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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20200282

Michael McDougall and Bonita McDougall, Plaintiffs and Appellees,

v.

AgCountry Farm Credit Services, PCA, Defendant, Third-Party Plaintiff and Appellant,

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, Third-Party Defendants.

APPELLANT AGCOUNTRY FARM CREDIT SERVICES, PCA'S BRIEF

APPEAL FROM JUDGMENT, DATED OCTOBER 23, 2020, OF THE DISTRICT COURT OF TOWNER COUNTY, NORTH DAKOTA, NORTHEAST JUDICIAL DISTRICT, THE HONORABLE DONOVAN FOUGHTY PRESIDING

ORAL ARGUMENT REQUESTED

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[¶9] **STATEMENT OF THE CASE**

Bankruptcy Proceedings

[¶10] On October 19, 2016, Kent and Erica McDougall petitioned for relief under the United States Bankruptcy Code, with the Bankruptcy Court of the District of North Dakota (the "Bankruptcy Court"), Case Number 16-30542 (the "Bankruptcy Proceeding"). (Appellant's Appendix ["App."] 61, 81.) Within the Bankruptcy Proceeding, Kent and Erica McDougall instituted an adversary action (the "Adversary Action") against AgCountry Farm Credit Services, PCA ("AgCountry") and Michael and Bonita McDougall ("McDougalls"). (App. 61-62.) The amended complaint in the Adversary Action included three counts, one for avoidance of a transfer under 11 U.S.C. § 548, one for avoidance of a mortgage on the basis

of fraud, and the third for the determination that the transfer of property by Kent and Erica McDougall back to the McDougalls was appropriate and nonavoidable. (App. 61-62.)

[¶11] On May 22 and 23, 2017, the Bankruptcy Court held a trial in the Adversary Action. (App. 62.) On July 10, 2017, the Bankruptcy Court issued its Memorandum Decision and Order and entered Judgment in favor of AgCountry, denying any relief to Kent and Erica McDougall or the McDougalls. (App. 61-88.)

[¶12] On July 20, 2017, Kent and Erica McDougall and McDougalls filed a motion to amend or alter the judgment entered in the Adversary Action, through the same attorney that represented Kent and Erica McDougall at the trial of the Adversary Action. (Doc. # 45.) On October 5, 2017, the Bankruptcy Court entered an order denying the motion to alter or amend the judgment. (Doc. # 46.)

[¶13] On October 17, 2017, Kent and Erica McDougall and McDougalls filed an appeal of the judgment entered in the Adversary Action, appealing to the Bankruptcy Appellate Panel for the Eighth Circuit Court of Appeals (the "B.A.P."). (Doc. # 47.) On December 21, 2017, the B.A.P. dismissed Kent and Erica McDougall from the appeal because they were no longer the debtor in possession, having converted their Bankruptcy Proceeding from being under Chapter 12 to one under Chapter 7. (Doc. # 47.) On July 23, 2018, the B.A.P. dismissed the appeal as to the McDougalls, finding that the Bankruptcy Court lacked jurisdiction over any claim between the McDougalls and AgCountry in the Adversary Action because this did not affect the bankruptcy estate. (Doc. # 48.) On July 24, 2018, on remand the Bankruptcy Court entered an order and judgment in the Adversary Action that provided McDougalls' claim regarding the validity of AgCountry's mortgage lien was dismissed because the Bankruptcy Court lacked subject matter jurisdiction of that claim. (Doc. # 49.)

State Court Proceedings

[¶14] This case was initiated by McDougalls through the service of the Summons and Complaint upon AgCountry on or about September 7, 2018 and filed with the Towner County District Court on August 30, 2018 (Case Number 48-2018-CV-00045). (App. 12-31). AgCountry filed an Answer, Counterclaim, and Third Party Complaint on September 28, 2018. (App. 32-47.) McDougalls filed a Reply to Counterclaim on October 11, 2018. (App. 48-50.) 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).

[¶15] 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. (App. 102-109.) The Memorandum Decision 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" 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. The district court subsequently 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. (App. 111-114.)

[¶16] Notice of Appeal was filed by McDougalls with this Court on May 2, 2019. (Doc. # 130.) The McDougalls did not appeal the judgment granting relief to AgCountry on

AgCountry's counterclaims and third-party complaint, but only appealed the dismissal of McDougalls' claims in McDougalls' Complaint. (Doc. # 130.) This Court heard the appeal and issued its opinion on January 23, 2020. McDougall v. AgCountry Farm Credit Services, PCA, 2020 ND 6, 937 N.W.2d 546 (herein "McDougall I"). This court affirmed the district court's April 17, 2019 judgment in part, reversed the judgment only as to the McDougalls' claims of deceit and unjust enrichment, and remanded the proceeding to the district court. This court entered judgment on January 3, 2020, awarding neither party costs on the appeal in McDougall I. (Doc. # 153.)

[¶17] On remand, the district court held a trial with a jury over July 7-10, 2020 on the remanded issues of McDougalls' claims in their Complaint of deceit and unjust enrichment. (App. 165.) The McDougalls were allowed to file an Amended Complaint seeking exemplary damages prior to trial. (App. 115.) On July 10, 2020, the issue of deceit was submitted to the jury and the jury returned a verdict finding that AgCountry had not committed deceit. (App. 162-164.) Following the trial, the parties submitted a stipulation of facts related to Kent and Erica McDougalls' bankruptcy proceedings and each submitted post-trial briefing on the issue of unjust enrichment. (Doc. ## 270-276.) The district court issued its Findings of Fact, Conclusions of Law, and Order for Judgment on August 18, 2020. (App. 165-173.) On August 21, 2020, McDougalls filed their statement of costs and disbursements. (App. 174-175.) AgCountry filed an objection to the claimed costs and disbursements on August 31, 2020. (Doc. ## 283-286.) McDougalls filed their reply to the objection on September 3, 2020. (Doc. ## 287-289.) On October 8, 2020, the district court entered an order denying AgCountry's objection to the claimed costs and

disbursements and ordered the taxation of the same. (App. 176-177.) Judgment was entered on October 23, 2020. (App. 178.)

[¶18] On October 28, 2020, AgCountry filed its notice of appeal. (App. 180-184.) On December 14, 2020, AgCountry filed an amended notice of appeal. (App. 185-189.)

[¶19] **STATEMENT OF FACTS**

[¶20] This proceeding relates to a certain mortgage that AgCountry was granted on real estate situated in the County of Towner and State of North Dakota, consisting of 140 acres in section 25, Township 162 North, Range 67 West ("the Premises" or "the Home Quarter"). The Premises are agricultural land. (App. 52.) The mortgage also encumbers a significant amount of land that is not the Premises and was not owned by McDougalls. (Transcript of Hearing dated July 7-10, 2020 (hereinafter "Trial Tr.") 216:5-25; App. 146.)

[¶21] The McDougalls are married to each other and were the record titleholders of the Premises by the records in the office of the County Recorder in and for Towner County, North Dakota, having taken title by virtue of a warranty deed executed in their favor by Kent M. McDougall and Erica M. McDougall on the 7th day of April 2016, and recorded with the Towner County Recorder on April 7, 2016 as Document No. 154692 (hereinafter the "April 7 Deed"). (App. 149-150.) The McDougalls are the parents of Kent M. McDougall and former parents in law of Erica M. McDougall (hereinafter "Kent and Erica McDougall"). (Trial Tr. 52:8-11; 124:9-19.)

