

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 30884

SONJA R. KING,

Plaintiff/Appellee,

vs.

GARY A. KING,

Defendant/Appellant.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

The Honorable Douglas E. Hoffman, Presiding Judge

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Citations to the settled record of *Sonja R. King v. Gary A. King*, 41DIV23-000090 (hereinafter referred to as the “Divorce Action”), as reflected by the Clerk’s Index for said case, are designated with (S.R. ____) and the page number. Citations to the Appellant’s Appendix are designated as (App. ____) and the page number. Defendant/Appellant Gary A. King will be referred to as (“Gary”) and Plaintiff/Appellee Sonja R. King will be referred to as (“Sonja”).

A court trial was held in this matter beginning on July 30, 2024, and ending August 1, 2024. Relevant portions of the transcripts are included in Appellant’s Appendix and specially cited as follows: References to the July 30, 2024 trial transcript are designated as (July 30 TT at ____) and the page and line numbers. References to the July 31, 2024 trial transcript are designated as (July 31 TT at ____) and the page and line numbers. References to the August 31, 2024 trial transcript are designated as (Aug. 31 TT at ____) and the page and line numbers.

The pending civil matter in which Gary is a plaintiff, *Cyprus Risk Management, LLC, et al. v. Caledonia Ledge, LLC, et al.*, 41CIV23-000654, will be referred to as (the “Civil Action”).

JURISDICTIONAL STATEMENT

Gary appeals from a Judgment & Decree of Divorce, dated October 10, 2024, and its incorporated Findings of Fact and Conclusions of Law, dated September 18, 2024, in *Sonja R. King v. Gary A. King*, 41DIV23-000090, in the Second Judicial Circuit of South Dakota, the Honorable Douglas Hoffman, Circuit Court Judge, presiding. (App. 1-3, 6-

31.) A Notice of Entry of Judgment and Decree of Divorce was filed and served on October 16, 2024. (App. 4-5.)

Gary filed a timely Notice of Appeal on November 6, 2024. (S.R. 1671.) This Court has jurisdiction to hear this matter under SDCL § 15-26A-3(1), which grants the Court jurisdiction over final judgments from the circuit court.

STATEMENT OF THE ISSUES

I. Whether the circuit court abused its discretion when it classified the entirety of the Civil Action as marital property and distributed it to Gary.

Circuit Court Ruling: The circuit court abused its discretion when it went beyond the record and the parties' agreement and included the entirety of the pending Civil Action as marital property. Because the Civil Action is currently pending and thus cannot be assigned a proper value, it should have been excluded from the marital estate (with the exception of the Civil Action's retainer, as agreed upon by the parties).

Relevant Authority: *Dunham v. Sabers*, 2022 S.D. 65, 981 N.W.2d 620

Kappenmann v. Kappenmann, 479 N.W.2d 520 (S.D. 1992)

Ahrendt v. Chamberlain, 2018 S.D. 31, 910 N.W.2d 913

SDCL § 25-4-44

II. Whether the circuit court clearly erred when it determined the value of the Civil Action to be \$350,000.

Circuit Court Ruling: The circuit court clearly erred in concluding the value of the Civil Action was \$350,000. Because the Civil Action is currently pending, it does not and cannot have a present value. Indeed, the circuit court's applied value was not based on evidence in the record; rather, it was based on arbitrary, speculative, and conjectural grounds.

Relevant Authority: *Dunham v. Sabers*, 2022 S.D. 65, 981 N.W.2d 620

Kappenmann v. Kappenmann, 479 N.W.2d 520 (S.D. 1992)

Ahrendt v. Chamberlain, 2018 S.D. 31, 910 N.W.2d 913

SDCL § 25-4-44

STATEMENT OF THE CASE

This appeal is from a decision by the Second Judicial Circuit Court, Minnehaha County, the Honorable Douglas E. Hoffman presiding. The Judgment & Decree of Divorce erroneously found the entirety of the Civil Action was marital property, the Civil Action was worth \$350,000, and the Civil Action would be allocated to Gary in the property distribution. This appeal challenges the circuit court's decision to classify the entirety of the Civil Action as marital property as well as circuit court's valuation of the Civil Action as \$350,000.

STATEMENT OF FACTS

Gary and Sonja King married on May 10, 2004. (App. 7, ¶ 5.) On May 30, 2023, Sonja initiated the Divorce Action against Gary. (*Id.*, ¶ 7.) Sonja sought, among other things, an equitable division of marital property and debts of the parties. (*Id.*, ¶ 8.)

While the Divorce Action was pending, Gary engaged legal counsel to initiate the Civil Action against his former business partners. (App. 21, ¶ 98(dd).) Gary remitted a retainer of \$50,000 to his counsel (hereinafter referred to as the "Retainer"). (*Id.*) The funds used to pay the retainer were sourced from the sale of the parties' real property in Okoboji, Iowa. (*Id.*)

On August 7, 2023, Gary made a demand in the Civil Action to his former business partners for \$3,016,001.62 (hereinafter referred to as the "Demand Letter"). (*Id.*, See S.R. 668.) On August 21, 2023, Gary formally commenced the Civil Action by filing a Summons and Complaint against his former business partners. (See S.R. 676.) As of the date of this brief, the Civil Action remains pending.

A three-day court trial commenced in the Divorce Action, occurring on July 30 through August 1, 2024. (App. 6, ¶ 1.) At the beginning of the trial, the parties were prompted to inform the circuit court regarding what the primary issues would be during the trial. (App. 33; July 30 TT at 9:19-24.) Gary informed the court of the parties' apparent agreement on alimony, insurance, and child support. (App. 34; July 30 TT at 10:5-12.) Likewise, Gary informed the circuit court that the parties had agreed to the following:

Gary would retain all interest in any and all lawsuits pending and be responsible for satisfying any and all judgments with the exception that should Gary receive money from one of the pending lawsuits, Sonja will receive the first \$25,000 which is one-half of the money spent for the attorney fee retainer from marital assets to commence the lawsuit.

(App. 35; July 30 TT at 12:2-8.) Sonja objected to Gary's statements regarding child support, but, notably, did *not* object to Gary's statements regarding the pending lawsuits (i.e., his statements regarding the Civil Action). (*Id.*)

For trial, the parties submitted an "Assets and Liabilities Exhibit" which laid out the proposed property values and respective allocations between the parties. (*See* S.R. 453-459.) The retainer for the Civil Action amount was described as "\$50k that Sonja gave to Gary for retainer . . . for his lawsuit." (*Id.*) The Assets and Liabilities Exhibit showed no value on the Civil Action itself and likewise showed no value on Gary's various businesses that are involved in the Civil Action. (*Id.*) Thus, at trial, the only evidence initially presented regarding the Civil Action was Exhibits 22 (the Demand Letter), 24 (the Complaint), and 78 (the Retainer). (S.R. 668, 676, 1198.) Indeed, during Sonja's case-in-chief, she presented no testimonial evidence regarding whether the Civil

Action should be included in the marital estate, what (if any) value should be placed on the Civil Action, or how it should be allocated.

On the second day of trial and the first day of Gary's testimony, he briefly discussed the Retainer for the Civil Action. He clarified the description of the Retainer in the Assets and Liabilities Exhibit being marital funds from the sale of the parties' Okoboji property, not money that Sonja gave to Gary. (App. 37-38; Jul 31 TT at 177:24-178:8.) Gary also testified about the parties' agreement relating to the Retainer and the Civil Action, stating:

Q: So, anyway, the 50,000 and back up to Line 35, you don't have any trouble, ah, since you're going to be spending more money on this lawsuit that, that \$25,000, that would be half of, of the amount that's marital or half of it would be of the marital would be 25,000. You don't have any trouble with that, do ya?

A: Not at all.

(App. 39; July 31 TT at 179:4-9.)

Gary's testimony continued into the third day of trial. When Gary was cross-examined, he was not questioned about the Civil Action being included as marital property, what the value of it was, and who it should be attributed to. On Gary's redirect examination, he further testified about the Civil Action and the parties' agreement on its applicability to the marital estate:

Q: Okay. Now, let's talk about your lawsuit. Were you under the impression that there was an agreement between you and Sonja and the two lawyers here that you were going to retain all interest in the, ah, this lawsuit involving your business, and you were going to pay Sonja 20 [sic] \$25,000 as half of the amount for the retainer?

A: That was what was requested and, yes, that's what we agreed to.

Q: And as far as the value of the lawsuit, you could get zero?

A: I'm well aware of that, and I, I'm not certain a couple of partners could recover.

Q: They could file bankruptcy?

A: Yes.

Q: And you're going to be spending hundreds of thousands of dollars trying to find that out, aren't you?

A: That in addition to possibly years of litigation.

(App. 41; Aug. 1 TT at 76:6-22.)

When Gary's re-direct examination was complete, the circuit court asked if Sonja wanted an opportunity for re-cross examination or if she was going to call any rebuttal witnesses. Sonja declined and rested her case. (App. 42; Aug. 1 TT at 77:9-13.)

Thereafter, during Sonja's closing argument, she did not establish a position about the Civil Action's value. Conversely, during Gary's closing, he specifically addressed the Civil Action, reiterating that the parties agreed Gary would pay Sonja \$25,000 from any proceeds he recovers from the Civil Action, and Gary "should be on his own" regarding the rest of the Civil Action, which was consistent with the Assets and Liabilities Exhibit and Gary's testimony. (App. 43-44; Aug. 1 TT at 100:15-101:11.)

After closing arguments, the circuit court gave its oral ruling, including addressing the Civil Action. To start, the court noted how little evidence there was in the record, stating "the only evidence that we have is the [D]emand [L]etter." (App. 45; Aug. 1 TT at 130:9-10.) It also acknowledged certain costs that would be associated with the Civil Action, such as a "big attorney fee cut[,] expenses and cost of collection." (*Id.*, Aug. 1 TT at 130:21-25.) The court further acknowledged the uncertainty of the outcome and "risk that [Gary] might not . . . recover anything[.]" (App. 46; Aug. 1 TT at 131:1-2.)

Nonetheless, the court *sua sponte* assigned \$350,000 as a value to the entirety of the Civil Action, which included the \$50,000 Retainer. (*Id.*; Aug. 1 TT at 131:13-15.) The court determined its value on the rest of the Civil Action as “10% of the ask” in the Demand Letter. (*Id.*; Aug. 1 TT at 131:13-15.) The court, in large part, based this determination on the firm Gary retained for the Civil Action, stating, “I’m allowed to take judicial notice of the fact that they’re an excellent law firm . . . and they typically don’t take junk litigation. So, you know, there’s some value there.” (App. 45; Aug. 1 TT at 130:14-20.) The court thereafter assigned Gary the Civil Action as a marital asset and allocated to Gary the remaining interest in the Civil Action. (*Id.*; Aug. 1 TT at 131:15-20.)

After the court’s oral ruling, Gary’s counsel sought clarification on the Civil Action. The court further explained that the \$50,000 Retainer was included because the parties “put that money down” for the Civil Action, and the extra \$300,000 figure was added because “if everybody that’s involved is a rational human being then the case must be worth at least 10% of the ask[.]” (App. 47; Aug. 1 TT at 141:8-14.)

The court then went on to explain a different valuation method it thought about using, but ultimately rejected, which would have taken the demand and cut it in half because Gary would be “happy [] to get half that,” then splitting the demand again “for risks,” and then taking one-third off “which would get it down to 500.” (App. 47-48; Aug. 1 TT at 141:15-142:3.) With that as a reference, the court stated it believed its “350 calculation is the most conservative calculation [it] could feel reasonably logically comfortable with for that business.” (App. 47, Aug. 1 TT 141:19-21.) The court then expressly conceded, “we don’t have a lot to work with, but [the Civil Action is] worth

something, and I have to have some kind of logical basis for determining value.” (*Id.*, Aug. 1 TT 141:21-24.) When Gary’s counsel again asked why the court was including the full Retainer instead of half of the Retainer like the parties agreed, the court simply responded that Gary does not “have to pay her the [\$]25,000 on top . . . if you guys wanted to settle the case then I mean I wasn’t following any of your methodologies that necessarily were pretrial negotiation strategies. So I’m just figuring, I think the case is worth [\$]350,000.” (App. 48-49; Aug. 1 TT at 142:15-143:6.)

Ultimately, the court issued its written Findings of Fact, which were based on the speculative nature of the lawsuit’s outcome, Gary’s intelligence and shrewdness, and representation by competent counsel. The relevant finding, Finding of Fact 98(dd), states:

Lines 57 – 66: Gary’s businesses are either disbanded or involved in a lawsuit. As evidenced in Exhibits 22 – 24 & 78, Gary has engaged legal counsel and made a demand regarding the monies he is owed. The value of the lawsuit and loans Gary put forth at trial are awarded to Gary in the amount of \$350,000. The Court finds that this amount includes the \$50,000 retainer paid to Davenport Evans Law Office from marital funds after the sale of their Okoboji real property and ten percent (10%) of the demand Gary has asserted he is owed. The Court’s rationale for this valuation was stated on the record. Gary is reckless but also intelligent and shrewd, and represented by competent counsel. The retainer is essentially an investment in a potential outcome and the demand is the best-case scenario for the outcome in the business lawsuit. Based upon all of the evidence in the case a valuation of Gary’s cause of action against his former business partners of the actual money he has invested in the case plus only 10% of his legal demand is a very conservative and rational valuation for the Court to make in this case.

(App. 21, ¶ 98(dd).) Gary explicitly objected to this finding. (*See* S.R. 1449; Defendant’s Objections to Plaintiff’s Findings of Fact and Conclusions of Law at 9.)

As a result of the court’s decision, Gary was erroneously attributed \$350,000 in marital assets that should not have been allocated to him. This created a snowball effect which inequitably impacted the rest of the distributions in the court’s division of

property. The decision of the circuit court regarding the valuation of the Civil Action should be reversed.

ARGUMENT

I. The circuit court abused its discretion when it chose to classify the entirety of the Civil Action as marital property, place a value on the entirety of the Civil Action, and allocate the entirety of the Civil Action to Gary.

The Civil Action is a separate, pending lawsuit that cannot be valued without speculation and conjecture. The entirety of the Civil Action should not have been included in the marital estate, should not have been assigned additional value, and that additional value should not have been wholly attributed to Gary. The record shows the parties agreed that Sonja was to be paid \$25,000 or half of the Retainer amount paid for the Civil Action. Neither party otherwise placed a value on the Civil Action or argued that the entirety of the Civil Action should be included in the marital estate, valued in its entirety, and distributed to Gary. When the circuit court decided to go beyond this arrangement, it abused its discretion.

“South Dakota is an all property state, meaning all property . . . is subject to equitable division, regardless of title or origin.” *Dunham v. Sabers*, 2022 S.D. 65, ¶ 39, 981 N.W.2d 620, 637 (quoting *Osdoba v. Kelley-Osdoba*, 2018 S.D. 43, ¶ 18, 913 N.W.2d 496, 502); accord SDCL § 25-4-44. A circuit court must therefore classify property as marital or nonmarital before dividing it. *Id.* (quoting *Ahrendt v. Chamberlain*, 2018 S.D. 31, ¶ 8, 910 N.W.2d 913, 918). In classifying property as marital or nonmarital, a circuit court has “broad discretion.” *Id.* (quoting *Ahrendt*, 2018 S.D. 31, ¶ 10, 910 N.W.2d at 918). Thus, “a circuit court’s decision to determine whether property is marital or non-marital [is reviewed] for an abuse of discretion.” *Field v. Field*, 2020 S.D.

51, ¶ 18, 949 N.W.2d 221, 225 (citing *Anderson v. Anderson*, 2015 S.D. 28, ¶ 8, 864 N.W.2d 10, 14).

There is no “rigid formula” or “fixed percentage” a circuit court must follow when dividing property. *Id.* ¶ 40, 981 N.W.2d at 637 (quoting *Osdoba*, 2018 S.D. 43, ¶ 19, 913 N.W.2d at 502). However, factors a court must consider when classifying and dividing property are:

(1) the duration of the marriage; (2) the value of the property owned by the parties; (3) the ages of the parties; (4) the health of the parties; (5) the competency of the parties to earn a living; (6) the contribution of each party to the accumulation of the property; and (7) the income-producing capacity of the parties’ assets.

Id. (quoting *Ahrendt*, 2018 S.D. 31, ¶ 10, 910 N.W.2d at 918).

Regarding spouses’ lawsuits in property division, this Court has held that settlement proceeds *received during a marriage* from a spouse’s separate personal injury lawsuit may be included in a marital estate. *Compare e.g., Johnson v. Johnson*, 2007 S.D. 56, ¶ 34, 734 N.W.2d 801, 810 (concluding the circuit court did not err in dividing settlement proceeds from the parties’ personal injury action); with *Fink v. Fink*, 296 N.W.2d 916, 917-18 (S.D. 1980) (holding the circuit court’s findings were not clearly erroneous and it did not abuse its discretion when it denied the wife a share of the husband’s personal injury settlement when the lawsuit arose prior to marriage and the proceeds were received after the wife filed for divorce). However, when a spouse’s separate lawsuit is still pending when a divorce is granted, any recovery may be excluded from the marital estate if there is insufficient evidence to place a present value on it.

In *Kappenmann v. Kappenmann*, for example, this Court affirmed the trial court’s decision to not consider the husband’s pending lawsuit in its distribution. 479 N.W.2d

520, 524-25 (S.D. 1992). In *Kappenmann*, the husband and wife were in a car accident together during their marriage. *Id.* at 521. At the time of their divorce, both had pending personal injury claims arising from the accident. *Id.* Evidence was introduced during the divorce proceedings that the wife had received a \$10,000 settlement offer, but she had rejected it. *Id.* No evidence was introduced regarding the husband's claim. *See id.*

Ultimately, the trial court did not include the husband's pending claim in the division of marital assets. *Id.* at 524. It did, however, include the wife's claim based on the actual settlement offer, but offset it using the husband's retirement account, which the court stated was equal in value. *Id.* The wife appealed, challenging among other things, the court's exclusion of the husband's personal injury claim in the division of marital assets. On appeal, the *Kappenmann* Court held that because the husband's personal injury claim was seemingly "nominal," there was generally no "disparity in the value of the assets" and the distribution was ultimately equitable. *Id.* at 525. Notably, the Court concluded the wife:

[F]ailed to meet her burden of proof and establish a value on [the husband's] personal injury claim To do so would have been relatively simple. It is not the trial court's responsibility to do this for her.

Id.

Indeed, as the *Kappenmann* Court affirmed, it is appropriate to exclude a pending lawsuit from a marital estate when there is nothing in the record regarding the value of the lawsuit or the other party has failed to meet their burden of establishing the value of that lawsuit. If there is insufficient evidence to establish the value of a pending lawsuit, not only could it be considered separate property from the marital estate, but it could also not be excluded from the marital estate in its entirety. *Cf. Wegner v. Wegner*, 391

N.W.2d 690, 694 (S.D. 1986) (citing *Fries v. Fries*, 288 N.W.2d 77, 81 (N.D. 1980)) (in ruling on a motion to vacate a property settlement agreement due to the husband's alleged failure to disclose a pending lawsuit as a marital asset, the circuit court found the husband's pending lawsuit had no known value at the time at divorce, and any value would be "speculative and conjectural."). This Court's ruling necessitates that there must be equity in the property division of a marital estate.

This approach was similarly reflected in *Ahrendt v. Chamberlain*, 2018 S.D. 31, ¶ 23, 910 N.W.2d at 921-22. In *Ahrendt*, the Court found no error when the circuit court concluded a Retiree Medical Allowance ("RMA") plan the husband's employer provided him had no value to include in the marital estate. *Id.* The circuit court concluded there was no present value because the RMA had no cash value, was not transferable, and it could not be accessed until the husband's retirement. *Id.* The court also noted the husband's employer was struggling financially, thus the plan had potential to be terminated or modified at the employer's discretion. *Id.* This Court agreed with the circuit court that "[b]ecause actual reimbursement of any specific amount was speculative . . . the RMA had no present value to include in the marital estate." *Id.*

Other courts have also ruled that pending lawsuits should be excluded from marital estates. In *Fries v. Fries*, for example, the North Dakota Supreme Court affirmed the exclusion of a lawsuit from the marital estate. 288 N.W.2d at 81. Relevantly, the husband cross-appealed and sought a determination of whether the lower court erred when it failed to consider the wife's separate, pending lawsuit in equitably dividing the marital property. *Id.* at 79. The North Dakota Supreme Court agreed with the trial court

that the wife's pending personal injury claim was far too speculative to include in a property division of a marital estate. *Id.* at 81. The court reasoned:

There is *no method* by which a trial judge can place a monetary value on such a claim without engaging in conjecture and speculation. We do not know whether or not such claim may ever result in any monetary compensation to [the wife].

Id. (emphasis added). See also *Kluck v. Kluck*, 1997 N.D. 41, ¶ 28, 561 N.W.2d 263, 270 (citations omitted) (“Where receipt of future benefits is speculative, we have held the potential benefits should not be valued as assets in the marital estate.”); *Paulson v. Paulson*, 2010 N.D. 100, ¶ 19, 783 N.W.2d 262, 271 (citing 27B C.J.S. *Divorce* § 852 (2009)) (“In order to be considered a property asset in the marital estate, the property must be a present property interest, rather than a mere expectancy.”).)

The Court of Appeals of Nebraska has also addressed a spouse's pending personal injury claim. During the marriage in *Mathew v. Palmer*, the wife initiated a medical malpractice action for personal injuries she sustained from surgery. 589 N.W.2d 343, 348 (Neb. App. 1999). The malpractice action was pending when the parties were granted a divorce. *Id.* at 351. The trial court determined the malpractice action was the wife's separate property. *Id.* at 348. On appeal, the husband argued the action was marital property, citing various reasons why the wife's injuries affected the marriage and diminished the marital estate. *Id.* In conducting its analysis, the appellate court noted, “[t]here is no definitive evidence on the status of the malpractice action or the elements of damage” related to it. *Id.* Thus, the court concluded the wife had met her burden in showing the injuries in the malpractice action were personal to the wife and “not includable in the marital estate.” *Id.*

Keeping with this same logic, this Court has also determined that speculative “contingent liabilities” may not be considered as part of the marital estate when dividing property. *See Hansen v. Hansen*, 302 N.W.2d 801, 802 (S.D. 1981) (“Speculative contingent liabilities should not be considered in apportioning the parties’ assets for purposes of a property division.”); *Larson v. Larson*, 2007 S.D. 47, ¶ 15, 733 N.W.2d 272, 276 (husband’s personal guaranteed loan was a contingent liability and was properly disregarded for purposes of computing the husband’s assets); *Goeden v. Goeden*, 2024 S.D. 51, ¶¶ 39-40, 11 N.W.3d 768, 780-81 (concluding the circuit court did not err in denying husband credit for his anticipated realtor and closing costs related to his sale of his home “because of the lack of evidence of an intention to sell and the uncertainties of what costs would exist in the future if and when [the husband] did sell.”). The same logic should therefore apply to speculative assets, as exist in this case.

Here, in accordance with the logic of this Court’s case law and other appellate courts who have had the opportunity to address similar issues, the Civil Action should not have been included in the marital estate (outside of the agreed-upon \$25,000 Retainer payment to Sonja), it should not have been valued beyond the parties’ agreement, and it should not have been allocated to Gary as a marital asset.

Indeed, the Civil Action is still pending. There is no definitive evidence in the record that could have appropriately established a present value on the lawsuit beyond the parties’ agreement. Neither party placed a specific value on the Civil Action in the Assets and Liabilities Exhibit beyond repayment for the Retainer. Beyond this, Gary explicitly testified the parties agreed he would retain all interest in the Civil Action and that interest was to be treated as separate, non-marital property.

Sonja's inaction also supports this result. Sonja did not dispute the existence of the agreement or even clarify her position on it. She likewise did not dispute Gary's understanding of the agreement and did not question Gary further about his understanding of the agreement. In short, Sonja has not presented any evidence and has not argued that she has "contributed in any way to the acquisition or maintenance of this asset [beyond the agreed-upon \$25,000]. Nor has she argued or established that she is in financial need of this asset." *Evens v. Evens*, 2020 S.D. 62, ¶ 34, 951 N.W.2d 268, 280. As such, Sonja has failed to meet her burden in establishing the Civil Action as a marital asset and anything beyond the parties' agreement should have been excluded from the marital estate.

The court's allocation ultimately led to an inequitable result. Alone, it is inequitable to be assigned an asset that does not actually have a present value. Further, because the entirety of the Civil Action was included as a marital asset to Gary, the court allocated other assets to Sonja to try to reach an equitable division of property. However, because Gary should not have been allocated the full value of the Civil Action, these additional assets should not have been distributed to Sonja to make up for the same. Indeed, Sonja received additional, inequitable assets because of the court's inclusion of the entirety of the Civil Action.

The circuit court stepped outside the bounds of its discretion when it included the entirety of the Civil Action as a marital asset. It is not the trial court's responsibility to place a value on property when the parties have intentionally omitted that same property from the estate, and particularly — as in this case — the record does not support doing

so. This Court should determine the circuit court abused its discretion in including the Civil Action in the marital estate and remand the case for reconsideration the same.

II. The circuit court clearly erred when it valued the Civil Action at \$350,000.

In conjunction with the circuit court abusing its discretion in including the entirety of the Civil Action in the marital estate, its factual finding that the Civil Action is valued at \$350,000 is clearly erroneous in itself. This is particularly problematic because the circuit court's erroneous valuation impacted how the court classified and distributed the remaining marital property.

In South Dakota, the valuation of assets in divorce cases is primarily the responsibility of a circuit court as the trier of fact, but this Court will step in "when the valuation is clearly erroneous." *Dunham*, 2022 S.D. 65, ¶ 63, 981 N.W.2d at 642. Overturning a circuit court's finding of fact is warranted when "a complete review of the evidence leaves [this] Court with a definite and firm conviction that a mistake has been made." *Id.* (alteration in original) (quoting *Giesen v. Giesen*, 2018 S.D. 36, ¶ 26, 911 N.W.2d 750, 757). Indeed, although the circuit court's valuation of assets "does not have to be exact[.]" it "must fall within a reasonable range of figures, based on the evidence presented at trial." *Id.* (cleaned up) (quoting *Conti v. Conti*, 2021 S.D. 62, ¶ 26, 967 N.W.2d 10, 17). Further, absent special circumstances, "the date of valuation of the marital estate is generally the date of the granting of divorce." *Conti*, 2021 S.D. 62, ¶ 26, 967 N.W.2d at 17 (quoting *Pieper v. Pieper*, 2013 S.D. 98, ¶ 41, 841 N.W.2d 781, 789).

