

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Louise Broten and Linda Schuler, in their )  
individual capacities & as Co-Personal )  
Representatives of the Estate of Helen )  
Broten, deceased, )

Plaintiffs and Appellee, )

vs. )

James Broten, in his individual capacity )  
& as Personal Representative of the )  
Estate of Olaf Broten, deceased, )

Defendant and Appellant. )

Supreme Court No. 20160151

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Appeal from the Second Amended Judgment dated February 26, 2016, by the Barnes  
County District Court, Southeast Judicial District, Hon. Jay Schmitz presiding.

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**APPELLEES' BRIEF**

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[¶1]

## **STATEMENT OF ISSUES**

### **I. WHETHER THE DISTRICT COURT WAS CORRECT IN DENYING JAMES BROTEN'S DEMAND FOR RELIEF UNDER THE THEORY OF UNJUST ENRICHMENT.**

## **STATEMENT OF THE FACTS**

[¶2] This case was previously before the North Dakota Supreme Court in Brotten v. Brotten, 2015 ND 127, 863 N.W.2d 902. In Brotten, this Court affirmed the District Court's determination that James Brotten ("James") breached certain fiduciary duties while acting as Personal Representative of his father's estate. This Court also affirmed the District Court's decision to award the plaintiff/appellees monetary damages. However, the matter was also remanded for further consideration of whether James was entitled to any compensation for payments purportedly made to his parents and whether the money judgment should be reduced for any improvements purportedly made to the real property that is the subject of this action.

[¶3] At the direction of the District Court, the parties submitted briefs addressing the remanded issues. *See* Docket at Documents 213 through 222 (Doc ID 213-222). A hearing was held before Judge Jay Schmitz on December 18, 2015, at the Barnes County Courthouse. The Court issued its Memorandum Opinion and Order on January 29, 2015. *See* Appendix at pages 81-85 (App. at 81-85). The Court found that James was entitled to an offset in the amount of \$20,000 for improvements made to the subject property; however, the Court denied James's request for compensation made under the theory of unjust enrichment. (App. at 82). The Second Amended Judgment was entered by the Court on February 26, 2016. (App. at 86-87).

[¶4] James filed his Notice of Appeal on April 25, 2016. (App. at 88-89). James is appealing only the Court’s determination that James was not entitled compensation under the restitution/unjust enrichment claim. (App. at 88-89). Accordingly, the issue of the \$20,000 reduction is not before this Court. While this matter was previously briefed at length in Brotten, we believe a recitation of relevant facts is necessary to adequately address James’s subsequent appeal.

[¶5] Olaf Brotten (“Olaf”) and Helen Brotten (“Helen”) were married in December 1940. *See* Trial Transcript of June 17, 2013, at page 15, line 9 (Tr.1 at 15:9). In 1941, Olaf and Helen moved onto a farm at Dazey, North Dakota, where they lived the rest of their lives. (Tr.1 at 15:13-15). Olaf and Helen had four children, namely: Linda Schuler (“Linda”), who passed away June 14, 2012; appellee Louise Brotten (“Louise”); appellant James Brotten (“James”); and Judith Legge (“Judy”). (Tr.1 at 16:9-15).

[¶6] The Brotten “family farm” consisted of the following real property located in Barnes County, North Dakota:

Township 143 North, Range 60 West:  
Section 26: SW/4NW/4; S/2SW/4; NW/4SW/4  
Section 27: NE/4; SE/4

(“Subject Property”). Olaf assisted in farming until approximately a year before his death. (Tr.1 at 20:2-6). Olaf Brotten died testate on June 26, 1998. (Tr.1 21:10, App. 60 at ¶4). Following Olaf’s death, James was appointed to serve as personal representative of Olaf’s estate. (App. 60 at ¶4). James’s appointment was due in part to written waivers of appointment he procured from Helen, Linda, Louise, and Judy, which in addition to supporting his application, also waived notice requirements of James’s actions, including providing an inventory or final accounting. (App. 61 at ¶7).

