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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20190140
Towner County Number: 48-2018-CV-00045

Michael McDougall and Bonita McDougall, v. Ag Country Farm Credit Services, PCA, 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,	Plaintiffs and Appellants, Defendant, Third-Party Plaintiff, and Appellee. Third-Party Defendants

APPELLANT'S REPLY BRIEF

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

ORAL ARGUMENT REQUESTED

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SUMMARY

[¶1] Michael and Bonita McDougall were deceived into conveying their land to their son and daughter-in-law, in order to pledge it to AgCountry on the promise of refinancing. AgCountry knew or should have known it would not provide refinancing, intending to deceive McDougall to act, which they did and now they seek to recover their resultant loss. Their cause of action is viable, the Irish case does not apply to these facts, or it should be reversed. There are no other bars to McDougall's claim.

[¶2] This reply brief will only directly respond to the arguments made in AgCountry's brief

ARGUMENT

[¶3] **The majority conclusion in Irish does not apply or should be reversed.** AgCountry continues to misconstrue the relationship of the parties; McDougall had no contractual relations with AgCountry. Every case where Irish has been applied is a situation in which the parties had a direct contractual relationship. The Irish court concluded that the statute of frauds would bar a claim between the contracting parties; the promisee sought to enforce an oral modification different than contained in their written contract.

[¶4] If McDougall and AgCountry had an "agreement" it would be that McDougall would transfer the Home Quarter to Kent and Erica, in consideration for which AgCountry would provide new financing to Kent and Erica. In that event, Bearce v. Yellowstone Energy Development, 2019 ND 89, 924 N.W.2d 791 would permit McDougall to prove fraud inducing them to transfer the Home Quarter and "challenge the validity of a contract and a corresponding request for a remedy of rescission." Id., at ¶12. Similarly, in Goldeneye Res., LLC v. Ganske, 2014 ND 179, 853 N.W.2d 544, the party deceived was permitted to use parol evidence to prove that the promisor's misrepresentation induced harmful action and therefore the claimant was entitled to relief.

[¶5] **Stare decisis does not bar McDougall's remedy.** Stare decisis is not absolute. "[A] decision's precedential value is measured by the context of its particular facts". Wanner v. North Dakota Workers Compensation, 2002 ND 201, ¶21, 654 N.W.2d 760 (citing In Re C.R.M., 552 N.W.2d 324, 326 (N.D. 1996). "Whether the previous holding should be adhered to is within the court's discretion under the circumstances of the case before it." Dickie v. Farmers Union Oil Co. of LaMoure, 2000 ND 111, ¶ 13, 611 N.W.2d 168 (citing Otter Tail Power Co. v. Von Bank, 72 ND 497, 8 N.W.2d 599 (1942)). The doctrine is not sacrosanct. Abbey v. State, 202 N.W.2d 844, 852 (N.D. 1972) (quoting Otter Tail Power Co. v. Von Bank, at 607 ("Whether or not a holding shall be adhered to or modified or overruled, is a question within the discretion of the court under the circumstances of the case under consideration.")).

[¶6] Stare decisis has limited applicability. Assuming Irish is used as AgCountry suggests, a person relying upon Irish is using it to the detriment of the public good; the perpetuation of Irish permits bad actors to make false misrepresentations knowing that the deceit is not actionable if they have a contractual relationship with the promisee. That is contrary to the maxim, "[f]or every wrong there is a remedy." NDCC § 31-11-05(14).

[¶7] **McDougall did not waive its present argument as to Irish.** AgCountry made its waiver argument to the district court. Appellee's Brief ¶34. The district court did not find a waiver. McDougall's argument throughout these proceedings has been that Irish does not apply to their factual situation.

[¶8] AgCountry misapplies waiver. Waiver occurs if the lower court did not have an opportunity to address the issue raised on appeal.

> Adams submits that the Federal Circuit "did not address the 'due process' issues now sought to be presented, . . . because these issues were never raised by Petitioner" before that court. *Id.*, at 47 (emphasis deleted). It is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in

> higher courts. But this principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue. See, *e.g., Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 174–175, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988). And the general rule does not prevent us from declaring what due process requires in this case, for that matter was fairly before the Court of Appeals.

