20190140
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 29, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20190140

Michael McDougall and Bonita McDougall, — Plaintiffs and Appellants

v.

AgCountry Farm Credit Services, PCA, — Defendant, Third-Party Plaintiff and Appellee,

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

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APPELLEE AGCOUNTRY FARM CREDIT SERVICES, PCA'S BRIEF

APPEAL FROM SUMMARY JUDGMENT, DATED APRIL 17, 2019, OF THE DISTRICT COURT OF TOWNER COUNTY, NORTH DAKOTA, NORTHEAST JUDICIAL DISTRICT, THE HONORABLE DONOVAN FOUGHTY PRESIDING

ORAL ARGUMENT REQUESTED

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[¶10] **STATEMENT OF THE CASE**

Bankruptcy Proceedings

[¶11] On October 19, 2016, Kent and Erica McDougall petitioned for relief under the United States Bankruptcy Code, with the Bankruptcy Court of the District of North Dakota (the "Bankruptcy Court"), Case Number 16-30542 (the "Bankruptcy Proceeding"). (Appellee's Appendix ["A.A."] at 10.) Within the Bankruptcy Proceeding, Kent and Erica McDougall instituted an adversary action (the "Adversary Action") against AgCountry Farm Credit Services, PCA ("AgCountry") and Michael and Bonita McDougall ("McDougalls"). (A.A. 10.) The amended complaint in the Adversary Action included three counts, one for avoidance of a transfer under 11 U.S.C. § 548, one for avoidance of a mortgage on the basis of fraud, and the third for the determination that the transfer of property by Kent and Erica McDougall back to the McDougalls was appropriate and nonavoidable. (Appellant's Appendix [App.] 57.)

[¶12] On May 22 and 23, 2017, the Bankruptcy Court held a trial in the Adversary Action. (App. 57.) On July 10, 2017, the Bankruptcy Court issued its Memorandum Decision and Order and entered Judgment in favor of AgCountry, denying any relief to Kent and Erica McDougall or the McDougalls. (App. 56-82; Docket ["Doc."] # 44.)

[¶13] On July 20, 2017, Kent and Erica McDougall and McDougalls filed a motion to amend or alter the judgment entered in the Adversary Action, through the same attorney that represented Kent and Erica McDougall at the trial of the Adversary Action. (Doc. # 45.) On October 5, 2017, the Bankruptcy Court entered an order denying the motion to alter or amend the judgment. (Doc. # 46.)

[¶14] On October 17, 2017, Kent and Erica McDougall and McDougalls filed an appeal of the judgment entered in the Adversary Action, appealing to the Bankruptcy Appellate Panel for the Eighth Circuit Court of Appeals (the "B.A.P."). (Doc. # 47.) On December 21, 2017, the B.A.P. dismissed Kent and Erica McDougall from the appeal because they were no longer the debtor in possession, having after the judgment was entered converted their Bankruptcy Proceeding from being under Chapter 12 to one under Chapter 7. (Doc. # 47.) On July 23, 2018, the B.A.P. dismissed the appeal as to the McDougalls, finding that the Bankruptcy Court lacked jurisdiction over any claim between the McDougalls and AgCountry in the Adversary Action because this did not affect the bankruptcy estate. (Doc. # 48.) On July 24, 2018, on remand the Bankruptcy Court entered an order and judgment in the Adversary Action that provided McDougalls' claim regarding the validity of AgCountry's mortgage lien was dismissed because the Bankruptcy Court lacked subject matter jurisdiction of that claim. (Doc. # 49.)

State Court Proceedings

[¶15] AgCountry agrees with and incorporates the Statement of the Case provided by McDougalls, as it pertains to these state court proceedings.

[¶16] **STATEMENT OF FACTS**

[¶17] This proceeding relates to a certain mortgage that AgCountry was granted on real estate situated in the County of Towner and State of North Dakota, to-wit (hereinafter referred to as "the Premises"):

N1/2 SE1/4 Section 25, T162N, R67W;

SE1/4 NE1/4 Section 25, T162N, R67W;

SW1/4 NE1/4 Section 25, T162N, R67W, less the S1/2 SW1/4 NE1/4.

The Premises are agricultural land. (A.A. 4.)

[¶18] The McDougalls are married to each other and are the record titleholders of the Premises by the records in the office of the County Recorder in and for Towner County, North Dakota, having taken title by virtue of a warranty deed executed in their favor by Kent M. McDougall and Erica M. McDougall on the 7th day of April, 2016, and recorded with the Towner County Recorder on April 7, 2016 as Document No. 154692 (hereinafter the "April 7 Deed"). (A.A. 4.) The McDougalls are the parents of Kent M. McDougall and parents in law of Erica M. McDougall (hereinafter "Kent and Erica McDougall"). (A.A. 5.)

[¶19] Kent and Erica McDougall were farmers and ranchers, operating a cattle production farm and also growing small grains. (Doc. # 51; Transcript of Hearing dated May 22, 2017 (hereinafter "Trial Tr. I") 56:11 to 57:4; 60:6-17.) Over the course of 2014 and 2015 AgCountry had extended several loans to Kent and Erica McDougall that Kent and Erica McDougall had requested for purchasing items or operating their farming operations. (Trial Tr. I 70:10 to 84:24; A.A. 13-69.) Over the course of 2014 and 2015 Kent and Erica McDougall had conversations with AgCountry Loan Officer Dean Aanderud regarding a possible refinancing of their loans with AgCountry. (Trial Tr. I 232:5 to 233:18.) Kent and Erica McDougall also had debts owed to Turtle Mountain

State Bank (hereinafter "TMSB"), and part of any request made by Kent and Erica McDougall for credit accommodations from AgCountry would entail necessary accommodations from TMSB. (Trial Tr. I 273:9 to 276:17.)

[¶20] Due to the past due status of the loans owed to AgCountry and the need for additional time to review up to date financial information, on March 31, 2016, AgCountry and Kent and Erica McDougall entered into the promissory note extensions and a mortgage was granted on the Premises. (Trail Tr. I 233:19 to 240:8; A.A. 70-75.) Additional lands are described in the mortgage and have been sold as part of Kent and Erica McDougall's Bankruptcy Proceeding. Mr. Aanderud testified at the trial of the Adversary Action that he provided a complete copy of the loan documents to Kent and Erica McDougall on March 31, 2016, and that Kent and Erica McDougall had the opportunity to review the documents prior to signing them. (Trial Tr. I 234:4 to 235:24.) Mr. Aanderud also testified that Kent and Erica McDougall signed a document entitled "Repayment/Restructure Plan" on March 31, 2016, and that Mr. Aanderud did not communicate anything to Kent and Erica McDougall that was inconsistent with that document. (Trial Tr. I 235:25 to 236:14; A.A. 76.) The promissory note extensions all reference promissory notes that had been executed by Kent and Erica McDougall prior to March 31, 2016. (A.A. 20, 28, 36, 44, 51, 57, 63, and 69.) The original promissory notes all explicitly in bold type caution Kent and Erica McDougall (referred to therein as "you" or "Borrowers") that there are no modifications unless in writing and only commitments to take credit action will be in writing:

> MODIFICATION: No modification of this document or any related document shall be enforceable unless in writing and signed by the party against whom enforcement is sought. Oral agreements or commitments to loan money, extend credit, or to forbear from enforcing repayment of a debt including promises to extend or renew such debt are not enforceable, regardless of the legal theory upon which it is based that is in any way related to the loan. To protect you (the Borrowers) and us (the Lender) from misunderstanding or disappointment, any agreements we reach covering such matters are contained in this writing, which is the complete and

> exclusive statement of the agreement between us, except as we may later agree in writing to modify it.