[¶22] Kent and Erica McDougall were farmers and ranchers, operating a cattle production farm and growing small grains. (Trial Tr. 55:13-23.) Over the course of 2014 and 2015 AgCountry had extended several loans to Kent and Erica McDougall that Kent and Erica McDougall had requested for purchasing items or operating their farming operations. (Trial

Tr. 160:20 to 164:25.) Over the course of 2014 and 2015 Kent and Erica McDougall had conversations with AgCountry Loan Officer Dean Aanderud regarding a possible refinancing of their loans with AgCountry. (Trial Tr. 65:15 to 67:9.) Kent and Erica McDougall also had debts owed to Turtle Mountain State Bank (hereinafter "TMSB"), and part of any request made by Kent and Erica McDougall for credit accommodations from AgCountry would entail necessary accommodations from TMSB. (Trial Tr. 135:7-22; 180:3-21; 200-12-25 260:18 to 261:8; 265:8-21.)

[¶23] Due to the past due status of the loans owed to AgCountry and the need for additional time to review up to date financial information, on March 31, 2016, AgCountry and Kent and Erica McDougall entered into the promissory note extensions and a mortgage was granted on the Premises. (Trial Tr. 266:8 to 268:3; 270:21 to 271:17; App. 140-146; Doc. ## 220-227.) Kent and Erica McDougalls' loans were not put into a non-accrual status, did not have late charges assessed, did not have their interest rates increased due to the loan extensions, and were given time to finalize their restricting plans between AgCountry and TMSB. (Trial Tr. 200: 12-25; 265:22 to 266:7; 273:11 to 274:3; 388:13-22.) Additional lands are described in the mortgage and have been sold as part of Kent and Erica McDougall's Bankruptcy Proceeding. (App. 52.) Mr. Aanderud testified at trial that he provided a complete copy of the loan documents to Kent and Erica McDougall on March 31, 2016, and that Kent and Erica McDougall had the opportunity to review the documents prior to signing them. (Trial Tr. 266:8 to 268:3.) Mr. Aanderud also testified that Kent and Erica McDougall signed a document entitled "Repayment/Restructure Plan" on March 31, 2016, and that Mr. Aanderud did not communicate anything to Kent and Erica McDougall that was inconsistent with that document. (Trial Tr. 266:8 to 268:3; App. 140.)

[¶24] Kent and Erica McDougall both testified at trial that they signed the Repayment/Restructure Plan. (Trial Tr. 91:20-24; 512:8-18.) In the Repayment/Restructure Plan, Kent and Erica McDougall unambiguously agreed that they were signing a mortgage against all their owned real estate for the extension of the promissory notes to June 1, 2016 and acknowledged that only "efforts will be made to refinance all of this debt into a FLCA loan secured by all real estate owned". (App. 140.)

[¶25] Erica McDougall testified she did not know she was signing a mortgage on March 31, 2016, despite having signed the Repayment/Restructure Plan on the same date and having signed in two places on the mortgage. (Trial Tr. 94:14-22; App. 145.) Kent McDougall testified he believed he was executing a mortgage on March 31, 2016. (Trial Tr. 513:9-11.) Kent McDougall also testified in a deposition in 2017 that his understanding of the entire transaction was correctly recorded on the Repayment/Restructure Plan document. (Trial Tr. 514:17 to 515:21.) Dean Aanderud testified that he presented all of the loan documents being signed on March 31, 2016, to Kent and Erica McDougall prior to their having signed them. (Trial Tr. 266:8 to 268:3.) Dean Aanderud testified Kent and Erica McDougall had the full opportunity to read the loan documents on March 31, 2016, and that they are consistent with what he communicated to them at the closing. (Trial Tr. 266:8 to 268:3.)

[¶26] Kent McDougall asked the McDougalls to deed the Premises to them, which the McDougalls did on April 5, 2016. (Trial Tr. 539:11-21.) The McDougalls executed a warranty deed to Kent and Erica McDougall on April 5, 2016 (hereinafter the "April 5 Deed"). (App. 147-148.) Neither of the McDougalls ever communicated with AgCountry regarding Kent and Erica McDougalls' loans or financial condition prior to executing the

April 5 Deed. (Trial Tr. 537:22 to 538:3; 589:19 to 590:6.) There was no restriction on the April 5 Deed from the McDougalls to Kent and Erica McDougall that restricted the rights being granted or any statement in the deed that the land was only intended for a particular purpose. (App. 147-148.) Michael McDougall testified that the April 5 Deed was executed without any set promises from Kent McDougall to repay his parents and was rather something that they would work out later. (Trial Tr. 542:11-13.)

[¶27] While AgCountry discussed with Kent and Erica McDougall possible terms for restructuring their debts with AgCountry, no specific terms were ever agreed upon to do so. (Trial Tr. 520:14 to 521:21.) Kent McDougall could not testify to any agreed upon amount, repayment terms, or interest rate that he claims to have been promised by Mr. Aanderud. (Trial Tr. 520:14 to 521:21.) At trial, Kent McDougall testified that he was expecting to sign additional documentation after March 31, 2016, to close a refinance transaction but also admitted in a prior deposition he had testified that he was not expecting to sign additional documents to close a refinance transaction after March 31, 2016. (Trial Tr. 520:14 to 521:21.) He also testified he believed he would immediately be getting an advance of money. (Trial Tr. 519:1 to 520:21.) Mr. Aanderud testified that there was no decision made regarding future credit actions on March 31, 2016 and that no one else at AgCountry had made any such decisions. (Trial Tr. 270:21 to 271:17.) Kent McDougall testified that he also understood that any approvals for credit action would include a decision by someone other than just Mr. Aanderud at AgCountry. (Trial Tr. 519:1 to 520:21; Doc. # 254.) Most tellingly, on cross examination, Erica McDougall testified that Dean Aanderud never communicated approval of any long-term refinance. (Trial Tr. 134:10-13.) Additionally, on direct examination, Kent McDougall testified he was only

told by Dean Aanderud that a restructure would "probably" happen, not that it would happen or was approved. (Trial Tr. 526:19-21; 519:1-6.)

[¶28] The McDougalls also did not fully understand the extent of Kent and Erica McDougall's financial troubles. Bonita McDougall testified she did not discuss financials at all with Kent or Erica McDougall, leaving those discussions between Kent McDougall and Michael McDougall. (Trial Tr. 589:19 to 590:6.) Neither did Erica McDougall discuss the matters with either of the McDougalls. (Trial Tr. 144:1 to 145:6.) The discussion regarding the status of Kent and Erica McDougall's financials only occurred between Kent McDougall and Michael McDougall. (Trial Tr. 144:1 to 145:6.) At trial, we learned that Kent McDougall did not tell his father that Kent and Erica McDougall had paid a retainer to an met with a bankruptcy lawyer. (Trial Tr. 548:7-20.) We also learned that Kent McDougall did not tell his father he had signed loan extension documents just days before the April 5 Deed was signed. (Trial Tr. 548:21 to 549:17.) Kent McDougall also did not tell his father Kent and Erica McDougall had met with a bankruptcy attorney and paid that bankruptcy attorney a retainer. (Trial Tr. 548:7-20.) Finally, we learned that Michael and Bonita McDougall made no efforts to independently verify with AgCountry the status of Kent and Erica McDougall's loans or any alleged future financing. (Trial Tr. 548:21 to 549:17.) The evidence indicated that Kent McDougall believed he was already going to be obtaining an additional advance of money whereas the written loan instruments did not indicate that at all and he did not clearly communicate the status of his dealings with AgCountry to his father.

