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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20160330
Williams Co. Court No. 53-2015-CV-01313

William Kulczyk and Rhonda Kulczyk,	)
	)
Plaintiffs and Appellants	)
	)
vs.	)
	)
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.	

APPEAL FROM THE *JUDGMENT*, DATED SEPTEMBER 13, 2016, AND *ORDER*, DATED JANUARY 30, 2017, BY THE HONORABLE JUDGE KIRSTEN M. SJUE, NORTHWEST DISTRICT COURT, WILLIAMS COUNTY, NORTH DAKOTA, CASE NO. 53-2015-CV-01313

BRIEF OF APPELLEE TIOGA READY MIX CO.

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[¶1] **STATEMENT OF ISSUES**

I. Whether the district court correctly determined the Kulczyks' foreclosure action was barred by res judicata.

II. Whether the district court was correct in denying the Kulczyks' Motion to Vacate Order Granting Summary Judgment.

STATEMENT OF THE FACTS

[¶2] Prior to the spring of 2015, Tioga Ready Mix Co. ("TRM") was engaged in the ready-mix concrete business in northwestern North Dakota and operated a concrete plant in Tioga, North Dakota. William Kulczyk and Rhonda Kulczyk (collectively the "Kulczyks") were the previous owners of TRM, which they sold to Bernard Vculek ("Vculek") in December 2011. As a financial advisor to Vculek, Scott Financial Corporation ("Scott Financial") assisted in facilitating the transaction between the parties. Scott Financial has not appeared in this matter. Under the terms of the sale from the Kulczyks to Vculek, TRM executed and delivered to the Kulczyks a promissory note in the principal amount of $1,400,000.00 (hereinafter "Promissory Note"). (Docket ID # 2).

[¶3] As security for the Promissory Note, TRM granted a mortgage (hereinafter "Mortgage") to the Kulczyks on the real property owned by TRM, which is located in Williams County, North Dakota, more fully described as:

> Parcel 1:
> Sublot 6 in the NE1/4 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 NE1/4 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 Plate thereof on file in the office of the County Recorder for said County and State.
>
> Parcel 3:
> (Approximately 20 Acres) W1/2SW1/4NE1/4 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.

("Subject Property"). *See* Appendix of William Kulczyk and Rhonda Kulczyk at 090 (Appx. at 090). The Mortgage was subsequently recorded in Williams County as Document No. 727619. (Id.) Vculek and his wife, Marlene Vculek, executed a personal guarantee in the amount of $1,400,000.00 (hereinafter "Personal Guarantee"). (Docket ID #55).

[¶4] Ultimately, a lawsuit was brought by the Vculeks and TRM against the Kulczyks in connection with issues related to the sale and the Kulczyks' management of TRM. (Appx. at 024) (Wherein the district court took judicial notice of all documents filed in Williams County District Court, Case No. 53-2012-CV-00460). In that action, TRM and the Vculeks asserted causes of action against the Kulczyks for breach of contract, fraud, and negligence seeking to recoup damages incurred as a result of the Kulczyks' conduct in connection with their management and subsequent sale of TRM. (Docket ID #56). In response to those claims, the Kulczyks alleged numerous counterclaims against TRM and the Vculeks. (Docket ID #57). Specifically, the Kulczyks asserted a breach of contract claim against the Vculeks under the Personal Guarantee as a result of an alleged breach of contract under the Promissory Note by TRM (Count One); two breach of contract claims against TRM under a Letter of Understanding Agreement executed at closing of

the sale (Counts Two and Three); a claim for declaratory relief against the Vculeks requesting the Court to find confidentiality and non-compete agreements void under North Dakota law (Count Four); and an alternative breach of contract claim against TRM and/or the Vculeks under an Asset Purchase Agreement and Addendum to Asset Purchase Agreement (Count Five). (Id.)