(A.A. 18, 27, 34, 42, 50, 56, 62, and 68, second to last page or last page of each Promissory Note).

[¶21] Kent and Erica McDougall both testified at trial in the Adversary Action that they signed the Repayment/Restructure Plan. (Trial Tr. I 94:12 to 95:6; 169:17-22.) In the Repayment/Restructure Plan, Kent and Erica McDougall unambiguously agreed that they were signing a mortgage against all their owned real estate for the extension of the promissory notes to June 1, 2016, and acknowledged that only "efforts will be made to refinance all of this debt into a FLCA loan secured by all real estate owned" – not that there was any assurance that such a loan would occur or be approved. (A.A. 76.)

[¶22] Erica McDougall testified she did not know she was signing a mortgage on March 31, 2016, despite having signed the Repayment/Restructure Plan on the same date and having signed in two places on the mortgage. (Trial Tr. I 135:9-12; A.A. 74, 76.) Kent McDougall testified he believed he was executing a mortgage on March 31, 2016. (Trial Tr. I 193:20 to 197:11.) Dean Aanderud testified that he presented all of the loan documents being signed on March 31, 2016, to Kent and Erica McDougall prior to their having signed them. (Trial Tr. I 235:3 to 236:25; 242:17 to 243:10; 324:5 to 326:1.) Dean Aanderud testified Kent and Erica McDougall had the full opportunity to read the loan documents on March 31, 2016, and that they are consistent with what he communicated to them at the closing.

[¶23] Kent and Erica McDougall asked the McDougalls to deed the Premises to them, which the McDougalls did on April 5, 2016. (A.A. 77-78.) Neither of the McDougalls ever communicated with AgCountry regarding Kent and Erica McDougalls' loans or financial condition prior to executing the deed on April 5, 2016. (Trial Tr. I 216:16-24; Doc. # 54 (5:21 to 6:13).) There was no restriction on the deed from the McDougalls to Kent and Erica McDougall that restricted the

rights being granted or any statement in the deed that the land was only intended for a particular purpose. (Trial Tr. I 223:1 to 224:19; A.A. 77-78.)

[¶24] While AgCountry discussed with Kent and Erica McDougall possible terms for restructuring their debts with AgCountry, no specific terms were ever agreed upon to do so. (Trial Tr. I 194:9 to 197:11.) Kent McDougall could not testify to any agreed upon amount, repayment terms, or interest rate that he claims to have been promised by Mr. Aanderud. (Trial Tr. I 194:9 to 197:11.) At trial in the Adversary Action, Kent McDougall testified that he was expecting to sign additional documentation after March 31, 2016, to close a refinance transaction but also admitted in a prior deposition he had testified that he was not expecting to sign additional documents to close a refinance transaction after March 31, 2016. (Trial Tr. I 197:4 to 198:21.) Mr. Aanderud testified that there was no decision made regarding future credit actions on March 31, 2016 and that no one else at AgCountry had made any such decisions. (Trial Tr. I 245:11to 246:12.) Kent McDougall testified that he also understood that any approvals for credit action would include a decision by someone other than just Mr. Aanderud at AgCountry. (Trial Tr. I 204:4 to 205:6; Ex. 101.) Most tellingly, on cross examination, Erica McDougall testified that Dean Aanderud never communicated approval of any long-term refinance, but rather testified that she "felt" that was going to happen. (Trial Tr. I 137:8 to 138:6.)

[¶25] **STANDARD OF REVIEW**

[¶26] This Court reviews the grant of summary judgment de novo. Tarnavsky v. Rankin, 2009 ND 149, ¶ 7, 771 N.W.2d 578. In Tarnavsky, this Court explained summary judgment:

> Summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if resolving factual disputes will not alter the result. . . . Whether summary judgment was proper is a question of law that we review de novo on the record. . . . A party seeking summary judgment bears the initial burden of showing there is no genuine dispute regarding the

> existence of a material fact . . . . On appeal, we view the evidence in the light most favorable to the party opposing the motion. . . .
>
> A party resisting a motion for summary judgment may not simply rely upon the pleadings or upon unsupported, conclusory allegations. Rather, the party resisting the motion must set forth specific facts by presenting competent, admissible evidence, whether by affidavit or by directing the court to relevant evidence in the record, demonstrating a genuine issue of material fact.

2009 ND 149, ¶¶ 7-8, 771 N.W.2d 578 (internal citations omitted).

[¶27] ARGUMENT

[¶28] I. The District Court correctly determined that the McDougalls' deceit claims are barred by the statute of frauds.

[¶29] The District Court held that as a matter of law the McDougalls' deceit claims are barred by the statute of frauds, as indicated by Irish Oil & Gas, Inc. v. Riemer, 2011 ND 22, 794 N.W.2d 715. (App. 52-53.) Specifically, the District Court noted that after reviewing Irish, and having found no other cases "which shed more light on this issue" the McDougalls claims were barred. (App. 53.) This holding should be affirmed by this Court.

[¶30] A. Irish was correctly decided.

[¶31] Under North Dakota law, a claim for deceit is predicated on one of the four theories below:

> 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;
> 3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or
> 4. A promise made without any intention of performing.

N.D.C.C. § 9-10-02. North Dakota's statute of frauds also requires certain agreements to be in writing:

> The following contracts are invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by the party's agent:

> 1. An agreement that by its terms is not to be performed within a year from the making thereof.
> 2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section 22-01-05.
> 3. An agreement for the leasing for a longer period than one year, or for the sale, of real property, or of an interest therein. Such agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing subscribed by the party sought to be charged.
> 4. An agreement or promise for the lending of money or the extension of credit in an aggregate amount of twenty-five thousand dollars or greater.
> 5. An agreement or promise to alter the terms of repayment or forgiveness of a debt that is in an aggregate amount of twenty-five thousand dollars or greater.

N.D.C.C. § 9-06-04.

