in Minot, Stanley and Williston, each store was set up under its own limited liability company, and each store had a separate loan package and financing funded by First National Bank & Trust Company of Williston p.k.a. First State Bank & Trust. (hereinafter "First State" or "Bank").

¶(14) In the loan package for Racers Store 102, L.L.C. in Williston, for the Note in the sum of $4,340,000.00 dated November 4, 2015, was a leasehold Mortgage given by Racers of same date of November 4, 2015, and the usual Security Agreement, given by Racers, referencing the November 4, 2015 Note. For purposes of this action, for Declaratory Judgment relief, Plaintiff

4201 does admit the Security Agreement dated November 4, 2015, prior to the Judgment entered in the foreclosure action did cover the subject liquor license, equipment and inventory utilized on site for operation of the Racers Store 102, truck stop and convenience store located in North Williston.

¶(15) The Racers Store 102, L.L.C. Note went into default and the Bank started its legal action to accelerate the loan and foreclose on the Bank's security by litigation commenced in October 2016, ("foreclosure action").

¶(16) The foreclosure Complaint in civil action 01477 does reserve the right to seek a deficiency Judgment (R78:4:22) and the Complaint states the personal property assets will be sold first and the proceeds applied to the Judgment amount before any real property is sold (R78:5:26).

¶(17) The Bank took over physical operations of Racers Store 102 in November 2017 to preserve the assets involved in the foreclosure and contracted to employ the services of 4201 to operate the store as a going concern. The Bank prepared all documents and was the facilitating party, to arrange for 4201 to take over possession of the convenience store by 4201 obtaining an assignment of the Ground Lease from OK Tire and operate the store subject to the liens held by the Bank. (Forbearance Agreement R79:1-9) and Addendum to Forbearance Agreement (R80:1-2). 4201 took over the Ground Lease and business operations of the store effective November 20, 2017.

¶(18) The Forbearance Agreement and Addendum to Forbearance Agreement contain clear language setting forth the duties and responsibilities agreed to by 4201: to assume all operational expenses; pay the property taxes; and split the operating profits pursuant to percentages set by the Bank. It was admitted at trial several times by the Bank chief loan officer, Chris Jundt; that 4201 did fully comply with the terms of the Forbearance Agreement

and the Addendum to Forbearance Agreement; and further, that 4201 did not in any way, breach such Forbearance Agreements with the bank. (Transcript at R118:41:11-14).

¶(19) In specific rebuttal to the Bank's claim of "unjust enrichment" against 4201, the Forbearance Agreement provided for cash payments to the Bank by 4201: for 4201 to pay the real estate taxes, (amount over $25,000.00); for 4201 to pay to get current with all delinquent vendors; for 4201 to pay all operational bills for wages, fuel and inventory; for 4201 to split all net profits when such profits were realized according to the percentages set by the Bank. Such payments by 4201 on these items, for the benefit of the Bank, was testified to be a sum over $100,000.00 dollars. (Jundt testimony at transcript R118:37:5 to R118:40:9).

¶(20) In addition to the above payments and costs assumed by 4201, the unjust enrichment claim by the Bank, is indeed debunked, by the major reason the Bank wanted someone to take over operations of the store as a going concern; that reason was for 4201 to continue to operate the store to make continuing qualifying payments into the State of North Dakota's underground fuel tank remediation fund. The Bank was looking ahead to cut down liability for expected environmental remediation costs after the Bank obtained title to the property. The testimony of the cash outlay the State had already paid for such environmental fuel tank remediation, was the testimony by Bank officer Chris Jundt stating payments made by the State fund was currently of over $300,000.00. The above payments by 4201 support significant consideration paid by 4201 in support of 4201 acquiring Williston Liquor License No. 125 and rebukes the Bank's claim of unjust enrichment by 4201 in this action.

¶(21) The sale of liquor was a significant source of revenue for Racers Store 102 and was a significant source of income relied upon by 4201 when 4201 contracted to take over operations of the Racers store. The Forbearance Agreements, contemplated, did specifically provide for, the transfer of Williston Liquor License Permit No. 125 from Racers Store 102, L.L.C. to 4201.

(See Addendum to Forbearance Agreement R80:1:6-7). The Forbearance Addendum Agreement, specifically provided that 4201, by agreeing to take over and operate the store for the Bank, 4201 did not assume any of the Racers Store 102, L.L.C. debts, to the Bank. The Bank was a signature party to the Addendum to the Forbearance Agreement (R80:2), where the Addendum recites that 4201 will be receiving "the liquor licenses held by Racers Store 102, L.L.C. and/or Racers store management," and further, states in paragraph 6 of the Addendum (R80:1:6-7); as follows:

> That 4201 has made an application to the City of Williston to transfer the liquor license held by Racers Store 102, LLC and/or Racers Store Management, LLC. Upon successful application, renewal and/or transfer of the liquor license to 4201, the liquor license becomes an asset of 4201 subject to the existing lien held by First National for the Races Store 102, LLC loans. 4201 shall execute any and all documents necessary to continue the existing lien over the liquor license or it shall execute any and all additional documents to grant a new security interest in the liquor license to First National.

Accordingly, the Bank intended, and did set forth in the Forbearance Agreements, clear wording, 4201 would take the subject liquor license as "an asset of 4201" subject to the lien held by the Bank for the Note and debt owed by Racers Store 102, L.L.C..

¶(22) One month after the effective date of the Forbearance Agreement (effective November 21, 2017) Racers Store 102, L.L.C. signs a Bill of Sale (R82:1-3) dated December 20, 2017, for the consideration stated and Racers did sell to 4201 "all assets of Racers Store 102, L.L.C., all proceeds and claims in relation thereto, licenses, liquor licenses, permits" etc.. and, the Bill of Sale and Assignment recites such sale is made subject to the security interest held by the Bank for the Note and debt of Racers to the Bank.