[¶7] James did not follow the terms of Olaf’s will, rather his sole act as Personal Representative was to execute a deed on November 9, 1999, transferring the Subject Property to himself. (App. 62 at ¶10). Although Louise did execute a waiver in favor of James’s appointment as Personal Representative, Louise was unaware of this transfer by James to himself until August 2, 2010. (App. 60 at ¶13; Tr.1 at 44:7-10).

[¶8] Helen Broten passed away June 16, 2010. (Tr.1 at 24:3-4). Following Helen’s death, Louise visited the Barnes County Courthouse to inquire if probate proceedings had commenced in her mother’s estate. (Tr.1. at 30:4-10). Louise was informed that no probate had commenced, but that her father had a will that was probated. (Tr.1 at 30:14-16.) Louise was previously unaware of Olaf’s will and was “incredulous.” (Tr.1 at 30:18-19). While at the courthouse, it was suggested to Louise that she visit the “registrar of deed’s office.” (Tr.1 at 31:7-11). While at the courthouse, Louise discovered the November 9, 1999 PR deed, which was executed by James in his capacity as personal representative of Olaf Broten’s estate. (Tr.1 9-12)

[¶9] On November 24, 2010, Louise and Linda, in their individual capacities and as co-Personal Representatives of the Estate of Helen Broten, commenced this action against James, individually and as Personal Representative of the Estate of Olaf Broten, alleging breach of fiduciary duty, conversion, deceit, and breach of contract. (App. at 8). A bench trial was held on June 17 and 18, 2013, which resulted in the district court finding that James breached his fiduciary duties as Personal Representative of the Estate of Olaf Broten by conveying the Subject Property to himself. (App. 60-70).

[¶10] In support of its finding, the district court explained:

- (a) James began paying several of the expenses, such as health insurance premiums, farm insurance premiums, and

electric/heating bills, in the 1970's, before the alleged oral contract was made. (b) The parties hired an attorney to prepare a written contract for deed, wills for Olaf and Helen, and a quit-claim deed from Helen to Olaf, all of which were clearly intended as complementary parts of Olaf and Helen's estate planning. James and Olaf were experienced businessmen. James and Louise testified Helen kept careful financial records. The complete lack of documentary evidence of the alleged oral contract was contrary to the parties' habits and patterns of conduct. (c) James' regular withdrawals of money from Helen's personal bank account for his own use contradicts his testimony that the alleged oral contract required him to pay all of his parents' expenses. (d) James' testimony as to the terms of the alleged oral contract is inconsistent with his affidavit in opposition to the motion for summary judgment, where he stated the agreement called for him to farm the [Subject Property] "for no pay." (e) Olaf and Helen's wills both show a clear intent to treat their four children equally. The alleged oral contract requires the court to believe Olaf and Helen intended for James to inherit virtually all of their property, to the exclusion of their other children.

(App. 65-66 at ¶ 27).

[¶11] The district court also found that James failed to prove partial performance of the alleged oral contract to purchase the Subject Property sufficient to avoid the Statute of Frauds. (App. 66 at ¶ 29). In support of this finding, the district court explained:

(a) James testified that Olaf actively participated in farming operations on the [Subject Property] up to the time of Olaf's death. James did not present any evidence showing that he took or intended to take exclusive or primary possession of the [Subject Property] during Olaf's lifetime. (b) James has made improvements on the farmstead, such as grain bins, and/or machine shed, but there is no evidence showing the improvements occurred during Olaf's lifetime, their value, or whether Olaf contributed to them. (c) The acts relied upon by James to show partial performance are not of such a nature as to be incomprehensible unless related to the alleged oral contract to purchase the [Subject Property]. James' payment of certain expenses on his parents' behalf resulted in tax advantages to James and

Olaf. The parties' actions, including James' taking of money from Helen's account and use of her assets as collateral for loans after Olaf's death, are equally consistent with a *de facto* partnership or joint venture.