[¶32] A majority of this Court, when presented with the question of whether a deceit action lies for a promise that would be barred under N.D.C.C. section 9-06-04, declined to hold that the deceit action could be brought in contravention of the statute of frauds. Irish Oil & Gas, Inc. v. Riemer, 2011 ND 22, ¶¶ 65, 69-75, 794 N.W.2d 715 (Vande Walle, C.J, concurring in part and dissenting in part, joined by Sandstrom, J., and Kapsner, J., concurring in part and dissenting in part). In Irish, the Plaintiff sought to amend a complaint to allege a deceit claim arising out of an alleged oral promise to modify an oil lease. Id. ¶ 5. The majority of this Court held that the district court was correct in denying the motion to amend the complaint to bring a deceit claim because the "proposed action for deceit is an end-run around the statute of frauds." Id. ¶ 72 (Kapsner, J., concurring in part and dissenting in part).

[¶33] Like Irish, the deceit action here is an end-run around an applicable statute of frauds regarding the lending of money. North Dakota Century Code section 9-06-04 provides as follows:

> The following contracts are invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by the party's agent:
>
> > 1. An agreement that by its terms is not to be performed within a year from the making thereof.

. . .

> 4. An agreement or promise for the lending of money or the extension of credit in an aggregate amount of twenty-five thousand dollars or greater.
>
> 5. An agreement or promise to alter the terms of repayment or forgiveness of a debt that is in an aggregate amount of twenty-five thousand dollars or greater.

Here, McDougalls alleged inconsistent terms than those contained in the written loan documents between AgCountry and Kent and Erica McDougall as the basis of their deceit claim. Any allegation of promises beyond the written documents are not chargeable against AgCountry and cannot be the basis of the deceit action under Irish. Specifically, the written loan documents disclaim an ability to modify the written terms by any oral statement.

[¶34] Here, the original Promissory Note/Loan Agreements each provided that there will be no modifications unless in writing:

> MODIFICATION: No modification of this document or any related document shall be enforceable unless in writing and signed by the party against whom enforcement is sought. Oral agreements or commitments to loan money, extend credit, or to forbear from enforcing repayment of a debt including promises to extend or renew such debt are not enforceable, regardless of the legal theory upon which it is based that is in any way related to the loan. To protect you (the Borrowers) and us (the Lender) from misunderstanding or disappointment, any agreements we reach covering such matters are contained in this writing, which is the complete and exclusive statement of the agreement between us, except as we may later agree in writing to modify it.

The Mortgage at issue contains a similar term:

> 22. Waiver and Modification. . . . This Mortgage may not be amended, modified, or altered other than by a further written agreement signed by the party alleged to be bound thereby. This Mortgage sets forth all of the terms agreed to by Mortgagee and Mortgagors with respect to the subject matter hereof, and replaces any prior oral agreements between Mortgagee and Mortgagors.

Finally, Promissory Note/Loan Agreement Modifications each state explicitly that "All other terms of the [Promissory Note/Loan Agreement] and the instruments securing the Note, as they may have been amended, shall remain in full effect." Thus, by the express terms of the written agreements Kent and Erica McDougall and AgCountry were agreeing to be bound only by the express written terms in the documents. Further, when there is a written agreement between parties, this Court has held that relying on any preliminary oral statements concerning the contract does not relieve parties to the contract from being bound by the written terms: "Preliminary oral statements and promises related to the terms of the contract do not provide the basis for a fraud claim if there is a subsequent written contract." Evenson v. Quantum Indus., Inc., 2004 ND 178, ¶ 17, 687 N.W.2d 241.

[¶35] In Evenson, a dealer of a line of skidsteers claimed fraud against the manufacturer of the skidsteers relative to the dealer agreement. Id. ¶¶ 3-6. The dealer claimed the manufacturer committed fraud because of oral statements about future conduct, that being that the manufacturer would not sell its line of products to another manufacturer. Id. The written dealer contract provided that either party could terminate upon written notice to the other party. Id. A majority of the North Dakota Supreme Court held that contradictory language in the written contract negates any claims for fraud based on the earlier oral statements. Id. ¶ 17. Like Evenson, the express written contracts spell out the due dates for all of the loans in question and specifically provide that for the protection of both AgCountry and Kent and Erica McDougall that they should both only rely on the written terms of the agreements. The written agreements say there is no promise of future credit actions unless in writing by AgCountry. The McDougalls' attempts to allege there were extra-contractual promises related to future conduct of AgCountry is the exact type of allegation that this Court held cannot be fraud in Evenson and cannot be deceit as held in Irish.

The McDougalls should have insisted on seeing the terms of the promise they allege they understood was to be entered between Kent and Erica McDougall and AgCountry before signing the April 5 Deed. Their failure to do so does not rise to a claim for deceit against AgCountry.

[¶36] The McDougalls attempts to suggest Irish should be overturned are unpersuasive. First, the McDougalls spend most of their briefing detailing the analysis of Irish and attempt to place the facts of this case within the view adopted by Justices Crothers and Maring. (Appellant Br. ¶¶ 31-41.) They simply argue that the views of three of the five North Dakota Supreme Court Justices were wrong in Irish, despite acknowledging that numerous other jurisdictions also hold that a tort deceit action is barred by the statute of frauds. Second, the McDougalls do not analyze in any way the law regarding stare decisis in North Dakota.

[¶37] Stare decisis is a principal of law that indicates prior holdings of a court should be followed in subsequent cases because rights may have accrued under the prior holdings and certainty and stability favor following prior decisions. Wenco v. EOG Resources, Inc., 2012 ND 219, ¶ 16, 822 N.W.2d 701. Further, when the prior decision is founded upon sound legal principals, which can be shown through persuasive authority from other jurisdictions that also follow the holding of the prior case, stare decisis indicates that the prior holding should be followed. Id. Here, the issues alleged in the action by the McDougalls involves loan transactions in excess of $25,000 and involves title to real estate, which the District Court found particularly within the holding of Irish. In Wenco, this Court declined to overturn prior precedent because of reliance on the prior holdings, including reliance concerning land title examinations. As in Wenco, the issue of transactions involving real estate, as was the case in Irish and also the mortgage transaction in this case, militates against overturning Irish. Rather, Wenco stands for the proposition that stare decisis supports the expectation interest of parties to land transactions that Irish will be followed, such

that a deceit action cannot be predicated upon a promise that would be barred by the Statute of Frauds.