Nelson v. Adams USA, Inc., 529 U.S. 460, 469–70, 120 S. Ct. 1579, 1586, 146 L. Ed. 2d 530 (2000). The North Dakota Supreme Court agrees, "[a] touchstone for an effective appeal on any issue is that the matter was appropriately raised in the district court so the court has an opportunity to intelligently rule on it." State v. Tresenriter, 2012 ND 240, ¶ 9, 823 N.W.2d 774.

[¶9] In this case, it is obvious the court considered the issue of the applicability of Irish. See Appendix 52—53. The court starts specifically with McDougall's argument that AgCountry committed deceit. Appendix 52, ¶ 30. Unfortunately, the court immediately commits the error complained of by applying the statute of frauds as a bar (Irish) to McDougall's claims against AgCountry. See Appellants Brief, ¶¶ 48-56. Obviously the court had the opportunity to decide an issue, and did so contrary to McDougall's argument that it does not apply.

[¶10] If AgCountry contends that McDougall must specifically ask the lower court to overturn Irish, that would be a requirement that McDougall perform a futile act; the lower court must follow the higher court authority. The U.S. Supreme Court states that the lower court must follow higher court precedent if it has direct application to the case.

> We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko*. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. We now conclude that *Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions.

Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 1921–22, 104 L. Ed. 2d 526 (1989). The North Dakota Supreme Court similarly holds:

> Although the trial court rendered its decision on the principle of stare decisis and followed the decision of a court of equal rank, we are not bound by such decision, and we will proceed to a determination of this case without considering the decision of the trial court as precedent binding on this court.

Fargo Pub. Library v. City of Fargo Urban Renewal Agency, 185 N.W.2d 500, 503 (N.D. 1971). Although it was in a different context, the Court also said, "[t]he law does not require idle acts." Id., at 505 (citing N.D.C.C. § 31-11-05(23)). McDougall's argument to the trial court that it should overrule Irish would be such a futile act.

[¶11] **The trial court incorrectly denied McDougall's claim for unjust enrichment.** AgCountry argues that there was a "legal justification" for AgCountry taking a mortgage on the "Home Quarter", and that McDougall had an adequate remedy at law. Both of these conclusions are in error, "fully reviewable on appeal". Matter of Estate of Moore, 2018 ND 221, ¶ 9, 918 N.W.2d 69.

[¶12] **There is no legal justification.** "Unjust enrichment is an equitable doctrine, applied in the absence of an express or implied contract, to prevent a person from being unjustly enriched at the expense of another." Lochthowe v. C.F. Peterson Estate, 2005 ND 40, ¶ 9, 692 N.W.2d 120 (cited in Moore, infra). AgCountry cites Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc., 2004 ND 117, ¶ 16, 680 N.W.2d 634, for the proposition that "unjust enrichment does not lie when the benefit gained by the one party was obtained by a legally enforceable contract". Appellee's Brief, ¶¶ 43-44. McDougall has no contract. The consideration AgCountry gave, an extension of time, was not a benefit to McDougall and had not value to Kent and Erica. (Appellant's Brief, ¶¶ 64-65) Had there been a contract, McDougall could utilize Bearce to rescind the fraudulently induced contract.

[¶13] **McDougall has no adequate remedy at law.** There is no dispute that Kent and Erica were in a chapter 7 bankruptcy[1], were McDougall's only source of recovery, and were insolvent. Midland Diesel Service & Engine Co. v. Sivertson, 307 N.W.2d 555, 557 (N.D. 1981) stands for the proposition that a remedy against an insolvent debtor may be inadequate. Additionally, this court concluded that availability of a remedy is not necessarily an adequate remedy. McColl Farms, 2013 ND 169, ¶20, 837 N.W.2d 359. McDougall may not seek relief from Kent or Erica during their bankruptcy or after, absent conditions that do not exist.[2] In the bankruptcy context, it is accepted without further analysis that unless creditors of the bankruptcy will be paid 100% of its claim, a creditor that improves its position from unsecured to secured, is in an improved (preferred) position. In re O'Neill, 550 B.R. 482, 515 (Bankr. D.N.D. 2016). Concomitantly, AgCountry's improved position results in an equal diminishment of McDougall's position.

