

IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA

Louise Broten & Linda Schuler,)	
in their individual capacity & as)	
Co-Personal Representatives of the)	
Estate of Helen Broten, deceased,)	
)	
Plaintiffs and Appellees,)	
)	Supreme Court No. 20160151
vs.)	
)	
James Broten, in his individual capacity,)	
& as Personal Representative of the)	
Estate of Olaf Broten, deceased,)	
)	
Defendant and Appellant.)	

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

APPELLANT'S BRIEF

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STATEMENT OF ISSUES

- I. Whether the District Court erred as a matter of law on remand in denying Defendant/Appellant James Broten any compensation or other equitable relief for payments made to his parents.**
- A. Were Olaf and Helen Broten enriched by the payments James Broten made to them and by James Broten's payment of their expenses?**
 - B. Was James Broten impoverished by the payments to his parents under the doctrine of unjust enrichment?**
 - C. Are Olaf and Helen Broten's enrichment and James Broten's impoverishment connected?**
 - D. Is there another justification for James Broten's payments?**
 - E. Does James Broten have another remedy at law?**

STATEMENT OF THE CASE

[¶1] Defendant and Appellant James Broten (“James”) appeals from the Second Amended Judgment and the district court’s underlying Memorandum Opinion and Order, concluding as a matter of law James did not establish he was entitled to any compensation for payments he made to his father Olaf Broten (“Olaf”) and mother Helen Broten (“Helen”) (collectively, “Parents”). This Court previously remanded this case to the district court to consider this issue in Broten v. Broten, 2015 ND 127, ¶ 23, 863 N.W.2d 902.

[¶2] Plaintiffs Louise Broten (“Louise”) and Linda Schuler (“Linda”) are the co-personal representatives of the estate of the parties’ mother Helen Broten (“Helen”). (App. 9, ¶ 3). In December 2010, Louise and Linda sued James, claiming he breached his fiduciary duties owed to Olaf’s estate when James was personal representative of Olaf’s estate. (App. 8-16). James answered denying liability. (App. 17-19; 23-25). Linda died in 2011. Louise has continued to serve as the personal representative of Helen’s estate.

[¶3] Following a bench trial in June 2013, the district court found James breached his fiduciary duties to Olaf’s estate and ordered further proceedings be held regarding remedies. (App. 70). Following an evidentiary hearing in November 2013, the district court entered its Memorandum Opinion and Order for Judgment, ordering judgment against James in favor of Louise, as personal representative of the Estate of Helen Broten. (App. 71-74). The district court entered an Amended Judgment in the amount of \$1,304,010.45, and James appealed. (App. 77-80).

[¶4] This Court affirmed the district court’s judgment finding a breach of fiduciary

duty and award of monetary damages but remanded for further proceedings on the issue of compensation owed to James for improvements made to the property or payments to his Parents. Brotten v. Brotten, 2015 ND 127, ¶¶ 23-24, 863 N.W.2d 902.

[¶5] On remand after oral argument, the district court entered a Memorandum Opinion and Order concluding that James was entitled to a deduction of \$20,000 against the Amended Judgment for improvements to the land at issue and that James was not entitled to any compensation for payments to his Parents. (App. 81-85). The district court entered a Second Amended Judgment on February 26, 2016, in the total amount of \$1,284,010.45. (App. 86-87). James appeals from the Second Amended Judgment. (App. 88-89).

STATEMENT OF THE FACTS

[¶6] Olaf and Helen owned and farmed approximately 480 acres of farmland in Barnes County (the “Land”), which is the subject of this lawsuit. (6/17/13 Trial Tr., p. 15, ll. 9-25; p. 17, ll. 17-18). Their farmstead and home was located on the Land. (6/17/13 Trial Tr., p. 16, ll. 1-7). Olaf and Helen had four children: Linda, Louise, James, and Judith Legge. (6/17/13 Trial Tr., p. 16, ll. 9-15).

[¶7] James testified he has farmed his entire life, including while attending North Dakota State University. (6/17/13 Trial Tr., p. 111, l. 25; p. 112, ll. 1-4). After graduating from North Dakota State in 1971, James began farming with his father. (6/17/13 Trial Tr., p. 117, ll. 5-17). James testified that during the 1970’s, Olaf and James began to transition the farm from Olaf to James so that by the mid-1970’s, James primarily operated the farm and farmed the Land. (6/17/13 Trial Tr., p. 119, ll. 22-25, p.