[¶5] A bench trial in Williams County Case No. 53-2012-CV-00460 was held on October 6-8, 2014, before the Honorable David W. Nelson. On March 4, 2015, the Court issued its Memorandum Opinion finding in favor of the Kulczyks as follows: (1) that the Kulczyks were entitled to a judgment against the Vculeks for $1.4 million under the Personal Guarantee (Count One); and (2) that the Kulczyks were entitled to a judgment against TRM for $25,000 plus prejudgment interest at 6.5 percent (Count Two). (Docket ID #58). Regarding the $1.4 million judgment against the Vculeks under the Personal Guarantee, the district court correctly found that prejudgment interest on that amount was not due "[b]ecause Vculek's personal guarantee does not include an interest rate on the Vculek's obligation…." (Id. at ¶ 5). As proposed by counsel for the Kulczyks, the court entered its findings and order for judgment on March 16, 2015. (Docket ID #59). A final judgment was entered in Williams County Case No. 53-2012-CV-00460 on March 20, 2015. (Docket ID #60). The judgment against the Vculeks and TRM has been fully satisfied. (Docket ID #61-65).

[¶6] On May 19, 2015, TRM entered into a purchase agreement with Triple Aggregate, LLC ("Triple Aggregate"), under which Triple Aggregate agreed to purchase the Subject Property from TRM, together with specific items of personal property. (Docket ID # 66). However, armed with the Mortgage against the Subject Property, the

Kulczyks refused to release said Mortgage and the transaction between TRM and Triple Aggregate was stalled. On September 6, 2015, the Kulczyks served a notice of foreclosure upon TRM claiming an amount due under the Mortgage of $127,670.27. (Docket ID #4).

[¶7] In November 2015, the Kulczyks commenced the above-captioned foreclosure action. (Appx. at 007, 013). In response thereto, TRM asserted the following as an affirmative defense:

> The Kulczyks' complaint is barred by … res judicata… Additionally, the district court's judgment entered in Williams County Case No. 53-2012-CV-00460 is final and conclusive as to all claims that were raised or could have been raised between the parties to that action, including the Kulczyks' foreclosure claim against TRM. The Kulczyks have admitted their foreclosure claim against TRM existed at the time of the previous lawsuit between the parties. *See* Williams County Case No. 53-2012-CV-00460, Docket ID No. 339, *Defendant's Post-Trial Brief* at ¶ 59. Rather than foreclosing their mortgage against TRM, and risk not being made whole due to North Dakota's anti-deficiency judgment rules, the Kulczyks elected to sue the Vculeks under the personal guarantee.

(Appx. at 015). TRM further asserted a counterclaim to quiet title to the Subject Property and declare the Kulczyks to have no interest in or lien or encumbrance upon the Subject Property. (Id.)

[¶8] In order to proceed with closing the transaction between Triple Aggregate and TRM, Triple Aggregate moved to deposit funds with the district court in the amount of the Kulczyks' claimed mortgage (plus interest). (Docket ID #19-31). On February 26, 2016, the district court entered its order granting Triple Aggregate's motion for leave to deposit funds, but indicated it would not order a release of the Kulczyks' mortgage.

(Docket ID #51). Accordingly, no deposit of funds was made by Triple Aggregate with the court in relation to this case. This ultimately led to an escrow agreement between TRM and Triple Aggregate on March 22, 2016, in order to permit the parties to close on their transaction ("Escrow Agreement"). (Docket ID #127). The Escrow Agreement outlined the terms under which certain funds were to be released to TRM and certain funds remained in escrow pending the resolution of this foreclosure action. (Id.) Subsequent to this agreement, TRM was informed by Triple Aggregate of an assignment of its interest in the Subject Property to a holding company, Agape Holdings, LLP ("Agape"). Accordingly, TRM prepared a warranty deed on April 12, 2016, to be held in escrow by Triple Aggregate's counsel, conveying the Subject Property to Agape as the assignee of Triple Aggregate.