[¶29] **STANDARD OF REVIEW**

[¶30] The standard of review varies with the different issues presented. As to a claim of collateral estoppel, collateral estoppel "is a question of law, fully reviewable on appeal." Ungar v. N. Dakota State Univ., 2006 ND 185, ¶ 10, 721 N.W.2d 16. Similarly, this Court has held that "[a] determination of unjust enrichment is a conclusion of law and is fully reviewable by this Court." Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc., 2004 ND 117, ¶ 26, 680 N.W.2d 634. The awarding of costs and disbursements is subject to review under the abuse of discretion standard. Specialized Contracting, Inc. v. St. Paul Fire & Marine Ins. Co., 2012 ND 259, ¶ 30, 825 N.W.2d 872. A district court abuses its discretion if it misinterprets or misapplies the law. Wheeler v. Southport Seven Planned Unit Dev., 2012 ND 201, ¶ 30, 821 N.W.2d 746.

[¶31] **ARGUMENT**

[¶32] I. The District Court erred in failing to hold the Plaintiffs' claims were barred by collateral estoppel.

[¶33] AgCountry presented the argument to the District Court that the McDougalls' claims in this action are barred by collateral estoppel because AgCountry obtained a successful judgment in the Adversary Action where the Bankruptcy Court found AgCountry had not committed fraud against Kent and Erica McDougall. The District Court ruled that the claims asserted by the McDougalls were not barred by collateral estoppel. (App. 104-105; 171.) The District Court first made this ruling in its order dated February 2018, and then again in its Findings of Fact, Conclusions of Law, and Order for Judgment dated August 18, 2020. (App. 104-105; 171.)

[¶34] This Court has recently summarized the law of res judicata as follows:

> [¶11] Although collateral estoppel is a branch of the broader law of res judicata, the doctrines are not the same. 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 their parties and their privies in all other actions. Res judicata applies even if subsequent claims are based upon a different legal theory. Collateral estoppel, or issue preclusion, forecloses relitigation of issues of either fact or law in a second action based on a different claim, which were necessarily litigated, or by logical and necessary implication must have been litigated, and decided in the prior action. For purposes of both res judicata and collateral estoppel, only parties or their privies are bound by an earlier judgment.
>
> [¶ 12] This Court has adopted an expanded version of privity for res judicata and collateral estoppel. Privity exists if a person is so identified in interest with another that he represents the same legal right. . . . The strict rule that a judgment is operative, under the doctrine of res judicata, only in regard to parties and privies, is sometimes expanded to include as parties, or privies, a person who is not technically a party to a judgment, or in privity with him, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein, at least where such right is actively exercised by prosecution of the action, employment of counsel, control of the defense, filing of an answer, payment of expenses or costs of the action, the taking of an appeal, or the doing of such other acts as are generally done by parties. Fundamental fairness underlies any determination of privity. A judgment on the merits exonerating a party from liability precludes a subsequent action against a party whose liability, if any, is derivative of or secondary to the exonerated party.

Ungar, ¶¶ 11-12 (citations and quotations omitted). The applicability of collateral estoppel "is a question of law, fully reviewable on appeal." Id. ¶ 10. Further, "[c]laim preclusion applies even if subsequent claims are based upon different legal theories." Lucas v. Porter, 2008 ND 160, ¶ 16, 755 N.W.2d 88. To establish collateral estoppel this Court has established a four-part test:

> (1) Was the issue decided in the prior adjudication identical to the one presented in the action in question?; (2) Was there a final judgment on the merits?; (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?; and (4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?'

Northstar Founders, LLC v. Hayden Capital USA, LLC, 2014 ND 200, ¶ 61, 855 N.W.2d 614 (quotations and citations omitted).

[¶35] Here, the claims advanced by the McDougalls should be barred by the judgment that was rendered in favor of AgCountry in the Adversary Action. The allegations in the McDougalls' Amended Complaint are all based on allegations of fraud or misrepresentation in the obtaining of a mortgage on the Home Quarter in April of 2016. This is precisely the same factual allegations at issue in the Adversary Action in which AgCountry prevailed, and it was determined that "AgCountry has a valid and enforceable mortgage lien against the Home Quarter." (App. 87.) The judgment in the Adversary Action meets all the requirements of collateral estoppel.

[¶36] First, the issues are identical. The McDougalls in their Amended Complaint set forth that the issues to be decided are identical to those decided in the Adversary Action, having base the factual allegations in the Amended Complaint in this matter on certain of the findings made by the Bankruptcy Court in the Adversary Action.

[¶37] Second, there was a judgment on the merits rendered in the Adversary Action in favor of AgCountry. The initial judgment in the Adversary Action was entered on July 10, 2017. (App. 88.) The subsequent judgment on appeal was entered July 24, 2018. (Doc. # 49.) The July 24, 2018 judgment did not disturb the finality of the earlier judgment in the Adversary Action between Kent and Erica McDougall and AgCountry. (App. 95, n.2; Doc. # 49.) The July 24, 2018 judgment solely dismissed McDougalls from the Adversary Action. Thus, there is a final judgment in the Adversary Action to which collateral estoppel applies. The District Court found that there was no final judgment entered in the Adversary Action, but that is not correct. The final judgment entered in the Adversary Action was and

is binding as between Kent and Erica McDougall and AgCountry. While the McDougalls may have been dismissed from the action by the B.A.P., that does not disturb the finality of the judgment in the Adversary Action as between Kent and Erica McDougall and AgCountry.

[¶38] Third, in this instance privity exists between McDougalls and Kent and Erica McDougall, such that the judgment in the Adversary Action should be binding upon the McDougalls. Privity is an "expanded" concept in North Dakota. Ungar, ¶ 12. Here, there are sufficient indicators such that this Court should find as a matter of law that privity exists between McDougalls and Kent and Erica McDougall. First, there is a privity of title between Kent and Erica McDougall and McDougalls. Kent and Erica McDougall's interest in the Home Quarter became encumbered by the AgCountry Mortgage as soon as they took title to the Home Quarter on April 5, 2016. The McDougalls trace title to the Home Quarter is through the April 7 Deed. The court in the Adversary Action held that the Mortgage is a valid encumbrance against Kent and Erica McDougall and, since the title to the Home Quarter is traceable only after the Mortgage is recorded, the McDougalls are likewise bound by that determination.

