IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 26917

STANLEY E. STABLER, ROSE MARIE STABLER,
BRAD A. STABLER, and BRENDA L. STABLER,

Appellants,

vs.

FIRST STATE BANK OF ROSCOE, a South Dakota corporation, and JOHN R. BEYERS,

Appellees.

Appeal from the Circuit Court
Fifth Judicial Circuit
McPherson County, South Dakota

HONORABLE SCOTT P. MYREN
Presiding Judge

APPELLANTS' BRIEF

WOODS, FULLER, SHULTZ
& SMITH, P.C.
Roger W. Damgaard
Sander J. Morehead
P.O. Box 5027
Sioux Falls, SD 57117
(605) 336-3890
Attorneys for Appellees

SCHOENBECK LAW
Lee Schoenbeck
P.O. Box 1325
Watertown, SD 57201
(605) 886-0010

DOUGHERTY & DOUGHERTY, LLC
Patrick T. Dougherty
P.O. Box 2376
Sioux Falls, SD 57101
(605) 335-8586

Attorneys for Appellants

Notice of Appeal was filed December 13, 2013

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INTRODUCTION

First State Bank of Roscoe (hereinafter "FSBR") and John Beyers have established themselves as bad actors in the banking world of rural South Dakota. In this matter before the Court, FSBR and John Beyers substantiated their reputations at a December 2012 jury trial in McPherson County, and a January 2013 Court trial on related issues before the Honorable Circuit Judge Scott Myren.

On December 20, 2012, a McPherson County jury found that John Beyers and FSBR conspired to fraudulently induce Stan and Rose Marie Stabler to sign a $650,000 note and mortgage, of which $439,100 was purely the product of fraud. Circuit Judge Scott Myren, in his Memorandum Decision Following Court Trial, described the conduct of John Beyers in attempting to circumvent the applicable banking laws this way: "Because of the malodorous circumstances through which he arranged for the creation of this loan, one feels a strong sense of discomfort at the idea that he should be allowed to do so." (SR 2827.)

FSBR and John Beyers are not strangers to this Court. This Court considered similar conduct, in which a Faulk County jury found that FSBR conspired to abuse process against another elderly bank customer in Fix v. First State Bank of Roscoe, 2011 S.D. 80, 807 N.W.2d 612.

This appeal is about ensuring that the law has an effective remedy for bad actors like FSBR and John Beyers.

PRELIMINARY STATEMENT

Defendants/Appellees First State Bank of Roscoe and John R. Beyers will be referred to as "FSBR," unless John Beyers is separately identified as "Beyers." The Ipswich State Bank will be referred to as "ISB." Plaintiffs/
Appellants Stanley, Rose Marie, Brad and Brenda Stabler will be referred to as "Stan, Rose Marie, Brad or Brenda," unless collectively referred to as "Stablers." The settled record is referenced by "SR"

followed by the appropriate page number(s) of the document. Judge Myren's Findings of Fact and Conclusions of Law dated October 21, 2013, are referenced by "FOF" or "COL" followed by the appropriate paragraph number. Testimony from the jury trial is referenced as "JT" followed by the appropriate page number. Testimony from the court trial is referenced as "CT" followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Stablers appeal from the December 3, 2013, Judgment on Jury Verdict and Court Trial, which was entered on December 10, 2013. Stablers filed a Notice of Appeal on December 11, 2013.

LEGAL ISSUES

1. Beyers was not a holder in due course, and the affirmative defenses of illegality and discharge in bankruptcy applied to him, with respect to the ISB debt he was allowed to collect.

   The Circuit Court held that Beyers was not subject to the affirmative defenses of illegality and discharge in bankruptcy.

   Most relevant authorities:

   - SDCL 57A-3-203(b)
   - SDCL 57A-3-203, Official Comment 2
   - SDCL 57A-3-305

2. Stan and Rose Marie should have been allowed to pursue emotional distress damages as part of the fraud and conspiracy claims against Beyers and FSBR.

   The Circuit Court held in the negative.

   Most relevant authorities:

   - Fix v. First State Bank of Roscoe, 2011 S.D. 80, 807 N.W.2d 612
   - SDCL 21-3-1

3. Because the jury found that the $650,000 Promissory Note was procured by fraud, none of the Promissory Note should be enforceable.

   The Circuit Court held in the negative.

   Most relevant authorities:

- Poeppel v. Lester, 2013 S.D. 17, 827 N.W.2d 580
- RESTATEMENT (SECOND) OF TORTS § 549, Comment i
- Adrian v. McKinnie, 2002 S.D. 10, 639 N.W.2d 529

4. Stan and Rose Marie's $20,000 exemplary damage verdict should have been sustained.

The Circuit Court held in the negative.

Most relevant authorities:

- Henry v. Henry, 2000 S.D. 4, 604 N.W.2d 285
- SDCL 21-1-9
- Pringle Tax Serv., Inc. v. Knoblauch, 282 N.W.2d 151 (Iowa 1979)

5. Beyers and FSBR are not entitled to their attorneys' fees and costs for work done in Bankruptcy Court.

The Circuit Court held in the negative.

Most relevant authorities:

- In re S. Dakota Microsoft Antitrust Litig., 2005 S.D. 113, 707 N.W.2d 85
- In re Everly, 346 B.R. 791 (B.A.P. 8th Cir. 2006)
- In re Nangle, 281 B.R. 654 (B.A.P. 8th Cir. 2002)

6. The 2009 Addendum to the 2004 collateral real estate mortgage was not signed or filed by the mortgagee, Beyers, and therefore should have lapsed.

The Circuit Court held in the negative.

Most relevant authorities:

- SDCL 44-8-26
- Moss v Guttormson, 1996 S.D. 76, 551 N.W.2d 14

STATEMENT OF THE CASE

The Stablers commenced this action in May of 2007 (SR 3074), and filed an Amended Complaint in June of 2008 (SR 3075). FSBR and Beyers filed Answers and asserted counter-claims in August of 2008. (SR 329, SR 3075-3078.) Beyers' allegations included that he was not pursuing judgment against Brad and Brenda for debt discharged in bankruptcy.

(Beyers' Count 3, SR 306-307; Beyers' Count 4, SR 307-308; Beyers' Count 7, SR 312-314; and Beyers' Count 8, SR 314-316.)

By January 27, 2009, it became apparent that Beyers was pursuing discharged debt, and a Complaint was filed by Brad and Brenda in Federal Bankruptcy Court. (App. 5.) The Bankruptcy Court deferred to the State Court's concurrent exercise of jurisdiction under the Bankruptcy Code (In re Stabler, 418 B.R. 764 (B.A.P. 8th Cir. 2009); and Stabler v. Beyers, 2009 WL 1651441 (Bankr. D.S.D. June 11, 2009), and the matter continued in State Court.

A McPherson County jury in December of 2012 determined that Beyers and FSBR conspired to defraud Stan and Rose Marie Stabler into signing a $650,000 promissory note and mortgage in March 2004, and that $439,100 of that note and mortgage were procured by fraud. (SR 3091.)

By stipulation, the trial in McPherson County took evidence on Brad and Brenda and Stan and Rose Marie's claims against the Defendants. (CT 4-9.) The remaining evidence concerning Brad and Brenda was taken at a Court Trial in January of 2013. (Id.)

A detailed procedural history is reflected in the first ten pages of the December 3, 2013, Judgment on Jury Verdict and Court Trial, which has the Special Verdict Form attached. (App. 4.) There were a number of issues resolved by summary judgment or by stipulation. For example, Beyers had to repay $149,808.42 to Brad and Brenda for payments he collected from them on the discharged debt reflected in the $650,000 promissory note and mortgage. (SR 3086.)

As to Stan and Rose Marie, the Court entered judgment for Beyers for the debt included in the fraudulently-procured $650,000 note, which debt was for the portion not procured by fraud. (SR 3083-3084.) Pre-trial, the Court dismissed Stan and Rose Marie's claims for emotional distress damages (SR 2584), and post-trial reversed the exemplary damage award of the jury. (SR 3086.)

As to Brad and Brenda, the Trial Court ruled that Beyers was a holder in due course for the ISB debt, and entitled to judgment against Brad and Brenda for that debt. (SR 2826-2828.) Also, the Trial Court awarded Beyers and FSBR attorneys' fees against Brad and Brenda for the work performed in Bankruptcy Court. (SR 3285, 3396.)

STATEMENT OF THE FACTS

Edmunds County Ag Services, Inc.

Brad and Brenda started Edmunds County Ag Services, Inc. (hereinafter "ECAS"), a spray and chemical business, in 1999. (Ex. 52.) Brad and Brenda's financing for the ECAS venture was provided by FSBR, which is owned by its president, Beyers. (Ex. 20.) In 2000, ECAS erected a building on the land of Brad's parents, Stan and Rose Marie, who gave a $200,000 mortgage to FSBR on the one quarter of land where the building would be erected. (Ex. 14.) The mortgage had a 14-year amortization schedule. (Id.)

In 2001, ECAS had financial problems, and by May 31, 2002, it was liquidated and out of business. (Ex. 20; JT 45:26 - 46:4.) The note securing the $200,000 mortgage on Stan and Rose Marie's land had been paid down to $110,900 by June 24, 2003. (Ex. 16; JT 40:14-16.) On that same day, it was removed from the Bank's books. (JT 40:18 - 41:9.)

ECAS had an additional $357,000 of unsecured debt owing to FSBR at the time it was liquidated. (Ex. 160, Bates No. 390.) Only Brad had signed a guaranty creating personal liability for the ECAS debt. (Ex. 24.)

FSBR Maintains ECAS as Shell on Bank Books

Even though ECAS was already out of business, on June 27, 2002, FSBR issued a promissory note for inventory in the amount of $122,221.50 (Ex. 31), and on the same day, a business operating note for $105,400. (Ex. 32.) Brad signed whatever notes Beyers asked him

to sign, even though ECAS was no longer in business. (JT 209:24 – 212:21.)

Almost a year after ECAS was liquidated, on March 6, 2003, FSBR issued a $15,171.61 operating note to ECAS (Ex. 29), and renewed two ECAS promissory notes into a new promissory note for $193,000. (Ex. 30.)

On May 13, 2003, Brad and Brenda filed for Chapter 7 bankruptcy, discharging Brad's personal guaranty of the ECAS debt. (Ex. 5.) The FSBR credit file makes no mention of the bankruptcy or the loss of the personal guaranty. (Ex. 20.)

On June 16, 2003, immediately before the FDIC auditors were to come on July 16, 2003 (Ex. 26, Answer No. 2), FSBR rolled all of the outstanding ECAS debt into one new $266,000 promissory note (Ex. 28). By his initials appearing on the back of the document, it is clear that Beyers handled the transaction. (Id.) The credit file shows the ECAS debt was moved off the bank books to "private financing" on June 17, 2003. (Ex. 20; JT 58:12–23.)

In July of 2003, Beyers reported to his board that he had successfully moved $357,000 of ECAS debt off the bank books. (JT 84:22 – 85:5; Ex. 160, Bates No. 390.)

Stan and Rose Marie Brought Into FSBR and Beyers' Web

Until 2002, Stan and Rose Marie banked at the Great Plains Bank in Eureka, where they lived. (JT 151:3–12.) Beyers realized that FSBR had a large amount of unsecured credit extended to the defunct ECAS, and only had one quarter of Stan and Rose Marie's land pledged for just the $110,900 remaining on the building loan. (JT 62:6–24.)

By the fall of 2001, FSBR recognized that the ECAS credit had to go on their watch list (Ex. 160, Bates No. 379), and they began eyeing Stan and Rose Marie's land (JT 78:2–21; Ex. 160, Bates No. 373.) In February of 2002, FSBR appraised Stan and Rose Marie's land, with an

eye towards obtaining it as collateral. (Ex. 139.) At approximately the same time, Beyers encouraged Brad to get his parents to move their business to FSBR. (JT 149:12-19; JT 214:22 - 215:2; JT 325:21 - 326:2.)

On July 16, 2002, Stan and Rose Marie signed a $75,000 promissory note in favor of FSBR, as part of a $300,000 line of credit, that says on its face that it is for "farm operating." (Ex. 1; JT 151:10-15; JT 453:23 - 455:5.) Stan and Rose Marie also signed a $300,000 collateral real estate mortgage ("CREM") to secure the line of credit. (Ex. 4.) This CREM was prepared by Attorney Rob Ronayne (Id.), instead of using the bank's forms. (JT 71:8-11; JT 459:3 - 460:14; Ex. 4; *cf.* Ex. 8.) On the mortgage Stan and Rose Marie signed, the first page referenced the $300,000 line of credit and they also saw and signed the signature page; there were no other pages. (JT 155:17-19; JT 171:2-3; JT 377:2-5.)

Over the course of the next two seasons, Stan and Rose Marie borrowed the line of credit up to $186,000. (Ex. 2.) FSBR admits that the record of advances looks like the loan performed as a farm operating line of credit. (JT 66:3-12; Ex 1, p. 2.)

Unbeknownst to Stan and Rose Marie, Beyers inserted a middle page in the mortgage, which encumbered their land with $427,621.50 of the defunct ECAS debt, and $265,328.17 of Brad and Brenda's debt, in addition to the $75,000 note Stan and Rose signed that day. (Ex. 4; JT 152:25 - 153:9, JT 154:22 - 155:19.) Almost $700,000 of debt they didn't owe now encumbered the 1,200 acres of Stan and Rose Marie's land. In later mortgages, FSBR had Stan and Rose Marie initial each page. (Ex. 8.) For this mortgage, FSBR did not use the bank forms that required initials on each page. (JT 71:8-11; JT 459:3 - 460:14; Ex. 4; *cf.* Ex. 8.) Under this mortgage, all of the line of credit would have been borrowed up the date the note was signed, and there

would have been no funds available for Stan and Rose Marie to utilize in their farming operation! (JT 456:4 – 457:12.)

Brad and Brenda Stabler Bankruptcy

Beyers decided that it would be best for the bank if Brad and Brenda filed bankruptcy, and so he made arrangements for them to be represented by the bank's attorney, Rob Ronayne. (SR 2824; JT 216:5–8; JT 282:1 – 283:25; JT 563:17–25.) In the words of the Trial Court:

> By maintaining their trust, encouraging them to file bankruptcy, and selecting their bankruptcy attorney, Beyers believed that he could control the situation so that the debts to the other creditors could be discharged while the obliga–tions to FSBR could be maintained or reassumed. Over the course of the next year, this is exactly what John Beyers and FSBR accomplished.

(SR 2824–2825.) Beyers' attorney Ronayne prepared the bankruptcy schedules to indicate that the debtors would reaffirm the debt owing to his client, FSBR (Ex. 57, last page), even though the large unsecured debt could not be legally reaffirmed. (JT 545:16 – 546:2.)

Attorney Ronayne was provided with documentation showing all of the debt of Brad and Brenda Stabler, including the ECAS debt that Brad had personally guaranteed. (Ex. 25; JT 535:9–14.) Attorney Ronayne prepared the bankruptcy petition, and excluded the largest unsecured creditor--that owed by Brad on his personal guaranty to Attorney Ronayne's client, FSBR (JT 537:11 – 538:2). It also excluded the existence of ECAS. (Ex. 57, Schedule D, p. 13; Ex. 57, p. 32; JT 541:5–19.) Brad and Brenda asked Attorney Ronayne why the ECAS debt was not listed, and Attorney Ronayne told them it didn't need to be there. (JT 216:25 – 217:16.)

On May 13, 2003, Brad and Brenda filed a Chapter 7 bankruptcy (Ex. 5), and on August 12, 2003, received a discharge in bankruptcy for their personal obligation on all of the debt they owed FSBR. (FOF 2, SR

3030–3031.) *In rem* debts, such as liens created by security interests in personal property and mortgages on real property, survive a discharge. (Id.)

At the time of filing bankruptcy, Brad and Brenda owed FSBR $231,472.14, and Brad owed $357,171.61 to FSBR on the ECAS personal guaranty. (Ex. 5, p. 2.) None of the discharged debt between FSBR and Brad and Brenda was reaffirmed pursuant to 11 U.S.C. § 524(c). (FOF 3, SR 3031.)

FSBR and Beyers Plan to Ignore Bankruptcy Law

FSBR decided, with the consent of Beyers, to pursue collection of the entire $700,000[1] from the Stablers, without regard to the bankruptcy. (JT 93:8 – 94:6.) FSBR told Brad and Brenda they had reaffirmed the debt to FSBR, (JT 222:3–12), and Attorney Ronayne helped FSBR create that impression. (JT 546:25 – 547:4.)

Scheme Directed at Stan and Rose Marie's Land

On March 9, 2004, $650,000 of debt that had previously been off FSBR's books (JT 100:14–23; Ex. 11) reappeared in the form of a note and mortgage signed by the Stablers. (JT 100:14–20; Exs. 7, 8, and 11.) The $650,000 note and mortgage included $550,000 of ECAS and Brad and Brenda debt, and $100,000 from Stan's operating note (JT 100:2–7), which numbers are confirmed from handwritten notes in FSBR's file. (Ex. 6.)

Beyers called Stan and Rose Marie on the night of March 8, 2004, to tell them that his employee, Curt Warkenthien, would be coming to their home the next day with papers for them to sign for $100,000 of their debt, and the rest would be Brad's debt. (JT 146:16–18.) Beyers did not tell them that the ECAS debt was included in the note and mortgage, or that Brad's obligation on it had been discharged in the

[1] Approximately $550,000 was included in the $650,000 March 2004 mortgage, and approximately $150,000 was the debt shifted to ISB. (FOF 4 and 8, SR 3031–3032.)

bankruptcy. (JT 146:24-25; JT 162:23 - 163:16.) Beyers did stress to Stan and Rose Marie that only $100,000 of the debt would be theirs. (JT 322:17 - 323:3.) Anticipating company, Rose Marie took out a roast for dinner the next day, and prepared a meal. (JT 146:18-23.) Stan and Rose Marie did not find out until years later, when they consulted Attorney Pat Dougherty[2], that FSBR had included the ECAS debt in the note and mortgage. (JT 147:1-7.) Even Beyers' attorney, Ronayne, had to eventually admit that it was not a true statement to call the discharged debt "Brad's debt." (JT 526:4 - 528:4.)

That night, Beyers came to their home, and was very distressed. (JT 148:1-12; JT 324:23 - 325:2.) He told Stan and Rose Marie that the bank examiners were coming, that he needed them to sign more papers to help him out, and that "It'll never hurt you." (JT 148:11-14; JT 325:2-6.) Stan and Rose Marie felt sorry for Beyers, trusted him, and signed. (JT 149:2-11; Exs. 43 and 44[3]; JT 324:25 - 325:8.)

Four days after Beyers had Stan and Rose Marie sign the $650,000 mortgage, of which only $100,000 was their debt, Beyers prepared a financial statement for them to sign, which showed their total real estate debt at only $140,000.[4] (Ex. 17; JT 120-123.) As Beyers had promised, Stan and Rose Marie only owed the $100,000. (JT 325:9-12.)

The next year, on May 25, 2005, FSBR again prepared a financial statement for Stan to sign that showed the long-term debt at $99,250. (Ex. 18; JT 124-126.) Again, Beyers had kept his promise that their debt was only the $100,000. (JT 325:13-15.) Not until two years after

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[2] Stan and Rose didn't go to see an attorney until the stress of all of this caused their son, Brad, to threaten suicide. (JT 199:5-8.)

[3] When Beyers does transactions outside the norm, he usually doesn't use bank forms, and has them specifically prepared by Attorney Vaughn Beck. (JT 105:11-17; JT 289:9 - 292:24; Exs. 14, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53, and 58.)

[4] There is a small amount of debt owing to Farm Credit Services, in addition to the $100,000.

obtaining their signatures on the $650,000 note, does Beyers finally prepare a financial statement that reflects the fraudulently-obtained debt. (Ex. 19; JT 132-133.)[5] The FSBR bank records also do not disclose that Beyers was pursuing Stan and Rose Marie for $650,000, instead of the balance owing on $100,000. (Ex. 22.)

The debt that was brought onto FSBR books by the creation of the March 9, 2004, note and mortgage was moved off the FSBR bank books by May 13, 2004. (JT 100:18-23.) This debt included $416,000 of ECAS debt that had been moved off the FSBR bank books on June 16, 2003, at the direction of Beyers (Ex. 27), until it was brought back on the bank books for the purpose of doing the March 2004 $650,000 note. (JT 101:1 - 102:4.)

The Scheme Directed at Brad and Brenda

On March 9, 2004, $550,000 of ECAS debt and Brad and Brenda debt was repackaged into a $650,000 note.[6] (FOF 4, SR 3031.) Remaining at FSBR was approximately $150,000 of Brad and Brenda's debt, $113,871.89 of which was discharged debt. (Id.) After Brad and Brenda received their discharge in bankruptcy, Beyers, as president and owner of FSBR, devised a scheme through which he would convince Brad and Brenda to continue paying on their discharged debt, by signing new notes for all of the discharged debt. (FOF 5, SR 3031.)

The Ipswich State Bank ("ISB") Debt Portion of Scheme

On or about May 11, 2004, Beyers prepared and had Brad and Brenda sign a false financial statement addressed to ISB, which he knew was

[5] The financial statement shows $529,000, because approximately $100,000 is Stan and Rose Marie's debt, leaving the $429,000 balance, which is very similar to the ultimate fraud finding of $439,100.

[6] The balance was Stan and Rose Marie's $100,000 debt. (JT 146:16-18.)

false. (FOF 6, SR 3031-3032; Ex. 161.) The financial statement asserted that Brad and Brenda had a net worth of $368,200. Beyers knowingly omitted the $629,000[7] of discharged debt Brad and Brenda owed Schurrs and Ernst. (FOF 6, SR 3031-3032.)

On the next day, Beyers went to ISB and met with Tom Holdhusen, President of ISB. (FOF 7, SR 3032.) Beyers explained to Holdhusen that Beyers wanted to move the loan from FSBR to ISB because the loan was classified and that he had an upcoming loan examination. (FOF 8, SR 3032.) Beyers arranged the meeting with ISB, went to the bank, and obtained the completed documents for the ISB loan. (FOF 9, SR 3032.) As part of the application process, Beyers presented the false financial statement to Tom Holdhusen. (FOF 10, SR 3032.) To convince ISB to take the debt, Beyers personally guaranteed the loan, (FOF 11, SR 3032; Ex. 54), but didn't tell Brad and Brenda. (JT 270:8-19.)

Beyers gave Tom Holdhusen his personal financial statement showing a net worth of approximately five million dollars. (FOF 12, SR 3032; Ex. 70.) Tom Holdhusen testified that ISB would not have entered into the transaction but for Beyers' personal guaranty. (FOF 13, SR 3032.) Beyers did not tell ISB that Brad and Brenda had received personal discharges in bankruptcy for some of the debt. (FOF 14, SR 3033.) Beyers was successful in transferring the debt, and FSBR received the $150,000. (Ex. 56.) Of the $150,000 debt that Beyers and FSBR moved to ISB with the new $150,000 ISB note, $113,871.89 was discharged debt from Brad and Brenda's bankruptcy. (JT 127-128; Stipulation, CT 36.) Tom Holdhusen, president of ISB, testified that

[7] The $650,000 note was paid down to $629,000 by Brad and Brenda, and then $416,000 transferred to Schurrs (Ex. SJ7, SR 1519) and $213,000 transferred to Roger Ernst (Ex. SJ9, SR 1521). This debt was later re-acquired by Beyers and is reflected in Beyers Counts 3 and 4 (SR 306-307.)

he was not told by Beyers and was not aware that the debt had been discharged in bankruptcy. (FOF 15, SR 3033.)

According to paragraph 6 of Beyers' guaranty to ISB, ISB did not have to obtain Beyers' permission to rewrite, renew, or grant extensions on the $150,000 note. (FOF 21, SR 3033.)

ISB did not do the normal risk rating that they would have done if this was an ordinary loan to Brad and Brenda. (FOF 24, SR 3034.) This was solely because of the personal guaranty by Beyers. (Id.)

For the first renewal in January of 2005, Beyers provided a new financial statement to ISB for his personal guaranty. (FOF 25, SR 3034; Ex. 70.) For the second renewal in January of 2006, Beyers provided a new financial statement to ISB for his personal guaranty. (FOF 26, SR 3034; Ex. 71.) Beyer's guaranty of the ISB loan to the Stablers was the only occasion where Tom Holdhusen ever saw a bank officer personally guaranty a loan moved out of the banker's bank. (FOF 27, SR 3034.) Tom Holdhusen worked as a banker in South Dakota for forty years. (Id.)

Discharged Debt Hidden from Regulators

The personal guaranty did not show up on the paper trail remaining at FSBR. (FOF 28, SR 3034.) Regulators looking at FSBR records on Brad and Brenda's debt would not be able to tell that the FSBR owner had signed a personal guaranty to get the debt paid by the loan from ISB. (FOF 29, SR 3034-3035.) The credit file memorandum at FSBR does not disclose that Brad and Brenda filed bankruptcy, or that any debt was written off as a result of the bankruptcy. (Ex. 21.)

Beyers' Collection of Discharged Debt

Brad and Brenda defaulted on their loan at ISB. (FOF 30, SR 3035.) The balance owing at the time of default was $73,734.53 of

principal and $3,455.23 of interest. (Id.) Because of his guaranty, Beyers paid off ISB and took an assignment of the loan. (FOF 31, SR 3035.) Beyers then sued Brad and Brenda for the ISB loan. (FOF 32, SR 3035.) The ISB loan was secured, in part, by various items of farm equipment. (FOF 33, SR 3035.) On April 11, 2013, Beyers sold the collateral repossessed from Brad and Brenda for the net sales proceeds of $30,685.70. (FOF 46, SR 3036.)

The parties stipulated on the record that if the Court ruled that Beyers was entitled to enforce the ISB Note, that the amount due and owing by Brad and Brenda on the Note was $111,869.10 as of January 16, 2013, plus per diem interest of $17.17 from that date until entry of judgment. (FOF 67, SR 3039.)

Beyers' Veracity:

The finders of fact heard testimony from Beyers, and below is the testimony that would reflect on his veracity.

1. Beyers testified that he didn't know about the $650,000 loan in 2004 until after it was done. (JT 37:19.) Rose Marie and Stan testified that Beyers called the night before and set up the March 9, 2004, meeting at their home. (JT 146:10–25; JT 322:19–25.)

2. Beyers testified he only knew Stan and Rose Marie were customers after they became customers. (JT 63:6.) Rose Marie and Stan testified that Beyers encouraged them to come to the bank and was there when they opened their account. (JT 149:16 – 151:2; JT 325:21 – 326:21.)

3. Beyers denied that he was at the 2002 loan signing. (JT 74:20–21.) Rose Marie and Stan testified to Beyers' involvement in the 2002 meeting, and at the meeting Beyers gave their grandchildren little red tractors. (JT 149:16 – 151:2; JT 154:19–21; JT 326:3–21.) Brad testified that he was at the bank that day with his parents, and that Beyers gave the tractors to the children. (JT 213:4 – 214:10.)

4. Beyers denied that he gave any advice to Brad and Brenda about what attorney to use in their bankruptcy. (JT 85:25 – 86:1.) Brad and Brenda testified that Beyers made the decision that they should file bankruptcy, and actually set up the appointment with Attorney Ronayne. (JT 215:24 – 216:13; JT 148:1–3; JT 249:3–8; JT 284:1–4; JT 318:3–7.) Brenda testified that Beyers had asked Attorney Ronayne to handle Brad and Brenda's bankruptcy as a personal favor to Beyers. (JT 283:17–18.)

5. Beyers testified that Attorney Ronayne told the bank that they didn't need to get a reaffirmation agreement. (JT 95:14–21.) Beyers also testified that Attorney Ronayne said Stablers would pay all of the discharged debt. (JT 136.) Attorney Ronayne denied it. (JT 547:18 – 548:11; JT 550:25 – 551:15.)

6. Beyers denied going to Stan and Rose Marie's home in Eureka at night to get documents signed (JT 117:8–9; but see JT 156:3–17 and Ex. 13.) Rose Marie testified that he always came late in the afternoon or evening. (JT 158:7–8.)

7. Beyers testified under oath that he didn't see Stan and Rose Marie on March 9, 2004, and that he was not dealing with them. (JT 102:9–11 and 20.) Later, when confronted with Ex. 43, a document on which he previously admitted obtaining the signatures of Stan and Rose Marie, which document is dated March 9, 2004, he revised his story. (JT 107–109.) He then proceeded to detail an elaborate story of the coincidence of him being at Stablers that day, which involved travel through several communities and two counties (JT 109–116), which story a McPherson County jury would have readily recognized as contrived. Rose Marie and Stan both testified that Beyers was at their home on March 9, 2004. (JT 156:3–19; JT 332:9–16.)

8. Beyers testified he was only at the Stabler home on two occasions. (JT 106:5–6.) Documents that show

Beyers went to the Stablers' home more than that to get signatures include: Exs. 45 and 46 on 4/19/04 (JT 117-118; JT 157:22 – 158:23); Exs. 47, 48 and 49 on 5/27/04; Ex. 50 on 3/21/05 (JT 128-129; JT 157:15-21); Ex. 43 and 44 on 3/9/04 (JT 156:1-12); and Ex. 58 from 8/3/05 (JT 119; JT 159:11-15).

ARGUMENT

1. BEYERS WAS NOT A HOLDER IN DUE COURSE WHEN HE TOOK AN ASSIGNMENT OF THE ISB PROMISSORY NOTE, AND HE WAS THEREFORE SUBJECT TO THE AFFIRMATIVE DEFENSES OF ILLEGALITY AND DISCHARGE IN BANKRUPTCY.

The law does not permit Beyers to launder and collect discharged debt. The Trial Court's Findings of Fact highlight that Beyers is not a holder in due course. While the Trial Court refers to Beyers' actions as "malodorous circumstances" (SR 2827), the Trial Court was forced to conclude as a matter of law: "Because John Beyers is presently standing in the shoes of ISB, he is also entitled to collect on the ISB Note." (COL 5, SR 3050.) The law for negotiable instruments is settled, not so constrained as the Trial Court viewed it, and does not give Beyers holder in due course status.

Holder in Due Course

When ISB made the Beyers-engineered loan to Brad and Brenda for $150,000 to take out the FSBR debt, ISB was a holder in due course because they did not have notice of the affirmative defense of discharge in bankruptcy. SDCL 57A-3-302(a)(2)(vi). A promissory note is a negotiable instrument (SDCL 57A-3-104(b) and (e)). ISB negotiated the instrument to Beyers (SDCL 57A-3-201(a)). But, once Beyers took ownership of the negotiable instrument, he only became a "holder" (SDCL 57A-1-201(21)), and never was a "holder in due course." As set forth below, because he had prior knowledge of defenses to the negotiable instrument, Beyers was never a holder in due course, he never stood in

the shoes of ISB, and he was never entitled to collect on the discharged portion of the ISB note.

Laundering Discharged Debt

The rights acquired by Beyers, as the transferee of the debt, are defined by statute:

> Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

SDCL 57A-3-203(b) (emphasis added).

The emphasized language contains the answer to the Trial Court's legal conundrum. The Official Comments to the Uniform Commercial Code further elaborate and enlighten:

> Under subsection (b) a holder in due course that transfers an instrument transfers those rights as a holder in due course to the purchaser. The policy is to assure the holder in due course a free market for the instrument. There is one exception to this rule stated in the concluding clause of subsection (b). A person who is party to fraud or illegality affecting the instrument is not permitted to wash the instrument clean by passing it into the hands of a holder in due course and then repurchasing it.

SDCL 57A-3-203, Official Comment 2(emphasis added).

It is particularly telling that as a party to the fraud or illegality, Beyers cannot "wash" the instrument, and become a holder in due course. The Trial Court's findings are a textbook example of Beyers doing his laundry on this dirty debt.[8]

[8] The comments to the Uniform Commercial Code are viewed as an authoritative source by the South Dakota Supreme Court, although not binding statutory authority. Rushmore State Bank v. Kurylas, Inc., 424 N.W.2d 649, 656-57, n.1 and n.9 on 664 (S.D. 1988); Terminal Grain Corp. v. Freeman, 270 N.W.2d 806, 811 (S.D. 1978); Olson v. Spitzer, 257 N.W.2d

Brad and Brenda preserved this issue for appeal in their Proposed Findings of Fact and Conclusions of Law at SR 2834, and especially SR 2842-2844.

Defense of Discharge in Bankruptcy and Illegality

A bankruptcy discharge is an injunction against an act to collect or recover discharged debt. 11 U.S.C. § 524 (a)(2). It is illegal to collect on discharged debt. In re Eastman, 419 B.R. 711, 726 (Bankr. W.D. Tex. 2009). Based upon the Findings of Fact made by the Trial Court, Beyer's arrangement of the ISB $150,000 loan was, and continues to be, illegal.

No longer a holder in due course, the Uniform Commercial Code recognizes that Beyers' collection action is subject to the following defenses:

> (a) Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:
> (1) A defense of the obligor based on . . . illegality of the transaction which, under other law, nullifies the obligation of the obligor, . . . or
> (iv) discharge of the obligor in insolvency proceedings[.]

SDCL 57A-3-305 (emphasis added).

The Uniform Commercial Code, in the Comments to 57A-3-302, make it clear that Beyers cannot have holder in due course status:

> Notice of a defense under Section 3-305(a)(1) of a maker, drawer or acceptor based on a bankruptcy discharge is different. There is no reason to give holder in due course status to a person with notice of that defense. The second sentence of subsection (b) is from former Section 3-304(5).

SDCL 57A-3-302, Official Comment 3 (emphasis added).

459, 463 (S.D. 1977); Dakota Pork Indus. v. City of Huron, 2002 S.D. 3, 638 N.W.2d 884,886; and Johnson v. John Deere Co., 306 N.W.2d 231, 232-233 and 236 (S.D. 1981). "The first important aid to interpretation is the Official Comments to each section of the UCC." The Law of Secured Transactions Under the Uniform Commercial Code, Third Edition, by Barkley and Barbara Clark, page 1-1.

Beyers is a mere "holder" of the ISB note, and is subject to the defenses of illegality and discharge in bankruptcy. A judgment against Brad and Brenda for the discharged debt is void at any time obtained as a matter of law. 11 U.S.C. § 524(a)(1). Beyers' efforts to collect on the discharged debt instrument are illegal.

Based upon the unchallenged Findings of Fact made by the Trial Court that Beyers had notice that the debt was discharged, and participated in the laundering of the debt, his claims as to the debt should be void as a matter of law.[9]

2. STAN AND ROSE MARIE SHOULD HAVE BEEN ALLOWED TO PURSUE EMOTIONAL DISTRESS DAMAGES AS PART OF THE FRAUD AND CONSPIRACY CLAIMS AGAINST BEYERS AND FSBR.

Stan and Rose Marie were the victims of a fraud and conspiracy perpetrated by FSBR and Beyers. (Special Verdict Form, SR 2659-2660.) In this tort action, Stan and Rose Marie sought emotional distress damages. The Trial Court dismissed the emotional distress damage claim in the Order on Pretrial Motions. (SR 2584.) The Trial Court's rationale was as follows:

> And without some guidance, some direction to that extent from the legislature or the Supreme Court, I don't see that I can authorize pursuit of emotional damages in this fraud case.

(Pretrial Hearing of Dec. 4, 2012, p. 72, lines 1-4.) A McPherson County jury ultimately found fraud, but was not allowed to award emotional distress damages.

The South Dakota Supreme Court has made it clear, in a different case against FSBR, Fix v. First State Bank of Roscoe, 2011 S.D. 80, 807 N.W.2d 612:

> We have consistently recognized emotional distress damages in tort actions.

[9] *In rem* claims to the personal property are not affected, and the Court's Findings of Facts disclose that Beyers was able to sell the equipment and receive the proceeds from his *in rem* lien. (FOF 46, SR 3036.)