¶(23) Two months after the Bill of Sale, after Williston Liquor License No. 125 is formally transferred into 4201 by action of the City of Williston; the Bank requested, and 4201 signed; a Third-Party Pledge (R81:1-3) stating while 4201 does not assume any and all obligations to

the Bank for the Note of $4,340,000.00, 4201 does acknowledge the Bank's lien in the subject liquor license as of February 1, 2018 with the following contract language:

> "Lender is hereby guaranteed all of the rights and remedies under the laws of the State of North Dakota, including, but not limited to the sale of the property PLEDGED hereunder."
>
> (See Pledge, R81:1-3)

¶(24) Accordingly, from the above documents it is conclusively established, without challenge, that as of February 1, 2018:

a. 4201 had purchased all personal property, inventory, non-fixture equipment, licenses for gas, liquor license rights and all other assets of Racers Store 102, L.L.C. subject to the security interest held by the Bank for the Note owed by Racers Store 102, L.L.C., to the Bank.

b. The foreclosure process by the Bank had begun but no court Findings, Order of Judgment or Judgment had yet been obtained by the Bank in Civil No. 01477 foreclosure action.

c. 4201 held and owned Liquor License No. 125 subject to the lien rights by the Bank for the security package for the Racers Store 102, L.L.C. loan.

d. 4201 d.b.a. Safari had no loans with the Bank, and had no contractual relationship with the Bank to assume or pay anything for the Racers Store 102, L.L.C. Note being foreclosed by the Bank.

e. 4201 took on significant debt to third parties to pay the real estate taxes, vendors, wages and operate the convenience store splitting the profits with the Bank and maintain the State fuel tank insurance coverage then so important to pay for expected environmental cleanup of the property.

¶(25) The Exhibits 9, 10, 11, 13 and 14 received at trial [1] document the foreclosure process followed by the Bank, through Court Findings, Judgment and Sheriff's Sale in the Foreclosure action Civil No. 01477, which Findings and Judgment, are now conclusive, final, and not subject to be reopened under Rule 60 of Civil Procedure, as no Motion to reopen the Judgment and seek to foreclose any lien in the subject personal property has yet to be made by the Bank.

¶(26) These Exhibits here referenced filed in the foreclosure action conclusively document, that, although the Bank reserved a right to seek a deficiency Judgment and right to sell off the personal property first, to apply to the Judgment obtained, before selling the real estate at Sheriff's sale; no such right was followed through by the Bank in the Judgment. The Bank elected to only move on foreclosure of just the land, and did not levy upon, nor sell, any of the personal property in which the Bank then had a lien, such conduct by the Bank is a clear waiver of a known right.

¶(27) The Bank also elected to negotiate a stipulation for a waiver of the time period for redemption, to accelerate when the Bank could receive a Sheriff's Deed for the real property. (R96:1)

¶(28) The Bank also admitted at trial, that the Bank did settle out the personal guaranty liability of Charles Horning, in a package deal involving; all Racers stores loans, which included the Racers Store 102, L.L.C. Note held by the Bank then in foreclosure. (Jundt testimony, transcript R118:63:18 to R118:64:12)

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[1] Exhibit 9, Findings of Fact, Conclusion of Law and Order for Judgment (R83:1-12) entered March 13, 2019; Judgment (R84:1-5) entered March 29, 2019; Notice of Entry of Judgment (R85:1) entered March 29, 2019; Exhibit 12, Writ of Special Execution (R86:1-2) dated April 18, 2019, Exhibit 13; Notice of Execution of Sale (R87:1-2) dated April 22, 2019, (Sale date of May 28, 2019); Exhibit 14, (R88:1-3) Sheriff's Report and Return on Special Execution of Real Property dated May 29, 2019, Exhibit 15, (R89:1-2) Order Confirming Sale dated June 4, 2019.

¶(29) The court record conclusively shows, as a fact, by May 15, 2019, the litigation to foreclose and collect upon the Racers Store 102, L.L.C. Note of November 4, 2015 had been fully adjudicated, and all the assets the Bank sought to be included in the Judgment entered in Civil No. 01477, had been fully collected upon by the Bank. The Note had been reduced to Judgment and the Judgment had resulted in a Sheriff's sale of the real property assets. The Bank, for whatever reason, had not sought to foreclose any lien, in and to, any of the Bank's security in personal property, specifically, Williston City Liquor License No. 125.

¶(30) After obtaining title to the land through foreclosure, the Bank replats the property as "3rd Avenue Subdivision" by plat dated September 18, 2020 and the Bank continued with 4201 operating the convenience store, until the Bank gave notice, in March 2021 the Bank was closing the convenience store operated by 4201 effective April 1, 2021.

¶(31) Upon receiving notice in March 2021 that the Bank was closing the convenience store in April 2021, 4201 did start closing down the store and removing assets without objection from the Bank and did then start the application process to move the business site for liquor sales under liquor license No. 125 to a new business location.

¶(32) The application filed by 4201 d.b.a. Safari Fuels 105 was dated and delivered with all fees paid to the City of Williston Auditors office March 18, 2021, and such application to transfer the location was set for City Commission approval for the April 27, 2021 meeting of the Williston City Commission. The Bank informed the City of Williston, the Bank claimed a lien in liquor license No. 125 and would object to such transfer of location. This action by the Bank resulted in the 4201-Safari application (as to location-not ownership) to be tabled and taken off the Agenda for the April 27, 2021 Commission meeting and was not put back on the agenda of the City of Williston until December 2021, 4201's application is still pending with the City of Williston due to the current injunction Ordered by this Court.

¶(33) After almost 3 mutually beneficial years, with 4201 operating the convenience store and the Bank knowing that 4201 had to move the business location for liquor license No. 125 (to preserve the liquor license due to inactivity), the Bank after giving notice to 4201 that the store would close effective April 1, 2021; the Bank objected to 4201's application for the transfer of location of the subject liquor license. The April 27, 2021 City Commission agenda, for the transfer of liquor license, then falls into limbo, the transfer is taken off the City Commission agenda and the Bank then offers to "sell" its alleged lien to 4201. The Bank even offers to finance 4201 to purchase the lien for $250,000.00.