[¶39] Privity is also demonstrated through the McDougalls' participation in the Adversary Action. The McDougalls were so connected in interest with Kent and Erica McDougall in the Adversary Action that privity should be found here. The McDougalls participated in the Adversary Action by attending the hearing and in the case of Michael McDougall testifying. (App.58-60; 76) The McDougalls were also represented in the Adversary Action in post-judgment motions and on appeal of the Adversary Action by the same lawyer that Kent and Erica McDougall met with prior to signing the March 31, 2016

extension documents and that represented them throughout the Bankruptcy Proceeding; this same counsel represented the McDougalls before the District Court, before this Court on the prior appeal, and on this appeal. (App.58-60; Trial Tr. 113:16-20.) The McDougalls were also liable for the payment of the lawyer for Kent and Erica McDougall even before the lawyer was representing them in post-judgment and appeal matters in the Adversary Action. Michael McDougall signed a limited personal guaranty of the attorney's fees owed by Kent and Erica McDougall to their attorney on October 20, 2016, and so was also paying for the counsel of Kent and Erica McDougall. (Doc. # 50.) Here, there is privity of interest between McDougalls and Kent and Erica McDougall throughout the Adversary Action because McDougalls paid for joint representation and participated in the control of the litigation. See also, Rutherford v. Kessel, 560 F.3d 874, 880 (8th Cir. 2009) (sitting at "counsel's table during the entire" prior trial and paying attorney's fees for party leads to finding of privity).

[¶40] Finally regarding privity, the McDougalls are connected to Kent and Erica McDougall through a familial relationship that justifies privity in this instance. The Eleventh Circuit Court of Appeals has held that "Although a familial relationship need not, in and of itself, confer privity status, it does constitute an important factor when assessing the preclusive effects of a prior adjudication." Jaffree v. Wallace, 837 F.2d 1461, 1467 (11th Cir. 1988). Here, the family relationship between McDougalls and Kent and Erica McDougall is another factor, in addition to the control of and participation in the Adversary Action, that justifies a finding of privity in this instance.

[¶41] The District Court did not analyze the issue of privity in either of its orders. (App. 104-105; 171.) The District Court held that "[a]pplying collateral estoppel against someone

who was neither a party nor in privity with a party would 'abrogate the fundamental requirement of due process' as the claim, or a part of it, would have been adjudicated in another case without his having an opportunity to be heard." (App. 104-105.) The District Court quotes Holloway v. Lockhart, 813 F.2d 874, 878-79 (8th Cir. 1987) for the justification that McDougalls should not be collaterally estopped in this matter. Holloway involved a section 1983 action brought by an inmate against the prison where he was held when the prisoner was a bystander to the teargassing of other prisoners who refused instructions of the jailers. Id. at 875-76. The district court in Holloway dismissed the prisoner's action because it relied on a prior case in the same district where the court had dismissed the rebelling prisoners' section 1983 action against the prison arising out of the same incident. Id. at 878.

[¶42] Holloway is easily distinguishable from the facts of this case. The plaintiff in Holloway did not participate in any manner in the prior lawsuit involving the other prisoners, unlike the McDougalls who were present, testified, and have used the same lawyers in all the proceedings. The plaintiff in Holloway was only connected to the other litigation because he was a prisoner in the same prison at the time of the incident. The court in Holloway did not even thoroughly analyze the privity issue. Id. Here the District Court should have recognized that privity exists between McDougalls and Kent and Erica McDougall, and on that basis found collateral estoppel applied.

[¶43] In Ungar, this Court held a plaintiff could not bring a claim against a different defendant in a second action where the defendant in the first action was exonerated and the second defendant's liability would be derivative of any liability of the defendant in the first action. Id. ¶ 19. Like Ungar, the McDougalls claims are entirely derivative of the fraud

claims that were asserted by Kent and Erica McDougall in the Adversary Action. Accordingly, this Court should determine that privity exists between McDougalls and Kent and Erica McDougall and that collateral estoppel applies to all the McDougalls claims against AgCountry.

[¶44] Fourth, the McDougalls were given a fair opportunity to be heard on the issues by which they should be precluded. The McDougalls were present for trial in the Adversary Action and participated in the Adversary Action by being present at the hearing, had opportunity to question witnesses, and Michael McDougall testified. Further, the persons with whom they are in privity, Kent and Erica McDougall, were represented by counsel, presented testimony and argument, and had a fair opportunity to present the issues to the Bankruptcy Court in the Adversary Action. The McDougalls and Kent and Erica McDougall were represented by the same attorney in presenting post-judgment motions to the Bankruptcy Court in the Adversary Action. In fact, counsel for Kent and Erica McDougall in his opening statement indicated that the McDougalls have an identical interest as Kent and Erica McDougall:

> One more point. Kent and Erica McDougall contend that the transfer from Mike McDougall was earmarked, I mean was only for that purpose and they know that and that's the reason they did it and that's the reason they transferred it back and that's why I think we have identical perspective on this and that's why Michael and Bonita McDougall are -- you know, could have been categorized as plaintiffs, but because I'm suing this out, making sure all the parties are present, we sued them as defendants, but they have an identical interest because they are a party to the misfeasance, malfeasance as well.

(Doc. # 51 at 36:6-20.)

[¶45] All of the requirements of collateral estoppel have been met, showing that the Adversary Action had already concluded and found that the Mortgage was not induced by

fraudulent misrepresentations, that statements made by Mr. Aanderud to Kent and Erica McDougall prior to signing the Mortgage are not the type of statements that are actionable misrepresentations, and that the Mortgage is a valid and binding lien against the Premises. Accordingly, the District Court should have dismissed the Plaintiffs' Complaint against AgCountry on collateral estoppel grounds.

[¶46] II. The Plaintiffs claims for deceit and unjust enrichment were waived in failing to appeal the original judgment in favor of AgCountry on AgCountry's counterclaims.

[¶47] This Court in McDougall I affirmed the District Court's Judgment dated April 17, 2019, as too all issues except the dismissal of the McDougalls' claims for deceit and unjust enrichment. McDougall I, ¶ 26. Specifically, this Court affirmed the District Court's Judgment dated April 17, 2019 as to all remaining claims. Id. The District Court's Judgment dated April 17, 2019, specifically granted AgCountry the equitable remedy of foreclosing the mortgage held against the Home Quarter as requested in AgCountry's counterclaims and third party complaint. (App. 111-114.) The McDougalls set up in their reply to the counterclaim a defense based on the same allegations contained in the McDougalls' Complaint and allege for those reasons any relief for AgCountry under the assignment of rents or foreclosure of the mortgage should be denied. (App. 48-50.)

[¶48] This Court has held that an appellant's failure to brief arguments on appeal "are deemed abandoned, and thereby become the law of the case and will not be considered on appeal." State v. Duchene, 2007 ND 31, ¶ 10, 727 N.W.2d 769. Further, considering the law of the case, a court's judgment should be logical and consistent. See State v. Lehman, 2010 ND 134, ¶ 17, 785 N.W.2d 204. In Duchene, this Court held that an unappealed part

of the district court's decision was controlling of the decision on appeal because that unappealed portion made the appealed portion moot. See id.