The circuit court should support their valuations from the record and make rational decisions therefrom. *E.g.*, *Osdoba*, 2018 S.D. 43, ¶ 15, 913 N.W.2d at 501-02 (concluding that based on the record, the circuit court's valuation of the marital home at net value instead of market value was not clearly erroneous). Even in cases where

evidence to support a valuation is one-sided, a circuit court must still rely on the evidence that exists in the record. *See Evens*, 2020 S.D. 62, ¶ 39, 951 N.W.2d at 281 (agreeing with the circuit court's acceptance of the husband's expert valuation when the wife did not provide any counterevidence). When a court fails to support its valuation from evidence in the record, its valuation is clear error. *See e.g., Conti*, 2021 S.D. 62, ¶¶ 23-27, 967 N.W.2d at 16-17 (holding a circuit court's valuation of the marital residence was clearly erroneous because evidentiary testimony and the exhibit specifically referenced by the court were contrary to its valuation); *Johnson*, 2007 S.D. 56, ¶¶ 37-39, 734 N.W.2d at 810-11 (concluding the circuit court clearly erred when it valued property using different valuation dates for "no apparent reason").

Under the same cases discussed in the aforementioned section of this brief, the circuit court's valuation of the Civil Action was clearly erroneous. A pending lawsuit cannot be valued without definitive evidence, and even then, the valuation may be suspect. But the court's valuation here was not based on definitive evidence; rather, it was solely based on speculative and conjectural figures. The parties submitted the Assets and Liabilities Exhibit which showed that neither side believed the entirety of the Civil Action had a present value. Moreover, neither party asked the circuit court to value the entirety of the Civil Action. The parties simply agreed that if Gary obtains proceeds from the Civil Action, he will reimburse Sonja \$25,000 for the Retainer that was paid from marital funds. As further evidence of this agreement, Gary testified that the parties also agreed he would retain all interest in the lawsuit, besides the \$25,000 of the Retainer which would be paid to Sonja. Sonja did not dispute this through her own evidence, her

own testimony, her cross-examination of Gary, or in her closing argument. Indeed, both parties agreed on the Civil Action's valuation and the record reflects this.

Nonetheless, the circuit court *sua sponte* determined it was going to value the Civil Action at \$350,000. The circuit court's valuation, however, was wholly unsupported from the record. Stated another way, its ten percent figure was not "within a reasonable range of figures, based on the evidence presented at trial." *Dunham*, 2022 S.D. 65, ¶ 63, 981 N.W.2d at 642. Neither party suggested the demand as a starting point for the valuation, because neither party placed a value on the Civil Action. Simply put, a demand is simply a request with no guarantee it will even be responded to, let alone paid. Indeed, a litigation demand, without more, should not be used as a reasonable basis for determining the value of an overall litigation to be included in a marital estate.

Yet, that is precisely what the circuit court did in this case. While the circuit court considered various factors (i.e., Gary's law firm, his intelligence, etc.) to reach its valuation, these factors should not be used in determining the value of a substantial asset and/or liability. Indeed, retaining a certain law firm, for example, does not mean a case will produce a certain result. *Accord* Rule 7.1(c), South Dakota Rules of Professional Responsibility, SDCL § 16-18-A. As the court even acknowledged in its oral findings, Gary could potentially recover nothing from the Civil Action, which is precisely why a pending lawsuit cannot have an articulable value until it is resolved.

The inclusion of the full Retainer amount in the valuation was also erroneous. The record supported the agreement for Gary to pay Sonja \$25,000 from any proceeds he recovered from the Civil Action. Gary's counsel reiterated this when seeking clarification on the circuit court's ruling, and the Court acknowledged it. Yet, the court still decided to

include the full Retainer in its valuation because that was what was “put down.” (App. 47; Aug. 1 TT at 141:8-14.) If the Court considered the full Retainer to be marital property, and the parties agreed to essentially split the retainer, then there was no rational basis for the Court to stray from the parties’ agreement and allocate the full Retainer to Gary.

In sum, the circuit court’s valuation of the Civil Action was clearly erroneous because it was based on speculation and conjecture. The Civil Action is still pending and cannot reasonably have a value placed on it. The ten percent figure the circuit court applied was not based on evidence in the record. The inclusion of the full retainer was also unsupported from the record. Gary thus asks this Court to reverse and remand the circuit court’s factual findings and instruct the court to exclude the Civil Action from the marital estate or issue a valuation that is supported from the record.

CONCLUSION

The circuit court abused its discretion when it decided, *sua sponte*, to value and classify the entirety of the Civil Action contrary to what was presented in the record. In addition to the court abusing its discretion, its valuation of the Civil Action itself was clearly erroneous. When this \$350,000 “asset” was assigned to Gary in the property division, it inequitably impacted the remainder of the division. This Court should reverse the circuit court’s Findings of Fact and Conclusions of Law and remand the case “for the entry of valuation findings and a reconsideration of an equitable division of the property.” *Huffaker v. Huffaker*, 2012 S.D. 81, ¶ 13, 823 N.W.2d 787, 791 (quoting *Farlee v. Farlee*, 2012 S.D. 21, ¶ 10, 812 N.W.2d 501, 504).

Dated at Sioux Falls, South Dakota, this 10th day of March, 2025.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.

A handwritten signature in black ink, appearing to read "Mitchell Peterson", written over a horizontal line.

Mitchell A. Peterson
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Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellant complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 365, this Brief contains 5,349 words and 26,549 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 points) and was prepared using Microsoft Word 365.

Dated at Sioux Falls, South Dakota, this 10th day of March, 2025.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Brief of Appellant" was filed electronically with the South Dakota Supreme Court and that the original was filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on the 10th day of March, 2025.

The undersigned further certifies that an electronic copy of "Brief of Appellant" was served electronically to the attorneys set forth below, on the 10th day of March, 2025:

Rachel Preheim
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rachel@lockwoodlaw.com
Attorneys for Appellee

Dated at Sioux Falls, South Dakota, this 10th day of March, 2025.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.



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APPENDIX

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A

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	ss:	
COUNTY OF LINCOLN)	SECOND JUDICIAL CIRCUIT
<hr/>		
SONJA R. KING)	
)	
Plaintiff,)	41DIV. 23-90
)	
v.)	
)	JUDGMENT & DECREE
GARY A. KING)	OF DIVORCE
)	
Defendant.)	
<hr/>		

This action came before the Court, the Honorable Douglas Hoffman, Circuit Judge presiding, on July 30 – August 1, 2024, at the Lincoln County Courthouse, Canton, South Dakota. The Plaintiff, Sonja R. King, being personally present and represented by Rachel Preheim, Lockwood & Zahrbock Kool Law, and the Defendant, Gary A. King, being personally present and represented by Thomas Frankman, Davenport & Evans Law;

It satisfactorily appearing to the Court that the Plaintiff and Defendant were duly and legally married on the 10th day of May, 2004 in the Country of Jamaica and both parties are bona fide residents of the State of South Dakota, for all times relevant hereto; and

It further satisfactorily appearing to the Court that the Judgment herein rendered should be in all things entered, Defendant having been served with a true and correct copy of the Summons and Complaint of the Plaintiff, and more than 60 days having elapsed since service thereof, and the Court having jurisdiction of the parties and subject matter, and the making and entering of written Findings of Fact and Conclusions of Law being executed by the Court on the 18th day of September, 2024, it is hereby,

ORDERED, ADJUDGED AND DECREED that the bonds of matrimony heretofore existing between Plaintiff and Defendant be and the same are forever dissolved, and the Plaintiff is hereby granted an absolute Decree of Divorce on the grounds of adultery and extreme cruelty pursuant to SDCL 25-4-2(1) and SDCL 25-4-2(2), and the parties hereto are restored to the rights, status and conditions of single persons; and it is further

ORDERED, ADJUDGED AND DECREED that the written Findings of Fact and Conclusions of Law executed by the Court on the 18th day of September, 2024 are by this reference made a part hereof and incorporated in this Decree of Divorce; and it is further

ORDERED, ADJUDGED AND DECREED that Pursuant to SDCL 25-4A-5, if the court finds that any party has willfully violated or willfully failed to comply with any provisions of the custody or visitation decree, the court shall impose appropriate sanctions to punish the offender or to compel the offender to comply with the terms of the custody or visitation decree.

The court may enter an order clarifying the rights and responsibilities of the parents and the court's order. The court may order one or more of the following sanctions:

- a. To require the offender to provide the other party with make up time with the child equal to the time missed with the child, due to the offender's noncompliance;
- b. To require the offender to pay, to the other party, court costs and reasonable attorney's fees incurred as a result of the noncompliance;
- c. To require the offender to pay a civil penalty of not more than the sum of one thousand dollars;
- d. To require the offender to participate satisfactorily in counseling or parent education classes;

- e. To require the offender to post bond or other security with the court conditional upon future compliance with the terms of the custody or visitation decree or any ancillary court order;
- f. To impose a jail sentence on the offender of not more than three days; or
- g. In the event of an aggravated violation or multiple violations, the court may modify the existing visitation or custody situation, or both of any minor child.

The provisions of this section do not prohibit the court from imposing any other sanction appropriate to the facts and circumstances of the case.

10/10/2024 9:31:49 AM

BY THE COURT:


Hon. Douglas Hoffman

Circuit Court Judge

Attest:
Baker, Teresa
Clerk/Deputy



B

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of October, 2024, she filed a true and correct copy of NOTICE OF ENTRY OF JUDGMENT & DECREE OF DIVORCE via electronic filing with the Clerk of Courts using the Odyssey File and Service System which transmits notice of said electronic filing directly to counsel of record, intending said service upon counsel as indicated and addressed below:

Thomas M. Frankman
Davenport Evans Hurwitz and Smith
206 W 14th Street
Sioux Falls, SD 57101

Dated this 16th day of October, 2024, at Sioux Falls, South Dakota.

/s/ Rachel Preheim
Rachel Preheim
Lockwood & Zahrbock Kool Law Office
121 S. Franklin Ave. Suite 1
Sioux Falls SD 57103
605-331-3643
Attorney for Plaintiff

C

STATE OF SOUTH DAKOTA

)

IN CIRCUIT COURT

COUNTY OF LINCOLN

ss:

)

SECOND JUDICIAL CIRCUIT

SONJA R. KING

)

)

Plaintiff,

)

41DIV. 23-90

)

v.

)

GARY A. KING

)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

)

Defendant.

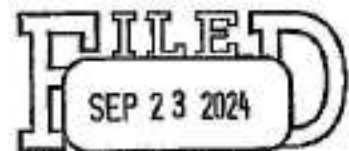
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This action came before the Court, the Honorable Douglas Hoffman, Circuit Judge presiding, on July 30 – August 1, 2024, at the Lincoln County Courthouse, Canton, South Dakota. The Plaintiff, Sonja R. King, being personally present and represented by Rachel Preheim, Lockwood & Zehrbock Kool Law, and the Defendant, Gary A. King, being personally present and represented by Thomas Frankman, Davenport & Evans Law; the Court having heard testimony and evidence presented by both parties; the Court having considered all of the records on file herein; and this Court having jurisdiction over this matter, and for good cause appearing, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT:

1. Plaintiff, hereinafter referred to as "Sonja," was born on the 23rd day of November, 1978.
2. Sonja currently resides at 8504 S. Quiet Oak Circle; Sioux Falls, SD 57108.
3. Defendant, hereinafter referred to as "Gary," was born on the 22nd day of November, 1974.



Lincoln County, S.D.
Clerk Circuit Court
Appellant Appx. 006

4. As of the date of trial Gary was residing at an AirBnB located at 891 14th Street, Unit 2714; Denver, CO 80202.
5. The parties were married on the 10th day of May, 2004 in the Country of Jamaica.
6. Two children were born of the marriage, namely, Hudson Alexander King, born on the 12th day of June, 2009; and Landon Bradley King, born on the 5th day of January, 2012.
7. Sonja filed for divorce on the 30th day of May, 2023 in Lincoln County, South Dakota on the grounds of extreme cruelty, willful desertion, and adultery.
8. Sonja sought primary legal and physical custody of the minor children; child support; equitable division of marital property; alimony; and attorney fees. *See Verified Complaint filed May 30, 2023.*
9. Gary was served via a civil process server, Carla Baker, on the 15th day of June, 2023. Specifically, Gary was served with the Notice of Appearance; Summons; Verified Complaint; Plaintiff's Interrogatories & Request for Production of Documents to Defendant (First Set); and South Dakota Parenting Guidelines. *See Affidavit of Service filed June 16, 2023.*
10. Gary filed an Answer to Verified Complaint on the 6th day of September, 2023. *See Answer to Verified Complaint filed September 6, 2023.*
11. Sonja has a journalism major from the University of Nebraska – Lincoln. After receiving her degree, Sonja worked in North Carolina as an administrative assistant at the YMCA. Sonja relocated to Sioux Falls after 9/11 to be near family and began working at Wells Fargo, first as a temporary job before moving into a mortgage banker role. Sonja went on to start a private mortgage group, which was disbanded in

2013 when Sonja's primary role became being a mother to the parties' minor children and wife.

12. At other times during the pendency of the parties' marriage, Sonja did work part-time as a fitness instructor and at Lululemon in Sioux Falls, South Dakota.
13. During the pendency of the divorce, Sonja worked various jobs to make ends meet, including substitute teaching; cleaning houses; flipping real estate; and working at Bagel Boy.
14. Sonja is currently employed at KN Construction, Inc. in Harrisburg, South Dakota with her work hours typically being from 8 AM until 5 PM Monday – Friday with the occasional weekends. Sonja earns a salary of \$65,000 per year at KN Construction, Inc. *See Exhibit 64.*
15. Sonja provides health insurance for herself and the minor children through her employment. *See Exhibit 65.*
16. Gary attended the University of Sioux Falls before moving to Omaha, Nebraska to obtain a Master's Degree from Creighton University. After graduation, Gary worked for Mutual of Omaha as a senior underwriter.
17. In 2011, Gary launched Cypress Risk Management.
18. Gary has been involved in various business ventures throughout the parties' marriage.
19. Gary has a pending lawsuit against his former business partners in which Gary is represented by competent counsel and wherein he claims in a legal pleading drafted by counsel and filed with the Circuit Court under SDCL 15-6-11 that he is owed \$1,369,871.96 by said defendant business partners under promissory notes with

- interest accruing. Gary has asserted in legal correspondence that he is owed at least \$1,646,129.66 due for loans, advances, and expenditures. See Exhibits 22 & 23.
20. Gary's lawsuit against his former partners was filed in Lincoln County, South Dakota in August 2023. See Exhibit 24.
21. Gary's lawsuit against his former business partners was introduced into evidence when Gary was questioned by his attorney regarding the lawsuit and the demand letter put forth in Exhibit 22.
22. Gary is under federal indictment for sixteen (16) counts of various charges, specifically: wire fraud; money laundering; bank fraud; and mail fraud stemming from a Grand Jury indictment filed on February 29, 2024 in the United States District Court of South Dakota Western Division. See Exhibit 27.
23. As a result of Gary's actions within Cypress Risk Management LLC, Gary's South Dakota Resident Insurance Producer License was revoked. The South Dakota Business Entity License of Cypress Risk Management LLC was also revoked by the South Dakota Department of Labor and Regulation Division of Insurance. See Exhibit 26.
24. Findings of Fact and Conclusions of Law regarding Gary and Cypress Risk Management LLC were entered by the South Dakota Department of Labor and Regulation Division of Insurance were signed on the 8th day of March, 2023 with the proposed decision including revocation of Gary's insurance producer license; Cypress Risk Management LLC should be revoked; and that Gary and Cypress Risk Management LLC should be permanently enjoined from transacting insurance business in South Dakota. See Exhibit 26.

25. Student Assurance Services, Inc. initiated a civil suit against Cypress Risk Management, LLC and Gary. *See* Exhibit 25. Student Assurance Services, Inc. received a Default Judgment in the amount of \$708,076.08. *See* Exhibit 26.
26. The Student Assurance Services, Inc. Judgment has a lien against two real properties owned by the parties; specifically, 8504 S. Quiet Oak Circle; Sioux Falls, SD 57108 and 38148 297th Street; Lot 14; Lake Andes, SD.
27. Gary is currently unemployed but is seeking employment.
28. Gary's Social Security Statement shows that his income in 2022 was \$292,000. *See* Exhibit 73.
29. Gary can earn an income of at least what Sonja is making as he is educated and well spoken.
30. Sonja was awarded primary physical custody of the minor children during the pendency of this matter. *See* Order from Hearing on November 8, 2023.
31. In the fall of 2023, the minor children began therapy with Larry L Dancier, MS, QMHP at Stronghold Counseling Services, Inc.
32. Initially, the minor children were engaged in sessions on a bi-weekly basis, but this has since evolved into appointments on a monthly basis.
33. Gary was involved in three (3) of the sessions.
34. Mr. Dancier testified that the minor children do not have an interest in spending time with Gary. Mr. Dancier described the relationship between the minor children and their father as sterile.

35. Mr. Dancier had not experienced such apathy on the part of teenage children and lack of forward movement to repair the father-son relationship in his forty (40) years of practice.
36. Mr. Dancier does not recommend forcing the minor children to spend time with their father as the same would be detrimental to their wellbeing and further damage the parent/child relationship and undermine any remaining hope of eventually healing the parent/child relationship.
37. The minor children have witnessed law enforcement come to the marital home looking for Gary.
38. The minor children are aware that their father has been on the news regarding his legal matters involving Cypress Risk Management LLC.
39. The minor children are aware of Gary's legal charges and have experienced embarrassment and shame as a result.
40. The elder son is the individual who discovered disturbing photos on his iPad in relation to his dad's actions, including but not limited to his affairs.
41. Gary's messages to the boys are inappropriate when blaming their mother and discussing the legal proceedings. See Exhibit 82.
42. Sonja has not affected the therapeutic relationship between the minor children and Mr. Dancier. Sonja is not to blame for the boys indifference towards their father as the boys have grown up in a one parent environment given Gary's consistent absence from the home.
43. Sonja is not molding Mr. Dancier's opinions, nor does Mr. Dancier believe that parental coaching has occurred. Rather, the children's reactions to their father at this

time are consistent and a natural response to his reprehensible conduct toward themselves, their mother, and the law.

44. When pressed on cross-examination, Mr. Dancier made clear that there was a lack of movement when Gary was involved and forcing involvement would be damaging to the minor children. Gary needs to take accountability for his actions and apologize and seek forgiveness to resuscitate his relationship with his sons.
45. The minor children are of an age to speak regarding their preferences for custody. The minor children do not want to spend time with their father currently and need time to process their trauma from him, as well as for Gary to take accountability for his actions.
46. Mr. Dancier is known to the Court through his professional testimony in many prior complex custody cases over many years to be a competent and well-respected family therapist, and his testimony in this case was rational, appeared to be predicated upon reasonable professional judgment, and was deemed highly credible by this Court.
47. The minor children are intelligent and active young men who are doing well in their current custodial arrangement and the evidence shows that they are not being unduly influenced but are rather experiencing a normal reaction to betrayal by their father.
48. Sonja is in counseling with Elli Larsen at Stronghold Counseling Services, Inc.
49. Ms. Larsen testified that Sonja's sessions commenced in October 2023.
50. Ms. Larsen testified that Sonja is working on overcoming psychological trauma from Gary, which involves domestic violence or intimate partner violence therapy, and working through her experiences of coercion/threats; emotional abuse; isolation; blaming the partner; and manipulation of her children by Gary over several years.

51. Sonja is making progress in therapy by empowering herself; learning and gaining an understanding of the financials that she was previously not privy to; and finding a strong support system.
52. Sonja is still navigating how to respond to Gary's messages and the emotional abuse she has endured. *See Exhibits 83 & 84.*
53. Ms. Larsen does not have concerns regarding Sonja's ability to parent or Sonja's ability to make sound legal decisions for the minor children.
54. Ms. Larsen is known to the Court through her professional testimony in many complex family law cases to be competent and well respected in her professional field and the Court found her testimony to be credible in this case.
55. Gary engaged in an extra marital affair with Leah Bettin, although the two did not have sexual relations.
56. Ms. Bettin worked for Let It Fly during the time Gary had an ownership interest in the same, which is how they met.
57. While Ms. Bettin stated that sexual intercourse did not occur, Ms. Bettin and Gary had an inappropriate relationship that negatively affected his marriage with Sonja. *See Exhibit 57.*
58. Gary spent lavishly on Ms. Bettin, including but not limited to travel; restaurants; shopping; strip club private room; gambling; alcohol and drugs.
59. Ms. Bettin kept a record of the money Gary spent on her that totaled over \$100,000 from approximately 2020 – 2021. *See Exhibit 56.*

60. Exhibit 56 details that Ms. Bettin traveled with Gary to Scottsdale, AZ; New York, NY on two (2) occasions; Deadwood, SD; and Las Vegas, NV throughout their relationship.
61. Exhibit 56 details that Gary paid for Ms. Bettin's trip to Grenada; Gary provided Ms. Bettin with spending money on a regular basis; and Gary provided Ms. Bettin with a vehicle.
62. Exhibit 57 evidences that Gary gave Ms. Bettin his credit card information and told her to order anything she wanted. See Exhibit 57, pages 408 & 410.
63. Ms. Bettin testified that Gary drank to the level of intoxication and utilized illegal substances.
64. Gary would regularly gamble.
65. Gary asked Ms. Bettin to be his wife. See Exhibit 57, page 434.
66. Ms. Bettin is currently thirty (30) years old and currently resides in Sioux Falls, South Dakota. In essence, Gary was the paradigm of a "Sugar Daddy" for Ms. Bettin.
67. Sonja was not aware of Ms. Bettin and Gary's relationship nor the money spent by Gary on and for Ms. Bettin.
68. Ms. Bettin's testimony was credible and the Court concluded that she testified truthfully and essentially confessed the nature of her relationship with Gary to Sonja from the witness stand.
69. Gary engaged in sexual relations with Tiffany Wilber while married to Sonja.
70. Ms. Wilber is currently the owner of Deaf Services Unlimited in Des Moines, IA.
71. Ms. Wilber met Gary in 2018 at McNally's Irish Pub in Sioux Falls, South Dakota.

72. Gary held himself out as going through a divorce from the onset of his relationship with Ms. Wilber.
73. Ms. Wilber was previously hired by Gary to do interior design work at two businesses that Gary had an ownership interest in within Deadwood, SD.
74. Ms. Wilber believes she was paid by Rushmore Gaming and received benefits including health insurance.
75. Gary provided Ms. Wilber with a Porsche Cayenne to drive.
76. Sonja was not aware of Ms. Wilber's use of the vehicle.
77. Ms. Wilber assisted Gary in looking for a residence in the Deadwood-Sturgis area as she is also a real estate agent.
78. Ms. Wilber assisted Gary in securing the residence located at 11962 Big Piney Road; Sturgis, SD ("Big Piney").
79. Ms. Wilber and her son assisted in demolition work at Big Piney.
80. Ms. Wilber spent time, including overnights with Gary, at Big Piney.
81. Ms. Wilber traveled with Gary on numerous occasions, including but not limited to New York; Florida; Arizona; California; Wisconsin; Nevada; and Israel. See Exhibit 60.
82. Gary, or his business(es), would pay for the travel Ms. Wilber experienced during her relationship with Gary.
83. Josh Miller testified that Ms. Wilber traveled with Gary and he was threatened by Gary not to tell Sonja.
84. Gary was generous in giving gifts, including but not limited to jewelry and shoes. Gary spent over \$10,000 on gifts for Ms. Wilber.

85. Gary would get upset if Ms. Wilber paid for things.
86. Gary met Ms. Wilber's family, including her children, and spent holidays with Ms. Wilber and her children.
87. Gary held Ms. Wilber out as his wife in Deadwood, SD.
88. Gary engaged in correspondence with Ms. Wilber regarding the pending divorce, including attempts to influence her testimony prior to depositions. See Exhibit 58.
89. Gary invited Ms. Wilber to Denver in May 2024, paying for a flight and Denver Nuggets NBA tickets for her. See Exhibit 58.
90. Ms. Wilber did attempt to go to the marital residence and confess the affair and apologize to Sonja but was threatened by Gary.
91. Ms. Wilber does not believe Gary was truthful with her or his wife.
92. Ms. Wilber explained that Gary was controlling and would threaten her.
93. Ms. Wilber's testimony was credible. It was evident to the Court from observing Ms. Wilber's manner while testifying and her tone and statements that she was ashamed of her conduct in having a relationship with Gary. The tenor of her testimony was that she was essentially hoodwinked into believing that Gary was leaving his wife and that Ms. Wilber and Gary were a couple with a future together, and when she realized that she had been misled, she was ashamed for her own foolishness as well as how her conduct had contributed to harming Sonja and the boys.
94. Each party set forth their respective position regarding the distribution of property in Exhibit 1.
95. The parties did engage in formal discovery requests under the Rules of Civil Procedure.

96. The parties were not subjected to a Pre-Trial Order by the Court.

97. Exhibit 1 details the assets and debts the Court considered in its determination of equitable division of property.

98. Exhibit 1:

- a. Line 7: The value of 8504 S. Quiet Oak Circle; Sioux Falls, SD 570108 was stipulated to by the parties at \$791,000. This real property is awarded to Sonja subject to its mortgage as detailed in Exhibit 31.
- b. Line 8: Dean Sternhagen testified regarding his price opinion and the listing agreement he had with the parties. *See* Exhibits 2 – 3. Mr. Sternhagen had issues with Gary during the time the property was ordered to be sold as Gary frustrated the process and threatened Dean. *See* Exhibit 4. Gary rented out the property as an AirBnB during the pendency of this divorce despite a Court Order requiring him to refrain from such activity without the consent of Sonja. *See* Exhibits 4; 74; and 90. Gary did not share any profits from the AirBnB rental with Sonja nor utilize the profits towards marital debt. Gary is awarded the real property at a value of \$479,000 subject to its mortgage as detailed in Exhibit 30.
- c. Line 9: Big Piney is currently listed for sale at a price of \$1,649,000. *See* Exhibit 5. The parties agree that the property shall remain for sale. Larry Gehle, Chief Risk Officer at First National Bank, testified that the property was supposed to be renovated and sold but the same did not occur. Gary would consistently inform the Bank that the home was almost ready to be put on the market; however, the bank incurred additional costs in the form of a

construction loan to complete the renovations. The bank also had to bring the property current in its outstanding bills. Gary has engaged a bankruptcy attorney to assist with the dealings of the Big Piney property. Exhibit 28 details the loan payoff amount, including the note balance for advances the bank had to incur for the property to be in marketable condition. Exhibit 29 details the closing statement from the purchase of the property and evidences the \$500,000 deposit Gary paid towards the home, which correlates to Counts 11 and 13 of Gary's federal indictment (Exhibit 27). Upon the sale, any proceeds shall be applied to the outstanding loans with First National Bank. Any remaining proceeds shall be applied to the Cypress Risk Management Debt (Exhibits 35 – 36) and the Student Association Services Debt (Exhibit 25). Gary shall be solely responsible for any and all costs associated with the Big Piney property and the Cypress Risk Management Debt (Exhibits 35 – 36) and the Student Association Services Debt (Exhibit 25) and shall indemnify and hold harmless Sonja for the same.

