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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

Michael McDougall and Bonita McDougall, v. Ag Country Farm Credit Services, PCA, and Any person in possession, and All persons unknown, claiming any estate or interest in, or lien or encumbrance upon, the real estate described in the Third Party Complaint,	Plaintiffs and Appellants, Defendant, Third-Party Plaintiff, and Appellee. Third-Party Defendants

APPELLANT'S BRIEF

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

ORAL ARGUMENT REQUESTED

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[¶1] **STATEMENT OF ISSUES**

[¶2] Did the district court err in granting summary judgment in favor of AgCountry on McDougalls' deceit claims, premised upon the conclusion that the statute of frauds bars deceit claims?

[¶3] Did the district court err in granting summary judgment in favor of AgCountry on McDougalls' unjust enrichment claims, concluding that there was an absence of justification and an adequate remedy provided by law?

[¶4] **STATEMENT OF THE CASE**

[¶5] This case was initiated by Michael and Bonita McDougall through the service of the Summons and Complaint upon the appellee on or about September 7, 2018, and filed with the Towner County District Court on August 30, 2018 (Case Number 48-2018-CV-00045). Appendix 6-25. AgCountry filed an Answer, Counterclaim, and Third Party Complaint on September 28, 2018. Appendix 26-41. AgCountry made a Motion for Summary Judgment on December 31, 2018. (Doc. #38). McDougalls responded to AgCountry's Motion for Summary Judgment and made a Countermotion for Summary Judgment. (Doc. #70). Reply Briefs were filed by both parties. (Doc. #96 and 99).

[¶6] The Court held a hearing on the motions for summary judgment on February 13, 2019. The court issued its Memoranda Decision and Order Regarding Motion and Countermotion for Summary Judgment on February 22, 2019. Appendix 45-53. The Memorandum and Order granted summary judgment in AgCountry's favor, dismissing McDougalls' claims of conversion, equitable and/or promissory estoppel, unjust enrichment, and deceit. AgCountry was also granted a declaration of superiority of its

mortgage in the "Home Quarter" [1] and the right to foreclose its mortgage. Summary judgment was reserved on the issues of the assignment of rents and issues relating to an easement on the property.

[¶7] The court issued a Memorandum Decision and Order for Judgment disposing of the remaining issues of the case on April 15, 2019. (Doc. #117). Judgment was entered on April 17, 2019. Appendix 81-84

[¶8] Notice of Appeal by Michael and Bonita McDougall was filed with the Supreme Court on May 2, 2019, which is the matter now before this court. Appendix 85-86.

[¶9] **STATEMENT OF FACTS**

[¶10] The facts of this case arise largely out of a transaction between Michael and Bonita's son and daughter-in-law, Kent and Erica McDougall, and AgCountry. Kent and Erica McDougall filed bankruptcy in the United States Bankruptcy Court for the District of North Dakota on October 19, 2016 (Case Number 16-30542, Doc. #1) and began an adversary case against AgCountry by filing a Complaint in the United States Bankruptcy Court for the District of North Dakota on November 22, 2016 (Adversary Case Number 16-7027, Doc. #1) regarding a mortgage granted to AgCountry in the "Home Quarter." Michael and Bonita McDougall were added as parties to the adversary case. Adversary Case Number 16-7027, Doc. #18. The relief requested in the adversary case was to rescind the deed, determine the priority of AgCountry's interests in the "Home Quarter", and to determine whether the mortgage granted to AgCountry was a fraudulent conveyance.

[1] The legal description of the "Home Quarter" is: The North Half of the Southeast Quarter (N½SE¼) and the South Half of the Northeast Quarter (S½NE¼), Section Twenty-five (25), Township One Hundred Sixty-two (162), Range Sixty-seven West (67W), Fifth P.M., Towner County, ND.

Adversary Case Number 16-7027, Doc. #19. Following the trial in the adversary case, the bankruptcy court issued a Memorandum and Order concluding that, as a matter of law, Michael and Bonita McDougall and Kent and Erica McDougall could not succeed on the fraud and deceit claims because the misrepresentations made by AgCountry were in regards to a future event. Appendix 54-80. The judgment was appealed by Michael and Bonita McDougall, but the case was dismissed due to lack of jurisdiction over Michael and Bonita's claims. Adversary Case Number 16-7027, Doc. #63.

[¶11] The bankruptcy court's Memorandum and Order made extensive findings of fact as determined at trial. The court and both parties to this action adopted and utilized those findings of fact in making their motions for summary judgment in this case. Appendix 45-46. The applicable findings of fact are detailed below.

[¶12] Kent and Erica McDougall were farmers and ranchers who began raising cattle in 2007. In 2007, they began living on a 160 acre parcel of land near Rock Lake in Towner County, North Dakota, which they refer to as the "Home Quarter." In 2009, they purchased the "Home Quarter." In 2011, after a "tough year", Kent and Erica McDougall sold the "Home Quarter" to Michael and Bonita McDougall and used the proceeds of the sale to reduce their debt. Kent and Erica McDougall continued to live on the property rent free, intending to eventually repurchase the parcel from Michael and Bonita McDougall. Appendix 55-56[2].

[¶13] In 2013, Kent and Erica McDougall began financing their operation through AgCountry. Appendix 56. Kent and Erica McDougall's financial situation remained stable

[2] All citations to Appendix pages 54 to 81 reference the bankruptcy court's Memorandum and Order which includes the findings of fact adopted by both parties and the district court in the summary judgment analysis in this case.

in 2013 but in 2014, grain and cattle prices dropped and they were running short of operating capital near the end of the year. In August of 2014, Kent and Erica McDougall sought to refinance their debt with AgCountry and to borrow additional funds from them. Appendix 57. The financing plan progressed slowly. In the meantime, the 2015 season did not go well – crop prices and the cattle market fell. At that point, Kent and Erica McDougall began borrowing money from AgCountry to pay operating expenses, eventually resulting in eight loans totaling $394,800. Appendix 57-58.

[¶14] At the time they were receiving the funds from AgCountry, Kent and Erica McDougall understood that the notes for the eight loans would be refinanced with other loans, combined with the new operating loan, and all rolled into one larger promissory note with AgCountry. Kent and Erica McDougall testified that Dean Aanderud, their loan officer at AgCountry, repeatedly suggested that the prospects for restructuring and refinancing the new loan were good. Kent and Erica McDougall were in frequent contact with Mr. Aanderud who consistently represented that he was working on their financing request, it "looked good", everything was "fine", and they should hear something about their loan and refinancing request soon. Through the course of these communications, Mr. Aanderud continually highlighted the fact that additional financing would be forthcoming from AgCountry. Appendix 59-60. Additionally, AgCountry continued to advance further sums to Kent and Erica McDougall, despite cash flow issues. Appendix 60.