[¶9] On March 4, 2016, TRM moved for summary judgment arguing, in part, the Kulczyks' foreclosure claim was barred by res judicata in that the judgment entered in the first lawsuit was final and conclusive as to all claims that were raised or could have been raised between the Kulczyks and TRM. (Docket ID #52-67). That included the Kulczyks' foreclosure claim, which was known to the Kulczyks, but foregone in favor of proceeding against the Vculeks as personal guarantors. (Id.) On September 12, 2016, the district court entered its Memorandum Opinion and Order Granting Motion for Summary Judgment. (Appx. at 023). The Judgment was entered on September 13, 2016. (Appx. at 054). The warranty deed completing the sale from TRM to Triple Aggregate was delivered by TRM after the district court's summary judgment ruling in September 2016 and recorded.

[¶10] The Kulczyks filed their Notice of Appeal on October 6, 2016. (Appx. at 056). This Court entered an Order of Remand on December 6, 2017, to permit the Kulczyks to file a Rule 60(b) motion with the district court. On December 16, 2016, the Kulczyks filed a Motion to Vacate Order Granting Motion for Summary Judgment. (Docket ID #119-124). The district court held a hearing on January 30, 2017, for arguments on the Kulczyks' motion. (Appx. at 093). After arguments by the parties, the court orally informed the parties of its rationale for denying the motion. (Id.) An Order Denying Motion to Vacate Order Granting Motion for Summary Judgment was entered the same day. (Appx. at 085). The Kulczyks filed their Second Notice of Appeal to the North Dakota Supreme Court on February 6, 2017. (Appx. at 086).

LAW AND ARGUMENT

I. The district court correctly determined the Kulczyks' foreclosure action was barred by res judicata.

[¶11] In the case Riverwood Commercial Park, L.L.C. v. Standard Oil Co., the North Dakota Supreme Court provided an in-depth analysis of the doctrine of res judicata (claim preclusion). *See* 2007 ND 36, 729 N.W.2d 101. Generally speaking, "[t]he [doctrine] of res judicata bar[s] courts from relitigating claims and issues in order to promote the finality of judgments, which increases certainty, ***avoids multiple litigation***, wasteful delay and expense, and ultimately conserves judicial resources." Id. at ¶13 (emphasis added). "The applicability of res judicata or collateral estoppel is a question of law, fully reviewable on appeal." Id. (emphasis added).

> Res judicata, or claim preclusion, prevents relitigation of claims that were raised, ***or could have been raised***, in prior actions between the same parties or their privies. Thus, res judicata means a valid, existing final judgment from a court

> of competent jurisdiction is conclusive with regard to claims raised, or those that could have been raised and determined, as to [the] parties and their privies in all other actions. Res judicata applies even if subsequent claims are based upon a different legal theory.

Id. (internal citations omitted) (emphasis added). The Court further explained:

> Claim preclusion prevents parties and those in privity with them from raising legal theories, claims for relief, or defenses which could have been raised in the prior litigation, even though such claims were never actually litigated in the prior case.

Id. at ¶ 14 (citing 18 James W. Moore, Federal Practice § 131.13[1] (3d ed.2006)).

[¶12] At the outset of this foreclosure action, TRM raised the affirmative defense of res judicata. (Appx. at 015). The Kulczyks, TRM, and the Vculeks have a long and storied history involving a previous lawsuit arising from the Kulczyks' management and subsequent sale of TRM in late 2011. The previous lawsuit between these parties was also venued in Williams County as Tioga Ready Mix Co., et al. v. William Kulczyk, et al., Williams County District Court, Case No. 53-2012-CV-00460. The Kulczyks (appellants) and TRM (an appellee) were both parties to that action in which numerous claims and counterclaims were asserted by and among the parties. The Kulczyks asserted a breach of contract claim against the Vculeks seeking damages of an amount "not less than [$1.4 million]" under a personal guarantee signed by the Vculeks. (Docket ID #56). The Kulczyks also asserted claims against TRM in the prior lawsuit for breach of contract (Counts Two, Three, and Five), and voluntarily elected not to assert a foreclosure claim against TRM under the mortgage. (Id.) The Kulczyks have acknowledged their foreclosure claim against TRM existed at the time of the previous lawsuit between the parties. (Docket ID #67). However, "[r]ather than foreclose their mortgage and risk not

being made whole due to North Dakota's anti-deficiency judgment rules, the Kulczyks chose to sue the Vculeks under the personal guarantee." (Id. at ¶ 59).