- d. Line 12: 2021 Audie SQ7 is awarded to Sonja at a value of \$60,931. See Exhibit 6. Sonja is responsible for the debt associated on Line 79. See Exhibit 37.
- e. Line 13: Infiniti G35x is property used by the parties' minor child, Hudson. See Exhibit 7.
- f. Line 14: 2021 Porche Cayenne is primarily driven by Gary. Bryan Launderville testified that Gary has not been financially responsible regarding this vehicle and Gary's mother signed a personal guarantee regarding the

vehicle to prevent the bank repossessing the same. *See* Exhibit 34. The Porche is awarded to Gary at a value of \$63,249. *See* Exhibit 8. Gary is responsible for the debt associated on Line 76, *See* Exhibit 33.

- g. Line 15: the 1973 Chevy Blazer was sold by Gary, without the knowledge or consent of Sonja, at an auction in May 2024. Gary retained the funds he received from the auction without the consent of Sonja or a Court Order. *See* Exhibit 90.
- h. Line 16: Gary sold the 1947 Jeep during the pendency of this action without the knowledge or consent of Sonja and kept the funds.
- i. Line 17: 1973 Ford Mustang is awarded to Gary at a value of \$40,000. *See* Exhibit 77.
- j. Line 20: Wells Fargo checking (2670) is awarded to Sonja. *See* Exhibit 9.
- k. Line 21: Wells Fargo Savings (7592) is awarded to Sonja. *See* Exhibit 10.
- l. Line 22 – 24: Omitted as non-disputed closed accounts.
- m. Line 25: Wells Fargo Savings (1231) is for the minor child and awarded to Landon. *See* Exhibit 11.
- n. Line 26: Wells Fargo Checking (4132) is for the minor child and awarded to Hudson. *See* Exhibit 12.
- o. Line 27: Wells Fargo Savings (7604) is for the minor child and awarded to Hudson. *See* Exhibit 13.
- p. Line 28: Wells Fargo Checking (9430) is awarded to Gary. *See* Exhibit 14.
- q. Line 29: First Dakota Checking (0196) is awarded to Gary.

- r. Line 30: Farmer's State Bank Checking (7103) is awarded to Gary. *See* Exhibit 15.
- s. Line 31: Gary is awarded his PayPal account. *See* Exhibits 18 & 91.
- t. Line 32: Sonja is awarded her Venmo account. *See* Exhibit 16.
- u. Line 33: Sonja is awarded her PayPal account. *See* Exhibit 17.
- v. Line 34 - 42: The Court does not put a value on these lines.
- w. Line 45: Edward Jones (1282) contains Lululemon Stock in the amount of \$13,740 that is awarded to Sonja at said value. The remainder of the account, at a value of \$6,037 is awarded to Gary. *See* Exhibits 19 - 20.
- x. Line 46: Edward Jones IRA (4227) is awarded to Sonja. *See* Exhibit 19.
- y. Line 47: Edward Jones Roth IRA (4148) is awarded to Sonja. *See* Exhibit 19.
- z. Lines 48 - 49: These Edward Jones Accounts are for the minor children, Sonja is the proper person to manage these accounts on behalf of the minor children.
- aa. Line 50: Swift Fuels is awarded to Gary at the value of \$50,000 pursuant to Gary's testimony that he paid \$50,000 for fifty (50) shares when purchased through his company, KV Holdings. Gary went on to testify that he purchased shares in 2021 or 2022 and the same are not publicly traded and that his intent was to sell the shares to a major conglomerate after approximately ten (10) years.
- bb. Line 51: Cega Innovations is awarded to Gary at a value of \$20,000. Pursuant to Gary's testimony, the K-1 statement associated with this line item that he purchased in 2018 has a value of \$20,000.

- cc. Line 54: Sonja is awarded her term life insurance policy with Reliabank. *See* Exhibit 21.
- dd. Lines 57 – 66: Gary's businesses are either disbanded or involved in a lawsuit. As evidenced in Exhibits 22 – 24 & 78, Gary has engaged legal counsel and made a demand regarding the monies he is owed. The value of the lawsuit and loans Gary put forth at trial are awarded to Gary in the amount of \$350,000. The Court finds that this amount includes the \$50,000 retainer paid to Davenport Evans Law Office from marital funds after the sale of their Okoboji real property and ten percent (10%) of the demand Gary has asserted he is owed. The Court's rationale for this valuation was stated on the record. Gary is reckless but also intelligent and shrewd, and represented by competent counsel. The retainer is essentially an investment in a potential outcome and the demand is the best-case scenario for the outcome in the business lawsuit. Based upon all of the evidence in the case a valuation of Gary's cause of action against his former business partners of the actual money he has invested in the case plus only 10% of his legal demand is a very conservative and rational valuation for the Court to make in this case.
- ee. Line 75 – 79 have been addressed in previous findings.
- ff. Line 80: The Wells Fargo Line of Credit (9127) is a marital debt that will be split equally between the parties. *See* Exhibit 38.
- gg. Line 81: Sonja is responsible for her Citi Credit Card (5243). *See* Exhibit 39.
- hh. Line 82: Sonja is responsible for her Target Credit Card (6519). *See* Exhibit 40.

- ii. Line 83: Sonja's parents, Martin and Genola Hegge, have a promissory note with Sonja. The Court will not value the same in the division of property and Sonja will be responsible for any amounts due and owing. *See* Exhibit 41.
- jj. Line 84: Gary is responsible for his Capital One Credit Card (0450). *See* Exhibit 42.
- kk. Line 85: Gary is responsible for his Capital One Credit Card (6918). *See* Exhibit 43.
- ll. Line 86: Gary is responsible for his Capital One Credit Card (6028). *See* Exhibit 44.
- mm. Line 87: Gary is responsible for his Citi Credit Card (7874). *See* Exhibit 45.
- nn. Line 88: Gary is responsible for his Discover Card (3763). *See* Exhibit 46.
- oo. Line 89: Gary is responsible for his Student Loans.
- pp. Line 90: Gary is responsible for the Student Assurance Services Judgment in its entirety and shall indemnify and hold Sonja harmless thereof. *See* Exhibit 25.
- qq. Line 110: Each of the parties shall be responsible for claiming fifty percent (50%) of the capital gain of the sale of the Okoboji real property on his or her respective taxes.
- rr. Line 113: Sonja was required to cash out \$50,000 from the Edward Jones IRA to pay a debt in relation to the Okoboji real property after Gary took insurance money to pay an alternative debt in lieu of paying the contractor. *See* Exhibits

54 – 55. Gary shall reimburse Sonja for fifty percent (50%) of the tax consequences in relation to the \$50,000 IRA withdrawal.

ss. Lines 114 –117: Gary shall be responsible for any and all tax liabilities, including preparation costs with Steier & Associates, in relation to his businesses and shall indemnify and hold Sonja harmless thereof. *See Exhibits 48 – 51.*

tt. Line 120: Gary shall be responsible and shall indemnify and hold Sonja harmless for any costs; fees; attorney fees; fines; and/or restitution associated with his charges in Nevada 23-CR-051703. *See Exhibit 61.*

uu. Line 121: Gary shall be responsible and shall indemnify and hold Sonja harmless for any costs; fees; attorney fees; fines; and/or restitution associated with his federal charges 5:24-CR-50031. *See Exhibit 27.*

vv. Line 122: Gary shall be responsible and shall indemnify and hold Sonja harmless for any costs; fees; attorney fees; fines; and/or restitution associated with the traffic ticket associated with Gary allowing an unknown female to operate the Porche Cayenne. *See Exhibit 86.*

ww. Line 123: Gary shall be responsible for any attorney fees associated with his retainment of Claire Gerry of Gerry Law Firm.

99. Gary engaged in activities that evidence a reckless disregard for the financial wellbeing of himself and his family, including reckless spending, gambling and womanizing.

100. Gary dissipated marital funds through his course of conduct and those dissipations have been established by the evidence in this case with reasonable certainty.

101. Any additional Findings of Fact included in the Conclusions of Law section are incorporated herein by this reference. To the extent any of the foregoing are improperly designated as a Finding of Fact and instead are a Conclusion of Law, they are hereby redesignated and incorporated herein as a Conclusion of Law.

CONCLUSIONS OF LAW:

1. This Court has jurisdiction over the parties and the subject matter of this case.
2. In custody disputes, the Court is obligated to determine what is in the best interest of the child, SDCL 25-4-45.
3. The best interest of the children is determined by an analysis of various factors, including the following: (a) the primary caretaker of the children; (b) parental fitness; (c) stability; (d) the child's preference; (e) harmful parental misconduct; (f) separation of siblings; and (g) substantial change in circumstances. *Fuerstenberg v. Fuerstenberg*, 1999 SD 35, 591 N.E.2d 798 (1999).
4. Joint legal custody is considered under SDCL 25-5-7.1, which states "In any custody dispute between parents, the court may order joint legal custody so that both parents retain full parental rights and responsibilities with respect to their child and so that both parents must confer on, and participate in, major decisions affecting the welfare of the child. In ordering joint legal custody, the court may consider the expressed desires of the parents and may grant to one party the ultimate responsibility over specific aspects of the child's welfare or may divide those aspects between the parties based on the best interest of the child. If it appears to the court to be in the best interest of the child, the court may order, or the parties may agree, how any such

responsibility shall be divided. Such areas of responsibility may include the child's primary physical residence, childcare, education, extracurricular activities, medical and dental care, religious instruction, the child's use of motor vehicles, and any other responsibilities which the court finds unique to a particular family or in the best interest of the child. If the court awards joint legal custody, it may also order joint physical custody in such proportions as are in the best interests of the child, notwithstanding the objection of either parent."

5. Some relevant factors when considering the parental fitness of each parent include the following: (a) mental and physical health; (b) the ability to give the children love, affection, guidance, and education and to impart the family's religion or creed; (c) commitment to prepare the children for responsible adulthood, as well as to insure that the children experience a fulfilling childhood; (d) exemplary modeling so that the children witness firsthand what it means to be a good parent, a loving spouse, and a responsible citizen; (e) willingness to maturely encourage and provide frequent and meaningful contact between the children and the other parent; and (f) capacity and disposition to provide the children with protection, food, clothing, medical care, and other basic needs. *Price v. Price*, 2000 SD 64, 611 N.W.2d 425 (2000).
6. The Court must evaluate which parent is best able to provide a stable and consistent home environment, considering the following: (a) the relationship and interaction of the child with the parents, step-parents, siblings and extended families; (b) the child's adjustment to home, school and community; (c) the parent with whom the child has formed a closer attachment, as attachment between parent and child is an important developmental phenomena and breaking a healthy attachment can cause detriment;

and (d) continuity, because when a child has been in one custodial setting for a long time pursuant to court order or by agreement, a court ought to be reluctant to make a change if only a theoretical or slight advantage for the child might be gained. *Price v. Price*, 2000 SD 64, 611 N.W.2d 425 (2000).

7. The Court further considers the factor of primary caretaker, which requires the consideration of which parent has been more responsible for the children primary to the custodial dispute and which parent has more time available to spend with the child. *Price v. Price*, 2000 SD 64, 611 N.W.2d 425 (2000).
8. If the child is of a sufficient age to form an intelligent preference, the Court may consider said preference. SDCL 25-4-45. *See also, Price v. Price*, 2000 SD 64, 611 N.W.2d 425 (2000).
9. Harmful parental misconduct is evaluated when a parent's misconduct has a harmful effect on a child and is committed in the presence of a child old enough to perceive the misconduct. *Price v. Price*, 2000 SD 64, 611 N.W.2d 425 (2000).
10. A court must not separate siblings absent compelling circumstances. *Price v. Price*, 2000 SD 64, 611 N.W.2d 425 (2000).
11. It is in the best interest of the minor children that Sonja shall have primary physical custody of the minor children.
12. Gary shall have parenting time in accordance with the South Dakota Parenting Guidelines; however, it is in the best interests of the children that they not be forced to go with Gary for parenting time against their wishes.
13. It is in the best interest of the minor children that Sonja shall have sole legal custody of the minor children as she has prioritized being a mother first and Gary has engaged

in activities that the children are aware of and the poor decisions made by Gary have negatively affected the children and his relationship with them. The best predictor of the future is the past and Gary cannot be trusted given the course of conduct he has engaged in, as he has yet to take accountability for his actions and seek forgiveness from and genuine reconciliation with his sons.

14. Child support is governed by SDCL 25-7.
15. A parent's duty to support his children is a paramount obligation of the parent. *Kost v. Kost*, 515 N.W.2d 209 (SD 1994).
16. Gary shall pay Sonja \$1100 per month in child support pursuant to the Order entered by the Court on November 8, 2023.
17. That the child support calculation takes into consideration the medical, dental, and vision insurance costs Sonja is paying pursuant to SDCL 25-7-6.16.
18. The child support obligation shall be due and payable the first of each month thereafter until the children attain the age of eighteen (18), or until the children attain the age of nineteen (19) if still a full-time student in a secondary school, or until the children are legally emancipated in accordance with SDCL 25-7A.
19. Child support payments shall be made in regular payments to the Department of Social Services and mailed to the Child Support Payment Center, Suite 84, 700 Governors Drive, Pierre, South Dakota 57501. The parties agree that the Department of Social Services is authorized to enter an Order for Withholding Gary's income, through the Department of Social Services, Office of Child Support Enforcement, as provided in SDCL 25-7A-23. *et. seq.*, without further action or proceeding.

20. When a divorce is granted, the courts may make an equitable division of the property belonging to either or both, whether the title to such property is in the name of the husband or the wife. In making such division of the property, the court shall have regard for equity and the circumstances of the parties. SDCL 25-4-44.
21. The factors to be included for determining property division are: (1) duration of the marriage; (2) value of property owned by the parties; (3) ages of the parties; (4) health of the parties; (5) competency of the parties to earn a living; (6) contribution of each party to the accumulation or dissipation of property; and (7) income-producing capacity of the property owned by the parties. *Billion v. Billion*; 1996 SD 101, 553 N.W.2d 226 (1996).
22. The Court has the discretion to determine what is and what is not considered marital v. nonmarital property. *Billion v. Billion*; 1996 SD 101, 553 N.W.2d 226 (1996).
23. In divorce proceedings, the date of valuation of the marital estate is the date of the granting of the divorce absent a finding of special circumstances. *Conti v. Conti*, 2021 SD 62, 967 N.W.2d 10; *Pieper v. Pieper*, 2013 SD 98, 841 N.W.2d 781; *Duran v. Duran*, 2003 SD 15, 657 N.W.2d 692.
24. Under *Taylor v. Taylor*, 2019 SD 27, 928 N.W.2d 458 parties may present conflicting evidence concerning the value of marital property and the Court is not required to accept either party's proposed valuation but should consider a valuation within the range of evidence presented.
25. Under *Pennock v. Pennock*, 356 N.W.2d 913, the Court has the broad discretion in dividing property and its decision will not be upset absent a clear abuse of discretion.

The Court in *Pennock* divided the marital estate seventy percent (70%) to one spouse and the remaining thirty percent (30%) to the other spouse.

26. In *Ahrendt v. Chamberlain*, 2018 SD 31, the Supreme Court discussed that inappropriate spending habits during the marriage may be weighed in a divorce property division as a consideration of the Court.
27. A trial court's division of property is not bound by any mathematical formula. *Endres v. Endres*, 532 N.W.2d 65, 71 (citing *Korzan v. Korzan*, 488 N.W.2d 689, 693 (S.D. 1992); additional citations omitted).
28. The parties were married on the 10th day of May, 2004.
29. The marital estate was valued at the date of divorce as set forth in Exhibit 1 and attached hereto.
30. Sonja and Gary are of sufficient age and health to be employed.
31. Sonja is competent to earn a suitable living. Gary has tremendous earning capacity according to his own testimony and history of earnings.
32. The Court's line-by-line valuation as set forth in Exhibit 1 takes into consideration the contribution of each party to the marriage. Sonja supported the family financially in the early years of the marriage and has continued to contribute to the marital estate despite prioritizing her role as a mother and wife. Gary has been the primary financial contributor until approximately 2018 when he began engaging in a course of conduct that has resulted in a dissipation of marital assets.
33. The Court has the authority to consider the dissipation of marital assets by Gary in making an equitable division of assets and debts.


34. Gary's course of conduct in his drinking, gambling, adulterous behaviors, exorbitant spending, alleged criminal activity, and business dealings evidence a reckless disregard for the financial wellbeing of his family.
35. Given the equitable distribution of the assets and debts as set forth in Exhibit 1, neither party owes the other a property equalization payment.
36. Under South Dakota Codified Law § 25-2-11, during a marriage, spouses are jointly responsible for the necessities of life, such as food and clothing, purchased by either spouse while they are living together as a family.
37. Alimony is authorized under South Dakota Codified Law § 25-4-41.
38. The Court has broad discretion in awarding alimony. The Court considers certain factors in determining the amount of alimony appropriate. The factors were decided in the South Dakota Supreme Court case, *Booth v. Booth*, 354 N.W.2d 924 (SD 1984) and include: (1) the length of the marriage; (2) the parties' respective earning capacities; (3) the parties respective financial condition; (4) the parties respective age, health, and physical condition; and (5) the parties social standing in life. The Supreme Court of South Dakota added a sixth factor, fault, to consider in awarding alimony in the case *Strickland v. Strickland*, 470 N.W.2d 832 (SD 1991).
39. Spousal support is not intended to equalize the income of the parties.
40. Spousal support is not awarded to either party in this matter.
41. Gary is at fault for the divorce.
42. Sonja shall be granted a Decree of Divorce from Gary upon the grounds of adultery and extreme cruelty pursuant to SDCL 25-4-2(1) and SDCL 25-4-2(2). Plaintiff's

Counsel is directed to prepare the appropriate Judgment and Decree of Divorce for the Court's signature and filing.

43. Sonja may file a Motion for Attorney Fees post-trial, and the same will be considered under the established rules governing the same.



BY THE COURT:


Hon. Douglas Hoffman
CIRCUIT COURT JUDGE

9/18/24

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STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

:SS

COUNTY OF LINCOLN)

SECOND JUDICIAL CIRCUIT

SONJA R. KING,

Plaintiff,

COURT TRIAL

-VS-

GARY AARON KING,

Defendant.

41DIV.23-000090

BEFORE:

The Honorable Douglas E. Hoffman
Circuit Court Judge
Second Judicial Circuit
Canton/Sioux Falls, South Dakota
July 30, 2024

APPEARANCES:

Ms. Rachel M. Preheim
Attorney at Law
121 South Franklin Avenue, Suite 1
Sioux Falls, South Dakota

For the Plaintiff;

Mr. Thomas M. Frankman
Attorney at Law
P.O. Box 1030
Sioux Falls, South Dakota

For the Defendant.

Roxane R. Osborn
605-782-3032
Sioux Falls, South Dakota

1 that we will present that, quite frankly, the defendant can
2 be honest about very little. He also has relocated himself
3 during the pendency of this matter and the pendency of his
4 federal criminal charges from the state of South Dakota to
5 Colorado.

6 So, we certainly do not believe that he is in a position
7 legally or physically to be that involved in the boys' lives.
8 There's also, of course, the concern that if he were to go to
9 federal prison based on the charges, that joint legal custody
10 would be a factual impossibility under the law.

11 THE COURT: What do you think the grounds should be for
12 the divorce?

13 MS. PREHEIM: Adultery.

14 THE COURT: Ah, and are you asking for any alimony?

15 MS. PREHEIM: We would love to. We certainly think that
16 there's money that has been hidden, but we don't believe that
17 we have the ability or that the assets and debts will show
18 that there is an ability to pay or that it would be paid.

19 THE COURT: Okay. Well, Mr. Frankman, I'm sure you have
20 a little different interpretation of what we're going to hear
21 about.

22 MR. FRANKMAN: I sure do.

23 THE COURT: Okay. Well, tell me what your perspective
24 is.

25 MR. FRANKMAN: I think we need to, instead of the

1 issues, I think we need to inform the court of what we have
2 agreed to.

3 THE COURT: I think that sounds like a good place to
4 start.

5 MR. FRANKMAN: And it's not a matter of they'd love to
6 have alimony. They agreed to, agreed to waive alimony. They
7 agreed that each party would maintain their own health
8 insurance. They agreed that each party would retain all
9 interest in any and all life insurance policies. They agreed
10 that Sonja would maintain health insurance for the children.
11 They agreed that Gary would pay child support in the sum of
12 \$1100 per month.

13 MS. PREHEIM: No, Your Honor, that is not an agreed
14 upon term coming into trial.

15 MR. FRANKMAN: Well, it's right in your letter of July
16 11th.

17 MS. PREHEIM: That was settlement negotiations, as soon
18 as we entered in a trial, that no longer became our position,
19 and we have our child support calculation in our exhibits.

20 MR. FRANKMAN: Which I've never seen, and I've never
21 been told until today at 9:17 that this is no longer an
22 agreement.

23 THE COURT: Well --

24 MR. FRANKMAN: -- which, which I'm going to make my
25 record on most of the testimony today.

1 Risk Management Loan, and the Wells Fargo Loan line of credit
2 in that order. And they agreed that Gary would retain all
3 interest in any and all lawsuits pending and be responsible
4 for satisfying any and all judgments with the exception that
5 should Gary receive money from one of the pending lawsuits,
6 Sonja will receive the first \$25,000, which is one-half of
7 the money spent for the attorney fee retainer from marital
8 assets to commence the lawsuit.

9 THE COURT: Okay. Well, what do you see as being the
10 main items in dispute then, Mr. Frankman?

11 MR. FRANKMAN: Well, we just learned, learned today, and
12 I want to, I'll make a record on that Exhibit 70 is some
13 accounting done by her dad that purports to indicate that
14 Gary should be, ah, there should be a \$650,581 amount put on
15 his side of the ledger. and I'm going to make a record as
16 soon as they call this gentleman to testify. So, that's
17 clearly an issue. There is an issue of, of Line 53 and 54
18 dealing with Swift Fuels. They put a \$1,000,000 in assets on
19 Gary's level, which is absurd with the Line 54 CB
20 Innovations, Gary, they put another \$1,000,000 on his list --
21 ledger, which is equally absurd. And so those are, those are
22 the main financial, ah, issues, and then there may be others
23 we go along, Judge, but that's what I can remember right now.

24 THE COURT: Okay.

25 MR. FRANKMAN: Oh, yeah, there's one more. I, I'm not

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STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

:SS

COUNTY OF LINCOLN)

SECOND JUDICIAL CIRCUIT

SONJA R. KING,

Plaintiff,

COURT TRIAL

-VS-

GARY AARON KING,

Defendant.

41DIV.23-000090

BEFORE:

The Honorable Douglas E. Hoffman
Circuit Court Judge
Second Judicial Circuit
Canton/Sioux Falls, South Dakota
July 31, 2024

APPEARANCES:

Ms. Rachel M. Preheim
Attorney at Law
121 South Franklin Avenue, Suite 1
Sioux Falls, South Dakota

For the Plaintiff;

Mr. Thomas M. Frankman
Attorney at Law
P.O. Box 1030
Sioux Falls, South Dakota

For the Defendant.

Roxane R. Osborn
605-782-3032
Sioux Falls, South Dakota

1 Q All right. Gary, PayPal, Line 31, shows \$342 and yours,
2 your side shows zero. Why, why the difference?

3 A The 342 is predicated off the September 30th, 2023
4 statement. Uh, the \$0.00 is what it's currently at today.

5 Q And we'll cover 34 here in a little bit, this called,
6 so-called un, unaccounted accounts. Um, so let's, let's go
7 ahead and do that now. Um, Line 34 of the, Sonja puts a
8 number of \$500,000 for unaccounted for accounts. Do you see
9 that?

10 A I did.

11 Q Do you have any unaccounted for accounts?

12 A I do not.

13 Q Do you know how they would come up with \$500,000?

14 A I have no idea.

15 Q Is there any basis for that?

16 A I can't think of anything.

17 Q Do you currently have any accounts that you haven't
18 accounted for?

19 A I do not have any accounts nor any cash that I have not
20 accounted for.

21 Q The next one, Line 35. I, I'm not understanding their
22 exhibit.

23 A Um --

24 Q -- we, we've made enough errors ourselves here, but Line
25 35 is the 50,000 that Sonja gave to Gary. See that?

- 1 A Yeah.
- 2 Q That was part of your money, wasn't it?
- 3 A Yeah, that was --
- 4 Q -- she didn't give you 50,000?
- 5 A No, the 50,000 originated from the proceeds from the
- 6 Okoboji sale of real estate.
- 7 Q And the Okoboji?
- 8 A Was a joint asset.
- 9 Q If you, if you go back, Okoboji and your other property
- 10 it all came primarily when I should say much of it came from
- 11 your income?
- 12 A Correct.
- 13 Q So, let's talk about that. It says see Line 36, and
- 14 when I look at Line 36, I see the Visa debit?
- 15 A Yeah.
- 16 Q If I've got that.
- 17 A The Visa debit.
- 18 Q No, wait a minute.
- 19 A Oh.
- 20 Q No, I just, is this, it is --
- 21 MR. FRANKMAN: Counselor, I want to be able to read
- 22 that, Line 36?
- 23 MS. PREHEIM: He has a Visa debit that he's depositing
- 24 Airbnb payments in to. He has not provided a single
- 25 statement despite three sets of interrogatory responses. So,

1 it is an unaccounted for fund that he is depositing money in
2 to.

3 MR. FRANKMAN: Okay, thank you.

4 Q So, anyway, the 50,000 and back up to Line 35, you don't
5 have any trouble, ah, since you're going to be spending more
6 money on this lawsuit that, that \$25,000, that would be half
7 of, of the amount that's marital or half of it would be of
8 the marital would be 25,000. You don't have any trouble with
9 that, do ya?

