

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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<p>William Kulczyk and Rhonda Kulczyk,  Plaintiffs and Appellants,  v.  Tioga Ready Mix Co., Scott Financial Corporation, Triple Aggregate, LLC, and all persons unknown, claiming any estate or interest in, or lien or encumbrance upon, the real estate described in the complaint,  Defendants and Appellees.</p>	<p><b>SUPREME COURT NO. 20160330</b>  Civil No. 53-2015-CV-01313</p>
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ON APPEAL FROM JUDGMENT DATED SEPTEMBER 13, 2016

AND

ON APPEAL FROM ORDER DATED JANUARY 30, 2017

WILLIAMS COUNTY DISTRICT COURT  
NORTHWEST JUDICIAL DISTRICT  
CIVIL NO. 53-2015-CV-01313  
THE HONORABLE KIRSTEN SJUE

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**APPELLANTS' BRIEF**

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## TABLE OF CONTENTS

	<u>Paragraph</u>
TABLE OF CASES .....	ii
TABLE OF AUTHORITIES .....	IV
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW .....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS .....	16
LAW AND ARGUMENT .....	30
I. THE DISTRICT COURT ERRED WHEN IT DISMISSED THE KULCZYKS' COMPLAINT AGAINST ALL DEFENDANTS WITH PREJUDICE.....	30
A. Standard of Review.....	31
B. The District Court erred when it concluded the Kulczyks' mortgage foreclosure action was a compulsory counterclaim to Tioga Ready Mix Co.'s prior action against the Kulczyks for breach of contract, negligence, and fraud. ....	32
1. The Kulczyks' mortgage foreclosure claim did not arise out of the same transaction or occurrence as Tioga Ready Mix's claims for breach of contract, fraud, and negligence. ....	32
2. Even if the Kulczyks' mortgage foreclosure claim should have been brought in the prior action equity requires that res judicata not be applied to preclude the Kulczyks' mortgage foreclosure claim. ....	50
II. THE DISTRICT COURT ERRED WHEN IT DENIED THE KULCZYKS' MOTION TO VACATE THE ORDER GRANTING TIOGA READY MIX CO.'S MOTION FOR SUMMARY JUDGMENT.....	54
A. Standard of Review.....	55
B. The District Court erred when it issued an advisory opinion that the outcome under its prior res judicata analysis would be the same despite the newly discovered information. ....	56
CONCLUSION.....	63

## TABLE OF CASES

	<u>Paragraph</u>
<i>Alerus Financial, N.A. v. Marcil Group Inc.</i> 2011 ND 205, 806 N.W.2d 160 .....	34, 37, 43
<i>Arndt v. Maki</i> 2012 ND 55, 813 N.W.2d 564 .....	31
<i>Bismarck Public School District No. 1 v. Hirsch</i> 136 N.W.2d 449 (N.D. 1965) .....	58
<i>First Fed. Sav. &amp; Loan Ass'n, v. Scherle</i> 356 N.W.2d 894 (N.D. 1984) .....	43, 47
<i>Gainey v. Gainey</i> 301 S.E.2d 763 (S.C. 1983) .....	61
<i>Hofsommer v. Hofsommer Excavating, Inc.</i> 488 N.W.2d 380 (N.D. 1992) .....	50
<i>Holverson v. Lundberg</i> 2016 ND 103, 879 N.W.2d 718 .....	31
<i>Krizan v. Krizan</i> 1998 ND 186, 585 N.W.2d 576).....	55
<i>Knutson v. Knutson</i> 2002 ND 29, 639 N.W.2d 495 .....	55
<i>Leo Lumber Co. v. Williams</i> 191 N.W.2d 573 (N.D. 1971) .....	35
<i>Mills v. City of Grand Forks</i> 2012 ND 56, 813 N.W.2d 574 .....	58
<i>Northwest Bank N. Dakota, Nat. Ass'n, v. Christianson</i> 494 N.W.2d 165 (N.D. 1992) .....	38
<i>Peterson v. Peterson</i> 555 N.W.2d 359 (N.D. 1996) .....	55
<i>Richland County Water Resource Bd. v. Pribbernow</i> 442 N.W.2d 916 (N.D. 1989) .....	61

## TABLE OF CASES

### Paragraph

<i>Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc.</i> 2007 ND 36, 729 N.W.2d 101 .....	36, 50, 58
<i>Security Nat. Bank. Edgeley v. Wald</i> 536 N.W.2d 924 (N.D. 1995) .....	35
<i>State ex rel. Spaeth v. Meiers</i> 403 N.W.2d 392, 393 n.1 (N.D. 1987) .....	61
<i>Terry v. Terry</i> 2002 ND 2, 638 N.W.2d 11 .....	55
<i>Thimjon Farms Partnership v. First Intern. Bank &amp; Trust</i> 2013 ND 160, 837 N.W.2d 327 .....	31
<i>Ungar v. N. Dakota State Univ.</i> 2006 ND 185, 721 N.W.2d 16 .....	50
<i>Valentina Williston, LLC v. Gadeco, LLC</i> 2016 ND 84, 878 N.W.2d 397 .....	31
<i>Vann v. Vann</i> 2009 ND 118, 767 N.W.2d 855 .....	55

**TABLE OF AUTHORITIES**

**Paragraph**

**North Dakota Rules of Civil Procedure**

N.D. R. Civ. P. Rule 13 .....	33, 35
N.D. R. Civ. P. Rule 13(a)(1) .....	35
N.D. R. Civ. P. Rule 59(b) .....	56
N.D. R. Civ. P. Rule 60(c)(1) .....	56
N.D. R. Civ. P. Rule 60(b)(2) .....	54, 56

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Did the District Court err when it dismissed the Kulczyks' Complaint for mortgage foreclosure against all Defendants with prejudice.
2. Did the District Court err when it concluded the Kulczyks' mortgage foreclosure action was a compulsory counterclaim to Tioga Ready Mix Co.'s prior action against the Kulczyks for breach of contract, negligence, and fraud.
3. Did the District Court err when it concluded the Kulczyks' mortgage foreclosure claim arose out of the same transaction or occurrence as Tioga Ready Mix's claims for breach of contract, negligence, and fraud.
4. Did the District Court err when it concluded equity and justice do not require the preclusion of res judicata in this case.
5. Did the District Court err when it denied the Kulczyks' Motion to Vacate the Order Granting Tioga Ready Mix Co's Motion for Summary Judgment.
6. Did the District Court err when it issued an advisory opinion that the outcome under its prior res judicata analysis would be the same despite the newly discovered evidence.