120, ll. 1-4). James farmed under the name “Brotten Farm.” (6/14/13 Trial Tr., p. 139, ll. 14-18).

[¶8] In December 1979, Olaf and Helen entered into a contract for deed with James under which James would purchase the Land from Olaf and Helen (the “Contract for Deed”). (App. 26-29). Under the terms of the Contract for Deed, James would pay \$200,000, plus six percent (6%) annual interest, in twenty-seven payments: six interest-only installments of \$12,000 from 1980 until 1986, and twenty installments of principal and interest of \$17,436 from 1987 until 2006. (App. 26-29). The total value of the Contract for Deed was \$432,720. (App. 26-29).

[¶9] James testified that in 1980, Olaf, Helen, and James orally modified the Contract for Deed. (6/17/13 Trial Tr., p. 124, ll. 14-25; p. 125, ll. 1-15). This modified oral contract for deed will be referred to in this brief as the “Oral Contract.” The Oral Contract provided that in exchange for the Land, James would pay certain living expenses for Olaf and Helen for the remainder of their lives and pay Olaf and Helen \$12,000 per year in interest. (6/17/13 Trial Tr., p. 126, ll. 18-25; p. 127, ll. 1-20; p. 171, ll. 7-10). James submitted testimony and documentary evidence of \$342,054.52 in payments to his Parents and for his Parents’ living expenses. (App. 30-37).

[¶10] James testified he paid Olaf and Helen \$12,000 per year in-kind as interest from at least 1983 until 1998 for total payments of \$180,000. (6/17/13 Trial Tr., p. 171, ll. 7-10). James testified the method of payment was in-kind. (6/17/13 Trial Tr., p. 171, ll. 21-25; p. 172, ll. 1-2). For example, James testified the payment was sometimes made through grain sold at the local elevator when James would instruct the elevator to pay the

proceeds of the sold grain to Olaf. (6/17/13 Trial Tr., p. 172, ll. 3-25; p. 173, ll. 1-11).

Other times, the payment was made by selling Broten Farm's hay, with the proceeds of the hay being paid to Olaf. (6/14/13 Trial Tr., p. 173, ll. 21-25).

[¶11] The \$12,000 per year payments are documented on Olaf and Helen's tax returns. For the 1983 tax year, the payment was identified on Schedule F of Olaf and Helen's Amended Tax Return and was described as "Interest on Farm." (App. 43). After 1983, all of the \$12,000 payments from James to his Parents were reported on Olaf and Helen's Form 1040 Schedule B Interest and Dividend Income as interest and identified as "James Broten." (App.51, 59). Olaf and Helen's 1983 Amended Tax Return, 1986 Tax Return, and 1998 Tax Return are included in the Appendix at 37-59 as a sample of James's Exhibit D-17. All of the tax returns offered in evidence as Exhibit D-17 are found at R. 130. The \$12,000 payment amount is consistent with the interest-only payments due under the Contract for Deed. (App. 26-29).

[¶12] James also testified he paid his parents living expenses by paying for health insurance, telephone bills, home repairs, utility bills for the electricity and heat for Olaf and Helen's home, and automobile and dwelling insurance. (6/17/13 Trial Tr., p. 126, ll. 18-25; p. 127, ll. 1-9). He also testified he assisted with the purchase of new automobiles for Olaf. (6/17/13 Trial Tr., p. 188, ll. 11-16). James offered documentary evidence of health insurance payments as Exhibits 2-12 (R. 115-125); telephone bill payments as Exhibits 13-14 (R. 126-127); home repair payments as Exhibits 15-16 (R. 127-128); utility bill payments as Exhibits 18-21 (R. 131-137) and 28-34 (R. 144-150); and automobile and dwelling insurance premium payments as Exhibits 22, 24, and 25 (R.

138, 140, 141). James conceded he began paying some of these expenses, including health insurance, property and automobile insurance, and utility bills in approximately 1978. (6/17/13 Trial Tr., p. 124, ll. 24-25; p. 137, ll. 12-17; p. 175, ll.15-25).