10 A Not at all.

11 Q Okay. Now, the Visa debit, Airbnb payments go to this
12 account. Do you know what that means?

13 A I do.

14 Q Okay. Tell us about that.

15 A That Visa debit card ending in 9346 is tied directly to
16 my Farmers State Bank checking account which you will see
17 Airbnb transactions periodically.

18 Q Okay. And Line 37, the VRBO account, explain that.

19 A Um, same. That -- I kind of forgot about VRBO. I, I
20 had one guest stay at VRBO, and I wasn't -- I wasn't happy
21 with the, the process. It, it just, I didn't like the
22 platform VRBO. I didn't understand the 45 day hold on, ah,
23 when they collect funds for a stay, VRBO holds it for 45 days
24 I believe before they release it, and it was a little too
25 sticky for me. So, I, I have an established account with

F

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STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

COUNTY OF LINCOLN) :SS

SECOND JUDICIAL CIRCUIT

SONJA R. KING,
Plaintiff,

COURT TRIAL

-VS-

GARY AARON KING,
Defendant.

41DIV.23-000090

BEFORE: The Honorable Douglas E. Hoffman
Circuit Court Judge
Second Judicial Circuit
Canton, South Dakota,
on August 1, 2024

APPEARANCES: Ms. Rachel M. Preheim
Attorney at Law
121 South Frankline Avenue, Suite 1
Sioux Falls, South Dakota

For the Plaintiff;

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1 you never got anything to constitute marital property, did
2 you?

3 A No.

4 Q And regarding any of these, any of these expenses?

5 A No.

6 Q Okay. Now, let's talk about your lawsuit. Were you
7 under the impression that there was an agreement between you
8 and Sonja and the two lawyers here that you were going to
9 retain all interest in the, ah, this lawsuit involving your
10 business, and you were going to pay Sonja 20 \$25,000 as half
11 of the amount for the retainer?

12 A That was what was requested and, yes, that's what we
13 agreed to.

14 Q And as far as the value of the lawsuit, you could get
15 zero?

16 A I'm well aware of that, and I, I'm not certain a couple
17 of partners could recover.

18 Q They could file bankruptcy?

19 A Yes.

20 Q And you're going to be spending hundreds of thousands of
21 dollars trying to find that out, aren't you?

22 A That in addition to possibly years of litigation.

23 Q Is there anything else, Gary, that I haven't asked you
24 about or hasn't been addressed that you'd like to address? A
25 I don't believe so.

1 MR. FRANKMAN: That's all I have then, thanks.

2 THE COURT: Any recross?

3 MS. PREHEIM: No, Your Honor.

4 THE COURT: Okay. Thank you, Sir, you may step down.

5 (The witness was excused.)

6 THE COURT: Well, Mr. Frankman, do you have any other
7 witnesses we should hear from today?

8 MR. FRANKMAN: No.

9 THE COURT: Defense rests?

10 MR. FRANKMAN: Yes.

11 THE COURT: Ms. Preheim, are you going to call any
12 rebuttal witnesses at all?

13 MS. PREHEIM: Your Honor, we would rest.

14 THE COURT: Okay. Well, should we break for lunch and
15 come back with closing arguments at 1:00 o'clock and, and
16 we'll make a decision, and bang the gavel, and you'll leave
17 the courthouse divorced?

18 MS. PREHEIM: Yes, Your Honor. Thank you.

19 THE COURT: I mean I guess not technically divorced
20 until one of the lawyers prepares the divorce decree and puts
21 it in my Odyssey queue, but you could potentially have that,
22 well, it might get delayed, but for all intents and purposes
23 you'll be divorced. All right. We'll see you at 1:00
24 o'clock.

25 MS. PREHEIM: Thank you, Judge.

1 anything with regard to the handling of those accounts, and
2 he's asking that he be able to continue handling those
3 accounts.

4 With regard to Line 37, I think that that that tells a
5 lot here about what Sonja's after. She's after anything that
6 she can get, whether it's truthful or not. To put a number
7 of \$500,000 for unaccounted, ah, accounts, ah, is not only
8 ridiculous, it's inappropriate, in my opinion, even attempt
9 to convince the court of that. Their calculation is you got
10 40,000 in your account and let's multiply it by 12 and we get
11 close to 500,000. They had no basis to even consider, ah,
12 putting that type of a, of a number on this exhibit other
13 than to go after whatever they can maybe convince the court,
14 which obviously they can't on that.

15 With regard to, um, the 50,000 that Sonja gave to Gary,
16 that's what Line 38 sent -- says. Sonja didn't give Gary
17 anything. It was a marital account and when it's a marital
18 account, she doesn't have to give him anything. She's
19 entitled to \$25,000. We agreed to that, um, before we ever
20 got to court, and I put it in our proposed stipulation at the
21 beginning of this trial, and we agreed, ah, that after that,
22 Gary's on his own with whether he can ever collect anything
23 from that lawsuit. And I would ask the court, um, that's
24 the, that's the agreement of the parties. And with regard to
25 that lawsuit, that lawsuit, the only thing they put in there

1 was the demand by, ah, Mitch Peterson, which I'm not sure the
2 relevance of that, to tell you the truth, that it could end
3 up being zero. It could end up with the defendants going
4 through bankruptcy. Gary could end up spending hundreds of
5 thousands of dollars and getting nothing, and, ah, if Sonja
6 wants to come to the table and start, um, putting up, ah, 50,
7 60, \$70,000, and perhaps more, and if we're successful we'll
8 see what we can give her. I don't think that makes any
9 sense, and I don't think that's what they're asking. So,
10 Gary should be on his own with regard to that and he should
11 pay Sonja \$25,000 back.

12 With regard to the Edward Jones accounts, Line 48, um,
13 so far what I can figure out is whatever Gary made, the
14 income that he generated, the financial acumen that he had,
15 that's marital. But the, but the what Sonja did with the
16 Lululemon, Lululemon stock, that's her's, and it doesn't go
17 that way. You don't get to say, well, I did this and so
18 that's mine, but every hour that you spent working, ah,
19 trying to, trying to make, ah, an estate for your family,
20 which by the way includes probably every item on this
21 exhibit, that's marital, and, and I think that's totally
22 unfair as well.

23 With regard to 49, the Edward Jones IRA, \$371,809, to be
24 honest with you, that's all, that's, that's the only money
25 these people have, and, and to, to award all of that to

1 people that are serious auto investors are aware of those
2 options. So, 50,000 is what it brought, that's what it was
3 worth.

4 Umm, so we got this lawsuit, I think it's exhibit, well,
5 related to it was the demand letter from Davenport, Evans,
6 Gary King repayment and demand, all of that where they lay
7 out all the reasons why Mr. King should get \$3,000,000 from
8 his former partners and his lawyers are at Lynn, Jackson, and
9 Denevan Falon Law firms. I mean, really the only evidence
10 that we have is the demand letter. Mr. Frankman said, well,
11 you know, I mean, that doesn't mean anything. We might lose.
12 We could get a judgment and some collectible and all of that
13 sort of thing, but we know that, Mr. King invested \$50,000
14 for a retainer to initiate the litigation. Uh, we know that
15 he's got Davenport, Evans, Hurwitz, and Smith to be his
16 attorneys, which I think I'm allowed to take judicial notice
17 of the fact that they're an excellent law firm because their
18 lawyers are practicing in court here, and I see their work,
19 and they do a great job, obviously, I'm impressed with them,
20 and they don't typically take junk litigation. So, you know
21 there's some value there. What is the value? I don't know,
22 but I mean I'm going to just super lowball it, but figure,
23 you know, it's got to at least be worth the \$50,000, and, ah,
24 you know, there's going to be a big attorney fee cut out of
25 it, and there's going to be expenses and cost of collection.

1 And there's risk that we might not, ah, recover anything,
2 that sort of thing. And it's not like lawsuits are publicly
3 traded. I think there's been some discussion as to whether
4 or not the rules of professional ethics will ever be modified
5 to allow people to invest in speculative plaintiff's
6 lawsuits. It's kind of, I think a new thing that the ABA is
7 looking at, but anyway, and South Dakota law says that the
8 court has to put a value on all the property in a divorce
9 case, and it has to be based upon some evidence. Well, we've
10 got fairly scanty evidence, and, but we have some evidence,
11 and you know, I can't check my common experience as a jurist
12 at the door. I'm allowed to utilize that in making these
13 kinds of determinations. 10% of the ask plus the \$50,000
14 retainer, I mean, I think that's pretty conservative. So,
15 I'm going to put 350,000 on the value of that case. And I
16 mean if Mr. King gets 3,000,000 out of it, let's just say he
17 nets two, it's all yours. You don't have to give your former
18 spouse a penny of it. You get a million net after
19 everything's paid. You get to keep it. You get nothing, you
20 get nothing.

21 So, but I mean, you're a businessman and kind of been a
22 speculator, and a risk-taker, and gambler, and so whereas
23 that's not Ms. King's persona.

24 So, we'll get that to that in a minute. So, the Swift
25 Fuels, I think so, remind me, Ms. Preheim, there's some

1 um, on a number of things, and I want to make sure that I got
2 it down.

3 THE COURT: Okay.

4 MR. FRANKMAN: So, if we look at, I didn't understand
5 what you were saying about the lawsuit. You started saying
6 the 50,000 retainer, and you said 50,000 value, and then you
7 said (unintelligible).

8 THE COURT: Yeah. I'm figuring 300,000. My calculation
9 for the valuation of the lawsuit is 50,000 because we put
10 that money down, and then another 300,000 cause that's
11 roughly 10% of what Mr. King is claiming he's owed. So I
12 figure if everybody that's involved is a rational human being
13 then the case must be worth at least 10% of the ask, plus the
14 50,000 we put down for a retainer.

15 Initially I calculated it a different way where I
16 figured 3,000,000 is probably, you know, you're probably
17 thinking we'll be happy with to get half that, which would be
18 1.5, and then split it again down to 750 for risks, and then
19 take a third off which would get it down to 500. So, my 350
20 calculation is the most conservative calculation I could feel
21 reasonably logically comfortable with for that business. But
22 I concede to that, you know, we don't, we don't have a lot to
23 work with, but it's worth something, and I have to have some
24 kind of a logical basis for determining a value. And just
25 based on my education, training, and experience with that

1 kind of litigation, both as a lawyer, and as a judge, and
2 knowing the parties and the law firm that's involved, I think
3 that's a good conservative estimate.

4 MR. FRANKMAN: So, let's go one step further, and I'm
5 not trying to be argumentative.

6 THE COURT: Sure.

7 MR. FRANKMAN: If I am, you let me know.

8 THE COURT: It's your job.

9 MR. FRANKMAN: Well, no, I'm not trying to be
10 argumentative, but you also, you're, you're saying that the
11 value is \$300,000, but you're adding 50,000 on to that when
12 we had an agreement that he would pay her her 25,000. So,
13 you, you've already, I don't know how, which way you're going
14 to do it when we get this figured out.

15 THE COURT: Yeah. Well, you don't have to, the 25,000,
16 I was assuming that that was not -- you don't have to pay her
17 the 25,000 on top. Okay. That's, if you guys wanted to
18 settle the case then I mean I wasn't following any of your
19 methodologies that necessarily were pretrial negotiation
20 strategies. So I'm just figuring, I think the case is worth
21 350,000. I think those defendants will scrape up that kind
22 of money to make you guys go away and, ah, just may like it
23 could be worth way more. It may end up being a bust, and the
24 risk is going to be on Mr. King because he's in the driver's
25 seat on that case.

G

25-4-44. Division of property between parties.

When a divorce is granted, the courts may make an equitable division of the property belonging to either or both, whether the title to such property is in the name of the husband or the wife. In making such division of the property, the court shall have regard for equity and the circumstances of the parties.

Source: SDC 1939, § 14.0726; SL 1988, ch 203.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL #30884

SONJA R. KING

Plaintiff/Appellee.

vs.

GARY A. KING

Defendant/Appellant.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

The Honorable Douglas E. Hoffman, Circuit Court Judge

BRIEF OF APPELLEE

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Notice of Appeal filed November 6, 2024

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PRELIMINARY STATEMENT

All references to the Settled Record of *Sonja R. King v. Gary A. King*, 41DIV23-090, as designated by the Lincoln County Clerk's Index, are cited as "S.R." followed by the page number. The Circuit Court's written Findings of Fact and Conclusions of Law, which incorporated the Court's ruling from the bench, are cited as "FOF" or "COL" followed by citation to the appropriate line. References to the Trial Transcript are cited with the specific date of trial, July 30, 2024; July 31, 2024; or August 1, 2024, followed by "T.T." with page and line numbers separated by a colon. Exhibits are cited as "Ex." followed by the exhibit number or letter and page in the Settled Record. Citations to Appellee's Appendix, are designated as "A.A." followed by the page number. References to Appellant's Brief are cited as "App. Brief." followed by the page number.

The civil litigation filed by Defendant, *Cyprus Risk Management, LLC, et al. v. Caledonia Ledge, LLC, et al.*, 41CIV23-0654, will be referred to as "Civil Action."

Plaintiff/Appellee, Sonja R. King, will be referred to as "Sonja." Defendant/Appellant, Gary A. King, will be referred to as "Gary."

JURISDICTIONAL STATEMENT

Sonja filed a Verified Complaint for Divorce on May 30, 2023, in the Second Circuit Court, Lincoln County. (S.R. 23). Gary filed his response to the Complaint on September 6, 2023. (S.R. 35). On the 8th day of November, 2023, the parties attended an interim hearing, presided over by the Honorable Judge Douglas E. Hoffman. (S.R. 89). Judge Hoffman entered an interim Order from Hearing on November 8, 2023 on the 21st day of November, 2023. (S.R. 174). A second interim hearing was held before Judge Hoffman on the 2nd day of April, 2024

regarding the sale of real property. (S.R. 247). An Order from Hearing on April 2, 2024 was filed on the 8th day of April, 2024. (S.R. 350). A trial was held on July 30, 2024; July 31, 2024 and August 1, 2024 in Lincoln County, South Dakota. (S.R. 348). Sonja submitted proposed Findings of Fact and Conclusions of Law on the 10th day of September, 2024. (S.R. 1433). Gary filed Objections to Plaintiff's Findings of Fact and Conclusions of Law on September 16, 2024. (S.R. 1441). Gary's Proposed Findings of Fact and Conclusions of Law were filed on September 23, 2024. (S.R. 1455). Judge Hoffman's executed Judgment & Decree of Divorce, dated October 10, 2024 incorporated Findings of Fact and Conclusions of Law, which were dated September 18, 2024. (S.R. 1509). Notice of Entry of Judgment was filed on October 16, 2024. (S.R. 1516). Gary filed a Notice of Appeal on November 6, 2024. (S.R. 1671).

LEGAL ISSUES

- I. Whether the Circuit Court abused its discretion when it classified the entirety of the Civil Action as marital property and distributed it to Gary.

Relevant Case Law:

Johnson v. Johnson, 2007 S.D. 56, 734 N.W.2d 801

Kappenman v. Kappenmann, 479 N.W.2d 520 (S.D. 1992)

SDCL 25-4-44

- II. Whether the Circuit Court clearly erred when it determined the value of the Civil Action to be \$350,000.00.

Relevant Case Law:

Conti v. Conti, 2021 S.D. 62, ¶ 26, 967 N.W.2d 10, 16-17

Guthmiller v. Guthmiller, 2003 SD 120, 670 N.W.2d 516

SDCL 25-4-44

STATEMENT OF FACTS

Sonja and Gary King were married on the 10th day of May, 2004 in the Country of Jamaica. S.R. 23; 1509. On May 30, 2023, Sonja filed for divorce from Gary on the grounds of extreme cruelty, willful desertion, adultery, or in the alternative, irreconcilable differences. S.R. 23. Sonja further sought primary physical and legal custody of the minor children and for Gary to pay child support. S.R. 23. Financially, Sonja requested the Court equitably divide the parties' assets and debts and award her spousal support. S.R. 23.

Gary did not file a Counterclaim but did file an Answer to Verified Complaint on the 6th day of September, 2023. S.R. 35. Gary admitted paragraph 9 of Sonja's Verified Complaint, that "[t]he parties have acquired certain property and debts during the course of their marriage. Wife asks the Court to make an equitable division of the property and debts of the marriage." S.R. 23; 35.

Sonja received a journalism major from the University of Nebraska in 2001. July 30, 2024 T.T. 132; 14-18. After securing her degree, Sonja worked as an administrative assistant at a YMCA in North Carolina until September 11th occurred and she relocated to South Dakota where she worked temporary jobs, including Wells Fargo. July 30, 2024 T.T 133; 5-14. Upon meeting Gary, she relocated to Omaha with Wells Fargo as Gary was in graduate school at Creighton University in Omaha. July 30, 2024 T.T 133; 14-17. While Gary was in school, Sonja founded a mortgage company, Private Mortgage Group where she worked as a mortgage broker. July 30, 2024 T.T 134; 1-5. Sonja relinquished her ownership interest after the children were born and Gary was traveling significantly for work. July 30, 2024 T.T 134; 10-16.

Sonja and Gary made the marital decision for Sonja to be a stay-at-home mom as they relocated to Sioux Falls to be closer to family as Gary was frequently traveling for work. July 30,

2024 T.T. 134; 19 – 135; 4. Sonja worked a couple part time jobs and did volunteer work from 2013 until the divorce was filed. July 30, 2024 T.T. 135 – 138. Gary agreed with Sonja prioritizing being a stay at home mom in 2013. July 31, 2024 T.T. 170; 20 – 171; 4.

Gary's employment began at Mutual of Omaha in June 2004. July 31, 2024 T.T. 153; 10-11. In 2012, Gary started his own insurance agency, Cypress Risk Management. July 31, 2024 T.T. 153; 19-20. While maintaining his insurance agency, until May 2023 when his insurance license was revoked, Gary was employed with and owned additional companies. July 31, 2024 T.T. 153; 23 – 154; 2 ; Ex. 26 ; Ex. 27. Gary explained that he was employed by Rushmore Gaming, as the president, which had ancillary LLC's tied into it. July 31, 2024 T.T. 153; 24 – 154; 2.

During the latter part of the marriage, Gary was the primary breadwinner. July 30, 2024 T.T. 138; 17-19. Sonja believed in the Spring of 2023, Gary was involved with close to 20 different businesses. July 30, 2024 T.T. 139; 6-9. Gary did not consult with Sonja regarding his businesses or involve her in the financials regarding his businesses during their marriage. July 30, 2024 T.T. 139; 1-3 and 12-13.

Gary acknowledges that Sonja contributed to the marital estate. July 31, 2024 T.T. 171; 5-7. Gary further admitted that every one of the assets on Exhibit I are marital assets. July 31, 2024 T.T. 171; 12-14.

Lines 57 – 66 of Exhibit I list the businesses Gary disclosed he had an interest in through GK, LLC. July 31, 2024 T.T. 193; 7 – 10. Gary stated that GK, LLC is "a limited liability company that [he] launched and used as a conduit as an investment vehicle in the various businesses with [his] former partners." July 31, 2024 T.T. 193; 7 – 10. Gary, at the time of trial, had pending litigation filed against his former partners. Ex. 22/A.A. 34; Ex. 23/A.A. 36; Ex

24/A.A. 42. Gary specifically testified that Line 59, Rivals LLC; Line 60, Elevated LLC; Line 61, Elevated 2, LLC; Line 62, Spyglass Global Management, LLC; Line 63, Caledonia Ledge LLC; Line 64, Main Ledge, LLC; Line 65, Rushmore Gaming, LLC; and Line 66, Cypress Risk Management, are all part of his lawsuit. July 31, 2024 T.T. 193; 18 – 194; 9. Moreover, Gary specifically stated there “are companies that are still in business.” July 31, 2024 T.T. 194; 10-11. GK, LLC was still in business at the time of trial and it had an active bank account at First Dakota. Ex. 89/S.R. 1332.

On August 7, 2023, Gary, through legal counsel, sent a repayment and demand letter, hereinafter referred to as “Demand Letter,” to the legal counsel of his business partners. Ex. 22/A.A. 34. Within the Exhibit, Gary identifies the businesses that are referenced in joint asset and liability exhibit, line 57 and lines 59 – 66 of Exhibit 1 as presented to Judge Hoffman at the divorce trial. Gary’s demand of repayment from his business partners was \$3,016,001.62, plus interest. Ex. 22/A.A. 34 and FOF 19. These various entities are also specifically named in Gary’s Complaint, as filed in the pending Civil Action, 41CIV23-0654. Ex. 24/A.A. 34.

The Demand Letter referenced discussed that the demand was for “various loans, advances and expenditures” paid by Gary or on behalf of entities owned by Gary. Ex. 22/A.A. 34. Enclosed with the Demand Letter was “an organized chart of such expenditures and loans.” Ex. 23/A.A. 36. Gary admitted during cross-examination that he prepared the loan documentation for the Demand Letter. August 1, 2024 T.T. 63; 10 – 12.

Gary filed his Civil Action in August 2023. Ex. 24/A.A. 42 and FOF 20. The Complaint filed in 41CIV23-0654 states and alleges that Cypress Risk Management, LLC; KV Holdings, LLC; GK, LLC, and Gary King, hereinafter referred to as “CIV Plaintiffs,” hereby state and allege against the Defendants named in the lawsuit, hereinafter referred to as “CIV Defendants”,

that CIV Plaintiffs entered into various agreements with CIV Defendants to loan funds; pay various advances; and make payments to or on behalf of CIV Defendants. Ex. 24/A.A. The Complaint goes on to state and allege that Gary, specifically named, has not been reimbursed. Ex. 24/A.A. The Complaint references loans; advances; promissory notes; and loss of salary from 2023 owed to CIV Plaintiffs. Ex. 24/A.A. 42The lawsuit was filed during the pendency of the divorce action. Ex. 24/A.A. 42 and FOF 20.

After filing for divorce, Sonja learned “that the majority of the money we had had he claims he had invested with businesses and that he was in the process of filing lawsuits with his business partners to recoup the money that he put into those businesses.” July 30, 2024 T.T. 187; 8 – 20. Gary claimed to Sonja that all their personal funds were invested with his business partners, who operated under a multitude of LLCs. July 31, 2024 T.T. 103, 16 – 19. Gary presented to Sonja that he put in a significant amount of money to start these businesses as this was their long-term retirement plan. July 31, 2024 T.T. 103; 19 – 23. Gary provided Sonja with documentation regarding loans that he put into these LLCs. July 31, 2024 T.T. 103; 23 – 104; 7; Ex. 22/A.A. 34; Ex. 23/A.A. 36. Gary did not object at trial to the entrance of Exhibits 22; 23; or 24. July 31, 2024 T.T. 104; 22-23 and 109; 4-6.

Prior to filing the Civil Action, Gary wrote to Sonja on June 1, 2023 that “[a]nything coming from the businesses goes to Sonja too. GK, LLC us quite a bit of equity and outstanding loans. Ballpark \$4M all in.” Ex. 84. This was not only in line with what he told Sonja in March 2023 when he said the parties had a net worth over four and a half million, but also with the Civil Action. July 30, 2024 T.T. 188; 1 – 2; Ex. 22./A.A. 34; Ex. 23/A.A. 36; Ex 24/A.A. 42.

Sonja testified that “As late as March of 2023, this was after he had lost his insurance license, which I had no knowledge of, and after his business had gone defunct, which I had no

knowledge of, he was still telling me that our net worth, after all liabilities was over four and a half million dollars.” July 30, 2024 T.T. 147; 16 – 21. Gary went on to tell Sonja that “his business partners weren’t contributing. He was carrying the weight of everybody. Um, all these lives depended on him supporting this business, that none of his business partners were putting money in to and that we were going to get repaid, and we were going to get repaid, and we were going to get repaid for all this money that he was putting in.” July 30, 2024 T.T. 149; 10 – 16.

Sonja relied upon Gary’s representations, stating “I had no reason not to believe him. He was my husband. I, I trusted him with everything I had in me.” July 30, 2024 T.T. 148; 7 – 8. Thus, Sonja agreed with paying Davenport Evans LLP Trust Account the \$50,000.00 from Wells Fargo (1525) on the 16th day of June, 2023 for legal representation with the Civil Action. Ex.78/S.R. 1198.

Further, Gary acknowledged during his direct examination that he was utilizing business assets to pay for plane tickets/hotels; entertainment; restaurants; and high-end luxury items for his extra-marital affairs. August 1, 2024 T.T. 13 – 18 and 64; 1 – 7 and FOF 58 and 82. Gary further admitted that he would take distributions from his business account and provide Leah Bettin with cash. August 1, 2024 T.T. 19; 5 – 7. Despite already testifying that every one of the assets on Exhibit 1 are marital assets, July 31, 2024 T.T. 171; 12-14, Gary attempted to backtrack from that position when confronted with the money he removed from his businesses to pay for his extra-marital affairs. August 1, 2024 T.T. 62 – 63. However, during this testimony, Gary again stated that he is owed a substantial amount on unreimbursed expenses from Rushmore Gaming, LLC as part of his ongoing lawsuit. August 1, 2024 T.T. 62; 22 – 24. Rushmore Gaming, LLC is line 65 of Exhibit 1. Ex. 1/A.A. 27. The Circuit Court stated in its oral ruling that Gary had a “reckless disregard to the financial well-being of himself and his

family is a major contributing factor to the , ah, why we don't have more assets and less debts on the ledger here." August 1, 2024 T.T. 134; 24 – 135; 2.

Exhibit 85 details the efforts made to receive financial information from Gary, including but not limited to, formal discovery requests regarding his businesses. Ex. 85/S.R. 1281 and FOF 95. Multiple requests were made during the pendency of this action to receive discovery responses from Gary via letters and a Motion to Compel. Ex. 85/S.R. 1281 and S.R. 76. Within Exhibit 85, specific requests were made regarding the status of 41CIV23-654, Ex. 85/S.R. 1281.

Despite the issues in ascertaining information from Gary, the business entities were included on the joint asset and liability exhibit, Exhibit 1, which was not objected to by Gary. August 1, 2024 T.T. 81; 17 – 82; 2. Exhibit 1 details the assets and debts the Court considered in its determination of equitable division of property. FOF 97.