¶(34) After 4201 finds out that the Bank is objecting to the transfer of location and the Bank wants $250,000.00 to release its alleged lien, 4201 retains attorneys and two demand letters are written to the Bank's attorney stating the Bank had waived and abandoned its right to any lien in the prior foreclosure action. (See Exhibit 24A R100:1-2, letter of May 28, 2021, and Exhibit 24B R101:1-3, letter of July 21, 2021)

¶(35) The Bank responds, not through Counsel, but by letter of August 9, 2021 sent directly to 4201; stating unless the Bank is paid $250,000.00 the Bank will be foreclosing its lien and selling the license. (R103:1)

¶(36) In response to the Bank's demand letter of August 9, 2021, 4201 did commence this action for equitable declaratory relief, on the issue of the lien status of the alleged lien, in and to, Williston Liquor License No. 125 by Complaint filed in this action dated August 19, 2021.

¶(37) In response to the commencement of this action for declaratory relief (no claim for civil damages), the Bank responded with a temper tantrum by unilaterally giving Raymond Melendez and 4201 notice it was closing all bank accounts involving any company for which Raymond Melendez, (Melendez was Managing Member of 4201), and was also a signature for his several companies and gave formal notice of civil trespass if Melendez, or any of his

employees, walked into any branch of the Bank. This conduct by the Bank came after Melendez and his companies never had any account problems in a banking relationship lasting over many (4) years. (Melendez testimony R118:180:10 to R118:182:5)

¶(38) On the issue relating to the Bank's Counterclaim against 4201-Safari for the conversion or damages to personal property located on the Racers store property, the testimony at trial was, before the rift over the liquor license issue surfaced, the Bank had given away the ice machine to Joes Digging Service, had not shown any interest in the onsite chattel assets, and the Bank had informed both Raymond Melendez and 4201 employee, Doug Hansen, "the Bank had no interest in holding a rummage sale" for the non-real estate items, such as the walk in cooler, gas pumps, coffee kiosk, generator and the like. (Hanson testimony R118:116:4 to R118:120:7), The emails between the Bank officer Chris Jundt and Melendez show there was no intent by the Bank to preserve or sell of such items. More particularly, there is no communication in the emails, that the Bank claimed any lien, in and to, any non-real estate chattel property, until and after, the attempted sale by the Bank of its alleged lien in the liquor license for $250,000.00 to 4201 fell through. The Bank then declared war on a long time good customer Raymond Melendez. The Bank involved the Williston Police when the coffee kiosk was being inspected by 4201 for being moved off site to help clear the property for site remediation and 4201-Safari even swept up the inside of the convenience store, on its way out the door.

¶(39) The facts show the Bank knew it had a lien on the personal property, liquor license and other collateral as it reserved the right to foreclose such lien and sell the personal property as set forth in the foreclosure Complaint, and then, elected to not foreclose or sell any personal property.

LAW AND ARGUMENT

I. ISSUE NO. 1

Whether the District Court erred in ruling First State Bank was not barred by application of Section 32-19-06.1 N.D.C.C. from obtaining a deficiency judgment in the subject prior foreclosure action as a matter of law. (*de novo* review)

¶(40) All roads in this appeal lead to the initial issue whether First State Bank complied with the requirements of 32-19-06.1 N.D.C.C. to preserve any right to seek a deficiency judgment in the underlying foreclosure action [2] to foreclose on its mortgage for the convenience store commercial property. The facts of such foreclosure are well documented and undisputed as shown by the Exhibits referenced in the above statement of the case. The status of the land foreclosure being commercial property is undisputed in this action.

¶(41) The critical undisputed facts, show, the Bank did reserve in its Complaint the right to seek a deficiency judgment and the Complaint also states the bank would sell the personal property, first, before selling the land upon execution of any Judgment. Thus the Bank did make a claim against the personal property in the foreclosure action.

¶(42) It is also undisputed and documented; the Bank, did not, file any appraisal of the land with the Clerk of Court establishing fair market price; did not seek to include any market price of the land in the Court Findings or Judgment; and did not sell any personal property first or otherwise in the foreclosure action. The Bank took title only to the land, got the redemption period waived, replatted the subject land and has sold off a parcel.

¶(43) Section 32-19-06.1 N.D.C.C. requires, in relevant part: (1) an appraisal of the real

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[2] Williams County District Court Case No. 53-2016-CV-01477 *First National Bank & Trust Company of Williston, Plaintiff v. OK Tire Store Williston Inc., et al., Defendant*s.

property, (2) the court filing of such appraisal and (3) a specific funding be then made by the trial court in its Findings of the value of the land set forth in the Judgment with such value amount to be then credited to the Judgment.

¶(44) The above actions mandated by Section 32-19-06.1 N.D.C.C. as set forth in the statute are preceded in the statute by the word "shall" in 32-19-06.1 N.C.C.C..

¶(45) There was no claim in this action, that Section 32-19-06.1 N.D.C.C. is in any way ambiguous; and accordingly, construing the legislative intent of this statute only requires reviewing the language of the statute to give the statute its plain ordinary and commonly understood meaning. *Wilkins v. Westby,* 2019 ND 186, ¶ 6, 931 N.W.2d 229. It is established law in North Dakota that application of statutes are questions of law, fully reviewable on appeal, *Id.*

¶(46) This Court has consistently interpreted the use of the word "shall" in a statute to create a mandatory duty:

> Ordinarily, the "shall" in a statute creates a mandatory duty. The word "shall" is "generally imperative or mandatory....excluding the idea of discretion, and...operating to impose a duty." Where necessary to effect the intent of the legislature, however, the word "shall" will be interpreted as creating a duty that is merely directory. If the duty prescribed in the statute is essential to its main objectives, the word "shall" is to be construed as creating a mandatory duty.
>
> *State v. Norman*, 2003 ND 66, ¶ 20, 660 N.W.2d 549, *citing, Sweeney v. Sweeney,* 2002 ND 206, ¶ 17, 654 N.W.2d 407.

¶(47) "This Court gives words in a statute their plain, ordinary and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. *Wilkens v. Westby,* 2019 ND 186, ¶ 6, 931 N.W.2d 229. Issues regarding interpretation and application of statutes are questions of law and are fully reviewable on appeal". *Id.*

¶(48) "If the wording of a statute is clear and unambiguous the letter of it is not to be disregarded and the statute is construed in a practical manner giving consideration to the context of the statute and the purpose for which they were enacted". *Motisi v. Hebron Public School District,* 2021 ND 229, ¶ 11, 968 N.W.2d 191, *citing, Wilkens v. Westby,* 2019 ND 186, ¶ 6, 931 N.W.2d 229. *See also,* 1-02-05 N.D.C.C..