## STATEMENT OF THE CASE

[¶1] This is a mortgage foreclosure action brought by William Kulczyk and Rhonda Kulczyk (“Kulczyks”). Because of events which occurred after the initiation of this action, the owner of the property subject to the mortgage, Agape Holdings, LLP (“Agape Holdings”), is not a party to this action. The District Court ruled that the former owner of the property, Tioga Ready Mix Co. (“Tioga Ready Mix”) was entitled to challenge the validity of the mortgage on behalf of the new owner based on the defense of claim preclusion.

[¶2] In 2011, Bernard Vculek and Marlene Vculek (“Vculeks”) purchased Tioga Ready Mix from the Kulczyks. As part of the purchase and sale, Tioga Ready Mix executed a Promissory Note (“Note”) in the Kulczyks’ favor. As security for the Note, Tioga Ready Mix also executed and delivered to the Kulczyks a Mortgage on certain real property situated in Williams County, North Dakota. The Vculeks personally guaranteed a portion of Tioga Ready Mix’s debt under the Promissory Note.

[¶3] In 2012, Triple Aggregate, LLC, (“Triple Aggregate”) sued Tioga Ready Mix for breach of contract, claiming Tioga Ready Mix failed to pay for materials. Tioga Ready Mix filed a third-party complaint against the Kulczyks, asserting claims for negligence, breach of contract, and fraud. The Kulczyks counterclaimed against the Vculeks and Tioga Ready Mix and ultimately judgments against Tioga Ready Mix and the Vculeks, including one for a portion of Tioga Ready Mix’s debt under the personal guaranty, were entered in the Kulczyks’ favor. The Note and Mortgage were not litigated in the first action by any of the parties.

[¶4] After the Kulczyks collected all that was owed from the Vculeks, they initiated this action to foreclose the mortgage and collect the remainder owed under the Note.

[¶5] This foreclosure action was commenced on October 28, 2015 against Tioga Ready Mix, the record owner and mortgagor, and Triple Aggregate, the real party in interest by way of a purchase and sale agreement with Tioga Ready Mix. (*Complaint and Summons*, App. 007-014). At the time the case was initiated, Triple Aggregate was in possession of the property.

[¶6] Tioga Ready Mix filed its Answer and Counterclaim on November 24, 2015 asserting the Kulczyks' foreclosure action was barred by the principles of collateral estoppel and res judicata. (*Tioga Ready Mix Co's Answer and Counterclaim*, App. 015-020).

[¶7] Triple Aggregate filed its Answer on December 1, 2015 denying the requested relief was appropriate. (*Triple Aggregate's Answer*, App. 021-022).

[¶8] Scott Financial did not appear in this action.

[¶9] At the time the foreclosure action was commenced, the Defendants admitted Tioga Ready Mix held title to the mortgaged property subject to a purchase agreement in favor of Triple Aggregate, who was in possession of the property. (*Tioga Ready Mix Co's Answer and Counterclaim*, App. 015-020; *Triple Aggregate's Answer*, App. 021-022).

[¶10] Tioga Ready Mix filed a Motion for Summary Judgment on March 4, 2016. Oral argument on the Motion for Summary judgment was held on April 18, 2016. Tioga Ready Mix contended it was the owner of the property and that it was entitled to the affirmative relief of a declaratory judgment declaring void the Mortgage based on res judicata and collateral estoppel. It requested judgment in its favor and not just judgment of dismissal.



¶11] The District Court entered its Memorandum Opinion and Order Granting Motion for Summary Judgment on September 12, 2016. (*Memorandum Opinion and Order Granting Motion for Summary Judgment & Judgment*, App. 023-055). The District Court concluded the Kulczyks' foreclosure action was barred by res judicata and the District Court ordered the mortgage be deemed satisfied thereby granting Tioga Ready Mix affirmative relief. In reaching its conclusion, the District Court erred when it concluded the Kulczyks' mortgage foreclosure claim was a compulsory counterclaim in the prior action between the parties. As a consequence, the Court quieted title to the Property in the name of Tioga Ready Mix. Notice of Entry of Judgment was served on September 14, 2016. (*Notice of Entry of Judgment*, App. 175).

¶12] The Kulczyks filed their first Notice of Appeal on September 30, 2016. (*First Notice of Appeal*, App. 056-059).

¶13] On October 20, 2016 the District Court forwarded to all the parties an ex parte email it received from a third party unrelated to this action indicating title to the Property was transferred during the pendency of the Kulczyks' foreclosure action, prior to the Court's order. (*Ex parte Email Communication*, App. 060-084). Neither Defendant alerted the Kulczyks or the District Court of the transfer. Based on this information, the Kulczyks requested leave from this Court to file a Rule 60(b) Motion with the District Court. Leave was granted on December 6, 2016 and the matter was remanded to the District Court for consideration of the Kulczyks' Rule 60(b) Motion.