[¶49] Further, the judgment entered by the court must be logical and consistent. See Continental Res., Inc. v. P&P Indus., LLC I, 2018 ND 11, ¶¶ 20-28, 906 N.W.2d 105. The judgment dated April 17, 2019, specifically found in favor of AgCountry on its equitable claim of mortgage foreclosure despite the McDougalls having set up equitable defenses to the mortgage foreclosure. Midwest Fed. Sav. & Loan Ass'n of Minot v. Kouba, 335 N.W.2d 780, 783 (N.D. 1983) (mortgage foreclosure is an equitable proceeding). In McDougall I, the McDougalls failed to challenge in any manner the grant of relief to AgCountry on its counterclaims for enforcement of the assignment of rents or foreclosure of its mortgage and those parts of the judgment dated April 17, 2019 was affirmed by this Court in McDougall I. Thus, the relief afforded AgCountry in the judgment dated April 17, 2019 is legally and logically inconsistent with the Court's Findings of Fact, Conclusions of Law, and Order for Judgment dated August 19, 2020. The result is that in this same equitable proceeding the District Court has first pronounced that equity requires the foreclosure of the mortgage on the Home Quarter, despite the equitable defenses presented by the McDougalls that the mortgage should not be foreclosed, and then second the district court turns around and determines that the same foreclosure that it previously ordered was a wrongful act on the part of AgCountry justifying the equitable remedy of unjust enrichment. This is logically and legally inconsistent orders of the District Court, and the propriety of the equitable foreclosure of the mortgage was conclusively established in McDougall I by the McDougalls' failure to appeal the judgment as to the foreclosure and this Court's affirmance of the judgment foreclosing the mortgage as that became the law

of the case. See Duchene, ¶10. Thus, because the McDougalls failed to appeal the judgment in favor of AgCountry's equitable counterclaims in McDougall I, their claim for equitable relief is closed off in accordance with the law of the case doctrine. This court should require a consistent determination of the equities in the same action below.

[¶50] III. The District Court erred in holding Plaintiffs were entitled to relief for unjust enrichment.

[¶51] The District Court held the McDougalls were entitled to relief for unjust enrichment despite the jury's verdict that AgCountry did not commit deceit. (App. 165-173.) First, the District Court found that the McDougalls were impoverished in that they McDougalls lost the equity in the Home Quarter but ignores that the McDougalls gave the Home Quarter to Kent and Erica McDougall. (App. 170.) Second, the District Court held there was a lack of justification for AgCountry retaining the proceeds of the sale of the Home Quarter because the McDougalls did not receive a material benefit from the transfer. (App. 170.) Finally, the District Court held that justification was lacking because it found AgCountry knew that there was no value being provided to Kent and Erica McDougall for granting the 60-day extension. (App. 170-171.) This erroneous decision by the District Court on unjust enrichment is fully reviewable by this Court. Ungar, ¶ 10.

[¶52] A. The District Court's findings and conclusions regarding AgCountry's intent is contradicted by and irreconcilable with the jury's verdict finding AgCountry did not commit deceit.

[¶53] The District Court found

> by clear and convincing evidence, that 1) AgCountry, via Aanderud, represented to Kent and Erica McDougall that the Home Quarter mortgage would further a refinancing or operating loan, 2) AgCountry, via Aanderud, knew this would be relayed to McDougalls and would serve as McDougalls' basis to transfer the Home Quarter and serve as the basis for Kent and Erica McDougall to grant a mortgage on the same, and 3) AgCountry did not intend, from at least March 14th, 2016, to ever use the mortgage as collateral

> for a refinance or operating loan, but as extra collateral upon which to collect *existing* debt.

(App. 168.) These findings stand in direct contradiction of the jury's verdict that AgCountry did not commit deceit.

[¶54] The jury instructions on deceit in this action were the following:

> **DECEIT**
>
> One who willfully deceives another person with intent to induce that person to alter his or her position to that person's injury or risk is liable for any damage the person thereby suffers.
>
> As used in these instructions, a "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; or
> 3) A promise made without any intention of performing.

(App. 157.) The jury's verdict ultimately was returned finding that there was not clear and convincing evidence that AgCountry committed deceit. (App. 162-164.) The District Court's own findings are in direct conflict with the jury's verdict. The District Court's findings amount to a finding that AgCountry did commit deceit by making a representation about its future performance that it did not intend to perform. This is in direct conflict with the jury's verdict that AgCountry did not make a promise without intention to perform and is irreconcilable. See Continental Res., ¶¶ 20-28.

[¶55] In Continental Resources, this Court reversed a judgment where the jury's verdicts on separate claims were inconsistent and irreconcilable. The plaintiff had not succeeded on a breach of contract claim against the defendant but then succeeded on a defense to a counterclaim based on the defendant's prior breach of contract. Id. Thus, the jury's verdict found that the defendant had both had and had not breached the agreement with the plaintiff and was thus irreconcilable. Id. Like Continental Resources, here the District Court's

decision related to AgCountry's intentions is irreconcilable with the jury's verdict finding AgCountry did not commit deceit.

[¶56] B. The record indicates the McDougalls were not impoverished because they intended to give the Home Quarter to Kent and Erica McDougall without any plans for renumeration.

[¶57] The McDougalls testified that they gave the Premises to Kent and Erica McDougall for no consideration without any arrangements for payment. (Trial Tr. Trial Tr. 542:11-13.) The face of the April 5 Deed also has no restrictions on it. (App. 147-148.) On April 5, 2016, the McDougalls fully intended to grant all the rights they had in the Premises to Kent and Erica McDougall with receiving nothing in return. The District Court went beyond the face of the April 5 Deed and April 7 Deed to find and hold the McDougalls were impoverished because they did not obtain an intangible or sentimental value in preserving their son's farm operation through this gift. AgCountry submits that the McDougalls have not been impoverished because they intended to give the Premises to Kent and Erica McDougall on April 5, 2016, without an expectation of it being returned to the McDougalls. There was no evidence of a written agreement regarding an obligation between Kent and Erica McDougall on the one hand and Michael and Bonita McDougalls on the other hand besides the April 5 Deed and the April 7 Deed. See Apache Corp. v. MDU Res. Grp., Inc., 1999 ND 247, ¶ 15, 603 N.W.2d 891.

[¶58] In Apache Corp., the plaintiff claimed it was entitled to unjust enrichment remedies because it was impoverished when it did not make as much money pursuant to a contract it had with a third party when the defendant breached under a separate contract the defendant had with that third party. Id. The defendant ultimately decided it would be in its best interest to breach the defendant's agreement with the third-party, and because of this

breach the expected benefits to the plaintiff under the agreement the plaintiff had with the third party were reduced. Id. This Court impliedly held that when the impoverishment claimed by the plaintiff was due to the contractual arrangements between the plaintiff and the third party there could be no unjust enrichment. See id. Specifically, this Court held that the impoverishment pursuant to the terms of the binding agreement that the plaintiff had with the third party is no impoverishment at all, even though the plaintiff had expected more. See id. Like Apache Corp, there was no impoverishment here, or if there were, it was due to the contracts between Kent and Erica McDougall on the one hand and the Plaintiffs on the other hand embodied in the April 5 Deed and April 7 Deed. Ultimately, the McDougalls intended to give the Premises away to Kent and Erica McDougall for no immediate exchange, meaning a gift, and this lack of impoverishment defeats their claim for unjust enrichment.

[¶59] C. The District Court erred in concluding there was a causal connection between any impoverishment and enrichment when there were no direct communications between AgCountry and the McDougalls.