¶(49) Here, 32-19-06.1 N.D.C.C. plainly sets forth the unambiguous requirements any lender who is foreclosing on commercial property must follow to preserve any right to a deficiency Judgment. These requirements are clear and unambiguous for the purpose of not allowing any bank or lender to abuse its position against the borrower or guarantor to manipulate the Judgement amount and collect more value then what the Judgment creditor is entitled to do so in the foreclosure action [3].

¶(50) Here, it is undisputed and documented that First State Bank in the underlying root action for foreclosure did not follow the several mandates of 32-19-06.1 N.D.C.C., as follows:

- No appraisal of the value of the real estate was ever filed with the Court.
- No value of the real estate was ever included in the trial court's Findings or Judgment.
- At the Sheriff's Sale the Bank bid in 3.5 million on its 5 million dollar Judgment without any measure or application of the value of the real property foreclosed.

¶(51) Where, the mandates set forth in 32-19-06.1 N.D.C.C. were not followed by the Bank, it follows, no deficiency Judgment can be allowed to the Bank in this action as a matter of law.

¶(52) The trial court's opinion does not apply the mandates of 32-19-06.1 N.D.C.C. where

[3] See public policy against deficiency judgments and requirement for establishment of fair market value of land to reduce deficiency amount as discussed in *First State Bank of Cooperstown v. Ihringer,* 217 N.W.2d 857, 863-864 (ND 1974), see also *East Grand Forks Sav. & Loan Ass'n v. Mueller,* 198 N.W.2d 124, (ND 1972).

the trial court held the Bank still has options to foreclose its liens in the personal property to collect upon the 1.5 million deficiency when collecting on the Judgment. This is clear error at law by the trial court as a matter of law and ignores the strong public policy of enforcing anti-deficiency legislation. (See trial court Findings and Order R131:12:28)

¶(53) Further, the foreclosure Complaint does reserve the right to seek a deficiency judgment and states the personal property collateral will be sold first, however, no such action was taken by the Bank, and this conduct shows, the Bank waived this right. However, the trial court held no such waiver occurred in this action. (See trial court opinion R131:12:27)

¶(54) The Bank's Answers to 4201-Safari's Requests for Admissions confirmed by the Bank's Chief Commercial Loan Officer (Chris Jundt) confirmed: that only the land was included in the Judgment; that only the land was sold at the foreclosure sale; and that the Note was deemed reduced to Judgment by the Bank. (Jundt testimony at transcript R118:68:21-24)

Further, the Bank entered into an agreement to cancel trade off any liability on the personal guaranty of the Note, in exchange for, the waiver and cancellation of all redemption rights. (See Jundt testimony R118:70:1-13)

¶(55) The Bank, post Judgment, in the foreclosure action, took title to the land, replatted the land, sold off a newly platted parcel. The Bank has not, at any time, sought to reopen the foreclosure Judgment and correct any error to qualify for a deficiency or otherwise foreclose on any claimed lien in any personal property, including, the subject liquor license, walk in cooler and generator which are the subject of this action.

¶(56) The time for any amendment of the Judgment in the foreclosure action has long since run [4], and the Judgment is final with the debt fully foreclosed.

[4] The foreclosure Judgment was dated March 29, 2019. Rule 60 N.D.R.Civ.P.

¶(57) Here, the Bank has not made any Motion to relief from the Judgment in the foreclosure action under Rule 60 and has otherwise waived any right to do so now. Motions for relief from Judgment must be made within a reasonable time. *Bellefeuille v. Bellefeuille, supra* at ¶ 15 [5].

¶(58) While there is the option of collection of the debt where there exists a separate enforceable personal guaranty, in this case, the personal guaranty was waived by the Bank.

¶(59) Accordingly, the trial court erred, as a matter of law, by failure to apply 32-19-06.1 N.D.C.C. and hold the Bank did not qualify for any deficiency Judgment, and accordingly, that the Bank no longer had any debt owed by Racers and no lien to any of the personal property involved in the security agreement in the foreclosure action. There are eversible errors as a matter of law made by the trial court in this action.

II. ISSUE NO. 2

Whether by application of Rule 60 N.D.R.Civ.P. the District Court erred in ruling First State Bank still held a valid and enforceable lien in and to the subject liquor license and other personal property collateral as a matter of law. (*de novo* review)

¶(60) In addition to the application of N.D.C.C. 32-19-06.1, First State Bank is presently time barred by application of Rule 60 North Dakota Rules of Civil Procedure from reopening the Judgment in the underlying civil action to foreclose on the personal property even if a deficiency Judgment is now available to the Bank.

¶(61) The Court record is undisputed that the Complaint [6] in the foreclosure action did properly reserve the right to seek a deficiency Judgment and the relief requested stated the

[5] *Bellefeuille citing Koop v. Koop,* 2001 ND 41, ¶ 7, 9, 622 N.W.2d 726.
[6] See Complaint (R3:4:23,R3:5:26)

personal property would be sold first before the land. The Findings [7] and Judgment [8] do not mention anything about a lien or foreclosure to sell any personal property. The Judgment is dated September 9, 2022 and Notice of Entry of Judgment [9] was made September 13, 2022. Only the land was sold and the Bank got the landowner OK Tire to waive all redemption rights, after which, the Bank took title, replatted and sold off a parcel of the land so foreclosed.

¶(62) It is undisputed fact the court record in the foreclosure action reflects absolutely nothing has been filed since the filing of the Judgment and Notice of Entry of Judgment to reopen or amend the Judgment to foreclose any lien in the subject liquor license or to reopen or amend the Judgment in any way.

¶(63) Absent extraordinary circumstance, the Bank is now timed out under Rule 60 North Dakota Rules of Civil Procedure from amending or reopening the Judgment to now seek a deficiency to foreclose any prior lien the Bank claimed in the foreclosure action involving the personal property which includes the liquor license and personal property involved in this lawsuit on appeal. There is no debt remaining to apply any money from any sale of any personal property.