¶14] A Hearing was held on the Kulczyks' Rule 60(b) Motion on January 30, 2017. The District Court denied the Kulczyks' request to vacate the Order Granting Tioga Ready Mix's Motion for Summary Judgment on January 30, 2017. (*Order Denying*

*Motion to Vacate Order Granting Motion for Summary Judgment*, App. 085). The District Court concluded the new information and conduct of the parties did not change the res judicata analysis under the Court's prior ruling. The Court concluded the actual owner of the property, Agape Holdings, need not be a party to this action and the former owner, Tioga Ready Mix, was authorized to challenge the validity of the mortgage on Agape Holdings' behalf.

[¶15] The Kulczyks timely filed their Second Notice of Appeal on February 6, 2017. (*Second Notice of Appeal*, App. 086-089).

### **STATEMENT OF THE FACTS**

[¶16] In 2011, the Kulczyks sold Tioga Ready Mix to the Vculeks. The transaction was partially financed by the Kulczyks. On December 21, 2011, Tioga Ready Mix executed and delivered to the Kulczyks a Note and Mortgage wherein Tioga Ready Mix promised to pay the Kulczyks \$1,400,000.00 with interest at the rate of 3.0%. (*Complaint*, at ¶ 1, App. 007). Payments were due in four (4) yearly installments, commencing on December 21, 2012 and ending on December 21, 2015 when the Note matured.

[¶17] To secure payment of the Note, Tioga Ready Mix, as mortgagor, executed and delivered to the Kulczyks a Mortgage dated December 21, 2011 which described the following tracts of land in Williams County, North Dakota:

**Parcel 1:**

Sublot 6 in the NE $\frac{1}{4}$  of Section 34 in Township 157 North of Range 95 West of the Fifth Principal Meridian in Williams County, North Dakota, according to the recorded Plat thereof on file in the office of the County Recorder for said County and State.

**Parcel 2:**

Sublot 4 in the NE $\frac{1}{4}$  of Section 34 in Township 157 North of Range 95 West of the Fifth Principal Meridian in Williams County, North Dakota,

according to the recorded Plat thereof on file in the office of the County Recorder for said County and State.

Parcel 3:

(Approximately 20 acres) W ½ SW ¼ NE ¼ of Section 34 in Township 157 North of Range 95 West of the Fifth Principal Meridian in Williams County, North Dakota, according to the recorded Plat thereof on file in the office of the County Recorder for said County and State.

(hereinafter the “Property”). *Id.* at ¶ 2, App. 007-008.

[¶18] The Mortgage was recorded on February 9, 2012. (*Kulczyk Mortgage*, App. 090-092). The Vculeks executed a personal guaranty for a portion of the debt of Tioga Ready Mix under the Note. (*Complaint*, at ¶ 5, App. 009).

[¶19] In May of 2012, Triple Aggregate sued Tioga Ready Mix for \$85,000.00 for unpaid materials furnished to Tioga Ready Mix.<sup>1</sup> Tioga Ready Mix added William Kulczyk as a third-party defendant and asserted claims for negligence.

[¶20] Tioga Ready Mix settled its dispute with Triple Aggregate shortly before the scheduled trial and less than a week before trial moved to amend its claims against William Kulczyk, who at the time was the sole defendant. The motion to amend was heard by the Court on the first day of trial. The Court allowed the amendment and continued the trial for nine months. Thereafter, Tioga Ready Mix added Rhonda Kulczyk as a defendant and filed an Amended Complaint against the Kulcyks. Tioga Ready Mix also added the Vculeks as additional plaintiffs and the Vculeks asserted claims against the Kulcyks as well.

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<sup>1</sup> The Kulcyks requested the District Court take judicial notice of Williams County, Case No. 53-2012-CV-00460.

[¶21] The Kulczyks answered and counterclaimed against Tioga Ready Mix for breach of contract and against the Vculeks for breaching the personal guaranty. No one made any claims concerning the Note and Mortgage or Tioga Ready Mix's obligations thereunder.

[¶22] The Court ruled in favor of the Kulczyks and against Tioga Ready Mix and the Vculeks, resulting in a judgment of \$1,400,000.00 against the Vculeks entered on March 20, 2015. (*Complaint* at ¶ 5, App. 009). The Kulcyks collected on their judgment against the Vculeks and after the \$1,400,000.00 was applied towards the debt secured by the Note and Mortgage there was due and payable by Tioga Ready Mix the sum of \$146,868.64, plus accrued interest. *Id.*

[¶23] Tioga Ready Mix failed to remit the yearly payments including interest due on December 21st of 2012, 2013, and 2014 and otherwise defaulted under the Note and Kulczyk Mortgage. *Id.* at ¶ 3, App. 008. By virtue of these defaults, the Kulczyks elected to accelerate the payments due and declared the whole amount of the unpaid principal sum of said Note and the Kulczyk Mortgage, with interest thereon including costs, to be due and payable. *Id.* On September 6, 2015, a written Notice Before Foreclosure (hereinafter the "Notice") was served upon Tioga Ready Mix. *Id.* at ¶ 4, App. 009.

[¶24] On October 28, 2015, the Kulczyks filed a Complaint to foreclose the Mortgage executed by Tioga Ready Mix. Tioga Ready Mix was named as a defendant as the owner based on title. Triple Aggregate was named as a defendant based on it being in actual possession of the property under a purchase agreement with Tioga Ready Mix. The Kulczyks claimed as part of the proceedings before the District Court that Triple

Aggregate, based on its possession and the purchase agreement, was the owner of the property and therefore the real party in interest for purposes of the foreclosure action. Scott Financial, Corporation (“Scott Financial”) was also named as a defendant because of its interest in the property as a mortgage holder. Scott Financial had not been a party to the original action.