[¶15] In spite of the rosy description given to Kent and Erica McDougall by Mr. Aanderud, internal communications between AgCountry employees present a different picture of the situation. Numerous emails indicate concerns about Kent and Erica McDougall's loan delinquencies, the need to obtain additional collateral to secure the debt,

and an intent to send their account to the special credit department for servicing. Additionally, Kent and Erica McDougall's loans were reaching and exceeding 90-days delinquent. At such time, AgCountry's policy was to put such a loan into non-accrual status. This means that the loan no longer accrues standard interest and AgCountry begins collection efforts. Despite AgCountry's policy of putting delinquent loans in non-accrual status after 90 days, they failed to do so as of March 1, 2016, at which time Kent and Erica's loans were more than 90 days delinquent. Appendix 62-64.

[¶16] On March 10, 2016, Kent McDougall sent an email to AgCountry personnel, including Mr. Aanderud, in which he stated: "It does no good for me to refinance and pay down the operating debt if nothing will be readvanced." Appendix 69. On March 31, 2016, Kent and Erica McDougall met Mr. Aanderud at AgCountry's office to sign loan documents. This included modifications of the eight promissory notes/loan agreements to extend the maturity on each of these notes to June 1, 2016. As part of the extension, Kent and Erica McDougall also signed a mortgage for the "Home Quarter" securing those eight notes. Appendix 66-67. Kent and Erica McDougall's understanding of the agreement was that they were granting a mortgage in the "Home Quarter" to AgCountry and, in exchange, AgCountry was granting payment extensions on the notes and would agree to loan them additional operating money. Appendix 68.

[¶17] Relying on Kent and Erica McDougall's representations that AgCountry promised to provide operating loans as requested, Michael and Bonita McDougall transferred the deed to the "Home Quarter" to Kent and Erica McDougall on April 5, 2016. Michael McDougall testified that he transferred the "Home Quarter" to Kent and Erica solely to allow them to get the promised operating funding from AgCountry. Michael McDougall

did not meet with AgCountry personnel directly. All of the information he received was from Kent and Erica McDougall. Appendix 69.

[¶18] Michael and Bonita's deed transferring the "Home Quarter" to Kent and Erica was hand delivered to AgCountry on April 5, 2016. AgCountry immediately drove the deed and Kent and Erica's mortgage to Rolla, ND from Langdon, ND for recording. Appendix 70. On April 7, 2016, Kent and Erica McDougall met with AgCountry Vice President Stacey Sem. At that meeting, Mr. Sem informed Kent and Erica McDougall that they should have had a discussion about their financial situation a long time ago and that it was very clear they were not going to be getting any new money from AgCountry. They were also informed that their loan officer, Dean Aanderud, was no longer an AgCountry employee. Appendix 70. At that time, Kent and Erica realized that AgCountry would not be fulfilling their promises of additional financing. So, they immediately drafted a deed to transfer the "Home Quarter" back to Michael and Bonita McDougall and immediately recorded it. Appendix 70-71.

[¶19] Kent and Erica McDougall were transferred to AgCountry special credit department and met with that officer on April 8, 2016. Eric Schoenherr was the special credit loan officer assigned to Kent and Erica McDougall. He was responsible for gathering financial information from Kent and Erica McDougall and did so over the following months. Mr. Schoenherr testified that it appeared that Mr. Aanderud had not requested appropriate financial information from Kent and Erica McDougall, even though it would have been available to him 2-3 months before the mortgage was signed. Appendix 71-72. Mr. Schoenherr testified that had he had that information at the time, he likely would not

have recommended any further funds being advanced to Kent and Erica McDougall based on their financial circumstances of their cattle operation. Appendix 73.

[¶20] Ultimately, AgCountry decided not to advance any further funds to Kent and Erica McDougall. They refused to release the mortgage in the "Home Quarter", and Kent and Erica McDougall petitioned for bankruptcy relief under Chapter 12 of the Bankruptcy Code on October 19, 2016. Appendix 73-74.

[¶21] **ARGUMENT**

[¶22] This is an appeal of a judgment granted on an order for summary judgment. A judgment granted on summary judgment presents the appellate court a question of law, and the Supreme Court reviews that judgment under the de novo standard. Cuozzo v. State, 92019 ND 95, ¶ 7, 925 N.W.2d 752 citing Dahms v. Nodak Mut. Ins. Co., 2018 ND 263, ¶ 6, 920 N.W.2d 293.

[¶23] Michael and Bonita McDougall are appealing from the district court's order on summary judgment dismissing their claims of deceit and unjust enrichment. These are the issues raised in this appeal.

[¶24] **A. Deceit.**

[¶25] Under North Dakota law, deceit is:

> 1. The suggestion as a fact of that which is not true by one who does not believe it to be true;
> 2. The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;
> 3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or
> 4. A promise made without any intention of performing.

N.D.C.C. 9-10-02

[¶26] "A promise made without any intention of performing it, which does not meet the requirements of a contract between the parties, may nevertheless satisfy the requirements of deceit, and a victim of that deceit may recover for any damage suffered." Erickson v. Brown, 2008 ND 57, ¶ 25, 747 N.W.2d 34.

> Under Chapter 9-10, N.D.C.C., if there is no contract between the parties,'[o]ne who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers.' N.D.C.C. §§9-10-01, 9-10-02(4), and 9-10-03. Under those statutes, a promise made without any intention of performing it which does not meet the requirements of a contract between the parties may nevertheless satisfy the requirements of deceit, and the victim of that deceit may recover for any damage suffered

Delzer v. United Bank of Bismarck, 527 N.W.2d 650, 653 (N.D. 1995).

[¶27] "Persons who fraudulently misrepresent the truth can be held liable to third parties if they have a 'reason to expect' their misrepresentation will be communicated to third parties." Brown v. Louisiana-Pacific Corp., 820 F.3d 339 (8th Cir. 2016) citing Clark v. McDaniel, 546 N.W.2d 590, 593 (Iowa 1996). Brown states that the Iowa Supreme Court has expressly adopted § 533 of the Restatement (2nd) of Torts which states,

> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that it's terms will be repeated or its substance communicated to the other, in that it will influence his conduct in the transaction or type of transaction involved.

Clark, 546 N.W.2d at 593, citing Restatement (2nd) of Torts § 533 (1977).