[¶60] The third element necessary for the Plaintiffs to prevail on an unjust enrichment claim is a connection between the claimed impoverishment and enrichment. Here, the District Court erred in concluding there was a causal connection between the enrichment and impoverishment. Rather, there is a lack of a causal connection between the claimed enrichment and impoverishment because of the intervening actions or omissions of both the McDougalls and Kent and Erica McDougall and lack of connection between McDougalls and AgCountry.

[¶61] The McDougalls never communicated with AgCountry regarding their decision to execute the April 5 Deed or about the terms of the written loan documents between

AgCountry and Kent and Erica McDougall. This Court has held that the lack of a direct connection between the parties defeats the connection element required for an unjust enrichment claim. See Thimjon Farms P'ship v. First International Bank & Trust, 2013 ND 160, ¶ 21-22, 837 N.W. 327. In Thimjon, this Court affirmed a summary judgment dismissal of an unjust enrichment claim due to a lack of a causal connection. Id. ¶24. This Court held that there was not a connection between the claimed enrichment and impoverishment because "First International is a legal stranger to Thimjon and Hagemeister, and no contract exists between them." Id. ¶21. This Court continued its analysis noting that "First International received no benefit directly from Thimjon and Hagemeister. Instead, the exchange of funds occurred between Northern Grain and Thimjon and Hagemeister, which indirectly benefitted First International. Generally, a third party is not liable under unjust enrichment simply for benefitting from a contract between two other parties." Id.

[¶62] Here, there is a lack of a connection between AgCountry and McDougalls. AgCountry was not a party to any communications between Kent McDougall and Michael McDougall concerning the decision to execute the April 5 Deed. Any claimed impoverishment to McDougalls results from the actions of the McDougalls or Kent and Erica McDougall in executing the deeds and mortgage. The impoverishment to McDougalls resulted from Kent and Erica McDougalls' having violated their warranties contained in the April 7 Deed. Here, the exchange of the Premises occurred between McDougalls and Kent and Erica McDougall. The benefit of gaining the mortgage on the Premises was indirectly given, like in Thimjon. The fact AgCountry was benefited by the contract between McDougalls and Kent and Erica McDougall evidenced by the April 5

Deed does not rise to the level of unjust enrichment. The failure to make any inquiry directly was not considered by the District Court. Direct inquiry by McDougalls would have cleared any confusion they may have had about the transaction because they could have seen the Repayment/Restructure Plan signed by Kent and Erica McDougall that unambiguously provided the mortgage was given for a 60-day extension.

[¶63] Additionally, the fact that Kent and Erica McDougall did not disclose to McDougalls the written loan documents signed by on March 31, 2016, and the McDougalls entire lack of attempt to contact AgCountry or review the loan documents shows there is a lack of a causal connection. The record shows that only Kent McDougall had any communications with Michael McDougall regarding the request to execute the April 5 Deed and did not disclose a number of pertinent facts to his father, such as having met with a bankruptcy attorney already and having already signed a mortgage in exchange for the 60-day extension. Rather, the record shows that AgCountry simply followed the written loan documents that it signed with its borrowers Kent and Erica McDougall and was justified in so doing. This all shows that there is a lack of connection for any claimed impoverishment.

[¶64] The District Court also finds that the connection to impoverishment and enrichment stems from AgCountry's refusal to release the mortgage on the Home Quarter after any further financing request from Kent and Erica McDougall was denied. (App. 170.) This however ignores the fact that the mortgage itself has been found to be legally enforceable by two courts, the Bankruptcy Court in the Adversary Action and the District Court in its judgment dated April 17, 2019, and not induced by deceit, as indicated in the jury's verdict.

This causal connection requires that AgCountry would have given up its legal contractual rights, which it is not required to do to avoid liability for unjust enrichment. See id. ¶ 22.

[¶65] D. The District Court erred in concluding there was a lack of justification for AgCountry retaining the mortgage on the Home Quarter.

[¶66] The District Court held that there was no justification for AgCountry's retention of the mortgage on the Home Quarter because Kent and Erica McDougall did not obtain a material benefit from the transaction. (App. 170.) This is in error because the mortgage is a legally binding agreement, Kent and Erica did in fact receive value from the extension, and the perceived lack of value received does not mean there was no justification on the part of AgCountry; Kent and Erica McDougall's loans did not have default interest, late charges, and they were given time to attempt to further rework or restructure.

[¶67] The fourth element that must be shown by the McDougalls is an "absence of a justification for the enrichment and impoverishment." Id. ¶20. Here, the record is clear that there is justification for the enrichment as shown by the written loan documents and the jury's verdict. This Court has held that "[w]hen the impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity and there has been no unjust enrichment." Id. ¶22 (quoting BTA Oil Producers v. MDU Res. Group, Inc., 2002 ND 55, ¶ 23, 642 N.W.2d 873). In Thimjon, this Court held that accepting a transfer of funds from a third party that were made by the third party on an unrestricted basis defeated the unjust enrichment claim. Id. This Court noted that the defendant in Thimjon received its enrichment through enforcing its valid contractual relationship with its borrower and the funds that the plaintiffs had paid were also paid pursuant to a valid contractual relationship between the plaintiffs and that same borrower. Id. Here, the nearly identical situation is present. AgCountry was granted the mortgage pursuant to its valid

contractual agreements with Kent and Erica McDougall; Kent and Erica McDougall obtained value in the form of additional time to come up with a viable plan, avoided late charges and default interest, and remained on accrual status with AgCountry. The McDougalls also made an unrestricted gift transaction with Kent and Erica McDougall in the April 5 Deed that indirectly granted the mortgage lien on the Premises. The enrichment to AgCountry was entirely justified because that is what AgCountry was promised by Kent and Erica McDougalls when they signed all the loan documents on March 31, 2016.

[¶68] The facts involved in BTA Oil Producers is identical to that of Apache Corp. BTA Oil Producers, ¶22. In BTA Oil Producers, this Court held that when any impoverishment occurs due to contractual arrangements then the result is not inequitable and unjust enrichment will not lie. Id. Here, the District Court erred when it did not respect the contracts that were entered into with AgCountry and Kent and Erica McDougall and instead tried to weigh the value provided on a post hoc basis. See also, Ritter, Laber & Assocs., Inc., ¶ 26.

[¶69] Finally, this Court should be mindful of the fact that two different fact finders have now held that AgCountry did not commit fraud or deceit in obtaining the mortgage on the Premises. First the Bankruptcy Court in the Adversary Action held that the mortgage is valid and not subject to avoidance due to fraud and then the recent jury verdict held that AgCountry did not commit deceit. These findings show that AgCountry obtained the mortgage in a justified manner and thus preclude granting McDougalls relief under unjust enrichment. Additionally, the jury in this action found that AgCountry did not commit deceit against the McDougalls.