[¶14] While McDougall has a remedy against Kent and Erica's bankruptcy estate[3], it is not an adequate remedy. At a minimum, there is a question of fact as the adequacy of the remedy—will McDougall get a commensurate consideration for their loss of the Home Quarter? The burden of proof lies with AgCountry; the court's summary holding regarding these two factors are inadequate to sustain this conclusion.

[¶15] **McDougall's deceit claim does not require direct communication.** Deceit, N.D.C.C. 9-10-02, does not make reference to "direct" communications. While there is no North Dakota

[1] It is public record that Kent and Erica were granted a bankruptcy discharge. N.D. Bankruptcy Court, file # 16-30542, discharged entered November 15, 2017, Doc. # 208.

[2] 11 U.S.C. § 362 operates as a stay of all legal and equitable proceedings against the debtors and their property; 11 U.S.C. § 727 discharges all of debtor's personal liability on all but certain specified debts and those debts deemed not discharged as a result of other actions taken in the bankruptcy proceeding, none of which apply to McDougall.

[3] AgCountry's claim that the debt would not be dischargeable in bankruptcy is baseless; it was AgCountry's deceit that created McDougall's loss not Kent and Erica.

caselaw on this question, California, with an identical statute[4], concludes that indirect communications can be the basis for deceit.

> The Restatement Second of Torts, section 533, articulates the relevant principle in this way: "The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transactions involved." [Citations omitted.]

Mirkin v. Wasserman, 5 Cal. 4th 1082, 1095–96, 858 P.2d 568, 575 (1993).

[¶16] AgCountry intended to deceive McDougall, through communications to Kent and Erica, to acquire additional collateral (Home Quarter) which AgCountry knew it could only acquire through action by McDougall harmful to themselves. (See Appellant's Brief, ¶¶ 15-17.)

[¶17] AgCountry made "encouraging representations regarding the possibility of refinancing [which] were not warranted by the information available to AgCountry", and as a result "induced Debtors into granting a mortgage in the Home Quarter." Memorandum and Order, Appendix 81. McDougall's deceit claim fits within each section of N.D.C.C. § 9-10-03 (See argument below, ¶ 23).

[¶18] AgCountry asserts that its statements were a prediction of a future event or an opinion, and therefore not actionable. McDougall asserts:

1) AgCountry's misrepresentations were of present facts—Kent and Erica's loan application "looked good", "yes, not to worry", "the loan should come soon" and "the loan should be coming next week". Appendix p. 70. But, the day after the mortgage was recorded, AgCountry (Stacy Sem) told them "somebody should have sat us down a long time ago" and Kent McDougall

[4] Cal. Civ. Code § 1710 (West).

testified "it was very clear that we weren't getting any new money at that time from signing that Home Quarter over." Appendix p. 72-73.

2) Misrepresentations of future events are actionable if the promissor has no intention of performing.

> We further note, although predictions of future events generally do not constitute fraud, see Kary, 541 N.W.2d at 706, our statutory definition of actual fraud expressly includes the making of a promise without any intention of performing it. N.D.C.C. § 9–03–08(4). In this case, the Borgens alleged Golden Eye made specific promises that it would drill and operate the wells itself, and would drill the Borgens' minerals first, with no intention or ability to perform that promise and with the specific intent to deceive the Borgens and induce them to lease their minerals to Golden Eye.

Golden Eye Res., LLC v. Ganske, 2014 ND 179, ¶ 25, 853 N.W.2d 544.

[¶19] **McDougall's claims are not barred by collateral estoppel.** While this Court has said that "[t]he applicability of res judicata or collateral estoppel is a question of law, fully reviewable on appeal", Ungar v. N. Dakota State Univ., 2006 ND 185, ¶ 10, 721 N.W.2d 16, there are elements of justice at play, and the lower court's judgment on the issue deserves some respect.