[¶25] After a summary judgment hearing on April 18, 2016, the District Court concluded the Kulczyks’ mortgage foreclosure action was barred by res judicata based on the prior litigation between the Kulczyks and Tioga Ready Mix and Judgment was entered in Tioga Ready Mix’s favor on September 13, 2016. (*Memorandum Opinion and Order Granting Motion for Summary Judgment and Judgment*, App. 023-055). The Kulczyks filed a Notice of Appeal with this Court on September 30, 2016. (*First Notice of Appeal*, App. 056-059). The Kulczyks received new information concerning the transfer of the Property on October 20, 2016, via an email from the Court. The Kulczyks discovered that immediately prior to the summary judgment hearing the Property was transferred by warranty deed from Tioga Ready Mix to Agape Holdings, a non-party to this litigation. The deed was recorded prior to this action becoming final. Agape Holdings is now the sole owner of the property at issue, subject to the Kulczyks’ mortgage.

[¶26] The new information was submitted to the District Court via an ex parte email sent by Troy Lang (“Lang”), an investigator working on a different commercial dispute. The District Court subsequently forwarded it to all interested parties on Thursday, October 20, 2016. (*Ex parte Email Communication*, App. 060-084). The information submitted by Lang indicates on May 19, 2015 Tioga Ready Mix auctioned off the Subject

Property and Triple Aggregate submitted the winning bid. *Id.* Upon further investigation, Lang claims he discovered a Warranty Deed dated April 12, 2016, six days before oral argument which was held on the motion for summary judgment in this matter, transferring the Property to Agape Holdings. *Id.* Lang alleges that Tioga Ready Mix delivered the Warranty Deed to Agape Holding's counsel of record, Daniel Frisk ("Frisk"). Lang notes that the Warranty Deed was not made an Exhibit to this action nor was any mention made of the transfer at oral argument on April 18, 2016. *Id.* The Warranty Deed was not recorded until September 21, 2016, eight days after the District Court entered Judgment in this case. *Id.*

[¶27] Lang alleges the property was transferred to Agape Holdings so Agape Holdings could defeat claims concerning access to the property brought by Lang's employer. In support of this position, Lang further indicates on April 19, 2016 Frisk forwarded an Affidavit of Samuel Dyk in conjunction with a Right of Access Agreement drafted by Frisk on April 21, 2016, wherein Samuel Dyk asserts his unrestricted ownership in the Subject Property. *Id.* Evidently, Lang believed that Samuel Dyk's assertions on behalf of Triple Aggregate and/or Agape Holdings that the property was owned by Agape Holdings were inconsistent with the representations made before the District Court by Defendants about the status of title to the Property. Lang evidently believed that the deed was completed and transferred to Agape so as to allow Agape to assert ownership of the Property while at the same time as part of this litigation Defendants claimed Tioga Ready Mix was still the owner, in opposition to the Kulczyks' arguments that Tioga Ready Mix did not have standing to challenge their mortgage because it was no longer the owner of the Property.

[¶28] Based on the newly discovered information and Tioga Ready Mix's and Triple Aggregate's failure to apprise the District Court and the Kulczyks of the transfer of the Property, the Kulczyks sought leave from this Court to file a Rule 60(b) Motion with the District Court. This matter was remanded to the District Court for consideration and disposition of the Kulczyks' Rule 60(b) Motion.

[¶29] The Kulczyks filed a Motion to Vacate the District Court's Order Granting Tioga Ready Mix's Motion for Summary Judgment under Rule 60(b). Hearing on the Kulczyks' Motion was held on January 30, 2017. (*January 30, 2017 Motion to Vacate Hearing Transcript*, App. 093-147). The District Court denied the Kulczyks' Motion to Vacate and held that the newly discovered information did not change the analysis under the Court's prior ruling on res judicata.

## **LAW AND ARGUMENT**

### **I. THE DISTRICT COURT ERRED WHEN IT DISMISSED THE KULCZYKS' COMPLAINT AGAINST ALL DEFENDANTS WITH PREJUDICE.**

[¶30] As to the Note and Mortgage, the only issue raised in the first action was whether the Vculeks were liable under the Personal Guaranty and for how much. (*Memorandum Opinion and Order Granting Motion for Summary Judgment*, ¶ 57, App. 042-043). The District Court in this action properly concluded collateral estoppel did not apply to bar the foreclosure action because the Note and Mortgage had not been litigated in the first case. The Court, however, wrongly concluded that foreclosure of the mortgage was a compulsory counterclaim in the first action—that the Kulczyks were required, in the nine month period after the Court granted a continuance, to add to the first action as a counterclaim a mortgage foreclosure claim and add as an additional party, Scott Financial. *Id.* at ¶ 81, App. 051-052. This conclusion is a misapplication of law and,

therefore, this Court should reverse and remand with directions that the foreclosure action should proceed against the owner of the Property.

**A. Standard of Review.**

[¶31] Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial so long as there are no genuine issues of material fact or if the only issues to be resolved are questions of law. *Valentina Williston, LLC v. Gadeco, LLC*, 2016 ND 84, ¶ 11, 878 N.W.2d 397. The moving party must establish that there are no genuine issues of material fact and they are entitled to judgment as a matter of law. *Holverson v. Lundberg*, 2016 ND 103, ¶ 12, 879 N.W.2d 718. The District Court must view the evidence in the light most favorable to the party opposing summary judgment, and that party should be given the benefit of all favorable inferences which can reasonably be drawn from the record. *Id.* Whether the District Court properly granted summary judgment is a question of law which [this Court] reviews de novo on the entire record. *Thimjon Farms Partnership v. First Intern. Bank & Trust*, 2013 ND 160, ¶ 8, 837 N.W.2d 327 (quoting *Arndt v. Maki*, 2012 ND 55, ¶ 10, 813 N.W.2d 564 (internal citations omitted)).