The Court found that,

"Lines 57 – 66: Gary's businesses are either disbanded or involved in a lawsuit. As evidenced in Exhibits 22 – 24 & 78, Gary has engaged legal counsel and made a demand regarding the monies he is owed. The value of the lawsuit and loans Gary put forth at trial are awarded to Gary in the amount of \$350,000. The court finds that this amount includes the \$50,000 retainer paid to Davenport Evans Law Office from marital funds after the sale of their Okoboji real property and ten percent (10%) of the demand Gary has asserted he is owed. The Court's rationale for this valuation was stated on the record. Gary is reckless but also intelligent and shrewd, and represented by competent counsel. The retainer is essentially an investment in a potential outcome and the demand is the best-case scenario for the outcome in the business lawsuit. Based upon all of the evidence in the case a valuation of Gary's cause of action against his former business partners of the actual money he has invested in the case plus only 10% of his legal demand is a very conservative and rational valuation for the Court to make in this case.

FOF 98(dd). This Finding of Fact is consistent with the analysis and discussion the Court had in reaching its conclusion as to valuation of Gary's business interests as involved in the Civil Action. August 1, 2024 T.T. 130; 4 – 20 and 141; 8 – 142; 3.

Contrary to Gary's assertions, neither a stipulation nor an agreement as to valuation of the Civil Action and its business entities was present at the three-day court trial. *See* S.R. 1 – 1717. While Gary referenced settlement negotiations in his testimony on direct examination, settlement negotiations did not result in an actual settlement of issues in written or oral form. *See* S.R. 1 – 1717. Specifically to this point, during Gary's closing argument, the statement was made that "In fact, I thought that's what we had agreed to, but there's a lot of things I thought we had agreed to, but hasn't shown up in the courtroom." August 1, 2024 T.T. 97; 6-8. To which the response was "Nothing was signed." August 1, 2024 T.T. 97; 9. Moreover, Gary's closing acknowledged that it was a "proposed stipulation at the beginning of this trial . . ." August 1, 2024 T.T. 100; 20. The Court acknowledged that an agreement had not been reached by the parties when he stated "That's, if you guys wanted to settle the case then I mean I wasn't following any of your methodologies that necessarily were pretrial negotiation strategies." August 1, 2024 T.T. 142; 17 – 20.

The record does not include a written stipulation. *See* S.R. 1 – 1717. The trial transcript from July 30, 2024 does not include a meeting of the minds or a canvassing of the parties regarding any stipulated terms. *See* July 30, 2024 T.T. The trial transcript from July 31, 2024 does not include a meeting of the minds or a canvassing of the parties regarding any stipulated terms. *See* July 31, 2024 T.T. The trial transcript from August 1, 2024 does not include a meeting of the minds or a canvassing of the parties regarding any stipulated terms. *See* August 1, 2024 T.T.

The Court properly exercised its discretion in determining that the business interests Gary has in Lines 57 – 66 of Exhibit 1 are marital, as was admitted by Gary, and placing a valuation

upon the businesses based upon the Civil Action initiated by Gary and supported by evidence prepared and provided by Gary through Exhibit 22 and 23.

STANDARD OF REVIEW

A trial court's evidentiary rulings are presumed correct and will not be reversed upon appeal unless there is a clear abuse of discretion, which is "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Weber v. Weber*, 2023 S.D. 64 ¶ 15, 999 N.W.2d 230, 234 (citing *Taylor v. Taylor*, 2019 S.D. 27, ¶ 14, 928 N.W.2d 458, 465 (additional citations omitted)). quotations omitted). "Abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Id.*

ARGUMENT

I. The Circuit Court did not abuse its discretion when it classified the entirety of the Civil Action as marital property and distributed it to Gary.

"South Dakota is an all property state, meaning all property of the divorcing parties is subject to equitable division by the circuit court, regardless of title or origin. *Weber v. Weber*, 2023 S.D. 64 ¶ 16, 999 N.W.2d 230, 234 (quoting *Ahrendt v. Chamberlain*, 2018 S.D. 31 ¶ 10, 910 N.W.2d. 913, 918 (additional citations omitted)). Prior to a division of property, the Court must determine whether the property is marital or non-marital. *Id.* The Court is afforded "broad discretion" in classifying property. *Id.*

"The court should consider the following factors when classifying and dividing property: (1) the duration of the marriage; (2) the value of the property owned by the parties; (3) the ages of the parties; (4) the health of the parties; (5) the competency of the parties to earn a living; (6)

the contribution of each party to the accumulation of the property; and (7) the income-producing capacity of the parties' assets." *Id.* The Circuit Court needs to consider equity and the circumstances the parties present when it is dividing marital property. *Id.* SDCL 25-4-44. When making an equitable property division, the Court is "not bound to any mathematical formula." *Id.* Moreover, "exactitude is not required in valuing the assets." *Kappenmann v. Kappenmann*, 479 N.W.2d 520 (S.D. 1992).

The businesses Gary had an interest in during the parties' marriage, were included in Exhibit I at lines 57 – 66. Gary testified that he had an interest in these businesses and that they were involved in his pending lawsuit against his former business partners. July 31, 2024 T.T. 193; 7 – 194; 9. The Court properly evaluated the evidence and testimony presented at trial when concluding that the pending lawsuit was marital property subject to equitable division and placed a value upon the asset. It was Gary's burden of proof to show the property was nonmarital or of no value. *Johnson v. Johnson*, 2007 S.D. 56, ¶ 34, 734 N.W.2d 801, 809.

In *Johnson* this Court discussed the analytical approach when evaluating lawsuits. *Id.* The analytical approach, as utilized in *Johnson* when analyzing the inclusion of personal injury settlement proceeds, includes the Circuit Court considering the "nature and underlying reasons for the compensation." *Id.* This Court in *Johnson* discussed that "[o]nly those portions of a personal injury award that represent compensation for past wages, medical expenses, and other items which diminish the marital estate are included within the marital estate." *Id.* (quoting *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657, 662 (Neb. 1999)). "Compensation for purely personal losses, such as pain, suffering, disfigurement, disability, or loss of post-divorce earning capacity, are not included in the marital estate." *Id.* This Court in *Johnson*, held that the Circuit

Court's finding was not an abuse of discretion when it divided the personal injury proceeds within the divorce. *Id.*

Further, *Johnson* discusses the four South Dakota decisions that analyzed personal property awards within the divorce context. *Id. Compare e.g. Wipf v. Wipf*, 273 N.W.2d 124, 125 (S.D. 1978) (holding it was not error to include personal injury award within the marital estate was); *Fink v. Fink*, 296 N.W.2d 916, 918 (S.D. 1980) (concluding that the award from a cause of action prior to the marriage and proceeds received from the cause of action after the commencement of the divorce were non-marital); *Henrichs v. Henrichs*, 426 N.W.2d 569, 571 (S.D. 1988) (finding that settlement proceeds are marital property subject to equitable distribution); and *Kappenmann v. Kappenmann*, 479 N.W.2d 520 (S.D. 1992) (determination not to consider Husband's pending personal injury claim but included Wife's pending personal injury claim in the property division).

Gary cites *Kappenmann* in support of his claim that his pending lawsuit should be excluded from the marital estate. App. Brief 11. This reliance is misplaced. Part of *Kappenmann* involved a conclusion that Wife did not establish her burden of proof for valuation of Husband's personal injury claim and that "to do so would have been relatively simple." *Id.* at 525. However, the Court further concluded that Wife's pending suit was part of the marital estates based solely upon the evidence that she was requesting \$75,000 and had rejected a \$10,000 settlement offer. *Id.* In the present case, Sonja presented significantly more evidence than Husband presented in *Kappenmann*. Sonja presented a Demand Letter wherein Gary was requesting payment of outstanding obligations totaling \$3,016,001.62. Ex. 22/A.A. 34. Moreover, Gary's own prepared documentation, introduced and received at trial as Exhibit 23, supports the outstanding loans, payments, unpaid salary, and business expense accounting Gary recorded and utilized as the

basis for his Demand Letter. Ex. 23/A.A. 36. The Circuit Court in the immediate case did not have to “go on a treasure hunt of its own to try and ferret out evidence” to support its Findings and Conclusions regarding the inclusion of the pending lawsuit in the marital estate and its value because Sonja met her burden of proof to establish a value on Gary’s pending lawsuit.

Kappenmann, 479 N.W.2d at 525. See FOF 39(dd); COL 20 – 35.

Gary further directs this Court to *Mathew v. Palmer*, 589 N.W.2d, 343 (Neb. App. 1999), App. Brief 13. In *Mathew*, the Nebraska Court of Appeals determined that it was not error to exclude Wife’s proceeds from a lawsuit for breach of privacy and a pending cause of action for damages Wife had from a medical malpractice lawsuit. *Id.* at 346. The Court conducted a review of legal authorities, which identified that Nebraska cases identify with the majority of jurisdictions that engage in the analytical approach discussed by this Court in *Johnson*. *Id.* at 350. The Court specifically summarized its approach stating “compensation for a tortious injury that a spouse has or will receive for pain, suffering, disfigurement, disability, or other debilitations of mind or body are not included in the marital estate, but compensation for past wages, medical expenses, and other items which diminish the marital estate are included within the marital estate.” *Id.* The Court went on to place the burden of proof that the pending malpractice action was not part of the marital estate upon Wife. *Id.* In conducting its analysis regarding the malpractice action based upon Wife’s injuries after a breast augmentation, the Court found that “there is no definitive evidence on the status of the malpractice action or the elements of damage that Jane is seeking to recover in that action.” *Id.* Moreover, the Court stated that “none of this affected the marital estate.” *Id.*

Additional jurisdictions have discussed the analytical approach to pending lawsuits and their marital components when including said lawsuits in the property division. The Court in

Furney v. Furney, contemplated the marital component of a pending lawsuit when it analyzed Husband's pending wrongful termination lawsuit. 2011 Wisc. App. LEXIS 639. In *Furney*, the Court recognized that Husband had a pending wrongful termination lawsuit during the divorce proceedings. *Id.* The trial court made a specific finding that the "possible proceeds from [the wrongful-termination] suit have a marital component in that some of the recovery will be lost wages from this marriage. *Id.* Given the marital component of the pending lawsuit, it was included in the Court's division of the marital estate. *Id.*

In *Muza v. Muza*, the Missouri trial Court classified a pending lawsuit Wife had filed against her former employer in its dissolution of marriage trial. 452 S.W.3d 326 (M.O. 2014). Missouri follows the analytical method of classifying monetary settlements. *Id.* at 329. The trial court explained "[Wife]'s lawsuit was filed during the marriage and alleges relief for claims and damages that occurred during the marriage. *Id.* at 328.

The *Mathew* case is distinguishable from the current matter as Gary did not prove that the property is nonmarital. In fact, the evidence and testimony presented make clear that the pending action is for outstanding obligations that had a direct effect on the marital estate. Gary's own admission at trial was that every one of the assets on Exhibit I, which included the businesses involved in the pending Civil Action, are marital assets. July 31, 2024 T.T. 171: 12-14.

In examining the evidence presented by Sonja at trial, the Circuit Court used the analytical approach and determined there is a marital component of the pending legal claim by Gary that supported its inclusion in the Circuit Court's valuation of the marital estate. FOF 98 and 99; COL 33-34. The pending legal claim seeks damages for income and assets lost during the marriage. This loss affected both spouses and recovery should be considered an asset under SDCL 25-4-44. Gary represented to Sonja that their marital money was invested with his

business partners and that these businesses were their retirement plan. July 31, 2024 T.T. 103, 16 – 23. Gary’s lawsuit is not for a future expectancy, but instead for alleged receivables and lost wages that were incurred during his marriage to Sonja. Again, his Demand Letter specifically states the \$3,016,001.62 demand as being for outstanding obligations from his marital businesses. The organized chart of expenditures, loans, and unpaid salary prepared by Gary, sets forth dates that were prior to Sonja filing for divorce, thus incurred during the course of the marriage. The business assets and Civil Action should not be excluded from the marital estate and the Circuit Court properly set out an equitable formula that could be applied to the asset to determine its valuation.

Gary’s contention that there was an agreement regarding the valuation of the Civil Action is a red herring unsupported by the record. Divorce agreements are governed by the rules of contract law. *Niemitalo v. Seidel*, 2022 SD 13, 972 N.W.2d 115. Gary had the burden of proving the elements of a contract. *Winegeart v. Winegeart*, 2018 SD 32, 910 N.W.2d 906. The existence of a contract includes the following elements: 1) parties capable of contracting; 2) parties’ consent; 3) a lawful object; and 4) sufficient cause or consideration. SDCL 53-1-2. In order to have a binding contract, there must be mutual assent or a meeting of the minds on all essential terms. *Winegeart*, 2018 SD at ¶ 16. Settlement negotiations are generally not admissible to prove or disprove the validity or amount of a disputed claim. SDCL 19-19-408.

The record is devoid of a written stipulation and agreement. The record specifically states that Sonja pointed this out during closing arguments. August 1, 2024 T.T. 97; 9. The Court further stated in its decision that it viewed the pretrial correspondence between the parties as “pretrial negotiation strategies.” August 1, 2024 T.T. 142; 17 – 20. A meeting of the minds did

not exist regarding the valuation of the Civil Action and the business interests involved in the same.

The Circuit Court properly considered the testimony and evidence presented when it determined the Civil Action and the businesses it involves were to be included in the marital estate. The Circuit Court did not abuse its discretion in its Findings of Fact and Conclusions of Law and should be *Affirmed*.

II. The Circuit Court did not clearly err when it determined the value of the Civil Action to be \$350,000.00.

The Circuit Court must place a value upon all the property held by the parties when making an equitable distribution of that property. *Guthmiller v. Guthmiller*, 2003 SD 120, ¶ 6, 670 N.W.2d 516, 517 (finding that the trial court should have made a specific finding regarding the value of the business before making an equitable division). A Circuit Court is not required to accept either party's proposed valuation of an asset. *Conti v. Conti*, 2021 S.D. 62, ¶ 26, 967 N.W.2d 10, 16-17. The Circuit Court's valuation must fall within a reasonable range based upon the evidence presented at trial. *Id.* (additional citations omitted).

The Supreme Court will not place valuation on the assets when reviewing the property division as that is a task for the trial court as the trier of fact. *Johnson*, 2007 SD at ¶ 37. "The only time this court interferes with the valuations determined by the trial court is when it has made a clearly erroneous valuation finding." *Id.* (quoting *Geraets v. Geraets*, 1996 SD 119, ¶ 7, 554 N.W.2d 198, 200). The date of divorce is the proper time to determine the value of the marital estate, absent special circumstances. *Id.*

South Dakota law requires an equitable division, it does not require an equal division. *Weber*, 2023 SD at ¶ 22. The Circuit Court is not required to provide a calculation for its determination of a property division. *Id.*

The Circuit Court valuation of the Civil Action and the marital business involved within was supported by the testimony and evidence. The Court specifically analyzed Exhibits 22 and 23 in concluding its valuation of the Civil Action.

The Circuit Court did not have to speculate regarding the value of Gary's outstanding obligations as the basis of his lawsuit as the evidence was admitted without objection. Exhibits 22 and 23 provided the Court with detailed support for the Circuit Court's consideration of the Civil Action, and its involved businesses, as marital property and the valuation thereof. The Circuit Court specifically discussed its calculation regarding the Civil Action. August 1, 2024 T.T. 141; 8 – 142; 3. The Circuit Court, utilizing its "education, training, and experience with that kind of litigation, both as a lawyer, and as a judge, and knowing the parties and the law firm that's involved," believed it was a conservative calculation for the business. August 1, 2024 T.T. 141; 19 – 142; 3. More to this point, the Circuit Court made a specific finding that

"Lines 57 – 66: Gary's businesses are either disbanded or involved in a lawsuit. As evidenced in Exhibits 22 – 24 & 78, Gary has engaged legal counsel and made a demand regarding the monies he is owed. The value of the lawsuit and loans Gary put forth at trial are awarded to Gary in the amount of \$350,000. The court finds that this amount includes the \$50,000 retainer paid to Davenport Evans Law Office from marital funds after the sale of their Okoboji real property and ten percent (10%) of the demand Gary has asserted he is owed. The Court's rationale for this valuation was stated on the record. Gary is reckless but also intelligent and shrewd, and represented by competent counsel. The retainer is essentially an investment in a potential outcome and the demand is the best-case scenario for the outcome in the business lawsuit. Based upon all of the evidence in the case a valuation of Gary's cause of action against his former business partners of the actual money he has invested in the case plus only 10% of his legal demand is a very conservative and rational valuation for the Court to make in this case.

FOF 98(dd). This Finding of Fact is consistent with the evidence presented at trial and the Exhibits admitted into the record. The Court did not solely rely upon the Demand Letter, but also Exhibit 23, which is the accounting prepared by Gary himself regarding what he is owed in outstanding obligations from his business ventures.

The Circuit Court properly exercised its broad discretion, as the trier of fact, in determining the value of Gary's businesses as involved in the Civil Action and including \$350,000 in its equitable division. The Circuit Court should be *Affirmed*.

CONCLUSION

The Circuit Court acted within its authority and discretion when it included Gary's businesses and Civil Action in the marital estate and placed a value thereupon for purposes of equitably dividing the marital estate under South Dakota Law.

The Circuit Court's Findings of Fact and Conclusions of Law should be *Affirmed*.

Respectfully submitted this 24th day of April, 2025 at Sioux Falls, South Dakota.



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CERTIFICATE OF COMPLIANCE

I, Rachel Preheim, hereby certify this brief is submitted within the parameters of SDCL § 15-26A-66 using in Times New Roman typeface, 12 pt. font, and that the word processing system used to prepare the brief indicates that the number of words used was 5,197 which does not include the table of contents; table of authority; headings; statement of legal issues; certificate of counsel; or any addendum materials.

Respectfully submitted this 24th day of April, 2025 at Sioux Falls, South Dakota.



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CERTIFICATE OF SERVICE

I, Rachel Preheim, hereby certifies that on the 24th day of April, 2025, I electronically filed with the South Dakota Supreme Court the Brief of Appellee and that the original was filed by mailing the same via United States mail, first class postage prepaid to Clerk of the Supreme Court, 500 East Capitol Avenue, Pierre, South Dakota, 57501-5070.

A true and correct copy of the foregoing brief was served electronically to Attorney for Appellant as set forth below, on the 24th day of April, 2025:

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1

STATE OF SOUTH DAKOTA

COUNTY OF LINCOLN

) IN CIRCUIT COURT

ss:

) SECOND JUDICIAL CIRCUIT

SONJA R. KING

Plaintiff,

v.

GARY A. KING

Defendant.

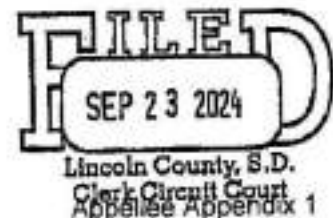
41DIV. 23-90

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This action came before the Court, the Honorable Douglas Hoffman, Circuit Judge presiding, on July 30 – August 1, 2024, at the Lincoln County Courthouse, Canton, South Dakota. The Plaintiff, Sonja R. King, being personally present and represented by Rachel Preheim, Lockwood & Zahrbock Kool Law, and the Defendant, Gary A. King, being personally present and represented by Thomas Frankman, Davenport & Evans Law; the Court having heard testimony and evidence presented by both parties; the Court having considered all of the records on file herein; and this Court having jurisdiction over this matter, and for good cause appearing, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT:

1. Plaintiff, hereinafter referred to as "Sonja," was born on the 23rd day of November, 1978.
2. Sonja currently resides at 8504 S. Quiet Oak Circle; Sioux Falls, SD 57108.
3. Defendant, hereinafter referred to as "Gary," was born on the 22nd day of November, 1974.



4. As of the date of trial Gary was residing at an AirBnB located at 891 14th Street, Unit 2714; Denver, CO 80202.
5. The parties were married on the 10th day of May, 2004 in the Country of Jamaica.
6. Two children were born of the marriage, namely, Hudson Alexander King, born on the 12th day of June, 2009; and Landon Bradley King, born on the 5th day of January, 2012.
7. Sonja filed for divorce on the 30th day of May, 2023 in Lincoln County, South Dakota on the grounds of extreme cruelty, willful desertion, and adultery.
8. Sonja sought primary legal and physical custody of the minor children; child support; equitable division of marital property; alimony; and attorney fees. *See* Verified Complaint filed May 30, 2023.
9. Gary was served via a civil process server, Carla Baker, on the 15th day of June, 2023. Specifically, Gary was served with the Notice of Appearance; Summons; Verified Complaint; Plaintiff's Interrogatories & Request for Production of Documents to Defendant (First Set); and South Dakota Parenting Guidelines. *See* Affidavit of Service filed June 16, 2023.
10. Gary filed an Answer to Verified Complaint on the 6th day of September, 2023. *See* Answer to Verified Complaint filed September 6, 2023.
11. Sonja has a journalism major from the University of Nebraska – Lincoln. After receiving her degree, Sonja worked in North Carolina as an administrative assistant at the YMCA. Sonja relocated to Sioux Falls after 9/11 to be near family and began working at Wells Fargo, first as a temporary job before moving into a mortgage banker role. Sonja went on to start a private mortgage group, which was disbanded in

2013 when Sonja's primary role became being a mother to the parties' minor children and wife.

12. At other times during the pendency of the parties' marriage, Sonja did work part-time as a fitness instructor and at Lululemon in Sioux Falls, South Dakota.
13. During the pendency of the divorce, Sonja worked various jobs to make ends meet, including substitute teaching; cleaning houses; flipping real estate; and working at Bagel Boy.
14. Sonja is currently employed at KN Construction, Inc. in Harrisburg, South Dakota with her work hours typically being from 8 AM until 5 PM Monday – Friday with the occasional weekends. Sonja earns a salary of \$65,000 per year at KN Construction, Inc. *See Exhibit 64.*
15. Sonja provides health insurance for herself and the minor children through her employment. *See Exhibit 65.*
16. Gary attended the University of Sioux Falls before moving to Omaha, Nebraska to obtain a Master's Degree from Creighton University. After graduation, Gary worked for Mutual of Omaha as a senior underwriter.
17. In 2011, Gary launched Cypress Risk Management.
18. Gary has been involved in various business ventures throughout the parties' marriage.
19. Gary has a pending lawsuit against his former business partners in which Gary is represented by competent counsel and wherein he claims in a legal pleading drafted by counsel and filed with the Circuit Court under SDCL 15-6-11 that he is owed \$1,369,871.96 by said defendant business partners under promissory notes with

- interest accruing. Gary has asserted in legal correspondence that he is owed at least \$1,646,129.66 due for loans, advances, and expenditures. *See Exhibits 22 & 23.*
20. Gary's lawsuit against his former partners was filed in Lincoln County, South Dakota in August 2023. *See Exhibit 24.*
21. Gary's lawsuit against his former business partners was introduced into evidence when Gary was questioned by his attorney regarding the lawsuit and the demand letter put forth in Exhibit 22.
22. Gary is under federal indictment for sixteen (16) counts of various charges, specifically: wire fraud; money laundering; bank fraud; and mail fraud stemming from a Grand Jury indictment filed on February 29, 2024 in the United States District Court of South Dakota Western Division. *See Exhibit 27.*
23. As a result of Gary's actions within Cypress Risk Management LLC, Gary's South Dakota Resident Insurance Producer License was revoked. The South Dakota Business Entity License of Cypress Risk Management LLC was also revoked by the South Dakota Department of Labor and Regulation Division of Insurance. *See Exhibit 26.*
24. Findings of Fact and Conclusions of Law regarding Gary and Cypress Risk Management LLC were entered by the South Dakota Department of Labor and Regulation Division of Insurance were signed on the 8th day of March, 2023 with the proposed decision including revocation of Gary's insurance producer license; Cypress Risk Management LLC should be revoked; and that Gary and Cypress Risk Management LLC should be permanently enjoined from transacting insurance business in South Dakota. *See Exhibit 26.*

25. Student Assurance Services, Inc. initiated a civil suit against Cypress Risk Management, LLC and Gary. See Exhibit 25. Student Assurance Services, Inc. received a Default Judgment in the amount of \$708,076.08. See Exhibit 26.
26. The Student Assurance Services, Inc. Judgment has a lien against two real properties owned by the parties; specifically, 8504 S. Quiet Oak Circle; Sioux Falls, SD 57108 and 38148 297th Street; Lot 14; Lake Andes, SD.
27. Gary is currently unemployed but is seeking employment.
28. Gary's Social Security Statement shows that his income in 2022 was \$292,000. See Exhibit 73.
29. Gary can earn an income of at least what Sonja is making as he is educated and well spoken.
30. Sonja was awarded primary physical custody of the minor children during the pendency of this matter. See Order from Hearing on November 8, 2023.
31. In the fall of 2023, the minor children began therapy with Larry L. Dancier, MS, QMHP at Stronghold Counseling Services, Inc.
32. Initially, the minor children were engaged in sessions on a bi-weekly basis, but this has since evolved into appointments on a monthly basis.
33. Gary was involved in three (3) of the sessions.
34. Mr. Dancier testified that the minor children do not have an interest in spending time with Gary. Mr. Dancier described the relationship between the minor children and their father as sterile.

35. Mr. Dancier had not experienced such apathy on the part of teenage children and lack of forward movement to repair the father-son relationship in his forty (40) years of practice.
36. Mr. Dancier does not recommend forcing the minor children to spend time with their father as the same would be detrimental to their wellbeing and further damage the parent/child relationship and undermine any remaining hope of eventually healing the parent/child relationship.
37. The minor children have witnessed law enforcement come to the marital home looking for Gary.
38. The minor children are aware that their father has been on the news regarding his legal matters involving Cypress Risk Management LLC.
39. The minor children are aware of Gary's legal charges and have experienced embarrassment and shame as a result.
40. The elder son is the individual who discovered disturbing photos on his iPad in relation to his dad's actions, including but not limited to his affairs.
41. Gary's messages to the boys are inappropriate when blaming their mother and discussing the legal proceedings. *See Exhibit 82.*
42. Sonja has not effected the therapeutic relationship between the minor children and Mr. Dancier. Sonja is not to blame for the boys indifference towards their father as the boys have grown up in a one parent environment given Gary's consistent absence from the home.
43. Sonja is not molding Mr. Dancier's opinions, nor does Mr. Dancier believe that parental coaching has occurred. Rather, the children's reactions to their father at this

time are consistent and a natural response to his reprehensible conduct toward themselves, their mother, and the law.