(App. 92-93 at ¶ 29). The district court concluded that “[t]he acts relied upon by James to show partial performance of the alleged oral contract are not of such a nature as to be incomprehensible and not capable of being understood unless related to the alleged oral contract for James to buy the [Subject Property].” (App. 67 at ¶47). “The actions of James, Olaf, and Helen are at least equally consistent with an express or implied agreement to engage in a joint farming enterprise in order to maximize tax advantages and income, and minimize expenses.” (*Id.*)

[¶12] Subsequently, a hearing on the appropriate remedy was held on November 27, 2013, after which the district court concluded that in order to restore the value of the Estate of Helen Broten to what it would have been absent the breach of fiduciary duty by James, the Estate of Helen Broten is entitled to compensation of \$103,054 for James's use of the Subject Property since June 16, 2010 (the date of Helen Broten's death); and judgment in the amount of \$1,197,000 for the value of the Subject Property as of December 2013. (App. 71-74).

[¶13] On March 21, 2014, the district court entered judgment against James. (App. 75-76). An Amended Judgment was entered against James in the amount of \$1,304,010.45 on August 15, 2014. (App. 77-78). A Notice of Appeal was filed by James on August 27, 2014, which led to this Court's decision in Broten v. Broten, 2015 ND 127, 863 N.W.2d 902.



[¶14]

**LAW AND ARGUMENT**

**I. THE DISTRICT COURT WAS CORRECT IN DENYING JAMES BROTEN'S DEMAND FOR RELIEF UNDER THE THEORY OF UNJUST ENRICHMENT.**

**A. Standard of Review – Unjust Enrichment.**

[¶15] As stated above, in Brotten, the North Dakota Supreme Court remanded this matter to the District Court for proceedings to determine whether any compensation is due to James, stating in pertinent part:

The district court's findings did not address payments made by James Brotten to the parents for living expenses, or interest payments they declared as income. The subsequent order for judgment does not address any compensation owed to James Brotten for improvements made to the property or payments to the parents.

Brotten at ¶ 23. Upon remand to the District Court, James filed a Motion on Remand for Restitution and Request for Oral Argument. (Doc ID 214). Within this motion, James outlined his argument that he is entitled to restitution for alleged payments made to or on behalf of Olaf and Helen Brotten, together with interest thereon at the statutory rate of six percent (6%) per annum, totaling \$805,443.22. (Doc ID 214 at ¶¶ 3-19). James bases his claim for such restitution solely upon the equitable doctrine of unjust enrichment. (Doc ID 214 at ¶ 3, citing Smestad v. Harris, 2012 ND 166, 820 N.W.2d 363). “A determination of unjust enrichment is a conclusion of law and is fully reviewable” upon appeal. Ritter, Laber & Associates, Inc. v. Koch Oil, Inc., 2004 ND 117, ¶26, 680 N.W.2d 634. Accordingly, the District Court's denial of James's unjust enrichment claim is fully reviewable by this Court.

**B. James Broten failed to establish that he is entitled to restitution under the theory of unjust enrichment.**

[¶16] Unjust enrichment is an equitable doctrine which rests upon quasi or constructive contracts implied by law to prevent a person from unjustly enriching himself at the expense of another. Hayden v. Medcenter One, Inc., 2013 ND 46, ¶ 14, 828 N.W.2d 775. “The doctrine [of unjust enrichment] applies in the absence of an express or implied contract.” Northstar Founders, LLC v. Hayden Capital USA, LLC, 2014 ND 200, ¶ 53, 855 N.W.2d 614. “To recover under a theory of unjust enrichment [the movant] must prove five elements (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of a justification for the enrichment and impoverishment; and (5) an absence of a remedy provided by law.” Id. (citing Lund v. Lund, 2014 ND 133, ¶ 16, 848 N.W.2d 266). The essential element in recovering under a theory of unjust enrichment is the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value. Zuger v. North Dakota Ins. Guar. Ass’n, 494 N.W.2d 135, 138 (N.D. 1992).

[¶17] Here, in order for James to recover restitution under the theory of unjust enrichment, James must establish that the Estate of Helen Broten was enriched, that James was impoverished, a connection between the enrichment of Helen’s estate and James’s impoverishment, with no justification for either, and an absence of remedy at law. These factors were previously argued to the District Court and are included in James’s appellate brief.