[¶38] Finally, the arguments advanced by McDougalls from fraud cases to justify overturning the holding of Irish are inapposite to this deceit claim. In all of the cases cited by the McDougalls, the party claiming the Statute of Frauds does not apply was seeking enforcement of the agreement barred by the statute of frauds. In Farmers Coop Ass'n of Churches Ferry v. Cole, 239 N.W.2d 808, 812 (N.D. 1976), a grain buyer sought to enforce an agreement to sell wheat against a farmer and this Court held that the statute of frauds was properly pled by the farmer. In Nelson v. TMH, Inc., 292 N.W.2d 580, 585 (N.D. 1980) this Court held there was a common law exception to the Statute of Frauds available to the plaintiff, such that the plaintiff could enforce an oral guaranty against the defendant who was the officer of the corporate defendant. This Court in Nelson found a specifically applicable exception to the statute of frauds in the context of a corporate guaranty. Id. In Smestad v. Harris, 2011 ND 91, ¶ 11, 796 N.W.2d 662, this Court held that oral promises to loan money were barred by the statute of frauds. In Bearce v. Yellowstone Energy Development, 2019 ND 89, 924 N.W.2d 791, this Court recently held that "Parol evidence of fraudulent inducement is only admissible to challenge the validity of a contract and a corresponding request for the remedy of rescission." Here, the genesis of the McDougalls' deceit claim is not attempting to avoid a contract they have with AgCountry and rescind that agreement because no such agreement exists. In sum, the case law cited by McDougalls does not support their contention that the holding in Irish should be overruled or not applied to the facts of this case.

[¶39] B. McDougalls did not present argument in their briefing that opposed AgCountry's position on Irish and have waived any defect from such failure.

[¶40] While the McDougalls' arguments for overturning Irish are not persuasive, fatal to the McDougalls' arguments on appeal is that they did not present such arguments in their briefing on

this point to the District Court. (Doc. ## 71, 99.) In its *Reply Brief in Support of Motion for Summary Judgment and in Response to Cross Motion for Summary Judgment*, AgCountry argued to the District Court that McDougalls had failed to oppose AgCountry's motion for summary judgment on its non-collateral estoppel arguments, which included the argument that the deceit action was barred by the Statute of Frauds under Irish. (Doc. # 96, ¶¶9-12.)

[¶41] This Court has held that failure to oppose an argument with citations to authority is a waiver of any opposition to the argument. Riemers v. Grand Forks Herald, 2004 ND 192, ¶ 11, 688 N.W.2d 167 ("This Court has said 'a party waives an issue by not providing supporting argument and, without supportive reasoning or citations to relevant authorities, an argument is without merit.'") Here, the McDougalls did not oppose any of the alternative grounds for summary judgment advanced by AgCountry in paragraphs 31 through 50 of AgCountry's principal brief on its motion for summary judgment. (Doc. ## 71, 99.) This was despite AgCountry having specifically pointed out in its reply brief in support of its motion for summary judgment that McDougalls did not make any arguments in opposition to the alternative grounds for summary judgment advanced by AgCountry in paragraphs 31 through 50 of AgCountry's principal brief on its motion for summary judgment. (Doc. # 96, ¶¶9-12.)

[¶42] This Court has also said that the party on summary judgment must connect the factual assertions it makes to the legal theories it advances, and failure to do so may be a waiver of the issue. Riverside Park Condominiums Unit Owners Ass'n v. Lucas, 2005 ND 26, ¶¶ 8, 34, 691 N.W.2d 862. Further, this Court has held that arguments not presented to the District Court will not be considered on appeal. Riemers v. State ex rel. University of North Dakota, 2009 ND 115, ¶ 18, 767 N.W.2d 832.

[¶43] In the District Court, as shown in the record on appeal before this Court, the McDougalls did not oppose AgCountry's non-collateral estoppel arguments for why the McDougalls' complaint should be dismissed, and having failed to provide factual assertions or legal authority in opposition to those arguments, and therefore waived that opposition. The McDougalls in their briefing did not oppose or show that their deceit claim is not barred under the law of Irish. (Doc. ## 71, 99.) Neither did the McDougalls explain in their briefing to the District Court how permitting the deceit action in this instance would not be an end-run around the statute of frauds which is what Irish stands to prevent. (Doc. ## 71, 99.) Irish, ¶ 72 (Kapsner, J., concurring in part and dissenting in part). The failure to present written argument on the issue of deceit was pointed out in AgCountry's reply brief in support of its motion for summary judgment and in response to the McDougalls' cross motion for summary judgment. (Doc. # 96, ¶¶9-12.) The McDougalls did not present argument in their reply briefing on this issue. (Doc. # 99.)

[¶44] To the extent argument was presented at the hearing on the summary judgment motions, those arguments are not a part of the record in this case on appeal because the McDougalls have failed to preserve those arguments by not ordering a transcript of the summary judgment hearing. N.D.R.App.P. 10(b). This Court has noted that appellants who fail to order a transcript of the proceeding bears the risk that statements made at the hearing are not a part of the record on appeal. American Express Centurion Bank v. Corum, 2017 ND 261, ¶ 10, 903 N.W.2d 710. This includes when an appellant fails to order a transcript of a summary judgment hearing. Id.; Weiss, Wright, Paulson & Merrick v. Stedman, 507 N.W.2d 901, 903 (N.D. 1993) (statements made at summary judgment hearing are not a part of the record on appeal when no transcript is furnished). The record does not support that the McDougalls in any way resisted summary judgment in favor of AgCountry on the ground that the deceit claim is barred by the statute of frauds under Irish.

[¶45] McDougalls' failure to order the transcripts under Rule 10(b) and present that record or preserve those arguments in the record is fatal on appeal. Messer v. Bender, 1997 ND 103, ¶ 14, 564 N.W.2d 291. Because the record does not indicate that McDougalls raised any opposition to the application of the statute of frauds barring their deceit claim, Riemers, 2009 ND 115, ¶ 18, this court should affirm the District Court on this point.

[¶46] II. The District Court correctly dismissed the McDougalls' unjust enrichment claims.

[¶47] The District Court held the McDougalls unjust enrichment claims were barred because they failed to provide sufficient evidence on two essential elements of that claim. (App. 51-52.) First, the District Court held there was no dispute of material fact that the McDougalls failed to show an absence of justification for any enrichment in favor of AgCountry. (App. 51-52.) Second, the District Court held the McDougalls did not provide sufficient disputed material facts to show an absence of legal remedies. (App. 51-52.) This was an appropriate decision by the District Court.

[¶48] A. There was justification for the taking because of the legally enforceable mortgage.

[¶49] A plaintiff making a claim for unjust enrichment must demonstrate the following elements: "(1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) an absence of justification for the enrichment and impoverishment; and (5) an absence of remedy provided by law." Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc., 2004 ND 117, ¶ 26, 680 N.W.2d 634. Further, a claim for unjust enrichment does not lie when the benefit gained by the one party was obtained by a legally enforceable contract. Id. Specifically, this Court has held "when the impoverishment resulted from a valid contractual agreement made by a party, the result was not contrary to equity." Id. ¶ 27.