[¶28] North Dakota courts have addressed this issue, including the Clark v. McDaniel analysis and the Restatement (2nd) of Torts § 533 analysis. While not expressly adopting Restatement § 533, this Court has held that a third party alleging fraud must show that they received misrepresentations or that misrepresentations were communicated to them, and

that the misrepresentations influenced their conduct. Thimjon Farms Partnership v. First International Bank and Trust, 2013 ND 160, 837 N.W. 2d 327. That has occurred in this case as AgCountry specifically targeted Michael and Bonita McDougall because they were the only people with real estate who could supplement Kent and Erica's collateral position with AgCountry. The misrepresentations made by AgCountry regarding new operating funds for Kent and Erica McDougall were intended to induce Michael and Bonita to transfer the "Home Quarter" to Kent and Erica, which then allowed AgCountry to receive a mortgage in that land.

[¶29] In its analysis of the McDougalls' deceit claim, the district court considered the issue of whether the statute of frauds applies to this claim. Under North Dakota law:

> "The following contracts are invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by the party's agent: [. . .]
>
> 4. An agreement or promise for the lending of money or the extension of credit in an aggregate amount of $25,000 or greater."

N.D.C.C. § 9-06-04.

[¶30] The district court spent considerable time discussing the case of Irish Oil and Gas, Inc. v. Reimer, 2011 ND 22, 794 N.W.2d 715, and concluded that case was dispositive in deciding McDougalls' deceit claim. The district court found that "use of a deceit claim to defeat the statute of frauds cannot stand." Appendix 51. The McDougalls contend that Justice Crothers's majority opinion correctly holds that the statute of frauds is inapplicable to deceit claims. In the alternative, the McDougalls argue that the facts of this case are distinguishable to those contained in Irish, and the district court erred in dismissing their deceit claim in summary judgment.

[¶31] **1. Justice Crothers's opinion in Irish is correct and the Court should follow his reasoning relating to the application of the statute of frauds to deceit claims.**

[¶32] The Irish case involved an oil and gas lease between Irish Oil & Gas, Inc. and three landowners. Irish entered into an oil and gas lease on the real estate owned jointly by three land owners in February of 2008. As part of the lease, Irish was to pay two bonus payments in the amount of $10,640 to each of the landowners. The payments were not made in a timely manner and one of the landowners called Irish to inquire as to the situation on March 24, 2008. Irish claims that the landowner made an oral agreement to grant an extension to June 15, 2008 for the payments to be made. The landowner then signed an oil and gas lease on April 30, 2008 with a different company for the same mineral interests that had been leased to Irish and returned Irish's late tendered payments. Irish sued the landowners for breach of the leases, and the landowners counterclaimed against Irish alleging breach of the leases. Irish later attempted to amend its complaint to allege deceit relating to the phone conversation where the alleged extension occurred. The lower court ruled that Irish would not be allowed to amend the complaint to allege a deceit claim reasoning that modifications to leases had to be in writing, and any evidence of oral modifications are without effect.

[¶33] Irish is a fractured decision involving concurring and dissenting opinions. Justice Crothers, the majority author, ruled that the statute of frauds does not prevent a party from bringing a deceit claim. He was joined in his opinion by Justice Maring. Their opinion in Irish analyzed numerous cases from a number of jurisdictions that have ruled for[3] and

[3] The statute of frauds bars deceit claims in the following jurisdictions: Classic Cheesecake Company, Inc. v. JPMorgan Chase Bank, N.A., 546 F.3d 839, 841 (7th Cir. 2008) (citing Indiana law, Ohio Valley Plastics, Inc. v. National City Bank, 687 N.E.2d 260, 263-67 (Ind. App. 1997)); Fericks v. Lucy Ann Soffe Trust, 100 P.3rd 1200, 1204-05 (Utah 2004); Mark Andrew of Palm Beaches, Ltd. v. GMAC Commercial Mortg. Corp., 265 F.Supp.2d 366, 382 (S.D.N.Y. 2003) (interpreting Florida law.); and Hurwitz v. Bocain, 670 N.E.2d 408, 412 (Mass. App. 1996). These jurisdictions utilize a strict application of the statute of frauds to prevent actions relating to oral contracts from being pursued as tort actions.

against[4] the conclusion that the statute of frauds can bar a deceit claim.[5] The majority opinion holds that the statute of frauds is a rule of evidence and not one of substantive law. Id. at ¶ 48. As such, it "merely renders incompetent oral proof of such promises[,]" covered by the statute of frauds. Id., citing Harriott v. Tronvold, 671 N.W.2d 417, 422 (Iowa 2003). The majority also refers to positions taken in the Restatements (Second) of Torts and Contracts.

> Since a promise necessarily carries with it the implied assertion of an intention to perform it follows that a promise made without such an intention is fraudulent and actionable in deceit…, this is true whether or not the promise is enforceable as a contract… If the agreement is not enforceable as a contract, as when it is without consideration, the recipient still has, as his only remedy, the action in deceit… The same is true when the agreement is oral and made unenforceable by the statute of frauds.

Id. at ¶ 50, citing Restatement (Second) of Torts § 530, cmt. (c) (1977). The Court goes further, stating that "[t]he Restatement Second of Contracts further supports the position that the statute of frauds does not prevent a plaintiff from pursuing a deceit claim based on an otherwise unenforceable oral agreement. Section 143 states that '[t]he Statute of Frauds does not make an unenforceable contract inadmissible in evidence for any purpose other

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[4] The statute of frauds does not bar deceit claims in the following jurisdictions: Burgdorfer v. Thielemann, 55 P.2d 1122 (Or. 1936); Munson v. Raudonis, 387 A.2d 1174, 1176 (N.H. 1978); Bourdon's, Inc. v. Ecin Industries, Inc., 704 A.2d 747, 749 (R.I. 1997); Restatement 2nd of Torts, Section 530 (1977); and Brown v. Founders Bank and Trust Co., 890 P.2d 855, 863 (Ok. 1994). The jurisdictions that do not apply the statute of frauds to deceit claims hold that the statute of frauds is a rule of evidence used as a defense to certain contract actions and should not be applied to instances where fraud is pled.

[5] Additional cases address this issue but were not included in the Court's opinion in Irish: Collins v. McCombs, 511 S.W.2d 745, 747-48 (Tex. Ct. App. 1974); Ostman v. Lawn, 305 So.2d 871, 872 (Fla. Ct. App. 1974); and Mildfelt v. Lair, 561 P.2d 805, 813 (Kans. 1977) prevent the consideration of deceit claims where the intention is to pursue a breach of contract claim covered by the statute of frauds through a tort claim of deceit. Dunn v. Womack, 383 S.W.3d 893 (Ark. Ct. App. 2011) supports the proposition that the statute of frauds does not curtail the availability to bring deceit claims based on oral representations.

than its enforcement in violation of the Statute.'" Id. citing Restatement (Second) of Contracts § 143 (1981). The majority opinion concludes that "because the statute of frauds is a rule of evidence giving rise to a defense in a contract action" and because the Irish case was not an action to enforce the contract, but to pursue a deceit claim, oral statements may be used to support a deceit claim. Id. at ¶ 51.