Fix, 2011 S.D. 80, ¶ 14, 807 N.W.2d at 617.

Additionally, the Court made it clear that the heightened burdens for emotional distress damages that come with certain torts, do not apply if it is an intentional tort. Id. Fraud is an intentional tort, Grynberg v. Citation Oil & Gas Corp., 1997 S.D. 121, 573 N.W.2d 493, 502, and the jury was so instructed. (Jury Instructions 21 and 22, SR 2650 and 2651.) Conspiracy is also an intentional tort. (Jury Instruction 14, SR 2643.)

FSBR and Beyers conspired to act fraudulently against Stan and Rose Marie (Special Verdict Form, SR 2659-2660), to recover debts discharged in Brad and Brenda's bankruptcy. The Defendants tried to wrongfully take this elderly couple's farm. (See Separate Answer and Counterclaim of Defendants First State Bank of Roscoe and John Beyers, Beyers Count 3, Beyers Count 4, Beyers Count 7, and Beyers Count 8, SR 306-316.)

The measure of damages in South Dakota is "the amount which will compensate for *all* the detriment proximately caused." Fix, 2011 S.D. 80, ¶ 14, 807 N.W.2d at 617; SDCL 21-3-1. Particularly given the egregious nature of Beyers and FSBR's conduct, and the repeated nature of their conduct, it is important that the civil justice system have a mechanism to fully compensate these victims. Emotional distress damages are an important part of compensating victims like Stan and Rose Marie.

Stan and Rose Marie should be granted a new trial on remand on the limited issue of emotional distress, and related exemplary damages.

3. BEYERS AND FSBR PROCURED THE $650,000 PROMISSORY NOTE AND MORTGAGE BY FRAUD, AND NONE OF THE NOTE SHOULD BE ENFORCEABLE.

"[F]raud will vitiate any contract. . . ." Poeppel v. Lester, 2013 S.D. 17, ¶ 23, 827 N.W.2d 580, 586; Wakonda State Bank v. Fairfield, 53 S.D. 268, 220 N.W. 515, 518 (1928); and Funke v. Holland

Furnace Co., 78 S.D. 374, 102 N.W.2d 668, 670 (1960). Fraud in the inducement is a question of fact for the jury. Poeppel at ¶ 20.

The McPherson County jury made very specific findings: 1. Were Stan and Rose Marie Stabler deceived into signing the $650,000 Promissory Note and Mortgage in March of 2004?

Yes __X__ No _____

2. What amount of the $650,000 March 2004 Promissory Note and Mortgage were obtained by fraud?

$439,100.00

When asked who perpetrated the fraud, the jury was very specific:

3. With a check mark, indicate which of the Defendants acted to deceive Stan and Rose Marie Stabler?

__X__ First State Bank of Roscoe __X__ John R. Beyers

(Special Verdict Form – SR 2659-2660.)

Once it was determined that the $650,000 note and mortgage were procured by fraud, there remained no instrument upon which Beyers could recover.

Beyers and FSBR approached the $650,000 promissory note like a gambling proposition. They held $210,900 of good debt, but they weren't satisfied with collecting the good debt. Instead, they rolled their good debt into a $650,000 promissory note, and gambled that they could collect an additional $439,100 of monies they were not owed. FSBR and Beyers lost their gamble, and then asked the Trial Court, after the fact, to give them back their wager. The Restatement of Torts speaks to this concept. A defendant shouldn't be enabled "to speculate on his fraud and still be assured that he can suffer no pecuniary loss." RESTATEMENT (SECOND) OF TORTS § 549, Comment i (App. 7.)

The Trial Court, post verdict, provided equitable relief to Beyers, and entered a judgment for him for the amount of his $650,000 note that was not the product of fraud. Beyers didn't seek rescission

and wasn't entitled to equitable relief. Particularly, the finding of fraud shows that Beyers did not have the clean hands that are necessary to come before the Court and seek equity.

> When claimants seek equitable relief in an instance where they would ordinarily be permitted such relief, they will nonetheless be denied the relief if they acted improperly or unethically in relation to the relief they seek. . . . Unrelated misconduct will not bar relief: "What is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts."

Adrian v. McKinnie, 2002 S.D. 10, 639 N.W.2d 529, 535 (emphasis added).

Acting unethically was the Defendants' business practice. An FSBR Vice President told Brad that "when we do something at the bank we cross our T's and we dot our I's and it's legal. Maybe not, maybe not ethical, but it's legal." (JT 229:9-12.) Tom Holdhusen describes Beyers' act of hiding debt off bank books as not "ethical." (JT 422:5-21.)

If Beyers' hands weren't so dirty, he could have sought rescission, admitted his fraud, and asked the Court to restore the debt remaining on the prior $100,000 and $110,900 obligations. Beyers did not plead or attempt to plead that, and chose instead to gamble that the jury would find that he had not committed fraud in obtaining the $650,000 note and mortgage. Beyers should not now be able to wager on his fraud, and be assured that he will suffer no pecuniary loss for it.

4. STAN AND ROSE MARIE'S $20,000 EXEMPLARY DAMAGE VERDICT SHOULD BE UPHELD.

The McPherson County jury awarded $20,000 in exemplary damages, which the Trial Court set aside because of the lack of a compensatory damage award. (FOF 88, SR 3043; COL 24, SR 3053.) Stan and Rose Marie believe that the jury finding of fraud, which negated either all or two-thirds of the $650,000 promissory note and mortgage, is a sufficient damage basis to support an award of exemplary damages.

Punitive damages require an award of compensatory damages. Henry v. Henry, 2000 S.D. 4, 604 N.W.2d 285, 288. It is important to appreciate why this is the rule. The reason for this requirement of "actual damages" is to prevent "petty outrages" from being brought before the Court. Id. The McPherson County jury finding that the $650,000 note and mortgage were procured by fraud and a conspiracy is not a "petty outrage," but is in fact a significant finding. More important from a legal perspective, it is an award of compensatory damages.

The presumed value of the $650,000 note and mortgage is $650,000. SDCL 21-1-9 – App. 8; Cosand v. Bunker, 2 S.D. 294, 50 N.W. 84, 85 (1891); McKindley v. Citizens' State Bank of Edgeley, 36 N.D. 451, 161 N.W. 601, 602-603 (1917). Both in economic reality, and in legal reality, the jury finding is a compensatory award of either $650,000 (promissory note void) or $439,100 (debt in promissory note reduced).

The situation where a bank and banker commit fraud in obtaining and attempting to enforce a large note and mortgage is unique. There are no South Dakota cases on the subject.

Other courts have attempted to address the "compensatory damage" requirement when faced with unusual settings, that don't quite fit the mold, like Stan and Rose Marie's situation. The Supreme Court of Iowa has recognized that it is sufficient "[w]hen harm has been done . . . actual damage has been suffered." Pringle Tax Serv., Inc. v. Knoblauch, 282 N.W.2d 151, 154 (Iowa 1979). The United States Eighth Circuit Court of Appeals recognized that restitutional-type damages, either equitable or compensatory, can satisfy the requirement. Kerr v. Charles F. Vatterott & Co., 184 F.3d 938, 944 (8th Cir. 1999). Similarly, see Kennedy v. Thomsen, 320 N.W.2d 657, 659 (Iowa Ct. App. 1982), and Hutchison v. Pyburn, 567 S.W.2d 762, 766 (Tenn. Ct. App. 1977).

The Defendants' conduct, as found by the jury, provides a basis for the award of punitive damages.

5. BEYERS AND FSBR ARE NOT ENTITLED TO THEIR ATTORNEYS' FEES AND COSTS FOR WORK DONE IN BANKRUPTCY COURT.

South Dakota follows the American Rule with respect to attorney's fees, that each party bears the burden of their own attorney's fees, unless one of two recognized exceptions applies. In re S. Dakota Microsoft Antitrust Litig., 2005 S.D. 113, 707 N.W.2d 85, 98. One of the exceptions allows attorney's fees to the extent of a "contractual agreement" between the parties. Id.

The Trial Court awarded $62,823.40 of attorney's fees (SR 3394), of which $35,320.50 was for legal work in Bankruptcy Court. (SR 3255.) The contractual agreement between Beyers and Brad and Brenda on the ISB note[10] provides as follows:

> **COLLECTION COSTS AND ATTORNEY'S FEES:** I agree to pay all costs of collection, replevin or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs (except where prohibited by law). To the extent permitted by the United States Bankruptcy Code, I also agree to pay the reasonable attorney's fees and costs you incur to collect this debt as awarded by any court exercising jurisdiction under the Bankruptcy Code.

SR 3250 (emphasis added).

The contractual agreement between the parties provides that the attorney's fees and costs can only be incurred if the legal work is awarded by a Court "exercising jurisdiction under the Bankruptcy Code," then to only "the extent permitted by the United States Bankruptcy Code."

Brad and Brenda first raised the affirmative defense of discharge in bankruptcy as it related to the ISB Note in State Court. (SR 269, 484, 492, 494, 495.) Since the discharge order was issued by the

[10] This ISB note is the subject matter of the first issue before the Court, concerning whether or not Beyers is a holder in due course.

Bankruptcy Court, Brad and Brenda asked the Bankruptcy Court to find Beyers in contempt and enforce the discharge order. (Complaint, App. 5.) The South Dakota Bankruptcy Court abstained from hearing the matter because the State Court, with its concurrent jurisdiction, could exercise jurisdiction under the Bankruptcy Code. In re Stabler, 418 B.R. 764 (B.A.P. 8th Cir. 2009); and Stabler v. Beyers, 2009 WL 1651441 (Bankr. D.S.D. June 11, 2009). Jurisdiction under the Bankruptcy Code to determine dischargeability in certain circumstances lies exclusively with the federal court. In re Everly, 346 B.R. 791, 796 (B.A.P. 8th Cir. 2006). But Brad and Brenda's matter is within the concurrent jurisdiction situations where the state court can exercise jurisdiction under the Bankruptcy Code. Id.

With respect to the contractual requirement that the fees be "permitted by the United States Bankruptcy Code," like South Dakota, bankruptcy law is loath to award attorney's fees, absent a basis in statute or contract. In re Nangle, 281 B.R. 654, 658 (B.A.P. 8th Cir. 2002). The Bankruptcy Code only allows attorney's fees under four specific statutory provisions, and only one of those allows a creditor to recover their attorney's fees. In re Nangle, 281 B.R. 658–659. The only situation in which a creditor is entitled to attorney's fees is under § 506(b) of the Bankruptcy Code, and that creditor must be oversecured (id.), which is not the situation here where the creditor was undersecured by $373,137.49. (SR 3255.)

South Dakota only allows attorney's fees in this setting if the contract between the parties authorizes it. The contract in this matter only authorizes fees when the Court is exercising jurisdiction under the Bankruptcy Code, if the Bankruptcy Code would permit the award of attorney's fees. In this situation, where Beyers was not an oversecured creditor, the Bankruptcy Code does not authorize it. The

judgment of attorneys' fees of $35,320.50, and any sales tax and costs relating to the bankruptcy proceeding, should be reversed.

6. THE 2009 ADDENDUM TO THE 2004 COLLATERAL REAL ESTATE MORTGAGE WAS NOT SIGNED OR FILED BY THE MORTGAGEE, BEYERS, AND THEREFORE SHOULD HAVE LAPSED.

A collateral real mortgage ("CREM") is a unique mortgage that is created under very specific statutory requirements:

> A filed collateral real estate mortgage is effective for a period of five years from the date of filing and thereafter for a period of sixty days. . . . An addendum continuing the effectiveness of the collateral real estate mortgage may be filed by the mortgagee within six months before and sixty days after the expiration of the five-year effective date.
>
> An addendum to a collateral real estate mortgage for the sole purpose of continuing the effectiveness of its lien need be signed only by the mortgagee.

SDCL 44-8-26 (emphasis added).

This statutory mortgage has certain specific characteristics, and one of them is that the addendum can only be signed by the "mortgagee." The rules of statutory construction are well settled:

> Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed.

Moss v Guttormson, 1996 S.D. 76, ¶10, 551 N.W.2d 14, 17. The legislature's use of the word "mortgagee" in SDCL 44-8-26 is clear, certain, and unambiguous.

Beyers sought foreclosure of the March 9, 2004, CREM (Ex. 8) in Count 7 of his Counterclaim (SR 312-314). The CREM was filed on March 11, 2004 (Ex. 8), assigned through several different individuals (Exs. 47, 48, and 49), and eventually was assigned by Schurrs, a partnership, to Beyers on August 18, 2008 (Ex. 64). From August 18, 2008, on, Beyers was the mortgagee of the March 9, 2004, CREM.

By statute, the CREM was effective for five years from the date of filing, and for a period of 60 additional days, within which the

mortgagee had to sign and file an addendum. SDCL 44-8-26. The CREM would have lapsed as a matter of law by statute in 2009, 60 days after March 9, unless an addendum was filed by Beyers, the mortgagee. On February 11, 2009, an addendum was filed, but not by Beyers, the mortgagee, but instead by Glenn Blumhardt, as Vice President of FSBR, Inc. (SR 1389-1390.)

The statutory requirement of Beyers, the mortgagee, signing the addendum, was not complied with.

On March 30, 2011, Stan and Rose Marie filed a motion for summary judgment on Count 7 alleging the CREM had lapsed because by statute only Beyers, the mortgagee, could have filed an effective addendum. The Circuit Court entered an order denying the motion for summary judgment, determining that the addendum to the collateral real estate mortgage "was sufficient as a matter of law to extend the Collateral Real Estate Mortgage's existence and effectiveness for an additional five years." (SR 1662.) Judge Myren's ruling is inconsistent with the clear language of SDCL 44-8-26. Ironically, even Judge Myren agreed with the Plaintiffs' position, having earlier described the statutory requirement as follows:

> The legislature made it easy to file the addendum. The addendum need only be signed by the mortgagee and filed within the required time period.

(SR 1500.)

In conclusion, the 2004 CREM expired as a matter of law when the mortgagee, Beyers, did not sign the addendum as required by SDCL 44-8-26. Stan and Rose Marie's Motion for Summary Judgment as to Count 7 of Beyers' Counterclaim should be granted.

RELIEF SOUGHT

Brad and Brenda seek a remand with instructions that the defenses of illegality and discharge apply to Beyers' claim on the ISB debt. A

reversal on the ISB debt reverses the attorneys' fees award also (Issue 5).

Stan and Rose seek a ruling that Beyers cannot collect any of the $650,000 note, as it was procured by fraud and/or he cannot receive equitable relief for the balance. Furthermore, Stan and Rose seek a limited remand for the jury to award emotional distress and punitive damages. Finally, they seek a ruling that the 2004 CREM lapsed as a matter of law (Issue 6), because it was not renewed as required by statute.

DATED this 26th day of March, 2014.

Respectfully submitted,

SCHOENBECK LAW

By:_____
LEE SCHOENBECK
P.O. Box 1325
Watertown, SD 57201
(605) 886-0010

and

DOUGHERTY & DOUGHERTY, LLC
Patrick T. Dougherty
P.O. Box 2376
Sioux Falls, SD 57101
(605) 335-8586

ATTORNEYS FOR APPELLANTS

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 26917/26918 (N.O.R.)
Consolidated with Appeal No. 26965/26994 (N.O.R.)

STANLEY E. STABLER,
ROSE MARIE STABLER,
BRAD A. STABLER, and
BRENDA L. STABLE R,
Plaintiffs/Appellants,

vs.

FIRST STATE BANK OF ROSCOE,
a South Dakota Corporation, and
JOHN R. BEYERS,
Defendants/Appellees.

Appeal from the Circuit Court
Fifth Judicial Circuit
McPherson County, South Dakota

HONORABLE SCOTT P. MYREN

APPELLEE'S BRIEF

WOODS, FULLER, SHULTZ
& SMITH P.C.
Roger W. Damgaard
Sander J. Morehead
P.O. Box 5027
Sioux Falls, SD 57117-5027
Attorneys for Defendants/Appellees

SCHOENBECK LAW,
Lee Schoenbeck
P.O. Box 1325
Watertown, SD 57201

DOUGHERTY & DOUGHERTY
Patrick T. Dougherty
100 N. Phillips Ave., Ste. 705
P.O. Box 2376
Sioux Falls, SD 57101
Attorneys for Plaintiffs/Appellants

Notice of Appeal was filed January 27, 2014.

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Statutes:

JURISDICTIONAL STATEMENT

FSB and Beyers agree with the Stablers' jurisdictional statement, except the Judgment on Jury Verdict and Court trial was entered on December 5, 2013, and Notice of Entry of Judgment was served on December 10, 2013.

LEGAL ISSUES[1]

I. Whether the ISB Note was an invalid reaffirmation agreement under 11 U.S.C. § 524(c), and therefore unenforceable as a matter of law?

The trial court held in the negative.

11 U.S.C. § 524(c)
11 U.S.C. 101

II. Whether Beyers was entitled to attorney fees incurred in defending the validity of the ISB Note?

The trial court ruled in the affirmative.

In re Loewen Group, 274 B.R. 427 (Bankr. D. Del. 2002)
In re Hedged-Investments Associates, Inc., 293 B.R. 523 (D. Colo. 2003)
In re Sapp, 2003 Bankr.LEXIS 2174 (Bankr. S.D Ind. March 4, 2003)
11 U.S.C. § 506(b)
11 U.S.C. § 501
11 U.S.C. § 502

[1]FSB and Beyers raised a number of issues in this appeal by way of Notice of Review in their Alternative Notice of Review and their Section B of Docketing Statement--Alternative Notice of Review both dated December 30, 2013. The issues identified in FSB's and Beyers' alternative notice of review are the same as those identified in their notice of appeal and docketing statement in their consolidated Appeal No. 26965/26994 (N.O.R.). Rather than restating all of those issues and their legal arguments on those issues here, FSB and Beyers incorporate the statement of legal issues, statement of facts, statement of the case, and argument from their opening brief in that consolidated appeal by reference.

F.R.B.P. 3001
F.R.B.P. 3012

III. Whether the jury's award of exemplary damages had to be remitted and dismissed because the jury trial was a trial for rescission, and Stan and Rose Stabler could not and did not recover compensatory damages?

The trial court ruled in the affirmative.

Henry v. Henry, 2000 SD 4, 604 N.W.2d 285
U.S. Lumber v. Fisher, 523 N.W.2d 87 (S.D. 1994)

IV. Whether Stan and Rose Stabler could recover emotional distress damages on their fraud claim for rescission?

The trial court held in the negative.

U.S. Lumber v. Fisher, 523 N.W.2d 87 (S.D. 1994)
Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255 (Iowa 1991)
Tolliver v. Visiting Nurse Ass'n, 771 N.W.2d 908 (Neb. 2009)
Jourdain v. Dineen, 527 A.2d 1304 (Me. 1987)

V. Whether the trial court could invalidate the entire $650,000 Note and Mortgage, when the jury, at Stan and Rose Stabler's request, found that only a portion of the Note and Mortgage were procured by fraud?

The trial court held in the negative.

St. Pierre v. State ex rel. South Dakota Real Estate Com'n, 2012 SD 25, 813 N.W.2d 151
SDCL § 15-6-15(b)

VI. Whether FSB's filing of a 2009 Addendum to the $650,000 CREM was effective to extend the term of the CREM even though the CREM had been assigned to Beyers?

The trial court ruled in the affirmative.

SDCL § 44-8-26
State v. I-90 Truck Haven Service, Inc., 2003 SD 51, 662 N.W.2d 288
NattyMac Capital, LLC v. Pesek, 2010 SD 51, 784 N.W.2d 156

STATEMENT OF THE CASE

This appeal is consolidated with FSB's and Beyers' Appeal No. 26965/26994 (N.O.R.). FSB and Beyers incorporate the statement of the case from their opening brief (referred to hereafter as "Opening Brief") in that consolidated appeal by reference, and focus here on procedural details relevant to the Stablers' appeal.

The Stablers filed a complaint for declaratory relief alleging unspecified obligations were discharged in bankruptcy. (S.R.[2] 3-24.) They then filed an amended complaint alleging a $150,000 note executed by Brad and Brenda in favor of the Ipswich State Bank on May 12, 2004, and a $650,000 Note executed by all of the Stablers in favor of FSB on March 9, 2004, were unenforceable against Brad and Brenda because they included debt discharged in Brad and Brenda Stabler's Chapter 7 bankruptcy in 2003. (S.R.267-275.) The Stablers further alleged the Notes were invalid because of fraud, breach of fiduciary duty, and other claims. (*Id.*)

[2]"Settled Record"

FSB asserted counterclaims regarding now-undisputed obligations. (Counts I-VIII). (S.R.294-302.)[3] Beyers counterclaimed as assignee on the $650,000 obligation (Counts III-VI); and as assignee on the ISB obligation (Counts I and II). Beyers sought a personal judgment against Brad and Brenda only to the extent the obligations were determined to not be discharged debt. *Id.* (S.R.306-308, ¶¶ 63, 69.)

Beyers moved for summary judgment on the ISB obligation. (S.R.499, 906-917.) In response, Brad and Brenda reopened their bankruptcy, and filed an adversary complaint in bankruptcy court. (S.R.Doc. 150[4]–Ex. C; SApp[5]. 059.) They alleged Beyers' counterclaims against them on the ISB obligation and the $650,000 obligation violated the bankruptcy discharge injunction and sought an order of contempt against Beyers. (*Id.*) They asserted both Notes were invalid reaffirmation agreements under 11 U.S.C. § 524(c), because they allegedly included debt that had been discharged in their bankruptcy, and were not approved by the bankruptcy court. (*Id.*)

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[3]FSB obtained summary judgments totaling over $200,000 against the Stablers, which the Stablers have not appealed. (S.R.940.)

[4]"Trial Court Docket Number" for unnumbered settled record items.

[5]"Stablers' Appendix" from their opening brief.

The circuit court entered a decision acknowledging Brad and Brenda Stablers' bankruptcy discharge, but holding the liens securing their debt owed to FSB had survived the bankruptcy, and that Beyers, the assignee of the ISB Note, was entitled to summary judgment regarding the ISB Note. (S.R.907-909.)

Brad and Brenda then side-tracked the litigation. They moved the bankruptcy court to enjoin the trial court's entry of summary judgment regarding the ISB Note, again asserting the ISB Note was an invalid reaffirmation agreement. (S.R.Doc. 471. Exhibit A; BApp.[6]088.) The bankruptcy court dismissed their claim that the ISB Note was an invalid reaffirmation of discharged debt. (S.R.Doc. 150 Ex. L, 7-8; BApp.092.) The bankruptcy court held the trial court's ruling that the "debt described in Count I of Beyers' state-court counterclaim [the ISB Note] *was not discharged in bankruptcy*" had collateral estoppel effect. (BApp.106-107) (emphasis added). The bankruptcy court also held the ISB Note was not an invalid reaffirmation. (*Id.*)

The bankruptcy court also dismissed the claim that Beyers' counterclaims on the $650,000 obligation violated the discharge injunction. (*Id.* 107-108) Beyers' counterclaim could not violate the bankruptcy discharge injunction, because Beyers sought a personal judgment against Brad and Brenda only to the extent the state court determined the debt underlying the $650,000 Note was not discharged. (*Id.*)

[6]FSB's and Beyers' Appendix from this responsive brief.

The bankruptcy court further opined the transactions regarding the $650,000 Note were not invalid reaffirmation agreements. (*Id.* 108.)

Finally, the bankruptcy court ruled that, alternatively, it would abstain from the case, and require Brad and Brenda to litigate in state court. (*Id.* 108-113.) They had chosen state court as their forum, and appeared to be forum shopping. (*Id*. at 113) The Stablers appealed the Bankruptcy Court's decision, and it was affirmed. *In re Stabler*, 418 B.R. 764 (8th Cir. BAP 2009). The Bankruptcy Appellate Panel agreed it was "apparent and egregious" Brad and Brenda were forum shopping. *Id.* at 770.

As discussed in FSB's and Beyers' appeal, Brad and Brenda eventually moved the trial court to declare the $650,000 Note unenforceable against them. (S.R.1069.) The trial court acknowledged, then resolved, a split of authority regarding the enforceability of the Note, and entered a letter decision granting that relief. (S.R.1279-80.) FSB and Beyers have not appealed that decision in their consolidated appeal. (Opening Brief 12.)

Brad and Brenda kept trying to invalidate the ISB Note. They eventually moved the trial court to rule the ISB Note was an invalid attempt to reaffirm debt under 11 U.S.C. 524(c). (S.R.1569.) Despite its and the bankruptcy court's previous rulings, the trial court held there was a triable issue of fact in that regard. (S.R.1659.)

At the final pretrial conference, Brad and Brenda elected rescission regarding the $650,000 Note and ISB Note, thereby waiving their tort claims for

compensatory and exemplary damages. (S.R.2579, BApp008--H.T.[7]12/4/12 76:14-77:25.) Their rescission claim regarding the ISB Note was set to be tried separately to the court. (*Id.*)

As noted in FSB' and Beyers' appeal, Stan and Rose took a different path. (Opening Brief 13.) They successfully argued the $650,000 transaction discharged a 2000 mortgage and 2002 CREM underlying two of Beyers' other counterclaims. (S.R.1291.) Those counterclaims were dismissed as a result. (*Id.*) Given their election to argue the $650,000 Note was effective to discharge previous obligations, the trial court held Stan and Rose could not dispute the $650,000 obligation was valid and owed, and were limited to seeking damages on their fraud claim. (*Id.*) The trial court also dismissed all of the Stablers' tort claims except for their fraud claim. (S.R.2486.)

At the final pretrial conference, Stan and Rose Stabler waived their damages claims regarding the $650,000 transaction, except for emotional distress damages, which were dismissed. (S.R.2579; BApp.006-101--H.T.12/4/12 68:8-73:10, 82:12-83:5.) However, the trial court then permitted them to proceed to trial on whether Beyers could enforce the obligation on the $650,000 Note, despite previously ruling they could not dispute its enforceability. (S.R.2641-42, 2645, 2659.)

[7]"Hearing Transcript (Date)."

Before the jury trial, FSB and Beyers argued exemplary damages could not be submitted to the jury. Stan and Rose could not recover compensatory damages, because all of their compensatory damages claims had been dismissed. They were only attempting to reduce Beyers' counterclaim on the $650,000 obligation. (S.R.2491, BApp.013--H.T.12/17/12, 7:9-9:1). The trial court nevertheless submitted exemplary damages to the jury.

The trial court instructed the jury to determine whether some, or all, of the $650,000 Note and Mortgage were unenforceable. (S.R.2642–Instruction No. 12.) The jury determined a portion of the $650,000 Note had been procured by fraud and could be avoided. (S.R.2630; SApp.057.) The jury also awarded $20,000 in exemplary damages. (*Id.* SApp.058.)

The court trial on Brad's and Brenda's claims was held a month later. Before and at the court trial, they stated the issue on the ISB Note was whether it comprised discharged debt, and had not been voluntarily accepted. (BApp.039 C.T.T.[8] 16:1-6; S.R.Doc. 406 Ex. D.) Stan and Rose also asked the trial court to declare the entire $650,000 Note and Mortgage unenforceable, though the jury had found only a portion unenforceable. (S.R.2856, 2916.)

[8]Court Trial Transcript

The trial court entered a letter decision and findings of fact and conclusions of law on these and other issues. (S.R.2823, 3030.) Three rulings are relevant. First, the trial court held Beyers could enforce the ISB Note because it "did not implicate the reaffirmation provisions of the bankruptcy code, Section 524(c)" (S.R.3030, COL ¶ 7; SApp.023). The trial court noted neither ISB nor Beyers were "holders of a claim" under Section 524 of the Bankruptcy Code, (*id.*) and that no party had asked the trial court to disregard FSB's status as an entity separate and distinct from Beyers, its president. (*Id.* ¶¶ 8-10; SApp.023-24.)

Second, the trial court ruled that, because Stan and Rose had recovered no compensatory damages, the exemplary damages award had to be remitted. (S.R.2831; SApp.037.)

Third, the trial court rejected Stan and Rose Stabler's request to invalidate the entire $650,000 Note and Mortgage, because they had not asked the jury for that "all or nothing" result and, accordingly, could not receive it from the trial court post-trial. (S.R.2828-2829; SApp.034.)

Brad and Brenda had stipulated Beyers could recover the attorney fees he incurred in defending the validity of the ISB Note, because the Note contained an attorney fee provision. (Bapp.038--C.T.T.13-14; SApp. 012, ¶ 68.) Beyers moved for his attorney fees (S.R.3154), and submitted affidavits detailing the fees incurred, including those incurred when Brad and Brenda had forum-shopped in bankruptcy court. (S.R.3167, 3215.) Brad and Brenda argued Beyers could not

recover the fees incurred in the bankruptcy court proceedings they had commenced. (S.R.3266-67.) The trial court ruled that, had Beyers not resisted their efforts to get the bankruptcy court to invalidate the ISB Note, Beyers would not have prevailed on the ISB Note, so Beyers could recover fees incurred in that proceeding. (*Id.*)

STATEMENT OF FACTS

Most of the "facts" identified in the Stablers' brief are irrelevant to the legal issues presented in these consolidated appeals. For brevity's sake, FSB and Beyers incorporate the statement of facts from the opening brief in their consolidated appeal by reference, and will address relevant points regarding the Stablers' statement below.

ARGUMENT

The issues in these appeals are legal. FSB and Beyers contend they were entitled to summary judgment on Stan and Rose Stabler's claims for legal reasons or, alternatively, were entitled to a new trial because of legal errors and legally-prejudicial false testimony at the jury trial. The Stablers' appeal, meanwhile, concerns the proper interpretation of two federal bankruptcy statutes, the legal propriety of an award of exemplary damages absent compensatory damages, the legal effect of a finding of partial fraud, and the legal availability of emotional distress damages on a rescission claim.

But the first 22 pages of the Stablers' 39-page brief do not mention the law. They are filled with alleged "facts" that have no impact on these issues. As noted in the consolidated appeal, most of these alleged "facts" and arguments should have been excluded from the jury trial. FSB and Beyers will first address the Stablers' legal issues, then will address how those other alleged "facts" actually support FSB's and Beyers' appeal.

I. The trial court properly ruled Beyers could enforce the ISB Note and recover the attorney fees he incurred defending the Note's validity.

The Stablers' first and fifth appeal issues relate solely to Brad and Brenda and the ISB Note. Their arguments regarding the enforceability of the ISB Note and Beyers' attorney fees are based upon a misrepresentation of the trial court's ruling, and a frivolous argument regarding a bankruptcy statute that does not apply. The Court should affirm that Beyers can enforce the ISB Note, and is entitled to the attorney fees incurred in defending the validity of that claim.

A. The ISB Note did not reaffirm discharged debt.

The trial court wrote a detailed opinion, and entered 111 findings of fact and 32 conclusions of law. (S.R.3030; SApp.003-028.) Neither the phrase "holder in due course," nor the holder in due course statute, SDCL § 57A-3-302, are mentioned in the opinion, findings, or conclusions. The issue on appeal is not whether Beyers was a "holder in due course" regarding the ISB Note.

Brad and Brenda Stabler identified the issue at the court trial: whether the ISB Note "is debt that's been discharged in a bankruptcy and not voluntarily accepted by the debtors." (BApp. 039--C.T.T.15:24-16:6.) They have consistently claimed the ISB Note was discharged debt not properly reaffirmed under a bankruptcy statute, 11 U.S.C. 524(c). (S.R.3186-3191, S.R.Doc. 471 Ex. A; SApp.061 ¶ 16.) This is a legal question. "When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *Discover Bank v. Stanley*, 2008 SD 111, ¶ 15, 757 N.W.2d 756, 761.

As discussed in the consolidated appeal, 11 U.S.C. § 524(c) provides that "[a]n agreement between *a holder of a claim* and the debtor, the consideration for which in whole or in part, *is based on a debt that is dischargeable in a case under this title* is enforceable to the extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived only if" certain procedures, including obtaining bankruptcy court approval, are followed. (Emphasis added.) For example, if a promissory note includes discharged debt *and* is between a bankrupt debtor and a party that "holds a claim" in the debtor's bankruptcy, the agreement isn't enforceable without court approval. *Id.* Neither ISB nor Beyers obtained court-approval for the ISB Note, but the trial court correctly determined Section 524(c) of the Bankruptcy Code did not apply. (S.R.2828; SApp.023-24, ¶¶7-10, 034.) The ISB Note was not based on "discharged debt." Moreover,

neither ISB nor Beyers were a "holder of a claim" in Brad and Brenda Stabler's bankruptcy. (SApp.023-24, ¶¶ 7-9, 034.)

1. The consideration for the ISB Note was not discharged debt.

One of the oft-repeated erroneous "facts" in the Stablers' brief is that the ISB Note comprised "discharged debt."[9] (Stabler Brief 16-17.) The consideration for the proceeds of the ISB Note was discharge of a lien that survived bankruptcy, not discharged debt. When the ISB Note was executed, FSB held a security interest in approximately $145,000 worth of Brad's personal property, including farm equipment. (Tr.Ex.[10] 57 Schedule B.)[11] These security interests survived the bankruptcy. *See In re Hansen*, 164 B.R. 632, 634 (Bankr. D.S.D. 1994); *see also Lee v. Yeutter*, 917 F.2d 1104, 1108 (8th Cir. 1990); *First State Bank v. Zoss*, 312 N.W.2d 127, 127-28 (S.D. 1981). FSB could have foreclosed those liens. *Id.* Instead, Brad and Brenda executed the ISB Note, and executed a new security

[9]Brad and Brenda, in fact, suggest that there was a "Stipulation" in that regard, alleging a "Stipulation" in the "CT" or court trial transcript at page 36. (Stabler Brief 17-18.) However, Brad and Brenda have omitted that FSB and Beyers specifically disputed their characterization of the debt, as reflected on the very next page of the transcript. (C.T.T. 36:15-37:4.)

[10]"Trial Exhibit"

[11]The value of the claim was approximately $225,000, but there were approximately $80,000 in priority purchase-money liens ahead of FSB's position, so $145,000 was secured by the equipment. (B.App. 30-31--T.T. 530:15-533:10.)

agreement in favor of ISB. (Tr.Ex. 131; BApp.028--T.T.[12]414:15-18.) ISB then issued a cashier's check for $150,000–roughly equal to FSB's liens in their personal property. (*Id.*) When FSB received the check, it terminated its financing statement, and released its security interest in Brad's personal property. This gave ISB a first-position lien in Brad's property securing the loan it made to pay off FSB's lien. (*Id*.) The proceeds of the ISB Note did not pay "discharged debt," they paid off and discharged FSB's surviving lien.

Beyers and Brad had the same understanding regarding the ISB transaction - Brad wanted to keep his property, but knew he couldn't keep it without paying; FSB didn't want to foreclose, but couldn't surrender its liens without payment. The ISB Note enabled Brad to keep his property while still paying off the lien that survived his bankruptcy. (BApp.40-42--C.T.T.24:24-25:25, 52:16-53:1-20; 54:1-20; 55:12-15.)

During the court trial, Brad admitted the proceeds of the ISB Note paid off FSB's surviving lien:

> Question: Okay and if we proceed to page 3 of Exhibit 131, do you recognize this check that went from the Ipswich State Bank *as loan proceeds to pay off the First State Bank's lien in your personal property?*
>
> Answer: *Yeah,* I believe that's the one John Beyers brought up to our shop -

[12]"Trial Transcript"

Question: Okay.

Answer: - one night.

****

Question: Okay. *And the proceeds from that Ipswich State Bank loan went to pay off the lien that the First State Bank had in your machinery and equipment; isn't that right?*

Answer: *I believe so, yes*.