**B. The District Court erred when it concluded the Kulczyks' mortgage foreclosure action was a compulsory counterclaim to Tioga Ready Mix Co.'s prior action against the Kulczyks for breach of contract, negligence, and fraud.**

- 1. The Kulczyks' mortgage foreclosure claim did not arise out of the same transaction or occurrence as Tioga Ready Mix's claims for breach of contract, fraud, and negligence.**

[¶32] The District Court concluded the Kulczyks “could have brought a mortgage foreclosure claim and obtained a deficiency judgment against Tioga Ready Mix either before, after, or contemporaneously with a guaranty judgment against the Vculeks.”



(*Memorandum Opinion and Order Granting Motion for Summary Judgment* at ¶ 67, App. 046). The District Court correctly recognized that if the Kulczyks added the foreclosure action as a compulsory counterclaim they would have also had to add Scott Financial as a third-party defendant. *Id.* at ¶ 74, App. 048-049. The Court explained it could think of no compelling reason why Scott Financial could not have been added as a party to the first action in order for the Kulczyks to bring their mortgage foreclosure claim against Tioga Ready Mix. *Id.*

[¶33] Based on these conclusions, the District Court held the Kulczyks were required to have included their mortgage foreclosure action and were required to add Scott Financial in the prior litigation and that their mortgage foreclosure action is now barred because of the principle of res judicata. *Id.* at ¶ 81, 051-052. Implicit in the District Court's holding is the conclusion the Kulczyks' mortgage foreclosure claim was a compulsory counterclaim under Rule 13 of the North Dakota Rules of Civil Procedure. This legal conclusion is erroneous. This conclusion fails to recognize that an action against a guarantor is based on the contract of guaranty and a mortgage foreclosure claim is based on a distinct obligation imposed by a note and mortgage.

[¶34] The Kulczyks' mortgage foreclosure claim did not arise out of the transaction or occurrence that was the subject matter of Tioga Ready Mix's Amended Complaint in the first action. *Alerus Financial, N.A. v. Marcil Group Inc.*, 2011 ND 205, ¶ 19, 806 N.W.2d 160. Similarly, the Kulczyks were not required to add Scott Financial to the original action. Accordingly, the Kulczyks' foreclosure claim was not a compulsory counterclaim and is not barred by res judicata.

[¶35] Rule 13 of the North Dakota Rules of Civil Procedure provides “[a] pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against any opposing party, if the claim: arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim.” N.D. R. CIV. P. 13(a)(1). This Court has “construed ‘transaction and occurrence’ broadly to avoid a multiplicity of suits and to mean a claim that is ‘logically related’ to the opposing party’s claim.” *Security Nat. Bank., Edgeley v. Wald*, 536 N.W.2d 924, 928 (N.D. 1995) (quoting *Leo Lumber Co. v. Williams*, 191 N.W.2d 573, 576 (N.D. 1971)). Where a party fails to properly plead a compulsory counterclaim, the party is precluded from asserting the counterclaim in a subsequent action under the doctrine of res judicata. *Id.*

[¶36] “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.” *Riverwood Commercial Park, L.L.C. v. Standard Oil Co.*, 2007 ND 36, ¶ 13, 729 N.W.2d 101, 106-07. “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 the parties and their privies in all other actions.” *Id.*

[¶37] While a lender is not entitled to double recovery under North Dakota law, actions to enforce a guaranty are not required to accompany actions to foreclose a mortgage. *Alerus Financial*, at ¶¶ 19-20, 806 N.W.2d 160 (“Alerus would be ‘free to collect the entire amount guaranteed jointly and severally by [the guarantors] without first resorting to foreclosing on the real estate’”). This is the case because the defendants are different in each action and “an action against a guarantor is based on a contract of guaranty which

is an obligation distinct from the obligation imposed by a note and mortgage.” *Id.* Bringing an action to enforce a guaranty separate from the foreclosure action is also supported by North Dakota’s deficiency judgment statutes. Specifically, bringing two separate causes of action provides protection against the limitations on obtaining a deficiency judgment following a foreclosure action. *Id.* at ¶ 20.

[¶38] While it is true that “there is no requirement in North Dakota law that an action against a guarantor must precede an action to foreclose on a real estate mortgage,” it is equally true that there is nothing under North Dakota law that requires joinder of a claim on a personal guaranty and a foreclosure claim. (*Memorandum Opinion and Order Granting Motion for Summary Judgment* at ¶ 63, App. 045). Moreover, this Court has provided that there is no particular chronological order required in which to collect what is due. *Northwest Bank N. Dakota, Nat. Ass’n, v. Christianson*, 494 N.W.2d 165, 167 n.1 (N.D. 1992). Although the District Court noted that there is no provision which prohibits the joining of a mortgage foreclosure claim along with other claims for relief in the same action, the absence of a prohibition does not imply the existence of an affirmative requirement. *Id.* at ¶ 68, App. 047.

[¶39] Tioga Ready Mix’s Amended Complaint in the first action included claims for breach of contract, fraud, and negligence against the Kulczyks arising out of the sale of Tioga Ready Mix to the Vculeks in 2011. *Id.* at ¶ 11, App. 026-027. Specifically, Tioga Ready Mix asserted the Kulczyks breached the Asset Purchase Agreement dated September 28, 2011, one of several documents related to the transaction. *Id.* The fraud claim was also related to the Asset Purchase Agreement dated September 28, 2011. *Id.* at

¶ 12, App. 027. The negligence claim was related to how the Kulczyks conducted the business of Tioga Ready Mix pending the sale to the Vculeks. *Id.*

Although there was evidence presented about the Promissory Note and Mortgage at trial in the prior action, and specifically regarding Tioga Ready Mix's default under the terms of the Promissory Note, the only issue raised and presented to the district court for decision was whether the Vculeks were liable under the terms of the Personal Guaranty Agreement and for how much.