> The "doctrines of res judicata claim preclusion and collateral estoppel issue preclusion 'should apply as fairness and justice require, and should not be applied so rigidly as to defeat the ends of justice.'" *Skogen v. Hemen Twp. Bd.*, 2010 ND 92, ¶ 17, 782 N.W.2d 638 (quoting *Riverwood Commercial Park*, at ¶ 14). We have said the burden is on the party claiming res judicata to establish the defense. *Robertson Lumber Co. v. Progressive Contractors, Inc.*, 160 N.W.2d 61, 76 (N.D.1968). *See Witzke v. City of Bismarck*, 2006 ND 160, ¶ 10, 718 N.W.2d 586 (party asserting estoppel has burden of establishing issue in second case was resolved in party's favor in prior proceeding).

Hanneman v. Nygaard, 2010 ND 113, ¶ 12, 784 N.W.2d 117. AgCountry cannot prove all of the essential elements of collateral estoppel.

[¶20] **There was no "final" judgment.** The judgment issued from the bankruptcy court was appealed, challenging an erroneous conclusion of law. The appeal was dismissed, first as to Kent and Erica and the trustee, because they had nothing to gain in the outcome, and then as to McDougall because the court did not have jurisdiction to hear the dispute.

> To the extent the McDougalls asserted before the bankruptcy court their rights concerning whether AgCountry holds a lien on the Home Quarter, the bankruptcy court had no jurisdiction over the dispute between the McDougalls and AgCountry. . . . .
>
> Related to jurisdiction is broad, but it is not without limits and "bankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995)). The alleged dispute between the McDougalls and AgCountry is a state law fraud dispute between two non-debtors (the McDougalls and AgCountry) about property (the Home Quarter) that was never property of the bankruptcy estate, and the outcome of which would not effect the bankruptcy estate. . . . This sought nothing from the bankruptcy court on behalf of or from the Debtors or their estate.

In re McDougall, 587 B.R. 87, 91 (B.A.P. 8th Cir. 2018).

[¶21] The bankruptcy court had no jurisdiction to determine Kent and Erica's (or the trustee's) claim or McDougall's claim, against AgCountry; it was as if the case had never existed.

> Because standing is jurisdictional, lack of standing precludes a ruling on the merits. Thus, the district court erred in giving preclusive effect to the Telepresence judgment because its dismissal of Telepresence's complaint for lack of standing was not a final adjudication of the merits.

Media Techs. Licensing, LLC. v. Upper Deck Co., 334 F.3d 1366, 1370 (Fed. Cir. 2003).

[¶22] On a far simpler and more practical basis, McDougall did not get a final judgment. The issue McDougall appealed was AgCountry's contention that is representations were "a prediction of a future event" or "opinion as to a future event". (See ¶ 18 above.) That is a substantial question to which McDougall did not get a final determination.

[¶23] **There was no privity as between Kent and Erica and McDougall.** McDougall was not in privity with Kent and Erica's bankruptcy estate or the trustee. Kent and Erica (the bankruptcy estate, later represented by the trustee) were seeking relief that would benefit the bankruptcy estate. McDougall sought relief for themselves. They are not in privity as they are not seeking the same relief—Kent and Erica might have recovered and preserved the mortgage for the bankruptcy estate. McDougall wanted to avoid the mortgage entirely. McDougall and the bankruptcy estate of Kent and Erica are not in privity because they have different interests.

[¶24] **Out of "fairness and justice", res judicata should not be applied as to defeat the ends of justice.** Hanneman v. Nygaard, 2010 ND 113, ¶ 12, 784 N.W.2d 117; see also Martin v. Marquee Pac., LLC, 2018 ND 28, ¶ 19, 906 N.W.2d 65 ("[t]his Court has never applied res judicata to prevent litigation against one who was neither a party nor in privity with a party in prior litigation resulting in a final judgment.")

[¶25] McDougall sought to be a party in bankruptcy litigation, which would include the right to appeal. They attempted that appeal, only to discover the litigation was void in its entirety. McDougall should be granted the right to be fully heard, including an appeal they did not waive. The Bankruptcy Court erred when it concluded as a matter of law that AgCountry's misrepresentations of a forthcoming loan was a mere prediction or opinion. AgCountry's misrepresentation fits within all 5 of the types of misrepresentations defined by the fraud statute.