44. When pressed on cross-examination, Mr. Dancler made clear that there was a lack of movement when Gary was involved and forcing involvement would be damaging to the minor children. Gary needs to take accountability for his actions and apologize and seek forgiveness to resuscitate his relationship with his sons.
45. The minor children are of an age to speak regarding their preferences for custody. The minor children do not want to spend time with their father currently and need time to process their trauma from him, as well as for Gary to take accountability for his actions.
46. Mr. Dancler is known to the Court through his professional testimony in many prior complex custody cases over many years to be a competent and well-respected family therapist, and his testimony in this case was rational, appeared to be predicated upon reasonable professional judgment, and was deemed highly credible by this Court.
47. The minor children are intelligent and active young men who are doing well in their current custodial arrangement and the evidence shows that they are not being unduly influenced but are rather experiencing a normal reaction to betrayal by their father.
48. Sonja is in counseling with Elli Larsen at Stronghold Counseling Services, Inc.
49. Ms. Larsen testified that Sonja's sessions commenced in October 2023.
50. Ms. Larsen testified that Sonja is working on overcoming psychological trauma from Gary, which involves domestic violence or intimate partner violence therapy, and working through her experiences of coercion/threats; emotional abuse; isolation; blaming the partner; and manipulation of her children by Gary over several years.

51. Sonja is making progress in therapy by empowering herself; learning and gaining an understanding of the financials that she was previously not privy to; and finding a strong support system.
52. Sonja is still navigating how to respond to Gary's messages and the emotional abuse she has endured. *See Exhibits 83 & 84.*
53. Ms. Larsen does not have concerns regarding Sonja's ability to parent or Sonja's ability to make sound legal decisions for the minor children.
54. Ms. Larsen is known to the Court through her professional testimony in many complex family law cases to be competent and well respected in her professional field and the Court found her testimony to be credible in this case.
55. Gary engaged in an extra marital affair with Leah Bettin, although the two did not have sexual relations.
56. Ms. Bettin worked for Let It Fly during the time Gary had an ownership interest in the same, which is how they met.
57. While Ms. Bettin stated that sexual intercourse did not occur, Ms. Bettin and Gary had an inappropriate relationship that negatively affected his marriage with Sonja. *See Exhibit 57.*
58. Gary spent lavishly on Ms. Bettin, including but not limited to travel; restaurants; shopping; strip club private room; gambling; alcohol and drugs.
59. Ms. Bettin kept a record of the money Gary spent on her that totaled over \$100,000 from approximately 2020 – 2021. *See Exhibit 56.*

60. Exhibit 56 details that Ms. Bettin traveled with Gary to Scottsdale, AZ; New York, NY on two (2) occasions; Deadwood, SD; and Las Vegas, NV throughout their relationship.
61. Exhibit 56 details that Gary paid for Ms. Bettin's trip to Grenada; Gary provided Ms. Bettin with spending money on a regular basis; and Gary provided Ms. Bettin with a vehicle.
62. Exhibit 57 evidences that Gary gave Ms. Bettin his credit card information and told her to order anything she wanted. *See Exhibit 57, pages 408 & 410.*
63. Ms. Bettin testified that Gary drank to the level of intoxication and utilized illegal substances.
64. Gary would regularly gamble.
65. Gary asked Ms. Bettin to be his wife. *See Exhibit 57, page 434.*
66. Ms. Bettin is currently thirty (30) years old and currently resides in Sioux Falls, South Dakota. In essence, Gary was the paradigm of a "Sugar Daddy" for Ms. Bettin.
67. Sonja was not aware of Ms. Bettin and Gary's relationship nor the money spent by Gary on and for Ms. Bettin.
68. Ms. Bettin's testimony was credible and the Court concluded that she testified truthfully and essentially confessed the nature of her relationship with Gary to Sonja from the witness stand.
69. Gary engaged in sexual relations with Tiffany Wilber while married to Sonja.
70. Ms. Wilber is currently the owner of Deaf Services Unlimited in Des Moines, IA.
71. Ms. Wilber met Gary in 2018 at McNally's Irish Pub in Sioux Falls, South Dakota.

72. Gary held himself out as going through a divorce from the onset of his relationship with Ms. Wilber.
73. Ms. Wilber was previously hired by Gary to do interior design work at two businesses that Gary had an ownership interest in within Deadwood, SD.
74. Ms. Wilber believes she was paid by Rushmore Gaming and received benefits including health insurance.
75. Gary provided Ms. Wilber with a Porsche Cayenne to drive.
76. Sonja was not aware of Ms. Wilber's use of the vehicle.
77. Ms. Wilber assisted Gary in looking for a residence in the Deadwood-Sturgis area as she is also a real estate agent.
78. Ms. Wilber assisted Gary in securing the residence located at 11962 Big Piney Road; Sturgis, SD ("Big Piney").
79. Ms. Wilber and her son assisted in demolition work at Big Piney.
80. Ms. Wilber spent time, including overnights with Gary, at Big Piney.
81. Ms. Wilber traveled with Gary on numerous occasions, including but not limited to New York; Florida; Arizona; California; Wisconsin; Nevada; and Israel. See Exhibit 60.
82. Gary, or his business(es), would pay for the travel Ms. Wilber experienced during her relationship with Gary.
83. Josh Miller testified that Ms. Wilber traveled with Gary and he was threatened by Gary not to tell Sonja.
84. Gary was generous in giving gifts, including but not limited to jewelry and shoes. Gary spent over \$10,000 on gifts for Ms. Wilber.

85. Gary would get upset if Ms. Wilber paid for things.
86. Gary met Ms. Wilber's family, including her children, and spent holidays with Ms. Wilber and her children.
87. Gary held Ms. Wilber out as his wife in Deadwood, SD.
88. Gary engaged in correspondence with Ms. Wilber regarding the pending divorce, including attempts to influence her testimony prior to depositions. See Exhibit 58.
89. Gary invited Ms. Wilber to Denver in May 2024, paying for a flight and Denver Nuggets NBA tickets for her. See Exhibit 58.
90. Ms. Wilber did attempt to go to the marital residence and confess the affair and apologize to Sonja but was threatened by Gary.
91. Ms. Wilber does not believe Gary was truthful with her or his wife.
92. Ms. Wilber explained that Gary was controlling and would threaten her.
93. Ms. Wilber's testimony was credible. It was evident to the Court from observing Ms. Wilber's manner while testifying and her tone and statements that she was ashamed of her conduct in having a relationship with Gary. The tenor of her testimony was that she was essentially hoodwinked into believing that Gary was leaving his wife and that Ms. Wilber and Gary were a couple with a future together, and when she realized that she had been misled, she was ashamed for her own foolishness as well as how her conduct had contributed to harming Sonja and the boys.
94. Each party set forth their respective position regarding the distribution of property in Exhibit 1.
95. The parties did engage in formal discovery requests under the Rules of Civil Procedure.

96. The parties were not subjected to a Pre-Trial Order by the Court.
97. Exhibit 1 details the assets and debts the Court considered in its determination of equitable division of property.
98. Exhibit 1:
- a. Line 7: The value of 8504 S. Quiet Oak Circle; Sioux Falls, SD 570108 was stipulated to by the parties at \$791,000. This real property is awarded to Sonja subject to its mortgage as detailed in Exhibit 31.
 - b. Line 8: Dean Sternhagen testified regarding his price opinion and the listing agreement he had with the parties. See Exhibits 2 – 3. Mr. Sternhagen had issues with Gary during the time the property was ordered to be sold as Gary frustrated the process and threatened Dean. See Exhibit 4. Gary rented out the property as an AirBnB during the pendency of this divorce despite a Court Order requiring him to refrain from such activity without the consent of Sonja. See Exhibits 4; 74; and 90. Gary did not share any profits from the AirBnB rental with Sonja nor utilize the profits towards marital debt. Gary is awarded the real property at a value of \$479,000 subject to its mortgage as detailed in Exhibit 30.
 - c. Line 9: Big Piney is currently listed for sale at a price of \$1,649,000. See Exhibit 5. The parties agree that the property shall remain for sale. Larry Gehle, Chief Risk Officer at First National Bank, testified that the property was supposed to be renovated and sold but the same did not occur. Gary would consistently inform the Bank that the home was almost ready to be put on the market; however, the bank incurred additional costs in the form of a

construction loan to complete the renovations. The bank also had to bring the property current in its outstanding bills. Gary has engaged a bankruptcy attorney to assist with the dealings of the Big Piney property. Exhibit 28 details the loan payoff amount, including the note balance for advances the bank had to incur for the property to be in marketable condition. Exhibit 29 details the closing statement from the purchase of the property and evidences the \$500,000 deposit Gary paid towards the home, which correlates to Counts 11 and 13 of Gary's federal indictment (Exhibit 27). Upon the sale, any proceeds shall be applied to the outstanding loans with First National Bank. Any remaining proceeds shall be applied to the Cypress Risk Management Debt (Exhibits 35 – 36) and the Student Association Services Debt (Exhibit 25). Gary shall be solely responsible for any and all costs associated with the Big Piney property and the Cypress Risk Management Debt (Exhibits 35 – 36) and the Student Association Services Debt (Exhibit 25) and shall indemnify and hold harmless Sonja for the same.

- d. Line 12: 2021 Audi SQ7 is awarded to Sonja at a value of \$60,931. *See* Exhibit 6. Sonja is responsible for the debt associated on Line 79. *See* Exhibit 37.
- e. Line 13: Infiniti G35x is property used by the parties' minor child, Hudson. *See* Exhibit 7.
- f. Line 14: 2021 Porsche Cayenne is primarily driven by Gary. Bryan Launderville testified that Gary has not been financially responsible regarding this vehicle and Gary's mother signed a personal guarantee regarding the

vehicle to prevent the bank repossessing the same. *See* Exhibit 34. The Porche is awarded to Gary at a value of \$63,249. *See* Exhibit 8. Gary is responsible for the debt associated on Line 76. *See* Exhibit 33.

- g. Line 15: the 1973 Chevy Blazer was sold by Gary, without the knowledge or consent of Sonja, at an auction in May 2024. Gary retained the funds he received from the auction without the consent of Sonja or a Court Order. *See* Exhibit 90.
- h. Line 16: Gary sold the 1947 Jeep during the pendency of this action without the knowledge or consent of Sonja and kept the funds.
- i. Line 17: 1973 Ford Mustang is awarded to Gary at a value of \$40,000. *See* Exhibit 77.
- j. Line 20: Wells Fargo checking (2670) is awarded to Sonja. *See* Exhibit 9.
- k. Line 21: Wells Fargo Savings (7592) is awarded to Sonja. *See* Exhibit 10.
- l. Line 22 – 24: Omitted as non-disputed closed accounts.
- m. Line 25: Wells Fargo Savings (1231) is for the minor child and awarded to Landon. *See* Exhibit 11.
- n. Line 26: Wells Fargo Checking (4132) is for the minor child and awarded to Hudson. *See* Exhibit 12.
- o. Line 27: Wells Fargo Savings (7604) is for the minor child and awarded to Hudson. *See* Exhibit 13.
- p. Line 28: Wells Fargo Checking (9430) is awarded to Gary. *See* Exhibit 14.
- q. Line 29: First Dakota Checking (0196) is awarded to Gary.

- r. Line 30: Farmer's State Bank Checking (7103) is awarded to Gary. *See* Exhibit 15.
- s. Line 31: Gary is awarded his PayPal account. *See* Exhibits 18 & 91.
- t. Line 32: Sonja is awarded her Venmo account. *See* Exhibit 16.
- u. Line 33: Sonja is awarded her PayPal account. *See* Exhibit 17.
- v. Line 34 - 42: The Court does not put a value on these lines.
- w. Line 45: Edward Jones (1282) contains Lululemon Stock in the amount of \$13,740 that is awarded to Sonja at said value. The remainder of the account, at a value of \$6,037 is awarded to Gary. *See* Exhibits 19 - 20.
- x. Line 46: Edward Jones IRA (4227) is awarded to Sonja. *See* Exhibit 19.
- y. Line 47: Edward Jones Roth IRA (4148) is awarded to Sonja. *See* Exhibit 19.
- z. Lines 48 - 49: These Edward Jones Accounts are for the minor children.
Sonja is the proper person to manage these accounts on behalf of the minor children.
- aa. Line 50: Swift Fuels is awarded to Gary at the value of \$50,000 pursuant to Gary's testimony that he paid \$50,000 for fifty (50) shares when purchased through his company, KV Holdings. Gary went on to testify that he purchased shares in 2021 or 2022 and the same are not publicly traded and that his intent was to sell the shares to a major conglomerate after approximately ten (10) years.
- bb. Line 51: Cega Innovations is awarded to Gary at a value of \$20,000. Pursuant to Gary's testimony, the K-1 statement associated with this line item that he purchased in 2018 has a value of \$20,000.

- cc. Line 54: Sonja is awarded her term life insurance policy with Reliabank. *See* Exhibit 21.
- dd. Lines 57 – 66: Gary's businesses are either disbanded or involved in a lawsuit. As evidenced in Exhibits 22 – 24 & 78, Gary has engaged legal counsel and made a demand regarding the monies he is owed. The value of the lawsuit and loans Gary put forth at trial are awarded to Gary in the amount of \$350,000. The Court finds that this amount includes the \$50,000 retainer paid to Davenport Evans Law Office from marital funds after the sale of their Okoboji real property and ten percent (10%) of the demand Gary has asserted he is owed. The Court's rationale for this valuation was stated on the record. Gary is reckless but also intelligent and shrewd, and represented by competent counsel. The retainer is essentially an investment in a potential outcome and the demand is the best-case scenario for the outcome in the business lawsuit. Based upon all of the evidence in the case a valuation of Gary's cause of action against his former business partners of the actual money he has invested in the case plus only 10% of his legal demand is a very conservative and rational valuation for the Court to make in this case.
- ee. Line 75 – 79 have been addressed in previous findings.
- ff. Line 80: The Wells Fargo Line of Credit (9127) is a marital debt that will be split equally between the parties. *See* Exhibit 38.
- gg. Line 81: Sonja is responsible for her Citi Credit Card (5243). *See* Exhibit 39.
- hh. Line 82: Sonja is responsible for her Target Credit Card (6519). *See* Exhibit 40.

- ii. Line 83: Sonja's parents, Martin and Genola Hegge, have a promissory note with Sonja. The Court will not value the same in the division of property and Sonja will be responsible for any amounts due and owing. See Exhibit 41.
- jj. Line 84: Gary is responsible for his Capital One Credit Card (0450). See Exhibit 42.
- kk. Line 85: Gary is responsible for his Capital One Credit Card (6918). See Exhibit 43.
- ll. Line 86: Gary is responsible for his Capital One Credit Card (6028). See Exhibit 44.
- mm. Line 87: Gary is responsible for his Citi Credit Card (7874). See Exhibit 45.
- nn. Line 88: Gary is responsible for his Discover Card (3763). See Exhibit 46.
- oo. Line 89: Gary is responsible for his Student Loans.
- pp. Line 90: Gary is responsible for the Student Assurance Services Judgment in its entirety and shall indemnify and hold Sonja harmless thereof. See Exhibit 25.
- qq. Line 110: Each of the parties shall be responsible for claiming fifty percent (50%) of the capital gain of the sale of the Okoboji real property on his or her respective taxes.
- rr. Line 113: Sonja was required to cash out \$50,000 from the Edward Jones IRA to pay a debt in relation to the Okoboji real property after Gary took insurance money to pay an alternative debt in lieu of paying the contractor. See Exhibits

54 – 55. Gary shall reimburse Sonja for fifty percent (50%) of the tax consequences in relation to the \$50,000 IRA withdrawal.

ss. Lines 114 –117: Gary shall be responsible for any and all tax liabilities, including preparation costs with Steier & Associates, in relation to his businesses and shall indemnify and hold Sonja harmless thereof. *See Exhibits 48 – 51.*

tt. Line 120: Gary shall be responsible and shall indemnify and hold Sonja harmless for any costs; fees; attorney fees; fines; and/or restitution associated with his charges in Nevada 23-CR-051703. *See Exhibit 61.*

uu. Line 121: Gary shall be responsible and shall indemnify and hold Sonja harmless for any costs; fees; attorney fees; fines; and/or restitution associated with his federal charges 5:24-CR-50031. *See Exhibit 27.*

vv. Line 122: Gary shall be responsible and shall indemnify and hold Sonja harmless for any costs; fees; attorney fees; fines; and/or restitution associated with the traffic ticket associated with Gary allowing an unknown female to operate the Porche Cayenne. *See Exhibit 86.*

ww. Line 123: Gary shall be responsible for any attorney fees associated with his retainerment of Claire Gerry of Gerry Law Firm.

99. Gary engaged in activities that evidence a reckless disregard for the financial wellbeing of himself and his family, including reckless spending, gambling and womanizing.

100. Gary dissipated marital funds through his course of conduct and those dissipations have been established by the evidence in this case with reasonable certainty.

101. Any additional Findings of Fact included in the Conclusions of Law section are incorporated herein by this reference. To the extent any of the foregoing are improperly designated as a Finding of Fact and instead are a Conclusion of Law, they are hereby redesignated and incorporated herein as a Conclusion of Law.

CONCLUSIONS OF LAW:

1. This Court has jurisdiction over the parties and the subject matter of this case.
2. In custody disputes, the Court is obligated to determine what is in the best interest of the child. SDCL 25-4-45.
3. The best interest of the children is determined by an analysis of various factors, including the following: (a) the primary caretaker of the children; (b) parental fitness; (c) stability; (d) the child's preference; (e) harmful parental misconduct; (f) separation of siblings; and (g) substantial change in circumstances. *Fuerstenberg v. Fuerstenberg*, 1999 SD 35, 591 N.E.2d 798 (1999).
4. Joint legal custody is considered under SDCL 25-5-7.1, which states "In any custody dispute between parents, the court may order joint legal custody so that both parents retain full parental rights and responsibilities with respect to their child and so that both parents must confer on, and participate in, major decisions affecting the welfare of the child. In ordering joint legal custody, the court may consider the expressed desires of the parents and may grant to one party the ultimate responsibility over specific aspects of the child's welfare or may divide these aspects between the parties based on the best interest of the child. If it appears to the court to be in the best interest of the child, the court may order, or the parties may agree, how any such

responsibility shall be divided. Such areas of responsibility may include the child's primary physical residence, childcare, education, extracurricular activities, medical and dental care, religious instruction, the child's use of motor vehicles, and any other responsibilities which the court finds unique to a particular family or in the best interest of the child. If the court awards joint legal custody, it may also order joint physical custody in such proportions as are in the best interests of the child, notwithstanding the objection of either parent."

5. Some relevant factors when considering the parental fitness of each parent include the following: (a) mental and physical health; (b) the ability to give the children love, affection, guidance, and education and to impart the family's religion or creed; (c) commitment to prepare the children for responsible adulthood, as well as to insure that the children experience a fulfilling childhood; (d) exemplary modeling so that the children witness firsthand what it means to be a good parent, a loving spouse, and a responsible citizen; (e) willingness to maturely encourage and provide frequent and meaningful contact between the children and the other parent; and (f) capacity and disposition to provide the children with protection, food, clothing, medical care, and other basic needs. *Price v. Price*, 2000 SD 64, 611 N.W.2d 425 (2000).
6. The Court must evaluate which parent is best able to provide a stable and consistent home environment, considering the following: (a) the relationship and interaction of the child with the parents, step-parents, siblings and extended families; (b) the child's adjustment to home, school and community; (c) the parent with whom the child has formed a closer attachment, as attachment between parent and child is an important developmental phenomena and breaking a healthy attachment can cause detriment;

- and (d) continuity, because when a child has been in one custodial setting for a long time pursuant to court order or by agreement, a court ought to be reluctant to make a change if only a theoretical or slight advantage for the child might be gained. *Price v. Price*, 2000 SD 64, 611 N.W.2d 425 (2000).
7. The Court further considers the factor of primary caretaker, which requires the consideration of which parent has been more responsible for the children primary to the custodial dispute and which parent has more time available to spend with the child. *Price v. Price*, 2000 SD 64, 611 N.W.2d 425 (2000).
 8. If the child is of a sufficient age to form an intelligent preference, the Court may consider said preference. SDCL 25-4-45. *See also, Price v. Price*, 2000 SD 64, 611 N.W.2d 425 (2000).
 9. Harmful parental misconduct is evaluated when a parent's misconduct has a harmful effect on a child and is committed in the presence of a child old enough to perceive the misconduct. *Price v. Price*, 2000 SD 64, 611 N.W.2d 425 (2000).
 10. A court must not separate siblings absent compelling circumstances. *Price v. Price*, 2000 SD 64, 611 N.W.2d 425 (2000).
 11. It is in the best interest of the minor children that Sonja shall have primary physical custody of the minor children.
 12. Gary shall have parenting time in accordance with the South Dakota Parenting Guidelines; however, it is in the best interests of the children that they not be forced to go with Gary for parenting time against their wishes.
 13. It is in the best interest of the minor children that Sonja shall have sole legal custody of the minor children as she has prioritized being a mother first and Gary has engaged

in activities that the children are aware of and the poor decisions made by Gary have negatively affected the children and his relationship with them. The best predictor of the future is the past and Gary cannot be trusted given the course of conduct he has engaged in, as he has yet to take accountability for his actions and seek forgiveness from and genuine reconciliation with his sons.

14. Child support is governed by SDCL 25-7.
15. A parent's duty to support his children is a paramount obligation of the parent. *Kost v. Kost*, 515 N.W.2d 209 (SD 1994).
16. Gary shall pay Sonja \$1100 per month in child support pursuant to the Order entered by the Court on November 8, 2023.
17. That the child support calculation takes into consideration the medical, dental, and vision insurance costs Sonja is paying pursuant to SDCL 25-7-6.16.
18. The child support obligation shall be due and payable the first of each month thereafter until the children attain the age of eighteen (18), or until the children attain the age of nineteen (19) if still a full-time student in a secondary school, or until the children are legally emancipated in accordance with SDCL 25-7A.
19. Child support payments shall be made in regular payments to the Department of Social Services and mailed to the Child Support Payment Center, Suite 84, 700 Governors Drive, Pierre, South Dakota 57501. The parties agree that the Department of Social Services is authorized to enter an Order for Withholding Gary's income, through the Department of Social Services, Office of Child Support Enforcement, as provided in SDCL 25-7A-23. *et. seq.*, without further action or proceeding.

20. When a divorce is granted, the courts may make an equitable division of the property belonging to either or both, whether the title to such property is in the name of the husband or the wife. In making such division of the property, the court shall have regard for equity and the circumstances of the parties. SDCL 25-4-44.
21. The factors to be included for determining property division are: (1) duration of the marriage; (2) value of property owned by the parties; (3) ages of the parties; (4) health of the parties; (5) competency of the parties to earn a living; (6) contribution of each party to the accumulation or dissipation of property; and (7) income-producing capacity of the property owned by the parties. *Billion v. Billion*; 1996 SD 101, 553 N.W.2d 226 (1996).
22. The Court has the discretion to determine what is and what is not considered marital v. nonmarital property. *Billion v. Billion*; 1996 SD 101, 553 N.W.2d 226 (1996).
23. In divorce proceedings, the date of valuation of the marital estate is the date of the granting of the divorce absent a finding of special circumstances. *Conti v. Conti*, 2021 SD 62, 967 N.W.2d 10; *Pieper v. Pieper*, 2013 SD 98, 841 N.W.2d 781; *Duran v. Duran*, 2003 SD 15, 657 N.W.2d 692.
24. Under *Taylor v. Taylor*, 2019 SD 27, 928 N.W.2d 458 parties may present conflicting evidence concerning the value of marital property and the Court is not required to accept either party's proposed valuation but should consider a valuation within the range of evidence presented.
25. Under *Pennock v. Pennock*, 356 N.W.2d 913, the Court has the broad discretion in dividing property and its decision will not be upset absent a clear abuse of discretion.

The Court in *Pennock* divided the marital estate seventy percent (70%) to one spouse and the remaining thirty percent (30%) to the other spouse.

26. In *Ahrendt v. Chamberlain*, 2018 SD 31, the Supreme Court discussed that inappropriate spending habits during the marriage may be weighed in a divorce property division as a consideration of the Court.
27. A trial court's division of property is not bound by any mathematical formula. *Endres v. Endres*, 532 N.W.2d 65, 71 (citing *Korzan v. Korzan*, 488 N.W.2d 689, 693 (S.D. 1992); additional citations omitted).
28. The parties were married on the 10th day of May, 2004.
29. The marital estate was valued at the date of divorce as set forth in Exhibit 1 and attached hereto.
30. Sonja and Gary are of sufficient age and health to be employed.
31. Sonja is competent to earn a suitable living. Gary has tremendous earning capacity according to his own testimony and history of earnings.
32. The Court's line-by-line valuation as set forth in Exhibit 1 takes into consideration the contribution of each party to the marriage. Sonja supported the family financially in the early years of the marriage and has continued to contribute to the marital estate despite prioritizing her role as a mother and wife. Gary has been the primary financial contributor until approximately 2018 when he began engaging in a course of conduct that has resulted in a dissipation of marital assets.
33. The Court has the authority to consider the dissipation of marital assets by Gary in making an equitable division of assets and debts.


34. Gary's course of conduct in his drinking, gambling, adulterous behaviors, exorbitant spending, alleged criminal activity, and business dealings evidence a reckless disregard for the financial wellbeing of his family.
35. Given the equitable distribution of the assets and debts as set forth in Exhibit 1, neither party owes the other a property equalization payment.
36. Under South Dakota Codified Law § 25-2-11, during a marriage, spouses are jointly responsible for the necessities of life, such as food and clothing, purchased by either spouse while they are living together as a family.
37. Alimony is authorized under South Dakota Codified Law § 25-4-41.
38. The Court has broad discretion in awarding alimony. The Court considers certain factors in determining the amount of alimony appropriate. The factors were decided in the South Dakota Supreme Court case, *Booth v. Booth*, 354 N.W.2d 924 (SD 1984) and include: (1) the length of the marriage; (2) the parties' respective earning capacities; (3) the parties respective financial condition; (4) the parties respective age, health, and physical condition; and (5) the parties social standing in life. The Supreme Court of South Dakota added a sixth factor, fault, to consider in awarding alimony in the case *Strickland v. Strickland*, 470 N.W.2d 832 (SD 1991).
39. Spousal support is not intended to equalize the income of the parties.
40. Spousal support is not awarded to either party in this matter.
41. Gary is at fault for the divorce.
42. Sonja shall be granted a Decree of Divorce from Gary upon the grounds of adultery and extreme cruelty pursuant to SDCL 25-4-2(1) and SDCL 25-4-2(2). Plaintiff's

Counsel is directed to prepare the appropriate Judgment and Decree of Divorce for the Court's signature and filing.

43. Sonja may file a Motion for Attorney Fees post-trial, and the same will be considered under the established rules governing the same.