[¶50] A failure of any one element on the part of a plaintiff on summary judgment is a proper basis to grant summary judgment to a defendant. Anderson v. Meyer Broadcasting Co., 2001 ND

125, ¶ 15, 630 N.W.2d 46; see also Ritter, ¶ 29. Here, the District Court properly found that there was a legal justification for the granting of the mortgage by Kent and Erica McDougall. The District Court held that the extension of time, as specifically identified in the separate document entitled "Repayment/Restructure Plan" is the justification. (App. 51-52.) This Court has held that a claim for unjust enrichment does not lie when the benefit gained by the one party was obtained by a legally enforceable contract. Ritter, ¶ 26, (citing Apache Corp. v. MDU Resources Group, Inc., 1999 ND 247, ¶ 15, 603 N.W.2d 891). Further, and not specifically relied upon by the District Court, is the fact that the Bankruptcy Court in the Adversary Action has judicially determined that as and between Kent and Erica McDougall and AgCountry that the mortgage is a valid and binding contractual relationship. (App. 82.) Given this, there is a justification for AgCountry's having obtained the Mortgage and there is no unjust enrichment claim available to McDougalls.

[¶51] In Ritter, the North Dakota Supreme Court held that an unjust enrichment claim was not available to the plaintiffs who directly contracted with the defendant because they had a direct breach of contract claim against the defendant. Ritter, ¶ 29. The plaintiffs who had contracted with a third party who then contracted with the defendant also did not have an unjust enrichment claim because "an impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity and an essential element of recovery under a theory of unjust enrichment—receipt of a benefit by the defendant from the plaintiff that would be inequitable to retain without paying for its value—is not present." Id. Like the defendant in Ritter, the obtaining of the mortgage by AgCountry was pursuant to a valid contractual relationship with Kent and Erica McDougall, and accordingly, the McDougalls, who have no contract with AgCountry, cannot assert an unjust enrichment claim against it. The validity of the contractual relationship between Kent and Erica McDougall and AgCountry was determined judicially in the Adversary Action, as

well as by the District Court finding that the "Repayment/Restructure Plan" was the valid contractual basis for obtaining the benefit to AgCountry. Kent and Erica McDougall were granted an extension of time on several past due notes and the then-current defaults on the loans were cured. These are a valid justification for AgCountry's actions to defeat a claim for unjust enrichment.

[¶52] B. The record on summary judgment indicates McDougalls failed to show legal remedies are inadequate.

[¶53] Additionally, the District Court found that the McDougalls failed to raise a genuine factual issue concerning their lack of an adequate remedy at law. Specifically, the District Court noted that the McDougalls had sought repayment from Kent and Erica McDougall for having deeded the premises to them by filing a proof of claim in the bankruptcy and that "Plaintiffs also did not refute AgCountry's assertion of a remedy at law against [Kent and Erica McDougall] for breach of the warranties contained in the April 7th, 2016, warranty deed conveying the Home Quarter back to [McDougalls]." (App. 52.) AgCountry's position is that the McDougalls did not put forward any material factual matter in the record to show they lacked an adequate remedy at law against Kent and Erica McDougall. In opposition to the motion for summary judgment the McDougalls had the burden to bring forward facts to meet this essential element of their claim. Zuger v. State, 2004 ND 16, ¶ 8, 673 N.W.2d 615. They did not do so, and the District Court properly found they did not meet this element.

[¶54] McDougalls also are construing facts before this court in their brief that are not in the record, including the assertion that "[t]here is no remedy available in bankruptcy court that will make up for [McDougalls'] changed position from owning the "Home Quarter" to an unsecured creditor." (Appellant Br. ¶ 70.) The McDougalls also indicate that any proof of claim they had against Kent and Erica McDougall "would likely be discharged". (Appellant Br. ¶ 70.) The

McDougalls do not cite to the record for these assertions, and the only factual materials supplied to the court on summary judgment on this matter were the proofs of claim filed by the McDougalls. (Doc. ## 57, 58.) The McDougalls did not present factual material to the District Court on the insolvency or collectability of any claim they might have against Kent and Erica McDougall. The District Court found this to be important, in ruling that "Plaintiffs also did not refute AgCountry's assertion of a remedy at law against Debtors [Kent and Erica McDougall] for breach of the warranties contained in the April 7th, 2016, warranty deed . . . ." (App. 52.) The McDougalls failed to bring forth facts on this necessary element of their unjust enrichment claim on summary judgment. Zuger, 2004 ND 16, ¶ 8 ("If no pertinent evidence on an essential element is presented to the trial court in resistance to a motion for summary judgment, it is presumed that no such evidence exists.").

[¶55] When a plaintiff has available legal remedies against a third party, such as a breach of contract claim against the third party, the plaintiff is not entitled to assert an unjust enrichment claim against a non-contracting defendant. D.C. Trautman Co. v. Fargo Excavating Co., Inc., 380 N.W.2d 644, 645–46 (N.D. 1986). In D.C. Trautman Co., the plaintiff, a contractor, brought an unjust enrichment claim against a building owner when the building owner's common wall was repaired after being damaged in a demolition by a different contractor. Id. at 644-45. The building owner had not contracted with the contractor for the repairs, but rather another party who was responsible for the damages had contracted to make the repairs for the benefit of the building owner. Id. at 645. This Court held in this situation that the contractor's remedy at law against the party with whom it had a contract was sufficient to defeat an unjust enrichment claim against the building owner. Id. at 646. Like D.C. Trautman Co., the McDougalls failed to show they did not have an adequate remedy at law under the contractual provisions of the April 7, 2016, warranty

deed from Kent and Erica McDougall. In fact, they did not show any factual material dispute concerning their legal remedies. Accordingly, the District Court properly dismissed the McDougalls unjust enrichment claim.

[¶56] McDougalls cite to two cases to show that their unjust enrichment claim is not barred because they have an adequate remedy at law, both of which are distinguishable. First, McDougalls cite Midland Diesel Serv. & Engine Co. v. Sivertson, 307 N.W.2d 555, 558 (N.D. 1981) for the proposition that the lack of an adequate remedy at law is met when the prime debtor is insolvent. Midland is distinguishable on two fronts. Midland was an appeal after a trial was conducted in the matter, unlike this matter where the McDougalls failed to bring forth evidence to show a material factual dispute on summary judgment. Id. at 556. Midland is also distinguishable from this case because the issue of whether the plaintiff had an adequate remedy at law against the non-party was not decided by this Court in Midland and, for that reason, presumably was not an issue in the case. See id. at 558.

[¶57] The McDougalls also cite McColl Farms, LLC v. Pflaum, 2013 ND 169, ¶¶ 20-21, 837 N.W.2d 359, for the proposition that dismissal of an unjust enrichment claim solely based on the determination that a remedy at law was available was is not proper. McColl Farms is distinguishable on two fronts. First, McColl Farms was an appeal of a dismissal of the unjust enrichment claims under North Dakota Rule of Civil Procedure 12(b)(6), whereas this case is after summary judgment. Id. This Court in McColl Farms specifically noted that it was conceivable that the plaintiff could prove some set of facts under which it would have an unjust enrichment claim, such as all other legal claims in the case against the defendant had failed. Id. ¶¶ 20-21. This matter is different than McColl Farms because, being a North Dakota Rule of Civil Procedure 56 motion as opposed to a Rule 12(b) motion, the McDougalls were given an opportunity on summary

judgment to present evidence that might substantiate this essential element of their unjust enrichment claim but they failed to do so. Further, the issue of whether the plaintiff in McColl Farms had available legal remedies against a third party was not analyzed, as such analysis was unnecessary to the decision in that case. Id. Accordingly, the District Court properly determined that the McDougalls failed to bring forth factual assertions to show they lacked an adequate remedy at law.