(BApp.041-042--C.T.T.52:16-53:3, 55:12-15) (emphasis added). Brad and Brenda omitted this sworn testimony from their brief, but are entitled to no better version of the facts. *See Osgood v. Osgood*, 2004 SD 22, ¶ 19, 676 N.W.2d 145, 151; *Parsons v. Dacy*, 502 N.W.2d 108, 111 (S.D. 1993); *Dartt v. Berghorst*, 484 N.W.2d 891, 897 (S.D. 1992). The proceeds of the ISB Note paid off FSB's valid lien that survived his bankruptcy.

The ISB Note could not be an improper reaffirmation because the consideration for the ISB Note was not discharged debt. The trial court's decision must be affirmed for this reason alone.

2. Neither Beyers nor ISB were a "holder of a claim."

The term "claim" under the Bankruptcy Code means a right to payment from or an equitable remedy against the Debtor. 11 U.S.C. § 101(5). The trial court recognized neither ISB nor Beyers were the "holder of a claim" in Brad and Brenda Stabler's bankruptcy, and that, accordingly, Section 524(c) of the Bankruptcy Code could not apply. (S.R.3050-51, ¶¶ 7-9; SApp.023-24, ¶¶ 7-9.) Brad and Brenda

have not appealed this conclusion, which provides another independent ground to affirm the trial court's decision.

The "holder of a claim" clause of 11 U.S.C. § 524(c) highlights an important distinction between the trial court's decision that the $650,000 Note was unenforceable against Brad and Brenda, and its decision that the ISB Note was enforceable. The trial court held the $650,000 Note, executed in favor of FSB, was an invalid reaffirmation agreement. (S.R.1279-1280.) A key part of the trial court's reasoning was that FSB was the holder of a claim in their bankruptcy. (*Id.*) Consequently, Section 524(c) applied to the $650,000 Note. But because neither ISB nor Beyers had claims in bankruptcy, the ISB Note did not involve the "holder of a claim," hence the different outcome. (S.R.3050-51, ¶¶ 7-9; SApp.023-24.)

During court-trial briefing, and in their appellate statement of facts, Brad and Brenda have suggested Beyers' involvement in the execution of the ISB Note, including his personal guarantee, warrants a finding that Beyers should be deemed to be FSB for purposes of this inquiry. (Stabler Brief 18.) However, the Stablers never asked the trial court to disregard FSB's status as an entity separate and distinct from Beyers, so these facts are irrelevant. (S.R.3051, ¶ 10; SApp.024.) A

number of undisputed facts also demonstrate Beyers did not intend to own the ISB Note.

First, Brad's and Brenda's knowledge regarding the guarantee was irrelevant. SDCL § 56-1-2 specifically provides that a guarantee requires neither knowledge nor consent of the principal of the debt–in this case Brad and Brenda. SDCL § 56-1-2. Given the South Dakota Legislature's endorsement of this process, Brad's and Brenda's alleged lack of knowledge regarding the guarantee cannot establish any wrongdoing on Beyers' part.

Second, the ISB Note was executed on May 12, 2004. (Tr.Ex.131.) Beyers was not assigned the ISB Note until July 3, 2007, after Brad and Brenda defaulted. (*Id.*) If Beyers intended to be the ultimate assignee of the ISB Note, he would not have waited until over three years had passed, the Stablers had defaulted, and litigation had commenced.

Third, the Stablers refinanced the ISB Note over a year after it was initially executed, with no notice to or permission from Beyers. (BApp.029--T.T.415:9-21; Tr.Ex.31.) If Beyers intended to gain ultimate control of the debt, he could have insisted Brad and Brenda Stabler refinance with him.

Fourth, the Stablers' own witness, ISB's president Tom Holdhusen, stated that, if Brad and Brenda had continued to make payments on the ISB note, ISB would not have asked Beyers to fulfill his guarantee, and Beyers wouldn't have wound up holding the debt. (BApp.029--T.T.417:22-418:13.) When the Note

was executed, Holdhusen did not think Beyers would take an assignment of the obligation. (*Id.*) ISB only asked Beyers to take an assignment of the ISB debt after Brad and Brenda defaulted, because he was contractually-obligated to pay the debt when the Stablers did not–like any other guarantor. SDCL § 56-1-16.

The trial court properly found that neither ISB nor Beyers were "holders" of a "claim" in the bankruptcy.

3. The "holder in due course" statute is irrelevant.

Because Section 524(c) of the Bankruptcy Code did not apply to the ISB Note, Brad and Brenda searched for a different argument after the trial court ruled. They proposed "conclusions of law" mentioning the "holder in due course" theory. (S.R. 2842-44, ¶¶ 1-11.) However, they submitted no written or oral argument before, at, or after the court trial supporting their theory. Their new theory was not properly raised for the trial court's consideration. It should not be considered for the first time here on appeal. *See, e.g., R.B.O. v. Priests of the Sacred Heart*, 2011 SD 86, ¶ 12 n.3, 807 N.W.2d 808, 811 n. 3.

More importantly, the argument is without merit. SDCL § 57A-3-308 codifies a three-part analysis regarding actions on a negotiable instrument. *See U.S. Bank Nat'l Ass'n v. Scott*, 2003 SD 149, ¶ 19, 673 N.W.2d 646, 652. First, the plaintiff must present a prima facie showing it is entitled to collect the debt. *Id.* Under SDCL § 57A-3-308(a) and (b), if the signatures on the instrument are admitted "production of the instrument entitles a holder to recover on it *unless* the

defendant establishes a defense." *See Id.* at ¶ 21 (emphasis in original) (quotations omitted); *see also* SDCL § 57A-3-308(a) and (b). Only if a defense is actually established will the burden shift back to the holder to prove it is a holder in due course. *U.S. Bank Nat'l Ass'n*, 2003 SD 149 at ¶ 19, 673 N.W.2d at 652 (citations omitted). The Official Comments to SDCL § 57A-3-308 likewise state "[u]ntil proof of a defense or claim in recoupment is made, *the issue as to whether the plaintiff has rights of a holder in due course does not arise*. In the absence of a defense or claim in recoupment, *any person entitled to enforce the instrument is entitled to recover.*" SDCL § 57A-3-308, official cmt. 2 (emphasis added). "Once the plaintiff has established his prima facie case, he will recover against the obligor unless the obligor establishes a defense. *His defense cannot simply be that the plaintiff is not a holder in due course.*" Hawkland & Lawrence–UCC Series § 3-307:5,[13] p. 3-538 (emphasis added).

[13]As noted in official comment 1 to SDCL § 57A-3-308, that statute is an updated version of former SDCL § 57A-3-307. (BApp.055.)

SDCL § 57A-3-308 and *U.S. Bank* are dispositive. Brad and Brenda never disputed their signatures on the ISB Note were authentic. *See* SDCL § 57A-3-308(a) and (b). Beyers' prima facie right to payment was established, and the burden shifted to Brad and Brenda to prove up a defense. Their defense was that the ISB Note was discharged debt not properly reaffirmed under Section 524(c) of the Bankruptcy Code. The trial court rejected that defense for the reasons outlined above. Accordingly, whether Beyers is a "holder in due course" is irrelevant. Because Brad and Brenda failed to prove their defense, Beyers is entitled to recover the balance owed in the ISB Note, and the trial court's ruling in that regard should be affirmed.

B. Beyers properly recovered the attorney fees he incurred in resisting Brad and Brenda Stabler's efforts to forum shop.

Brad and Brenda stipulated Beyers could recover the reasonable attorney fees incurred defending the ISB Note's validity. (BApp.038--C.T.T.13-14; SApp 012, ¶ 68.) The trial court found the fees Beyers sought were reasonable, which Brad and Brenda have not appealed. Consequently, Brad and Brenda have conceded both Beyers' entitlement to fees, and the amount of fees he was awarded. Nevertheless, they claim 11 U.S.C. 506(b), another bankruptcy statute, bars Beyers' claim for fees incurred in resisting the Stablers' efforts to forum shop in Bankruptcy Court. The trial court properly rejected this argument.

Section 506 of the Bankruptcy Code applies only to "allowed secured

claims" of a "holder of such claim" *in bankruptcy*. *See* 11 U.S.C. § 506(b). Section 506(b) "is an exception to the general rule that a creditor cannot claim interest accruing on debts *during bankruptcy*." *First United Sec. Bank v. Garner (In re Garner)*, 663 F.3d 1218, 1219 (11th Cir. 2011) (emphasis added). "Allowed claims" is a bankruptcy term of art. Section 501 of the Bankruptcy Code, provides that creditors can file "proofs of claim" with the bankruptcy court. 11 U.S.C. § 501. Section 502(a) of the Bankruptcy Code further provides that "[a] claim or interest, *proof of which is filed* under Section 501 *of this title*, is deemed *allowed*, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under Chapter 7 of this title objects." 11 U.S.C. § 502(a) (emphasis added.)

Thus, an "allowed secured claim" under Section 506(b) is a claim against the debtor's bankruptcy estate arising from a secured debt *in the bankruptcy*, not a claim in state court arising from a debt created post-bankruptcy, like the ISB Note. In *In re Loewen Group Int'l, Inc.*, for example, the court noted the difference between attorney fee claims inside and outside of bankruptcy, indicating Bankruptcy Code provisions such as 506(b) apply in bankruptcy, not state court. 274 B.R. 427, 444 n.36 (Bankr. D. Del. 2002) ("[a]lthough a contractual provision providing for the recovery of attorneys' fees and costs *may enable an unsecured creditor to pursue recovery of such fees and costs in an action in state court,* in the context of bankruptcy, the creditor's right to assert such claims is limited by the

provisions of the Bankruptcy Code.") (emphasis added); *accord In re Hedged-*

Investments Assocs., 293 B.R. 523, 527 (D. Colo. 2003); *In re Sapp*, 2003 Bankr. LEXIS 2174, * 16 (Bankr. S.D Ind. March 4, 2003).

Even in bankruptcy, Section 506(b) applies only to requests for attorney fees incurred between the date a bankruptcy petition is filed, and the date a Chapter 11, 12, or 13 plan is confirmed. *See, e.g., Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333, 1338-39 (11th Cir. 2000), *cert. denied*, 531 U.S. 1073 (2001); *In re Araujo*, 277 B.R. 166, 167 (Bankr. D. R.I. 2002); *In re Shaffer*, 287 B.R. 898, 900 (Bankr. S.D. Ohio 2002); *In re Lichty*, 251 B.R. 76, 78 (Bankr. D. Neb. 2000). Brad and Brenda filed for bankruptcy in May 2003. The ISB Note was not executed until May 12, 2004, approximately a year later, after they received their discharge, and after their bankruptcy case was closed.

As the trial court found, neither Beyers nor ISB were "holders of a claim" in the bankruptcy. (S.R.3051-52; SApp.023-24.) Beyers' claim for attorneys' fees based on the ISB note is also not a "claim" by a "holder of a claim" that implicates Section 506(b) of the Code. The only "claim" in bankruptcy was the one the Stablers asserted unsuccessfully before Judge Nail and the Bankruptcy Appellate Panel, forcing FSB and Beyers to incur significant attorneys' fees. Section 506(b) of the Bankruptcy Code was, and remains, irrelevant. The trial court's ruling that Beyers could recover his attorney fees should be affirmed.

II. Stan and Rose asked the jury to rescind the $650,000 Note and Mortgage, which controls the outcome of their appeal.

The Stablers' second, third, and fourth appeal issues relate solely to Stan and Rose. The relief Stan and Rose sought at the jury trial controls the outcome of their appeal. When parties sue for fraud in the inducement of a contract, they have two mutually-exclusive options. The first is to affirm the contract, and sue for money damages. *See, e.g., U.S. Lumber, Inc. v. Fisher*, 523 N.W.2d 87, 89 (S.D. 1994). The second is to waive damages, and seek rescission of the contract. *Id.* This "election of remedies" requirement is not procedural, but a "deeply-rooted" substantive rule of South Dakota law. *Id.*

As noted, Stan and Rose and Brad and Brenda followed separate paths regarding the $650,000 Note. Brad and Brenda elected rescission. (S.R.2579, BApp.008--H.T.12/4/12 76:14-77:25.) Stan and Rose, however, elected to affirm it. In 2011, the trial court, on Stan and Rose Stabler's motion, ruled the $650,000 transaction discharged two earlier mortgages on their property–a 2000 Mortgage and a 2002 CREM--and Beyers' counterclaims to foreclose those earlier mortgages were dismissed. (S.R.1291, 1406.) The trial court initially and properly ruled this election estopped Stan and Rose from disputing the Note was valid and owed, and limited them to seeking damages on their claim on the Note.

(BApp.004--H.T.10/24/12, 91:13-22.)

However, the trial court improperly permitted Stan and Rose to abandon their election, and pursue the opposite relief at trial. (S.R.2641-42, 2645, 2659.) They were allowed to ask the jury to decide the $650,000 Note was wholly or partially invalid. The jury trial was not a trial for damages–it was a trial for rescission of the Note.

This is reflected in the jury instructions. (S.R.2630.) Instruction No. 12 stated Stan and Rose had to prove the $650,000 Note and Mortgage were obtained through fraud and "that Stan and Rose Stabler are entitled to *avoid paying* the Defendants *on some or all of the note*, and are entitled to *avoid the effects* of the mortgage *in whole or in part*." (S.R.2643, BApp.036) (emphasis added). The jury was instructed to determine whether some or all of the Note and Mortgage should be rescinded. No instructions were given regarding how to calculate compensatory damages because no compensatory damages claims were tried.

This is outcome-determinative regarding Stan and Rose Stabler's appeal. They convinced the trial court to let them abandon their election of damages as a remedy, but are now asking this Court to ignore the partial rescission relief they were allowed to seek at the jury trial, restore their right to damages, and yet grant them full rescission as well. The Court must not allow Stan and Rose to keep attempting to recover inconsistent remedies, and must force them to live with the consequences of their elections. FSB and Beyers do not waive their appeal that Stan and Rose should have been bound by their election of damages. (Opening

Brief 24-27.) However, if the Court rules they could seek rescission, it must deny the relief Stan and Rose are seeking here.

A. The trial court had to vacate the exemplary damages award because compensatory damages were not possible.

This Court "has consistently held that punitive damages are not allowed absent an award for compensatory damages." *See Henry v. Henry*, 2000 SD 4, ¶ 5, 604 N.W.2d 285, 288. The jury was presented with Stan and Rose Stabler's rescission claim seeking cancellation of the $650,000 Note, not an affirmative claim for damages. (S.R.2630.) Because Stan and Rose sought rescission, an award of compensatory damages was impossible. (S.R.2491, BApp.013--H.T.12/17/12, 7:9-9:1). They obtained a judgment that a portion of that debt was uncollectable, not a judgment for compensatory damages. (SApp.016, ¶¶ 87-88.) An award of exemplary damages would have been improper. The trial court's decision to submit exemplary damages to the jury was reversible error.

In the context of rescission, for example, this Court previously affirmed a ruling that a party's election to pursue rescission on a fraud claim caused a waiver of that party's tort claims for compensatory and exemplary damages. *See, e.g., U.S. Lumber*, 523 N.W.2d at 89 (affirming trial court's dismissal of compensatory and punitive damages claims in light of plaintiff's election of rescission). This

view is shared by other courts regarding rescission claims. *See, e.g., Collins Music Co. v. FMW Corp.*, 586 S.E.2d 128, 131 (S.C. 2003).

The cases the Stablers have cited either do not support their position, or conflict with South Dakota law. In *Pringle Tax Serv., Inc. v. Knoblauch*, the issue was recovery of exemplary damages regarding breach of a covenant not to compete, not rescission on grounds of fraud. 282 N.W.2d 151, 152-53 (Iowa 1979). The plaintiff in *Pringle* proved compensatory damages, but the defendant's destruction of evidence made damages impossible to quantify. *Id.* Under those unique circumstances, the Iowa Supreme Court held that exemplary damages could be sustained. But *Pringle* has no applicability here, where no damages were even possible. *Kerr v. Charles F. Vatterott & Co.* is even more inapposite. *Kerr* concerned the remedies available under federal ERISA statutes and, most importantly, contains no discussion regarding the propriety of exemplary damages in the absence of a compensatory damages award. 184 F.3d 938, 944 (8th Cir. 1999). The other two cases *Kennedy v. Thomsen*, 320 N.W.2d 657, 658 (Iowa App. 1982) and *Hutchison v. Pyburn*, 567 S.W.2d 762 (Tenn. App. 1977) conflict with *U.S. Lumber*. As noted above, under *U.S. Lumber*, a *South Dakota* case, a party who seeks rescission waives all compensatory and exemplary damages claims.

Moreover, in *Kennedy* and *Hutchison* damages were at least possible. Here, an award of compensatory damages was not even possible. The Stablers identified only four categories of damages: emotional distress; payments on debts discharged in bankruptcy; damage to property rights and credit reputation; and attorneys' fees and punitive damages. (S.R.2169-70.) They conceded they were limited to those four categories of damages; then these claims were either waived or dismissed. (S.R.2579; BApp.006-101--H.T.12/4/12 68:8-73:10, 82:12-83:5.) Accordingly, although the exemplary damages claim should have been dismissed before trial, the trial court properly vacated the exemplary damages award, and its decision in that regard should be affirmed.

B. The trial court properly dismissed the Stablers' emotional distress claims.

The trial court properly dismissed the Stablers' emotional-distress claims for two independently-sufficient reasons. First, although FSB and Beyers do not concede Stan and Rose should have been allowed to seek rescission of the $650,000 Note, the jury trial on Stan and Rose Stabler's fraud claim was for rescission. Having sought rescission, Stan and Rose cannot complain that the trial court dismissed their damages claims, including their claim for emotional distress damages. *See, e.g., U.S. Lumber*, 523 N.W.2d at 89. If this Court affirms the trial court's erroneous decision to let Stan and Rose pursue rescission rather than damages, it must also affirm the dismissal of their emotional-distress claim.

Second, the Stablers could recover only pecuniary damages on their fraud claim, not non-economic damages such as alleged emotional distress. "[F]raud is an economic tort which only protects pecuniary losses . . ." *Bates v. Allied Mut. Ins. Co.*, 467 N.W.2d 255, 260 (Iowa 1991); *see also Tolliver v. Visiting Nurse Ass'n*, 771 N.W.2d 908, 914-916 (Neb. 2009) (explaining the rationale for the rule); *Umphrey v. Sprinkel*, 682 P.2d 1247, 1258-59 (Idaho 1983) (collecting cases); Dobbs, *Remedies, Fraud and Deceit*, § 9.2 (1973). So in an action for fraud, a plaintiff is not entitled to recover for mental anguish or distress. *See, e.g., Cornell v. Wunschel*, 408 N.W.2d 369, 382 (Iowa 1987); *Crowley v. Global Realty,*, 474 A.2d 1056, 1058 (N.H. 1984); *Kruse v. Bank of America*, 202 Cal.App.3d 38, 67 (Cal. Dist. Ct. App. 1988). This is the case even regarding alleged fraud against consumers, or by fiduciaries and banks. *See, e.g., Jourdain v. Dineen*, 527 A.2d 1304, 1307 (Me. 1987) (attorney); *Sparrow v. Toyota of Florence, Inc.*, 396 S.E.2d 645, 648 (S.C. Ct. App. 1990) (car purchase); *McKenney v. First Fed. Savings Bank*, 887 P.2d 927, 935 (Wyo. 1994) (bank); *see also Veilleux v. NBC*, 8 F.Supp.2d 23, 31 (D. Me. 1998).

A myriad of jurisdictions, including the neighboring jurisdictions of Iowa, Wyoming, and Nebraska, have rejected emotional distress claims grounded in fraud. FSB and Beyers are unaware of any South Dakota Supreme Court case

holding to the contrary. The Stablers' emotional distress claim was properly dismissed.

The Stablers' reliance on *Fix v. First State Bank of Roscoe*, is misplaced. In *Fix*, this issue was not before the Court. 2011 SD 80, 807 N.W.2d 612. There was no dispute regarding the availability of any particular damages. *Id*. at ¶¶ 9-16. The only issue was whether the trial court had improperly instructed the jury that Fix had to prove emotional distress to the "extreme and disabling" standard. *Id*. at ¶ 11. The only holding was "we hold that to recover emotional distress damages sustained as the result of the tort of *abuse of process*, a plaintiff is not required to prove the elements of intentional or negligent infliction of emotional distress." *Id*. at ¶ 16. *Fix* is irrelevant here. The trial court's dismissal of the emotional distress damages claim should be affirmed.

C. Stan and Rose could not obtain a full rescission of the $650,000 Note after the jury trial, when they consented to a trial where the jury could find that only a portion of the obligation was unenforceable.

FSB and Beyers do not concede the trial court properly allowed Stan and Rose to challenge the validity of the $650,000 Note and Mortgage. Their fraud claim was not actionable, and they had previously elected damages as their sole remedy. However, the trial court properly rejected the Stablers' post-trial request that it declare the entire $650,000 Note unenforceable. The jury instructions given, and their counsel's closing arguments, demonstrate they consented to a trial where

the jury could find that none, all, or only some of the $650,000 Note and Mortgage were procured by fraud. *See, e.g.,* SDCL § 15-6-15(b); *see also St. Pierre v. State ex rel. South Dakota Real Estate Com'n*, 2012 SD 25, ¶ 20, 813 N.W.2d 151, 157.

Instruction No. 11 stated that if the jury found the Note and Mortgage were procured by fraud, it would have a second issue to determine: "what amount, if any, of the $650,000 promissory note and mortgage were obtained by fraud . . ." (S.R.2641; BApp.035.) Instruction No. 12 likewise stated that Stan and Rose had to prove the note and mortgage were obtained through fraud and "that Stan and Rose Stabler are entitled to avoid paying the Defendants *on some or all of the note*, and are entitled to avoid the effects of the mortgage *in whole or in part*." (S.R.2642; BApp.036.) (Emphasis added). Stan and Rose did not object to Instruction Nos. 11 and 12, (BApp.032--T.T.623:2-22), which permitted a verdict that still required them to pay some of the Note and Mortgage. *See* SDCL § 15-6-51(c) and (d).

Stan and Rose could have insisted on instructions and a special verdict form that required the "all or nothing" result they are seeking now. (SApp.013, ¶ 73.) They didn't. (*Id.*) This was a reasonable strategy given their admission that over $200,000 of the debt comprising the $650,000 Note was validly owed. (BApp.020, 027--T.T.163:17-22, 384:16-21; SApp.013, ¶ 74) Stan and Rose would have faced greater risks had they tried to convince the jury that, though some of the debt was admittedly owed, the jury should still cancel all of the debt. The jury could have

rejected that argument, and then chosen the only other alternative–a finding that none of the obligation was procured by fraud. During closing arguments, Stan and Rose also argued the jury could find that less than all of the Note and Mortgage were procured by fraud. (App.033-T.T.649:13-18.) Ironically, Stan and Rose now claim *FSB and Beyers* asked the trial court for equitable relief. The record reflects Stan and Rose specifically asked the trial court, and are asking this Court, to grant them more relief than they were willing to ask the jury for. The Stablers efforts to obtain a post-hoc, risk-free, full rescission should be rejected, and the trial court's decision they could not do so should be affirmed.

III. The trial Court properly found the $650,000 Mortgage was extended by the filing of an addendum.

The Stablers' sixth appeal issue involves all of the Stablers--whether the trial court properly held that a Collateral Real Estate Mortgage, effective for five years from execution, is effective for an additional five years after an addendum is timely filed, even if the addendum was signed by the original mortgagee (FSB), rather than a subsequent assignee (Beyers). *See* SDCL _ 44-8-26. The Stablers claim the CREM ceased to be effective because the addendum, though timely, was filed by FSB, not Beyers. The Stablers' appeal is based entirely upon their improper interpretation of a statute, SDCL § 44-8-26. "When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed."

Discover Bank v. Stanley, 2008 SD 111 at ¶ 15, 757 N.W.2d at 761. Based upon the plain meaning of SDCL § 44-8-26, the trial court properly ruled the CREM is still effective.

SDCL § 44-8-26 provides in part that, "[a]n addendum to a collateral real estate mortgage for the sole purpose of continuing the effectiveness of its lien need be signed only by the *mortgagee*." (Emphasis added.) FSB was the "mortgagee" named in the CREM. FSB, as the named "mortgagee," was able to extend the lien created by the CREM by timely filing an addendum. FSB did so. The CREM therefore remains effective.

When construing a statute, courts presume "the legislature did not intend an absurd or unreasonable result . . . ." *State v. I-90 Truck Haven Service, Inc.*, 2003 SD 51, ¶ 3, 662 N.W.2d 288, 290. The Stablers' position conflicts with the primary purpose of recording statutes--notification to third parties. *See NattyMac Capital, LLC*, 2010 SD 51, ¶ 16, 784 N.W.2d 156, 160. For example, in *NattyMac Capital, LLC*, a party argued that, because a satisfaction of mortgage had been executed by a loan servicer, instead of the actual mortgagee, as required by the mortgage recording statutes, SDCL § 44-8-6 and 44-8-14, the satisfaction was not effective. *Id.* ¶¶ 9-10. This Court disagreed, stating recording statutes were concerned with notice to third parties, and that mortgage was still satisfied. *Id.* at ¶ 16.

SDCL § 44-8-26 is another statute from this same chapter of South Dakota

law. Likewise, here, an addendum was timely filed, and gave third parties, i.e., potential lenders, notice the CREM was still effective. The purpose of a publicly-filed addendum was fulfilled, which the trial court noted in rendering its decision. (BApp002–H.T.7/24/12 at 34-35.) No third party claims to have given value to the Stablers or any assignees under the belief the 2004 CREM had expired. If the Court interprets SDCL § 44-8-26 as the Stablers have requested, a CREM will, absurdly, be invalidated, though the purpose of recording–public notice–has been fulfilled. The trial court's ruling should be affirmed.

Alternatively, even if the Stablers are correct, this does not leave Beyers without a remedy. As noted in FSB's and Beyers' opening brief, with regard to the 2002 CREM at issue in that appeal, although this Court has not analyzed the proper remedy for a lender if a CREM has lapsed due to failure to file an appropriate addendum, the North Dakota Supreme Court has interpreted North Dakota's version of the CREM statute on this point to impart an equitable lien to a party like Beyers *See Gust v. Peoples and Enderlin State Bank*, 447 N.W.2d 914

(N.D. 1989). FSB and Beyers incorporate the argument from their opening appeal brief on that issue by reference. (Opening Brief 46-48.)

IV. The Stablers' "Statement of Facts" supports FSB's and Beyers' appeal.

Few facts discussed in Stablers' brief are relevant to their appeal. Most relate to FSB's and Beyers' consolidated appeal from the jury verdict. They are intended to cast FSB and Beyers as villains and pre-empt FSB's and Beyers' appellate arguments. But the Stablers' statement of "facts" confirms FSB's and Beyers' argument that Stan and Rose Stabler's case has never been about proving fraud. It has been about arguing FSB and Beyers are "bad." FSB and Beyers cannot possibly list each and every "fact" that is unsubstantiated, irrelevant, or improperly admitted. Moreover, FSB and Beyers also hesitate to emphasize "facts" when the issues on these appeals are legal. They will simply point out some of the more egregious examples. Many of these arguments actually support and exemplify FSB's and Beyers' arguments in their consolidated appeal.

A. The Stablers references to "Bad Actors," "Rita Fix," demonstrate their litigation strategy.

The introduction section of the Stablers' brief is a microcosm of their litigation strategy. They claim FSB and Beyers have "established themselves as bad actors in the banking world of rural South Dakota." Whether FSB and Beyers are "bad actors" is irrelevant to these appeals. Moreover, the Stablers' sole basis for this claim is not evidence presented in *this* case, but a jury verdict in a different

case, *Fix v. First State Bank of Roscoe*, 2011 SD 80, 807 N.W.2d 612. This is ironic for multiple reasons.

First, the jury verdict in *Fix* was vacated, and the case remanded for a new trial on all issues, so it has no precedential value. When a new trial is granted, it is as if the first trial never occurred. *See Day v. Amax, Inc.*, 701 F.2d 1258, 1263 (8th Cir. 1983) ("Following the grant of a new trial, the second trial, absent any stipulations by the parties to the contract, proceeds de novo"); *Mundy v. Olds*, 120 N.W.2d 469, 476 (Iowa 1963) ("'Broadly speaking, on a new trial the case is tried de novo and as though there had been no previous trial.'"). Second, the jury in *Fix* awarded the plaintiff no damages, most likely because she helped her son divert thousands of dollars of FSB's collateral proceeds by letting him sell his grain in her name to avoid FSB's security interest; because she kept thousands of dollars of those proceeds for herself; and because she lied about the scheme under oath.

Third, Stan and Rose improperly argued "conformity" during the jury trial, and are still doing so on appeal. As noted in FSB's and Beyers' appeal, it is improper to point to alleged "other acts" and assert they demonstrate that party's "conformity" of action at some other time. *See* SDCL § 19-12-5. (Opening Brief 33-36.) Stan and Rose improperly presented "other acts" to establish conformity at the jury trial. (*Id.*) They are now asking this Court to consider a vacated verdict in an unrelated case as proof that FSB or Beyers must have engaged in wrongful conduct toward them. This may play well before a jury but it should have no

persuasive force here.

B. The Stablers have confirmed FSB and Beyers have properly identified the alleged "fraud."

The Stablers repeatedly invoke "fraud" in their opening brief. Fraud is a tort with specific elements, and requires a (1) knowing or intentional/reckless; (2) misrepresentation; (3) of fact. *N. Am. Truck and Trailer, Inc., v. MCI Commc'n Servs., Inc.*, 2008 SD 45, ¶¶ 8, 10, 751 N.W.2d 710, 713. Throughout 22 pages of "facts," the only alleged misrepresentations the Stablers identified were:

1. FSB and Beyers presented the 2002 CREM with one of its three pages missing (Stabler Brief 10);

2. FSB and Beyers misrepresented Brad signed an agreement reaffirming his debt with FSB and still owed it (*Id.* 12);

3. Beyers told Stan he would only have to pay $100,000 of the $650,000 Note (*Id.* 13-15).

FSB and Beyers have already addressed these alleged misrepresentations in their own appeal, and rely upon those arguments in that regard. (Opening Brief 18-24.)

C. The Trial Court's decision demonstrates the Stablers' case is not based on actual fraud.

The Stablers cite several passages from the trial court's letter decision regarding the ISB Note, particularly where the trial court expressed its feelings about the transactions and jury trial. (Stabler Brief 1, 11.) The decision is filled with gratuitous criticism of Beyers and FSB that is irrelevant regarding whether

Beyers was the "holder of a claim" in Brad and Brenda Stabler's bankruptcy, or whether the ISB Note comprised "discharged debt." The trial court, like the jury, was misled into believing FSB and Beyers owed the Stablers a special duty. It was this error, rather than actual fraud, that produced the jury's verdict, and the trial court's criticism.

The trial court dismissed the Stablers' breach of fiduciary duty claims before trial, which the Stablers have not appealed. (S.R.2488.) The jury trial was supposed to address fraud. However, the trial court did not identify a single alleged misrepresentation of fact made to the Stablers. Instead, the crux of the trial court's criticism was "I find and conclude that John Beyers' intention was to protect the financial interests of FSBR" (S.R.2824; SApp.030) and that, being an "astute and experienced businessman" (*id.*) Beyers "devised a scheme" to collect "discharged debt" (S.R.2825; SApp.031), all the classic hallmarks of a breach of fiduciary duty claim–minus the duty itself.

Beyers was supposed to be looking out for FSB's interests, because "[t]he relationship between a bank and its borrower is generally considered to be a debtor-creditor relationship 'which imposes no special or fiduciary duties on a bank.'" *Dykstra v. Page Holding Co.*, 2009 SD 38, ¶ 24, 766 N.W.2d 491, 496. In fact, "it is a well established principle that commercial banks 'owe their primary allegiance to their directors and stockholders.'" *Id.* Absent a fiduciary duty (and as a matter of law, there was none here), FSB and Beyers had a duty to act in their

own best interest.

The trial court ignored these principles. If an experienced trial court judge could be led to criticize Beyers for protecting FSB's financial interests, and led to believe that "fraud" had occurred because Beyers and FSB acted with "self interest," it isn't surprising a jury was similarly misled.

Moreover, in discussing a "scheme" to collect discharged debt, the trial court emphasized its earlier ruling the $650,000 Note was unenforceable against Brad and Brenda. (S.R.2825, n.2; SApp.031 n.2.) However, as discussed in FSB's and Beyers' own appeal, the trial court omitted (1) its concession there was a split of authority in 2004 regarding the enforceability of the $650,000 Note against Brad and Brenda; (2) the difficulty it had reconciling the competing authorities before resolving that issue; (3) the Stablers' admission there was a split of authority on the issue; and (4) that some courts would still enforce the $650,000 Note against Brad and Brenda Stabler. (Opening Brief 21-22.) FSB and Beyers have already explained why a fraud claim could not be premised on a small-town banker failing to predict how a trial court judge would rule on a contested issue seven years after the fact. (*Id.*)

Finally, FSB's and Beyers' interests were not the only ones served by the transactions at issue. The Stablers benefitted too. The ISB Note enabled Brad to keep his personal property, including his farm equipment, and stay in farming. (BApp.040-042--C.T.T.24:24-25:25, 52:16-53:1-20; 54:1-20; 55:12-15.) Stan

admitted that, had FSB foreclosed in 2004, he would not have realized the nearly-four-fold increase in the value of his real estate and become a multi-millionaire because of the $650,000 Note. (BApp.026--T.T.379:6-14; Tr.Ex. 138.) The trial court, like the Stablers here, acknowledged only one side of the equation, emphasizing the benefit to FSB without admitting the benefits the Stablers received.

D. Beyers did not "know" he was pursuing discharged debt.

A related and repeated refrain is that FSB and Beyers were knowingly pursing discharged debt. (Stabler Brief 5, 12 16-17, 19, 22.) FSB's and Beyers' knowledge is irrelevant to any of the Stablers' arguments on appeal. Moreover, whether the debts involved were enforceable was fiercely contested. The bankruptcy court opined that Beyers' claims on the ISB Note and $650,000 Note were not efforts to collect discharged debt, and dismissed Brad and Brenda Stablers' adversary complaint in that regard. The Bankruptcy Court also opined these transactions were not invalid reaffirmation agreements. (S.R.Doc. 150 Ex. L, 15-22, BApp.106-107.) The Eighth Circuit Bankruptcy Appellate Panel affirmed the Bankruptcy Court's Order. *In re Stabler* 418 B.R. 764 (8th Cir. BAP 2009). The trial court eventually disagreed with the Bankruptcy Court, only after admittedly wrestling with two competing lines of authority, with no binding precedent in South Dakota. (Opening Brief 23-24.) Given the Bankruptcy Court's and trial court's own disagreement, it is disingenuous to argue FSB and

Beyers were knowingly trying to collect discharged debt. The argument presumes FSB and Beyers know more about bankruptcy law than a federal bankruptcy judge.

E. FSB and Beyers did not "stipulate" to evidence regarding the ISB transaction at the jury trial.

Before trial, FSB and Beyers noted evidence regarding the ISB note, which related only to Brad and Brenda, should not be permitted at the jury trial on Stan's and Rose's claims. (BApp.012--H.T.12/17/12 at 4:22-5:10.) At trial, they renewed that objection, but the trial court overruled it. (BApp.018--T.T.126:13-24.) Stan and Rose then used evidence regarding the ISB Note as improper "conformity" or "other acts" evidence, which requires a new trial. (Opening Brief 33-36.)

The Stablers now claim that evidence regarding Brad's and Brenda's claims, i.e., regarding the ISB Note, was admitted at the jury trial by "stipulation." (Stabler Brief 5.) For one thing, whether this is true has nothing to do with the Stablers' appeal. For another, the claim is false. The Stablers' brief citation is to the trial court's discussion of its erroneous "understanding" of why the evidence was allowed at the jury trial, and contains no "stipulation" by FSB and Beyers. FSB and Beyers did not "stipulate" to the ISB Note evidence at the jury trial–they specifically objected to it.