[¶34] However, in the two concurring and dissenting opinions (one by Chief Justice VandeWalle and joined by Justice Sandstrom; the other by Justice Kapsner) three justices opposed the availability of deceit claims in instances where the statute of frauds would bar the enforcement of an oral agreement.

[¶35] Chief Justice VandeWalle's opinion devotes one paragraph of three sentences to the issue of the statute of frauds acting as a bar to deceit claims. The entirety of his opinion on the topic is as follows:

> The majority opinion discusses the split in authority on the issue of whether the statute of frauds preventing a breach of contract claim also bars a deceit claim. While the majority opinion finds the most persuasive authority that which concludes the deceit claim is not barred by the statute of frauds, I am particularly concerned about the use of a deceit claim to defeat the statute of frauds with regard to written instruments involving the title to real property. I would not import that cause of action into our jurisprudence without further legislative consideration.

Irish, 2011 ND 22, ¶65, 794 N.W.2d 715.

[¶36] With all due respect, the Court is not importing a new cause of action but would be creating a bar not specifically stated in the statute. In this instance, McDougalls have a viable claim of deceit against AgCountry but, suddenly, it is barred because AgCountry's promise is unenforceable under the statute of frauds. AgCountry, as the perpetrator, is using the statute of frauds not to bar enforcement of the "promise of loan" (which it never intended to honor), but to bar a deceit claim by another (not a party to the contract) to

whom AgCountry represented its course of action, whether that course of action is specifically enforceable or not.

[¶37] The statute of frauds is a rule of evidence. Id, at ¶48. As a rule of evidence, it determines what evidence is sufficient to establish a particular claim. The statute of frauds acts as a bar to oral claims to real estate or entitlement to a "loan of $25,000 or more." N.D.C.C. § 9-06-04. The purported agreement is not void but voidable. The parties may perform the contract although not specifically enforceable at conception. Similarly, a contract missing material terms (an agreement to make an agreement) is similarly not void but may be unenforceable. The fact that a contract is unenforceable, whether due to the statute of frauds or merely a contract missing a material term, should not bar a claim of deceit arising from the promise of an agreement. Were this so, why is there a distinction between contracts unenforceable because not in writing and those in writing but unenforceable because not containing all material terms?[6] Deceit is not based upon a misrepresentation supported by a contract, and it cannot exist if there is a contract.[7]

[¶38] Deceit is not based on what is promised but on a false promise, intending to induce action and resulting in action by the promissee causing them harm. Whether AgCountry promised Michael and Bonita that it would loan Kent and Erica operating money (not

[6] "To be specifically enforceable, a contract " 'must be complete in itself ... at least with respect to its essential and material terms ... The court cannot supply an important omission or complete a defective contract for the purpose of specific performance.' "" Linderkamp v. Hoffman, 1997 ND 64, ¶ 5, 562 N.W.2d 734, citing Mandan-Bismarck Livestock Auction v. Kist, 84 N.W.2d 297, 302 (N.D. 1957) (quoting 81 C.J.S., *Specific Performance* § 35)."

[7] If the parties have a contract, the claim is for fraud. The remedy for fraud may be rescission of the contract or affirm the contract and obtain damages. Barker v. Ness, 1998 ND 223, ¶ 8, 587 N.W.2d 183.

intending to perform) or that it had already executed an agreement to make Kent and Erica an operating loan (not having done so) is irrelevant. Michael and Bonita have been deceived if they suffered harm. Is there a difference between a promise unenforceable because it falls within the statute of frauds and a promise that is unenforceable for other reasons? Intrinsically, deceit is not based upon the enforceability of a contract, and nowhere in our statutes is a deceit claim barred by the nature of the misrepresentation. Would the court have ruled differently in this case had AgCountry promised to make Kent and Erica a loan of $24,000?

[¶39] Justice Kapsner's dissent concludes that the oral statements are invalid to modify written contracts under N.D.C.C. §9-06-04 for lease of real property for a period longer than one year. Irish failed to get the alleged modification in writing and, therefore, Justice Kapsner held that their claim for deceit was barred.

[¶40] Justice Kapsner said:

> [¶ 72] This proposed action for deceit is an end-run around the statute of frauds.
> . . . .
> [¶ 75] Irish Oil is a sophisticated dealer in mineral leases. It is, or should be, fully aware of the constraints of the statute of frauds. It had the simple, expedient solution of getting a written modification of the leases signed by the parties to the leases. In the absence of any evidence of compliance with the statute of frauds, the trial court was correct that justice did not require amendment to the complaint for purposes of seeking such relief. I would affirm the trial court's denial of the motion to amend.

Irish Oil & Gas, Inc. v. Riemer, 2011 ND 22, ¶¶ 72, 75. This is not so much an interpretation of the interaction between deceit and the statute of frauds as it is a conclusion that a claimant may not use a claim of deceit to evade the known consequence of the statute of frauds – there can be no reliance. Irish may be making an end-run because it already had a contract with the purported promissor and knew how to modify its contract, but this holding

fails to explain why every deceit claim based upon a misrepresentation about a matter possibly subject to the statute of frauds is barred.[8]

[¶41] Justice Crothers's opinion is the most logical application of the statute of frauds to deceit claims. The statute of frauds does not absolutely bar a deceit action; it only prevents any attempt to enforce a contract covered by the statute of frauds. This is supported by ample additional North Dakota case law. "The statute of frauds is intended to prevent frauds and perjuries, and [. . .] courts ought not to allow the statute of frauds to be used as an instrument to accomplish fraud." Farmers Coop Ass'n of Churches Ferry v. Cole, 239 N.W.2d 808, 812 (N.D. 1976). "Where the promisor receives a direct personal benefit as a result of the promise, the promise is outside the statute of frauds." Nelson v. TMH, Inc., 292 N.W.2d 580, 585 (N.D. 1980). "The statute of frauds does not render an oral contract void, but merely makes the contract unenforceable against the promisor." Smestad v. Harris, 2011 ND 91, ¶ 11, 796 N.W.2d 662.