[¶13] Exhibit D-1 is a summary exhibit of James's exhibits and documents \$162,054.52 in expense payments, \$120,573.29 of which is supported by other exhibits and is not an estimate. (App. 30-37). For periods of time in which James could not locate supporting documents, he provided reasonable estimates of what those expenses were backed by payments that were supported by documents. (App. 30-37). For example, James was unable to locate supporting documents showing the premium payments he made for health insurance in 1987 and 1988, so James estimated no premium increases and relied on the premium amount for 1985 and 1986, which were supported by documentary evidence. (App. 30). James testified the health insurance never lapsed and was not for him or his family. (6/17/13 Trail Tr., p. 136, ll. 9-21). Exhibit D-1 does not include any amount for expenses for which James could not find supporting documents or provide a reasonable estimate, such as dwelling and automobile insurance premiums from before 2002, and does not include any amount for the amounts James testified he contributed for the purchase of Olaf's cars. (App. 37).

[¶14] James continued to pay Helen's living expenses after Olaf died. (6/17/13 Trial Tr., p. 190, ll. 13-22). Louise conceded at trial that she had reviewed Helen's bank statements from 1996 to 2010 and that Helen's banks statements did not show Helen's payment of any of these living expenses. (6/17/13 Trial Tr., p. 93, ll. 17-20; p. 96, ll. 14-25; p. 97, ll. 14-24). The district court found James paid his Parents' living expenses but

did not find what amount. (App. 64-65, ¶¶24, 26). James's testimony and exhibits were the only evidence in the record of the amount James paid.

[¶15] Olaf and Helen also took steps to help James ensure the success of James's farming operation. Olaf and Helen were the owners of several CDs. (6/17/13 Trial Tr., p. 260, ll. 10-14). James testified Olaf and Helen pledged those CDs as collateral for James's operating loan, which allowed James to receive a better interest rate. (6/17/13 Trial Tr., p. 260, ll. 15-25; p. 261, l. 1). Helen also allowed James to withdraw money from her checking account. (6/17/13 Trial Tr., p. 203, ll. 22-25; p. 204, ll. 1-22). James testified Helen always consented to the transfers, and the money was used to help James's farm. (6/17/13 Trial Tr., p. 204, ll. 5-22). James repaid some of the withdrawals but concedes he did not repay all of them. (6/17/13 Trial Tr., p. 261, ll. 22-25).

[¶16] Olaf died in June 1998, and James was appointed personal representative of Olaf's estate. (R. 103). On November 9, 1999, James, as personal representative of Olaf's estate, conveyed the Land to himself through a deed of personal representative. (6/17/13 Trial Tr., p. 200, ll. 12-20) (R. 107).

[¶17] Louise and Linda sued James, claiming James breached his fiduciary duty to Olaf's estate because James transferred the Land to himself. (App. 8-16). Following a bench trial in June 2013, the district court concluded James had not proven the existence of the Oral Contract by clear and unequivocal evidence under the doctrine of part performance and the transfer of the Land was a breach of James's fiduciary duties owed to Olaf's estate. (App. 69-70, ¶¶ 46-48).

[¶18] The court held a remedies hearing in November 2013. The court awarded

damages for reasonable rent and interest of \$103,054 plus the fair market value of the Land of \$1,197,000. (App. 2-3, ¶¶ 4, 7).

[¶19] James appealed. This Court affirmed the district court's judgment finding a breach of fiduciary duty and award of monetary damages but remanded for further proceedings on the issue of compensation owed to James for improvements made to the Land or payments to his Parents. Brotten v. Brotten, 2015 ND 127, ¶¶ 23-24, 863 N.W.2d 902.