¶(64) The Bank is now prevented from reopening the Judgment entered in the foreclosure action as a Rule 60 motion is not available to relieve a party from free, calculated and deliberate choices made in the foreclosure action. *First Nat. Bank of Crosby v. Bjorgen,* 389 N.W.2d 789, 796 (N.D. 1986). A Rule 60 motion not made in a timely manner provided by Rule 60 will by application of laches or undue delay preclude the party from relief. *In re Estate of Hansen,* 458 N.W.2d 264, 270 (N.D. 1990). *Overboe v. Odegaard,* 496 N.W.2d 574, 579, (N.D. 1993),

[7] See Findings (R6:11:58)
[8] See Judgment (R7:2:5)
[9] See Notice of Entry of Judgment (R48)

Bellefeuille v. Bellefeuille, 2001 ND 192, ¶ 16, 636 N.W.2d 195.

¶(65) The foreclosure Complaint specifically states "Plaintiff will not in a later or separate action demand Judgment for any deficiency from Defendant OK Tire Store Williston Inc. Plaintiff reserves the rights to seek a deficiency judgment from Defendant Racers Store 102, LLC" (Complaint R3:4:23).

¶(66) In this action now on appeal, 4201 did at trial and in its post-trial Brief [10] to the trial court provide evidence and argument that both N.D.C.C. 32-19-06.1 and Rule 60 provided grounds, as a matter of law, that First State Bank had lost all right to seek any deficiency judgment and with it all right to claim a lien or foreclosure of the subject liquor license and other personal property now claimed by the Bank.

¶(67) The trial court, in its opinion ruling [11] held the Bank could still maintain an action against the personal property and held the Bank still held a valid lien in the subject liquor license, walk in cooler, electric generator and coffee kiosk as a matter of law. (Order R131:17:41-42)

¶(68) Such a holding by the trial court is clear reversible error as a matter of law, fully reviewable by this Court as a matter of law.

¶(69) Such ruling by the trail court also included the ruling as a matter of law, 4201 had no standing and no privity, to assert in this action the Bank had lost any right to assert and claim a lien to foreclose in the personal property.

[10] See Post Trial Brief of 4201 (R120:12-15:32-39, R120:15-16:40-42)
[11] See trial court opinion (R131:17:41-42)

III. ISSUE NO. 3

Whether the District Court erred in ruling 4201 d.b.a. Safari Fuels, LLC did not have required privity of contract, as assignee to the subject liquor license and personal property, to here in this action maintain First State Bank is now prevented by collateral estoppel and *res judicata* to foreclose any prior lien, in and to, the subject liquor license and personal property collateral as a matter of law. (*de novo* review)

¶(70) The above authorities establish that First State Bank is by application of 32-19-06.1 N.D.C.C. and by Rule 60, laches and waiver is now disqualified from now asserting any lien right or right to collect on any further amount as a result of the underlying foreclosure action. The next issue is whether 4201 can assert such claim against the Bank in this action for declaratory relief.

¶(71) Here, 4201 took the position: that the Assignment of Ground Lease by OK Tire [12]; Bill of Sale; Forbearance Agreements; UCC filing by Bank involving Safari (4201 d.b.a. Safari) and; Pledge all did involve 4201 in the foreclosure action, and align 4201 with the needed privity to challenge the Bank's continued lien rights to the liquor license and other personal property.

¶(72) The trial court also held, that 4201 does not have the needed "privity" to now challenge the Bank's right to now foreclose its lien in the subject liquor license and personal property. [13]

Such holding is now on appeal, fully reviewable as a matter of law, where the trial court stated:

> Here, 4201 was clearly not a party to the prior foreclosure action in Case No. 53-2016-CV-01477, nor was it in privity with a party to that action. Somewhat interestingly, 4201 contends that it was in privity with the Bank in the prior foreclosure proceeding, which perhaps underscores the unique posture of this case, as 4201 is actually a

[12] OK Tire assigned Ground Lease to 4201 with Bank's approval (Ground Lease R108:1-4)
[13] Racers sold all assets to 4201 with Bank's consent. Bank filed amended UCC-1 financial statement against Safari (UCC-1 R90:1-4 and R91:1-2)

> successor in interest to Racers in the personal property, subject to the Bank's security interest. Regardless, the Court concludes that 4201 was not in privity with either the Bank or Racers in the previous proceeding. 4201 was a middleman of sorts in the transaction, working cooperatively with the Bank to operate the store during the foreclosure period and accepting a transfer of assets from Racers, but it was not so identified in interest with either that it represented the same legal right. 4201 did not participate in litigation of the prior action in any way, doing such acts that are generally done by parties, and Racers, the party to whose interest 4201 succeeded, did not defend against the action in any meaningful way. *See Martin,* 2018 ND 28, ¶ 20, 906 N.W.2d 65; *Kulczyk,* 2017 ND218, ¶¶18-19, 902 N.W.2d 485.
>
> For all these reasons, the Court concludes that the Bank's claims against 4201 in this matter for the foreclosure of the personal property collateral at issue, including the liquor license, are not barred by either *res judicata* or collateral estoppel.

¶(73) This Court has stated it has adopted an "expanded" version of privity for claim preclusion. *Ungar v. North Dakota State University,* 2006 ND 185, ¶ 12, 721 N.W.2d 16. Privity exists if a person is "so identified in interest with another that he represents the same legal right" *Hofsommer v. Hofsommer Excavating, Inc.,* 488 N.W.2d 380, 384 (quoting 48 Am. Jur.2d Judgment Sec. 532 (1969).

> "The strict rule that a judgment is operative, under the doctrine of *res judicata,* only in regard to parties and privies, is sometimes expanded to include as parties, or privies, a person who is not technically a party to a judgment, or in privity with him, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein, at least where such right is actively exercised by prosecution of the action, employment of counsel, control of the defense, filing of an answer, payment of expenses or costs of the action, the taking of an appeal, or the doing of such other acts as are generally done by parties."