F. Stan Stabler benefitted from ECAS' transactions.

Stan was an officer, director, and one-quarter owner of ECAS. All of the

Stablers, including Stan, worked for ECAS. An ECAS building was built on Stan's and Rose's land using proceeds of a loan to ECAS; and Stan and Rose gave a mortgage on their land to secure the building debt. (Tr.Exs.14, 52 at 2, 5-10; BApp.017, 019, 021, 023, 024-- T.T.39:1-6, 207:8-18, 235:7-15, 160:14-161:15, 232, 306:2-11.) Given these facts, and that issues regarding ECAS are irrelevant to the Stablers' appeal issues, why have they gone out of their way to cast ECAS as "Brad and Brenda Stabler's" company? (Stabler Brief 6-7.) Because it would be logical for Stan and Rose to agree to pay ECAS' debt, when Stan was part owner of ECAS, and a direct beneficiary of its debt–as FSB and Beyers argued on their own appeal.

G. Getting debt "off the books" is a prejudicial red herring.

The Stablers' opening brief is littered with references to FSB moving debt "off the books" to avoid "bank examiners." (Stabler Brief 8, 13-15, 19.) Apart from the fact that this has nothing to do with the issues the Stablers' appeal issues, FSB's and Beyers' opening brief thoroughly explains how the evidence on this concept was groundless, speculative, and not properly admissible. (Opening Brief 38-41.) This is yet another example of how the Stablers' opening brief is filled with "facts" that should not have been admitted at all, and that actually support FSB's and Beyers' own appeal positions.

H. The "unscheduled" ECAS debt was also irrelevant.

The Stablers emphasize that Rob Ronayne, Brad and Brenda Stabler's

bankruptcy attorney, failed to include ECAS' debt in their schedules. (Stabler Brief 11-12.) Stan and Rose misrepresented to the jury that this made it possible for FSB and Beyers to collect the ECAS debt. However, as already briefed (Opening Brief 41), Ronayne's failure to schedule ECAS' debt in Brad and Brenda Stabler's bankruptcy did not affect their bankruptcy discharge, consistent with black-letter bankruptcy law. (S.R.1273, n.2) (citing *In re Madaj*, 149 F.3d 467 (6th Cir. 1998)). Brad's guarantee of the ECAS debt was still discharged. In other words, when Brad and Brenda Stabler's bankruptcy was over, Ronayne had done his job. Brad and Brenda had no personal liability on any obligation to FSB or Beyers, regardless of how the ECAS debt was scheduled. The Stablers' criticism of Rob Ronayne is unwarranted, and in fact is one of the grounds for a new jury trial. (Opening Brief 41.)

I. Stan knew the ECAS debt was included in the $650,000 Note.

The Stablers claim FSB and Beyers did not tell Stan the $650,000 Note included ECAS' debt. (Stabler Brief 13.) But Stan understood the ECAS "shortfall" was in the $650,000 Note, stating "I figured it must be in here in that $550,000 . . .," the balance of the $650,000 Note apart from the $100,000 refinanced from his operating line. (B.App.025--T.T.371:7-9.)

J. Holdhusen testified falsely regarding Beyers' ethics.

The Stablers emphasize that ISB's president, Tom Holdhusen, described Beyers' conduct of "hiding debt off the bank books as not 'ethical'" (Stabler Brief 31.) It's remarkable the Stablers emphasized this testimony, given Holdhusen's subsequent admission that it was false. (Opening Brief 30, n. 11-12.) FSB and Beyers have already explained why his false testimony was unfairly prejudicial and rely upon their Opening Brief regarding that issue. (*Id.* 29-31.)

K. Neither appeal turns on Beyers' veracity, and the Stablers' description of conflicting testimony fails to establish anything in that regard.

Given the Stablers' many misrepresentations, it's ironic they conclude their statement of "facts" by questioning Beyers' veracity. (Stabler Brief 20-22.) None of the eight numbered paragraphs contains a single alleged misrepresentation that Beyers or FSB made to the Stablers. They instead describe conflicting testimony about who was present for various events, or what time of day various events happened. None of this conflicting testimony establishes who was truthful. It

simply establishes there was a dispute. Moreover, none of this conflicting testimony about what the parties recalled about when or where documents were signed is relevant to the issues raised in either appeal. It does not impact whether representations of unsettled bankruptcy law are actionable as fraud, whether the trial court improperly admitted evidence or improperly instructed the jury, whether the ISB Note is enforceable, or whether Stan and Rose can continue to seek inconsistent remedies.

IV. Conclusion.

Despite the many facts asserted in the Stablers' opening appeal brief, the issues presented on their appeal are legal. Brad and Brenda Stabler's appeal issues are resolved by proper analysis of two Bankruptcy Code provisions. The trial court properly found that Section 524(c) of the Bankruptcy Code regarding reaffirmation did not apply to the ISB Note. Neither ISB nor Beyers were the "holder of a claim" in Brad and Brenda Stabler's bankruptcy, and the consideration for the ISB Note was not discharged debt. The trial court also properly held that Section 506(b) of the Bankruptcy Code did not apply to Beyers' attorney fee claim in state court, outside of bankruptcy.

Stan and Rose Stabler's appeal issues must be resolved in light of the fact the relief they were permitted to seek at the jury trial, albeit improperly, was rescission. Under the election of remedies doctrine, they could not obtain both a rescission and tort damages. Accordingly, their emotional distress claim was properly dismissed,

and the exemplary damages verdict was properly vacated. The trial court erred in submitting exemplary damages to the jury, but at least it recognized its error, and vacated the exemplary damages verdict. Likewise, the trial court correctly held that emotional distress damages are not recoverable on a common-law fraud claim. Finally, the trial court recognized the trial court gave jury instructions permitting the jury to determine that Stan and Rose could avoid enforcement of only a portion of the $650,000 Note and Mortgage. The trial court rightfully rejected Stan and Rose Stablers' post-trial request for a better outcome than they were willing to seek from the jury.

When the law is not favorable, it is tempting to argue unsubstantiated facts and rely on rhetoric instead of reason. The law does not support the Stablers' appeal positions, so they have resorted to the same tactics they employed at Stan and Rose Stabler's jury trial. They have personally attacked FSB and Beyers regarding matters irrelevant to their appeal issues. But the Stablers' rhetoric does not control the outcome of the parties' appeals–the law does. The trial court's rulings regarding the Stablers' appeal issues were proper under the applicable law and should be affirmed.

Dated this 13th day of May, 2014.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Sander J. Morehead
Roger W. Damgaard
Sander J. Morehead
300 South Phillips Avenue, Suite 300
Post Office Box 5027
Sioux Falls, South Dakota 57117-5027
(605) 336-3890
Attorneys for Defendants/Appellees

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using WordPerfect X5, and contains 9,930 words excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word count of the word-processing program to prepare this certificate.

Dated this 13th day of May, 2014.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Sander J. Morehead
Roger W. Damgaard
Sander J. Morehead
300 South Phillips Avenue, Suite 300
Post Office Box 5027
Sioux Falls, South Dakota 57117-5027
(605) 336-3890
Attorneys for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May, 2014, I sent via email a true and correct copy of the foregoing Appellees' Brief to the following:

Lee Schoenbeck
Schoenbeck Law
Post Office Box 1325
Watertown, SD 57201
lee@schoenbecklaw.com

and

Patrick T. Dougherty
Dougherty & Dougherty
100 North Phillips Ave., Suite 705
P.O. Box 2376
Sioux Falls, SD 57101

/s/ Sander J. Morehead
One of the Attorneys for Defendants/Appellees

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 26917

STANLEY E. STABLER, ROSE MARIE STABLER,
BRAD A. STABLER, and BRENDA L. STABLER,

Appellants,

vs.

FIRST STATE BANK OF ROSCOE, a South Dakota corporation, and JOHN R. BEYERS,

Appellees.

Appeal from the Circuit Court
Fifth Judicial Circuit
McPherson County, South Dakota

HONORABLE SCOTT P. MYREN
Presiding Judge

APPELLANTS' REPLY BRIEF

WOODS, FULLER, SHULTZ
& SMITH, P.C.
Roger W. Damgaard
Sander J. Morehead
P.O. Box 5027
Sioux Falls, SD 57117
(605) 336-3890
Attorneys for Appellees

SCHOENBECK LAW
Lee Schoenbeck
P.O. Box 1325
Watertown, SD 57201
(605) 886-0010

DOUGHERTY & DOUGHERTY, LLC
Patrick T. Dougherty
P.O. Box 2376
Sioux Falls, SD 57101
(605) 335-8586

Attorneys for Appellants

Notice of Appeal was filed December 13, 2013

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STATEMENT OF THE CASE

Beyers' Statement of the Case has a glaring misrepresentation. He represents to this Court that his Counterclaim of August 18, 2008 "sought a personal judgment against Brad and Brenda only to the extent the obligations were determined to not be discharged debt." (Appellees' Brief, p. 4.) Beyers makes this representation to the Court to create the appearance of one who was complying with federal law, and not attempting to use this litigation to collect discharged debt. The balance of the record reveals a very different situation, one very frustrating through seven years of litigation for Brad and Brenda.

In January of 2009, in response to Interrogatory No. 13 asking Beyers to detail what debt he was not pursuing, he answered:

> Without waiving any objections, the quoted language was inserted in anticipation of a potential defense, not as an admission regarding any debt.

(App. 1 – Defendant Beyers' Answers to Plaintiff's Interrogatories (Set I).)

When deposed on February 3, 2009, and asked whether he viewed any of Brad and Brenda's debt as discharged, he responded: "I did not view it that way, and neither did my loan officers." (App. 2 – Brad and Brenda Stabler's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, p. 2.)

Frustrated with what appeared to be Beyers' attempt to collect discharged debt in the State Court proceedings, Brad and Brenda sought relief from the Federal Bankruptcy Court. In re Stabler, 418 B.R. 764, 770 (B.A.P. 8th Cir. 2009). In front of Federal Bankruptcy Judge Nail, Beyers persisted with his subterfuge, misleading Judge Nail into stating on the record:

> With respect to the debts described in counts three and four of Beyers' state court counter-claim, the analysis is much simpler. In both counts, Beyers states

> unambiguously, "Beyers is requesting judgment against Brad and Brenda Stabler only for those amounts determined not to be discharged in their prior Chapter 7 bankruptcy."

(Appellees' Brief, App. 107 (transcript p. 16:12-17).) In fact, they mislead Judge Nail into believing that the $650,000 being pursued against Brad and Brenda in Counts III and IV was actually post-petition debt. (Appellees' Brief, App. 108 (transcript p. 17:3-11).) Beyers persisted with this subterfuge before the Eighth Circuit United States Bankruptcy Appellate Panel. (In re Stabler, 418 B.R. at 767.) Ultimately, the Bankruptcy Appellate Panel affirmed the Bankruptcy Trial Court's determination that the State Court had concurrent jurisdiction to operate under the Bankruptcy Code, and affirmed the Bankruptcy Trial Court's abstention. (Id. at 770-71.)

The next year, on May 5, 2010, Beyers supplemented his interrogatory answer, reported the total debt as $803,340.71, plus accruing interest, and answered that:

> the statement referenced was not meant to operate as an admission regarding any particular debt. John Beyers is not admitting that any of the amounts at issue were discharged in Brad and Brenda Stablers' bankruptcy.

(App. 3 – Defendant John R. Beyers' First Supplemental Answers to Plaintiffs' Interrogatories at pp. 2-3.)

Finally, in 2011, Brad and Brenda were forced to seek summary judgment on the issue, and on April 1, 2011, Circuit Judge Myren dismissed John Beyers' Counterclaim Counts III, IV, VII, and VIII against Brad and Brenda Stabler, because he was pursuing debt discharged in the bankruptcy. (App. 4 – SR 1481.) Brad and Brenda spent three years fighting through the Federal Bankruptcy system, and the State Court system, to finally lay bare the misrepresentation Beyers initiated in his initial Counterclaim, and perpetrated before both a Federal Bankruptcy Trial Court and a Federal Bankruptcy Appellate Panel, until Judge Myren's ruling on April 1, 2011.

STATEMENT OF FACTS

Beyers' Brief, pp. 36-44, is an argument concerning different sections of the facts. This Court's standard is to review facts in a light most favorable to supporting the verdict. Hewitt v. Felderman, 2013 S.D. 91, 841 N.W.2d 258, 262. Stablers' Statement of Facts in their initial Brief is comprehensive, and includes a citation to the record for every fact asserted.

ARGUMENT

1. BEYERS WAS NOT A HOLDER IN DUE COURSE WHEN HE TOOK AN ASSIGNMENT OF THE ISB PROMISSORY NOTE, AND HE WAS THEREFORE SUBJECT TO THE AFFIRMATIVE DEFENSES OF ILLEGALITY AND DISCHARGE IN BANKRUPTCY.

The analysis under this issue should begin with these Conclusions of Law from the Court Trial:

> 4. If ISB was attempting to collect on the ISB Note, the Court would have no reason to prevent ISB from doing so.
> 5. Because John Beyers is presently standing in the shoes of ISB, he is also entitled to collect on the ISB Note.
> 6. Brad and Brenda Stabler have failed to set forth any legal reason that John Beyers could not have acquired the rights to the ISB loan with Brad and Brenda Stabler.

(SR 3050 - Appellants' Brief, App. 23.)

Conclusions of Law Nos. 4 and 5 reflect the "holder in due course status" that Beyers would have as the transferee of the loan instrument, pursuant to the right created in the first two and one-half lines of SDCL 57A-3-203(b). (Appellants' Brief, App. 98.) The next legal principle that controls, reflected in the next two and one-half lines of SDCL 57A-3-203(b), is that "holder in due course status" is lost if the transferee engaged in "fraud or illegality affecting the instrument." (Appellants' Brief, App. 98.)

Brad and Brenda raised the affirmative defense of discharge in bankruptcy in ¶ 34 of their Reply to Counterclaim (App. 5 - SR 484),

and illegality in ¶ 105 of the same document (App. 5 – SR 495). Brad and Brenda also raised the lack of holder in due course status and the applicability of the defense of fraud, illegality, and discharge in bankruptcy, in their Proposed Conclusions of Law Nos. 5–12, submitted to the Trial Court. (App. 6 – SR 2842–44.) This issue is preserved. SDCL 15–6–52(a) and City of Watertown v. Dakota, Minnesota & E. R. Co., 1996 S.D. 82, 551 N.W.2d 571, 577.

The Trial Court specifically made Findings that some of the ISB debt "had been discharged in the bankruptcy" [1] (FOF Nos. 14 and 15 – SR 3033 – Appellants' Brief, App. 6), and that Beyers had knowledge of the bankruptcy discharge. (FOF 64 – SR 3039 – Appellants' Brief, App. 12.)

Beyers' Brief attempts to distract this Court. SDCL 57A–3–203(b), the statute entitled "Transfer of Instrument – Rights Acquired by Transfer," is never cited or discussed in Beyers' Brief! Issue I.A. on pp. 11–13 of Beyers' Brief argues bankruptcy reaffirmation law, which is not part of the analysis for this particular issue before this Court. The issue on this count is that the debt was discharged, and being collected in violation of federal law. In re Eastman, 419 B.R. 711, 726 (Bankr. W.D. Tex. 2009).

Issue I.A.1., pp. 13–15 in Beyers' Brief, asserts that the debt was not discharged, but ignores the Trial Court's Findings of Fact to the contrary. (FOF Nos. 14 and 15 – SR 3033 – Appellants' Brief, App. 6.) Beyers attempts to argue that the debt was "roughly equal to FSB's liens in their personal property" (Beyers' Brief, p. 14), but cites to no findings or conclusions that support the assertion.

Under Issue I.A.2, Beyers again argues on pp. 15–18 that neither he nor ISB were a "holder of a claim," which is the statutory language

[1] Brad and Brenda also proposed Finding of Fact No. 5 describing the amount of the debt that was discharged in bankruptcy. (Proposed Findings and Conclusions, SR 2835, App. 6.)

concerning reaffirmations under 11 U.S.C. § 524(c); but Beyers asserts no authority that would allow him, as a non-claim holder, to ignore the bankruptcy discharge when he had knowledge of the bankruptcy, and collect discharged debt. In fact, it is illegal to collect on discharged debt, if the party knows of the bankruptcy discharge. In re Eastman, 419 B.R. 711, 726 (Bankr. W.D. Tex. 2009). In this matter, there is no dispute that Beyers had knowledge of the discharge (FOF Nos. 5, 14, 64, (Appellants' Brief, App. 4, 6, and 12 – SR 3031, 3033, and 3039) and the Trial Court's Memorandum Decision pp. 2-3, (Appellants' Brief, App. 30-31 – SR 2824-2825), where the Court notes that the "[bankruptcy] idea was solely that of John Beyers."

Finally, Beyers seems to take comfort in the language of SDCL 57A-3-308 and U.S. Bank Nat. Ass'n v. Scott, 2003 S.D. 149, 673 N.W.2d 646, on pp. 18-19 of his Brief. But, 57A-3-308 provides no other relief for Beyers, and in fact, reflects the same standards contained in SDCL 57A-3-203(b). Brad and Brenda have shown, and the Court has made Findings, that Beyers knew of the bankruptcy discharge, and that the ISB note contained discharged debt. At that point in time, Beyers had to prove that he was a holder in due course and entitled to overcome the defense. In fact, the Findings of Fact show that the defense applies. The Trial Court's Conclusions of Law, instead of shifting the burden to Beyers as required by U.S. Bank Nat. Ass'n., id., places the burden on Brad and Brenda "to set forth any legal reason that John Beyers could not have acquired the rights." (COL No. 6 – SR 3050 – Appellants' Brief App. 23.)

Beyers' knowledge of the discharge and the illegality of the transaction are defenses against his ability to collect the promissory note, SDCL 57A-3-305(a)(1), and 57A-3-202(b). He knew the ISB note included discharged debt. He is not a holder in due course. The

defense should have been allowed and, as a matter of law, defeated Beyers' claim on the promissory note.

Brad and Brenda respectfully request that because the defense of illegality and discharge in bankruptcy void the consideration for the ISB promissory note, that this Court remand with instructions to the Trial Court to dismiss the count, and reform the Judgment accordingly.

2. STAN AND ROSE MARIE SHOULD HAVE BEEN ALLOWED TO PURSUE EMOTIONAL DISTRESS DAMAGES AS PART OF THE FRAUD AND CONSPIRACY CLAIMS AGAINST BEYERS AND FSBR.

Stan and Rose Marie prevailed on a tort claim of fraud against FSBR and Beyers. (Special Verdict Form – SR 2659-2660 – Appellants' Brief, App. 1-2.) This Court, in an earlier case against this same bank, made it clear:

> We have consistently recognized emotional distress damages in tort actions.

Fix v. First State Bank of Roscoe, 2011 S.D. 80, 807 N.W.2d 612, 617.

In this appearance before this Court on the emotional distress damage issue, FSBR and Beyers are now arguing on pp. 27-29 that the economic loss doctrine precludes emotional distress damages in this cause of fraud against these consumers. This Court has recently addressed the economic loss doctrine, and appears to have limited it to cases arising under the Uniform Commercial Code. Jorgensen Farms, Inc. v. Country Pride Corp., Inc., 2012 S.D. 78, ¶ 24, 824 N.W.2d 410, 418. FSBR and Beyers are asking the Court to adopt an application of the economic loss doctrine that is broader than this Court did in Jorgensen Farms, and that is contravention of the principles this Court established in Fix v. First State Bank of Roscoe.

While South Dakota law, as set forth above, controls, there are a substantial number of jurisdictions that are following the South Dakota analysis from Fix in the context of emotional distress damages arising from a fraud claim. Malandris v. Merrill Lynch, Pierce, Fenner & Smith

Inc., 703 F.2d 1152, 1167 (10th Cir. 1981)(en banc)(Colorado law)(business tort argument rejected); Reserve Nat. Ins. Co. v. Crowell, 614 So. 2d 1005, 1011-12 (Ala. 1993); Firstbank of Arkansas v. Keeling, 312 Ark. 441, 850 S.W.2d 310, 313 (1993); Chodos v. Ins. Co. of N. Am., 126 Cal. App. 3d 86, 178 Cal. Rptr. 831 (Ct. App. 1981); Rosener v. Sears, Roebuck & Co., 110 Cal. App. 3d 740, 754-55, 168 Cal. Rptr. 237 (Cal. Ct. App. 1980); McNeill v. Allen, 35 Colo. App. 317, 534 P.2d 813, 819 (1975); Kilduff v. Adams, Inc., 219 Conn. 314, 593 A.2d 478, 484 (1991); Captain & Co., Inc. v. Stenberg, 505 N.E.2d 88, 100 (Ind. Ct. App. 1987); Burr v. Bd. of Cnty. Comm'rs of Stark Cnty., 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986); Coble v. Bowers, 1990 OK CIV APP 109, 809 P.2d 69, 73; Phinney v. Perlmutter, 222 Mich. App. 513, 564 N.W.2d 532, 544-46 (1997); Cook v. Children's Med. Grp., P.A., 756 So. 2d 734 (Miss. 1999); and Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1328 (D.C. 1995).

On damages only, there should be a remand for the jury to determine emotional distress, and the appropriate punitive damages relating thereto.

3. BEYERS AND FSBR PROCURED THE $650,000 PROMISSORY NOTE AND MORTGAGE BY FRAUD, AND NONE OF THE NOTE SHOULD BE ENFORCEABLE.

FSBR and Beyers contend that emotional distress damages are not appropriate because this was a rescission action. In FSBR and Beyers' Brief, they don't dispute the body of law in South Dakota that, if there is fraud found in the inducement, then the entire contract is vitiated. Poeppel v. Lester, 2013 S.D. 17, ¶ 23, 827 N.W.2d 580, 586.

Additionally, FSBR and Beyers did not address the issue of the equitable defenses that would have applied to any balance owing on the contract, if this were a rescission action. (Appellants' Brief, pp. 30-31.)

Once the jury found fraud, the $650,000 promissory note and mortgage should have been vitiated, and a judgment entered accordingly. If Bank and FSBR had wanted to seek equitable relief, those claims would have had to be subject to the equitable defense that would have applied to FSBR and Bank's conduct.

4. STAN AND ROSE MARIE'S $20,000 EXEMPLARY DAMAGE VERDICT SHOULD BE UPHELD.

SDCL 21-1-9 and the jury verdict finding of $439,100 of fraud provide a compensatory damage basis for Stan and Rose Marie's right to have the jury determine punitive damages. FSBR and Beyers refuse to address these issues (see Appellees' Brief, pp. 25-27), because they claim the trial was one for rescission, and argue election of remedies under U.S. Lumber, Inc. v. Fisher, 523 N.W.2d 87 (S.D. 1994). In U.S. Lumber, the plaintiffs elected rescission in their pleadings. Id. at 88. There is no such election in this matter before this Court, and FSBR and Beyers cannot cite to a rescission election in the record to support their argument.

Stan and Rose Marie ask the Court to recognize the right to seek punitive damages. Because of the emotional distress issue, Stan and Rose Marie are asking the Court to remand for a jury trial on damages only—allowing a McPherson County jury to determine the appropriate amount of emotional distress and punitive damages to provide justice in light of the fraudulent conduct by FSBR and Beyers.

5. BEYERS AND FSBR ARE NOT ENTITLED TO THEIR ATTORNEYS' FEES AND COSTS FOR WORK DONE IN BANKRUPTCY COURT.

The issue with respect to Brad and Brenda paying attorneys' fees is not whether the note authorizes attorneys' fees, but the extent to which the attorneys' fees are authorized. Beyers does not dispute (Appellees' Brief pp. 20-22) that the State Court was exercising its concurrent jurisdiction under the Bankruptcy Code. In re Stabler, 418 B.R. 764, 769-771 (B.A.P. 8th Cir. 2009). In that setting, the contract

only authorized attorneys' fees "[t]o the extent permitted by the United States Bankruptcy Code." (Trial Ex. 131.)

Beyers disputes the possible applicability of 11 U.S.C. § 506(b), but misses the point. Beyers has to affirmatively show the Court that there is a provision in the Bankruptcy Code that authorizes attorneys' fees in this bankruptcy setting. Beyers' Brief never attempts to affirmatively show this Court what section of the Bankruptcy Code would authorize these attorneys' fees. Because of the language in the contract, it is Beyers' burden to show that the Bankruptcy Code authorizes the attorneys' fees, and to prepare appropriate findings and conclusions.

Brad and Brenda preserved the issue, objecting to the proposed award of attorneys' fees for work performed in Bankruptcy Court (App. 7 – Objections to Proposed Order on Defendant Beyers' Motion for Attorneys' Fees – SR 3285), and there was no affirmative finding made by the Court of any provision in the Bankruptcy Code that authorizes attorneys' fees for work performed in Bankruptcy Court with respect to this matter. The Trial Court's Memorandum Decision, which is incorporated into its Order, says that "[a]ttorneys' fees will be awarded by a state court pursuant to the agreement of the parties set forth in the attorney's fees provision of the ISB note." (App. 8 – SR 3396 – Memorandum Decision dated January 15, 2014, attached to Order on Defendant Beyers' Motion for Attorneys' Fees.) As set forth on p. 34 of Appellants' Brief, the ISB note has a specific limitation with respect to attorneys' fees incurred for work done in Bankruptcy Court. There is no finding or conclusion that supports the award of these fees.

This Court has expressed reservation about awards made with respect to Federal Court proceedings in Fix v. First State Bank of

Roscoe, 2011 S.D. 80, 807 N.W.2d at 621 (in that instance costs, not attorneys' fees).

If there was a basis for awarding attorneys' fees under the Bankruptcy Code, Beyers would have cited the Bankruptcy Code section for the Court, but he didn't.

6. THE 2009 ADDENDUM TO THE 2004 COLLATERAL REAL ESTATE MORTGAGE WAS NOT SIGNED OR FILED BY THE MORTGAGEE, BEYERS, AND THEREFORE SHOULD HAVE LAPSED.

Beyers argues that SDCL 44-8-26 is clear and needs no interpretation because the statute says that the Addendum can be signed "only by the mortgagee." (Appellees' Brief, pp. 31-33.) Under South Dakota law, once a party takes an assignment, the assignee becomes the mortgagee. SDCL 44-8-29(2). This statute is clear and needs no interpretation.

The mortgagee, pursuant to SDCL 44-8-29, on February 11, 2009, when the Addendum was filed, was John Beyers. (App. 9 - SR 1362-1387.) The Addendum was signed by Glenn Blumhardt, as Vice President of FSBR, Inc. (App. 9 - SR 1389-1390.) The statute was not complied with.

Beyers directs the Court to NattyMac Capital LLC v. Pesek, 2010 S.D. 51, 784 N.W.2d 156, but NattyMac doesn't support Beyers' argument. NattyMac stands for the proposition that when the mortgage holder has a servicing agent, who has authority to service and satisfy the mortgage, documents by the servicing agent that are within the servicing agent's scope of authority are effective. Id. at 159-160.

Finally, Beyers makes an argument based on Gust v. Peoples and Enderlin State Bank, 447 N.W.2d 914 (N.D. 1989), but cites to no place in the record where this request for an equitable lien was raised or preserved in the context of Beyers' failure to comply with SDCL 44-8-26 concerning this mortgage.

The Addendum was not executed by the party who was the mortgagee at the time of the execution of the Addendum, and therefore the mortgage lapsed pursuant to the terms of SDCL 44-8-26.

Dated this 2nd day of June, 2014.

Respectfully submitted,

SCHOENBECK LAW

By: /s/ Lee Schoenbeck
LEE SCHOENBECK
P.O. Box 1325
Watertown, SD 57201
(605) 886-0010
and
DOUGHERTY & DOUGHERTY, LLC
Patrick T. Dougherty
P.O. Box 2376
Sioux Falls, SD 57101
(605) 335-8586

ATTORNEYS FOR APPELLANTS

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 26965/26994 (N.O.R.)
Consolidated with Appeal No. 26917/26918 (N.O.R.)

STANLEY E. STABLER,
ROSE MARIE STABLER,
BRAD A. STABLER, and
BRENDA L. STABLER,
Plaintiffs/Appellees,

vs.

FIRST STATE BANK OF ROSCOE,
a South Dakota Corporation, and
JOHN R. BEYERS,
Defendants/Appellants.

Appeal from the Circuit Court
Fifth Judicial Circuit
McPherson County, South Dakota

HONORABLE SCOTT P. MYREN

APPELLANTS' BRIEF

WOODS, FULLER, SHULTZ
& SMITH P.C.
Roger W. Damgaard
Sander J. Morehead
P.O. Box 5027
Sioux Falls, SD 57117-5027
Attorneys for Defendants/Appellants

SCHOENBECK LAW,
Lee Schoenbeck
P.O. Box 1325
Watertown, SD 57201

DOUGHERTY & DOUGHERTY
Patrick T. Dougherty
100 N. Phillips Ave., Ste. 705
P.O. Box 2376
Sioux Falls, SD 57101
Attorneys for Plaintiffs/Appellees

Notice of Appeal was filed January 27, 2014.

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JURISDICTIONAL STATEMENT

This is an appeal from a Judgment on Jury Verdict and Court Trial entered December 5, 2013, together with other orders entered during the case. (App.[1] 001-073, 148; S.R.[2]3287.) Notice of Entry of Judgment on Jury Verdict and Court Trial was served on December 10, 2013. (App. 011.) On December 18, 2013, FSB and Beyers filed a motion for new trial and renewed motion for judgment as a matter of law. (App. 004, 009; S.R. 3158, 3161.) The trial court denied the motions in a Letter Decision dated January 3, 2014 (S.R.3241), and orders entered on January 14, 2014. (App. 004, 009; S.R. 3158, 3161.) FSB and Beyers timely filed a Notice of Appeal on January 27, 2014. (S.R.3287.)[3]

LEGAL ISSUES

1. Whether Stan and Rose Stabler's fraud claim should have been dismissed as a matter of law, because it was grounded upon alleged representations that were not actionable as fraud?

The trial court ruled in the negative.

Sejnoha v. City of Yankton, 2001 SD 22, 622 N.W.2d 735
Mudlin v. Hills Materials Co., 2007 SD 118, 742 N.W.2d 49

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[1]"Appendix"

[2]"Settled Record"

[3]Appellees in this appeal, Stan and Rose Stabler, have also filed a Notice of Appeal No. 26917. The parties have filed notices of review (Nos. 26918 and 26993) in the appeals. The Court consolidated these appeals for purposes of simultaneous briefing and submission in an Order Denying Appellees' Motion to Dismiss Appeal #26965 and Order Consolidating Cases dated February 28, 2014.

Lynch v. Dial Fin., 656 N.E.2d 714 (Ohio Ct. App. 1995)
Skrypek v. St. Joseph Valley Bank, 469 N.E.2d 774 (Ind. Ct. App.)

2. Whether the jury trial regarding the enforceability of a $650,000 Note and Mortgage was improper as a matter of law, as Stan and Rose were barred from disputing the enforceability of the Note and Mortgage, and were limited to seeking damages?

The trial court ruled in the negative.

U.S. Lumber, Inc. v. Fisher, 523 N.W.2d 87 (S.D. 1994)
Watertown Concrete Products, Inc. v. Foster, 2001 SD 79, 630 N.W.2d 108
Canyon Lake Park, LLC v. Loftus Dental, PC, 2005 SD 82, 700 N.W.2d 729

3. Whether Stan and Rose Stabler's fraud claim should have been dismissed because they either waived or had dismissed all of their compensatory damages claims, barring their claim as a matter of law?

The trial court ruled in the negative.

McKie v. Huntley, 2000 SD 160, 620 N.W.2d 599
In re Estate of Olson, 2008 SD 97, 757 N.W.2d 219

4. Whether the trial court erred in failing to grant FSB's and Beyers' motion for new trial or renewed motion for judgment as a matter of law?

The trial court ruled in the negative

Credit Collection Servs., Inc. v. Pesicka, 2006 S.D. 81, 721 N.W.2d 474
Schoon v. Looby, 2003 SD 123, 670 N.W.2d 885
SDCL § 15-6-50(b)
SDCL § 15-6-59(a)

5. Whether Defendants are entitled to a new trial under SDCL § 15-6-59(a) (3), and (4) because:

A. The Defendants were denied a fair trial because the jury's verdict was obtained through false opinion testimony regarding Beyers' character from the Stablers' witness, Tom Holdhusen.

The trial court ruled in the negative.

Pickering v. State, 260 N.W.2d 234 (S.D. 1977)
Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509 (8th Cir. 1984)
Kline v. Belco, Ltd., 480 So.2d 126 (Fla. App.1985)
Williams v. United Dairy Farmers, et al., 188 F.R.D. 266 (S.D. Ohio 1999)
SDCL § 15-6-59(a)(3)
SDCL § 15-6-59(a)(4)

B. The Defendants were denied a fair trial because Stan and Rose Stabler tried their fraud claim on a theory they did not identify before trial in response to discovery or direct instruction from the trial court.

The trial court held in the negative.

Sanford v. Crittenden Mem. Hosp., 141 F.3d 882 (8th Cir. 1998)
SDCL § 15-6-59(a)(3)

6. Whether Defendants are entitled to a new trial under SDCL § 15-6-59(a)(7) because:

A. Stan and Rose Stabler improperly presented evidence and testimony regarding a Note for $150,000 executed by Brad and Brenda Stabler in favor of the Ipswich State Bank to prove fraud when Stan and Rose were not involved in that transaction; and when the evidence was presented to argue "conformity" in violation of SDCL § 19-12-5.

The trial court held in the negative.

State v. Mattson, 2005 SD 71, 698 N.W.2d 538
Novak v. McEldowney, 2002 SD 162, 655 N.W.2d 909
St. John v. Peterson (I), 2011 SD 58, 804 N.W.2d 71
St. John v. Peterson (II), 2013 S.D. 67, ___ N.W.2d ___.
SDCL § 19-12-5
SDCL § 19-12-3

B. The trial court improperly permitted Stan and Rose Stabler's exemplary damage claim to proceed to trial, though they could not

possibly recover compensatory damages, thereby introducing punitive damages and the Defendants' financial means into the trial.

The trial court ruled in the negative.

Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993)
Henry v. Henry, 2000 SD 4, 604 N.W.2d 285
KARK-TV v. Simon, 656 S.W.2d 702 (Ark. 1983)
Maercks v. Birchansky, 549 So.2d, 199 (Fla. App. 3d. 1989)
SDCL § 21-1-4.1

C. Stan and Rose Stabler improperly presented speculative expert testimony that the Defendants were motivated to hide transactions from bank examiners.

The trial court held in the negative.

State v. Guthrie, 627 N.W.2d 401 (S.D. 2001)
Astrazeneca LP v. Tap Pharm. Prod., Inc., 444 F.Supp.2d 278 (D. Del. 2006)
Lewis v. Parish of Terrebone, 894 F.2d 142 (5th Cir. 1990)

D. The trial court improperly permitted Stan and Rose Stabler to claim attorney Rob Ronayne engaged in wrongdoing as evidence of fraud, when Ronayne never represented or advised them, and his actions had no effect on whether any debts were discharged or owed.

The trial court held in the negative.

In re Madaj, 149 F.3d 467 (6th Cir. 1998)
SDCL § 19-12-3

E. The trial court improperly instructed the jury regarding "participations" when the obligation at issue was assigned, not participated.

The trial court ruled in the negative.