[¶58] III. The McDougalls' deceit claims are barred because they cannot show any direct communications with AgCountry about Kent and Erica McDougalls' financial condition.

[¶59] As the Appellee, AgCountry is permitted to advance alternative arguments to this Court that it had presented to the District Court to save the judgment in this matter without the necessity of having filed a cross-appeal. Olson v. University of N. Dakota, 488 N.W.2d 386, 388 (N.D. 1992). Moreover, this court has long held that it "will not set aside a correct result merely because the district court's reasoning is incorrect if the result is the same under the correct law and reasoning." State ex rel. K.B. v. Bauer, 2009 ND 45, ¶ 10, 763 N.W.2d 462 (citations and quotations omitted). Thus, this Court can affirm the judgment in this matter under alternative theories.

[¶60] Under North Dakota law, a claim for deceit is predicated on one of the four theories below:

> 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;
> 3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or
> 4. A promise made without any intention of performing.

N.D.C.C. § 9-10-02. Here, there is no question of fact that the McDougalls could not sustain a claim for deceit because there was no communication between McDougalls and AgCountry prior to AgCountry obtaining the Mortgage and McDougalls having deeded the Home Quarter to Kent and Erica McDougall. It is undisputed that McDougalls signed the April 5 Deed to Kent and Erica McDougall on April 5, 2016, without ever having communicated with anyone from AgCountry regarding Kent and Erica McDougall's financial status. (Doc. # 51 at 216:16-24, 224:12-19, 345:18 to 346:347:14; Doc. # 54 at 5:21 to 6:3.)

[¶61] The only conceivable claim that McDougalls could make would be that AgCountry committed deceit under subsection 3. See e.g., Hellman v. Thiele, 413 N.W.2d 321, 326-27 (N.D. 1987). In Hellman, the North Dakota Supreme Court held that a third party cannot predicate a claim of deceit against a bank under subsection 3 unless the bank had some special duty to disclose the financial condition of the bank's customer. Id. Rather, a bank can be liable to a third party under subsection 3 only when it has responded to the third party regarding an inquiry from the third party. Ostlund Chem. Co. v. Norwest Bank of Jamestown, 417 N.W.2d 833, 836 (N.D. 1988).

[¶62] In Ostlund, the North Dakota Supreme Court held a bank's liability is predicated on failure to disclose only if it does in fact communicate with the third-party: "While the Bank was originally under no duty to divulge any information about [its customer's] credit status, we believe that once the Bank chose to reply to [the non-customer plaintiff's] inquiry it had a duty to impart full, accurate, and truthful information." Id. Here, the undisputed facts showed there were no communications between AgCountry and McDougalls prior to the McDougalls' decision to execute the April 5 Deed transferring the property the Kent and Erica McDougall. Accordingly, liability cannot be predicated under subsection 3 the District Court would have properly dismissed the deceit claim against AgCountry on that ground.

[¶63] Additionally, the types of statements that are claimed to be deceitful in this case are not the types of statements that are actionable, as was found by the Bankruptcy Court in the Adversary Action. There is no dispute of material fact that any alleged statements in this matter made by Dean Aanderud constituted matters of opinion or prediction of future events. See Kary v. Prudential Ins. Co. of Am., 541 N.W.2d 703, 706 (N.D. 1996). In Kary, this Court held that statements a prospective employer made to a prospective employee of future earnings to be made by the prospective employee after entering into the agreement are predictive statements, which are not actionable as fraud. Id. This Court affirmed the trial court's granting of summary judgment finding that the statement was not actionable because it was in the nature of a prediction of a future event and there was no countervailing issue of material fact. Id. This Court held that it was proper factual resolution on summary judgment by the trial court that such a "statement is an opinion in the nature of a prophecy as to the happening of a future event and is not actionable." Id. Like Kary, and as found by the Bankruptcy Court in the Adversary Action, "Aanderud's statements to Debtors [Kent and Erica McDougall] about a potential loan and refinancing agreement are a prediction of a future event or his opinion about what might happen in the future. These types of statements are not actionable." Like Kary, any statements regarding future credit actions by AgCountry were a prediction of a future event or an opinion and are not actionable deceit.

[¶64] IV. The McDougalls' claims are barred by collateral estoppel.

[¶65] AgCountry also presented the argument to the District Court that the McDougalls claims are barred by collateral estoppel because AgCountry obtained a successful judgment in the Adversary Action where the Bankruptcy Court found AgCountry had not committed fraud against Kent and Erica McDougall, and is permitted to defend its favorable judgment on that ground. Olson, 488 N.W.2d at 388. The District Court found that collateral estoppel did not apply because

"there is no judgment on the merits and as Plaintiffs were not given a fait opportunity to be heard." (App. 49.) AgCountry submits that as an alternative ground to affirming the judgment that this Court should hold that the McDougalls claims are barred by collateral estoppel.

[¶66] This Court has recently summarized the law of res judicata as follows:

> [¶11] Although collateral estoppel is a branch of the broader law of res judicata, the doctrines are not the same. 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 their 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. For purposes of both res judicata and collateral estoppel, only parties or their privies are bound by an earlier judgment.
>
> [¶ 12] This Court has adopted an expanded version of privity for res judicata and collateral estoppel. Privity exists if a person is so identified in interest with another that he represents the same legal right. . . . 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. Fundamental fairness underlies any determination of privity. A judgment on the merits exonerating a party from liability precludes a subsequent action against a party whose liability, if any, is derivative of or secondary to the exonerated party.

Ungar v. N. Dakota State Univ., 2006 ND 185, ¶¶ 11-12, 721 N.W.2d 16 (citations and quotations omitted). The applicability of collateral estoppel "is a question of law, fully reviewable on appeal." Id. Further, "Claim preclusion applies even if subsequent claims are based upon different legal

theories." Lucas v. Porter, 2008 ND 160, ¶ 16, 755 N.W.2d 88. To establish collateral estoppel this Court has established a four-part test:

> (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?'

Northstar Founders, LLC v. Hayden Capital USA, LLC, 2014 ND 200, ¶ 61, 855 N.W.2d 614 (quotations and citations omitted).