Lucas v. Porter, 2008 ND 160, ¶ 22, 755 N.W.2d 88, quoting *Hofsommer* at 384 (quoting *Stetson v. Investors Oil, Inc.,* 176 N.W.2d 643, 651 (N.D. 1970)

¶(74) "Privity has also been found when one is so identified with another that he or she represents the same legal right". *Kulczyk v. Tioga Ready Mix Co.,* 2017 ND 218, ¶11, 902 N.W.2d 485, *Lucas v. Porter,* 2008 ND 160, ¶ 22, 755 N.W.2d 88 (*citing, Hofsommer, supra).* "Privity has been expanded to include a person not technically a party to a judgment, but who

is connected with it by his interest in the prior litigation and by his right to participate in it". *Id.* 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. *Martin,* 2018 ND 28, ¶ 19, 906 N.W.2d 65. Fundamental fairness underlies determinations of privity, *res judicata*, and collateral estoppel. *See Kulczyk,* at ¶ 11. The issue of privity when applied to claim preclusion is a question of law fully reviewable on appeal. *Id.* at ¶ 16, *citing*, *Ungar, Supra* 2006 ND 185 ¶ 10; *Hofsommer, supra* at p. 83.

¶(75) Here in this case, the trial court record contains exhibits and testimony documenting that during the Bank's foreclosure action, the Bank wished Racers being replaced as running the convenience store to preserve the collateral, provide money to the Bank from operations to apply to the Promissory Note and costs of foreclosure and to keep the business operating to keep the land and building currant with the North Dakota fund for leaking underground fuel tanks. To this end, the Bank drafted and negotiated with then foreclosure Defendant OK Tire Store, Inc. and 4201 to assign the Ground Lease, being then foreclosed, to 4201 and for 4201 to occupy and run the convenience store property; with 4201 making the payments for taxes, splitting the cash sales between 4201, OK Tire and the Bank; payment by 4201 into the fuel tank fund and running the store during the foreclosure process. (See Forbearance Agreement R79:6). Bank officer Chris Jundt confirmed at trial 4201 did fully perform all duties under the Forbearance Agreement which benefited the Bank for a sum in excess of $100,000.00 dollars. (Jundt testimony at Transcript R118:37:5 to R118:40:13).

¶(76) Subsequent to the Forbearance Agreement, Racers Store 102 executes a Bill of Sale wherein Racers assigns to 4201 all "rights, title and interests in and to the assets of Racers

Store 102, LLC" …including…" liens, liquor licenses, permits, contract rights". (Bill of Sale R4:1).

¶(77) The Bank then works with 4201 d.b.a. Safari to transfer the valuable liquor license into 4201 d.b.a. Safari pursuant to the Bill of Sale and hits a snag over unpaid property taxes of $24, 320.51 which then results in an Addendum to the Foreclosure Agreement signed December 1, 2017 between the parties OK Tire holding the Ground Lease, the Bank and 4201 (See Addendum to Forbearance Agreement R80)

¶(78) The Addendum specifically concerns the liquor license and states "Upon successful application, renewal and/or transfer of the liquor license to 4201, the liquor license becomes an asset of 4201 **subject to the existing lien held by First National for the Racers Store 102, LLC loans**" (R80:7-8). The Addendum provides the delinquent taxes would initially be split between 4201 and the Bank with 4201 then subsequently paying the Bank back its half of such taxes paid. (R80:8) The Bank at trial testified at trial to confirm 4201 d.b.a. Safari did fully perform and paid the Bank (See Jundt testimony Transcript R118:45:19).

¶(79) On the privity issue, the most important documents are the Third Party Pledge requested by the Bank and signed by 4201 dated February 1, 2018 between the Bank and 4201; and the Bank filing a UCC-1 to add Safari to the security package. (R81). This Third-Party pledge recites the Note by Racers, states the security agreement given as part of the collateral for the Racers Promissory Note, to include the subject liquor license now held by 4201; and states in event of default on the Note, Bank has all the rights and remedies under North Dakota law to include the sale of the liquor license **to apply funds to the Note by Racers**. The Bank pursuant to the pledge then files a UCC financing statement of record naming Safari as the owner of the subject liquor licenses securing the Racers Note. (See UCC Financial Statement

filing R90:1-4 and R91:1-2).

¶(80) The Pledge also contains specific language the Bank can collect attorney's fees from 4201 Safari for all legal fees and costs incurred to enforce it lien in the subject liquor license. (See Pledge R81:4.0).

¶(81) It is universal law that after an assignment, the assignee acquires no greater rights then held by the assignor and assignee merely stands "in the shoes" of the assignee. *Collection Center, Inc. v. Bydal*, 2011 ND 63, ¶ 20, 795 N.W.2d 667. As Racers remained liable on the Note to the Bank subject the lien rights claimed by the Bank, no novation of the Note did occur, however, a novation with extent to ownership of the liquor license did occur with the knowledge and consent of the Bank which involved 4201 d.b.a. Safari was now involved directly into the loan package and security held by the Bank for the Note specifically made by Racers Store 102, LLC. The Pledge and UCC filing directly involve 4201 in the financing package **and align the interest** of 4201 in the personal property collateral previously held by Racers. This conduct by the Bank establishes the requisite privity for 4201 to have standing to seek declaratory relief in this action.

¶(82) "For purposes of *res judicata,* collateral estoppel, privity with parties in prior action exists, if person so identified in interest with another that he represents the same legal right". *Ungar v. North Dakota State University,* 2006 ND 185, ¶ 12, 721 N.W.2d 16, *citing*, *Simpson v. Chicago Pneumatic Tool Co.,* 2005 ND 55, ¶ 8, 693 N.W.2d 612, *Hofsommer, Supra* at 384. See also, *Kulczyk v. Tioga Ready Mix,* 2017 ND 218, ¶ 11, 902 N.W.2d 485, *citing, Ungar Supra* ¶12 and *Hofsommer, Supra* at p. 384. This is such the case involving 4201 in this action.

¶(83) Fundamental issues of fairness underlies determinations of privity and *res judicata* and

the applicability of *res judicata* is a question of law fully reviewable on appeal. *Kulczyk, Supra* at ¶¶ 10-11.