First Nat'l Bank of Louisville v. Continental Ill. Nat'l Bank and Trust Co. of Chicago, 933 F.2d 466 (7th Cir. 1991)
Baddou v. Hall, 2008 SD 90, 756 N.W.2d 559

Stammerjohan v. Sims, 31 N.W.2d 449 (S.D. 1948)

F. Stan and Rose improperly presented evidence that Brad and Brenda did not have to pay the $650,000 Note, when the basis for Brad and Brenda not having to pay did not apply to Stan and Rose.

The trial court held in the negative

Isaac v. State Farm Mut. Auto Ins. Co., 522 N.W.2d 752 (S.D. 1994)

G. The Court improperly permitted a conspiracy claim to be tried based upon an entity allegedly conspiring with its officer, injecting a criminal-like issue into the trial.

The trial court held in the negative.

Larson by Larson v. Miller, 76 F.3d 1446 (8th Cir. 1996)
LRL Properties v. Portage Metro Hous. Auth., 55 F.3d 1097 (6th Cir. 1995)
Ruiz v. Alegria, 896 F.2d 645 (1st Cir. 1990)
Johnson v. Armfield, 2003 SD 134, 672 N.W.2d 478

7. Whether the trial court improperly ruled, as a matter of law, that a collateral real estate mortgage dated July 6, 2002, executed by Stan and Rose Stabler in favor of the First State Bank of Roscoe, had partially lapsed due to an alleged failure to file timely addendums?

The trial court ruled in the negative.

State v. I-90 Truck Haven Service, Inc., 2003 SD 51, 662 N.W.2d 288
Gust v. Peoples and Enderlin State Bank, 447 N.W.2d 914 (N.D. 1989)
NattyMac Capital, LLC v. Pesek, 2010 SD 51, 784 N.W.2d. 156
SDCL § 44-8-26

STATEMENT OF FACTS

Brad and Brenda Stabler started borrowing from the First State Bank of Roscoe ("FSB") in the 1990's. (App.[4] 192, T.T.[5] 558:19-24.) In 1999, Brad incorporated Edmunds County Ag Services, Inc. ("ECAS"). (App. 159, T.T.205:5-15.) ECAS provided spraying and other services to farmers. (App. 159, 163--T.T.204:24-205:7; 206:3-5, 231-232.) Brad was ECAS' president; his father, Stan, was vice president, treasurer, and secretary. (*Id.* 232-233; Tr.Ex.[6] 52 at 2, 5-10.) Both were directors and shareholders. (*Id*.) All of the Stablers worked for ECAS. (App. 158, 163, 173--T.T.160:14-161:15, 232, 306:2-11). ECAS and the Stablers lacked startup capital, so they borrowed funds from FSB. (App. 163-- T.T.233:17-22.) FSB took a lien in Brad's and ECAS' personal property. (App. 163-64--T.T.234-235.) Brad guaranteed ECAS' debt. (Tr.Ex. 24; App. 061--T.T.61:5-14.)

On April 14, 2000, Brad executed a $200,000 promissory Note to FSB for ECAS secured by ECAS' personal property and his property through his guarantee. (Tr.Exs. 15, 75, 147; App. 192--T.T.556:16-558:14.) Stan and Rose executed a $200,000 real estate mortgage on a quarter of their land to secure the Note (the

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[4]"Appendix"

[5]"Trial Transcript"

[6]"Trial Exhibit"

"2000 Mortgage") (Tr.Ex. 14). The land was their "Homeplace" where Stan's father raised him, Stan raised Brad, and Brad's family lived. (App. 160, 164, 176--T.T.207:8-12, 235-236, 352:5-19.) The loan proceeds were used to construct a building for ECAS on the Homeplace. (App. 152, 160, 164--T.T.39:1-6, 207:8-18, 235:7-15.)

Eventually, ECAS had cash-flow issues. (App. 160, 164, 192--T.T.207:19-208:9, 237:14-17, 558:25-559:13.) It couldn't collect its receivables; vendors sued on past due accounts; and customers sued alleging crop damage caused by Brad's and ECAS' negligence. (App. 162-163--T.T.215:7-19, 237:19-21.) Brad was named personally in some of the lawsuits. (*Id.*) In 2002, ECAS liquidated its property to pay FSB. (App. 153, 164--T.T.45:22-46:4, 237-238.) However, it still owed FSB over $350,000. (Tr.Exs. 15, 31, 32; App. 164, 193--T.T.238:4-11, 560:3-8.)

Given the shortfall, FSB could have foreclosed the 2000 Mortgage and its security interests in Brad's and Brenda's personal property, and called Brad's guaranty. (App. 165, 176-77--T.T.242:6-21, 353:14-21, 365:10-17.) Instead, on July 16, 2002, Stan and Rose executed a collateral real estate mortgage ("2002 CREM") for $300,000 on all of their real property to provide additional security. (Tr.Ex. 4; App. 155, 194--T.T.67:2-22, 566:12-22.) The 2002 CREM stated it secured six obligations–three ECAS notes, two of Brad's and Brenda's notes, and

an operating note for Stan and Rose. (Tr.Ex. 4.) Brad came to FSB when Stan and Rose signed (App. 161, 165--T.T.213:1-7, 240:15-22), and admitted the CREM addressed the shortfall. (App. 166--T.T.243:10-244:5.) Stan and Rose provided no other explanation for how the shortfall was addressed. (App. 187--T.T.474:7-19.) After the 2002 CREM was executed, FSB didn't foreclose on the 2000 Mortgage or its security interest in Brad's personal property. (App. 165--T.T.242:6-21.)

In May 2003, Brad and Brenda filed for Chapter 7 Bankruptcy. (Tr.Ex. 57, App. 167--T.T.244:9-11.) Aberdeen attorney Rob Ronayne represented them. (Tr.Ex. 57 at 2.) Ronayne failed to list the guaranteed ECAS debt on their bankruptcy schedules. (S.R.1270, n. 2.) This had no impact, as their pre-petition debt, including Brad's guarantee of ECAS' debt, was discharged. (*Id.*)

Bankruptcy does not discharge liens, however. *First State Bank v. Zoss*, 312 N.W.2d 127, 127-28 (S.D. 1981). FSB's liens in the Stablers' real and personal property survived. (App. 166--T.T.244:12-245:3.) ECAS never filed for bankruptcy, so its obligations were still owed. (App. 184--T.T.438:4-6.) FSB could have foreclosed its liens on the Stablers' property. However, Brad wanted to keep his collateral and keep farming and didn't want his parents' land foreclosed. (App. 166-167--T.T.245:14-19, 246:17-247:12.) He and FSB agreed FSB would

not foreclose, and would keep working with him, if the debts were paid. (App. 166-167, 195--T.T.245:14-19, 246:17-247:25, 568:12-569:4.)

Accordingly, FSB didn't foreclose the 2000 Mortgage, 2002 CREM, or its other security interests. (App. 166-167, 195-196--T.T.246:21-247:25, 570:18-571:4.) FSB also loaned money to Brad and Brenda during their bankruptcy, when most other lenders would have foreclosed. (App. 175, 189--T.T.484:18-25, 311:13-312:11; Tr.Ex. 107.) By early 2004, however, Brad, Brenda, and ECAS still hadn't paid their obligations, and Stan was past due. (App.169, 179--T.T.259-260, 373:9-374:10.) FSB had agreed to work with the Stablers (S.R.1158-59, 1161) but had to either foreclose, or bring the debts current. (App. 196-197--T.T.573:6-576:10.)

On March 9, 2004, the Stablers executed a promissory note for $650,000. ("The $650,000 Note") (Tr.Ex. 7.) The $650,000 Note refinanced, and brought current, three groups of obligations: (1) $376,900 ECAS owed; (2) $173,100 Brad and Brenda owed personally; and (3) $100,000 from Stan's operating note. (S.R.2645.) The Stablers and ECAS undisputedly incurred and received the benefit of the refinanced debts. (App. 213, ¶ 2.)

The $650,000 Note was secured by a collateral real estate mortgage ($650,000 Mortgage") on all of the Stablers' real property and a lien in their personal property. (Tr.Exs. 8, 42.) Brad and Stan understood the $650,000 Note

included some of their and ECAS' debt. (App. 168, 197--T.T.255:4-11, 256:25-257:10, 576:15-18.) When asked what happened to the ECAS shortfall, Stan stated "I figured it must be in here in that $550,000 . . ." the balance of the $650,000 Note other than the $100,000 refinance of his operating line. (App. 179--T.T.371:7-12.)

Stan's and Brad's real estate was then worth approximately $700,000. (Tr. Ex 138.) When this lawsuit started in 2007, it was worth over $1.3 million. (*Id.*) By the time of trial in 2012, it was worth over $2.5 million. (*Id.*) Stan admitted if FSB foreclosed in 2004, he wouldn't have realized this significant increase in property value, (App. 181--T.T.379:6-14.) His personal property had also been at risk. (Tr.Ex. 97; App. 198--T.T.580:1-13.)

$21,000 of the $650,000 Note was paid. (S.R.1276, ¶1275.) The $629,000 balance and security was assigned in shares to Arnold Schurr and Roger Ernst. (*Id.* 1276-77.) Eventually, Ernst's share of the obligation was also assigned to Schurrs. (*Id.*; Tr.Exs. 43-50.) The Stablers wanted to make interest-only payments on the debt. (App. 169--T.T.262:19-25.) FSB couldn't accept interest-only payments, but Schurr and Ernst were willing to. (App. 189-190--T.T.486-487.)

The $650,000 Note did not cover all of Brad's and Brenda's debt. FSB held pre-bankruptcy liens in Brad's personal property, including farm equipment, and made post-bankruptcy advances, which remained in default. Instead of FSB

foreclosing (App. 170--T.T.267:10-268:23), on May 12, 2004, Brad and Brenda executed a $150,000 Note to the Ipswich State Bank (the "ISB Note"), and ISB issued a cashier's check for $150,000 to FSB. (Tr.Exs. 55 and 56; App. 182--T.T.413:6-414:18.) The check paid these obligations, permitting Brad to keep his property. (*Id.*) Beyers guaranteed the ISB Note to help Brad and Brenda get the financing. (App. 157--T.T.127:17-19, Tr.Ex. 54.) Stan and Rose were not involved in this transaction. (App. 182--T.T.412:15-413:5.)

In 2005 and 2006, Brad made interest payments on the $629,000 obligation, and paid on the $150,000 ISB Note without objection, while Stan and Rose never made a payment. (App. 180--T.T.377:21-378:2.) Meanwhile, FSB kept its end of the agreement. It did not foreclose (App. 169, 180--T.T.260:12-21, 375:21-376:15), and loaned hundreds of thousands of dollars to the Stablers thereafter. (Tr.Exs. 90-94, 102, 109-116.)

By February 2007, Stan was nearly a year past due on two notes, so FSB called the notes. (Tr.Ex. 88.) The Stablers responded by refusing to make further payments, and claimed for the first time the debt was discharged in bankruptcy. This lawsuit followed a few months later. All rights regarding the $650,000 transaction and the ISB Note were subsequently assigned to Beyers, because Beyers did not want Schurrs and ISB to have to litigate the Notes. (S.R.1629 ¶ 3; Tr.Ex. 61-67.)

STATEMENT OF THE CASE

The Stablers pled fraud, fiduciary duty, civil conspiracy, civil RICO, and good faith and fair dealing claims. The Stablers claim regarding the $650,000 Note and ISB Note was that Beyers and FSB improperly had them pay debts discharged in Brad's and Brenda's bankruptcy. (S.R.267, ¶¶ 37-58.) Beyers and FSB counterclaimed. The relevant counterclaims were (1) Beyers' counterclaims against Brad and Brenda regarding the ISB Note; and (2) Beyers' counterclaims regarding the portions of the $650,000 Note, and regarding the 2000 Mortgage, 2002 CREM, and $650,000 CREM. (S.R.303-316, ¶¶ 45-112.)

In August 2009, FSB obtained summary judgment for over $300,000 against the Stablers on all of its counterclaims, which the Stablers have not appealed. (S.R.940.) On April 4, 2011, the Court entered summary judgment incorporating a letter decision dated February 3, 2011. (App. 048, 051, S.R.1270, 1406.) The trial court resolved an issue of first impression in South Dakota, subject to a split of authority nationally, and ruled the $650,000 Note was unenforceable against Brad and Brenda, because it was a reaffirmation of debt discharged in their bankruptcy that was not approved by the bankruptcy court. (App. 059-060, S.R.1279-80.) However, this did not affect Stan's and Rose's liability on the $650,000 Note, because they had not filed for bankruptcy.

The trial court dismissed Beyers' counterclaims against Stan and Rose regarding the 2000 Mortgage and 2002 CREM, holding the parties intended the $650,000 transaction to discharge those mortgages (App. 049, 071, S.R.1291) and that the 2002 CREM partially lapsed due to failure to file timely addendums. (App. 067, 068, S.R.1287-1293.)

The trial court certified this order final under SDCL § 15-6-54(b), and Beyers and FSB appealed. (S.R.1552.) However, this Court found the Rule 54(b) certification inadequate, and dismissed the appeal on jurisdictional grounds. Litigation continued. (S.R.1563.)

Eventually, the parties submitted additional dispositive motions. The trial court dismissed the Stablers' fiduciary duty, good faith and fair dealing, and RICO claims, but denied Defendants' motion regarding fraud. (App. 046, S.R.2486.) When asked to identify the triable issue regarding fraud, the trial court stated it was whether the Defendants knew they could not have the Stablers agree to pay the relevant debts without bankruptcy-court approval. (App. 129--H.T.[7] 10/30/2012 89:1-8, 89:24-90:2.) However, it also ruled that, because Stan and Rose had successfully argued the $650,000 transaction discharged the 2000 mortgage and 2002 CREM, they could not dispute the remaining debt was valid and owed, but were limited to seeking damages. (App. 130--H.T.10/24/12, 91:13-22 .)

[7]"Hearing Transcript (Date)"

At the final pretrial hearing Brad and Brenda elected rescission and waived their damages claims. (S.R.2579, App. 037, 143--H.T.12/4/12 76:14-77:25.) Their claim regarding the ISB Note was to be tried separately to the court. (*Id.*) Stan and Rose waived their claims for damages regarding the $650,000 transaction, except for emotional distress damages, which the court dismissed as a matter of law. (S.R.2579; App. 141-142, 144--H.T.12/4/12 68:8-73:10, 82:12-83:5.) However, the trial court permitted them to proceed to trial on whether Beyers could enforce their obligations on the $650,000 Note, despite previously ruling they could not dispute the Note was enforceable. (S.R.2641-42, 2645, 2659.)

Stan and Rose did not try a fraud claim. They presented a breach of fiduciary duty claim that FSB made bad loans to ECAS that became uncollectible; that FSB should have foreclosed instead of obtaining the $650,000 Note; and that they were "trusting people," all hallmarks of a fiduciary duty claim. (App. 150--T.T.7:22-8:13.) The Stablers presented little evidence regarding misrepresentations. Instead, they attacked Beyers' character, and alleged illegality that did not exist. Some examples included:

- Obtaining false testimony from ISB's president that Beyers acted unethically regarding the Stabler credit (App. 183--T.T.422:14-21);
- Arguing Ronayne's failure to list ECAS' debt in the bankruptcy affected its collectability, when this was untrue (App. 203--T.T.645:4-20);

- Belatedly claiming Beyers defrauded Stan by telling him he would only have to pay $100,000 of the $650,000 Note –a completely new theory. (App. 177-179--T.T.364:8-17; 364:24-365:1; 367:18-24; 368:14-18; 369:16-22; 371:21-24; 372:24-373:2);
- Having their expert claim FSB hid transactions from bank examiners, when this testimony was "pure speculation" (App. 185-86, 188--T.T.460:15-464:16, 480:2-19);

The trial court also (1) submitted exemplary damages to the jury, though no compensatory damages were possible; (2) permitted "conspiracy" to be tried, though there could be no conspiracy between FSB and Beyers, its president; and (3) permitted the jury to know that Brad and Brenda did not have to pay the $650,000 Note, though their grounds for avoiding payment were inapplicable to Stan and Rose. The ploy succeeded. The jury determined $439,100 of the $650,000 Note and Mortgage was unenforceable and awarded $20,000 in exemplary damages. (App. 208-209, S.R.2659-60.)

The trial court then held a court trial on the ISB Note. Holdhusen admitted his jury-trial testimony regarding Beyers' ethics was false. (App. 183, 220-21--T.T.422:14-25, C.T.T.[8] 69:20-71:19.) The court held Beyers could enforce the ISB

[8]"Court Trial Transcript"

Note against Brad and Brenda, and vacated the exemplary damages award. (S.R.2829, 2832.)

ARGUMENT

The jury's verdict must be vacated, because Stan and Rose Stabler's fraud claim should have been dismissed before trial. The alleged representations Stan and Rose used to resist summary judgment were not factual. They were representations regarding bankruptcy law that couldn't be fraud. Moreover, the alleged representations weren't "false" because they concerned legal issues of first impression in South Dakota. The trial court had also previously ruled Stan and Rose could not claim the $650,000 Note and Mortgage were unenforceable. The Court should vacate the verdict, and remand for entry of judgment for Beyers on his counterclaims.

Alternatively, the Court must reverse and remand for new trial. The trial court erroneously denied multiple pre-trial motions, enabling the Stablers to present irrelevant evidence, and allege non-existent illegality. Individually and cumulatively, the evidence was unfairly prejudicial to FSB and Beyers.

I. The Defendants were entitled to judgment as a matter of law on the Stablers' fraud claims, and on Beyers' counterclaims.

FSB and Beyers were entitled to summary judgment before trial. The denial of a motion for summary judgment is reviewed *de novo*; and "[i]n considering a trial court's grant or denial of summary judgment, this Court will affirm only if all

legal questions have been decided correctly." *Muhlbauer v. Estate of Olson*, 2011 SD 42, ¶ 7, 801 N.W.2d 446, 448.

A. Stan and Rose Stabler's fraud claim was not actionable.

Fraud is a tort with specific elements, and requires a (1) knowing or intentional/reckless; (2) misrepresentation; (3) of fact. *N. Am. Truck and Trailer, Inc., v. MCI Commc'n Servs., Inc.*, 2008 SD 45, ¶¶ 8, 10, 751 N.W.2d 710, 713.

1. Representations of law cannot support a fraud claim.

The word "fact" is critical. *Arnoldy v. Mahoney*, 2010 SD 89, ¶ 42, 791 N.W.2d 645, 659; *Sejnoha v. City of Yankton*, 2001 SD 22, ¶ 15, 622 N.W.2d 735, 739. Representations regarding what the law requires or permits are not actionable. *Id*. The effect of an instrument, or whether a transaction is legal, are issues of law, and not actionable. *See Lynch v. Dial Fin.*, 656 N.E.2d 714, 720 (Ohio Ct. App. 1995); *see also Randazzo v. Harris Bank Palatine, N.A.,* 262 F.3d 663, 667-68 (7th Cir. 2001); *GE Capital Corp. v. Del. Mach. & Tool Co.*, 2011 U.S. Dist. LEXIS 53897, *9-10 (S.D. Ind. May 17, 2011); *Skrypek v. St. Joseph Valley Bank*, 469 N.E.2d 774, 780 (Ind. Ct. App. 1984).

Stan and Rose Stabler's fraud claim was based on an alleged representation regarding a legal issue. In their Amended Complaint, the Stablers identified two grounds for fraud. Count II asserted Stan and Rose were defrauded regarding the 2002 CREM because it was presented with a page missing. (S.R.267 ¶¶ 34-35.)

Count III alleged Beyers and FSB fraudulently obtained the Stablers' signatures on the $650,000 Note because the debt refinanced was discharged in bankruptcy. (*Id.* ¶¶ 38-41.)

The Defendants moved for summary judgment regarding Count III. After years of discovery and motion practice, the Stablers identified only four issues in response:

1. The Defendants misrepresented the 2002 CREM was a two-page document for a "farm operating loan" when it was a three-page document listing other debt. (S.R.2206.)

2. The Defendants represented to Brad he reaffirmed debt owed to FSB in his bankruptcy. (*Id.*)

3. FSB moved debt "off the bank books" after the bankruptcy. (S.R.2207.)

4. The Defendants "represented to Stan and Rose Marie Stabler that a $650,000 note [was] debt owing by them and their son, Brad." (*Id.*)

The Stablers represented these were the only grounds to be tried. (App. 132--11/27/12 H.T.12:20-13:20.) The Defendants were entitled to rely on this representation.

Stan and Rose previously obtained a ruling the 2002 CREM was discharged, and partially lapsed, rendering the allegations in Count II, (issue one), moot. (S.R.1406.) They also didn't ask the Court to instruct the jury to resolve whether a page of the 2002 CREM was missing, (S.R.2630), and waived the right to have a jury resolve that issue. *See, e.g., State v. Big Crow*, 2009 SD 87, ¶ 19, n.2, 773

N.W.2d 810, 816 n.2. Moving debt "off the books," (issue three), doesn't involve representations to the Stablers, and couldn't create an issue of fact; and the Stablers' expert acknowledged a bank should get troubled credit off its books. (App. 190--T.T.487:19-488:11.)

This left Stan and Rose with one claim: the Defendants knew the $650,000 Note was an improper refinance of discharged debt that was not "owed" or properly "reaffirmed." The trial court confirmed this when asked to identify the triable issue on the fraud claim, as contemplated by SDCL § 15-6-56(d). The court stated the Stablers could potentially prove the Defendants "knew exactly what they were doing when they went to the, to the Stablers and had them reaffirm debt without going through bankruptcy court." (App. 129-130--H.T.10/30/12 89:7-90:2.)

These were representations of law regarding the Bankruptcy Code. A bankrupt debtor may agree to repay otherwise-discharged debt through "reaffirmation," governed by 11 U.S.C. § 524(c). A reaffirmation agreement is "[an] agreement between a holder of a claim and the debtor,[9] the consideration for which, in whole or in part, is based on a *debt that is dischargeable* in a case under

[9]Stan and Rose were not "debtors" because they did not file for bankruptcy, so the reaffirmation provisions, including obtaining court approval, did not apply to them.

this title . . . ." *Id*. (Emphasis added). That section also identifies procedures to reaffirm debt, including obtaining court approval.

However, a bankruptcy discharge affects only the debtor's personal liability, not security interests or liens in the debtor's property. *See In re Hansen*, 164 B.R. 632, 634 (Bankr. D.S.D. 1994); *see also Lee v. Yeutter*, 917 F.2d 1104, 1108 (8th Cir. 1990); *First State Bank*, 312 N.W.2d at 127-28. A creditor holding a valid, unavoided security interest may move to lift the automatic stay on the collateral prior to discharge, or wait until the debtor has received a discharge and the case is closed. *See* 11 U.S.C. § 362(c)(2). The creditor then pursues an *in rem* action enforcing the lien. *See Hansen*, 164 B.R. at 634; *see also FDIC v. Union Entities (In re Be-Mac Transp. Co.*), 83 F.3d 1020, 1025 (8th Cir. 1996); *Zoss*, 312 N.W.2d at 127-28. Brad's and Brenda's bankruptcy did not discharge the liens securing their obligations, including FSB's security interests in their property, and Stan's and Rose's property, so that property was at risk of foreclosure. Had FSB foreclosed, Stan and Rose wouldn't have benefitted from the significant increase in the value of their real property thereafter.

When the parties executed the $650,000 Note, there was a split of authority regarding whether a new note, given to obtain forbearance from foreclosure regarding pre-bankruptcy debts, was enforceable against discharged debtors without court approval. Some courts held those obligations were enforceable. *Shields v.*

Stangler (In re Stangler), 186 B.R. 460, 464 (Bankr. D. Minn. 1995); *Minster State Bank v. Heirholzer (In re Heirholzer)*, 170 B.R. 938, 941 (Bankr. N.D. Ohio 1994); *see also Watson v. Shandell (In re Watson)*, 192 B.R. 739, 749 (B.A.P. 9th Cir. 1996). Some courts had ruled otherwise. *In re Zarro*, 268 B.R. 715, 722 (Bankr. S.D.N.Y. 2001); *In re Matter of Arnold*, 206 B.R. 560, 563 (Bankr. N.D. Ala. 1997); *In re Gardner*, 57 B.R. 609, 610 (Bankr. D. Me. 1986). The Stablers acknowledged this split of authority during the first appeal. (S.R.2166, Doc.[10] 355 Ex. D). The trial court also acknowledged the split of authority (Doc. 459, Ex. P at 63:12-22), but followed Brad's and Brenda's authorities, and ruled the $650,000 Note was unenforceable against Brad and Brenda as a matter of law. (App. 058-59--S.R.1278-79.)

FSB and Beyers have not appealed this decision because the Eighth Circuit finally addressed the question in a different case. *Williams v. King* (*In re King*), 480 B.R. 321, 329 (B.A.P. 8th Cir. 2012). However, there was a split of legal authority when the $650,000 Note was signed, and some courts would still resolve that legal issue in the Defendants' favor. *See, e.g., In re Martin*, 2012 Bankr. LEXIS 906, 23 (B.A.P. 6th Cir. March 7, 2012) (unpublished) ("[e]xecuting a new promissory note to repay a debt that was discharged in order to avoid a foreclosure on debtor's home is new consideration that supports a finding of a valid

[10] "Trial Court Docket Number" for unnumbered settled record items.

post-discharge agreement"); *see also In re Smith*, 467 B.R. 122, 128 (Bankr. W.D. Mich. 2012). This establishes the alleged representations were legal, not factual.

2. The alleged representations were not false in 2004.

The split of authority precludes a fraud claim for another reason. The alleged representations that Brad "reaffirmed" debt owed to FSB in his bankruptcy, and "that a $650,000 note [was] debt owing by [Stan and Rose] and their son, Brad" were not false when made. The trial court found the $650,000 Note *was* a reaffirmation agreement, because it met the definition of "reaffirmation." (App. 059--S.R.1279; App. 133.) The alleged "reaffirmation" representation was true. Moreover, Stan understood the ECAS "shortfall" was included in the $650,000 Note, stating "I figured it must be in here in that $550,000 . . .," the balance of the $650,000 Note apart from the $100,000 refinanced from his operating line. (App. 179--T.T.371:7-9.) He also understood Brad had assumed ECAS's obligations:

> Question: Okay. You say that Brad had assumed the obligations of Edmunds County Ag?
>
> Answer: Yes.
>
> Question: Who told you that? Did Brad tell you that?
>
> Answer: And I believe John did.
>
> Question: Okay. You're saying Brad and John told you that?
>
> Answer: I am going to go more - we start first with John and then Brad.

(Doc. 332 Ex. A at 70:1-8.) This was consistent with the agreement after the ECAS shortfall that FSB would not foreclose if Brad agreed to pay the debt. (App. 166-67, 195--T.T.246:21-247:25, 568:12-569:4.) Thus, these alleged representations were true.

Moreover, had the trial court resolved the split of authority discussed above in favor of FSB and Beyers, those representations would have remained true. The representations did not become legally "untrue" until the trial court ruled that way, seven years later. The trial court's ruling on that legal issue in Brad's and Brenda's favor did not transform the alleged statements into factual or "fraudulent" ones. For example, even a sophisticated party, like an insurance company, cannot be liable for bad faith when the denial upon which the bad-faith claim is based concerns an issue of first impression. *See Mudlin v. Hills Materials Co.*, 2007 SD 118, ¶ 14, 742 N.W.2d 49. "That the denial [is] eventually found to be erroneous does not mean the denial was in bad faith." *Id.* at ¶ 15. "[T]he insurer does not act tortiously if it acts upon a permissible, albeit mistaken, belief that the claim is not compensable." *Id.*

In 2011, the trial court resolved an issue of first impression in South Dakota, subject to a nationwide split of authority. But in 2004, there was no law in South Dakota regarding the enforceability of the Note absent bankruptcy-court approval, and courts in other jurisdictions were divided. The trial court wrestled with the issue (Doc. 459, Ex. P), and recognized the split of authority. (*Id.* Ex. D, 53:22-54:4.)

Accordingly, Beyers could not have knowingly misrepresented the law. The Stablers should not have been permitted to try a fraud claim premised on proving Beyers knew the transactions violated the Bankruptcy Code, when the trial court admittedly struggled with the decision, and some Courts would likely *still* enforce the $650,000 Note against Brad and Brenda. Stan and Rose Stabler's fraud claim regarding the $650,000 Note and Mortgage should have been dismissed.

B. Stan and Rose could not challenge the enforceability of the $650,000 Note and the mortgages securing it.

The verdict must be vacated for another reason. Brad and Brenda elected rescission regarding the $650,000 Note, but Stan and Rose elected a different remedy. They argued the $650,000 Note and related transactions discharged the debt and mortgages refinanced by the Note, including the $200,000 Mortgage and 2002 CREM. (Doc. 459 Ex. B.)

The trial court agreed:

> *When the Stablers signed the new promissory note, their promise to repay served as satisfaction of the old promissory notes that were being refinanced.* Schurrs and Ernst literally paid FSBR the amounts due on those refinanced loans in return for assignment of the Stablers' March 9, 2004, Promissory Note and mortgage. *Once those promises were satisfied, the mortgages and security agreements that secured them were released by operation of law.*

(App. 072) (emphasis added.) The trial court then dismissed Beyers' counterclaims on these mortgages. (App. 049, S.R.1406.)

The Defendants later moved for summary judgment that Stan and Rose could not challenge the enforceability of the $650,000 Note, having successfully argued the Note discharged those mortgages. (S.R.1851; H.T.10/30/12, 49:2-50:17.) The trial court ruled "[e]ssentially, the motion is granted with this exception: That Stan and Rose Marie are not precluded from asserting fraud in the creation of those notes." (H.T.10/30/12 81:13-17.) The Defendants asked "[t]he Court has granted it provisionally stating that Stan and Rose Stabler are not precluded from asserting fraud in the creation. ***Are you saying in terms of seeking damages or challenging the validity?***" (App. 130–H.T.10/30/12 91:9-12) (emphasis added).

The trial court responded unequivocally: "***Seeking damages.***" (*Id.* 91:13) (emphasis added.)

To ensure no confusion, the Defendants asked: "Okay. So you have granted the motion ***that they are not permitted to challenge that the debt is owed . . .***" (*id.* 91:14-16) (emphasis added). The court replied "***True***." (*Id.* 91:17) (emphasis added.) The court confirmed this was also true regarding mortgages securing the Note. (*Id.* 91:18-22.) These oral rulings were incorporated into the court's written order. (App. 047, S.R.2489.)

At the pre-trial conference, Stan's and Rose's counsel argued they could still claim the Note should be cancelled. (App. 136--H.T.12/4/12, 26:13-20). The Defendants noted the ruling above barred this claim. (App. 139-140–H.T.12/4/12 58:12-59:6; 61:18-62:4.) The Court nevertheless permitted Stan and Rose to proceed to jury trial on that theory. (*Id.* 62-63.)

This was legal error. Stan and Rose had a choice regarding their fraud claim. They could elect to either (a) affirm the $650,000 Note and sue for damages; or (b) elect rescission and try to recover any consideration paid–not both. *U.S. Lumber, Inc. v. Fisher*, 523 N.W.2d 87, 89 (S.D. 1994); *see also* SDCL § 53-11-1. They did not elect rescission, probably because they never paid on the Note. They instead elected to affirm, by using the Note and Mortgage *offensively* to obtain dismissal of Beyers' counterclaims on earlier mortgages. This affirmed the Note's and Mortgage's validity, because an invalid note could not discharge previous obligations. *See, e.g., FDIC v. Katzowitz*, 2012 U.S. Dist. LEXIS 13345, 14-15 (E.D. Mich. February 3, 2012) (unpublished) (holding borrower could not avoid paying 2004 note marked "paid" when borrower simultaneously alleged the 2005 note that "paid" the 2004 note was forged).

Relatedly, the Stablers were judicially estopped from taking one position, i.e., that the earlier mortgages were discharged by the $650,000 transaction; getting a favorable ruling on that position; and then taking the opposite position, i.e., that

the $650,000 transaction was invalid. *See Watertown Concrete Products, Inc. v. Foster*, 2001 SD 79, 630 N.W.2d 108, 113 (S.D. 2001); *see also Canyon Lake Park, LLC v. Loftus Dental, PC*, 2005 SD 82, ¶ 34, 700 N.W.2d 729, 737-38.

Stan and Rose Stabler elected their remedy on the $650,000 Note and Mortgage. They affirmed the Note and Mortgage by using them to get two of Beyers' counterclaims dismissed, which limited them to seeking damages. The Court must vacate the jury's verdict, and reaffirm the trial court's decision that Stan and Rose could not challenge the enforceability of the $650,000 Note and Mortgage.

C. Once Stan and Rose Stablers' damages claims were waived or dismissed, the Court should have dismissed their complaint.

Once the Court vacates the verdict, it must dismiss Stan and Rose Stabler's fraud claim. Where the undisputed facts fail to establish each required element of a cause of action, judgment as a matter of law is proper. *McKie v. Huntley*, 2000 SD 160, ¶ 17, 620 N.W.2d 599, 603. Damages is an essential element of a fraud claim. *In re Estate of Olson*, 2008 SD 97, ¶ 20, 757 N.W.2d 219, 225. Before trial, Stan and Rose Stabler's damages claims were all waived or dismissed.

The Stablers identified only four categories of damages: (a) emotional distress; (b) payments on discharged debts; (d) damage to property rights and credit reputation; and (e) attorneys' fees and punitive damages (there was no category "C"). (S.R.2169-70.) The Stablers conceded they were limited to those

categories. (App. 141--H.T.12/4/12, 68:8-69:11.) Regarding Category A, the trial court ruled none of the Stablers could recover emotional distress damages. (*Id.* 71:10-72:5.) Regarding Category B, Stan and Rose conceded they made no payments on the $650,000 Note. (*Id.* 73:6-10.) The Stablers withdrew their category D claim, probably because the $650,000 transaction helped them retain property that had significantly increased in value. (*Id.* 82:12-22; Tr.Ex. 138.) They also withdrew their Category E claim. (*Id.* 82:23-83:5.)

Once these rulings were made, there were no compensatory damage claims left. And Stan and Rose were already barred from challenging the validity of the Note and Mortgage. Their fraud claim should have been dismissed, because they could not prove an essential element of their claim–damages.

II. In the alternative, the Defendants are entitled to a new trial.

The fundamental right protected by a motion for new trial is a fair trial. *See Schoon v. Looby*, 2003 SD 123, ¶ 18, 670 N.W.2d 885, 891. When errors likely affected the jury's verdict, a new trial is warranted. *Id.* Denial of a motion for new trial is reviewed for an abuse of discretion. *See Harmon v. Washburn*, 2008 SD 42, ¶ 24, 751 N.W.2d 297, 303. A decision based on an erroneous legal conclusion is automatically an abuse of discretion. *See Credit Collection Servs.,*

Inc. v. Pesicka, 2006 SD 81, ¶ 5, 721 N.W.2d 474, 476. The trial court abused its discretion here. (App. 001.)

A. A new trial is warranted under SDCL § 15-6-59(a) (3), and (4).

Under SDCL § 15-6-59(a)(3), and (4), a new trial may be granted on grounds of accident, surprise, or newly discovered evidence.

1. The jury verdict was obtained through false opinion testimony.

Under the federal version of SDCL § 15-6-59(a) (3) and (4), a new trial is proper when (1) a material witness testifies falsely; (2) without the false testimony, the jury might have reached a different verdict; and (3) the party seeking the new trial was taken by surprise when the false testimony was given or did not know of its falsity until after trial. *Davis v. Jellico Comm. Hosp., Inc.*, 912 F.2d 129, 134 (6th Cir. 1990). South Dakota courts employ this analysis. *See Pickering v. State*, 260 N.W.2d 234, 235 (S.D. 1977).