[¶20] On remand, after motion and oral argument, the district court deducted \$20,000 from the Judgment for additional improvements James had made to the Land. (App. 82, ¶3). However, the district court concluded James was not entitled to any compensation for payments he made to Olaf and Helen. (App. 85, ¶¶ 8-9). Despite previously finding James made payments to his Parents, the district court now questioned the accuracy of James's evidence of these payments. (App. 83, ¶¶ 5-6). For example, the court referenced James's testimony regarding James's assistance in purchasing Olaf's cars (App. 83, ¶ 5), but James did not ask for any restitution for car payments because he was not able to establish an amount for car payments (App. 37). The court also questioned the credibility of James's \$12,000 in-kind interest payments, relying on an incorrect and out-of-context statement from James's testimony (App. 83, ¶ 6). The district court also concluded that James had not been impoverished and that Olaf and Helen has not been enriched under the doctrine of unjust enrichment because of James and Olaf's business relationship, because James had not submitted evidence of his income during the time he farmed the Land, and because James had withdrawn money from his mother's bank

account for farm use and used Helen's CDs as collateral for his farm loan. (App. 84, ¶ 7). The district court concluded James was entitled to no restitution. (App. 85, ¶ 9).

LAW AND ARGUMENT

I. The District Court erred as a matter of law on remand when it denied Defendant/Appellant James Broten any compensation or other equitable relief for payments made to his Parents.

[¶21] A party barred by the Statute of Frauds from recovering on a contract may be entitled to restitution. Smestad v. Harris (“Smestad II”), 2012 ND 166, ¶ 13, 820 N.W.2d 363. Unjust enrichment is one basis for requiring restitution of benefits conferred in the absence of an express contract. Id. at ¶ 16. “Unjust enrichment is an equitable doctrine based upon a quasi or constructive contract implied by law to prevent a person from being unjustly enriched at the expense of another.” Ritter, Laber & Associates, Inc. v. Koch Oil, Inc., 2004 ND 117, ¶ 26, 680 N.W.2d 634. Restitution and unjust enrichment are broad, equitable remedies: “Where an implied-in-law contract is asserted, the question is not merely what is or is not the case but, rather, what in equity ought to be the case . . . A contract implied in law is a fiction of law adopted to achieve justice where no true contract exists.” Matter of Estate of Zent, 459 N.W.2d 795, 800-01 (N.D. 1990) (citations omitted). The elements of unjust enrichment are (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and the impoverishment, (4) absence of a justification for the enrichment and impoverishment, and (5) an absence of a remedy provided by law. Smestad II, 2012 ND 166, ¶ 16; 820 N.W.2d 363. A district court's determination whether the facts support a finding of unjust enrichment is a

conclusion of law that is fully reviewable on appeal. *Id.* at ¶15.

[¶22] In Smestad II, the plaintiff was barred from collecting a debt from the defendant because of the statute of frauds. *Id.* at ¶ 3. The Supreme Court adopted the majority rule that a party barred from recovering by the statute of frauds may be entitled to restitution. *Id.* at ¶ 13. Denying equitable relief would be contrary to the purpose of the statute of frauds because the “Statute of Frauds was never intended to be used to permit one relying on it to enrich itself at the expense of another or to aid in defrauding the other person.” *Id.* (quoting 10 Richard A. Lord, Williston on Contracts § 27:22 (4th ed. 2011)). The Supreme Court affirmed the district court’s grant of restitution under the doctrine of unjust enrichment. *Id.* at ¶ 17-18.

[¶23] Other courts that have considered the intersection of the statute of frauds and restitution have relied heavily on the quasi-contractual nature of unjust enrichment. For example, in Roske v. Ilykanyics, the Minnesota Supreme Court stated:

Quasi contracts are not contracts at all in the legal sense, Fargo Foundry Co. v. Village of Callaway, 148 Minn. 273, 181 N.W. 584, for “Neither promise nor privity, real or imagined, is necessary.” Town of Balkan v. Village of Buhl, 158 Minn. 271, 275, 197 N.W. 266, 267, 35 A.L.R. 470. The quasi-contractual obligation is raised or imposed by law and is independent of any real or expressed intent of the parties.

45 N.W.2d 769, 774 (Minn. 1951). Similarly, the Connecticut Supreme Court has held that when recovery is barred by the statute of frauds, the party is entitled to restitution because it would be “unjust to permit [the landowner] to retain payments or services that he has received and to transfer nothing in return.” Montanaro Bros. Builders v. Snow, 460 A.2d 1297, 1301 (Conn. 1983). The Kansas Supreme Court has held a vendee, who

is denied specific performance for the sale of land, is entitled to restitution for expenditures or services benefitting the vendor on the basis of quantum meruit. Walker v. Ireton, 559 P.2d 340, 347 (Kan. 1977).