[¶13] After a bench trial in the previous lawsuit, the district court found, in part, that the Kulczyks were entitled to a judgment against the Vculeks for $1.4 million under the Personal Guarantee and a judgment against TRM for $25,000 plus prejudgment interest at 6.5 percent. (Docket ID #58). The *Judgment* in Williams County Case No. 53-2012-CV-00460 was entered on March 20, 2015 and has been fully satisfied by the Vculeks and TRM. (Docket ID #60-65). In November 2015, the Kulczyks commenced the above-captioned foreclosure action. (Appx. at 007, 013). On September 12, 2016, the district court granted summary judgment in favor of TRM based on the rationale that the Kulczyks' foreclosure claim is barred by the principle of res judicata. (Appx. 023).

[¶14] The Kulczyks contend that the district court erred in dismissing their foreclosure action with prejudice. (Appellants' Brief at ¶¶ 30-50). The Kulczyks claim their foreclosure action was not a compulsory counterclaim. (Id. at ¶¶ 30, 32). Specifically, the Kulczyks argue "[i]mplicit in the District Court's holding is the conclusion the Kulczyks' mortgage foreclosure claim was compulsory counterclaim under Rule 13 of the North Dakota Rules of Civil Procedure." (Id. at ¶ 33). However, a thorough reading of the record and appendix will reveal this is the first anyone has mentioned Rule 13 or compulsory counterclaims. It is clear from the district court's Memorandum Opinion and Order Granting Motion for Summary Judgment that the legal principle upon which summary judgment was granted is res judicata, a common-law doctrine, not a codified rule of civil procedure. (Appx. at 023). "This Court has repeatedly and consistently held that issues or contentions not raised or considered in the district court cannot be raised for

the first time on appeal from a judgment or order, and this Court will not address issues raised for the first time on appeal." Beeter v. Sawyer Disposal LLC, 2009 ND 153, ¶ 20, 771 N.W.2d 282. Accordingly, the Kulczyks' argument regarding compulsory counterclaims and Rule 13 of the North Dakota Rules of Civil Procedure should be disregarded by this Court.

[¶15] Additionally, the Kulczyks inexplicitly claim that the "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." (Appellants' Brief at ¶ 34). The mortgage and note, upon which the foreclosure action is predicated, are part and parcel of the sale of TRM from the Kulczyks to the Vculeks. To suggest otherwise is simply disingenuous. The Kulczyks cannot side-step the indisputable fact that the Kulczyks and TRM were both parties to the first action, which, contrary to the Kulzcyks' frivolous assertion, was based on the same transaction: the sale of TRM from the Kulczyks to the Vculeks.

[¶16] TRM asserts that the district court was correct in determining that the Kulczyks' foreclosure action is barred by res judicata. The March 20, 2015 *Judgment*, entered in Williams County Case No. 53-2012-CV-00460, is final and conclusive as to all claims that were raised ***or could have been raised*** between the Kulczyks and TRM. Certainly, the Kulczyks were aware of the viability of their foreclosure claim and that it ***could have been raised*** in the prior action between the parties. (Docket ID #67 at ¶ 59). However, despite asserting other contract-based claims against TRM, the Kulczyks elected to sue the Vculeks under the Personal Guarantee "[r]ather than foreclose their mortgage and risk not being made whole due to North Dakota's anti-deficiency judgment rules…." (Id.)

This was a strategic and voluntary choice made by the Kulczyks to which they are now bound as a matter of law.