In fraud cases, "credibility takes on added importance." *See Sommerville v. Major Exploration, Inc.*, 576 F.Supp. 902, 907 (S.D.N.Y. 1983). In *Rosebud Sioux Tribe v. A & P Steel, Inc.*, a new trial was granted because the revelation of false testimony discredited one of the prevailing party's key witnesses, and changed the "entire complexion" of the case. 733 F.2d 509, 516-517 (8th Cir. 1984); *see also Johnson v. VeriSign, Inc.*, 2002 U.S. Dist. LEXIS 13229, *53 (E.D. Va. July 17, 2002) (false testimony improperly bolstered a party's credibility);

Williams v. United Dairy Farmers, 188 F.R.D. 266, 275-76 (S.D. Ohio 1999); *Kline v. Belco, Ltd.*, 480 So.2d 126, 128 (Fla. Dist. Ct. App. 1985) (witness falsely impugned plaintiff's credibility); *Lee v. Rudolph-Brady*, 236 S.W.3d 658, 659 (Mo. Ct. App. 2007) (primary witness testified falsely).

Here, ***the*** key witness testified falsely. Holdhusen testified that Beyers acted unethically regarding the Stabler credit (App. 183--T.T.422:14-25[11]), then admitted at the court trial he had testified falsely about Beyers' ethics. (App. 220--C.T.T.69:20-71:19.)[12] It is not hyperbole to call Holdhusen the "star" of

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[11]Question: Have you ever moved debt off the Ipswich State Bank books so that regulators couldn't see it?

Answer: Not in the manner this was done, no.

Question: And why not?

Answer: No particular reason, I guess. I just didn't feel it was probably appropriate.

Question: It wouldn't be ethical to you, right?

Answer: Right.

[12]Question: Specifically, what in your opinion was unethical about Mr. Beyers' conduct?

Answer: As far as I was concerned there was nothing unethical about it.

Question: Okay. That isn't exactly what you told Mr. Schoenbeck on cross-examination is it?

Stan and Rose Stabler's case. He was mentioned by name at least twenty-two times in closing arguments. (App. 200-207--T.T.634:5-6, 634:7-8, 634:12-13, 634:18, 635:3, 635:10, 635:24, 636:3, 636:20, 636:24, 637:17, 641:21, 646:6, 649:11, 650:16, 681:8, 681:9, 684:4, 684:24, 685:3, 685:7.)

It isn't surprising why. "In a credibility contest, the testimony of neutral, disinterested witnesses is exceedingly important." *Lindstadt v. Keane*, 239 F.3d 191, 203 (2d. Cir. 2001). The Stablers presented Holdhusen, another banker, not only as "disinterested," but as Beyers' "friend." (App. 183--T.T.421:3-5.) His false testimony about Beyers' character was devastating. (App. 220--C.T.T.70:15-25.)

The three components of the *Davis* standard, adopted in *Pickering*, are satisfied. First, Holdhusen admitted he testified falsely. Second, Holdhusen's false testimony affected the verdict. Nothing could be more devastating to the defense of a fraud claim than false opinion testimony from the defendant's trusted friend that the defendant acted unethically. Absent Holdhusen's testimony, and the Stablers' serial emphasis on Holdhusen during closing arguments, the jury would have reached a different result. Third, the Defendants had no way of knowing Holdhusen would provide false opinion testimony–only Holdhusen knew he would lie.

Answer: I see that.

2. Stan and Rose presented a new theory of fraud.

It is "long established" precedent, under the federal rules version of SDCL § 15-6-59(a)(3), that "surprise" warranting a new trial includes testimony or theories of recovery different from those identified before trial. *See Sanford v. Crittenden Mem. Hosp.,* 141 F.3d 882, 886 (8th Cir. 1998) (holding mid-trial shift in expert testimony from failure to diagnose to failure to prevent was ground for new trial).

After years of discovery, and after the trial court required them to identify the grounds for fraud to be tried, the Stablers represented they would present only the four theories discussed above. (Section I.A.1, *supra*; App. 132--H.T.11/30/12 12:20-13:20.) The Defendants prepared for trial assuming this was true. However, Stan belatedly claimed Beyers defrauded him by telling Stan he would only have to pay $100,000 of the $650,000 Note. (App. 177-79--T.T.364:8-17; 364:24-365:1; 367:18-24; 368:14-18; 369:16-22; 371:21-24; 372:24-373:2.) This theory was not identified when the Court instructed the Stablers' counsel to identify their theories. The Stablers also did not identify it in responding to the Defendants' statement of undisputed material facts (S.R.1911, App. 108-127) or in identifying alleged issues of fact. (S.R.1931, App. 103-107.)

If fraud must be pled with particularity, SDCL § 15-6-9(b), it must be tried with particularity too. The Defendants prepared for a trial regarding Stan's and

Rose's allegations that the Defendants knew the relevant debts were not properly reaffirmed. They prepared expert and other testimony on those issues, only to have that preparation rendered useless by a new–and completely different--theory. The Court must grant a new trial where the Defendants can prepare for whatever theory the Stablers choose to present.

B. A new trial is warranted under SDCL § 15-6-59(a)(7), because the trial court admitted unfairly prejudicial evidence, and improperly instructed the jury.

A new trial may be granted when evidence was improperly admitted, or instructions were improperly given. SDCL § 15-6-59(a)(7). Evidence must be relevant, and must not persuade the jury in an unfair or illegitimate way. SDCL § 19-12-3; *St. John v. Peterson*, 2011 SD 58, ¶ 16, 804 N.W.2d 71, 76. Jury instructions must be based on the issues raised, s*ee Baddou v. Hall*, 2008 SD 90, ¶ 16, 756 N.W.2d 554, 559, so "[i]f an instruction is requested which is not relevant to an issue in the case, it should be refused though it may state a correct principle of law." *Stammerjohan v. Sims*, 31 N.W.2d 449, 451 (S.D. 1948). A definitive pretrial ruling, such as on a motion in limine, preserves error, regardless of whether an objection is renewed. SDCL § 19-9-3.

1. Evidence regarding the ISB Note was improper "conformity" evidence.

The Court could have prevented Holdhusen's false testimony. Before trial, the Defendants noted Brad and Brenda Stabler's claim regarding the ISB Note was

being tried separately, and that it would be unfairly prejudicial to have that issue presented before the jury. (App. 147--H.T.12/17/12 at 4:22-5:10.) The ISB Note didn't involve Stan and Rose, who knew nothing about the transaction. Holdhusen testified the first time he met Stan and Rose was when he was deposed during this lawsuit. (App. 182--T.T.412:15-22.) And the ISB Note was signed in May 2004, two months *after* the $650,000 Note.

Stan and Rose Stabler's counsel asked Beyers about a "deal involving Brad and Brenda and the Ipswich State Bank . . ." (App. 156--T.T.126:13-15.) The Defendants objected on relevance grounds, consistent with their pretrial argument. (App. 156--T.T.126:13-24.) The trial court overruled the objection. (*Id.*) Consequently, Stan and Rose presented evidence regarding a transaction that didn't involve them.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." SDCL § 19-12-5. But "conformity" is why the ISB Note was presented. Stan and Rose argued that, because Beyers allegedly fooled Holdhusen two months *after* the $650,000 Note and Mortgage were signed, this proved Beyers tried to fool them two months earlier:

> "You see, *there isn't much difference between what he pulled on Tom Holdhusen in May and what he pulled on Stan and Rose Marie Stabler in March*." (App. 200--T.T.634:7-9.)

"You have to decide yes or no on was there fraud in getting their signatures. And we hope the evidence shows you that *just like they pulled the same thing on Tom Holdhusen*, yes is the right answer there." (App. 204–T.T.649:8-11.)

"You know, *they don't want to talk about this is the same thing he did to Tom Holdhusen*." (App. 206–T.T.681:7-8.)

"Mr. Beyers' plan and his bank's plan *was to con these people like he conned Tom Holdhusen* and to get all of their land." (App. 207–T.T.684:3-4.)

"But there isn't any question, *just like Tom Holdhusen*, they were lied to to get them to sign it." (*Id.* T.T.684:23-24.)

This is textbook "conformity" argument. "Other acts" can be admissible for other purposes. SDCL § 19-12-5. But there was no "other purpose." The ISB Note was presented to show Beyers conformed, i.e., "did the same thing" to Stan and Rose he supposedly did to Holdhusen. Holdhusen and the ISB Note were the centerpiece of Stan and Rose Stabler's closing, so they cannot dispute the prejudice.

Even if this evidence had some "other purpose," the trial court did not properly admit it. Courts must apply a two part test before admitting "other acts" evidence: (1) whether the evidence is relevant to some material issue in the case; and (2) whether the probative value of the evidence is substantially outweighed by its prejudicial effect. SDCL § 19-12-3; § 19-12-5; *State v. Mattson,* 2005 SD 71, ¶ 18, 698 N.W.2d 538, 545; *Novak v. McEldowney*, 2002 SD 162, ¶ 12, 655 N.W.2d 909, 913. Even if both requirements are met, the court must identify the

exception under which the evidence is admitted. *State v. McDonald*, 500 N.W.2d 243, 245-46 (S.D. 1993).

When a trial court fails to conduct this inquiry on the record, a new trial is required. *See St. John*, 2011 SD 58, ¶ 17, 804 N.W.2d at 76; *St. John v. Peterson (II)*, 2013 S.D. 67, ¶ 23. The trial court did not conduct that inquiry here. Moreover, the trial court later determined the ISB Note was enforceable against Brad and Brenda (S.R.2829), and Holdhusen later testified Beyers did not defraud him. (App. 221--C.T.T.71:20-23.)[13] It is doubtful the evidence would have been admitted had the trial court conducted the required inquiry. Finally, the Court failed to identify the exception under which these "other acts" were admitted, which also requires a new trial.

Testimony regarding the ISB transaction was "conformity" evidence that should have been excluded, or "other acts" evidence that was not properly admitted. In either case, this error requires a new trial.

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[13]Question: Okay. Do you feel that John Beyers had cheated the Ipswich State Bank with regard to the Brad and Brenda transaction?

Answer: Not at all.

Question: Do you feel that he would have defrauded you?

Answer: No.

2. The Court improperly instructed the jury regarding punitive damages.

Before punitive damages may be submitted to the jury the trial court must ensure it is appropriate. *See* SDCL § 21-1-4.1. This prevents "the use of claims for punitive damages as means of harassment . . . ." *see Dahl v. Sitner*, 474 N.W.2d 897, 901 (S.D. 1991). This Court has described this threshold requirement as something that defendants are "protected by." *Schaffer v. Edward D. Jones & Co.*, 1996 SD 94, ¶ 46, 552 N.W.2d 801, 815.

Before trial, the Defendants noted Stan and Rose could not possibly recover compensatory damages (S.R.2491, App. 148--H.T.12/17/12, 7:9-9:1), which barred any claim for exemplary damages. *See Henry v. Henry*, 2000 SD 4, ¶ 5, 604 N.W.2d 285, 288. The trial court rejected this argument, but then vacated the exemplary damages award after trial because no compensatory damages were awarded. (App. 025, S.R.2831.)

But the damage had already been done in two ways. First, parties may not ask juries to "send a message" or otherwise appeal to "community consciousness" when punitive damages are not properly at issue. *See., e.g., Beis v. Dias*, 859 S.W.2d 835, 840 (Mo.App. 1993); *Maercks v. Birchansky*, 549 So.2d, 199, 199-200 (Fla. App. 3d. Dist. 1989). But improperly submitting exemplary damages to the jury enabled the Stablers' counsel to make those appeals during closing arguments. (App. 204–T.T.649:22-650:25.) The trial court's post-trial

vacation of the exemplary damages award did nothing to remedy the harm caused by the error.

Second, evidence of the defendant's wealth encourages juries to base their decision on who can "afford" to pay. *See Burke v. Deere & Co.*, 6 F.3d 497, 513 (8th Cir. 1993); *Mirabel v. Morales*, 57 A.3d 144, 152 (Pa. Super. Ct. 2012). Consequently, "where the issue of punitive damages is erroneously submitted to the jury, together with the Defendants financial condition, an award of compensatory damages is tainted and cannot stand." *See KARK-TV v. Simon*, 656 S.W.2d 702, 705 (Ark. 1983).

Stan and Rose Stabler's closing arguments squarely implicated this policy. Their counsel stated that exemplary damages had to be high because the Defendants had allegedly created "four, five, six million dollars of equity . . ." by engaging in transactions like the ones at issue. (App. 204--T.T.649:22-650:13.) This encouraged the jury to decide Stan and Rose should not have to pay the $650,000 Note because the Defendants, with their "millions of dollars" could "afford it."

3. The Court improperly permitted the Stablers to argue Beyers was motivated to "hide" transactions from bank examiners.

"[T]he purpose of expert testimony is to assist the trier of fact and not to

supplant it. . . . The credibility of witnesses and the evidentiary value of their testimony falls solely within the province of the jury." *Bridge v. Karl's, Inc*., 538 N.W.2d 521, 525 (S.D. 1995). "Opinions merely telling a jury what result to reach are impermissible as intrusive, notwithstanding the repeal of the ultimate issue rule." *State v. Guthrie*, 627 N.W.2d 401, 415 (S.D. 2001). Experts cannot testify regarding "intent, motive, or state of mind, or evidence by which such state of mind may be inferred." *See Astrazeneca LP v. Tap Pharm. Prod., Inc.*, 444 F.Supp.2d 278, 293 (D. Del. 2006); *see also United States Gypsum v. LaFarge North Am., Inc.*, 670 F.Supp.2d 768, 775 (N.D. Ill. 2009); *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 627 F.Supp.2d 384, 440 (D.N.J. 2009).

Also, expert testimony in South Dakota is analyzed under the standard articulated in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). *Kuper v. Lincoln-Union Elec. Co.*, 557 N.W.2d 748, 760 (S.D. 1996). Litigation opinions are closely scrutinized. *Daubert*, 483 F.3d at 1317-19. An expert opinion must be based on facts, not speculation. *Lewis v. Parish of Terrebone*, 894 F.2d 142, 146 (5th Cir. 1990). Expert testimony lacking sufficient factual basis should be excluded. *Kuhmo Tire*, 526 U.S. at 152 (citing *Daubert*, 509 U.S. at 592.)

The Defendants moved to exclude testimony or argument about bank examinations, and to preclude the Stablers' expert, Bob Nash, from testifying the

Defendants "hid" transactions from examiners by getting debt "off the books," because an expert may not testify about someone's "intent" and because Nash had admitted two key things: (1) any bank should get non-performing debt "off the books;" and, more importantly (2) he would be speculating about bank examinations because he had never seen FSB's examination results, nor inspected FSB's books. (Doc. 459, Ex. L–Brief at pp. 6-13.) The trial court denied the motion regarding examinations, and allowed Nash to testify that the "motive" for the transactions at issue was to hide things from bank examiners. (App. 035--S.R 2582; App. 137-38--H.T.12/4/12, 41:13-18, 48:10-18; App. 185-86--T.T.460:15-464:16.)

The trial court should not have permitted Nash's prejudicial testimony regarding Beyers' "motive" because there is no material difference between "motive" and "intent." Moreover, under cross examination, Nash admitted, as he had previously, that his testimony about examinations was, *"pure speculation*," because he hadn't seen examinations results, and hadn't inspected FSB's books. (App. 188--T.T.480:2-19). Nash also admitted again that any bank should try to get troubled accounts "off the books." (App. 190--T.T.487:19-488:11.)

The Stablers cannot dispute the trial court's error in permitting "motive" testimony and argument based on an inadequate factual foundation was material. Their counsel referred to hiding debt from bank examiners with debt "off the

books" several times. (App. 201-205--T.T.636:16-18, 637:3-5, 637:13, 641:4-7, 644:14-16, 647:15-19, 650:17-18, 651:16-17.) The error was also prejudicial. "[E]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *See Daubert*, 509 U.S. at 595. Nash's testimony, essentially told the jury what result to reach, and should not have been allowed.

4. The Court improperly permitted Stan and Rose to claim that Rob Ronayne engaged in wrongdoing.

From the outset of the litigation, the Stablers appeared to claim that Ronayne engaged in wrongdoing while representing Brad and Brenda. However, before trial, Brad and Brenda identified only one thing they believed Ronayne had done wrong- failing to list ECAS' debt in their bankruptcy schedules. (App. 093, ¶¶ 103-104; App. 121 ¶¶ 103-104.) The trial court previously ruled this did not affect their bankruptcy discharge, consistent with black-letter bankruptcy law. (App. 053, n.2--S.R.1273, n.2) (citing *In re Madaj*, 149 F.3d 467 (6th Cir. 1998)). Brad's guarantee of the ECAS debt was still discharged. Also, Stan and Rose had no relationship with, and received no advice from, Ronayne. (App. 093, ¶ 102, App. 121, ¶ 102.)

The Defendants moved to exclude any allegation of wrongdoing regarding Ronayne, which the Court denied. (Doc. 459, Ex. L, at p. 17; App. 036; S.R.2583; App. 140--H.T.12/4/12, 63:3-5, 64:8.) Stan and Rose had Brad and

Brenda testify about Ronayne's supposed wrongdoing regarding their bankruptcy schedules (App. 162, 172--T.T.217:7-16; 285:4-24) though Ronayne hadn't given Stan and Rose legal advice about anything.

During closing arguments the Stablers claimed Ronayne's error made it possible for the Defendants to collect ECAS' debt:

> His clients are saying to him, why isn't Edmunds County Ag Services in here? Oh, it doesn't need to be. Now he says, well, it was a, it was a mistake. It was an oversight on my part. That's garbage. That's the bank's lawyer falsifying documents because that's where they were sent so that the bank could create a paper trail that looked better to try and collect debt that should have been charged off. And they move it off their books.
>
> (App. 203--T.T.645:4-20.)

This argument was legally false. Why this was unfairly prejudicial is so obvious as to render the inquiry rhetorical. This was a fraud trial. The Stablers argued Ronayne helped defraud the Stablers by not listing ECAS' debt, when the ostensible "proof" was an error the Court already found legally irrelevant.

5. The Court improperly instructed the jury regarding participations.

A participation is a special banking transaction. The original lender has a relationship with the borrower, like a normal debtor-creditor relationship. *See First Nat'l Bank v. Continental Illinois Nat'l Bank and Trust Co.*, 933 F.2d 466, 467 (7th Cir. 1991). The lender sells pieces of the loan to third parties who "participate" in the loan. Unlike an assignment, the original lender services the

loan, and is the only party that has a relationship with the borrower.

The $650,000 obligation was assigned to Schurr and Ernst, not participated. The ISB Note was a new note, not a participation. The defendants objected there was no reason to instruct the jury about participations, (App. 199--T.T.625-626), but the Court instructed the jury about them. (App. 215-16.)

The Stablers cannot claim the error was harmless. The issue was a cornerstone of Stan and Rose Stabler's case strategy. It was the basis of Holdhusen's false testimony about Beyers' ethics. (App. 183--T.T.422:14-20.) In closing arguments Stan and Rose argued that the transactions involving Schurr and Ernst were "participations" in "violation of the law" when they were not participations. (App. 207–T.T.685:8-11.) These instructions exacerbated Holdhusen's false testimony, and enabled the Stablers to improperly imply illegality.

6. The Court improperly admitted evidence regarding Brad's and Brenda's obligation to pay the $650,000 Note.

Brad and Brenda obtained rescission on grounds of non-compliance with the Bankruptcy Code. This argument was unavailable to Stan and Rose. Whether Brad and Brenda owed on the $650,000 Note should not have been submitted to the jury. Defendants proposed to instruct the jury to not speculate about why Brad and Brenda were not parties at the jury trial. (S.R.2530.) They also moved to exclude evidence related to rulings that occurred after the alleged fraud, including the ruling Brad and Brenda did not owe the $650,000 Note. (S.R.2160; App. 144-45--H.T.12/4/12 83:6-8, 87:9-17, 87:25-88:13.) The Court instead instructed the jury that the obligation was not properly reaffirmed. (*Id.* 87:25-88:13.) Stan and Rose also presented evidence and argument about the issue. (App. 171, 173, 191, 204--T.T.271:25-272:1; 293:24-294:1; 494:22-25; 647:7-9.)

When there is a ruling on a legal issue in a pending case, the ruling cannot be used to measure the good faith of the parties' earlier actions. *See Isaac v. State Farm Mut. Auto Ins. Co.*, 522 N.W.2d 752, 758 (S.D. 1994). In *Isaac*, the trial court ruled an insurance policy's setoff provision was void, and that benefits needed to be paid. *Id.* However, the trial court allowed the plaintiffs to argue the ruling also supported their bad faith claim. This Court ruled:

> Therefore, the trial court's later ruling that the setoff provision was void as a matter of public policy was not material or relevant to the issue of whether State Farm was acting in bad faith *at the time it denied coverage*. Accordingly, it was error for the trial court to advise the jury of its ruling.

Id. (emphasis added).

The Stablers' fraud claims were based on a subsequent ruling regarding a Bankruptcy Code provision previously interpreted in a divergent manner. Permitting the jury to know Brad and Brenda did not have to pay, based on resolution of an issue in considerable doubt in 2004, was error.

This error must have affected the verdict. The Defendants had to convince a McPherson County jury that fellow residents of their county should pay $650,000. Evidence that Brad and Brenda didn't have to pay made that burden insurmountable. The jury must have wondered, "if Brad and Brenda don't owe, why should Stan and Rose pay." The jury was prejudicially and unfairly predisposed against enforcing the Note against Stan and Rose.

7. The court improperly permitted the conspiracy claim to be tried.

The trial court improperly denied the Defendants' motion for summary judgment regarding conspiracy. (App. 047--S.R.1867.) "According to the intracorporate conspiracy doctrine, a corporation cannot conspire with itself though its agents when the acts of the agents are within the scope of their employment." *Larson by Larson v. Miller*, 76 F.3d 1446, 1456 n. 6 (8th Cir. 1996); ***LRL Properties v. Portage Metro Hous. Auth.***, 55 F.3d 1097, 1106 n. 4 (6th Cir. 1995).

Beyers' alleged actions were in his capacity as FSB's president. The

$650,000 Note and Mortgage were executed in favor of FSB. They were assigned to Schurr and Ernst by FSB. Beyers did not become personally involved in the obligation until 2008, after the lawsuit started, when the obligation was assigned to him with the assistance of FSB's current counsel. The trial court found there was no wrongdoing in facilitating those assignments. (S.R.1403.) All alleged actions by Beyers were on behalf of FSB, not Beyers personally, and couldn't support a conspiracy claim.

The term "conspiracy" is pejorative and conjures up images of criminal activity. This "stigma" is why groundless federal conspiracy claims, like RICO claims, must be dismissed promptly. *See Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990.) A South Dakota jury verdict may be overturned for improper instructions on contributory negligence. *See, e.g., Johnson v. Armfield*, 2003 SD 134, ¶ 14, 672 N.W.2d 478, 482. If a verdict can be overturned because of an instruction on an innocuous term like "contributory negligence," an unsupported conspiracy claim, raising the implication of criminal conduct, must have impacted this verdict.

III. The 2002 CREM did not lapse

The interpretation of a statute is reviewed *de novo*. *Discover Bank*, 2008 SD 111, ¶ 15, 757 N.W.2d at 761.

In July 2002, SDCL § 44-8-26 read in part:

> A filed collateral real estate mortgage which states a maturity date of the instrument secured thereby of five years or less is effective until such maturity date and thereafter for a period of sixty days. Any other filed collateral real estate mortgage is effective for a period of five years from the date of filing and thereafter for a period of sixty days. *Id.*

The effectiveness of a CREM can be extended by filing a timely addendum. *Id.*

Here, an addendum was filed in May 2007, before five years expired. (App. 067-68.) However, the circuit court ruled the 2002 CREM partially lapsed because a separate addendum had to be filed for each obligation secured by the CREM, and that, because five of the six obligations listed in the CREM were dated "five years or less" from the date of the CREM, the CREM had lapsed. (App. 067-68.) This was legally erroneous for multiple reasons.

First, the 2002 CREM identified a note with a maturity date of December 15, 2013, a date that was not "five years or less" from the date of the CREM. Under the plain meaning of the second sentence of SDCL § 44-8-26, the 2002 CREM was effective for five years after filing.

Second, courts construing statutes presume "that the legislature did not intend an absurd or unreasonable result." *State v. I-90 Truck Haven Service, Inc.*,

2003 SD 51, ¶ 3, 662 N.W.2d 288, 290. But this ruling produces multiple absurd results. Collateral real estate mortgages "allow lenders and borrowers more flexibility in their lending relationships." *Gust v. Peoples & Enderlin State Bank*, 447 N.W.2d 914, 917 (N.D. 1989). "A collateral real estate mortgage permits the lender to file one mortgage with a stated face amount with the actual debt owed during the term of the mortgage fluctuating based on the credit needs of the borrower." *Id.* But under the circuit court's interpretation, if a CREM secures multiple specific obligations, multiple addendums must be filed. This is contrary to the statute's purpose.

Third, the trial court ignored the primary purpose of mortgage recording statutes--notification to third parties. *See NattyMac Capital, LLC*, 2010 SD 51, ¶ 16, 784 N.W.2d at 160. Here, an addendum was filed on May 22, 2007, giving third parties notice of the CREM. No third party gave value under the belief the 2002 CREM had lapsed. The trial court's decision absurdly invalidates a CREM though its public-notice function was fulfilled.

Fourth, when the intention of parties is manifested by the language of an agreement, that language should be enforced. *Pauley v. Simonson*, 2006 SD 73, ¶ 8, 720 N.W.2d 665, 667. The CREM states "[t]he original term of this mortgage is five years unless such term is extended by the filing of an addendum to this mortgage." (Tr.Ex. 4.) The parties intended the 2002 CREM be effective for

five years after it was filed.

Even if the trial court's statutory interpretation was correct, this does not end the inquiry. This Court has not analyzed the remedy if a CREM has lapsed, but the North Dakota Supreme Court has interpreted North Dakota's substantially identical CREM statute on this point. In *Gust*, the court recognized that, if the property was still available for application to the debt, the creditor was entitled to enforce an equitable lien against the property. 447 N.W.2d at 920 (citations omitted). The circuit court did not address this argument. (App. 068-069.)

The Stablers undisputedly received the benefit of the funds loaned, secured by the 2002 CREM. The property in the 2002 CREM was still available for application, so Beyers should have had an equitable lien he could pursue as to those obligations.

CONCLUSION

The Stablers were permitted to try a fraud case for damages, when there was no fraud and they had no damages. The Stablers should not have been permitted to pursue a fraud claim based on the premise that a small-town South Dakota banker "knew" how unsettled law would apply to a transaction, when the trial court itself struggled with that issue. Moreover, Stan and Rose elected to affirm the $650,000 Note and Mortgage, limiting them to a damages claim, when they obtained a ruling the $650,000 Note and Mortgage discharged two earlier mortgages, and Beyers' counterclaims on those mortgages were dismissed as a result. Once they obtained that result, Stan and Rose should not have been permitted to abandon their election and challenge the validity of the Note and Mortgage, particularly when it enabled Stan and Rose Stabler to keep real property that has since nearly quadrupled in value.

Not only was the jury trial improper, it was an unfair trial. Stan and Rose were allowed to pursue a strategy that had little to do with proving fraud. The false specter of illegality regarding "bank examinations," unscheduled bankruptcy debt, and participations, and the false testimony about Beyers' ethics, ensured the jury would have a negative opinion of the Defendants. Evidence of the Defendants' net worth encouraged the jury to find against the parties that could "afford" it. Evidence that Brad and Brenda didn't have to pay encouraged the

jury to decide that Stan and Rose shouldn't pay either.

Stan and Rose Stabler are an elderly farming couple. It is easy to think of "justice" for them. But the Defendants were entitled to justice and a fair trial too–and they deserved more and deserved better where both were concerned. The judgment against FSB and Beyers must be reversed, and judgment entered in Beyers' favor on his counterclaims. In the alternative, FSB and Beyers are entitled to a new, fair trial.

Dated this 26th day of March, 2014.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Sander J. Morehead

Roger W. Damgaard
Sander J. Morehead
300 South Phillips Avenue, Suite 300
Post Office Box 5027
Sioux Falls, South Dakota 57117-5027
(605) 336-3890
Attorneys for Defendants/Appellants

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using WordPerfect X5, and contains 9,920 words excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word count of the word-processing program to prepare this certificate.

Dated this 26th day of March, 2014.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Sander J. Morehead

Roger W. Damgaard
Sander J. Morehead
300 South Phillips Avenue, Suite 300
Post Office Box 5027
Sioux Falls, South Dakota 57117-5027
(605) 336-3890
Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of March, 2014, I sent via email and United States first-class mail, postage prepaid, two true and correct copies of the foregoing Appellants' Brief to the following:

Lee Schoenbeck
Schoenbeck Law
Post Office Box 1325
Watertown, SD 57201
lee@schoenbecklaw.com

and

Patrick T. Dougherty
Dougherty & Dougherty
100 North Phillips Ave., Suite 705
P.O. Box 2376
Sioux Falls, SD 57101

/s/ Sander J. Morehead

One of the Attorneys for Defendants/Appellants

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 26965/26994 (N.O.R.)
Consolidated with Appeal No. 26917/26918 (N.O.R.)

STANLEY E. STABLER, ROSE MARIE STABLER, BRAD A. STABLER, and BRENDA L. STABLER,

Plaintiffs/Appellees,

vs.

FIRST STATE BANK OF ROSCOE, a South Dakota corporation, and JOHN R. BEYERS,

Defendants/Appellants.

Appeal from the Circuit Court
Fifth Judicial Circuit
McPherson County, South Dakota

HONORABLE SCOTT P. MYREN
Presiding Judge

APPELLEES' BRIEF

WOODS, FULLER, SHULTZ
& SMITH, P.C.
Roger W. Damgaard
Sander J. Morehead
P.O. Box 5027
Sioux Falls, SD 57117
(605) 336-3890

Attorneys for Appellants

SCHOENBECK LAW
Lee Schoenbeck
P.O. Box 1325
Watertown, SD 57201
(605) 886-0010

DOUGHERTY & DOUGHERTY, LLC
Patrick T. Dougherty
P.O. Box 2376
Sioux Falls, SD 57101
(605) 335-8586

Attorneys for Appellees

Notice of Appeal was filed January 27, 2014

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INTRODUCTION

There are two criticisms that consistently apply to Appellants' Brief. First, Appellants never look at the facts in the light most favorable to the jury verdict, when facts are relevant to their argument. Second, for most of their issues, Appellants did not object at trial and give the Trial Court an opportunity to address their concerns.

PRELIMINARY STATEMENT

Defendants/Appellants First State Bank of Roscoe is referred to as "FSBR," and John Beyers is referred to as "Beyers." The Ipswich State Bank is referred to as "ISB." Plaintiffs/Appellees Stanley, Rose Marie, Brad and Brenda Stabler are referred to as "Stan, Rose Marie, Brad or Brenda," unless collectively referred to as "Stablers." The settled record is referenced by "SR" followed by the appropriate page number(s) of the document. Testimony from the jury trial is referenced as "JT" followed by the appropriate page number. Testimony from the court trial is referenced as "CT" followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Stablers agree with Appellants.

LEGAL ISSUES

1. WHETHER STAN AND ROSE MARIE'S FRAUD CLAIM WAS BASED UPON A MISTAKE OF LAW? THE CIRCUIT COURT HELD IN THE NEGATIVE.
   - 11 U.S.C. § 524(c)
   - DuBois v. Ford Motor Credit Co., 276 F.3d 1019 (8th Cir. 2002)

2. WHETHER STAN AND ROSE MARIE'S CLAIMS SHOULD HAVE BEEN DISMISSED BECAUSE OF AN ELECTION OF REMEDIES. THE CIRCUIT COURT HELD IN THE NEGATIVE.
   - Ripple v. Wold, 1996 S.D. 68, 549 N.W.2d 673
   - Dobbs Law of Remedies at § 9.4 (2d Ed. 1993)
   - Anderson v. Johnson, 441 N.W.2d 675 (S.D. 1989)

3. WHETHER STAN AND ROSE MARIE'S CLAIMS SHOULD HAVE BEEN DISMISSED BECAUSE OF JUDICIAL ESTOPPEL. THE CIRCUIT COURT HELD IN THE NEGATIVE.

- Webb v. Webb, 2012 S.D. 41, 814 N.W.2d 818
- Canyon Lake Park, L.L.C. v. Loftus Dental, P.C., 2005 S.D. 82, 700 N.W.2d 729

4. WHETHER STAN AND ROSE MARIE'S CLAIMS SHOULD HAVE BEEN DISMISSED FOR A LACK OF DAMAGES. THE CIRCUIT COURT HELD IN THE NEGATIVE.

- SDCL 21-1-1
- RESTATEMENT (SECOND) OF TORTS § 903 (1977)
- SDCL 21-1-9

5. WHETHER FSBR AND BEYERS SHOULD RECEIVE A NEW TRIAL BASED UPON SURPRISE OR NEWLY-DISCOVERED EVIDENCE, BECAUSE OF TOM HOLDHUSEN'S TESTIMONY. THE CIRCUIT COURT HELD IN THE NEGATIVE.

- Bakker v. Irvine, 519 N.W.2d 41 (S.D. 1994)
- Johnson v. Schmitt, 309 N.W.2d 838 (S.D. 1981)
- State v. Klein, 444 N.W.2d 16 (S.D. 1989)

6. WHETHER FSBR AND BEYERS SHOULD RECEIVE A NEW TRIAL BASED UPON SURPRISE OR NEWLY-DISCOVERED EVIDENCE, BECAUSE OF A CLAIM OF A NEW THEORY OF FRAUD. THE CIRCUIT COURT HELD IN THE NEGATIVE.

- State v. Klein, 444 N.W.2d 16 (S.D. 1989)
- Veith v. O'Brien, 2007 S.D. 88, 739 N.W.2d 15

7. WHETHER FSBR AND BEYERS ARE ENTITLED TO A NEW TRIAL BECAUSE OF TESTIMONY CONCERNING THE PART OF THEIR PLAN INVOLVING BRAD AND BRENDA AT ISB. THE CIRCUIT COURT HELD IN THE NEGATIVE.

- SDCL 19-12-5
- State v. Wright, 2009 S.D. 51, 768 N.W.2d 512
- Veith v. O'Brien, 2007 S.D. 88, 739 N.W.2d 15

8. WHETHER FSBR AND BEYERS ARE ENTITLED TO A NEW TRIAL BASED UPON THE JURY BEING INSTRUCTED ON PUNITIVE DAMAGES. THE CIRCUIT COURT HELD IN THE NEGATIVE.

- SDCL 21-1-9
- Cosand v. Bunker, 2 S.D. 294, 50 N.W. 84 (1891)
- Mid-Am. Mktg. Corp. v. Dakota Indus., Inc., 289 N.W.2d 797 (S.D. 1980)

9. WHETHER FSBR AND BEYERS ARE ENTITLED TO A NEW TRIAL BASED ON THE TESTIMONY OF BOB NASH. THE CIRCUIT COURT HELD IN THE NEGATIVE.

- Veith v. O'Brien, 2007 S.D. 88, 739 N.W.2d 15

- In re Estate of Dokken, 2000 S.D. 9, 604 N.W.2d 487
- State v. Guthrie, 2001 S.D. 61, 627 N.W.2d 401

10. WHETHER FSBR AND BEYERS ARE ENTITLED TO A NEW TRIAL BASED ON THE TESTIMONY OF ATTORNEY ROB RONAYNE. THE CIRCUIT COURT HELD IN THE NEGATIVE.

- SDCL 19-14-19
- State v. Dale, 439 N.W.2d 98 (S.D. 1989)
- Veith v. O'Brien, 2007 S.D. 88, 739 N.W.2d 15

11. WHETHER FSBR AND BEYERS ARE ENTITLED TO A NEW TRIAL BECAUSE OF THE JURY INSTRUCTION REGARDING PARTICIPATIONS. THE CIRCUIT COURT HELD IN THE NEGATIVE.