[¶70] The District Court cited to two cases in support of its conclusion that there was a lack of justification for AgCountry's retention of the proceeds from the Home Quarter, both of which are distinguishable. First, Mansfield v. Federal Land Bank of Omaha, No. 4:14CV3232, 2015 WL 4546610, at *3 (D. Neb. July 28, 2015) does not concern any claim of unjust enrichment, rather being an unpublished decision of a magistrate judge in the United States District Court for the district of Nebraska concerned with the denial of a motion to remand a mineral interest dispute. Second, the decision of Midland Diesel Service & Engine Co. v. Sivertson, 307 N.W.2d 555 (N.D. 1981) involved direct communication and contacts between the plaintiff and defendant. The defendant in Midland directly accepted the transfer of the personal property at issue (an engine) from the plaintiff in a partnership capacity and then installed the engine into a truck owned directly by the defendant. Id. at 556. The partnership consisted of the defendant allowing his son to use the truck owned by the defendant to haul goods for hire. Id. The partnership did not pay for the engine and the defendant ended up with the truck with the replaced engine. Id. Unlike Midland, AgCountry did not directly communicate or directly induce the McDougalls into transferring the Home Quarter. AgCountry never dealt with the McDougalls directly, unlike Midland. As is undisputed in the record, the McDougalls did not do anything to verify the underlying transaction between AgCountry and Kent and Erica McDougall. Midland is not instructive on this point, and rather, the principal of Thimjon requiring direct communication with the lender involved is instructive.

[¶71] E. The District Court erred in concluding the McDougalls lacked an adequate remedy at law.

[¶72] The District Court held that the McDougalls lacked an adequate remedy at law because their deceit claim was denied by the jury and the McDougalls' could not legally

compel Kent and Erica McDougall to repay the value of the Home Quarter due to Kent and Erica McDougall's Bankruptcy discharge. The fifth element needed to prevail on an unjust enrichment claim is an "absence of remedy provided by law." Ritter, Laber & Assocs., Inc., ¶ 26. The District Court's determination on this issue is in error and the McDougalls did not demonstrate they had exhausted available legal remedies.

[¶73] As an initial matter, the McDougalls have made claims in the Kent and Erica McDougall Bankruptcy resulting from the breach of the warranties contained in the April 7 Deed related to the Premises being free and clear of all encumbrances and liens. These claims were ultimately not paid in the Kent and Erica McDougall bankruptcy after that proceeding was converted to a chapter 7 proceeding. Kent and Erica McDougall were granted a discharge in that bankruptcy and now the McDougalls cannot enforce payment of these claims against Kent and Erica McDougall personally. However, the McDougalls did not present to the District Court any explanation or reasoning why they did not seek to hold these claims as being non-dischargeable in the Bankruptcy proceeding. Not all debts are dischargeable in bankruptcy. See generally, 11 U.S.C. § 523. Here, there is clear evidence in the record that the McDougalls could have excepted to the discharge of their debt in the Kent and Erica McDougall bankruptcy and no explanation why they did not.

[¶74] First, debts that arise out of false pretenses or false representations are not subject to discharge. 11 U.S.C. § 523(a)(2)(A). Here, there is evidence in the record that false statements in the April 7 Deed were made to the McDougalls by Kent McDougall, namely the representation that the Premises were being transferred back to the McDougalls free and clear of all liens when Kent McDougall knew full well that he had already granted a mortgage on the Premises. (Trial Tr. 513:9-11.) Further, there is evidence that Kent

McDougall knew he had already granted a mortgage to AgCountry and did not tell Michael McDougall this fact prior to McDougalls signing the April 5 Deed. (Trial Tr. 513:9-11; 516:4-17.) The McDougalls could have attempted to have their claim against Kent and Erica McDougall determined to be non-dischargeable but they did not do so. In fact, the same attorney who represented Kent and Erica McDougall in the Bankruptcy Proceeding is representing them in the present action. Rather than attempt to fully pursue their damages against Kent and Erica McDougall the McDougalls sought to hold AgCountry solely responsible. See also, 66 Am. Jur. 2d Restitution and Implied Contracts § 28 ("The existence of an 'adequate remedy' that precludes the application of unjust enrichment does not connote the ability to recoup the impoverishment by bringing an action against a solvent person but merely connotes the ability to bring an action or seek a remedy.").

[¶75] This Court has recognized that a plaintiff cannot assert an unjust enrichment claim against a defendant when the plaintiff has a breach of contract against another person because the plaintiff has an adequate remedy at law. Lochthowe v. CF Peterson Estate, 2005 ND 40, ¶¶ 13-14, 692 N.W.2d 120; DC Trautman Co. v. Fargo Excavating Co., 380 NW 2d 644, 645-46 (N.D. 1986). In Lochthowe, the plaintiff had settled with non-parties with whom it had a prior contract and then sued the defendant alleging unjust enrichment. Lochthowe, ¶¶ 6, 13-14. This Court held that the plaintiff's legal right to pursue his breach of contract claims against the non-parties showed that the plaintiff could not meet the fifth element required to pursue an unjust enrichment claim against the defendant. Id. ¶¶ 13-14. Similarly, in DC Trautman Co., this Court held that the plaintiff did not meet its burden to prove unjust enrichment because the evidence showed there were contract claims available against a non-party. 380 N.W.2d at 645-46.

[¶76] Like Lochthowe and DC Trautman Co., the McDougalls have not met their burden of showing they lack a remedy at law. The evidence shows they filed claims against the Kent and Erica McDougall bankruptcy estate related to the breach of warranties in the April 7 Deed but there is nothing in the record explaining why the McDougalls did not object to the discharge of their claim. The McDougalls were content to not fully attempt to seek repayment from Kent and Erica McDougall and instead solely hold AgCountry responsible. The McDougalls bear the burden of establishing that they lack a remedy at law, and they have not done so.

[¶77] IV. The District Court erred in awarding the McDougalls prejudgment interest from April 6, 2016.

[¶78] The District Court awarded prejudgment interest to the McDougalls from April 6, 2016, the date the mortgage was recorded with the Towner County Recorder. (App. 172.) This was in error and a misapplication of the law relative to awards for unjust enrichment.

[¶79] While the North Dakota Century Code provides for prejudgment interest on legal claims, the equitable remedy of unjust enrichment is not such a claim, and prejudgment interest is inappropriate. United Hosp. v. D'Annunzio, 514 N.W.2d 681, 686 (N.D. 1994). In United Hospital, this Court held that the right to recover on claim of unjust enrichment is not a vested right of the plaintiff, and that prejudgment interest is not appropriate in such cases. Id. As such, this Court has held that on unjust enrichment claims there should ordinarily not be an award of prejudgment interest. Id.

[¶80] The award of prejudgment interest is particularly troublesome here for several reasons. First, as is noted by the District Court, the award of damages should be based on the benefit obtained by the defendant, not the plaintiff's loss. KLE Construction v. Twalker Development, LLC, 2016 ND 229, ¶ 15, 887 N.W.2d 536. Here, the "benefit" received by

AgCountry was non-existent until AgCountry was able to subsequently sell the Premises to a third party for $163,000.00 on April 24, 2020. The District Court's order for prejudgment interest relates back to a time when AgCountry had not yet obtained any benefit from the transaction and when the McDougalls were still free to raise an equitable defense to the foreclosure of the mortgage. This award of prejudgment interest is even more inequitable when viewed through the lens of the McDougalls' ability to have appealed the foreclosure of AgCountry's mortgage in McDougall I and, assuming they had been successful, avoided any benefit conferred to AgCountry. See KLE Construction, ¶ 15; United Hosp., 514 N.W.2d at 686. Here, the effect of the District Court's award is to award the McDougalls an approximately an additional $44,000 in damages all attributable to a time in which AgCountry had not yet benefited and the McDougalls still had the ability to oppose the foreclosure. This is an inequitable result.