**1. James Broten failed to establish that the Estate of Helen Broten was unjustly enriched.**

[¶18] In his brief on remand, James claims to have paid at least \$162,000.00 in living and home expenses for Olaf and Helen. (Doc ID 215 at ¶8). In his appellate brief, James

goes further and contends that “Olaf and Helen were enriched because James paid a majority of Olaf and Helen’s living expenses for thirty years.” *See* Appellant’s Brief at ¶25. At trial, James presented a summary exhibit, referred to as Exhibit D-1. (App. at 30). However, as noted in Court’s Memorandum Opinion and Order on remand, the Court did not make a finding that Exhibit D-1 was accurate. (App. 83 at ¶5). To the contrary, the Court found the accuracy of Exhibit D-1 questionable on several grounds, including, (1) that it was prepared by James’s attorneys and included a fair amount of supposition, (2) that its accuracy was undercut by testimony by witnesses at trial, and (3) that its accuracy was undercut by James’s own testimony at trial. (App. 83 at ¶5-6) Accordingly, James has failed to establish by competent evidence an amount by which the Estate of Helen Broten (or the Estate of Olaf Broten) was enriched.

[¶19] Additionally, other findings of fact made by the Court undercut James’s claim that the Estate of Helen Broten was enriched. The most egregious finding is that James freely transferred funds from his mother’s account to himself without repayment. (App. 65 at ¶ 29(c)). In essence, any payment that James purported made on behalf of his mother’s living expenses was in fact made with her own money. Additionally, James testified that he did not actually pay his parents the \$12,000 per year, rather they “moved things around” and money did not actually change hands. *See* 6/17/13 Transcript at page 171, lines 21-25, page 172 lines 1-2 (Tr.1 at 171: 21-25 and 172: 1-2); *see also* App. 63 at ¶21.

**2. James Broten failed to establish that he was impoverished.**

[¶20] The primary evidence that James relies upon to show that he was impoverished is again Exhibit D-1. As stated above, the District Court questioned the accuracy of this

summary exhibit. In his appellate brief, James claims that “the district court’s reasoning is not supported by the record.” However, James conveniently disregards numerous facts in the record that show that he was receiving both money and benefits from his parents during this time. As stated above, James freely transferred funds from his mother’s account to himself without repayment. (App. 65 at ¶¶ 23, 27(c), 29(c)). Additionally, James had use of the Subject Property since June 16, 2010, and kept all income derived therefrom which should have been paid to the Estate of Helen Broten. (App. 72 at ¶4). James further utilized certificates of deposit (CDs) belonging to his parents as security for his operating loans. (App. 64 at ¶23).

[¶21] James contends (as illustrated on Exhibit D-1), that he paid Olaf and Helen \$12,000 per year in-kind as interest from at least 1983 until 1999, totaling \$180,000. See Appellant’s Brief at 10. At trial, when James was questioned about these supposed payments, James admitted that he had no idea how they came up with the number of \$12,000. (6/17/13 Transcript at page 174, lines 22-25). James also testified that he did not actually pay his parents the \$12,000 per year, rather they “moved things around” and money did not actually change hands. See 6/17/13 Transcript at page 171, lines 21-25, page 172 lines 1-2 (Tr.1 at 171: 21-25 and 172: 1-2); see also App. 63 at ¶21. Furthermore, James admitted he received income from his father’s farming operation. (6/17/13 Transcript at page 121, lines 19-21). As noted by the district court, James and Olaf also received preferential tax treatment due to any payments James made on behalf of his parents or the joint operation. (App. 64 at ¶29(c)).

[¶22] It is clear from the record that James was treated as a partner in the farming operation and received financial considerations, either in the form of income or tax

treatment and therefore it cannot be said that he was impoverished. His actions were done in exchange for remuneration (just not the remuneration he is now seeking). As recognized by the District Court, “[t]he evidence clearly shows that ‘enrichments’ and ‘impoverishments’ flowed both ways between James Broten and his parents, but James contends the court should simply ignore one side of the equation.” (App. 84 at ¶7) In finding no enrichment to the Estate of Helen Broten, and no impoverishment to James, the District Court correctly found that “James has not proven that, on balance, his parents were enriched and he was impoverished during the course of their long history of ‘moving things around’ in their farming operations in order to maximize income.” (*Id.*)

**3. If this Court finds both an enrichment and an impoverishment, it must also recognize a justified connection between them.**