- SDCL 51A-4-16
- State v. Klein, 444 N.W.2d 16 (S.D. 1989)

12. WHEHER BEYERS AND FSBR ARE ENTITLED TO A NEW TRIAL BECAUSE THE JURY LEARNED THAT BRAD AND BRENDA DIDN'T HAVE TO PAY ON THE $650,000 NOTE. THE CIRCUIT COURT HELD IN THE NEGATIVE.

- Grynberg v. Citation Oil & Gas Corp., 1997 S.D. 121, 573 N.W.2d 493

13. WHETHER FSBR AND BEYERS ARE ENTITLED TO A NEW TRIAL BECAUSE THE JURY WAS INSTRUCTED ON THE CONSPIRACY CLAIM. THE CIRCUIT COURT HELD IN THE NEGATIVE.

- Garza v. City of Omaha, 814 F.2d 553 (8th Cir. 1987)
- Wiles v. Capitol Indem. Corp., 280 F.3d 868 (8th Cir. 2002)

14. WHETHER THE JULY 16, 2002, CREM PARTIALLY LAPSED DUE TO A FAILURE TO FILE A TIMELY ADDENDUM. THE CIRCUIT COURT HELD IN THE AFFIRMATIVE.

- SDCL 44-8-26 (pre-2011 amendment)
- In re Ulmer, 1992 WL 1482495, at *5 (Bankr. D.N.D. 1992)
- Connecticut Nat. Bank v. Germain, 503 U.S. 249, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)

STATEMENT OF THE CASE

Appellants' Brief includes many arguments in their Statement of the Case. Stablers have responded to these arguments in the "Argument" section of the Brief. For a Statement of the Case, Stablers incorporate by this reference their Statement of the Case on pp. 4-6 of

Appellants' Brief in Appeal No. 26917, which is a more objective review of the procedural history.

STATEMENT OF THE FACTS

Appellants' Statement of Facts is not consistent with the requirement of reporting the facts in a light most favorable to supporting the verdict. Hewitt v. Felderman, 2013 S.D. 91, 841 N.W.2d 258, 262.

Stablers incorporate by this reference their Statement of the Facts on pp. 6-22 of Appellants' Brief in Appeal No. 26917, which Statement of Facts is attached to this Brief as Appellees' App. A.

ARGUMENT

I. JUDGE MYREN PROPERLY DENIED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON STAN AND ROSE MARIE'S FRAUD CLAIM.

FSBR and Beyers ask the Supreme Court to reverse the denial of summary judgment. Set forth below are the standards for the review of a denial of a motion for summary judgment, and the facts that support the Trial Court's denial of FSBR and Beyers' motion for summary judgment. FSBR and Beyers' discussion on pp. 16-28 of their brief is largely without regard to the question of whether or not there was an issue of fact presented to the Trial Court at the time of the motion for summary judgment.

A. Standard of review.

This Court has recognized the following rules:

1. Did FSBR and Beyers demonstrate the absence of any genuine issue of material fact?

2. The evidence must be viewed most favorably to Stan and Rose Marie.

3. Reasonable doubt should be resolved against FSBR and Beyers.

4. Stan and Rose Marie must present specific facts showing that a genuine, material issue for trial exists.

5. Was the law correctly applied?

6. Is there any basis which supports the Trial Court? Waddell v. Dewey Cnty. Bank, 471 N.W.2d 591, 593 (S.D. 1991).

B. There were genuine issues of material fact.

FSBR and Beyers get their "facts" by paraphrasing the oral arguments from a hearing where FSBR and Beyers sought reconsideration of the denial of their previously-filed motion for summary judgment. (SR 2075-2076.) Instead, the question before this Court is whether the Trial Court had genuine issues of material fact before it.

The Trial Court had Stablers' submission, entitled "Genuine Issues of Material Fact" (SR 1931-1935), which included Paragraphs 1-8 with citations to the record, documenting a question of fact. (Appellees' App. B.)

The Trial Court also had the Affidavit of Stanley Stabler and Rose Marie Stabler, which supported questions of fact in Paragraphs 2-5 and 7. (Appellees' App. C.)

FSBR and Beyers filed the required Statement of Undisputed Material Facts (SR 1869-1897), to which Stan and Rose Marie responded (SR 1911-1930), which included at least three statements by FSBR and Beyers (Appellees' App. D), and responses by Stan and Rose Marie (Appellees' App. E), that revealed questions of fact for the jury.

As admitted in FSBR and Beyers' Brief on p. 9, the $650,000 note actually included $376,900 of ECAS debt. Thus, Beyers and FSBR misrepresented to Stan and Rose Marie the content of the note. Furthermore, as was developed by FSBR and Beyers in their cross-examination of Stan at trial, Beyers and FSBR told Stan and Rose Marie that they only owed $100,000 of the note:

> Well, John had called the night before and told us this is what would be coming. He said $100,000 is yours, you sign this, and Brad will sign for the other $550,000.

(JT 371:21-24. Also see JT 372:24 - 373:2 in Appellees' App. F.)

Beyers bolstered his fraud by preparing financial statements for Stan for two years following the note, representing that Stan only owed the $100,000 that Beyers had told Stan that he owed. (Exs. 17 and 18; JT 120-126.)

There was a genuine issue of material fact to support Judge Myren's denial of the motion for summary judgment.

C. This fraud was not about a mistaken representation of law.

Set forth in Stan and Rose Marie's Appellants' Brief in Appeal No. 26917 is a detailed Statement of Facts from pp. 6-22 (attached as Appellees' App. A). In his Memorandum Decision Following Court Trial dated July 8, 2013, Judge Scott Myren described this as a well thought-out scheme executed by Beyers and FSBR over a number of years. (SR 2825 - attached as Appellees' App. H.) This plan was not a mere representation about a mistake of law.

Additionally, Beyers and FSBR's argument about the alleged "mistake" of law rings hollow when put in the context of the statutes involved and ignored by them. Their scheme was to avoid the fresh start protection provided to debtors after a bankruptcy discharge. In part, they did this by avoiding the reaffirmation provisions contained in 11 U.S.C. § 524(c). There is no dispute that FSBR and Beyers did not seek reaffirmation of the discharged debt, and that the debt could not have been reaffirmed. (JT 438:10 - 439:10; 545:16 - 546:2.)

The law in the Eighth Circuit has been clear that "a post-petition contract renewing pre-petition debt is a reaffirmation agreement and is only effective with court approval in strict compliance with 11 U.S.C. § 524(c)." DuBois v. Ford Motor Credit Co.,

276 F.3d 1019, 1022 (8th Cir. 2002), and recently reaffirmed in In re King, 480 B.R. 321, 328 (B.A.P. 8th Cir. 2012). There are seven very specific provisions for any reaffirmation agreement required by 11 U.S.C. § 524(c).

Very specific provisions of the Bankruptcy Code must be complied with for any reaffirmation agreement to be enforceable: (1) the agreement was made in advance of the debtor's discharge; (2) the agreement contains a clear and conspicuous statement advising the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after the agreement is filed with the court, whichever occurs later; (3) the agreement has been filed with the court; (4) the debtor has not rescinded the agreement; (5) the debtor has been warned by the bankruptcy judge as to the effects of the agreement; (6) the court finds that the agreement does not impose an undue hardship on the debtor; and (7) the court finds that the agreement is in the debtor's best interest. 11 U.S.C. § 524(c). (Appellees' App. G.)

DuBois established the law in the Eighth Circuit since 2002, but Beyers and FSBR have attempted to confuse the issue by arguing a minority position, and claiming a "split of authority." The minority position advocated by them has been rejected for many years by most published decisions. Matter of Arnold, 206 B.R. 560 (Bankr. N.D.Ala. 1997); In re Stevens, 217 B.R. 757 (Bankr. D.MD. 1998); In re Zarro, 268 B.R. 715 (Bankr. S.D.N.Y. 2001); In re Watkins, 240 B.R. 668 (Bankr. E.D.N.Y. 1999); In re Cherry, 247 B.R. 176 (Bankr. E.D.Va. 2000); In re Weeks, 400 B.R. 117 (Bankr. W.D.Mich. 2009).

In re Adams put FSBR's conduct in perspective:

> . . . 11 U.S.C. § 524(c). That section permits reaffirmations in certain limited circumstances, following specific statutory procedures and only under the supervision of the bankruptcy court or, when applicable,

> the debtor's attorney. **To pervert those procedures is to strike at the heart of the bankruptcy system.**

229 B.R. 312, 313 (Bankr. S.D.N.Y. 1999)(emphasis added).

This is not about a mistake of law. Even on that issue, Beyers claims that Attorney Ronayne told FSBR that the Bank didn't need to get a reaffirmation agreement (JT 95:14-21), and that Stablers would pay all of the discharged debt (JT 136) was disputed by Attorney Ronayne. (JT 547:18 - 548:11; JT 550:25 - 551:15.)

D. Judge Myren correctly denied summary judgment on the issues of election of remedies and judicial estoppel.

1. Election of remedies.

In Beyers and FSBR's Brief on pp. 24-26, they argue that summary judgment should have been granted on the issue of election of remedies, and reference U.S. Lumber, Inc. v. Fisher, 523 N.W.2d 87, 89 (S.D. 1994). The election of remedies argument is misplaced. After U.S. Lumber, Inc. v. Fisher, this Court decided Ripple v. Wold, 1996 S.D. 68, 549 N.W.2d 673, noting that the doctrine of election is remedies is "disfavored," and has one specific purpose:

> The purpose of the election of remedies doctrine is not to block recourse to any particular remedy but to prevent duplicate remedy for a single wrong.

Id. at 675.

This Court has favorably cited the explanation in Dobbs Law of Remedies at § 9.4 (2d Ed. 1993):

> The election doctrine does not apply to preclude the plaintiff from pursuing inconsistent theories or even inconsistent factual assertions. Modern procedure permits alternative and inconsistent claims and also alternative and inconsistent defenses. No objection can be raised, for example, to the plaintiff's claim of both common law fraud and statutory misrepresentation, or to the claim of both fraud and contract breach, even though the plaintiff will be entitled to but one satisfaction.

Ripple, 549 N.W.2d at 675.

Additionally, it doesn't appear from Appellants' Brief that a motion for summary judgment against Stan and Rose Marie on the basis of election of remedies was filed before the Trial Court, and the issue therefore is not preserved. Anderson v. Johnson, 441 N.W.2d 675, 677 (S.D. 1989).

2. Judicial estoppel.

The elements of judicial estoppel are set forth in Webb v. Webb, 2012 S.D. 41, 814 N.W.2d 818, 821. Judicial estoppel does not involve parties pleading in the alternative, but involves parties taking different positions in two separate proceedings. Canyon Lake Park, L.L.C. v. Loftus Dental, P.C., 2005 S.D. 82, 700 N.W.2d 729, 738.

The Stablers have never varied from their position that the $650,000 mortgage in 2004 was obtained by fraud. Not in a separate case, but in this case, the Trial Court had earlier made findings that there were defects in two of the Bank's earlier notes and mortgages. One set of issues dealt with a 2000 mortgage and related notes, and Beyers has not appealed that issue. (SR 1481, 1498-1499.)

The other issue is whether a 2002 collateral real estate mortgage complied with the statutory requirements for a collateral real estate mortgage (SR 1481, 1499-1500), which is addressed below at pp. 33-37.

Judicial estoppel does not apply, because there is no risk of inconsistent legal positions when the rulings are all within the same proceeding and before the same Court.

In this matter, the Trial Court reconciled the earlier rulings, including the one not appealed, by finding that the $650,000 mortgage of March 9, 2004, was valid and enforceable on its face, unless Stan and Rose Marie could prove that Beyers and FSBR had committed fraud in the creation of the note. (Order on Dispositive Motions filed December 11, 2012 - SR 2487.)

There was no judicial estoppel issue upon which Judge Myren could have granted summary judgment.

E. Judge Myren correctly denied summary judgment on the claim of an absence of damages.

The Trial Court addressed this issue in ruling on a pretrial motion (Order on Pretrial Motions – SR 2584), that the jury could decide damages with respect to whether or not the $650,000 note was procured by fraud. From the beginning of the lawsuit, Stan and Rose Marie have contended that the 2004 promissory note and mortgage for $650,000 were procured by fraud. (Amended Complaint – SR 271.) As set forth under section 1.B. above, and in Stan and Rose Marie's Appellants' Brief in Appeal No. 26917, there was a substantial factual record before the Court that the Defendants had engaged in fraud in procuring $650,000 of debt against Stan and Rose Marie.[1] In fact, the jury subsequently found that $439,100 of Stan and Rose Marie's debt was procured by fraud. (Special Verdict Form – SR 2659.) Debt of $439,100 being wrongfully asserted against Stan and Rose Marie is a loss or harm. SDCL 21-1-1.

Beyers held a $650,000 promissory note and mortgage and was asserting that debt against Stan and Rose Marie and their farm. (Exs. 7 and 8.) Throughout the case, Stan and Rose Marie asserted, and the Trial Court ruled, that Stan and Rose Marie should be allowed to try the fraud in the procurement case and seek any damages related thereto. (Pretrial Hearing transcript: Appellants' Appendix at App. 142, p. 72:14-22; and Appellants' Appendix at App. 140, p. 62:12-16.) By the time of the trial, Beyers had been asserting a $650,000 debt, plus

[1] Beyers and FSBR buried their fraud deep, and the Trial Court commented on this in its February 3, 2011, Memorandum Opinion granting summary judgment on some aspects of the case. See Appellees' App. I.

accumulated interest, against Stan and Rose Marie and their farm for eight years. The damage claim that the jury found, of the amount of debt that was procured by fraud, is a very real damage claim:

> When there has been harm only to the pecuniary interests of a person, compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed.

RESTATEMENT (SECOND) OF TORTS § 903 (1977). Additionally, the $650,000 note and mortgage have a presumed value of $650,000. SDCL 21-1-9; Cosand v. Bunker, 2 S.D. 294, 50 N.W. 84, 85 (1891); McKindley v. Citizens' State Bank of Edgeley, 36 N.D. 451, 161 N.W. 601, 602-603 (1917).

2. FSBR AND BEYERS ARE NOT ENTITLED TO A NEW TRIAL.

A. Standard of review.

Judge Myren denied the motion for a new trial, and his decision is reviewed under an abuse of discretion standard. Hewitt v. Felderman, 2013 S.D. 91, 841 N.W.2d 258, 262. If the jury's verdict can be explained with reference to the evidence, viewing the evidence in a light most favorable to the verdict, the verdict will be sustained. Id. A jury's verdict should be set aside only in extreme cases where the jury has acted under passion or prejudice, or where the jury has palpably mistaken the rules of law. Id.

One of the rules this Court doesn't utilize is the claim asserted by Beyers and FSBR that an erroneous legal decision automatically is an abuse of discretion. Credit Collection Servs., Inc. v. Pesicka, 2006 S.D. 81, 721 N.W.2d 474, 476. Like all human beings, trial judges may make incorrect legal decisions in the course of a seven-year piece of litigation, culminating in both a jury trial and a court trial, and the reality is that the parties are not entitled to a "perfect trial." State v. Wright, 2009 S.D. 51, 768 N.W.2d 512, 527. Judge Myren gave the parties a fair trial.

B. FSBR and Beyers are not entitled to a new trial because of surprise or newly-discovered evidence. SDCL 15-6-59(a)(3) and (4).

1. Tom Holdhusen's testimony was neither a surprise nor newly-discovered evidence.

First, and most important, the testimony of Tom Holdhusen that is referred to in Beyers and FSBR's Brief on pp. 29-31, appears in the cross-examination on p. 422 of the jury trial transcript at lines 20-21. What does *not* appear on that page is an objection to the testimony. Beyers and FSBR failed to preserve the issue for appeal. Bakker v. Irvine, 519 N.W.2d 41, 47 (S.D. 1994); Anderson v. Johnson, 441 N.W.2d 675,677 (S.D. 1989).

Second, the two lines objected to are in the redirect, occurring after FSBR and Beyers opened the door on cross-examination. (JT 420:16-21 - Appellees' App. F.)
Once Beyers and FSBR opened the door, they were not entitled to challenge the admission of the evidence. State v. Klein, 444 N.W.2d 16, 19 (S.D. 1989).

Additionally, the two lines of testimony raised on appeal are taken out of context. Tom Holdhusen's testimony was important, but not for the reasons FSBR and Beyers use in their appeal. Instead, Tom Holdhusen told the jury how Beyers said that Beyers was moving bad debt off the bank books to hide the bad debt from bank examiners.[2] (JT 406:11-24 - Appellees' App. F.)

Tom Holdhusen was also able to testify to Beyers' personal involvement, using his personal guaranty to move the money off FSBR bank books. (JT 407:6-16 - Appellees' App. F; Ex. 54.)

[2] Because Beyers denied that he had been moving debt to hide it from bank examiners, and that he had ever told anybody that, Tom Holdhusen's testimony was powerful for putting Beyers' veracity at issue. (JT 127:12-16.]

Holdhusen was also damaging because he was able to testify to that part of Beyers' plan that involved the practice of altering financial statements. (Appellees' App. F - JT 408:13 - 409:9; Ex. 161.)

Finally, with respect to Tom Holdhusen's decision at the subsequent Court Trial to recant his description of Beyers' conduct as unethical, the Trial Judge was in the position to judge the credibility and bias of the witness. Johnson v. Schmitt, 309 N.W.2d 838, 841 (S.D. 1981). Most important, and not mentioned in Beyers and FSBR's Brief to this Court, at the Court Trial it came out that Tom Holdhusen had a very strong reason to be biased in favor of Beyers, and to subsequently change his testimony as Beyers invited him to do at the Court Trial. Beyers and his family had recently purchased Tom Holdhusen's family bank, a fact that was first disclosed at the Court Trial! (CT 73:5-11.)

2. There is no new theory of fraud that constitutes surprise, warranting a new trial.

In FSBR and Beyers' Brief, pp. 32-33, they contend that Stan testified for the first time at trial as follows:

> Stan belatedly claimed Beyers defrauded him by telling Stan he would only have to pay $100,000 of the $650,000 note.

(Appellants' Brief, p. 32.)

The testimony now described as a "surprise" is testimony elicited by FSBR and Beyers in the cross-examination of Stan at the jury trial. Each of the references cited on p. 32 of Appellants' Brief is from their cross-examination of Stan. (Appellants' App. 177-79 - JT 364:8-17; 364:24-365:1; 367:18-24; 368:14-18; 369:16-22; 371:21-24; 372:24-373:2.) To that extent, FSBR and Beyers cannot object to testimony for which they opened the door. State v. Klein, 444 N.W.2d 16, 19 (S.D. 1989).

Additionally, when the testimony was solicited by counsel for Beyers and FSBR and the answer was received, Beyers and FSBR did not object, ask the Court to strike, seek a curative instruction, or take any other action to present a concern to the Trial Court and preserve the issue for appeal. Veith v. O'Brien, 2007 S.D. 88, 739 N.W.2d 15, 26. (Appellants' App. 177-79 - JT 364:8-17; 364:24-365:1; 367:18-24; 368:14-18; 369:16-22; 371:21-24; 372:24-373:2.) The record cited shows that counsel for FSBR and Beyers went back to the same topic and solicited the same answer on multiple occasions in the course of the cross-examination.

Also, the record would support that it wasn't a surprise, because the same information was disclosed in Plaintiffs' Responses to Defendants' Statement of Undisputed Facts on October 24, 2012. (See Appellees' App. E.)

C. FSBR and Beyers are not entitled to a new trial pursuant to SDCL 15-6-59(a)(7).

1. Beyers is not entitled to a new trial because of testimony concerning the part of the plan involving Brad and Brenda at the Ipswich State Bank.

Beyers and FSBR pursued a continuous plan over approximately four years to obtain Stan and Rose Marie's land as satisfaction of uncollectible debt of ECAS and discharged obligations of Brad and Brenda's. (Appellants' Brief in Appeal No. 26917, pp. 6-22, attached as Appellee's App. A.) Evidence concerning portions of the plan involving ISB that showed FSBR and Beyers moved debt off the bank books to avoid detection, and prepared false financial statements, were part of the fraud plan. Relevant evidence with respect to motive, opportunity, intent, preparation, plan, and knowledge are admissible under SDCL 19-12-5. The rule contained in SDCL 19-12-5 is a rule of inclusion. State v. Wright, 1999 S.D. 50, ¶¶ 13-14, 593 N.W.2d 792, 798.

To bring a motion for a new trial pursuant to SDCL 15-6-59(a)(7), it must be based on an objection. Beyers and FSBR's appeal is based upon an alleged "conformity" objection contending that other acts evidence was introduced to prove character. (Appellants' Brief, pp. 33-36.) Beyers and FSBR never made an objection concerning 404(b), and alleging character evidence, conformity, or anything that would alert the Trial Court to the concern that is reflected in FSBR and Beyers' Brief. The only objection made by FSBR and Beyers was once as to relevancy (JT 126:21-22), and at no opportunity did FSBR and Beyers raise before the Trial Court their concern about "conformity" issues. Failure to bring the issue to the Court by way of objection waives the issue. Veith v. O'Brien, 2007 S.D. 88, 739 N.W.2d 15, 26.

Missing from FSBR and Beyers' Brief is also the fact that the parties had stipulated that evidence would be used at both the jury trial and Court trial, because of the overlap within the issues. (CT 7:20 - 8:1.) Immediately before the jury trial started, the parties shared with the Court their belief that there was overlapping evidence and that they could sort that out in their presentations. (Hearing in Chambers Prior to Voir Dire 4:17 - 6:12 - Appellees' App. N.) The Trial Court admonished the parties with respect to their agreement:

> It sounds like you folks understand the agreement you have and I will go along with it. If there is some problem along the way, just approach and come back and talk about it to make sure if there is some confusion.

(Hearing in Chambers Prior to Voir Dire, 6:13-17 - Appellees' App. N.)

Attorney Damgaard advised the Court that he would make objections if necessary, and the Court expressed its understanding. (Appellees' App. N.)

Beyers and FSBR never objected through the testimony of Beyers providing a false financial statement to ISB, through the testimony of Beyers moving the debt off the bank books, and using ISB as one part of

that process. The testimony on that topic appeared through several witnesses at the trial, without objection, including the entire direct examination of Tom Holdhusen. (JT 406-411.)

Stablers raised the issue pre-trial, and the Court had the opportunity to review and consider that the evidence with respect to the ISB loan was relevant to show how Beyers intended to hide the debt and cover up the fraud. (Pretrial hearing, 64:9 – 65:12.) In that exchange with the Court, it appears that counsel for Beyers and FSBR are agreeing to the Court's ruling, and certainly are not telling the Court of a concern with respect to a character conformity issue.

2. Beyers is not entitled to a new trial because of the jury being instructed on punitive damages.

First, the Trial Court properly instructed the jury on exemplary damages. Stan and Rose Marie have set forth their support for the $20,000 punitive damage award on pp. 32-33 of Appellants' Brief in Appeal No. 26917. The note and mortgage that the jury found were procured by fraud had a presumed value of $650,000. SDCL 21-1-9; Cosand v. Bunker, 2 S.D. 294, 50 N.W. 84, 85 (1891). The jury found that $439,100 of the debt that Beyers and FSBR were asserting against Stan and Rose Marie were procured by fraud. (SR 2659.) There were actual damages to support an award of punitive damages.

Second, the punitive damage instructions are separate from the fraud instructions. There is a presumption that the jury understands and follows the Court's instructions. Mid-Am. Mktg. Corp. v. Dakota Indus., Inc., 289 N.W.2d 797, 799 (S.D. 1980).

Third, Beyers and FSBR contend that the jury finding of fraud was the product of the jury being instructed on punitive damages. This Court's standard with respect to a motion for a new trial is that if the jury's verdict can be explained with reference to the evidence, and the evidence is viewed in the light most favorable to the verdict, the

verdict should be sustained. Hewitt v. Felderman, 2013 S.D. 91, 841 N.W.2d 258, 262. The factual record to support the jury's finding of fraud is substantial, and is laid out in detail, with every sentence cited to the record, in Stan and Rose Marie's Appellants' Brief in Appeal No. 26917, pp. 6-22 (attached as Appellees' App. A).

Finally, Beyers' personal financial status was interjected into his scheme by Mr. Beyers' own conduct. As part of the process of fraudulently collecting the debt against Stan and Rose Marie's land, Beyers gave a personal guaranty and a financial statement to support it. (See Appellees' App. A at p. 17.) If this jury was prejudiced by the punitive damage instruction, or the introduction of Beyers' wealth into the record, then Beyers and FSBR have failed to explain why the punitive damage award was only $20,000, and why the jury's specific finding on the amount of the $650,000 note procured by fraud was the exact amount that the record shows was procured by fraud.

3. Beyers is not entitled to a new trial because of the testimony of Bob Nash.

Beyers is asking this Court to order a new trial because expert witness Bob Nash testified about facts that showed Beyers' motive to hide debt from bank examiners. First, it is important to note that FSBR successfully obtained an order prohibiting Bob Nash, or any witness, from testifying concerning the Defendants' intent to defraud or not to defraud. (SR 2582.) The Trial Court explained its rationale for limiting the testimony. (Pretrial hearing, pp. 41-49.) There is no allegation, based on the citation of the record, that the Trial Court's order was violated in any respect during the trial. When Bob Nash testified to the facts concerning the dates of bank examinations and the movement of debt (JT 460:15 - 464:16), Beyers and FSBR made no objection to the testimony. Failure to object waives the issue. Veith v. O'Brien, 2007 S.D. 88, 739 N.W.2d 15, 26.

Second, Beyers is mistaken when he attributes Bob Nash as the source of evidence concerning Beyers moving debt off the bank books. Tom Holdhusen testified that Beyers told him of Beyers' motivation to move the debt off the bank books before auditors would see it. (JT 406:17-22.) Stan and Rose Marie testified that Beyers said something to them about a problem with auditors being a reason for all of the documents Beyers needed them to sign on March 9, 2004, at their farm. (Stan: JT 332:11-16 and Rose Marie: JT 148:11-14.)

Bob Nash was an expert witness whose knowledge, skill, experience, training, and education assisted the jury in understanding the facts. SDCL 19-15-2. The Trial Court had the opportunity to weigh Mr. Nash's credentials and opinions in light of the complex debtor-creditor and banking issues that were going to be presented before the jury. (Pretrial Hearing, p. 38:9 - 49:12.)

Expert witnesses have been allowed to testify as to the state of mind in South Dakota. In re Estate of Dokken, 2000 S.D. 9, 604 N.W.2d 487, 498; State v. Guthrie, 2001 S.D. 61, 627 N.W.2d 401, 415. An expert cannot just tell a jury an expert's opinion, that merely tells the jury what result to reach—that is impermissible. However, an expert can provide relevant testimony that assists the jury in understanding the evidence. Id. The expert opinion has to do more than offer the jury something they can infer for themselves. In the matter before the Court, Bob Nash's understanding of commercial transactions helped the jury understand why the course of conduct by the Defendants was not normal. (JT 434-466.) Objections to Bob Nash's testimony, which weren't made, would have gone to weight and not admissibility. Dokken at 499.

Bob Nash explained the reaffirmation process in a bankruptcy, and the effect of a bankruptcy on personal guarantees, in terms lay people could understand. (JT 432-445.) He testified to how the Bankers

System document production works, which was relevant to the abnormal documents Beyers and FSBR used for the fraudulent transactions with Stan and Rose Marie. (JT 459-460.) He explained what bank examiners make banks do when they find non-performing debts have been retained on bank books. (JT 461-462.) He explained how the bank examination process is subverted if the non-performing debts are moved in a manner that doesn't allow the examiners to look at them. (JT 462-464.) All of this testimony was without objection by Beyers or FSBR. Additionally, Beyers and FSBR's attorney had the opportunity to test Bob Nash's statements and opinions through 27 pages of cross-examination, without objection by the Stablers. (JT 467-494.)

4. Beyers is not entitled to a new trial because of the testimony of Attorney Rob Ronayne.

There is no basis for a new trial based upon the admission of the testimony of Rob Ronayne. First, FSBR and Beyers are the party that called Rob Ronayne as a witness on a broad range of topics. (JT 500-522.) Once they called him to the stand, it opened his testimony to cross-examination. SDCL 19-14-19; State v. Dale, 439 N.W.2d 98, 109 (S.D. 1989). Second, there were no objections by FSBR and Beyers to any of the testimony of Rob Ronayne, direct or cross-examination. The issues with respect to Rob Ronayne's testimony are not preserved for appeal. Veith v. O'Brien, 2007 S.D. 88, 739 N.W.2d 15, 26. Third, FSBR and Beyers cite to a statement made in closing argument, which also was not objected to, and therefore not preserved for appeal. (JT 645:4-20.) Veith, 739 N.W.2d at 26.

5. FSBR and Beyers are not entitled to a new trial because of the jury instruction regarding participations.

FSBR and Beyers made a relevancy objection to Instruction No. 18. (JT 625:7-11 - Appellees' App. F.)

Instruction No. 18 explained what a participation is. (Appellees' App. J.) The phrase "participation" was used many times in the course of the trial. (JT 102-03, 105, 114, 584, 587.) Judge Myren provided a well-reasoned opinion for an instruction explaining the banking concept of "participation" to the jury. (JT 625:12 - 626:5 - Appellees' App. F.)

There was a second instruction with respect to participations, Instruction No. 19. (SR 2648 - Appellees' App. K.) Defendants' only objection to that instruction was that the statute upon which it is based--SDCL 51A-4-16--is stated in the affirmative rather than prohibitive terms. (JT 626:7-9 - Appellees' App. F.) Defendants proposed no alternative instruction and made no other objection before the Trial Court. In Defendants' Appellants' Brief, they do not contend that Instruction No. 19 is a misstatement of the law, and therefore that issue is not properly preserved. Grynberg v. Citation Oil & Gas Corp., 1997 S.D. 121, 573 N.W.2d 493, 503.

FSBR and Beyers make two additional arguments in this section. First, they claim that the participation issue is related to their objection concerning the testimony of Tom Holdhusen. The testimony they cite to is from redirect examination, and directly confronts issued raised by the Bank on cross-examination. Once the Bank opened the door, they cannot object to the cross-examination. State v. Klein, 444 N.W.2d 16, 19 (S.D. 1989). Additionally, the testimony referenced by FSBR and Beyers in their Brief is testimony that they did not object to, and did not preserve as an appeal issue. (JT 422:14-21 - Appellees' App. F.) Veith, 739 N.W.2d at 26.

Secondly, FSBR and Beyers claim that a statement made in closing argument was error, but that statement also was not objected to. Veith, 739 N.W.2d at 26. (JT 685:8-11.)

6. Beyers and FSBR are not entitled to a new trial because the jury learned that Brad and Brenda didn't have to pay on the $650,000 note.

Because of the scope of FSBR's fraudulent scheme, as set forth in Appellees' App. A, and because of the defense FSBR and Beyers were asserting about why they should be excused from getting Brad and Brenda's names on a $650,000 note that was largely for discharged debt, the Trial Court was forced to provide some explanation for the jury to put the issues in context. Throughout the entire proceeding, Stablers contended that the 1978 Bankruptcy Code on reaffirmations was clear, that subsequent cases had made it clear, that the Eighth Circuit Court of Appeals rulings affirmed the clear language of the statute, and that Beyers and FSBR were lying about believing that they could avoid the reaffirmation statutes and continue to pursue discharged debt.

At the pretrial, the Trial Court agreed with FSBR and Beyers, and indicated it would give a preliminary instruction accordingly, to help clarify the issue for the jury. (Appellees' App. O (SR 2582); Appellants' App. 38.)

The Court presented the parties with Preliminary Instruction No. 10 (Appellees' App. L – SR 2598) to address the issue, and when presented with that instruction, Mr. Morehead said: "We don't have any objection, Your Honor." (Hearing in Chambers Prior to Voir Dire, 3:6 – Appellees' App. N.) The issue is not preserved for appeal because Appellants failed to object. Grynberg v. Citation Oil & Gas Corp., 1997 S.D. 121, 573 N.W.2d 493, 503.

7. The Trial Court properly instructed the jury on the conspiracy claim.

FSBR and Beyers did move for summary judgment on the conspiracy count, which motion was denied. (SR 1867.) FSBR and Beyers did not object to the jury instructions with respect to conspiracy, and their Brief before this Court does not contend that they made such

objections. While it is true that a corporation cannot conspire with itself (agents), an intra-corporate conspiracy may be established where individual defendants act outside the scope of their employment for personal reasons, out of self-interest, or for their own benefit. Garza v. City of Omaha, 814 F.2d 553, 556 (8th Cir. 1987); Wiles v. Capitol Indem. Corp., 280 F.3d 868, 871 (8th Cir. 2002); and Crutcher-Sanchez v. Cnty. of Dakota, 687 F.3d 979, 987 (8th Cir. 2012). As the record demonstrates, Beyers regularly acted outside of the scope of his employment with respect to the Stablers.

Beyers owned 100 percent of the stock in FSBR (Ex. 71), and in 2006, the net value of the stock was $4,647,000. (Ex. 70.) The ECAS debt (Ex. 160, Bates No. 390), and Brad and Brenda's discharged debt (Ex. 57), are approximately equal to 10 percent of the value of Beyers' interest in FSBR. Beyers had a personal financial reason to conspire to find a way to collect the ECAS debt and the discharged debt against Stan and Rose Marie's land.

Beyers' personal role in the detailed fraudulent plan is well documented. (See Appellees' App. A.) In support of FSBR and Beyers' argument, it is important to note that they represent to this Court: "Beyers did not become personally involved in the obligation until 2008, after the lawsuit started." (Appellants' Brief, p. 45.) The record before this Court tells a different story. For example, in July of 2003, Beyers reported to the bank board that he had moved $357,000 of ECAS debt off the bank books. (JT 84:22 – 85:5; Ex. 160, Bates No. 390.) If Beyers were not involved in this in a personal capacity, then there should be no involvement with this debt after that date. However, if the Court directs its attention to Ex. 13, it will see a December 27, 2006, handwritten letter from Beyers, which has attached to it a payment schedule showing payments Beyers was collecting for

interest on the $629,000 note.[3] Beyers is personally involved in collecting the Stabler payments for debt not held by the bank. Noteworthy, the letter is not on bank stationery. Nowhere in the letter does he indicate he is writing in any corporate capacity. Similarly, when Beyers engineered the ISB transaction, that included a portion of the discharged debt, the new loan issued by ISB received a guaranty, but the guaranty wasn't from FSBR. The guaranty was provided by John Beyers personally. (FOF No. 11, SR 3032, and Ex. 54.) With respect to the $650,000 note, Beyers testified that even though this was no longer a debt of FSBR, Beyers collected the interest payments and delivered the monies to Schurrs. (Beyers' depo. pp. 94-95 – Appellees' App. M.)

Beyers' personal involvement in this transaction from the outset, is outside of the scope of his responsibilities at FSBR, and are set forth above. As the bookend to his personal involvement, Beyers and FSBR introduced before the jury Exs. 61 through 66, where, after the scheme had been exposed at the end, Beyers personally, and not the bank, took ownership of the notes and mortgages and pursued collection.

3. JUDGE MYREN PROPERLY RULED THAT A COLLATERAL REAL ESTATE MORTGAGE (CREM) DATED JULY 16, 2002, HAD PARTIALLY LAPSED DUE TO A FAILURE TO FILE A TIMELY ADDENDUM.

In 2002 Stan and Rose Marie gave FSBR a $300,000 CREM. The mortgage states that it secures six separate instruments dating from April 14, 2000, to July 16, 2002. (SR 1510 – Appellees' App. I.) The CREM lapsed as to five of the six promissory notes.