[¶81] Additionally, in Midland Diesel, this Court held that with an award of unjust enrichment there is no entitlement to prejudgment interest because there was no "'vested' right of recovery until judgment was rendered." Midland Diesel, 307 N.W.2d at 558. In Midland Diesel, the plaintiff sought prejudgment interest from the date the engine in question was provided to the defendant. Id. This Court held prejudgment interest was not proper where the equitable remedy of unjust enrichment was concerned and affirmed the district court's decision to not award prejudgment interest. Id. Similarly, the McDougalls did not have a vested right to their equitable relief in this case until judgment was entered on October 23, 2020, and this court should reverse the award of prejudgment interest.

[¶82] V. The District Court abused its discretion in its award of costs and disbursements to the McDougalls.

[¶83] The District Court in its Order Denying Defendant Objection to Plaintiff's Statement of Costs and Disbursements held the McDougalls were entitled to costs and disbursements incurred in other legal proceedings that were not ordered by the other involved courts. This was in error and an abuse of the District Court's discretion.

[¶84] The awarding of costs and disbursements is subject to review under the abuse of discretion standard. Specialized Contracting, Inc., ¶ 30. Here, the District Court abused its discretion in the award of costs and disbursements because it misinterpreted or misapplied the law and failed to address the arguments of AgCountry. Id.; Wheeler, ¶ 30.

[¶85] The District Court did not address the argument that it was the wrong forum to award costs incurred by the McDougalls in obtaining deposition transcripts in the bankruptcy Adversary Action or on appeal to the B.A.P. The District Court indicated that any time a deposition may be used at a trial in a later action that those costs because it would be illogical to require the same depositions to be retaken. (App. 177.) The District Court however did not address AgCountry's argument that the McDougalls had an available forum to obtain those costs already, namely the Bankruptcy Court.

[¶86] The McDougalls included $1,890.15 related to deposition fees from the Bankruptcy Adversary action incurred April and May 2017, predating the commencement of this proceeding. The McDougalls were not awarded costs and disbursements in the Bankruptcy Adversary Action in either judgment entered in that case. Federal Rule of Bankruptcy Procedure 7054 would have permitted the Bankruptcy Court to award costs to the McDougalls, but it did not do so. Even though the McDougalls were ultimately dismissed from the Bankruptcy Adversary Action after remand from the B.A.P. they should have and could have pressed their claim for those costs to the Bankruptcy Court under 28 U.S.C. §

1919. This provision of federal statute specifically provides that the federal court has authority to award costs even for a dismissal for lack of jurisdiction: "Whenever any action or suit is dismissed in any district court, the Court of International Trade, or the Court of Federal Claims for want of jurisdiction, such court may order the payment of just costs." 28 U.S.C. § 1919. The McDougalls did not seek any of these costs in the Bankruptcy Court.

[¶87] The McDougalls also included in their costs and disbursements the costs of preparing transcripts for an appeal of the Bankruptcy Court's decision to the B.A.P. in the amount of $3,803.35 incurred in November of 2017 and before the institution of this lawsuit. The Federal Rule of Bankruptcy Procedure 8021 governs an award of costs on appeal and provides as follows: "(a) Against Whom Assessed. The following rules apply unless the law provides or the district court or BAP orders otherwise: (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise; . . . ." There was no agreement for the taxation of any costs in the B.A.P. and the judgment from that court did not award the costs of the appeal to the McDougalls. Thus, under Federal Rule of Bankruptcy Procedure 8021 the costs of the B.A.P. appeal were actually awarded to AgCountry and not to the McDougalls. The cost of preparing the transcripts for that appeal are thus not proper to be awarded in the District Court.

[¶88] The McDougalls also included in the statement of costs and disbursements the costs of the prior appeal filing fee for the appeal in McDougall I; this is not a proper item to awarded by the District Court. The award of costs and disbursements in appeals to this Court is governed by North Dakota Rule of Appellate Procedure 39, which provides as follows: "(a) Against Whom Assessed. Unless the law provides or the court orders otherwise: . . . (4) if a judgment is affirmed in part, reversed in part, modified, or vacated,

costs are taxed only as the court orders." Here, this Court in McDougall I did not award costs to either party and it is inappropriate of the McDougalls to now seek the same below.

[¶89] In sum, the only properly taxable costs were those incurred directly in this action, and not those incurred in any other legal action by the McDougalls or previously determined by another court as not being taxed in favor of the McDougalls. Accordingly, the costs and disbursement award must be reduced by $5,818.50.

Conclusion

[¶90] For the forgoing reasons, this Court should reverse the judgment of the District Court and remand for the matter for a judgment of dismissal in favor of AgCountry.

Statement Regarding Oral Argument

[¶91] Pursuant to North Dakota Rule of Appellate Procedure 28(h), AgCountry requests oral argument in this matter. The issues involved span multiple proceedings involving bankruptcy and state court proceedings, and oral argument will be helpful to this Court to narrow and understand the scope of the record presented to the District Court in this matter.

Respectfully submitted this 23rd day of February, 2021

/s/ John D. Schroeder
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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20200282

Michael McDougall and Bonita McDougall,	Plaintiffs and Appellees,
v.	
AgCountry Farm Credit Services, PCA,	Defendant, Third-Party Plaintiff and Appellant,
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,	Third-Party Defendants.

APPELLANT AGCOUNTRY FARM CREDIT SERVICES, PCA'S CERTIFICATE OF COMPLIANCE

[¶1] The undersigned certifies pursuant to N.D. R. App. P. 32(a)(8)(A), the text of the Brief of Appellant AgCountry Farm Credit Services, PCA, contains no more than 38 pages.

[¶2] The Brief of Appellant has been prepared in a proportionally spaced typeface using Microsoft Office 365 word processing software in Times New Roman 12-point font.

Respectfully submitted this 23rd day of February, 2021

/s/ John D. Schroeder

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Michael McDougall and Bonita McDougall,	Plaintiffs and Appellees,
v.	
AgCountry Farm Credit Services, PCA,	Defendant, Third-Party Plaintiff and Appellant,
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,	Third-Party Defendants.

CERTIFICATE OF SERVICE

[¶1] I hereby certify and declare that on February 23, 2021 the following documents:

(1) Appellant AgCountry Farm Credit Services, PCA's Brief;

(2) Appellant AgCountry Farm Credit Services, PCA's Certificate of Compliance;

(3) Appellant AgCountry Farm Credit Services, PCA's Appendix; and

(4) this Certificate of Service

were filed electronically with the North Dakota Supreme Court and that copies of the foregoing were sent via electronic mail via the Supreme Court's E-filing Portal to the following:

Kip M. Kaler (#03757), kip@kaler-doeling.com, attorney for appellees

Patrick J. Sinner (#08345), patrick@kaler-doeling.com, attorney for appellees

[¶2] I declare, under penalty of perjury under the law of the State of North Dakota, that the forgoing is true and correct.

Signed on February 23, 2021, at Grand Forks, North Dakota.

/s/ John D. Schroeder

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