[¶17] Again, as indicated in Riverwood Commercial Park, L.L.C. v. Standard Oil Co., res judicata bars relitigation of claims to promote the finality of judgments, which increases certainty, avoids multiple litigation, wasteful delay and expense, and ultimately conserves judicial resources. Id. at ¶13. In this case, permitting the Kulczyks' foreclosure action to move forward frustrates these bases. This matter was tried and judgments against the Vculeks and TRM were satisfied at great expense. However, because of this subsequent action, TRM remains in perpetual litigation. TRM faces uncertainty in dealing with Triple Aggregate and Agape, and is subject to continued, unnecessary expense in both time and money. The court system and judicial resources are also still being expended on a matter that was well-settled.

[¶18] In support of their argument that a second mortgage action should be permitted against TRM, the Kulczyks rely upon Alerus Financial, N.A. v. Marcil Group, Inc., 2011 ND 205, 806 N.W.2d 160. However, as properly recognized by the district court in its summary judgment ruling:

> If the only parties to the prior action in Case No. 53-2012-CV-00460 had been the Kulczyks and the Vculeks, and the only issue raised was the Vculek's liability under the Personal Guranty Agreement, then there is no question that the Kulczyks' current mortgage foreclosure action against Tioga Ready Mix would be permissible. But Tioga Ready Mix was a party to the prior action, and the parties litigated all of the numerous issues arising from the Kulczyks' sale of Tioga Ready Mix to the Vculeks, under all of the various agreements entered into by the parties during that process, with the exception of Tioga Ready Mix's liability to the Kulczyks under the Promissory Note and Mortgage dated December 21, 2011. Viewed through these facts, the

> Kulczyks' argument is essentially that no matter what previous litigation arising from the same transaction or set of operative facts may have occurred between the exact same parties, the mortgage foreclosure is always a separate cause of action that may be brought on its own.
>
> After careful consideration, this Court does not believe that the Alerus Financial case requires that result. First, although a particular lender may prefer such a procedure, there is no requirement in North Dakota law that an action against a gurantor must precede an action to foreclose on a real estate mortgage. In the Alerus Financial case itself, a foreclosure action against the commercial real property was initiated prior to the action against the gurantors, and was reduced to a judgment prior to the guaranty judgment. Second, in its reasoning in Alerus Financial, the North Dakota Supreme Court expressly noted that the defendants, the mortgagor in the first action and the three guarantors in the second action, were different parties. That is not the case as between the Kulczyks and Tioga Ready Mix, which were both parties to the prior proceeding in Case No. 53-2012-CV-00460.

(Appx. at 044-045) (internal citations omitted).

[¶19] Alternatively, the Kulcyzks claim that equity requires that res judicata not be applied to preclude their foreclosure claim. (Appellants' Brief at ¶¶ 50-53). The Kulczyks assert that "[t]he practical effect of the District Court's holding leaves the Kulczyks with no avenue to foreclose on the mortgage…" (Id. at ¶ 52). However, this assertion ignores the simple fact that the Kulczyks' foreclosure action could have, and most certainly should have, been brought in connection with the first action.

[¶20] Although this Court reviews this matter de novo, it is clear that the most basic elements of res judicata exist in this case. The Kulczyks, the Vculeks, and TRM were all parties in the first action. The Kulczyks could have, and should have, brought their foreclosure claim in the first action. For strategic reasons they elected not to. The district

court recognized this and properly determined that the equitable principle of res judicata prevents the subsequent suit.

II. The district court was correct in denying the Kulczyks' Motion to Vacate Order Granting Summary Judgment under N.D.R.Civ.P. 60(b)(2).