[¶24] In McEnulty v. McEnulty, a case very similar to this case, the Kansas Supreme Court ordered restitution to the party who did not receive the property at issue because that party could not prove part performance under the statute of frauds. 69 P.2d 1105, 1109 (Kan. 1937). In McEnulty, the plaintiff was the nephew of the defendant. Id. at 1106. The plaintiff claimed his mother had entered into an oral contract that if the plaintiff lived with the defendant, became a member of his family, and assisted him during his lifetime, then the defendant would give the plaintiff all the property the defendant had at the time of his death. Id. The Kansas Supreme Court held the plaintiff had not proven the defendant's alleged promise to give the plaintiff everything at the death of the defendant by clear, convincing, and conclusive evidence. Id. at 1109. However, the court held the plaintiff had to be awarded restitution as compensation for his services rendered to the defendant. Id. (citing Masterson v. Masterson, 163 P. 617, 617 (Kan. 1917)).

A. Olaf and Helen Broten were enriched by the payments James Broten made to them and by James Broten's payment of their expenses.

[¶25] The enrichment element focuses on whether the recipient received a valuable benefit. See, e.g., Zent, 459 N.W.2d at 800 (discussing the benefit decedent received through the care of a friend). Olaf and Helen were enriched because James paid a majority of Olaf and Helen's living expenses for thirty years. Olaf and Helen had other

income and could have paid these expenses, but they did not have to because James paid the expenses. Louise conceded at trial that she had reviewed Helen's bank statements from 1996 to 2010 and that Helen's banks statements did not show Helen's payment of any of these living expenses. (6/17/13 Trial Tr., p. 93, ll. 17-20; p. 96, ll. 14-25; p. 97, ll. 14-24). The district court found James paid his Parents' living expenses. (App. 64-65, ¶¶24, 26). They were also enriched by the \$12,000 per-year in-kind interest payments because this is an additional \$180,000 of income they would not otherwise have had. Therefore, Olaf and Helen received a benefit from these expense and interest payments and were enriched.

B. James Broten has been impoverished by the payments to his Parents under the doctrine of unjust enrichment.

[¶26] James has been impoverished because the money he paid to or for the benefit of Olaf and Helen was no longer available for his use and he is now required to pay full fair market value for the Land. In Smestad II, the Court held this was an impoverishment for the party seeking restitution. 2012 ND 166, ¶ 17, 820 N.W.2d 363.

[¶27] The payments James made to or for his Parents were summarized on Exhibit D-1. (App. 30-37). James paid Olaf and Helen's health insurance premiums (R. 115-125); telephone bills (R. 126-127); home repairs (R. 127-128); utility bills (R. 131-137, 144-150); and automobile and dwelling insurance premiums (R. 138, 140, 141). James's exhibits, including Exhibit D-1, and testimony was the only evidence in the record of the amount James paid.

[¶28] In its Memorandum Opinion and Order, however, the district court questioned the

accuracy of Exhibit D-1, stating:

Defendant's Exhibit D-1 (Docket #114) does purport to show that amount was paid to Olaf and Helen between 1978 and 1998, and it was admitted into evidence. I never made a finding that D-1 was accurate, however, and in fact I find its accuracy is questionable for several reasons." (App. 83, ¶ 5).

[¶29] However, the district court's reasoning is not supported by the record. First, as an example of the court's accuracy concerns, the district court states:

Moreover, the exhibit's factual premises were undercut by testimony from James's own witnesses, including himself. For example, Exhibit D-1 (p. 8) refers to James purchasing Cadillacs for Olaf from Don Wilhelm Inc., a dealership in Jamestown. Wilhelm testified, however, that Olaf always paid for his own cars, and that James's checks to Don Wilhelm were for cars James was buying for himself.

(App 83, ¶ 5).

[¶30] Page 8 of Exhibit D-1 does reference two exhibits James offered to support his testimony regarding the payments for cars. (App. 37). However, Exhibit D-1 clearly states that no dollar amount is allocated to this expense item because James was not able to reasonably calculate an amount. (App. 37). Contrary to the district court's order, Exhibit D-1 does not include any amount for items for which James could not find supporting documents or to provide a reasonable estimate, such as dwelling and automobile insurance premiums from before 2002, and does not include any amount for the purchase of Olaf's cars. (App. 37). The district court improperly used the reference to the automobiles as a justification to ignore the remainder of Exhibit D-1 despite the fact that no amount of restitution was claimed for the automobiles.