[¶42] The statute of frauds should not apply to this case as the McDougalls are not attempting to enforce the provisions of the contract (i.e. require AgCountry to loan additional operating funds to Kent and Erica McDougall). Michael and Bonita McDougall are requesting relief because they were fraudulently induced to transfer the "Home Quarter" to Kent and Erica McDougall (and mortgage to AgCountry). The transfer was made solely for the purpose of obtaining a new operating loan for Kent and Erica. Michael and Bonita never would have transferred the "Home Quarter" if the only benefit would be a two-month extension of the maturity dates of Kent and Erica's existing loans. AgCountry directly benefited from the transfer as it now has a mortgage in real estate it had no interest

[8] McDougalls' situation is also factually distinguishable (argued below).

or claim to before the transfer. Therefore, the statute of frauds in inapplicable to this situation and cannot be the basis of dismissing Michael and Bonita's deceit claim against AgCountry.

[¶43] This Court decided an analogous case addressing the parol evidence rule which lends additional credence to the contention that the statute of frauds does not act as a bar to deceit claims. In the case of Bearce v. Yellowstone Energy Development, 2019 ND 89, 924 N.W.2d 791, an energy company entered into a written option agreement with a landowner to purchase the land as a site for an ethanol plant in exchange for cash and shares of the company. Id. at ¶ 2. The company exercised its option and paid the agreed upon cash, but the parties disputed how much of the company's stock the landowner was to receive as the company had given a stock multiplier to its original investors (each original investor's stock was tripled). The landowner stated that the company represented that his stock would be treated the same as other original investors. The landowner was not given the stock multipliers. Id. at ¶¶ 3-8. The landowner argued that he was fraudulently induced into entering the option contract as the actual amount of stock he would be receiving was misrepresented. Id. at ¶ 10. As a written contract existed, the company argued that the parol evidence rule excluded any evidence of terms outside of the written contract. The court ruled that parol evidence may be used to show fraudulent inducement and to "challenge the validity of a contract and a corresponding request for the remedy of rescission." Id. at ¶ 12.

[¶44] Also, it is hard to distinguish the holding in Golden Eye Res., LLC v. Ganske, 2014 ND 179, 853 N.W.2d 544 from McDougall's claim. Golden Eye Res. analyzes the parol evidence rule which, in essential part, imposes the same result. The parol evidence

rule bars evidence intended to modify a written contract. The statute of frauds bars the creation of terms of a contract regarding certain subjects that are not in writing. In both, the essential terms of the "contract" must be in writing to be enforceable.

> [¶ 17] The parol evidence rule is a rule of substantive law, and parol evidence generally cannot be used to vary or contradict the terms of a complete, written contract adopted as a definite expression of the parties' agreement. [Citations omitted.] We have clarified, however, that parol evidence may be considered when the written agreement does not reflect the parties' intent because of fraud, mistake, or accident. *Finstad,* at ¶ 13; *Myaer,* at ¶ 20. This Court has explained the application of the parol evidence rule:
>
> > " ' " 'Where parties, *without any fraud or mistake,* have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement:' ... 'all preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract ... and "*unless fraud, accident, or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence.*" ' " ' "
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> > ....
>
> . . . .Accordingly, the parol evidence rule does not apply to the immediate parties to a contract where one of the parties alleges fraud as a defense to the validity of the contract, and parol evidence is admissible to show the inducement for entering the contract. [Citations omitted.]
>
> [¶ 18] This exception to the parole evidence rule applies even if the evidence contradicts or conflicts with the terms of the written agreement:
>
> > It is widely agreed that oral testimony is admissible to prove fraud or misrepresentation, mistake or illegality. This exception to the parol evidence rule applies even if the testimony contradicts the terms of a completely integrated writing.
>
> 6 Peter Linzer, *Corbin on Contracts* § 25.20[A], at 277–79 (2010) (footnotes omitted). The court in *Poeppel v. Lester,* 2013 S.D. 17, ¶ 22, 827 N.W.2d 580, recently noted that "[a] substantial majority of jurisdictions follow the traditional, majority view that the parol evidence rule is inapplicable in cases of fraudulent inducement." Thus, "parol or extrinsic evidence is admissible to prove fraud," and "[t]he parol evidence rule is simply not applicable *552 when fraud has been employed as enticement to enter a contract." *Poeppel,* at ¶ 20. In such cases, "[t]o bar extrinsic evidence would be to make the parol evidence rule a shield to protect misconduct." 6 Linzer, *supra,* § 25.20[A], at 280. Furthermore, this Court has expressly

> cautioned that the statute of frauds may not be employed to perpetrate a fraud or promote an injustice. [Citations omitted.]

Golden Eye Res., LLC v. Ganske, 2014 ND 179, ¶¶ 17-18, 853 N.W.2d 544. The analogy is Ganske is not barred by the parol evidence rule (intended to protect the sanctity of the written contract) from proving the promissor's misrepresentations inducing harmful actions, but McDougalls are barred by the statute of frauds (intended to protect the sanctity of certain contracts required to be in writing) from proving the promissor's misrepresentations inducing harmful actions.

[¶45] McDougalls were induced to act by false promise, which if it had been in the context of a contract directly with them, they could have rescinded or sought damages under the logic of Golden Eye Res.. But the application of Irish by the district court bars McDougalls from a remedy because the false promise was not in writing. There seems to be a distinction between fraud (misrepresentation in a contract setting) and deceit (misrepresentation when no contract exists) without a real difference.

[¶46] In the present case, Michael and Bonita allege that AgCountry deceived them into transferring the "Home Quarter", which they never would have done had they known AgCountry's actual intent was to not provide any more funding to Kent and Erica. While no written contract exists between Michael and Bonita and AgCountry (and, therefore, the parol evidence rule does not apply), the principle remains the same. Evidence of inducement through misrepresentations should be admissible to establish deceit.

[¶47] Using the statute of frauds to defeat Michael and Bonita's deceit claim is inappropriate and against public policy as it allows bad actors to be rewarded in situations where a party induces another to act in reliance on oral misrepresentations. A sophisticated deceiver would know that a misrepresentation of a contract barred by a statute of frauds is

safe. If the deceiver promises an interest in real estate, that promise is not only unenforceable but also cannot be a basis for a deceit claim (nor a fraud claim as there is no contract). The most effective deceit is only as much of a misrepresentation as necessary to induce the desired action by the promissee. The creation of a category of misrepresentations that cannot be the basis for a deceit claim does not exist in the Century Code and this Court should not imply such a category. The statute of frauds should not be allowed to be used as a shield to protect deceitful behavior. The district court's finding that the statute of frauds acts as a bar to Michael and Bonita's deceit claim should be reversed.