The relevant statute provides: "A filed collateral real estate mortgage which states a maturity date of the instrument secured thereby of five years or less is effective until such maturity date and

[3] This is the $650,000 debt. Brad and Brenda paid $21,000 of it, to reduce the balance to $629,000.

thereafter for a period of sixty days."[4] SDCL 44-8-26. (Appellees' App. T.)

Judge Myren granted partial summary judgment with respect to Count VI of Beyers' Counterclaim, concerning the CREM dated July 16, 2002. The 2002 CREM listed six different promissory notes. Four of the notes had maturity dates before October 1, 2002. One note was due on July 15, 2003. The final note matured on December 15, 2013. Thus, five notes listed within the CREM stated "a maturity date of the instrument secured thereby of five years or less." The addendum to the 2002 CREM was filed years after five of the notes had reached maturity.

In construing a statute, courts must begin with the plain meaning of its language. Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552, 557 (1990). Where statutory language is unambiguous, the judicial inquiry is complete. Connecticut Nat. Bank v. Germain, 503 U.S. 249, 252-54 (1992). When the statutory scheme is coherent and consistent, there is no need for a Court to inquire beyond the language. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240-241 (U.S. Mich. 1989).

The Trial Court's decision clearly and correctly analyzed the plain meaning of the CREM foreclosure statute. (SR 1500 - Appellees' App. I.)

FSBR asked the Trial Court and this Court to ignore the explicit language of the statute, where the legislature required that any CREM securing a promissory note with a maturity date of less than five years had to be extended with a properly-filed addendum within sixty days of its maturity date, or it lapsed.

In ruling on the summary judgment motion, Judge Myren held:

> In this case, FSBR did not file timely addendums with respect to the five notes that have already matured. Consequently, the CREM no longer secures the payment of

[4] This statute was later amended in 2011.

> those five promissory notes. The May 22, 2007, addendum extended the effectiveness of the CREM regarding the note that matures on December 15, 2013.

(Decision on Second Round of Motions for Summary Judgment – SR 1500 – Appellees' App. I.) The arguments numbered 1 through 4 on pp. 47 and 48 of Appellants' Brief do not survive the clear logic and straightforward statutory interpretation provided by Judge Myren.

Finally, Beyers argues that if the 2002, $300,000 CREM has lapsed, he is entitled to an equitable lien. Beyers relies upon Gust v. Peoples and Enderlin State Bank, 447 N.W.2d 914 (N.D. 1989), which the North Dakota Court held was important: "To prevent unjust enrichment of the borrower and to provide restitution to the lender, an equitable remedy should be implied." Id. However, Beyers has only pled a mortgage foreclosure action, and has not pled an equitable lien (Separate Answer and Counterclaims of Defendants First State Bank of Roscoe and John R. Beyers, SR 291–330), or sought to amend and assert an equitable lien. A party cannot seek relief that was not pled. Behrens v. Wedmore, 2005 S.D. 79, 698 N.W.2d 555, 577. Even in North Dakota, where Gust was decided, the lapse of a collateral real estate mortgage does not automatically give rise to an equitable lien. In re Ulmer, 1992 WL 1482495, at *5 (Bankr. D.N.D. May 8, 1992). Furthermore, with respect to Gust, North Dakota's foreclosure law is different than South Dakota's. North Dakota does not authorize an action upon a debt secured by a real property mortgage only, without resort to foreclose. N.D.C.C. § 32-19-07. Conversely, in South Dakota, a mortgagee may sue on indebtedness without foreclosing a mortgage. Fed. Land Bank of Omaha v. Schley, 67 S.D. 476, 293 N.W. 879, 880 (1940). Unlike the lender in Gust, Beyers had an adequate remedy at law.

However, the debts that Beyers wants to pursue under this section of their Brief are the debts that the jury found were procured by

fraud. If the Court would allow Beyers to proceed with the unpled cause of action for an equitable lien, then Stan and Rose Marie would be entitled to assert the equitable defenses of fraud and unclean hands.

Under either scenario, Beyers never has the opportunity to collect the debt that he fraudulently obtained. With respect to this issue though, Judge Myren was correct in his statutory interpretation. If Beyers' argument were correct, then the legislature would not have had to change the statute as they did in 2011.

CONCLUSION

Stablers request that the Court affirm the Trial Judge on all 14 issues contained in FSBR and Beyers' appeal.

DATED this 13th day of May, 2014.

Respectfully submitted,

SCHOENBECK LAW

By: _____
LEE SCHOENBECK
P.O. Box 1325
Watertown, SD 57201
(605) 886-0010

and

DOUGHERTY & DOUGHERTY, LLC
Patrick T. Dougherty
P.O. Box 2376
Sioux Falls, SD 57101
(605) 335-8586

ATTORNEYS FOR APPELLEES

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 26965/26993 (N.O.R.)
Consolidated with Appeal No. 26917/26918 (N.O.R.)

STANLEY E. STABLER,
ROSE MARIE STABLER,
BRAD A. STABLER, and
BRENDA L. STABLER,
Plaintiffs/Appellees,

vs.

FIRST STATE BANK OF ROSCOE,
a South Dakota Corporation, and
JOHN R. BEYERS,
Defendants/Appellants.

Appeal from the Circuit Court
Fifth Judicial Circuit
McPherson County, South Dakota

HONORABLE SCOTT P. MYREN

APPELLANTS' REPLY BRIEF

WOODS, FULLER, SHULTZ
& SMITH P.C.
Roger W. Damgaard
Sander J. Morehead
P.O. Box 5027
Sioux Falls, SD 57117-5027
Attorneys for Defendants/Appellants

SCHOENBECK LAW,
Lee Schoenbeck
P.O. Box 1325
Watertown, SD 57201

DOUGHERTY & DOUGHERTY
Patrick T. Dougherty
100 N. Phillips Ave., Ste. 705
P.O. Box 2376
Sioux Falls, SD 57101
Attorneys for Plaintiffs/Appellees

Notice of Appeal was filed January 27, 2014.

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ARGUMENT

Stan and Rose ("the Stablers") have scarcely engaged FSB's and Beyers' ("Defendants'") arguments. They primarily argue waiver, using the phrase "failed to preserve" five times; "waived" twice and "failed to object" 24 times. The Defendants filed several pretrial motions anticipating this gambit, which preserved the trial court's errors. The Stablers rely on "waiver" because they have little substantive response.

I. The Defendants are entitled to judgment as a matter of law.

The Stablers have played legal hide and seek regarding their fraud claims and their relief sought, and still are on appeal. It is time for the game to end. The Court should reverse the jury's verdict, and instruct the trial court to dismiss the Stablers' fraud claims, and enter judgment in Beyers's favor on his counterclaims.[1]

A. The Stablers' claim was based on an alleged misrepresentation of law.

The Stablers describe fraud as a "plan" or "scheme." But fraud is a tort with elements they do not discuss. (Opening Brief 17.[2]) They don't dispute the

[1]If the Court grants this relief, the Stablers' consolidated-appeal issues 2, 3, and 4 will be moot, as will Defendants' new-trial issues below. Only issues regarding the ISB Note and $650,000 CREM (Stabler issues 1, 5, and 6) will remain.

[2]The Defendants' Appellants' Brief on this appeal.

legal principles the Defendants identified. (*Id.*) Instead, they are trying to create a moving target regarding their fraud claim.

1. The Stablers cannot alter their claim on appeal.

The Stablers claim the potential factual issues are broader than those the Defendants identified. (Stabler Brief 5-7.) But when a party concedes an issue at summary judgment, the concession is binding on appeal. *See NattyMac Capital, LLC v. Pesek*, 2010 SD 51, ¶ 19, 784 N.W.2d 156, 161. The Stablers cannot avoid the concessions they made. After five years of discovery, they identified only a few alleged misrepresentations, which the Defendants have addressed. (Opening Brief 18.) The Defendants' list of those statements is no "paraphrase." (Stabler Brief 6.) It comes from the Stablers' own submission. (S.R. 2006–RApp. 020-021.[3]) Responding to the trial court's direct instruction, their counsel conceded these were the only grounds for fraud. (App.[4]132–H.T.11/27/12[5]--12:20-13:20.) They cannot retract that concession.

[3]Defendants' reply appendix to this brief.

[4]Defendants' opening appeal brief appendix.

[5]"Hearing transcript (date) (page:line)"

The Stablers cite the trial court's decision, but it doesn't identify any misrepresentations. (Defendants' Appellees' Brief[6] 37-38.) They cite their Genuine Issues of Material Fact, but the only alleged representations in that document, Paragraphs 9 and 10, are the "reaffirmation" issues the Defendants addressed. (App.104-105) (Opening Brief 19-24.) They still assert their undisclosed theory Beyers told them they would have to pay only $100,000 of the $650,000 Note. But that was not disclosed or asserted at summary judgment in the Stablers' response to the Defendants' statement of undisputed material facts (S.R.1911, App.108-127) or in their "Genuine Issues of Material Fact" pleading. (S.R.1931, App.103-107.) They also did not disclose it in response to the trial court's direct pre-trial inquiry. (Opening Brief 32.) They still claim they didn't know ECAS' debt was included in the $650,000 Note, failing to acknowledge Stan's contrary admission. (Opening Brief 22; App.179--T.T.[7]371:7-9.) The Stablers also do not dispute the "missing page" allegation regarding the 2002 CREM is moot, nor that moving debt "off the books" doesn't involve representations to the Stablers, and couldn't create an issue of fact. (*Id.* 18-19.)

The Stablers, therefore, had one claim: the Defendants failed to predict how the trial court would resolve a split of authority regarding the technical and legal

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[6]Defendants' responsive brief in the Stablers' appeal.

[7]"Trial Transcript"

requirements of the Bankruptcy Code. (*Id.*) The Defendants have explained why this could not be fraud. (Opening Brief 16-24.)

2. Only the Stablers believe the law was settled.

The Stablers' only substantive response is that the law was settled in 2004 regarding the enforceability of the $650,000 Note against Brad and Brenda absent a court-approved reaffirmation agreement. They know if the law was unsettled, any representations about that transaction's legality were not knowingly false when made, and cannot support a fraud claim against even a sophisticated entity, let alone a small-town banker. (Opening Brief 19-24.) Their argument, however, hinges upon an indefensible reading of *DuBois v. Ford Motor Credit*, 276 F.3d 1019 (8th Cir. 2002).

DuBois did not address the propriety of post-discharge notes given to prevent foreclosure. It concerned whether a creditor could enter a post-discharge lease agreement refinancing charges from a debtor's pre-petition lease without a reaffirmation agreement. *Id.* at 1022. The Eighth Circuit held the creditor could. *Id.* at 1023-24. So the creditor *won*, without a reaffirmation. *Id.* *DuBois* is favorable to the Defendants' position, not the Stablers'.

The Stablers' expert, a bankruptcy attorney, agreed *DuBois* did not address the enforceability of a post-discharge agreement to avoid foreclosure without a court-approved reaffirmation agreement (RApp.026-28–Nash 25:3-25:25), and admitted the split of authority on the issue. (*Id.* 55:1-14). The division still exists, (Opening Brief 21-22), as the Stablers acknowledged during the first

appeal. (S.R.2166, Doc.[8] 355 Ex. D, RApp.031-034). The trial court also had difficulty resolving the split (Doc. 459, Ex. P--63:12-22, RApp.075) which it acknowledged at the pretrial conference. (RApp.017-018.--H.T.12/4/12--53:22-54:4.) The law was far from settled in 2004, and remains unsettled now.

Because the law was not settled, the Stablers ignore the Defendants' arguments based on the rationale of *Mudlin v. Hills Materials Co.* (Opening Brief 23-24.) They should not have been permitted to try a fraud claim premised on proving Beyers knew the transactions violated the Bankruptcy Code. The Stablers' fraud claim should have been dismissed.

B. The Defendants raised both election of remedies and judicial estoppel.

The Stablers don't dispute the procedural history supporting the estoppel/election issue. (Opening Brief 24-26.) Instead, they have tried to avoid these issues. First, they morphed the trial court's ruling that the $650,000 transaction discharged the 2000 Mortgage and 2002 CREM into a ruling those mortgages had unspecified "defects." (Stabler Brief 12.) This ignores the trial court's detailed, five-page discussion about how the $650,000 transaction discharged those mortgages (App.069-073), as summarized in the judgment.

[8] "Trial Court Docket Number" for unnumbered settled record items.

(App.018).

Second, the Stablers claim election of remedies is "waived," because Defendants' motion for summary judgment was entitled "judicial estoppel." But at summary judgment, the Defendants also argued election of remedies:

> *And this actually goes with the argument on election of remedies*. They've essentially done the oppose of what Brad and Brenda have done. They've elected to affirm the agreement and try to get their damages. And so we can't have a situation again where it's a valid transaction, a valid transaction that had this effect on those previous mortgages, but it's invalid going forward. *They've done the other half of what the U.S. Lumber court talked about. They've elected to affirm that they owe this debt and that the mortgage is enforceable, try to get their damages.*

(RApp002-005--H.T.10/30/12 53:20-54:13) (emphasis added).

> My argument is, no matter what they convince the jury, they can't dispute that it's enforceable against them. *All they have left now is to do what the U.S. Lumber court talked about. They have affirmed the contract and tried to sue for damages to the extent they can prove they have any*.

(*Id*. 55:16-56:16) (emphasis added.) The election issue is not waived.

The Stablers argue election of remedies is "disfavored," and allowed them to plead alternative relief. This begs the question. The Stablers could *plead* inconsistent relief, but cannot *receive* inconsistent relief. They can obtain only one remedy. *Ripple v. Wold*, 1996 SD 68, ¶ 7, 549 N.W.2d 673, 674-75; *see also TFF, Inc. v. Sanitary and Improvement Dist. No. 59 of Sarpy County*, 790 N.W.2d 427, 432 (Neb. 2010) ("although parties can plead inconsistent claims, once they have obtained a judgment on one claim by asserting a legal or factual position,

they

cannot obtain another judgment for the same injury based on a theory inconsistent with the previous position").

The trial court permitted the Stablers to pursue inconsistent remedies. They haven't disputed a promissory note cannot be effective to discharge previous obligations, yet simultaneously invalid and rescinded because of fraud. *See, e.g., FDIC v. Katzowitz*, 2012 U.S. Dist. LEXIS 13345, 14-15 (E.D. Mich. February 3, 2012) (unpublished). Yet, after dismissing two of Beyers' counterclaims because the $650,000 Note was valid and effective, the trial court permitted the Stablers to try to rescind the Note. (Opening Brief 24-27.) The trial court initially ruled that they were limited to seeking damages on that claim. (RApp.006–H.T.10/30/12 91:9-22; App. 047, S.R.2489.) It should not have reversed course and let them pursue rescission.

The Stablers finally argue there is no risk of inconsistent results, and that judicial estoppel only applies in two different "cases" substituting "cases" for "proceedings." Notwithstanding the Stablers' discussion of "elements" of judicial estoppel, their own case, *Webb v. Webb* holds judicial estoppel "cannot be reduced to an equation" in this fashion, 2012 SD 41, 814 N.W.2d 818, 821 (quoting *Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.*, 2005 S.D. 82, ¶ 34, 700 N.W.2d 729, 737-38).

Moreover, here there were two "proceedings" and the inconsistent outcomes and judgments have already occurred. The first "proceeding" was the Stablers' motion in 2010 to dismiss Beyers' counterclaims on the 2000 Mortgage and 2002 CREM, resulting in a ***judgment*** dismissing those counterclaims. (S.R.1406; App.049.) The second "proceeding" was the jury trial in December 2012, where they tried to invalidate the $650,000 Note, despite relying on its validity at the previous "proceeding," and also obtained a judgment. Unless the Court reverses this error, the $650,000 Note will have been deemed valid for purposes of obtaining a judgment, when it suited the Stablers' needs, yet subject to challenge when it did not.

C. The jury trial was for rescission, not damages.

The Stablers were not entitled to seek rescission, so they have recast the relief they sought from the jury as damages. The Defendants have briefed why damages were impossible, and why the Stablers should not be allowed to keep switching remedies when it suits them. (S.R.2491, App.148--H.T.12/17/12, 7:9-9:1) (Defendants' Appellees' Brief 23-24). The jury considered a rescission claim, not an affirmative damages claim. (*Id.*) The Stablers were barred from seeking rescission, and had no damages. Their fraud claim should have been dismissed. (Opening Brief 24-26.)

II. The Defendants did not receive a fair trial.

The crux of the Stablers' new trial arguments is that the case was difficult, and the trial court did its best. However, the trial court's good intentions cannot undo the prejudice caused by its improper decisions.

A. The Stablers have misstated the applicable legal standards.

The Stablers' repeatedly rely on waiver, because they have no substantive response. The Stablers made two key errors, however. First, they recite the "facts most favorable to the jury verdict" standard, which is inapplicable because the alleged "facts most favorable" to them should have been excluded. Second, they invoke the "failure to object" doctrine of waiver, which is no longer the law.

1. The "most favorable to the verdict" standard does not apply.

The "facts most favorable to the verdict" standard applies when a party asserts insufficiency of the evidence. *See, e.g., Bertelsen v. Allstate Ins. Co.*, 2013 SD 44, ¶ 16, 833 N.W.2d 545, 554; *Baddou v. Hall*, 2008 SD 90, ¶ 13, 756 N.W.2d 554, 558-59. The Defendant have not asserted factual insufficiency under SDCL § 15-6-59(a)(6). They have asserted legal error under § 15-6-59(a)(7). A decision based on an error of law is an abuse of discretion. *See Credit Collection Servs., Inc. v. Pesicka*, 2006 SD 81, ¶ 5, 721 N.W.2d 474, 476.

2. The Defendants have preserved error for appeal.

The Stablers serially assert the Defendants failed to object to errors and waived them. But SDCL § 19-9-3 provides that "once the court makes a definitive ruling on the record admitting or excluding evidence, either at *or before trial*, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." SDCL § 19-9-3 (emphasis added). A trial court's pre-trial ruling on a motion in limine satisfies this requirement. *See Estate of Holznagel v. Cutsinger*, 2011 SD 89, ¶ 5, 808 N.W.2d 103, 104, n.1; *State v. Johnson*, 2009 SD 67, ¶ 14, 771 N.W.2d 360, 366. The Defendants filed motions and written objections regarding the errors appealed in anticipation of the Stablers' "waiver" argument. The Stablers also cite *Veith v. O'Brien*, 2007 SD 88, 739 N.W.2d 15 at least eleven times. However, the *Veith* Court noted SDCL § 19-9-3 in its current form was not adopted until 2006 and was not applicable. 2007 SD 88, ¶ 36, 739 N.W.2d at 26, n.17. The rule articulated in *Veith* is no longer the law.

B. The Stablers have conceded Holdhusen's testimony was material, false, and prejudicial; and that their "$100,000" theory was not disclosed before trial.

The Stablers have not substantively addressed the Defendants' arguments under SDCL § 15-6-59(a)(3) and (4). They don't dispute Holdhusen's testimony was false, material, and affected the verdict, nor that false testimony regarding a party's character or credibility is prejudicially damaging, especially during a fraud

trial. (Opening Brief 29-31.) The Stablers only response is "waiver." (Stabler Brief 16.) They claim when Holdhusen testified falsely, the Defendants had to state "your Honor, we object to this false testimony." This makes no sense. The Defendants didn't know Holdhusen was lying until they found out a month later, hence their post-trial motion under SDCL § 15-6-59(a)(3) regarding "newly discovered" evidence. (Opening Brief 29.) They further argue the Defendants "opened the door" to Holdhusen's false testimony without citing any cases holding that false testimony on redirect examination is immune from challenge; and that Holdhusen's testimony is "taken out of context" without identifying the proper "context." Meanwhile, Defendants' substantive arguments stand unrebutted and unaddressed. (*Id.* 29-31.) The Defendants are entitled to a new trial.

The Stablers fail to dispute that "surprise" warranting a new trial includes theories of recovery not identified before trial. (*Id.* 32.) Instead they make three "waiver" arguments. First, they assert the Defendants "opened the door" regarding the new theory Beyers told them they would only have to pay $100,000 of the $650,000 Note. (Stabler Brief 18.) But the issue was first mentioned in the Stablers' opening statement. (RApp.010-T.T.16:3-5.) The first testimony about it came from Rose under direct examination. (RApp.012–T.T.146:13-18.) The Defendants didn't "open the door." Second, they assert the issue was disclosed in their summary judgment pleadings. However, as noted at page 3,

supra, and the Defendants' opening brief (Opening Brief 32) this is false. They also didn't identify it in response to the trial court's pre-trial instruction. (Opening Brief 32.) Third, they claim the issue was waived, but cite only *Veith* for this proposition, and *Veith* did not address this issue. When a party changes liability theories at trial, no objection is necessary to preserve error. *Spurlock v. Lawson*, 881 F.Supp. 436, 438 (E.D. Ark. 1995).

C. The Stablers have failed to substantively address the trial court's evidentiary errors.

The Stablers have provided little substantive response regarding the trial court's evidentiary errors. Instead they've relied on "waiver." However, the Defendants filed several motions and made oral and written objections on these issues. (RApp.053-072, App. 34-38.)

1. The Stablers' response regarding "conformity" evidence is based on misrepresentations of the record.

The Stablers fail to dispute the ISB transaction did not involve Stan and Rose or their property, and constituted "other acts;" nor that they argued "conformity." (Opening Brief 33-36.) They instead argue the Defendants waived the issue based on three misrepresentations.

First, they claim "the parties stipulated that evidence would be used at both the jury trial and the court trial because of the overlap within the issues" and "immediately before the jury trial started, the parties shared with the Court their

belief that there was overlapping evidence and that they could sort that out in their presentations." (Stabler Brief 20.) This is false. Before trial, the Defendants argued evidence regarding the ISB transaction involved only Brad and Brenda, and would be unfairly prejudicial at Stan's and Rose's separate trial. (App. 147--H.T.12/17/12 at 4:22-5:10.) Second, they assert the Defendants never objected to questions regarding ISB. (Stabler Brief 21.) But the very first time the Stablers' attorney inquired about the ISB transaction, the Defendants objected–and the trial court overruled the objection. (App. 156--T.T.126:13-24.) The Defendants raised the issue before trial, and at the first opportunity at trial. They did not need to continue objecting to evidence regarding the ISB transaction. SDCL § 19-9-3. Third, they allege the Defendants agreed to admission of ISB transaction evidence at the pretrial conference. (Stabler Brief 22.) However, the Stablers' deception here is that, the portion of the transcript they've cited precedes Brad's and Brenda's subsequent election of a separate court trial regarding the ISB Note (App.143--H.T.12/4/12 76-77), removing them as parties from the jury trial, and prompting Defendants' subsequent pre-trial objection. (Opening Brief 33.) If the Stablers had a substantive response, they would not have to misrepresent the record. For the reasons outlined in the Defendants' opening brief, a new trial is required.

2. The Stablers have failed to demonstrate exemplary damages were properly submitted.

The Stablers have failed to dispute improperly-submitted exemplary damages claims are prejudicial. (Opening Brief 37-38.) They argue that exemplary damages were properly submitted, but in the absence of compensatory damages, exemplary damages are inappropriate. (*Id.*) The jury trial was for rescission of the $650,000 Note–not damages.

The Stablers suggest that, because the punitive damage and fraud instructions were separate, there was no prejudice. (Stabler Brief 22.) But before punitive damages may be submitted to the jury the trial court must ensure it is appropriate. *See* SDCL § 21-1-4.1. This is an essential threshold requirement. *Schaffer v. Edward D. Jones & Co.*, 1996 SD 94, ¶ 46, 552 N.W.2d 801, 815. The Stablers' position renders SDCL § 21-1-4.1 meaningless, and circumvents the legislature's purpose in enacting it. Moreover, the Stablers have failed to explain how the other instructions reduced the prejudice caused by the "community consciousness" and "send a message" arguments the Stablers made during closing arguments, which were possible only because exemplary damages were improperly submitted to the jury. (Opening Brief 37-38.)

3. The Stablers have missed the point regarding Bob Nash and "off the books."

The Stablers claim the Defendants waived their argument regarding Nash's testimony about "motive" and about bank examinations because the Defendants did not object to his testimony, and his testimony violated no orders. (Stabler Brief 24.) This misses the point. The Defendants filed motions in limine on these issues. (RApp.059-065, Doc. 459, Ex. L-Brief at pp. 6-13; App. 035.) Once the trial court ruled Nash could testify about "bank examinations" and "motives," the Defendants didn't have to keep objecting. SDCL § 19-9-3. Moreover, there is no difference between "motive" and "intent," so the Court's order in that regard is also irrelevant. And the Stablers haven't responded to the case law establishing that expert testimony about "motive" is just as improper. (Opening Brief 38-39.) The Stablers also haven't disputed Nash's admission that any bank would want to get troubled debt "off the books," and that Nash's testimony regarding examinations was "pure speculation." (*Id.*)

The only two cases the Stablers have cited are either inapposite or contrary to their position. *In re Estate of Dokken* addressed a psychiatrist's testimony regarding a testator's mental capacity, not the testator's intent. 2000 SD 9, ¶ 38, 604 N.W.2d 487, 498. Nash speculated about motives and intentions, not mental capacity. And in *State v. Guthrie*, the trial court committed error by permitting an

expert to testify about intent. 2001 SD 61, ¶ 42, 627 N.W.2d 401, 419. Though the error was deemed harmless, *Guthrie* confirms the trial court erred.

Improperly admitted expert testimony is prejudicial in general. *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 595 (1993). Permitting an expert to testify speculatively about someone's intent in a fraud trial is the ultimate prejudice. The trial court allowed Nash to opine the Defendants' supposed "hiding debt off the books" was wrongful, even though he was admittedly speculating, and permitted him to testify about Beyers' supposed "motives." A new trial is required.

4. The Defendants were forced to call Rob Ronayne because the trial court denied their motion in limine, and permitted the Stablers to testify Ronayne had harmed them.

The Stablers haven't challenged the Defendants' appeal arguments regarding Ronayne, including that Ronayne never advised Stan or Rose about anything. (Opening Brief 41-42.) They've conceded they deceived the jury in prejudicial fashion, warranting a new trial. (*Id.*) The Stablers argue waiver instead. But the Defendants filed a pre-trial motion to exclude the evidence and argument at issue. (RApp.069-070, App. 036–Brief 17-18.) The trial court's unequivocal denial of the motion (App. 036), preserved the error. SDCL § 19-9-3.

The Stablers claim the Defendants "opened the door" by calling Ronayne to

testify. There is a split of authority between federal and state courts regarding whether a party waives error for appeal by being the first to introduce erroneously-admitted evidence at trial, with most state courts holding there is no waiver. *See, e.g., Cure v. State*, 26 A.3d 899, 312-317 (Md. App. 2011) (collecting cases). However that issue is not even implicated here, because the Stablers were the first ones to introduce the erroneous evidence, not the Defendants. During the Stablers' opening statement (RApp.009–T.T.14:5-14); and during their direct examinations of Brad and Brenda (RApp.013-014--T.T.216:25-217:16, 283:14-284:24), the Stablers and their counsel accused Ronayne of wrongdoing regarding their bankruptcy schedules which, as noted in the Defendants' opening brief, was legally irrelevant. (Opening Brief 41-42.) The Defendants didn't call Ronayne to testify until *after* the Stablers introduced the evidence the Defendants had unsuccessfully moved to exclude.

The Stablers' remarkable position is that, if the Defendants wanted to appeal the trial court's erroneous decision to let them mislead the jury about Ronayne, the Defendants had to let the Stablers make their deceptive statements about Ronayne without presenting any contrary testimony. The Stablers have failed to cite any authority supporting this position, because it is not the law. *See, e.g., Haralampopoulos v. Kelly*, 2011 Colo. App. LEXIS 1645 **12-15 (Colo.

App. Oct. 13, 2011) (plaintiff did not waive trial court's failure to exclude evidence under either federal law or state majority rule, because defendant was the

party who introduced the evidence, and plaintiff had a right to rebut the evidence after the trial court erroneously admitted it).

5. Participations were not relevant.

The Stablers have missed the point regarding "participation" instructions. They apparently concede the only relevant transactions-–the $650,000 Note and Mortgage and subsequent assignments--were not participations. Jury instructions must be based on the issues raised, s*ee Baddou v. Hall*, 2008 SD 90, ¶ 16, 756 N.W.2d 554, 559, so "[i]f an instruction is requested which is not relevant to an issue in the case, it should be refused though it may state a correct principle of law." *Stammerjohan v. Sims*, 31 N.W.2d 449, 451 (S.D. 1948). This is why the Defendants objected to "participation" instructions. (Opening Brief 42-43.) The Stablers have failed to respond to these arguments. (*Id.*) Instead they rely on "waiver." But once the trial court overruled the Defendants' objection to "participation" instructions generally, the Defendants did not have to keep objecting each time the Stablers' counsel talked about "participations" during closing arguments. SDCL § 19-9-3.

6. The Defendants did not waive their objection to testimony regarding Brad's and Brenda's obligation to pay.

The Stablers have not addressed the Defendants' arguments regarding the trial court permitting the jury to know that Brad and Brenda did not have to pay the

$650,000 Note, or the unfair prejudice this caused. (Opening Brief 43-44.) Instead, they have raised another "waiver" argument. (Stabler Brief 29-30.) But the Defendants filed a pre-trial motion consistent with their appeal position, which the trial court denied, stating the Stablers' counsel could draft a jury instruction on the issue. (App. 038.) This preserved the error for appeal. SDCL § 19-9-3.

The Defendants did not stop preserving the error. They objected that testimony and instructions that the debt "cannot be pursued" or that Brad and Brenda Stabler were "not liable" were improper. (RApp.040-041--S.R. 2496) ("if the jury is given the additional information that Brad and Brenda do not owe on the obligations at issue, the Stablers will simply argue that, because Brad and Brenda Stabler do not have to pay, they shouldn't have to pay either, which is irrelevant to the question the jury has to answer.") The Defendants further noted "Defendants are not waiving their position that the jury should not be informed about the ruling of the Court, irrespective of how the jury is informed, under the rationale of *Isaac v. State Farm*, as outlined in the Defendants' motion." (RApp.039–S.R. 2496, n.1.) They also proposed a preliminary instruction that would have instructed the jury not to speculate about why Brad and Brenda were not parties at the jury trial. (RApp.047–S.R. 2530.) The Stablers' waiver argument could not be more disingenuous.

7. The conspiracy claim should not have been tried.

The Stablers do not dispute that if the conspiracy claim was improperly submitted, the Defendants were unfairly prejudiced. (Opening Brief 45-46.) The Stablers argue instead that Beyers had a financial reason to conspire with FSB, based on his ownership of FSB. This is the so-called "personal stake" exception to the intracorporate conspiracy doctrine. *See, e.g., Oksanen v. Page Memorial Hosp.*, 945 F.2d 696 (4th Cir. 1991). This exception is very limited, however, and would swallow the rule were it not limited to a situation where a corporation's agent derives a benefit wholly independent of the benefit derived by the corporation. *See Godfredson v. JBC Legal Grp., P.C.,* 387 F. Supp. 2d 543, 550 (E.D.N.C. 2005). In *Godfredson*, the personal stake exception was inapplicable to a claim that a law firm and its sole owner conspired based on the owner's financial interest in the firm. *Id.* As in *Godfredson*, any benefit Beyers stands to realize from the $650,000 Note by virtue of his ownership of FSB is related to the benefit FSB itself received. Likewise, the Stablers benefitted from the transaction keeping real property that has since quadrupled in value, but they don't want to have to pay for that benefit.

III. The 2002 CREM was properly extended.

The Stablers advance a "plain meaning" argument based on the trial court's letter decision. (Stabler Brief 34.) However, the trial court acknowledged "[t]he legislature did not provide any separate guidance about how to handle a CREM

which lists multiple promissory notes with different maturity dates." (App.068.) The trial court resolved the issue by analyzing "legislative intentions" not "plain meaning." (*Id.*) The legislative policies underpinning collateral real estate mortgages demonstrate the trial court did not properly analyze the CREM statute. (Opening Brief 47-48.) The Stablers have not addressed these arguments. (*Id.*)

The Stablers also make four arguments regarding equitable liens. First, they argue Beyers did not raise the issue. (Stabler Brief 35.) This isn't the case. Beyers submitted the issue in response to Stan Stabler's motion for summary judgment, and the trial court either didn't consider it, or didn't include its analysis in its opinion. (App. 067-068.) Second, the Stablers claim Beyers had an adequate remedy at law regarding the 2002 CREM. (Stabler Brief 36.) But the 2002 CREM secured Brad's and ECAS' debts as well. Beyers had no remedy at law against Stan. The only option was foreclosure. Third, the Stablers state a party is not automatically entitled to an equitable lien, citing *In re Ulmer*, 1992 WL 1482495 (Bankr. D.N.D. 1992). That case does not discuss the circumstances that led to the court's decision. *Id.* at * 5-6. Meanwhile, *Gust v. Peoples and Enderlin State Bank*, 447 N.W.2d 914, 917 (N.D. 1989), recognized in *In re Ulmer* as the "seminal" equitable lien case, demonstrates Beyers could obtain an equitable lien. Fourth, the Stablers claim an equitable lien would permit Beyers to pursue debts the jury found fraudulent. (Stabler Brief 36.) But the only debt submitted

for the jury's consideration was the $650,000 Note. (App.211-212.) The Stablers didn't ask the jury to resolve whether the 2002 CREM was fraudulent, (S.R.2630), and waived the right to have a jury resolve it. *See, e.g., State v. Big Crow*, 2009 SD 87, ¶ 19, n.2, 773 N.W.2d 810, 816.

CONCLUSION

The parties have submitted six briefs on several legal issues in these consolidated appeals. The word legal is critical. The Stablers' rhetoric about "schemes" and "laundered debt" is based on legally-irrelevant evidence. When the rhetoric is stripped away, the Stablers' fraud claim fails as a matter of law. If the Court affirms the jury's verdict, it will be holding that a party can be liable for fraud by failing to accurately predict how a trial court will resolve an unsettled question of law.

The Stablers' rhetoric does not withstand scrutiny in any event. Their essential argument is that the Defendants defrauded them by failing to foreclose on them, and by giving them a second chance instead. Brad and Brenda emerged from bankruptcy with a lender willing to work with them, and got to keep the collateral securing the obligations they had owed. Stan and Rose were able to keep the real property securing those obligations and are now multi-millionaires–all because of the "fraudulent" $650,000 Note. The Stablers repaid that benefit by demonizing the Defendants, and asking to be absolved of the

one thing they gave in return–their promise to pay the $650,000 Note. If the jury verdict stands that is what will occur. The judgment against the Defendants must be reversed, and judgment entered in Beyers' favor on his counterclaims. Alternatively the Defendants are entitled to a new, fair trial.

Dated this 2nd day of June, 2014.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Sander J. Morehead

Roger W. Damgaard
Sander J. Morehead
300 South Phillips Avenue, Suite 300
Post Office Box 5027
Sioux Falls, South Dakota 57117-5027
(605) 336-3890
Attorneys for Defendants/Appellants

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using WordPerfect X5, and contains 4,930 words excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word count of the word-processing program to prepare this certificate.

Dated this 2nd day of June, 2014.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Sander J. Morehead

Roger W. Damgaard
Sander J. Morehead
300 South Phillips Avenue, Suite 300
Post Office Box 5027
Sioux Falls, South Dakota 57117-5027
(605) 336-3890
Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2014, I sent via email a true and correct copy of the foregoing Appellants' Reply Brief to the following:

Lee Schoenbeck
Schoenbeck Law
P.O. Box Box 1325
Watertown, SD 57201
lee@schoenbecklaw.com

and

Patrick T. Dougherty
Dougherty & Dougherty
100 North Phillips Ave., Suite 705
P.O. Box 2376
Sioux Falls, SD 57101

/s/ Sander J. Morehead

One of the Attorneys for Defendants/Appellants