[¶31] The district court also misstates the record in its criticism of the in-kind interest payments James made to his Parents. The court stated:

As James argues, this figure [total interest payments of \$180,000] would seem to be a reasonable extrapolation from Olaf's tax returns, which show he reported \$12,000 per year in "interest income" from James. [See Docket #130]. However . . . James testified that many, or even most, of those payments were not actually made. Rather than making cash payments, he testified "we moved things around" in order to maximize Olaf's income [ellipse in original].

(App. 83, ¶ 6).

[¶32] The court's conclusion is not supported by the record. First, James did not testify "we moved things around." James testified at his deposition that he and Olaf "moved inventory around" and "enhanced [Olaf's] income." (App. 21-22; Deposition of James Broten, [11/29/11] pp. 32-34). James did not make actual cash payments because they moved inventory from James to Olaf. (App. 21-22; Deposition of James Broten, [11/29/11] pp. 32-34). At trial, James expanded on this explanation. Regarding moving "inventory around," James testified he would either sell his grain in Olaf's name or give the grain to Olaf to sell. (6/17/13 Trial Tr., p. 172, ll. 16-25; p. 173, l. 1). James also testified he would sell hay from his farm and have the money paid to Olaf. (6/17/13 Trial Tr., p. 173, ll. 21-25). These inventory transfers were not cash payments but did enhance Olaf and Helen's income and were reported as interest income on Olaf and Helen's tax returns. James's deposition and trial testimony, when properly read together in context, are consistent and support the accuracy of Exhibit D-1.

[¶33] Second, it is irrelevant whether the payments were with cash or in-kind property transfers. Either way Olaf and Helen had the benefit of and were enriched by \$12,000 per

year from James, and James was impoverished by no longer having \$12,000 per year. The 1983 tax return identifies the payment on Schedule F as “Interest on Farm.” (App. 43). After 1983, the payments were reported on Olaf and Helen’s Form 1040 Schedule B Interest and Dividend Income as interest from “James Broten.” (App. 51, 59). The payments are identified as farm interest paid by James. (App 43, 51, 59). Therefore, the court’s reasoning in why James was not impoverished by the payment of his Parents’ expenses is not support by the record. James was impoverished by not having the use of this money or property.

C. Olaf and Helen Broten’s enrichment and James Broten’s impoverishment are connected.

[¶34] The enrichment and impoverishment are connected. If James had not paid the living and home expenses, Olaf and Helen would have had to pay them or choose going without. James also testified he paid Olaf and Helen’s expenses contemplating it was in consideration for the Land and that the Land would be his. (6/17/13 Trial Tr., p. 127, ll. 18-23).

[¶35] For the in-kind payments, Olaf and Helen’s tax returns indicate on their face the interest payments were connected to the farm and were from James. (App 43, 51, 59). The payments had to be connected to the Land in order to deduct the interest payments. The \$12,000 amount is also consistent with the \$12,000 interest-only payment required in the Contract for Deed, showing the payments are connected to the Land. (App. 26-29).

[¶36] The district court noted Olaf and James farmed together to benefit each other’s operation. (App. 84, ¶ 7). As examples of this, the district court focused on Helen

allowing James to withdraw funds from her account, and those funds have not been paid back. (App. 84, ¶ 7). However, these checking account transfers were less than payments James made for Olaf and Helen's benefit. At most, the unpaid portion of the transfers would be an offset against James's restitution. The transfers do not mean Olaf and Helen did not receive a benefit that is connected to the payments James made.

[¶37] The court also noted James used Olaf and Helen's CDs as collateral for his operating loan. (App. 84, ¶ 7). This is true but is unrelated to James's payment of his Parent's expenses or connected to the \$12,000 per year payments. The use of the CDs as collateral does not mean the Parents' enrichment and James's impoverishment are not connected.