*Id.* at ¶ 57, App. 042-043. Nothing in Tioga Ready Mix's Amended Complaint raised any claims or allegations concerning the Note or Mortgage or any rights or obligations under the Note or Mortgage.

[¶40] The District Court in the first action ultimately held that the Vculeks were jointly and severally liable to the Kulczyks under the Personal Guaranty Agreement in the total amount of \$1.40 million, with post-judgment interest at the statutory rate of 6.50%. *Id.* at ¶ 31, App. 033. The District Court also held that the Kulczyks did not breach any contractual duties and it dismissed the fraud and negligence claims against them. *Id.* at ¶ 33-34, App. 034.

[¶41] No claims under the Note and Mortgage were raised in Tioga Ready Mix's and the Vculek's Amended Complaint. No issues related to these agreements were litigated by the parties except in reference to the guaranty. Scott Financial's mortgage-based interest in the property and its priority as compared to the Kulczyks mortgage was not raised in the Plaintiffs' pleadings in the first action and Scott Financial was not a party to that action either.

[¶42] Because the Amended Complaint did not include any allegation related to the Note and Mortgage, and because Scott Financial was not a party, the Kulczyks had to determine whether to proceed as they did or whether to attempt to also include, in

addition to the other issues, a mortgage foreclosure claim. The District Court concluded they were legally required to do so. This conclusion is plain error.

[¶43] The conclusion ignores clear North Dakota law which provides that the foreclosure action is a separate action from claims related to the guaranty. *See Alerus Fin., N.A. v. Marcil Grp. Inc.*, 2011 ND 205, ¶ 13, 806 N.W.2d 160; *First Fed. Sav. & Loan Ass'n, v. Scherle*, 356 N.W.2d 894, 896 (N.D. 1984).

[¶44] The Court's conclusion ignores the fact that not all of the interested parties were included in the litigation and that the Kulczyks would have had to add Scott Financial as a party. Scott Financial's owner, Brad Scott, was the Plaintiffs' expert witness and also a fact witness. The District Court concluded that the Kulczyks were legally required to also make his company a party. North Dakota law does not support this conclusion.

[¶45] The conclusion also fails to recognize the procedural posture of the first action. The District Court granted Tioga Ready Mix's motion to amend its pleadings on the day originally scheduled for trial. The Court allowed the amendment, continued the trial, and ordered Tioga Ready Mix pay sanctions to the Kulczyks for the Kulczyks' expenses in preparing for trial as originally scheduled. The Court then rescheduled the case to be tried a short nine months later. The District Court's conclusion in this case ignores the fact that the Kulczyks would not have had sufficient time to perfect a mortgage foreclosure claim and add additional parties to the case in addition to completing pre-trial preparations for the new claims set forth in the Amended Complaint in the short time allowed. The decisions made by the Kulczyks cannot be viewed in a vacuum. They must be examined based on the unusual posture of the first case caused by decisions made by Tioga Ready Mix in that action.

[¶46] Finally, the District Court's conclusion that the foreclosure action must be included fails to recognize the interplay between an action to collect on a personal guaranty and a foreclosure action. The preferred method is to proceed first on the guaranty and then, depending on the recovery, proceed to foreclose the mortgage. To proceed first on the mortgage foreclosure runs the risk of losing the ability to collect on the guaranty because of the deficiency judgment provisions under North Dakota law.

[¶47] For example, in *Scherle*, the bank obtained personal guarantees on a debt secured by a mortgage and commenced an action against both the guarantors and the borrower when the debt became delinquent. *First Fed. Sav. & Loan Ass'n, v. Scherle*, 356 N.W.2d 894, 895 (N.D. 1984). The bank first received a judgment of foreclosure against the borrower and the property was purchased for the full amount of indebtedness. *Id.* The separate action against the guarantors was subsequently dismissed because the guaranties were extinguished. *Id.* at 896. The same result could have occurred in this case.

[¶48] The purpose of requiring compulsory counterclaims is a desire to avoid unnecessary litigation. The method mandated by the District Court, however, is not efficient and not consistent with the purpose of the rule. A final judgment could not be easily entered using the procedure mandated by the District Court because the court would not be in the position in a single action to foreclose the mortgage and collect on the guaranty at the same time as part of the same case. The judgment amount in one is dependent on the amount collected in the other. One action must necessarily be completed first.

[¶49] As North Dakota law recognizes that a mortgage foreclosure action is a separate action from other claims and therefore does not have to be included as part of other

claims unrelated to the mortgage, the Kulczyks rightly chose to counterclaim on the personal guaranty against the Vculeks first, reserving their right to bring a foreclosure action at a later date. The Kulczyks' mortgage foreclosure claim was not a compulsory counterclaim in the prior action and is not now barred by res judicata.

**2. Even if the Kulczyks' mortgage foreclosure claim should have been brought in the prior action equity requires that res judicata not be applied to preclude the Kulczyks' mortgage foreclosure claim.**

[¶50] For purposes of res judicata, “only parties or their privies may take advantage of or be bound by the former judgment.” *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 384 (N.D. 1992). “This Court has adopted an ‘expanded’ version of privity for res judicata.” *Ungar v. N. Dakota State Univ.*, 2006 ND 185, ¶ 12, 721 N.W.2d 16. “[P]rivity exists if a person is so identified in interest with another that he represents the same legal right.” *Id.* (quoting *Hofsommer v. Hofsommer, Excavating, Inc.*, 488 N.W.2d at 384 (internal quotation omitted)). However, “fundamental fairness underlies any determination of privity.” *Id.* This Court has further explained that in applying res judicata courts are to look to equity to avoid injustice. Res judicata “should apply as fairness and justice require, and should not be applied so rigidly as to defeat the ends of justice or to work an injustice.” *Riverwood Commercial Park, L.L.C. v. Standard Oil Co.*, 2007 ND 36, ¶ 14, 729 N.W.2d 101, 106-07.