BY THE COURT:




Hon. Douglas Hoffmann
CIRCUIT COURT JUDGE

9/18/24

2

70,000 cyons loan
second by LA + quiet act.

SAS int 15% new \$708,000
against both Q.O. + LA.
SONJA KING V. GARY KING

SR453 New Version

ASSETS AND LIABILITIES EXHIBIT

	A	B	C	D	E	F	G	H	I	J	K	L	M
	ASSETS AND LIABILITIES EXHIBIT												
	ASSETS/LIABILITIES	ASSET/LIABILITY VALUE				ACQUIRED PRIOR TO MARRIAGE BY:	RECEIVED GIFT OR INHERITANCE OR SETTLEMENT BY:	SONJA'S PROPOSED PROPERTY DIVISION		GARY'S PROPOSED PROPERTY DIVISION		COURT'S PROPERTY DIVISION	
		SONJA	SONJA	GARY	SOURCE			SONJA	GARY	SONJA	GARY	SONJA	GARY
1	ASSETS												
2	REAL ESTATE												
3	8504 S. Quiet Oak Circle, Sioux Falls, SD 57108 (lien against house for \$77k & SAS)	didn't loan her to sell it.										360K ASK	431K EQV
4		\$200,000	\$200,000	\$200,000	Marriage (Duffy appraised 4/7/00)			\$701,000	\$791,000				
5	38148 297th Street, lot 14, Lake Andes, SD (Pickstown property)			Waiting on appraisal				To be sold	To be sold			\$479,000	567K EQV
6	both agree to 2nd offer + various debts				Marion Appraised 10/11/22 as lot 22 in lot 14			To be sold	To be sold	To be sold	To be sold		
7	11962 Big Piney Rd. Sturgis, SD			\$1,500,000				To be sold	To be sold	To be sold	To be sold		
8	VEHICLES/PERSONAL PROP												
9	2021 Audi SQ7									\$60,931			
10	Infiniti G35s									Financing			
11	2021 Porsche Cayenne Sport			\$63,249	Trade in value			\$63,249		\$63,249			
12	1973 Chevy Blazer				Gary wouldn't provide RPD			\$25,000		\$50,000			
13	1947 Jeep (Gary sold for \$12,000)							\$12,000		\$12,000			
14	1973 Ford Mustang				Gary wouldn't provide RPD								
15	BANK ACCOUNTS/OTHER												

Appellee Appendix 27

Copy of Assets and Liabilities Exhibit 07.30.24

AUG 07 2024
Lincoln County, S.D.
Clerk Circuit Court

Page 1

Cap 6011
IRA →

EXHIBIT
P+5
7/31/24

SONJA KING V. GARY KING

	A	B	C	D	E	F	G	H	I	J	K	L	M
	ASSETS/LIABILITIES	ASSET/LIABILITY VALUE				ACQUIRED PRIOR TO MARRIAGE BY:	RECEIVED GIFT OR INSURANCE OR SETTLEMENT BY:	SONJA'S PROPOSED PROPERTY DIVISION		GARY'S PROPOSED PROPERTY DIVISION		COURT'S PROPERTY DIVISION	
		SONJA	SOURCE	GARY	SOURCE			SONJA	GARY	SONJA	GARY	SONJA	GARY
3													
4													
20	Wells Fargo, checking acct (2670). Sonja (acct opened 04/20/23)						her earnings			\$1,386	\$1,386		
21	Wells Fargo, savings acct (7592). Sonja (acct opened 05/23/23)						JoJo			\$11,688	\$11,688		
22	Wells Fargo, savings acct (1525). Sonja (proceeds from sale of Okoboji condo)												
23	Wells Fargo, checking acct (3993). Joint												
24	Wells Fargo, savings acct (0775). Joint												
25	Wells Fargo, savings acct (1231). Landon/Sonja												
26	Wells Fargo, checking acct (4132). Hudson/Sonja												
27	Wells Fargo, savings acct (7604). Hudson/Sonja												
28	Wells Fargo, business checking (9430). Cypress Risk Management LLC										\$0		
29	First Dakota, checking acct (0196). GK LLC			\$2	06/28/24						\$2		
30	Farmers State Bank, checking acct (7103). Gary (\$12,000 deposit on 9/29/23)			\$965	06/08/24						\$9		
31	Paypal, Gary										\$0		
32	Venmo, Sonja										\$16		
33	PayPal, Sonja										\$0		
34	Gary's unaccounted for accounts										\$0		

SONJA KING V. GARY KING

	A	B	C	D	E	F	G	H	I	J	K	L	M
	ASSETS/LIABILITIES	ASSET/LIABILITY VALUE				ACQUIRED PRIOR TO MARRIAGE BY:	RECEIVED GIFT OR INHERITANCE OR SETTLEMENT BY:	SONJA'S PROPOSED PROPERTY DIVISION		GARY'S PROPOSED PROPERTY DIVISION		COURT'S PROPERTY DIVISION	
		SONJA	SOURCE	GARY	SOURCE			SONJA	GARY	SONJA	GARY	SONJA	GARY
3													
4													
5	550k that Sonja gave to Gary for wedding (Mitch Peterson & Karen Hord) for his lawsuit												
35	Visa debt (19346) - Airbnb payments go to this acct												
36	VRBO acct												
37	Paypal payment to Jason Dentlinger for \$1856.40 on 2/18/23												
38	Apple cash - Paypal shows transfers via Apple Cash, Gary												
39	Account statements for funds transfers - online, cryptos												
40	Ebay, Gary												
41	Cash/ATM withdrawals												
42													
43													
44	Pension Plans/Stocks												
45	Edward Jones, Joint Tenants with Right of Survivorship (1282-1-8), Joint (\$13,740.20 is from Lufulemon stock from when Sonja worked there)												
46	Edward Jones, IRA (4227-1-2), Sonja on March 29, 2023 Gary took \$50,000 from this account and transferred to the joint Edward Jones acct to pay Conrad Construction for condo damage. They had used insurance checks for something else?												

Appellee Appendix 29

SONJA KING V. GARY KING

	A	B	C	D	E	F	G	H	I	J	K	L	M
	ASSETS/LIABILITIES	ASSET/LIABILITY VALUE				ACQUIRED PRIOR TO MARRIAGE, IF:	RECEIVED GIFT OR INHERITANCE OR SETTLEMENT IF:	SONJA'S PROPOSED PROPERTY DIVISION		GARY'S PROPOSED PROPERTY DIVISION		COURT'S PROPERTY DIVISION	
3		SONJA	SOURCE	GARY	SOURCE			SONJA	GARY	SONJA	GARY	SONJA	GARY
4													
47	Edward Jones Roth IRA (4148-1-9), Sonja	\$1,336	EDUCATION								\$1,336		
48	Edward Jones (4276-1-9), Hudson (Sonja until age 21)	\$27,900	EDUCATION										
49	Edward Jones (7370-1-8), Landon (Sonja until age 21)	\$44,002	EDUCATION										
50	Swift Fuels (Gary told Sonja they have 50,000 shares)	\$1,000,000	EDUCATION										
51	Cega Innovations, Gary	\$1,000,000	EDUCATION										
52													
53	LIFE INSURANCE												
54	Reliabank Life Insurance, term policy (5598), Sonja												
55													
56													
57	OR LLC												
58	Cega Innovations - Gary told Sonja he has a decent interest in this medical device company												
59	Rivals LLC												
60	Elevated LLC												
61	Elevated 2 LLC												
62	Spyglass Global Management LLC												
63	Caladonia Lodge LLC												
64	Main Lodge LLC												
65	Rushmore Gaming LLC												
66	Cypress Risk Management												
67													
68	TOTAL ASSETS												
69													
70													

SUNJA KING V. GARY KING

	A	B	C	D	E	F	G	H	I	J	K	L	M
	ASSETS/LIABILITIES	ASSET/LIABILITY VALUE				ACQUIRED PRIOR TO MARRIAGE BY:	RECEIVED GIFT OR INHERITANCE OR SETTLEMENT BY:	SONJA'S PROPOSED PROPERTY DIVISION		GARY'S PROPOSED PROPERTY DIVISION		COURT'S PROPERTY DIVISION	
		SONJA	SOURCE	GARY	SOURCE			SONJA	GARY	SONJA	GARY	SONJA	GARY
71	LIABILITIES												
72													
73	First Dakota National Bank, loan on 11962 Big Piney Road, Surgis property (0417), GK-LIA	\$1,024,292	Joint					Full off with sale			Pd off with sale		
74	First Dakota National Bank, loan on Lake Andes (7112), Joint	\$512,430	Joint	\$512,430	Joint			Full off with sale			\$512,430		
75	Farmers State Bank, mortgage on Quiet Oak Circle (2621)	\$360,298	Joint					\$360,298		\$360,298			
76	Farmers State Bank (5625), loan on 2024 Porsche	\$66,393	Joint	\$66,393	No due on asset						\$66,393		
77	Farmers State Bank, loan (0001) Cypress Risk Management	\$66,393	Joint								Pd off with sale		
78	Farmers State Bank (0002), Cypress Risk Management	\$66,393	Joint								Pd off with sale		
79	Audi Financial Services, loan on 2021 Audi (7710), Joint	\$66,393	Joint										
80	Wells Fargo, LOC (9127), Joint	\$66,393	Joint										
81	Chit Card (5251), Sonja	\$66,393	Joint										
82	Target Card (6519), Sonja	\$66,393	Joint										
83	Loan from Martin & Genola Hepp, Sonja	\$66,393	Joint										
84	Capital One (0450), Gary	\$66,393	Joint	\$66,393	Joint						\$66,393		
85	Capital One (6918), Gary	\$66,393	Joint	\$66,393	Joint						\$66,393		
86	Capital One (6028), Gary	\$66,393	Joint	\$66,393	Joint						\$66,393		

Appellee Appendix 31

SONJA KING V. GARY KING

	A	B	C	D	E	F	G	H	I	J	K	L	M
	ASSETS/LIABILITIES	ASSET/LIABILITY VALUE				ACQUIRED PRIOR TO MARRIAGE BY:	RECEIVED GIFT OR INHERITANCE OR SETTLEMENT BY:	SONJA'S PROPOSED PROPERTY DIVISION		GARY'S PROPOSED PROPERTY DIVISION		COURT'S PROPERTY DIVISION	
		SONJA	SONJA	GARY	SOURCE			SONJA	GARY	SONJA	GARY	SONJA	GARY
87	Citi (7874), Gary	\$41,091	08/13/23	\$39,630	08/13/23					\$20,546	\$20,546		
88	Discover (3763), Gary			\$4,978	08/11/24	07/11/24 still but no post due stated					\$4,978		
89	Nelnet, student loan, Gary			\$46,995	08/18/24						\$46,995		
90	Student Assurance Services (SAS) judgment, Cypress Risk Management & Gary King	\$700,071									pd off with sale		
91	Attorney fees, Sonja	\$64,778						\$64,778					
92													
93													
94	TOTAL LIABILITIES	\$1,000,000		\$100,282		\$0	\$0	\$265,136	\$265,136	\$427,126	\$482,551	\$0	\$0
95	FINANCIAL SUMMARY												
96													
98	TOTAL ASSETS							\$1,125,000	\$1,125,000	\$865,732	\$1,050,156	\$0	\$0
99	TOTAL LIABILITIES							\$265,136	\$265,136	\$427,126	\$482,551	\$0	\$0
100	NET WORTH							\$859,864	\$859,864	\$438,606	\$567,605	\$0	\$0
101								\$859,864	\$859,864	\$438,606	(\$64,550)	\$0	\$0
102								\$1,049,995	\$1,049,995	\$503,156	\$503,156	\$0	\$0
103													
104													
105	To Be Accounted For:												
106	Exhibit 70 Accounting												
107	2019 Volvo XC 90 that Sonja had to sign over for Gary's debt at the storage unit												
108	Homeowners policy payments for 11962 Big Piney Rd - charged on Sonja's credit card												

SONJA KING V. GARY KING

	A	B	C	D	E	F	G	H	I	J	K	L	M
	ASSETS/LIABILITIES	ASSETS/LIABILITIES VALUE				ACQUIRED PRIOR TO MARRIAGE	RECEIVED GIFT OR INHERITANCE OR SET ASIDE	SONJA'S PROPOSED PROPERTY DIVISION		GARY'S PROPOSED PROPERTY DIVISION		COURT'S PROPERTY DIVISION	
3		<i>Capital gains</i>				<i>at the time of</i>	<i>trust account</i>						
4		SONJA	SOURCE	GARY	SOURCE			SONJA	GARY	SONJA	GARY	SONJA	GARY
109	Hudson's 2021 IRS bill												
110	Capital gains from Okoboji												
111	Steier & Associates, invoice for for tax preparation, Joint												
112	Porsche vehicle insurance												
113	Sonja's liability for CPA missing \$50k IRA withdrawal by Gary												
114	Steier & Associates, invoice for tax preparation, Cypress Risk Management #1												
115	Steier & Associates, invoice for tax preparation, Cypress Risk Management #2												
116	Steier & Associates, invoice for tax preparation, GK LLC												
117	Steier & Associates, invoice for tax preparation, KV Holdings												
118	Marital funds spent on Leah Betan												
119	Marital funds spent on Tiffany Wilber												
120	Nevada criminal charges, restitution, costs and attorney fees												
121	Federal criminal charges, restitution, costs and attorney fees												
122	Colorado traffic violation and costs												
123	Payments to Gerry Law Firm												

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DAVENPORT EVANS

— LAWYERS —

DAVENPORT, EVANS, HURWITZ & SMITH, LLP

206 WEST 14TH STREET • PO BOX 1030 • SIOUX FALLS SOUTH DAKOTA • 57101-1030
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August 7, 2023

MITCHELL PETERSON
Direct Dial: 605-357-1242
e-mail: mpeterson@dehs.com

Sent via email

Kraig Kronaizl kkronaizl@lynnjackson.com

Cesar Juarez cjuarez@lynnjackson.com

Meghann Joyce meghann@denevanfalon.com

Re: Gary King Repayment and Demand – Rule 408 settlement communication

Greetings:

Please be advised our law firm represents Gary King, Cypress Risk Management, LLC, KV Holdings, LLC, GK, LLC (collectively, "Gary") in the civil action that is the subject of the attached Complaint, which has not yet been filed with the clerk of court. The current delinquent indebtedness of Elevated, LLC, Rushmore Gaming, LLC, Main Ledge, LLC, Caledonia Ledge, LLC, Spyglass Global Management, LLC, Elevated 2, LLC, Rivals, LLC (collectively, "entities") and Gary's business partners (Ryan Karst, Terry Schmidt, Jared Miller, and Eldon Swinger) has been referred to our attention. Would you please confirm that you continue to represent Gary's business partners and the aforementioned entities? If separate counsel is now involved due to commencement of litigation, please let us know.

As your clients are well aware, Rushmore Gaming made, executed, and delivered to Gary various Promissory Notes in the sum of \$1,059,000.00 with an interest rate of five percent. Rushmore Gaming has failed to make the payments required by the terms of the Notes, with interest accruing. Moreover, your clients each borrowed \$77,717.99 from Gary under the May 2022 "Let it Fly" Notes (collectively, the "Notes"), again with an interest rate of five percent. Your clients have failed to repay Gary and interest accruing. Demand is hereby made for immediate payment of the Notes.

Moreover, your clients are likewise aware of the various loans, advances, and expenditures paid by Gary to or on behalf of the above-named entities for which he has not been reimbursed. An organized chart of such expenditures and loans is attached. Such advances and expenditures are consistent with (and can be verified by) each entities' bank records. As of the date of this letter, Gary is owed \$1,369,871.96 under the Notes, with interest accruing, and at least \$1,646,129.66 due for the attached loans, advancements, and expenditures. More unreimbursed expenditures are sure to be revealed in discovery.



Rather than pay Gary the amount due and owing under the terms of the Notes, your clients deliberately transferred the Rushmore Gaming Notes to Elevated, LLC with the intent to hinder and deprive Gary as a creditor. These transfers are set forth plainly and undoubtedly in the May 30, 2023, Special Meeting Minutes. Such transfers fall squarely under the purview of the Uniform Fraudulent Transfer Act, which provides Gary a strong framework to pursue claims against both the entities and individuals for their involvement in such fraudulent transfers.

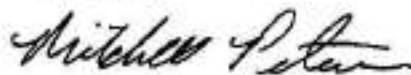
Accordingly, Gary exercises his right to demand full payment of the obligations pursuant to the terms of the Note and further demands repayment of the various loans, advances, and expenditures paid by Gary to or on behalf of your clients. These outstanding obligations total the sum of \$3,016,001.62. In addition, interest continues to accrue on the Notes.

Such payment of \$3,016,001.62 must be made within ten (10) days from the date of this letter. If your clients fail to make the payments set forth herein, Gary intends to publicly file the Complaint served this week, a copy of which is attached. If payment is not made, Gary reserves his right to take any lawful action against your clients, including exercising Gary's rights and remedies under the law and bringing to the public's attention all matters contained in the Complaint, including breach of contract, breach of fiduciary duty, wrongful disassociation, fraudulent transfer, conversion, civil conspiracy, and defamation. As part of this settlement demand, Gary also requires a mutually agreeable joint press release the terms of which Gary will provide for your clients' review upon receipt of the above payment.

We urge your clients to comply with the terms of the above demand to avoid further action on our part. Your clients have the opportunity to choose the appropriate course of action and uphold their financial responsibilities to Gary. Not doing so will expose your clients to prompt and public legal action.

Best regards.

Sincerely,



MITCHELL PETERSON
For the Firm

MAP/aah & css
CC: Gary King
Enclosures

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Loans Due and Owing from Rushmore Gaming, Karst, Schmidt, Miller, and Swinger to Gary King.

Date	Payer	Amount	Original MD	1st Amended MD	2nd Amended MD	Interest	Terms
03/09/21	Cypress	\$300,000.00	9/30/2021	12/31/2021	2/28/2022	5.00%	Single Balloon at Maturity
06/17/21	Cypress	\$300,000.00	9/30/2021	12/31/2021	2/28/2022		
08/06/21	Cypress	\$15,000.00	9/30/2021	12/31/2021	2/28/2022		
08/18/21	Cypress	\$200,000.00	11/15/2021	1/31/2022		5.00%	Single Balloon at Maturity
09/01/21	Cypress	\$25,000.00	11/1/2021	12/31/2021	2/28/2022	5.00%	Single Balloon at Maturity
09/09/21	Cypress	\$20,000.00	11/1/2021	12/31/2021	2/28/2022	5.00%	Single Balloon at Maturity
09/15/21	Gary King	\$10,000.00	11/1/2021	12/31/2021	2/28/2022	5.00%	Single Balloon at Maturity
09/24/21	Cypress	\$20,000.00	11/1/2021	12/31/2021	2/28/2022	5.00%	Single Balloon at Maturity
10/10/21	KV Holdings	\$20,000.00	12/31/2021	2/28/2022		5.00%	Single Balloon at Maturity
10/14/21	KV Holdings	\$15,000.00	12/31/2021	2/28/2022		5.00%	Single Balloon at Maturity
10/26/21	Gary King	\$20,000.00	12/31/2021	2/28/2022		5.00%	Single Balloon at Maturity
11/23/21	Cypress	\$14,000.00	2/28/2022				
12/15/21	Spyglass Global	\$150,000.00	2/28/2022			5.00%	Single Balloon at Maturity
03/22/22	Rushmore to Cypress	-\$250,000.00					
Total:		\$1,059,000.00	plus interest				

Date	Payer	Amount	Borrower	Interest
05/09/22	Gary King	\$77,717.99	Eldon Swinger	5.00%
05/09/22	Gary King	\$77,717.99	Jared Miller	5.00%
05/09/22	Gary King	\$77,717.99	Ryan Karst	5.00%
05/09/22	Gary King	\$77,717.99	Terry Schmidt	5.00%
Total:		\$310,871.96	plus interest	



**Amounts Owed from Elevated, Rushmore Gaming, Main Ledge, Elevated 2, Rivals, Spyglass
Global Management, Karst, Schmidt, Miller, and Swinger to Gary King.**

Payments to Gary King		
Date	Payor	Amount
08/06/21	Cypress	\$15,000.00
09/02/21	Cypress	\$25,000.00
12/10/21	Cypress	\$8,400.00
07/08/22	Gary King	\$10,000.00
08/25/22	Cypress	\$20,000.00
09/09/22	Cypress	\$20,000.00
09/26/22	Cypress	\$18,000.00
10/11/22	Cypress	\$17,000.00
11/14/22	Cypress	\$60,000.00
Total:		\$193,400.00

Payments to Gary King			
Date	Payor	Amount	Note
06/23/22	Cypress	\$10,000.00	
07/22/22	Cypress	\$60,000.00	
08/19/22	Cypress	\$50,000.00	
12/23/22	Gary King	\$40,000.00	
01/11/23	Cypress	\$25,000.00	
01/13/23	Cypress	\$25,000.00	
Total:		\$210,000.00	*minus handful of unverified payments from Main Ledge to Gary

Payments to Gary King			
Date	Payor	Amount	Note
04/20/22	KV Holdings	\$12,500.00	
07/14/22	Cypress	\$25,000.00	Payment to Doug Sehr
07/18/22	Cypress	\$100,000.00	Payment to Doug Sehr
08/03/22	Gary King	\$50,000.00	
08/30/22	Gary King	\$10,000.00	Wire to Ifrah Law on behalf of Rushmore for Bally's Matter
10/17/22	KV Holdings	\$3,000.00	
10/28/22	KV Holdings	\$3,000.00	
01/17/23	Cypress	\$6,000.00	
11/15/22	Rushmore to Gary	-\$5,000.00	
Total:		\$209,500.00	

**Amounts Owed from Elevated, Rushmore Gaming, Main Ledge, Elevated 2, Rivals, Spyglass
Global Management, Karst, Schmidt, Miller, and Swinger to Gary King.**

Payments to Spyglass Global Management (SGM) Minus Payments to Gary			
Date	Payor	Amount	Note
07/21/21	Cypress	\$25,000.00	Payment TO l&s Audio
01/27/22	Cypress	\$50,000.00	
04/20/22	KV Holdings	\$10,000.00	
05/11/22	Cypress	\$10,000.00	
05/31/22	Gary	\$10,000.00	
01/12/23	Cypress	\$6,000.00	
02/06/23	Gary	\$5,000.00	Cash for Tea Safe
02/24/23	Gary	\$5,000.00	Cash for Tea Safe
03/09/23	OK, LLC	\$5,000.00	
03/25/23	Gary	\$11,500.00	
03/25/23	Gary	\$16,000.00	
04/15/23	Gary	\$4,000.00	
12/26/21	SGM	-\$30,000.00	to Cypress
01/04/23	SGM	-\$8,000.00	to Cypress
01/06/23	SGM	-\$4,000.00	to Cypress
02/06/23	SGM	-\$5,000.00	to Gary
02/22/23	SGM	-\$5,000.00	to Cypress
03/09/23	SGM	-\$5,000.00	to Gary
03/30/23	SGM	-\$5,000.00	to Gary
04/05/23	SGM	-\$8,000.00	to Cypress
04/11/23	SGM	\$0.00	to GK, LLC
Total:		\$82,500.00	

Payments to Gary from SGM from 01/01/2021 to 01/01/23		
Date	Payor	Amount
08/10/22	Cypress	\$50,000.00
08/25/22	Cypress	\$150,000.00
08/31/22	Cypress	\$200,000.00
Total:		\$400,000.00

Payments to Gary from Elevated 2, Rivals, Main Ledge, Rushmore Gaming, and Karst		
Date	Payor	Amount
07/08/21	Cypress	\$25,000.00
08/24/21	Cypress	\$50,000.00
06/10/22	Cypress	\$5,000.00
07/15/22	Cypress	\$8,000.00
07/26/22	Gary	\$5,000.00
Total:		\$93,000.00

**Amounts Owed from Elevated, Rushmore Gaming, Main Ledge, Elevated 2, Rivals, Spyglass
Global Management, Karst, Schmidt, Miller, and Swinger to Gary King.**

Payments to Gary King from Elevated, Rushmore Gaming, Main Ledge, Elevated 2, Rivals, Spyglass Global Management, Karst, Schmidt, Miller, and Swinger			
Date	Payor	Amount	Note
02/25/22	Gary	\$10,000.00	
03/28/22	Cypress	\$24,000.00	
05/27/22	Gary	\$10,000.00	
05/31/22	Gary	\$75,620.62	Cosand Construction for buildout
06/23/22	Gary	\$35,000.00	Cosand Construction for Let it Fly buildout
02/14/23	GK, LLC	\$5,500.00	
03/29/22	Rivals	-\$16,000.00	to Gary
11/08/22	Rivals	-\$6,000.00	to Cypress
11/29/22	Rivals	-\$20,000.00	to Gary
03/09/22	Rivals	-\$5,000.00	to GK, LLC
03/23/23	Rivals	-\$7,500.00	to Gary
04/17/23	Rivals	-\$5,000.00	to GK, LLC
Total:		\$100,620.62	

Payments to Gary King from Main Ledge			
Date	Payor	Amount	Note
01/01/23-05/31/23	Main Ledge	\$104,166.67	5/12ths of Gary's annual salary unpaid in 2023.
Total:		\$104,166.67	

Payments to Gary King from Rushmore Gaming			
Date	Payor	Amount	Note
	Rushmore Gaming	\$47,500.00	18 Months of Rent for office space occupied 75% by Rushmore Gaming at a monthly total rent of \$3,500.
Total:		\$47,500.00	

Payments to Gary King from CRM Amex 2022			
Date	Payor	Amount	Note
12/11/22-1/5/22		\$148,340.50	CRM Amex 2022 Business Expenses
Total:		\$148,340.50	

Payments to Gary King from CRM Amex 2021			
Date	Payor	Amount	Note
12/17/21-04/15/21		\$29,320.73	CRM Amex 2021 Business Expenses
Total:		\$29,320.73	

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STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

CYPRESS RISK MANAGEMENT, LLC, KV
HOLDINGS, LLC, GK, LLC, AND GARY A.
KING,

Plaintiffs,

v.

ELEVATED LLC, RUSHMORE GAMING,
LLC, MAIN LEDGE, LLC, CALEDONIA
LEDGE, LLC RYAN KARST, TERRY
SCHMIDT, JARED MILLER, AND ELDON
SWINGLER,

Defendants.