[¶38] Finally, the court criticizes James for focusing on "only one side of the ledger" (App. 84, ¶ 7). The district court held that for James to prove he is entitled to restitution, he would have to account for every benefit he may have received from his Parents over thirty years, including all income James earned from the Land, any reductions in income tax payable because of the assumed tax deductions James may have claimed, and the benefit of the reduced loan interest by using his Parents' CDs as collateral. (App. 84-85, ¶¶ 7-8). The incredibly onerous standard articulated by the district court seems to blend the heavy burden James had to meet to avoid the impact of the Statute of Frauds and the equitable principal of unjust enrichment.

[¶39] However, the doctrine of part performance and unjust enrichment are very distinct concepts. To successfully prove part performance, "the claimant must show that the alleged part performance is consistent only with the existence of the alleged oral

contract,” and cannot “be accounted for through the application of some other hypothesis.” Brotten v. Brotten, 2015 ND 127, ¶ 10, 863 N.W.2d 902 (quoting Trosen v. Trosen, 2014 ND 7, ¶ 24, 841 N.W.2d 687; Johnson Farms v. McEnroe, 1997 ND 179, ¶ 18, 568 N.W.2d 920). Essentially, under part performance, James had to disprove every other conceivable hypothesis by clear and unequivocal evidence, which is a very high standard. The district court appears to carry this standard through to unjust enrichment by requiring James disprove every conceivable benefit that may have been shared between James and his Parents by working together.

[¶40] By contrast, for unjust enrichment the issue is not merely what is or is not the case but what in equity ought to be the case in order to achieve justice where no true contract exists. Estate of Zent, 459 N.W.2d at 800-01. In this case, equity requires that if James is going to be required pay the full fair market value of the Land as of 2013, which will benefit his siblings and not his Parents, he should receive credit for the value of the benefits he bestowed to his Parents over thirty years.

D. There is no other justification for James Brotten’s payments.

[¶41] The enrichment and impoverishment cannot be justified by any other reason. There is no evidence in the record James’s ongoing payments to Olaf and Helen were a gift. Had James not paid their living expenses, Olaf and Helen would have spent their own money for their own living expenses. Furthermore, it would be fundamentally unfair for Olaf to receive the benefit of these living expenses and in-kind interest payments without James receiving credit for the value of these benefits.

[¶42] Any benefits James may have received from farming with his father also

presented benefits to Olaf, so the fact that James and Olaf farmed together does not prohibit restitution. For example, James had equipment, and Olaf had some equipment. They likely used each other's equipment on their respective farm operations. (6/17/13 Trial Tr., p. 244, ll. 3-9). James also contributed labor, individually and through hired men, that helped with Olaf's operation, and Olaf likely provided labor to James. (6/17/13 Trial Tr., p. 245, ll. 1-4). This shared work offsets and does not prohibit James from receiving restitution. The district court previously referred to Olaf and James's relationship as a de facto partnership, but a partner does not generally pay the personal living expenses of another partner. James should not be expected to pay Olaf's personal living expenses while Olaf retained the income from his farming operation. He was providing a substantial benefit to his Parents by paying their personal living expenses and paying additional in-kind income, above and beyond what would be expected of two farmers who are farming together.

E. James Broten has no other remedy at law.

[¶43] Lastly, James is without any other remedy at law because of the statute of frauds. In Smestad II, this Court held the operation of the statute of frauds leaves the enforcing party without a remedy at law. 2012 ND 166, ¶ 18, 820 N.W.2d 363. Not 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 fair market value of the Land and to give up nothing in return. This is fundamentally unfair and contrary to the law regarding restitution.

[¶44] For these reasons, the Court should award James an equitable offset of

\$342,054.52 against the Second Amended Judgment as restitution.

CONCLUSION

[¶45] For the reasons set forth above, James Broten asks this Court reverse the district court's Memorandum Opinion and Order and order \$342,054.52 be deducted from the Second Amended Judgment.

Dated this 28th day of July, 2016.

/s/ Douglas Murch
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ATTORNEYS FOR
DEFENDANT/APPELLANT

**CERTIFICATE OF SERVICE
BY ELECTRONIC MEANS**

I, RACHEL STALLMAN, hereby certified that on the 28th day of July, 2016, I served the following document on appellee by electronic means by forwarding it to appellee's attorney at dsmith@smithbakke.com:

APPELLANT'S BRIEF; AND

APPENDIX

/s/ Rachel Stallman

Rachel Stallman