[¶51] It is undisputed here that the amount sought in the foreclosure action is due and owing and that absent reversal of the District Court's dismissal of the foreclosure action one or more of the Defendants will receive a windfall. This result is not equitable given the unique facts and procedural history of the two cases.

[¶52] In addition to not being equitable to apply res judicata in favor of Tioga Ready Mix, it is also inequitable to apply the concept of privity in favor of Triple Aggregate and the non-party owner of the property, Agape Holdings. The District Court held that “Triple Aggregate is clearly in privity with Tioga Ready Mix...because Triple Aggregate is the party in actual possession of the real property and the successor to Tioga Ready Mix’s interest under the Commercial Purchase Agreement.” (*Memorandum Opinion and Order Granting Motion for Summary Judgment* at ¶ 73, App. 048). Under the District Court’s analysis, the Kulczyks would similarly be barred by res judicata from asserting their mortgage foreclosure claim against Agape Holdings, a non-party to the foreclosure action. (*January 30, 2017 Motion to Vacate Hearing Transcript*, pg. 52: 15-17, App. 144). The practical effect of the District Court’s holding leaves the Kulczyks with no avenue to foreclose on the mortgage which was of record prior to each transfer of the Property and no remedy to recoup amounts secured by the mortgage, which at all times relevant was a valid lien of record.

[¶53] Finally, in addition to barring the Kulczyks from foreclosing the mortgage the District Court’s decision eliminates, as a matter of law, the Kulczyks ability to defend against the quiet title action brought by Tioga Ready Mix, who is no longer the owner of the property. The Kulczyks are being precluded from their remedy at the same time that Tioga Ready Mix is being granted affirmative relief on behalf of Agape Holdings. The District Court’s decision does more than just block the Kulczyks’ foreclosure action. It grants Tioga Ready Mix affirmative relief. This is an inequitable result and the District Court erred when it failed to apply equity in favor of the Kulczyks.



**II. THE DISTRICT COURT ERRED WHEN IT DENIED THE KULCZYKS' MOTION TO VACATE THE ORDER GRANTING TIOGA READY MIX CO.'S MOTION FOR SUMMARY JUDGMENT.**

[¶54] The ex parte email received by the District Court and forwarded to the parties both constitutes newly discovered evidence and evidences the Defendants' fraud, misrepresentation, or misconduct. Either ground supports vacating the judgment under Rule 60(b) of the North Dakota Rules of Civil Procedure. The District Court held, however, that if it assumed grounds existed to reconsider its decision, its order should not be vacated because the newly discovered information evidencing transfer of the Property to Agape Holdings does not change the outcome under its analysis of res judicata. In reaching its conclusion, the District Court found that Agape Holdings was in privity with Tioga Ready Mix as an assignee of Triple Aggregate and the newly discovered evidence of the transfer would not produce a different result and did not prevent the Kulczyks from fully and fairly presenting their case. This was an abuse of discretion.

**A. Standard of Review.**

[¶55] “This Court reviews a district court’s denial of a motion to vacate a judgment for an abuse of discretion.” *Vann v. Vann*, 2009 ND 118, ¶ 10, 767 N.W.2d 855 (citing *Krizan v. Krizan*, 1998 ND 186, ¶ 13, 585 N.W.2d 576). This Court does not review the substantive accuracy of the District Court’s decision, but “determine[s] only whether the court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not established.” *Id.* (quoting *Knutson v. Knutson*, 2002 ND 29, ¶ 7, 639 N.W.2d 495. “A district court abuses its discretion when it acts in an arbitrary, unconscionable, or unreasonable manner. *Id.* Where a “decision is not the product of a rational mental process by which the facts and law relied on are stated and considered together for the purpose of achieving a reasoned and reasonable determination” a trial

court has acted in an arbitrary, unconscionable, or unreasonable matter. *Terry v. Terry*, 2002 ND 2, ¶ 4, 638 N.W.2d 11 (citing *Peterson v. Peterson*, 555 N.W.2d 359, 361 (N.D. 1996)).

**B. The District Court erred when it issued an advisory opinion that the outcome under its prior res judicata analysis would be the same despite the newly discovered information.**

[¶56] Rule 60(b)(2) of the North Dakota Rules of Civil Procedure provides “On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons: (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b).” N.D. R. CIV. P. 60(b)(2). A Rule 60(b)(2) motion based on newly discovered evidence must be made “no more than a year after notice of entry of the judgment.” N.D. R. CIV. P. 60(c)(1).

[¶57] In this case all necessary elements are satisfied. The Kulczyks were not made aware of the April 12, 2016 Warranty Deed purporting to transfer title to the Subject Property until receipt of Lang’s email forwarded by the District Court on October 20, 2016. The chain of title at all times relevant to the proceedings provided Tioga Ready Mix as the record owner and the pleadings indicated only that Tioga Ready Mix had entered into a Commercial Purchase Agreement with Triple Aggregate. There was no evidence presented at the April 18, 2016 Summary Judgment Hearing, by any of the parties or their counsel, related to the purported transfer of the Property to a separate third party. (*April 18, 2016 Summary Judgment Hearing Transcript*, App. 148-174).