[¶48] **2. Irish is distinguishable from the facts of this case and inapplicable.**

[¶49] In the alternative, the facts of this case are distinguishable from those in Irish. As such, Irish is inapplicable and the statute of frauds should not prevent the McDougalls from pursuing a deceit claim against AgCountry.

[¶50] North Dakota courts have found that "restitution is an available remedy when a contract is void or unenforceable under the statue of frauds." Smestad, 2012 ND 166, ¶ 13, 820 N.W.2d 363.

> Whether an agreement within the Statute of Frauds is void or merely unenforceable, one who has partly performed the agreement and who is not in default in continuing performance should be compensated for any benefit that has been furnished the other party if the latter refuses to perform.
>
> The general rule is that a party who refuses to continue performing a contract that is unenforceable by reason of the Statute, after having derived a benefit from a part performance by the other party, must pay for or return what has been received from the other party under the contract. 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. To permit a party to an oral contract to accept the benefits of the contract and then invoke the Statute to avoid payment would be using the Statute to perpetrate a fraud. The rule is of general application except in certain cases principally involving actions for real estate brokers' commissions or under home improvement contractor statutes, in which the right to recovery would defeat or nullify the very purpose of the Statute.

Id. citing 10 Richard A. Lord, Williston on Contracts § 27:22 (4th ed.2011).

[¶51] The major distinguishing feature between the present case and Irish is that Michael and Bonita McDougall were not a party to a contract with the promissor. Michael and Bonita's claim is not to enforce the agreement between AgCountry and Kent and Erica McDougall to advance additional funds. Instead, Michael and Bonita's request is to have AgCountry return the "Home Quarter" to them as its transfer to Kent and Erica was caused by AgCountry's false promise. The sole reason Michael and Bonita transferred the "Home Quarter" was to secure further financing for Kent and Erica. Had AgCountry not hidden the fact that it had no intent to advance any more money to Kent and Erica, the "Home Quarter" would not have been transferred. The statute of frauds is not implicated. Michael and Bonita have no right to enforce the agreement to loan money, they merely relied upon AgCountry's representation that it would act as promised (presumably including putting that agreement in writing if necessary). This is a completely separate issue from the enforceability of an agreement between AgCountry and Kent and Erica.

[¶52] AgCountry's internal communications demonstrate its false promises; it had no intention/ability to loan new funds to Kent and Erica. AgCountry specifically targeted Michael and Bonita. AgCountry knew Kent and Erica had no other collateral to secure their debt. The only additional collateral available was the "Home Quarter." AgCountry's state of mind is also shown in the extreme measures it took to immediately record the deed and mortgage of the "Home Quarter." The same day it received the signed documents, it drove the documents over 60 miles from Langdon, ND to Rolla, ND to be recorded as soon as received. The next day, Sem (AgCountry) tells Kent and Erica there will be no new loan. Appendix 70.

[¶53] Another significant distinction between this case and Irish is whether the agreement between Kent and Erica and AgCountry is even covered by the statute of frauds. The statute of frauds states that any agreement to loan money in the amount of $25,000 or greater is invalid unless a writing exists memorializing the agreement, "subscribed by the party to be charged." N.D.C.C. § 9-06-04(4). The Repayment/Restructure Plan stated that "[e]fforts will be made to refinance all of this debt into an FLCA loan secured by all real estate owned. Appendix 50. While the "refinance" involved hundreds of thousands of dollars, the inducement was the advance of new funds (Kent: "it does no good . . . if nothing will be readvanced." Appendix 69.).

> [¶54] Generally, an "agreement to agree" is unenforceable because its terms are so indefinite it fails to show a mutual intent to create an enforceable obligation. Clooten v. Clooten, 520 N.W.2d 843, 848-49 (N.D.1994) (promise to negotiate in the future and "work something out" is an agreement to agree in the future which lacks essential terms and is insufficient to support an enforceable contract); Bergquist-Walker Real Estate, Inc. v. William Clairmont, Inc., 353 N.W.2d 766, 772 (N.D.1984) (agreement to agree in the future which is not sufficiently definite to enable a court to give it an exact meaning is not an enforceable obligation); Super Hooper, Inc. v. Dietrich & Sons, Inc., 347 N.W.2d 152, 155 (N.D.1984) (agreement to agree is rarely enforceable). See generally 1 Williston on Contracts, § 3.5 (4th ed. 1990); 1 Corbin on Contracts § 4.1 (Rev. ed. 1993); 17A Am.Jur.2d, *Contracts* § 35 (1991).

Lire v. Bob's Pizza Inn Restaurants, Inc., 541 N.W.2d 432, 434 (N.D. 1995).

[¶55] Here, there was no statement as to the dollar amount to be advanced by AgCountry to Kent and Erica. It was nothing more than an "agreement to agree." As such, it is unenforceable and lacking material terms. The statute of frauds cannot be said to apply as there is no specific allegation of an agreement to loan funds in excess of $25,000. If the statute of frauds is not applicable to the facts of this case, Irish has no application and evidence relating to Michael and Bonita's deceit claim should be considered by the district court. That is part of the irony of application of Irish to this case. If Kent and Erica had

asserted an agreement to loan $24,000, a deceit claim would not be barred but if they asserted an agreement to loan $25,000, a deceit claim is barred. AgCountry's deceit was the misrepresentation that it would help Kent and Erica, when it really had no intention to do so. Michael and Bonita were not a party to a contract and were not concerned about the amount of assistance Kent and Erica would receive. They were deceived by AgCountry's promise that Kent and Erica would get what they needed.

[¶56] AgCountry practiced only as much deceit as necessary to hit its target. Kent McDougall informed AgCountry, in no uncertain terms, that: "[i]t does no good for me to refinance and pay down the operating debt if nothing will be readvanced." Appendix 69. Despite this declaration, AgCountry continued telling Kent and Erica that new funds "were coming" but AgCountry needs "additional collateral" (the only additional collateral could be the "Home Quarter"). Appendix 59-60. Michael and Bonita were deceived into transferring their interest in the "Home Quarter" to Kent and Erica based on the promises from AgCountry that further funds would be extended to Kent and Erica. Michael and Bonita would not have deeded the "Home Quarter" to Kent and Erica had they been informed what AgCountry knew or should have known: Kent and Erica would not get new funds.

[¶57] **B. Unjust Enrichment.**

[¶58] "Unjust enrichment is an equitable doctrine applied in the absence of an express or implied contract, to prevent one person from being unjustly enriched at the expense of another." Apache Corp. v. MDU Resources Group, Inc., 1999 ND 247, ¶ 13, 603 N.W.2d 891, citing Zuger v. North Dakota Ins. Guar. Ass'n, 494 N.W.2d 135, 138 (N.D. 1992). Five elements are required to find unjust enrichment: (1) an enrichment; (2) an

impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of a justification for the enrichment and impoverishments; and (5) an absence of a remedy provided by law. Id., citing Albrecht v. Walter, 1997 ND 238, ¶ 23, 572 N.W.2d 809.