¶(84) Here in this case, the trial court ruled 4201 was not in privity with Racers but was only a "successor in interest", "did not participate in the litigation in any way" and was just a middleman cooperating with the Bank to operate and "did not hold the same legal right" regarding the collateral liquor license as Racers had involving the Bank as regards to the foreclosure action. (See Court Findings R131:14:32). This was clear error by the trial court on the issue of privity.

¶(85) As contract interpretation is a question of law, a plain reading of the two forbearance agreements and pledge agreements, prepared by the Bank, during the litigation, plainly show the Bank tied the liquor license bought by 4201 d.b.a. Safari to the Racers Promissory Note, and security package involved in the foreclosure litigation. This is especially true where the Bank amended its UCC filing to perfect a security interest in the subject liquor license naming Safari as now holding the liquor license. (See UCC-1 R91:1-2) The above contracts between the Bank and 4201 d.b.a. Safari do clearly go far beyond 4201 being just a middleman helping the Bank and the UCC filing shows a clear "identity of interest" showing the subject liquor license to be squarely involved in the foreclosure litigation. The trial court was in error on the privity issue and 4201 has good and fair standing with privity to assert waiver, *res judicata* and collateral, estoppel effect upon the Bank to decide the issue whether the Bank has lost its lien right, in and do, to such personal property collateral.

¶(86) The availability and applicability of *res judicata* or collateral estoppel is a question of law fully reviewable on appeal. *Ungar v. North Dakota State University,* 2006 ND 185, ¶ 10, 721 N.W.2d 16, *citing, Hofsommer, Supra* p. 383.

¶(87) The doctrine of *res judicata* applies to claims that were raised or **could have been raised** in prior actions between the same parties or their privies, *Hall v. Estate of Hall,* 2020 ND 205, ¶ 17, *citing, Kulczyk, Supra* at ¶10.

¶(88) Here, the Bank did make the claim to the personal property (which includes the liquor license and collateral involved in this action) which Complaint states the personal property would be sold first, then the land. The Bank then elects to ignore the statute 32-19-06.1 N.D.C.C. to qualify for any deficiency judgment, takes Judgment only for sale of the land, sells the land at Sheriff's Sale, takes title after redemption is waived and replats to sell off part of the property. The time period for the Bank to reopen the Judgment to now attempt to comply with the anti-deficiency statute has long run out and the Judgment in the foreclosure action has become final with the Note by Racers reduced to Judgment. It is clear the Bank made choices in the foreclosure action and chose not to foreclose on any personal property or seek any deficiency judgment in the foreclosure action.

¶(89) This Court has applied the following four elements to decide whether *res judicata* barred claims as set forth in *Hall v. Estate of Hall,* 2020 ND 205, ¶ 17, 950 N.W.2d 168, *citing, Ungar, Supra* at ¶ 12; such factors to be as follows:

> 1. A final decision on the merits in the first action by a court of competent jurisdiction;
>
> 2. The second action involves the same parties, or their privies, as the first;
>
> 3. The second action raises an issue actually litigated or which should have been litigated in the first action;
>
> 4. An identity of the causes of action.

¶(90) Silbernagel v. Silbernagel, 2011 ND 140, ¶18, 800 N.W.2d 320, the factors for applying

the doctrine of collateral estopple was discussed as follows:

> Four test must be met before collateral estopple will bar relitigation of a fact or issue involved in an earlier lawsuit: (1) 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?

Silbernagel v. Silbernagel, 2011 ND 140, ¶ 18, 800 N.W.2d 320 (quoting *Hofsommer,* at 384).

¶(91) The above factors are present in this action where 4201 had brought an action for declaratory relief as to the statutes of the lien rights now held by the Bank in the liquor license and the Bank Answered and has sought right to foreclose its alleged lien to the liquor license and personal property collateral. The same undisputed facts apply to the specific issue of collateral estoppel that the Bank has lost its lien in and to the subject liquor license. Here, collateral estoppel generally relitigation of the issue in a second action which were or by logical and necessary implication must have been litigated and determined in prior suit.

¶(92) Accordingly, there is no longer any debt owed by Racers for which any lien to be foreclosed by action and no deficiency judgment for which the sale of the subject liquor license or debt can be applied to such foreclosed Note or Judgment.

¶(93) As 4201 has privity involving the same asset (liquor license) and same alleged lien, it follows, 4201, as standing in the shoes of Racers, has the right to allege *res judicata* in this action to advance a solid legal basis that First State (f.k.a. First National Bank & Trust of Williston) has lost its right to relitigate its alleged lien rights to the liquor license and other personal property.

¶(94) *Fettig v. Estate of Fettig,* 2019 ND 261, ¶21, 934 N.W.2d 547. Here in this case, the elements of collateral estoppel are also present on this issue of any claimed lien by the Bank and 4201 has the required privity to assert the operative effect of collateral estoppel to defeat the Bank's claim of holding a present lien in the collateral.

¶(95) In this case, there exists strong public policy and legislative intent to force lenders to comply with the terms of North Dakota's anti-deficiency statutes and to uphold the protections the legislative intended by the anti-deficiency statutes. *H & F Hogs v. Huwe,* 368 N.W.2d 553 at 555 (N.D. 1985).

¶(96) The purpose development and history of the North Dakota ant-deficiency statutes are well described in *First State Bank of Cooperstown v. Ihringer,* 217 N.W.2d 857 (N.D. 1974) and in *East Grand Forks Savings and Loan Ass'n v. Mueller,* 198 N.W.2d 124 (N.D. 1972). These policies require Banks in Foreclosure actions to follow the statute(s) to qualify for any deficiency judgment.

¶(97) Accordingly, the trial court committed reversible error by: (1) not enforcing the anti-deficiency statutes; (2) not applying Rule 60 N.D.R.Civ.P. to hold Bank is now prevented to reopen the prior foreclosure action and (3) not allowing 4201 to assert waiver, *res judicata* and collateral estoppel to the Bank's actions in the prior foreclosure action.