[¶23] Should this Court disagree with our contentions above, i.e. that the Estate of Helen Broten was not enriched and that James Broten was not impoverished, the connection between the two cannot be ignored. Any expenses James incurred on behalf of his parents is a result from their joint farming operation. Again, the District Court found that the parties’ actions “are equally consistent with a de facto partnership or joint venture.” (App. 67 at ¶ 29(c)). Any impoverishment to James stemmed from a benefit James received, directly or indirectly, in the form of financial considerations from Olaf’s farming operation (income, taxes, use of land and machinery). Any enrichment to Olaf and Helen was a result of their providing financial considerations to James (sharing income, machinery, land, etc.). In any event, there exists a justification between any enrichment or impoverishment as alleged in this case (i.e. the joint farming operation), and James cannot satisfy the fourth element of unjust enrichment.

[¶24] In his appellate brief, James states “[t]he enrichment and impoverishment cannot be justified by any other means.” *See* Appellant’s Brief at ¶41. James refutes the district court’s “de facto partnership” categorization. However, as discussed above, James simply ignores the fact that he did in fact receive substantial benefits from his parents (using their funds freely, using CDs at collateral, obtaining income from the Subject Property during Olaf Broten’s lifetime). Unlike James, this Court cannot ignore these facts in considering the justified connection between the actions that James categorizes as enrichment and impoverishment.

#### **4. Other remedies at law exist.**

[¶25] James ends his appellate brief with a conclusory paragraph addressing whether any other remedy at law exists for James in this instance. *See* Appellant’s Brief at ¶43. Specifically, James contends that “[n]ot awarding restitution to James will have the effect of permitting Olaf and Helen, through their estates, to retain James’s payments and receive the full market value of the Land [i.e. the Subject Property] and give up nothing in return.” (*Id.*) James’s argument is incorrect on no less than three separate bases. First, James had at least three other remedies at law: (1) James had the opportunity to deal with the land transfer during the probate of the Estate of Olaf Broten (in which James served as Personal Representative); (2) James had the opportunity to make a claim against the Estate of Helen Broten (which he did, but never substantiated); and finally (3) James could have filed a lawsuit against his parents, their estates, or alleged a counterclaim in this action. Beyond the initial filing of a claim in Helen’s estate, James did none of these things.

[¶26] James’s argument for this element (i.e. not awarding restitution will result in a windfall to the Estate of Olaf and Helen) is nothing short of a reiteration of his argument in the first appeal: that James made payments to his parents for land, even though (1) the Court made no finding of fact that James made actual payments; (2) the record does not contain any clear value for the payments, and most importantly (3) the Court found at least one other credible explanation for these payments, a joint farming operation. It cannot be said that James Broten had no other remedy at law available to him, nor can it be said that his argument on this element is persuasive.

**5. James Broten ignores the essential question in unjust enrichment.**

[¶27] As stated above, “[t]he essential element in recovering under a theory of unjust enrichment is the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value.” Zuger at 138. In its Memorandum Opinion and Order, the District Court keyed in on this essential element, finding both: (1) James received substantial benefits from his farming relationship with Olaf Broten before Olaf’s death; and (2) James has taken all of the income off of the Subject Property since 1999, which is the year after Olaf Broten died. (App. 85 at ¶8). James’s argument simply fails to recognize the benefits he did receive from his parents, which have been well established at trial, in the briefing, and in argument above. The District Court perhaps summarizes the flaw in James’s argument best in stating that “James wants the court to consider only one side of the ledger in deciding whether his parents were enriched and he was impoverished by their business relationship.” (App. 84 at ¶7).

**CONCLUSION**

[¶28] For the reasons explained, the District Court was correct in denying James Broten's demand for relief under the theory of unjust enrichment. It is clear that the Court's findings are supported by the evidence presented at trial and found throughout the record. Accordingly, the Court's Second Amended Judgment dated February 26, 2016 should be affirmed.

Dated August 29, 2016.

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**CERTIFICATE OF SERVICE**

[¶29] I hereby certify that a true and correct copy of the forgoing brief was electronically filed with the Clerk of the North Dakota Supreme Court on the 29th day of August, 2016, and e-mailed to the following:

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