[¶59] The court, in its Memoranda and Order Granting Summary Judgment, found that of the five elements of unjust enrichment, the McDougalls met the first three, but the court found that the fourth element (absence of justification for the enrichment and impoverishment) and the fifth element (an absence of the remedy provided by law) were not met and, therefore, dismissed the claim for relief. Appendix 49-50. The court found that the language in the restructure plan promising that efforts will be made to issue a new loan, as well as securing the existing loan and the extension of the due dates, is sufficient justification for the enrichment and, as such, the burden is not met. Appendix 50. In regards to the fifth prong of the unjust enrichment test (the absence of a remedy provided by law), the district court found that the McDougalls could have filed a proof of claim in Kent and Erica's bankruptcy case. Alternatively, they could have brought suit against Kent and Erica McDougall for breach of warranties relating to the warranty deed attempting to transfer the "Home Quarter" back to them after they learned that AgCountry would not loan them any more funds. Appendix 50. The district court erred in finding that the fourth and fifth prongs of Michael and Bonita's unjust enrichment claim were not met.

[¶60] **1. No justification exists between the enrichment and the impoverishment.**

[¶61] The district court's order provided no legal rationale with which to make a determination of whether justification existed. The Memoranda Decision states that Kent and Erica's "Repayment/Restructure Plan […] provides justification for the enrichment[,]"

as it gave Kent and Erica a two-month extension on their loan due dates in exchange for a mortgage in all their "real estate to secure all existing and **possible** future PCA debt with AgCountry." Appendix 50. AgCountry's Repayment/Restructure Plan also promised that "[e]fforts will be made to refinance all of this debt into a FLCA loan secured by all real estate owned." Appendix 50.

[¶62] North Dakota caselaw addressing the issue of the justification prong, even tangentially, states that "[t]he doctrine of unjust enrichment serves as a basis for requiring restitution of benefits conferred in the absence of an express or implied in fact contract." Midland Diesel Service & Engine Co. v. Sivertson, 307 N.W.2d 555, 557 (N.D. 1981) citing Beck v. Lind, 235 N.W.2d 239, 250 (N.D. 1975). "The doctrine is invoked 'when a person has and retains money or benefits which in justice and equity belong to another.'" Id. citing Schlichenmayer v. Luithle, 221 N.W.2d 77, 83 (N.D. 1974). The complainant need only show that the recipient of the benefit "has, without justification, obtained a benefit at the direct expense of the former, who then has no legal means of retrieving it." Id. "The essential element in recovering under the theory is the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value. Id. citing Hayden v. Medcenter One, Inc., 2013 N.D. 46, ¶ 14, 828 N.W.2d 775. Determination of the existence of justification appears to be largely based on the facts of the specific case, but little guidance exists as to the appropriate standard and weight to give to the evidence. See Schroeder v. Buchholz, 2001 N.D. 36, ¶ 17, 622 N.W.2d 202.

[¶63] The case of Midland Diesel Service & Engine Co. v. Sivertson, 307 N.W.2d 555, 557 (N.D. 1981) is illustrative of this issue. In that case, a man purchased a diesel engine from a merchant on credit to install in a truck titled in his father's name. The truck was

used for a trucking business operated by the purchaser as a partnership with his father. No payments were ever made for the diesel engine. The trucking business went into bankruptcy and the father took possession of the truck. The merchant sued the father for unjust enrichment. The court ruled that the father was unjustly enriched by retaining possession of the engine without payment. The court stated that while "a third party who derives gain from an agreement between others has not necessarily been unjustly enriched […] [i]f, however, the third party has participated somehow in the transaction through which the benefit is obtained, that fact must be considered by the court." Id. at 558.

[¶64] Here, AgCountry was enriched at Michael and Bonita's expense and no justification exists for that enrichment. Michael and Bonita agreed to transfer the "Home Quarter" to Kent and Erica for the sole purpose of allowing AgCountry to advance them additional funds. AgCountry had no intention/ability of advancing additional funds. AgCountry received a valuable piece of real estate in exchange for a brief extension of Kent and Erica's loan maturity dates, which was of no value to Michael and Bonita. Kent McDougall informed AgCountry in his e-mail that an extension of his loans had no value to him either, absent an extension of more funding. Had Michael and Bonita known that the value they wanted would not be provided, they would not have transferred the "Home Quarter." AgCountry's promise that "[e]fforts will be made to refinance all of this debt into a FLCA loan secured by all real estate owned" was nothing more than an "agreement to agree" and is generally unenforceable. See Bob's Pizza, 541 N.W.2d at 434. But, the justification for the enrichment and impoverishment is measured as between AgCountry and Michael and Bonita (promissor and promissee). AgCountry was enriched; Michael and Bonita were impoverished. What did Michael and Bonita receive that justified their

impoverishment? Michael and Bonita acted upon a promise of a new operating loan that was not delivered. There is no justification for their impoverishment.

[¶65] It is unjust for AgCountry, as to Michael and Bonita, to retain the benefit of that transaction without the anticipated benefit to Michael and Bonita, particularly given the change of positions is the result of AgCountry's misrepresentations. The transaction between Kent and Erica and AgCountry of a mortgage in the "Home Quarter" for an extension on their loan due dates may be legal consideration as between them, but it is not justification for the lack of benefit represented to Michael and Bonita. They were not a party to the contract, and their only reason to be involved was to help Kent and Erica secure the promised additional funds from AgCountry.

[¶66] The court made this determination on summary judgment. This Court reviews that decision de novo; it is not obligated to give any weight to the trial court's conclusion. This Court should conclude, as a matter of law, that there is no justification for the enrichment and impoverishment.

[¶67] **2. The McDougalls do not have an adequate remedy provided by law.**

[¶68] The court found that Michael and Bonita did not meet the burden of that element as they had the ability to file a proof of claim in the bankruptcy, and that they could sue Kent and Erica for breach of warranties when they attempted to convey the "Home Quarter" back to Michael and Bonita. Appendix 50.

[¶69] Unjust enrichment claims are generally not available where a claimant has a remedy at law. McColl Farms, LLC v. Pflaum, 2013 N.D. 169, ¶ 19-20, 837 N.W.2d 359. But North Dakota courts have also found that in cases where a legal remedy exists, if an

equitable remedy may be more appropriate and is better for rendering complete justice, an unjust enrichment claim may stand.