¶(98) Here, where 4201 does stand in privity with OK Tire and Racers; the test for application of waiver [14] collateral estoppel and *res judicata* are met and apply in this action.; as a matter

[14] Waiver is the voluntary and initial relinquishment of a known right or claim which the party would have enjoyed. *Stenehjem v. Sette,* 240 N.W.2d 596, 600 (ND 1976). Here, Bank knew of its right to foreclose its lien in and to the non-land collateral as stated such in its Complaint, then chose not to do so by foreclosing only on the land.

of law. The trial court committed reversible error on these issues as a matter of law.

IV. ISSUE NO. 4

Whether upon remand 4201 is entitled to recover its attorney's fees provided for under the Pledge Agreement as a matter of contract interpretation as a matter of law. (*de novo* review)

¶(99) On the issue of attorney's fees, the trial court awarded attorney's fees based upon the contract language of the Pledge given by 4201 to the Bank. (See Findings and Opinion of trial court R131:16:39). (See also Pledge R81:2:4.0)

¶(100) The pledge states 4201 will pay the Bank's attorney fees for any litigation or costs to enforce the terms of the pledge. The pledge as written by the Bank does not give 4201 the same right to attorney's fees as a party to the Pledge Contract if 4201 prevails in this action.

¶(101) Contract interpretation is a question of law fully reviewable on appeal. *Hallin v. Inland Oil & Gas Corporation,* 2017 ND 254, ¶¶ 8-9, 903 N.W.2d 61; *City of Bismarck v. Mariner Construction, Inc.,* 2006 ND 108, ¶¶ 10-11, 714 N.W.2d 484.

¶(102) Applying the factors for interpretation of contracts (Chapter 9-07 N.D.C.C.) favor the remedy of attorney's fees to be mutual to both parties. Accordingly, of this case is remanded in favor of 4201, then an award of attorney's fees should be made in favor of 4201 in this action. The remedy should be mutual to both the Bank and 4201.

CONCLUSION

¶(103) North Dakota law is full of mandates by Statutes and Rules such examples as Statutes of Limitations, driving regulations, taxation, and in this case, the requirements of 32-19-06.1 N.D.C.C. to establish any deficiency judgment in a foreclosure action involving commercial property. There are consequences for the Bank to ignore the mandatory terms set forth in32-

19-06.1 N.D.C.C.. Where the Bank first reserved its lien and right to sell the personal property, then chose to only foreclose on the land itself, now Rule 60 prevents the Bank going back in time to reopen the foreclosure action to cure the defects of non-compliance with 32-19-06.1 N.D.C.C..

¶(104) The Bank made a choice to only foreclose on the land and waive any deficiency Judgment; such that OK Tire and Racers would have had the defenses of waiver, *res judicata* and collateral estoppel to prevent the Bank from collecting on the personal property. Accordingly, the central issue is, whether, 4201 as assignee to OK Tire and Racers, has sufficient privity to step into the shoes of OK Tire and Racers, to now assert these same defenses against the Bank in this action; to defeat the Bank's claim it still holds a valid enforceable lien to the subject liquor license and other collateral. So what debt is left, for the Bank to foreclose and apply the proceeds of sale to under North Dakota law? There is no remaining debt post foreclosure, there is no Judgment left to satisfy, and no procedural way to reopen the foreclosure action.

¶(105) Privity, as a matter of law and fundamental fairness favors 4201 in this action; as 4201 has a clear "identity of interest" regarding the subject liquor license and other personal property collateral Racers sold to 4201 where the Bank tied 4201 to the Racers loan and foreclosure by the UCC filing, the Foreclosure Agreements and the Pledge solicited by the Bank from 4201.

¶(106) Accordingly, the trial court was wrong to hold 4201 does not have the required privity to step into the shoes of Racers and defeat the Bank's claim of an active and enforceable lien in and to the subject liquor license.

ORAL ARGUMENT REQUESTED

¶(107) The complicated issues involving the prior foreclosure action are best handled by oral argument to answer the question of this Court for this appeal.

Dated this 6 day of December, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellant in the above matter, hereby certifies in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional spaced, 12 point font typeface, and the total number of pages of the above Brief totals 35 pages, inclusive, which is within the limit of 38 pages.

/s/ Charles L. Neff
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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

4201 2ND Ave. W., LLC, d.b.a. Safari Fuels 105, Plaintiff and Appellant, vs. First State Bank & Trust, Defendant and Appellee, and First State Bank & Trust, Third-Party Plaintiff and Appellee, vs. 4201 2nd Ave. W., LLC, Third-Party Defendant and Appellant, and Safari Fuels Management, LLC, Topped Off Coffee, LLC, Third-Party Defendants and Appellant, and City of Williston, Third-Party Defendants and Appellees.	**SUPREME COURT NO. 20220309** Williams County District Court Case No. 53-2015-CV-00870 **CERTIFICATE OF SERVICE**

[¶1] I, Charles L. Neff, hereby certify that the **Appellant 4201 2nd Ave. W., LLC, d/b/a Safari Fuels 105 Brief** and **Appendix** were served by electronic means upon the following on December 6, 2022, by sending a true and correct copy thereof electronically with the Clerk of the North Dakota Supreme Court, to wit:

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FILED
IN THE OFFICE OF THE
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DECEMBER 8, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

4201 2ND Ave. W., LLC, d.b.a. Safari Fuels 105,
Plaintiff and Appellant,

vs.

First State Bank & Trust,
Defendant and Appellee,

and

First State Bank & Trust,
Third-Party Plaintiff and Appellee,

vs.

4201 2nd Ave. W., LLC,
Third-Party Defendant and Appellant,

and

Safari Fuels Management, LLC, Topped Off Coffee, LLC,
Third-Party Defendants and Appellant,

and

City of Williston,
Third-Party Defendants and Appellees.

SUPREME COURT NO. 20220309

Williams County District Court
Case No. 53-2015-CV-00870

CERTIFICATE OF SERVICE

[¶1] I, Charles L. Neff, hereby certify that the **Appellant 4201 2nd Ave. W., LLC, d/b/a Safari Fuels 105 Amended Brief** were served by electronic means upon the following on December 8, 2022, by sending a true and correct copy thereof electronically with the Clerk of the North Dakota Supreme Court, to wit:

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