[¶58] The evidence would not be offered for impeachment purposes. Rather, the existence of the April 12, 2016 Warranty Deed and the Defendants’ apparent knowledge of that fact would be offered to rebut the res judicata defense presented. The evidence is

both material and likely to result in a different outcome in that claim preclusion only prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies. *Mills v. City of Grand Forks*, 2012 ND 56, ¶ 8, 813 N.W.2d 574. As is outlined above, “[f]undamental fairness underlies any determination of privity.” *Bismarck Public School District No. 1 v. Hirsch*, 136 N.W.2d 449, 453-454 (N.D. 1965). Moreover, res judicata “should apply as fairness and justice require, and should not be applied so rigidly as to defeat the ends of justice or to work an injustice.” *Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc.*, 2007 ND 36, ¶ 14, 729 N.W.2d 101, 107. The issue of privity cannot be litigated until it is properly raised as a defense. Here it was never raised because the Defendants did not disclose the transfer of the property.

[¶59] Further, the conclusion that Agape Holdings, a non-party to the present case, is in privity with Tioga Ready Mix as an assignee of Triple Aggregate, and that Agape Holdings’ ability to defend against the Note and Mortgage can be raised by Tioga Ready Mix is not before the Court. The Kulczyks have not been given an opportunity to be heard on the issue of privity, factually or legally.

[¶60] Tioga Ready Mix no longer has any interest in the property and therefore is no longer a proper party to this proceeding. Whether or not Agape Holdings can properly raise the issue of privity is not properly before the Court and any decision on this issue is advisory.

[¶61] “It is well settled that courts cannot give advisory opinions.” *Richland County Water Resource Bd. v. Pribbernow*, 442 N.W.2d 916, 918 (N.D. 1989) (quoting *State ex rel. Spaeth v. Meiers*, 403 N.W.2d 392, 393 n.1 (N.D. 1987)). Where no meaningful

relief can be granted courts should not issue advisory opinions. *Id.* (quoting *Gainey v. Gainey*, 301 S.E.2d 763, 764 (S.C. 1983)). The only meaningful relief the District Court could grant in this case was to grant the Kulczyks' Motion to Vacate the Order Granting Tioga Ready Mix's Motion for Summary Judgment and allow the Kulczyks' to conduct additional discovery as to the status of title and ultimately add Agape Holdings as a party to the case. Accordingly, the District Court order denying the Kulczyks' Motion to Vacate was an impermissible advisory opinion.

[¶62] It is undisputed that at the time the District Court heard the Kulczyks' Motion to Vacate, the deed transferring the Property from Triple Aggregate to Agape Holdings had been delivered and recorded. It is also undisputed that the relief requested in the Kulczyks' Complaint was to have the Property sold and foreclosed upon, the remedy the law allows. Agape Holdings is now the record owner and party in possession of the property and is not a party to this action. Assuming the District Court had concluded that the Property should be foreclosed, it is unclear how the Court could issue any relief against a non-party to this litigation absent adding Agape Holdings as a party to the case. Accordingly, this Court should reverse the District Court's Order and remand with instructions to allow the Kulczyks to conduct additional discovery and add Agape Holdings as a property party to the case.

### **CONCLUSION**

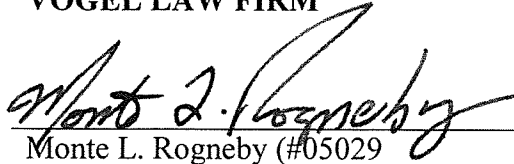
[¶63] In the first round of litigation Tioga Ready Mix brought a Third-Party Complaint against the Kulczyks for breach of contract, negligence, and fraud. The Kulczyks counterclaimed against the Vculeks on the Personal Guaranty executed in conjunction with the 2011 sale of Tioga Ready Mix from the Kulczyks to the Vculeks. Although the Kulczyks collected a Guaranty Judgment against the Vculeks, they rightfully reserved

their right to bring the present foreclosure action against Tioga Ready Mix at a later date. After the District Court held the Kulczyks' foreclosure claim was barred by res judicata and the Kulczyks' filed their first Notice of Appeal, the District Court received an email from a non-party to the litigation indicating that the Property was transferred to a third party during the pendency of the action. Despite asserting that Tioga Ready Mix was the record owner and that Triple Aggregate was the party in possession and intimate knowledge of the transfer, neither Tioga Ready Mix nor Triple Aggregate or their counsel apprised the Kulczyks or the District Court of the transfer. This newly discovered information constitutes sufficient grounds for the District Court to Vacate its Order Granting Tioga Ready Mix's Motion for Summary Judgment. The District Court's denial of the Kulczyks' Motion to Vacate was an abuse of discretion. For these reasons, the Kulczyks respectfully request that this Court reverse the District Court's Order and enter an Order providing the Kulczyks have a right to maintain a mortgage foreclosure action and remand with instructions to allow the Kulczyks to conduct additional discovery and add Agape Holdings as a proper party to the case.

Respectfully submitted March 20, 2017.

**VOGEL LAW FIRM**

By:

A handwritten signature in black ink, appearing to read "Monte L. Rogneby", is written over a horizontal line.

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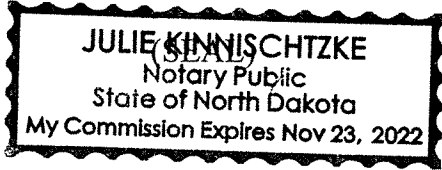


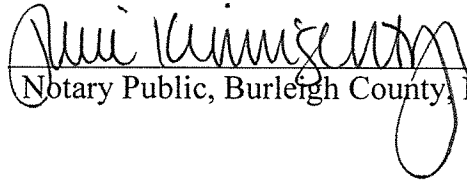
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Alicia Rash

Subscribed and sworn to before me this 22 day of March, 2017.



  
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Notary Public, Burleigh County, North Dakota