41CIV23-

COMPLAINT

Plaintiffs, Cypress Risk Management, LLC ("Cypress"), KV Holdings, LLC ("KV"), GK, LLC ("GK"), and Gary King ("Gary") (collectively, "Plaintiffs") hereby state and allege as follows for their Complaint against Defendants Elevated, LLC ("Elevated"), Rushmore Gaming, LLC ("Rushmore Gaming"), Main Ledge, LLC ("Main Ledge"), Caledonia Ledge, LLC ("Caledonia Ledge"), Ryan Karst ("Karst"), Terry Schmidt ("Schmidt"), Jared Miller ("Miller"), and Eldon Swingler ("Swingler") (collectively, "Defendants") as follows:

1. Cypress is a limited liability company organized under the laws of the State of South Dakota, with its principal place of business located at 6225 S. Pinnacle Place, Suite 202, Sioux Falls, SD 57108.
2. KV Holdings is a limited liability company organized under the laws of the State of South Dakota, with its principal place of business located at 6225 S. Pinnacle Place, Suite 202, Sioux Falls, SD 57108.



3. GK is a limited liability company organized under the laws of the State of South Dakota, with its principal place of business located at 6225 S. Pinnacle Place, Suite 202, Sioux Falls, SD 57108.

4. Gary is a citizen and resident of Lincoln County, South Dakota.

5. Upon information and belief, Defendant Elevated is a limited liability company organized under the laws of the State of South Dakota, with its principal place of business located at 2700 W. Sudbury Street, Sioux Falls, SD 57108.

6. Upon information and belief, Defendant Rushmore Gaming is a limited liability company organized under the laws of the State of South Dakota with a principal place of business located at 300 S. Phillips Ave., Suite 300, Sioux Falls, SD 57104.

7. Upon information and belief, Defendant Caledonia Ledge is a limited liability company organized under the laws of the State of South Dakota with a principal place of business located at 300 S. Phillips Ave., Suite 300, Sioux Falls, SD 57104.

8. Upon information and belief, Defendant Main Ledge is a limited liability company organized under the laws of the State of South Dakota with a principal place of business located at 300 S. Phillips Ave., Suite 300, Sioux Falls, SD 57104.

9. Upon information and belief, Defendant Karst is a citizen and resident of Lincoln County, South Dakota.

10. Upon information and belief, Defendant Schmidt is a citizen and resident of Kingsbury County, South Dakota.

11. Upon information and belief, Defendant Miller is a citizen and resident of Lincoln County, South Dakota.

12. Upon information and belief, Defendant Swingler is a citizen and resident of Brown County, South Dakota.

13. Gary and Defendants Karst, Schmidt, Miller, and Swingler were members of various companies, including Defendants Elevated and Rushmore Gaming.

14. Gary served as the Manager of Defendants Elevated and Rushmore Gaming for a number of years.

15. Plaintiffs entered into various agreements with Defendants to loan funds to Defendants Rushmore Gaming, Main Ledge, Caledonia Ledge, and Elevated.

16. As of the date of this Complaint, the loans are all past due, with interest accruing.

17. Plaintiffs also paid various advances on behalf of Defendants Rushmore Gaming, Main Ledge, Caledonia Ledge, and Elevated under various purchase or loan agreements.

18. As of the date of this Complaint, Plaintiffs have not been repaid for such advances.

19. Moreover, in his capacity as Managing member, Gary loaned funds to Defendants Rushmore Gaming, Main Ledge, Caledonia Ledge, and Elevated and paid expenses to cover various operating expenditures including, but not limited to, startup costs, payroll, renovation and remodel expenses, manager fees, and other such expenses and advances.

20. As of the date of this Complaint, Gary has not been reimbursed for such loaned amounts.

21. Gary made the above-described loans, advances, and payments on behalf of and for Defendants.

22. On May 30, 2023, Defendants Karst, Schmidt, Swingler and Miller held a special meeting of members of Defendants Elevated and Rushmore Gaming.

23. During the meeting, Defendants Karst, Schmidt, Swinger, and Miller unanimously voted to cancel Gary's ownership and membership certificates in Defendant Elevated.

24. During the meeting, Defendants Karst, Schmidt, Swinger, and Miller also unanimously voted to improperly assign promissory notes currently issued by Defendant Rushmore Gaming outside of the company.

25. During the meeting, Defendants Karst, Schmidt, Swinger, and Miller further unanimously voted to transfer ownership of Defendant Elevated's membership units in Defendant Rushmore Gaming and the company's assets to another corporate entity.

COUNT I: DEBT

26. Plaintiffs incorporate the previous allegations set forth herein.

27. Plaintiffs have demanded repayment of the various loans, advances, and expenditures paid by Plaintiffs to or on behalf of Defendants.

28. Despite Plaintiffs' demands that the loaned amounts be repaid, Defendants have failed and refused, and continue to fail and refuse, to repay such funds.

29. As a result, Plaintiffs have been damaged at an amount to be proven at trial, including interest on said amounts at the statutory rate from the date of this complaint through the date of judgment.

COUNT II - BREACH OF CONTRACT

30. Plaintiffs incorporate the previous allegations set forth herein.

31. Plaintiffs have various loan agreements and promissory notes with Defendants.

32. The agreements and promissory notes are enforceable agreements between Plaintiffs and Defendants.

33. Plaintiffs performed their obligations under the agreements and promissory notes.
34. Defendants have breached its agreements with Plaintiffs by failing and refusing to pay Plaintiffs as required under the agreements and promissory notes.
35. Despite Plaintiffs' demands the loaned amounts be repaid, Defendants have failed and refused, and continue to fail and refuse, to repay such funds, with interest accruing.
36. Moreover, Defendants failed to pay Gary his salary from January 1, 2023, to May 31, 2023.
37. As a result of Defendants' material breach of the agreements, Plaintiffs have been damaged in an amount to be proven at trial.
38. Plaintiffs are entitled to compensation from Defendants for damages suffered as a result of Defendants' breach of contract.

COUNT III – UNJUST ENRICHMENT (In the alternative)

39. Plaintiffs incorporate the foregoing allegations as if set forth fully herein.
40. Defendants received benefits in the form of assets or monetary gain from Plaintiffs.
41. Defendants were aware of and accepted such assets and funds from Plaintiffs.
42. Plaintiffs expected to be repaid for their loans, advances, and other funds provided to and on behalf of Defendant companies, and Defendants were aware of Plaintiffs' expectation.
43. Plaintiffs incurred significant expenses and debt providing such funds to Defendants in expectation of Defendants performing their obligations under the parties' agreements, promissory notes, and business relationships.
44. Defendants improperly transferred said assets and funds and are currently in possession of such improperly gained funds.

45. Defendants have been unjustly enriched through the use of Plaintiffs' assets and funds.

46. Defendants' retention of such assets and funds unjustly enriches Defendants and should be disgorged.

47. Plaintiffs were damaged as a result of Defendants' breaches in an amount to be proven at trial.

48. It would be unjust and inequitable to allow Defendants to receive and retain the benefit of Plaintiffs' funds and assets without paying for the same.

49. The Court should award punitive damages against Defendants in an amount to be determined at trial.

COUNT IV - BREACH OF FIDUCIARY DUTY

50. Plaintiffs incorporate the foregoing allegations as if set forth herein.

51. Defendants owed Plaintiffs a fiduciary duty to act competently and in the best interests of the parties' companies and members.

52. Defendants breached said duties, including the duties of loyalty and due care, by transferring ownership of company assets without authorization, mishandling company funds, removing Gary as a member of the companies, transferring company assets to a new entity with the intent to defraud and avoid repaying Defendants' debts to Plaintiffs, and abandoning the parties' entities and businesses.

53. Plaintiffs were damaged as a result of Defendants' breaches in an amount to be proven at trial.

54. The Court should award punitive damages against Defendants in an amount to be determined at trial.

COUNT V - WRONGFUL DISASSOCIATION

55. Plaintiffs incorporate the foregoing allegations as if set forth herein.

56. Defendants wrongfully dissociated its member company to fraudulently transfer assets of the company to other companies and individuals.

57. Defendants further wrongfully dissociated from Plaintiffs.

58. Under SDCL § 47-34A-602, Defendants are liable to Plaintiffs for damages caused by such wrongful dissociation.

59. Plaintiffs were damaged as a result of Defendants' breaches in an amount to be proven at trial.

COUNT VI - FRAUDULENT TRANSFER

60. Plaintiffs incorporate the foregoing allegations as if set forth herein.

61. On information and belief, Defendants have transferred and will continue to transfer assets of the Defendant companies with the intent to hinder, delay, or defraud Plaintiffs. These transfers include, but are not limited to, transfers and assignments of promissory notes to Defendant Elevated from Defendant Rushmore Gaming. Any remote recipient of such funds is put on notice that their receipt of the same may constitute a fraudulent transfer under South Dakota law.

62. Defendants' fraudulent transfers violate the Uniform Fraudulent Transfer Act (UFTA) as adopted in South Dakota, SDCL chapter 54-8A.

63. Defendants' actions were actually and constructively fraudulent under UFTA, SDCL § 54-8A-1, *et seq.*, and therefore are subject to the remedies set forth in SDCL § 54-8A-7.

64. The fraudulent transfers constitute a violation of UFTA and were contrived with the intent to deceive and defraud Plaintiffs, or to defeat, hinder or delay Plaintiffs as a creditor of its just debts, damages, and demands.

65. Defendants' fraudulent intent is discernible from, among other things: the transfer was to an insider, the transfers were made after Gary was removed as a member of the Defendant companies, and the transfers were made after Gary requested repayment.

66. Plaintiffs have standing to assert and recover such fraudulent transfers in accordance with South Dakota's Uniform Fraudulent Transfer Act, SDCL § 54-8A-1, *et seq.*

67. Plaintiffs were damaged as a result of Defendants' fraudulent transfers in an amount to be proven at trial.

68. Defendants' actions were fraudulent and done in a willful, wanton, and with reckless disregard of the rights of Plaintiffs, entitling Plaintiffs to punitive damages in an amount to be determined at trial.

COUNT VII – CONVERSION

69. Plaintiffs incorporate the foregoing allegations as if set forth herein.

70. Defendants have misappropriated or converted Plaintiffs' assets for their own use or personal benefit by converting the funds loaned, advanced and provided by Plaintiffs, as well as various property and assets bought by Plaintiffs.

71. Plaintiffs were damaged as a result of Defendants' conversion in an amount to be proven at trial.

COUNT VIII – CIVIL CONSPIRACY

72. Plaintiffs incorporate the foregoing allegations as if set forth herein.

73. Defendants entered into a conspiracy to commit the torts alleged in this Complaint.

74. Defendants had a meeting of the minds with the object of defrauding Plaintiffs, as soon by the meeting minutes from the Defendants special meeting.

75. Defendants were involved in the commission of one or more unlawful overt acts by participating in, soliciting, accepting benefits from, or condoning acts in furtherance of the civil conspiracy.

76. As co-conspirators, Defendants are charged with constructive knowledge of the conducts, acts, and omissions of one another and are vicariously responsible for one another's conducts, acts, and omissions.

77. Plaintiffs have incurred damages as a proximate result of such conspiracy, including but not limited to, financial losses, economic losses, and other such damages caused by the civil conspiracy between Defendants, as well as the time, energy, and expense incurred by Plaintiffs to bring legal action to respond to the threats posed by said conspiracy including costs, expenses, and reasonable attorney fees.

78. Defendants are liable to Plaintiffs for damages which were proximately caused by their participation in the civil conspiracy including the funds misappropriated by Defendants to defraud Plaintiffs, together with Plaintiffs' costs, expenses, and reasonable attorney fees of this action, along with all other damages allowed by law.

COUNT IX - DEFAMATION

79. Plaintiffs incorporate the foregoing allegations as if set forth herein.

80. Under SDCL § 20-11-1, "[e]very person is obligated to refrain from infringing upon the rights of others not to be defamed.

81. SDCL § 20-11-2 defines defamation as either libel or slander.

82. SDCL § 20-11-3 defines libel as follows: "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

83. SDCL § 20-11-4 defines slander as "a false and unprivileged publication, other than libel, which: (1) [c]harges any person with crime, or with having been indicted, convicted, or punished for crime; (2) [i]mputes to him the present existence of an infectious, contagious, or loathsome disease; (3) [t]ends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit; (4) [i]mputes to him impotence or want of chastity; or (5) [b]y natural consequence, causes actual damage.

84. Defendants Miller and Karst made public comments in the spring and summer of 2023 that Gary defrauded Defendants.

85. Defendants Miller and Karst's statements falsely imply Gary defrauded Defendants.

86. Defendants Miller and Karst were aware the statements were false.

87. Defendants Miller and Karst's false statements and the implications therefrom have a tendency to injure Gary in occupation, profession, trade, and business.

88. Defendants Miller and Karst defamed Gary, either expressly or through implication.

89. Defendants Miller and Karst are liable to Gary for defamation or defamation through implication.

90. Plaintiffs are entitled to judgment in an amount to be determined at trial for all damages caused by Defendants' defamation of Gary.

91. Defendants Miller and Karst acted intentionally or with willful, wanton, and reckless disregard of the rights of Plaintiffs, with actual or presumed malice, entitling Plaintiffs to punitive damages in an amount to be determined at trial.

COUNT X- PUNITIVE DAMAGES

92. Plaintiffs incorporate the foregoing allegations as if set forth herein.

93. Defendants are guilty of oppression, fraud, actual malice, and presumed malice.

94. Defendants' actions and conduct described in this Complaint were committed intentionally or with willful and wanton misconduct.

95. Plaintiffs are entitled to an award of punitive damages against Defendants.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in its favor and against Defendants, jointly and severally, and requests the following relief:

- A. For all relief requested in this Complaint;
- B. For a judgment against Defendants, jointly and severally, in an amount to be proven at trial;
- C. For pre-judgment interest and post-judgment interest at the statutory rate;
- D. For punitive damages;
- E. For recovery of costs, disbursements, expenses and attorney fees as allowed; and
- F. For all other relief the Court finds lawful, equitable, and just.

Dated at Sioux Falls, South Dakota, this 1st day of August, 2023.


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DEMAND FOR JURY TRIAL

Plaintiffs demands a trial by jury on all issues of fact.



Mitchell Peterson

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 30884

SONJA R. KING,

Plaintiff/Appellee,

vs.

GARY A. KING,

Defendant/Appellant.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

The Honorable Douglas E. Hoffman, Presiding Judge

REPLY BRIEF OF APPELLANT

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Notice of Appeal filed November 6, 2024

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PRELIMINARY STATEMENT

Appellant Gary A. King (“Gary”) submits this Reply Brief in response to the arguments raised by Appellee Sonja R. King (“Sonja”) in defense of the circuit court’s inclusion and valuation of a pending civil lawsuit (the “Civil Action”) in the marital estate. The defined terms in this Reply Brief carry the same definitions as those in Appellant’s Opening Brief unless specifically noted otherwise herein. As outlined in Gary’s initial brief, the circuit court abused its discretion in classifying the entirety of the Civil Action as a divisible marital asset and clearly erred in valuing the Civil Action at \$350,000, contrary to the undisputed evidence in the record.

ARGUMENT

I. Sonja’s attempt to characterize the entire Civil Action as marital property is not supported by the record or applicable law.

Sonja argues the businesses referenced in the Civil Action were marital in nature and therefore the entire pending lawsuit related to those business interests must also be considered part of the marital estate. (Appellee’s Brief at 9, 11-12.) However, this conflation is legally and factually unsound. The businesses may have existed during the marriage, but the Civil Action is a pending, contingent claim brought by Gary and various business entities to recoup alleged losses from former business partners. The claim is unresolved and speculative.

The evidence was clear at trial that the entirety of the Civil Action was not meant to be included in the marital estate. The parties’ Assets and Liabilities Exhibit explicitly assigned no value to the Civil Action and did not seek to include it in the marital estate. (S.R. 453–459.) Rather, the description related to the Civil Action was “\$50k that Sonja gave to Gary for retainer . . . for *his* lawsuit.” (*Id.* (emphasis added).) The Retainer was

the only asset related to the Civil Action that was to be divided in the divorce. Apart from the Retainer, the parties did not, for example, itemize legal costs, fees, expenses, or otherwise provide evidence as to how potential proceeds would be divided if anything was recovered from the Civil Action. Thus, it was undisputed that Gary would retain all interest in the Civil Action and Sonja would only receive \$25,000 from any future proceeds to reflect her share of the marital funds used for the Retainer. (App. 35, July 30 TT at 12:2–8; App. 41, Aug. 1 TT at 76:6–22.)

Furthermore, Sonja never objected to this proposal at trial, did not cross-examine Gary on this about the Civil Action, and offered no competing evidence or argument in her closing about the entirety of the Civil Action being included in the marital estate. Even now, she provides no response for her inaction at trial other than noting her attorney’s three-word response in a discussion about child support. (Appellee’s Brief at 13 (citing Aug. 1 TT at 97:9) (“Nothing was signed.”).) Sonja’s attempt to now recharacterize the Civil Action as jointly owned or previously agreed marital property is inconsistent with her silence during trial and her failure to establish or even propose a present value for the claim. *See Kappenmann v. Kappenmann*, 479 N.W.2d 520, 525 (S.D. 1992) (failure to prove value of pending claim warrants exclusion from marital estate). The circuit court thus erred in including the entirety of the Civil Action in the marital estate.

II. Sonja erroneously argues that the “analytical approach” is appropriate, even though pending lawsuits must not be considered in material property distributions.

Pending lawsuits should not be considered for property distribution. Sonja plainly fails to address North Dakota’s same view. *Fries v. Fries*, 288 N.W.2d 77, 81 (N.D. 1980). She also fails to address this Court’s consistent logic in the context of speculative

contingent assets, *Ahrendt v. Chamberlain*, 2018 S.D. 31, ¶ 23, 910 N.W.2d 913, 921-22, or liabilities, *Hansen v. Hansen*, 302 N.W.2d 801, 802 (S.D. 1981). Sonja instead misreads Gary's argument and cites *Johnson v. Johnson*, 2007 S.D. 56, 734 N.W.2d 801, along with out-of-state cases in support of her erroneous proposition that the "analytical approach" applies, Gary had the burden of proof under that approach, and the circuit court properly applied it to the Civil Action. (*See* Appellee's Brief at 9-10, 12.)

This Court's "analytical approach" is inapplicable in this divorce matter. *See Johnson*, 2007 S.D. 56, ¶ 34, 734 N.W.2d at 810 ("the analytical approach is appropriate in deciding the extent to which a personal injury *award* should be included in the marital estate[.] [T]his approach is limited in application to cases where the jury returned a partitioned verdict.") (emphasis and brackets added). Gary has not argued it applies, but has instead exemplified it as a court's rubric when a completed personal injury lawsuit is in play. *Id.* ¶ 32, 734 N.W.2d at 810. Instead, Gary argues there should be *no* analytical approach applied when a pending lawsuit is in play. Indeed, such an approach should not be considered for property distribution because it is speculative in nature and contingent upon several factors and would likely result in inequity. This is especially true when no evidence exists to establish an asset or liability's value. *See Kappenmann*, 479 N.W.2d at 525.

The out-of-state cases cited by Sonja also do not carry weight, because those trial courts applied rules that do not exist in this State. In *Muza v. Muza*, 451 S.W.3d 326, 331 (Mo. Ct. App. 2014), for example, the Missouri Court of Appeals affirmed the trial court's decision to classify the wife's pending lawsuit as marital property because the wife failed to rebut Missouri's statutory presumption that the property was marital. In

Furney v. Furney, No. 2010AP2168, unpublished disp., ¶ 6 (WI App Aug. 9, 2011), the trial court applied a common-law exception to Wisconsin's community property presumption of equal division. See Wisc. Stat. § 767.61 (formerly § 767.255). That exception is, for a spouse's separate lawsuit, a court presumes the injured spouse is entitled to all the compensation for pain, suffering, bodily injury and future earnings, while compensation for medical or other expenses and lost earnings incurred during the marriage is presumed to be divided equally. *Weberg v. Weberg*, 463 N.W.2d 382, 386 (Wis. Ct. App. 1990) (cited by the *Furney* trial court ¶ 6, *supra*.) This is not the approach South Dakota courts generally take, however. Instead, South Dakota courts equitably divide property based on the circumstances of the case, SDCL § 25-4-44, and there are no statutory or common-law presumptions for separate, pending lawsuits.

The circumstances supported the circuit court only dividing the Retainer and excluding the Civil Action from the marital estate. The evidence presented at trial showed that half of the Retainer, if recovered, should have been awarded to Sonja. That is it. Sonja sat silently, not introducing expert testimony, documentary proof of amounts contributed, or evidence of likely recovery. Although Sonja cites Gary's prior communications about potential value, (Appellee's Brief at 11-12,) she does not explain why those optimistic pre-litigation estimates (from a man whose credibility her attorney regularly attacked at trial) should be binding — especially when she failed to press for their inclusion during trial. As in *Kappenmann*, 479 N.W.2d at 525, the circuit court cannot fill in evidentiary gaps. Yet, here, the court filled those gaps *sua sponte* by valuing the entire lawsuit and placing it in the marital estate. This was an abuse of discretion.

III. The circuit court's valuation of the Civil Action was clearly erroneous because it was based entirely on speculation and not on evidence in the record.

A court cannot place a definitive value on a spouse's separate, pending lawsuit. *Kappenmann*, 479 N.W.2d at 525; *Wegner v. Wegner*, 391 N.W.2d 690, 694 (S.D. 1986); *Fries*, 288 N.W.2d at 81. This is especially true when no evidence supports it. *Kappenmann*, *supra*. Notably missing from every case cited in Sonja's brief is an appellate court affirming a trial court's decision to value the entirety of a separate, pending lawsuit. Even in the cases Sonja cites, such as *Muza*, and *Furney*, *supra*, the courts did not place a value on the lawsuits but instead awarded expectancies based on statutory or common-law presumptions. The circuit court undeniably erred when it valued the Civil Action here.

Contrary to Sonja's belief, there was no evidence in the record supporting a present value for the Civil Action. Sonja contends the circuit court relied on Exhibit 23 (S.R. 670-675), an accounting of loans by Gary, when valuing the lawsuit. (Appellee's Brief at 16.) The court did not cite Exhibit 23 or the value of the businesses themselves when valuing the Civil Action. It only stated the businesses were "either disbanded or involved in a lawsuit." (App. 21, ¶ 98(dd).) Indeed, the court conceded that "the *only* evidence we have is the [D]emand [L]etter." (App. 45; Aug. 1 TT at 130:9-10 (emphasis added).)

But the Demand Letter was just that—a demand. It was not a judgment or settlement, and it certainly was not an asset with an ascertainable value. The court expressly admitted it had little to go on, stating "we don't have a lot to work with" and then used an arbitrary figure of 10% of Gary's Demand Letter, reasoning only that "if everybody that's involved is a rational human being then the case must be worth at least

10% of the ask.” (App. 47; Aug. 1 TT at 141:8-14.) The court further justified its valuation based on the quality of Gary’s legal counsel as well as Gary’s “shrewdness,” rather than on any competent valuation evidence. (App. 45; Aug. 1 TT at 130:14-20.)

In sum, the circuit court’s method of valuation — anchored in conjecture, judicial intuition, and unsupported extrapolation — was clearly erroneous. *See Conti v. Conti*, 2021 S.D. 62, ¶ 26, 967 N.W.2d 10, 16–17 (valuation must be within a reasonable range based on record evidence).

IV. The circuit court’s valuation resulted in an inequitable distribution of marital assets.

Finally, Sonja fails to rebut the real-world consequence of the circuit court’s error: by assigning a speculative \$350,000 asset to Gary, the court then redistributed other tangible marital assets to Sonja to balance the estate. That redistribution compounded the harm.

Sonja received an inflated share of the marital estate based on an asset that does not and may never exist. The consequence was an inequitable division of property under SDCL § 25-4-44. This is precisely the kind of outcome that courts have advised against when speculative or contingent assets or liabilities are included without evidentiary foundation. *See Hansen*, 302 N.W.2d at 802 (quoting *Wallahan v. Wallahan*, 284 N.W.2d 21, 25-26 (S.D. 1979) (“Speculative contingent liabilities should not be considered in apportioning the parties’ assets for purposes of a property division.”).) This case should thus be remanded to further correct this error.

V. Sonja's motion for appellate attorney's fees must be denied.

This Court should deny Sonja's motion for appellate attorney's fees under SDCL §§ 15-26A-87.3 and 15-17-38. Sonja has failed to adequately explain why she is entitled to reimbursement.

Whether appellate attorney's fees are proper depends on several factors, including "the property owned by each party, the relative incomes, the liquidity of the assets and whether either party unreasonably increased the time spent on the case." *Cook v. Cook*, 2022 S.D. 74, ¶ 39, 983 N.W.2d 180, 193. Opting not to discuss the applicable factors, Sonja simply reasons that this is a divorce appeal, and she has "incurred substantial attorney fees" in the appeal. Merely highlighting the existence of fees falls incredibly short of explaining why they should be reimbursed. Sonja's explanation is lacking, and thus her request must be denied because she waived the issue. *See* SDCL § 15-26A-60(6) ("The argument shall contain the contentions of the party with respect to the issues presented, the reasons therefore, and the citations to the authorities relied on."); *Magner v. Brinkman*, 2016 S.D. 50, ¶ 25, n.13, 883 N.W.2d 74, 85, n.13 ("Plaintiffs have not attempted to explain why they are entitled to appellate attorney fees. Therefore, their request is waived.").

CONCLUSION

The circuit court abused its discretion by including the entirety of the pending Civil Action in the marital estate. It clearly erred by assigning the Civil Action a speculative value of \$350,000. Sonja did not prove the claim was jointly owned, did not value it, and did not object to the parties' agreement regarding its exclusion apart from the \$25,000 reimbursement. Gary therefore respectfully requests that this Court reverse

the circuit court's inclusion and valuation of the Civil Action and remand the case for recalculation of the parties' marital property division consistent with the record.

Dated at Sioux Falls, South Dakota, this 22nd day of May, 2025.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.

A handwritten signature in black ink, appearing to read "Mitchell Peterson", written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Reply Brief of Appellant complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 365, this Brief contains 2,088 words and 10,863 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 points) and was prepared using Microsoft Word 365.

Dated at Sioux Falls, South Dakota, this 22nd day of May, 2025.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Reply Brief of Appellant" was filed electronically with the South Dakota Supreme Court and that the original was filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on the 22nd day of May, 2025.

The undersigned further certifies that an electronic copy of "Reply Brief of Appellant" was served electronically to the attorneys set forth below, on the 22nd day of May, 2025:

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