> Actual fraud within the meaning of this title consists in any of the following acts committed by a party to the contract, or with the party's connivance, with intent to deceive another party thereto or to induce the other party to enter into the contract:
>
> 1. The suggestion as a fact [Kent and Erica might get a loan] of that which is not true by one who does not believe it to be true [AgCountry knows Kent and Erica will not get a loan];
>
> 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true though that person believes it to be true ["There is compelling evidence that Aanderud's encouraging representations regarding the possibility of refinancing were not warranted by the information available to AgCountry and that these positive assertions induced Debtors into granting a mortgage in the Home Quarter. Appendix 81];
>
> 3. The suppression of that which is true by one having knowledge or belief of the fact [the obligation to disclose the truth when under a duty to do so—"we believe that once the [representor] chose to reply to [party]'s inquiry it had a duty to impart full, accurate, and truthful information." Ostlund Chem. Co. v. Norwest Bank of Jamestown, 417 N.W.2d 833, 836 (N.D. 1988)];
>
> 4. A promise made [we will fairly consider giving you a loan] without any intention of performing it [you won't qualify for a loan]; or
>
> 5. Any other act fitted to deceive [say anything to get the Home Quarter as collateral].

N.D.C.C. §9-03-08[5] (bracketed material added to show its application to these facts).

[¶26] At a minimum, McDougall ought to be permitted to challenge the bankruptcy court's erroneous conclusion of law. Most importantly, while the fact finding by the bankruptcy court might arguably be deemed binding upon the parties, the court made an error of law, which neither McDougall nor their alleged privities were allowed to correct on appeal. The court's legal conclusion ("Aanderud's statements to Debtor 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 statement are not actionable." Appendix p. 81) is in error. Those statements were "not warranted by the information available to AgCountry", but were made intending to get McDougall's Home Quarter.

[¶27] **McDougall did not waive their right to appeal.** AgCountry argues that McDougall only appealed the summary judgment order.[6] McDougall's notice of appeal states that they appeal "the Judgment dated April 17, 2019 (docket No. 123)". Appendix p. 87. It is true that the only errors assigned on appeal arise out of the February 22, 2019 order dismissing McDougall's complaint; but, McDougall cannot say the foreclosure judgment is in error, unless this Court reverses the order dismissing their complaint.

[¶28] The essence of AgCountry's argument is: 'this appeal is moot because the foreclosure has since been completed and this Court cannot grant McDougall effective relief.' That is an obvious distortion. McDougall sought to avoid AgCountry's lien encumbering their property. The fact that AgCountry forecloses the property and takes the value, does not prevent McDougall from

[5] The same conduct can constitute both fraud and deceit, depending upon whether there is a contract. Erickson v. Brown, 2008 ND 57, ¶ 24, 747 N.W.2d 34.

[6] AgCountry apparently relies upon Appellant's misstatement that they appealed the court's order, when they actually appealed the judgment.

getting relief for the value misappropriated. Were AgCountry's supposition correct, a strong and fleet-footed creditor could moot most appeals. In any case it is irrelevant here. McDougall's complaint not only asked for relief avoiding AgCountry's mortgage in their land, but alternatively asked for a "monetary judgment . . . against AgCountry for the amount of the unpaid balance due on the mortgage against the Home Quarter" or "monetary judgment . . . against AgCountry for the amount of all damages they have incurred . . ." Appendix p. 8-27.

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

CONCLUSION

[¶30] Michael and Bonita McDougall request that this Court reverse the judgment entered, concluding that McDougall stated a viable cause of action in that the Irish case does not apply or is overruled, and that they may also obtain relief under their claim of unjust enrichment.

Dated this 19th day of August, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Appellant's Reply Brief complies with the applicable page limitations contained in N.D.R.App.P. 32(a)(8)(A) and the Court's granting of the appellant's motion to expand page limitation. This document contains 15 pages total.

Dated this 22nd day of August, 2019.

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