[¶67] Here, the claims advanced by the McDougalls should be barred by the judgment that was rendered in favor of AgCountry in the Adversary Action. The allegations in the McDougalls' Complaint are all based on allegations of fraud in the obtaining of a mortgage on the Home Quarter in April of 2016. This is precisely the same factual allegations at issue in the Adversary Action in which AgCountry prevailed, and it was determined that "AgCountry has a valid and enforceable mortgage lien against the Home Quarter." The judgment in the Adversary Action meets all the requirements of collateral estoppel.

[¶68] First, the issues are identical. The McDougalls in their Complaint set forth that the issues to be decided are identical to those decided in the Adversary Action, having base the factual allegations in the Complaint in this matter on certain of the findings made by the Bankruptcy Court in the Adversary Action. Second, there was a judgment on the merits rendered in the Adversary Action in favor of AgCountry. The initial judgment in the Adversary Action was entered on July 10, 2017. The subsequent judgment on appeal was entered July 24, 2018. The July 24, 2018 judgment did not disturb the finality of the earlier judgment in the Adversary Action between Kent and Erica McDougall and AgCountry. The July 24, 2018 judgment solely dismissed McDougalls from the Adversary Action. Thus, there is a final judgment in the Adversary Action to which

collateral estoppel applies. The District Court found that there was no final judgment entered in the Adversary Action, but that is not correct. The final judgment entered in the Adversary Action was and is binding as between Kent and Erica McDougall and AgCountry. While the McDougalls may have been dismissed from the action by the B.A.P., that does not disturb the finality of the judgment in the Adversary Action as between Kent and Erica McDougall and AgCountry.

[¶69] Third, in this instance privity exists between McDougalls and Kent and Erica McDougall, such that the judgment in the Adversary Action should be binding upon the McDougalls. Privity is an "expanded" concept in North Dakota. Ungar, ¶ 12. Here, there are sufficient indicators such that this Court should find as a matter of law that privity exists between McDougalls and Kent and Erica McDougall. First, there is a privity of title between Kent and Erica McDougall and McDougalls. Kent and Erica McDougall's interest in the Home Quarter became encumbered by the AgCountry Mortgage as soon as they took title to the Home Quarter on April 5, 2016. The McDougalls trace title to the Home Quarter is through April 7 Deed. The court in the Adversary Action held that the Mortgage is a valid encumbrance against Kent and Erica McDougall and, since the title to the Home Quarter is traceable only after the Mortgage is recorded, the McDougalls are likewise bound by that determination.

[¶70] Privity is also demonstrated through the McDougalls' participation in the Adversary Action. The McDougalls were so connected in interest with Kent and Erica McDougall in the Adversary Action that privity should be found here. The McDougalls participated in the Adversary Action by attending the hearing and in the case of Michael McDougall testifying. The McDougalls were also represented in the Adversary Action in post-judgment motions and on appeal of the Adversary Action by the same lawyer as Kent and Erica McDougall; this same counsel represented the McDougalls before the District Court and on this appeal. The McDougalls were also liable

for the payment of the lawyer for Kent and Erica McDougall even before the lawyer was representing them in post-judgment and appeal matters in the Adversary Action. Michael McDougall signed a limited personal guaranty of the attorney's fees owed by Kent and Erica McDougall to their attorney on October 20, 2016, and so was also paying for the counsel of Kent and Erica McDougall. Further, in the post-judgment motions in the Adversary Action the McDougalls and Kent and Erica McDougall shared an attorney, the same lawyer who represented Kent and Erica McDougall throughout the Adversary Action and who is representing McDougalls in this present action. The McDougalls and Kent and Erica McDougall all took the position in their post-judgment briefing in the Adversary Action that they in fact had "the same position and desire the same outcome" in the Adversary Action. (Adversary Action Doc. # 51, p. 8 n.4.) The same position was advanced by the McDougalls' attorney on appeal, arguing to the B.A.P. that there is a "unity of interest" between McDougalls and Kent and Erica McDougall in the Adversary Action, such that it is proper that the post-judgment motion was brought by one attorney for all of them. (Adversary Action Appeal Doc. # 10, pp.6-7.) Here, there is privity of interest between McDougalls and Kent and Erica McDougall throughout the Adversary Action because McDougalls paid for joint representation and participated in the control of the litigation. See also, Rutherford v. Kessel, 560 F.3d 874, 880 (8th Cir. 2009) (sitting at "counsel's table during the entire" prior trial and paying attorney's fees for party leads to finding of privity).

[¶71] Finally regarding privity, the McDougalls are connected to Kent and Erica McDougall through a familial relationship that justifies privity in this instance. The Eleventh Circuit Court of Appeals has held that "Although a familial relationship need not, in and of itself, confer privity status, it does constitute an important factor when assessing the preclusive effects of a prior adjudication." Jaffree v. Wallace, 837 F.2d 1461, 1467 (11th Cir. 1988). Here, the family

relationship between McDougalls and Kent and Erica McDougall is another factor, in addition to the control of and participation in the Adversary Action, that justifies a finding of privity in this instance.

[¶72] The District Court did not analyze the issue of privity in its order. (App. 50.) The District Court held that "[a]pplying collateral estoppel against someone who was neither a party nor in privity with a party would 'abrogate the fundamental requirement of due process' as the claim, or a part of it, would have been adjudicated in another case without his having an opportunity to be heard." (App. 50.) The District Court quotes Holloway v. Lockhart, 813 F.2d 874, 878-79 (8th Cir. 1987) for the justification that McDougalls should not be collaterally estopped in this matter. Holloway involved a section 1983 action brought by an inmate against the prison where he was held when the prisoner was a bystander to the teargassing of other prisoners who refused instructions of the jailers. Id. at 875-76. The district court in Holloway dismissed the prisoner's action because it relied on a prior case in the same district where the court had dismissed the rebelling prisoners' section 1983 action against the prison arising out of the same incident. Id. at 878.

[¶73] Holloway is easily distinguishable from the facts of this case. The plaintiff in Holloway did not participate in any manner in the prior lawsuit involving the other prisoners, unlike the McDougalls who were present, testified, and have used the same lawyers in all the proceedings. The plaintiff in Holloway was only connected to the other litigation because he was a prisoner in the same prison at the time of the incident. The court in Holloway did not even thoroughly analyze the privity issue. Id. Here the District Court should have recognized that privity exists between McDougalls and Kent and Erica McDougall, and on that basis found collateral estoppel applied.

[¶74] In Ungar, this Court held a plaintiff could not bring a claim against a different defendant in a second action where the defendant in the first action was exonerated and the second defendant's liability would be derivative of any liability of the defendant in the first action. Id. ¶ 19. Like Ungar, the McDougalls claims are entirely derivative of the fraud claims that were asserted by Kent and Erica McDougall in the Adversary Action. Accordingly, this Court should determine that privity exists between McDougalls and Kent and Erica McDougall.