[¶21] The Kulczyks also contend that the district court erred in denying the Kulczyks' Motion to Vacate Order Granting Summary Judgment while this matter was on remand to the district court. (Appellant's Brief at ¶¶ 54-62). Regarding the standard of review, the Kulczyks' appellate brief correctly states that the North Dakota Supreme Court reviews denials of a motion to vacate under the abuse of discretion standard. (Id. at ¶ 55) (citing Vann v. Vann, 2009 ND 118, ¶10, 767 N.W.2d 855). Under an abuse of discretion standard, "the court's decision will not be reversed unless the court acted in an arbitrary, unreasonable, or unconscionable manner, it misinterpreted or misapplied the law, or its decision is not the product of a rational mental process leading to a reasoned determination." Gaede v. Bertsch, 2017 ND 69, ¶ 17, 891 N.W.2d 760, 765.

[¶22] This Court has repeatedly held that "[a] motion for relief under N.D.R.Civ.P. 60(b) is not a substitute for appeal and should not be used to relieve a party from free, calculated, and deliberate choices he has made." State ex rel. N. Dakota Dep't of Labor v. Riemers, 2010 ND 43, ¶ 9, 779 N.W.2d 649. "A Rule 60(b) motion is not an opportunity to provide a litigant with a second chance to present new explanations, legal theories, or proof to a court." Johnson v. Bronson, 2013 ND 78, ¶ 34, 830 N.W.2d 595 (internal citation omitted). "A party seeking Rule 60(b) relief bears the burden of establishing sufficient grounds for disturbing the finality of the decree, and relief should be granted only in exceptional circumstances." Id.

[¶23] When the Kulczyks brought this motion, they requested the district court set aside its summary judgment based on alleged newly discovered evidence [N.D.R.Civ.P 60(b)(2)] and fraud [N.D.R.Civ.P. 60(b)(3)], claiming a lack of candor on behalf of the undersigned. (Docket ID #121). In their appellate brief, the Kulczyks appear to have limited their argument to newly discovered evidence and allege that the district court erred in issuing an advisory opinion. (Appellant's Brief at ¶¶ 54-62). TRM respectively disagrees with these arguments.

[¶24] In pertinent part, Rule 60(b) indicates that a district court may "relieve a party… from a final judgment…for…(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). The Kulczyks contend that an ex parte email to the district court equates to newly discovered evidence and therefore the district court should have vacated its summary judgment ruling. (Docket ID #121). This ex parte email in question was addressed to Judge Sjue and outlines a dispute between Triple Aggregate and a third-party. (Appx. at 060). The only part even seemingly relevant is the warranty deed given by TRM to Agape. (Appx. at 063).

[¶25] The Kulczyks' brief to the district court in support of their Rule 60(b)(2) motion cited the controlling authority on "newly discovered evidence," i.e. that the party seeking relief on the grounds of newly discovered evidence must establish the following: (1) the evidence must have been discovered following trial; (2) the movant must have exercised due diligence in discovering the evidence; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material and admissible; and (5) the evidence must be such that a new trial would probably produce a different result.

(Docket ID #121 at ¶ 13) (citing Perry v. Reinke, 1997 ND 213, ¶ 27, 570 N.W.2d 224). In ruling from the bench, the district court denied the motion to vacate based on the fifth element listed above, indicating, "…I do find that there would **not** be a different result in this case based upon my understanding of the concepts of res judicata and privaty (sic)." (Appx. at 144:18-20) (emphasis added).

[¶26] The Kulczyks have turned the district court's analysis on its head, arguing the court issued an advisory opinion. (Appellants' Brief at ¶¶ 56-62). However, it is clear from the case law cited in the Kulczyks' own brief (i.e. Perry v. Reinke) that one of the elements the Kulczyks must establish to prevail on its Rule 62 motion is that the "newly discovered evidence" must "be such that a new trial would probably produce a different result." (Docket ID # 121 at ¶ 27). What the Kulczyks claim to be an advisory opinion is simply the district court conducting the appropriate legal analysis required by the Perry case. The district court correctly indicated, "[o]ne of the prongs that must be established by the movant is that the evidence must be such, the newly discovered evidence must be such, that a new trial would probably produce a different result." (Appx. at 142:24-143:3). It is under this analysis the district court denied the Kulczyks' motion to vacate. (Appx. at 144:18-23).