> There is authority from other jurisdictions and some North Dakota case law that for a party to be entitled to equitable relief, that relief must be *better* adjusted to rendering complete justice than a legal remedy. A & A Metal Bldgs. v. I–S, Inc., 274 N.W.2d 183 (N.D.1978); Graven v. Backus, 163 N.W.2d 320, 327 (N.D.1968) ["... that the plaintiff may have a remedy at law by an action for damages does not prohibit an equity court from assuming jurisdiction if the equitable remedy is *better* adapted to render a more perfect and complete justice than the remedy at law."] [emphasis added]; Warren Tool Co. v. Stephenson, 11 Mich.App. 274, 161 N.W.2d 133, 147 (1968) ["... the existence of a legal remedy does not prevent equity from decreeing a *more complete* remedy."] [emphasis added]. The modern phraseology trend in North Dakota cases and among scholars is that if there is a legal remedy *equally* adjusted to rendering complete justice, the court will not generally apply equitable relief. Omlid v. Sweeney, 484 N.W.2d 486, 490 (N.D.1992) ["A fundamental principle of equity is that a 'party is not entitled to equitable relief if there is a remedy provided by law which is *equally* adjusted to rendering complete justice.' "] [emphasis added]; D.C. Trautman Co. v. Fargo Excavating Co., 380 N.W.2d 644 (N.D.1986); State v. Hooker, 87 N.W.2d 337 (N.D.1957); McGurren v. City of Fargo, 66 N.W.2d 207 (N.D.1954) ["But a legal remedy in order to be adequate in the sense involved in determining the jurisdiction of equity must be as practical and *as efficient* to the ends of justice and its prompt administration as the remedy in equity."] [emphasis added]; Dobbs, Handbook on the Law of Remedies § 2.5, p. 57 (1973). No matter how one chooses to phrase it ["better" or "equal"], the result is the same.

In Re Estate of Hill, 492 N.W.2d 288, n.3 (N.D. 1992). See also Raarum Estates v. Murex Petroleum Corp., 2015 W.L. 5692151 (D.N.D.).

[¶70] The other legal remedies available to Michael and Bonita are insufficient and inadequate. Michael and Bonita would have possessed an unsecured claim in Kent and Erica's Chapter 7 bankruptcy case that essentially replaced AgCountry's unsecured claim in that case. AgCountry, due to their fraudulent inducement causing the transfer of the "Home Quarter", became a secured creditor at Michael and Bonita's expense. There is no remedy available in bankruptcy court that will make up for Michael and Bonita's changed

position from owning the "Home Quarter" to an unsecured creditor. Further, any claim for unsecured debt they could file in Kent and Erica's bankruptcy would likely be discharged, just as AgCountry's would have been had it not surreptitiously taken the "Home Quarter." It is particularly ironic that AgCountry argues that Michael and Bonita could have attempted to have Kent and Erica's debt declared to be non-dischargeable as the entire sequence of events arises from AgCountry's misrepresentations.

[¶71] Michael and Bonita's only remedy would be to pursue an insolvent debtor. This is the same position as the appellant in the Midland Diesel case discussed above. The court in that case determined that even in cases of alternative remedies or the option to pursue an insolvent debtor, the remedies may not be adequate and an unjust enrichment claim may still be pursued. Midland Diesel, 307 N.W.2d at 558. This Court has held that courts err when they dismiss an "unjust enrichment claim solely based on [the] determination that a remedy at law was available. [underlining added]" McColl Farms, 2013 ND 169, ¶20, 837 N.W.2d 359. The remedy must be adequate. That is particularly poignant in this case. Michael and Bonita transferred land (for sake argument valued at $150,000) to allow AgCountry to have additional security ($150,000). As a result, AgCountry's unsecured claim in Kent and Erica's bankruptcy case was reduced by $150,000 and Michael and Bonita now had a $150,000 unsecured claim in the bankruptcy case. Is the allowance of an unsecured claim in a bankruptcy case of $150,000 an adequate remedy for loss of $150,000 in equity in real estate? It depends on whether unsecured claims will be paid 100%. Instinctively, it is not an adequate remedy unless unsecured creditors are paid 100% of their claims. If Michael and Bonita were to be paid 100% of their claim in bankruptcy, they would not be pursuing that same $150,000 from AgCountry and, logically, AgCountry

would not be fighting so hard to keep the collateral if it could get paid the same amount for that claim in the bankruptcy. Michael and Bonita do not have an adequate remedy.

[¶72] Again, the district court made this conclusion on summary judgment. This Court reviews that conclusion de novo and can make its own conclusion that Michael and Bonita had no adequate remedy at law. The fifth prong of unjust enrichment exists.

[¶73] Inasmuch as all of the elements of unjust enrichment exist, unjust enrichment is a remedy that should have been granted to Michael and Bonita. Therefore, the district court erred in dismissing their claim for unjust enrichment.

[¶74] **CONCLUSION**

[¶75] Michael and Bonita McDougall respectfully request that the Court reverse the judgment of the district court and conclude that Michael and Bonita are entitled to relief on their deceit and unjust enrichment claims. The district court found all of the elements necessary to grant Michael and Bonita summary judgment on both of these claims, except for the elements this Court should now conclude also exist. It is appropriate that this Court enter judgment on Michael and Bonita McDougall's claims as a matter of law. Remand is necessary only to determine the relief to be granted.

Dated this 21st day of June, 2019.

/s/ Patrick J. Sinner

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REQUEST FOR ORAL ARGUMENT

The Appellants hereby request oral argument pursuant to N.D.R.App. 28(h).

Oral argument will be helpful to the Court in this case as the Appellant is requesting the Court to overturn precedent in North Dakota law related to deceit claims and the application of the Statute of Frauds pursuant to this Court's decision in the case of Irish Oil and Gas, Inc. v. Reimer, 2011 ND 22, 794 N.W.2d 715. The unclear interpretation of the Irish case will require additional input from counsel at oral argument to define the issues confronting the Court on appeal and to detail the proper application of the Irish decision.

Additionally, due to the fact-intensive nature of this appeal, it will be helpful for the Court to have attorneys present at oral argument who can clarify any parts of the record that may be unclear.

Dated this 25th day of June, 2019.

/s/ Patrick J. Sinner

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the applicable page limitations contained in N.D.R.App.P. 32(a)(8)(A). This document contains 37 pages.

Dated this 25th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2019, the following document:

Appellant's Brief

was filed electronically with the Clerk of Court through North Dakota Supreme Court E-Filing Portal and a copy of the above listed document was sent electronically to the following:

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2019, the following document:

Appellant's Brief

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