[¶75] Fourth, the McDougalls were given a fair opportunity to be heard on the issues by which they should be precluded. The McDougalls were present for trial in the Adversary Action and participated in the Adversary Action by being present at the hearing, had opportunity to question witnesses, and Michael McDougall testified. Further, the persons with whom they are in privity, Kent and Erica McDougall, were represented by counsel, presented testimony and argument, and had a fair opportunity to present the issues to the Bankruptcy Court in the Adversary Action. The McDougalls and Kent and Erica McDougall were represented by the same attorney in presenting post-judgment motions to the Bankruptcy Court in the Adversary Action. In fact, counsel for Kent and Erica McDougall in his opening statement indicated that the McDougalls have an identical interest as Kent and Erica McDougall:

> One more point. Kent and Erica McDougall contend that the transfer from Mike McDougall was earmarked, I mean was only for that purpose and they know that and that's the reason they did it and that's the reason they transferred it back and that's why I think we have identical perspective on this and that's why Michael and Bonita McDougall are -- you know, could have been categorized as plaintiffs, but because I'm suing this out, making sure all the parties are present, we sued them as defendants, but they have an identical interest because they are a party to the misfeasance, malfeasance as well.

(Doc. # 51 at 36:6-20.)

[¶76] All of the requirements of collateral estoppel have been met, showing that the Adversary Action had already concluded and found that the Mortgage was not induced by fraudulent

misrepresentations, that statements made by Mr. Aanderud to Kent and Erica McDougall prior to signing the Mortgage are not the type of statements that are actionable misrepresentations, and that the Mortgage is a valid and binding lien against the Premises. Accordingly, the District Court should have dismissed the Plaintiffs' Complaint against AgCountry on collateral estoppel grounds, and this Court can affirm the judgment on these grounds.

[¶77] V. The McDougalls' failure to appeal the judgment as to AgCountry's Counterclaims of foreclosure and enforcement of an assignment of rents waives their arguments on the issues they have raised on appeal.

[¶78] The McDougalls have identified in this appeal three preliminary issues, all of which are related to the propriety of the court's decision as it relates to the McDougalls' claims in their Complaint. (App. 87.) The McDougalls' brief in this matter does not in any manner challenge the District Court's Judgment as to AgCountry's counterclaims for foreclosure of the mortgage in issue or enforcement of the assignment of rents. Specifically, the McDougalls state they are "appealing from the district court's order on summary judgment dismissing their claims of deceit and unjust enrichment." (Appellant Br. ¶ 23.)

[¶79] This Court has held that an appellant's failure to brief an argument on appeal "are deemed abandoned, and thereby become the law of the case and will not be considered on appeal." State v. Duchene, 2007 ND 31, ¶ 10, 727 N.W.2d 769. Further, in light of the law of the case, a courts' judgment should be logical and consistent. See State v. Lehman, 2010 ND 134, ¶ 17, 785 N.W.2d 204. In Duchene, this Court held that an unappealed part of the district court's decision was controlling of the decision on appeal because that unappealed portion made the appealed portion moot. See id.

[¶80] Here, the McDougalls have failed to challenge in any manner the grant of relief to AgCountry on its counterclaims for enforcement of the assignment of rents or foreclosure of its

mortgage. Having abandoned those arguments, the McDougalls have allowed the propriety of AgCountry's claims to become the law of the case. See Duchene, ¶10. 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. If McDougalls were to prevail, the result could be that they obtain a judgment that the mortgage granted AgCountry was obtained through deceit but that the same mortgage is enforceable against McDougalls to foreclose their interest in the property and under which the McDougalls were required to pay the rentals from the property to AgCountry. The best result that the McDougalls could hope for under the law of the case in this matter would result in an entirely irreconcilable judgment. Accordingly, this court should find that the issues challenging dismissal of the McDougalls' claims are barred by the law of the case in their failure to appeal the judgment in favor of AgCountry on its counterclaims.

[¶81] VI. In the event this court reverses the Judgment, remand is appropriate.

[¶82] The McDougalls have requested that this Court reverse the judgment and remand the proceedings only so the District Court can fashion a remedy. This is not an appropriate remedy in this Court. AgCountry asserted to the District Court that there were unresolved factual issues that would have been necessary for the District Court to find relative to McDougalls' Counter-Motion for Summary Judgment, such that reversal to the District Court on those disputed facts is warranted, since the District Court did not pass on those arguments or facts. (Doc. # 96, ¶¶ 23-24.) The McDougalls' assertions that the only item to be decided is their remedy is not correct. AgCountry asserted in response to their Counter-Motion for Summary Judgement that there are factual issues concerning reasonable reliance of any alleged misrepresentations that justified defeat

of the counter motion. Accordingly, in the event this Court reverses the judgment, it would be proper to remand for further proceedings as to any liability of AgCountry.

[¶83] Conclusion

[¶84] For the forgoing reasons, this Court should affirm the Judgment of the District Court.

Respectfully submitted this 5th day of August, 2019.

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[¶85] Statement Regarding Oral Argument

[¶86] AgCountry requests oral argument in this matter. The issues involved span multiple proceedings involving bankruptcy and state court proceedings, and oral argument will be helpful to this Court to narrow and understand the scope of the record presented to the District Court in this matter.

Respectfully submitted this 5th day of August, 2019.

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[¶87] **Rule 32 Certificate of Compliance**

[¶88] I hereby certify that this document complies with the applicable page limitations contained in N.D.R.App.P. 32(a)(8)(A). This document contains 37 pages.

Respectfully submitted this 5th day of August, 2019.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20190140

Michael McDougall and Bonita McDougall, — Plaintiffs and Appellants

v.

AgCountry Farm Credit Services, PCA, — Defendant, Third-Party Plaintiff and Appellee,

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

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CERTIFICATE OF SERVICE

[¶1] I hereby certify that on July 29, 2019, the following documents:

APPELLEE AGCOUNTRY FARM CREDIT SERVICES, PCA'S BRIEF (Corrected)
APPELLEE'S APPENDIX (Corrected)

were 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:

Kip M. Kaler (#03757), kip@kaler-doeling.com, attorney for appellants
Patrick J. Sinner (#08345), patrick@kaler-doeling.com, attorney for appellants

Dated: July 29, 2019

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IN THE SUPREME COURT
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Michael McDougall and Bonita McDougall, — Plaintiffs and Appellants

v.

AgCountry Farm Credit Services, PCA, — Defendant, Third-Party Plaintiff and Appellee,

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

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CERTIFICATE OF SERVICE

[¶1] I hereby certify that on August 5, 2019, the following documents:

APPELLEE AGCOUNTRY FARM CREDIT SERVICES, PCA'S BRIEF, dated August 5, 2019 (Corrected)

were 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:

Kip M. Kaler (#03757), kip@kaler-doeling.com, attorney for appellants
Patrick J. Sinner (#08345), patrick@kaler-doeling.com, attorney for appellants

Dated: August 5, 2019

/s/John D. Schroeder
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Attorney for AgCountry Farm Credit Services, PCA