[¶27] The Kulczyks maintain an argument that Agape's involvement as an assignee of Triple Aggregate's interest somehow alters the application of res judicata in this case. (Appellants' Brief at ¶ 58). However, in its Memorandum Opinion and Order Granting Motion for Summary Judgment, the district court found that privity existed between TRM and Triple Aggregate based on the fact that (1) Triple Aggregate was in actual possession of the Subject Property; and (2) based on the Commercial Property Agreement

between TRM and Triple Aggregate, which was entered in May 2015, after the district court's decision in the prior matter. (Appx. at 048, ¶ 73). The district court's determination that privity exists between Agape, as an assignee of Triple Aggregate, and TRM is an extension of that rationale. In their appellate brief, the Kulczks contend they have not had the opportunity to be heard on the issue of privity, factually or legally. (Appellants' Brief at ¶ 59). This is simply false. The issue of privity discussed by the district court at length in its Memorandum Opinion and Order Granting Motion for Summary Judgment. (Appx. at 047-049, ¶¶ 70-75). Nothing prevented the Kulczyks from addressing these issues in post-judgment motion practice, or raising the issue in their Rule 60(b)(2) motion.

[¶28] Ultimately, the district court's finding under its Rule 60(b)(2) analysis, that the "newly discovered evidence" would not produce a different result, was not arrived at in an arbitrary or unreasonable manner. The denial of the motion to vacate was based on the same sound rationale and reasoned determination that the district court applied in granting summary judgment. The Kulczyks cannot show the district court abused its discretion in denying the motion to vacate under Rule 60(b)(2). As such, TRM respectfully requests the North Dakota Supreme Court affirm the denial.

[¶29] Alternatively, should this Court disagree with the district court's analysis of privity under the doctrine of res judicata, and the fifth element of the Perry case, TRM also argues the Kulczyks have failed to establish the second element required in Perry: that the movant must have exercised due diligence in discovering the evidence. (Docket ID # 125). It is undeniable the Kulczyks conducted no discovery whatsoever in this foreclosure lawsuit, despite the Kulczyks' awareness of TRM's pending sale of the

Subject Property. In their appellate brief, the Kulczyks specifically request this Court remand the matter to the district court so that the Kulczyks can conduct "additional" discovery, despite not having conducted any in the first place. (Appellants' Brief at ¶ 63). As indicated above, the only relevant fact from the ex parte email discussed above was that the grantee under the warranty deed consummating the transaction was changed from Triple Aggregate to Agape, an assignee of Triple Aggregate. TRM's conveyance of the Subject Property to Agape would have been clearly discoverable had the Kulczyks sought that information. However, because the Kulczyks failed to exercise even a modicum of due diligence, this information is not "newly discovered evidence" as contemplated by Rule 60(b)(2) and the Perry case, and the Kulczyks are not entitled to relief thereunder.

CONCLUSION

[¶30] For the reasons outlined above, TRM respectfully requests the North Dakota Supreme Court affirm the district court's order for summary judgment and order denying the Kulczyks' motion to vacate the same.

Dated: April 24, 2017.

SMITH PORSBORG SCHWEIGERT
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CERTIFICATE OF SERVICE

[¶31] I hereby certify that a true and correct copy of the foregoing brief was filed electronically with the Clerk of the North Dakota Supreme Court on the 24th day of April, 2017, and e-mailed to the following: **Monte L. Rogneby** (mrogneby@vogellaw.com); **Briana L. Hildebrand** (bhildebrand@vogellaw.com); and **Daniel J. Frisk** (dfrisk@grandefrisk.com).

[¶32] I further certify that a true and correct copy of the foregoing brief will be mailed by first class mail, postage paid, to the following: **Scott Financial Corporation**.

Dated: April 24, 2017.

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