

IN THE
Supreme Court
of the
State of South Dakota

No. 31101

ESTATE OF PAUL O'FARRELL, individually, and, as a
beneficiary of the family trust; and, for the benefit of The Estate of
Victoria O'Farrell;
SKYLINE CATTLE COMPANY, a South Dakota corporation; and
VOR, INC, a South Dakota corporation,
PLAINTIFFS/APPELLANTS

vs.

KELLY O'FARRELL, an individual;
GRAND VALLEY HUTTERIAN BRETHERN, INC., a South
Dakota corporation;
THE RAYMOND AND VICTORIA O'FARRELL LIVING
TRUST, a South Dakota trust; and
RAYMOND O'FARRELL, individually, as Trustee, and as Special
Administrator of the Estate of Victoria O'Farrell; and
VOR, INC. (by Raymond O'Farrell).
DEFENDANTS/APPELLEES

An intermediate appeal from the Circuit Court
Third Judicial Circuit, Grant County, South Dakota

The Hon. Patrick Pardy
CIRCUIT COURT JUDGE

APPELLANTS' BRIEF

Submitted by: Daniel K. Brendtro; Mary Ellen Dirksen; & Benjamin Hummel
Hovland, Rasmus & Brendtro, Prof. LLC; P.O. Box 2583; Sioux Falls, SD 57101
Attorneys for Plaintiffs/Appellants, including Lance O'Farrell

Petition for Intermediate Appeal Granted on August 11, 2025

Lee Schoenbeck
Joseph Erickson
Schoenbeck & Erickson, PC
1200 Mickelson Dr., Ste. 310
Watertown, SD 57201
lee@schoenbecklaw.com
joe@schoenbecklaw.com

Counsel for the Raymond and Victoria O'Farrell Living Trust, and, the Estate of Victoria O'Farrell (and for Raymond O'Farrell individually, as, Special Administrator of the Estate; and as Trustee), and as asserted counsel for VOR, Inc., by and through Raymond O'Farrell.

Reed Rasmussen
Siegel, Barnett & Schutz,
LLP PO Box 490
Aberdeen, SD 57402
Rrasmussen@sbslaw.net

Counsel for Grand Valley Hutterian Brethren, Inc.

William G. Beck
Seth A. Lopour
Woods, Fuller, Shultz & Smith, PC
300 S. Phillips Ave., Ste. 300
Sioux Falls, SD 57117
billbeck@woodsfuller.com
seth.lopour@woodsfuller.com

Counsel for Grand Valley Hutterian Brethren, Inc.

Jack Hieb
Richardson Law Firm
1 Court Street
P.O. Box 1030
Aberdeen, SD 57402-1030
jhieb@rwwsh.com
Counsel for Kelly O'Farrell

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT.....	1
THE RECORD.....	5
STATEMENT OF THE CASE & FACTS.....	6
STATEMENT OF THE ISSUES.....	18
STANDARD OF REVIEW	23
ARGUMENT.....	22
1. The Circuit Court erred by granting summary judgment on Count 1, which seeks a declaration of the invalidity of various corporate and trust actions undertaken by Raymond (and his removal as trustee).	24
2. The Circuit Court erred by failing to rule on the other relief sought in Count 1: a declaration as to Raymond’s removal as Trustee (found in paragraphs 4, 79, 80, and 81 of the Original Complaint, and, restructured as ‘Count 2’ of the proposed, Amended Complaint).	31
3. The Circuit Court erred by granting summary judgment on the rescission claim in Count 2.	38
a. The Circuit Court erred in its analysis of a <i>legal</i> rescission.	34
b. The Circuit Court erred in its analysis of an <i>equitable</i> rescission.	38

c. Other grounds upon which to invalidate the deed.....	40
4. The Circuit Court erred by refusing Plaintiffs’ Rule 56(f) affidavit, which requested a stay of the summary judgment proceedings so that discovery could proceed on the claims in the Complaint (and the Amended Complaint).	43
5. This is not a frivolous action.	45
CONCLUSION.....	47
CERTIFICATE OF COMPLIANCE.....	49
CERTIFICATE OF SERVICE.....	50

TABLE OF AUTHORITIES

South Dakota Supreme Court Opinions

<i>Betty Jean Strom Tr. v. SCS Carbon Transp., LLC,</i> 2024 S.D. 48, 11 N.W.3d 71.....	23, 43, 44
<i>Discover Bank v. Stanley,</i> 2008 S.D. 111, 757 N.W.2d 756	23
<i>Est. of O'Farrell v. Grand Valley Hutterian Brethren, Inc.,</i> 2024 S.D. 81, 15 N.W.3d 745.....	4, 7 n.10, 11
<i>Est. of Olsen v. Agtegra Coop.,</i> 2024 S.D. 39, 9 N.W.3d 763	23
<i>Goetz v. State,</i> 2001 S.D. 138, 636 N.W.2d 675.....	39 n.27
<i>Good Lance v. Black Hills Dialysis, LLC,</i> 2015 S.D. 83, 871 N.W.2d 639.....	23
<i>Gronau v. Weubker,</i> 2003 S.D. 116, 670 N.W.2d 380	22, 46
<i>In Re Betty Luhrs Trust,</i> 443 N.W.2d 646 (S.D. 1989)	18, 29
<i>Knudsen v. Jensen,</i> 521 N.W.2d. 415 (S.D. 1994).....	20, 34, 35
<i>Matter of Estate of Petrik,</i> 2021 S.D. 49, 963 N.W.2d 766	2
<i>McDowell v. Citicorp Inc.,</i> 2008 S.D. 50, 752 N.W.2d 209	23
<i>Muhlbauer v. Estate of Olson,</i> 2011 S.D. 42, 801 N.W.2d 446	42 n.36
<i>N.W. Realty Co. v. Carter,</i> 338 N.W.2d 669 (S.D. 1983)	34
<i>Olson v. Huron Reg'l Med. Ctr., Inc.,</i> 2025 S.D. 34, 24 N.W.3d 405.....	24, 45
<i>Prairie Lakes Healthcare v. Wookey,</i> 1998 S.D. 99, 538 N.W.2d 405	44
<i>Ridley v. Lawrence County Comm'n,</i> 2000 S.D. 143, 619 N.W.2d 254	46
<i>Skoglund v. Staab,</i> 312 N.W.2d 29 (S.D. 1981).....	34, 38
<i>Stormo v. Strong,</i> 469 N.W.2d 816 (S.D. 1991).....	23, 44

<i>Uhre Realty Corp. v. Tronnes</i> , 2024 S.D. 10, 3 N.W.3d 427	23
<i>VOR, Inc. v. Est. of O'Farrell</i> , 2025 S.D. 2, 17 N.W.3d 252	3, 7 n.10

Other State Court Opinions

<i>Behrens v. American Stores Packing Co.</i> , 236 Neb. 279, 460 N.W.2d 671 (1990)	46
<i>Schroder v. Scotten, Dillon Co.</i> , 299 A.2d 431 (Del.Ch. 1972)	36

Federal Court Opinions

<i>Hansmeyer v. Shotkoski</i> , 2018 WL 3104437 (D.S.D. June 22, 2018)	18, 26, 28
---	------------

Statutes

SDCL § 15-6-8	37
SDCL § 15-6-15	12
SDCL § 15-6-35	11, 32, 43, 44, 45
SDCL § 15-6-56	Passim
SDCL § 15-17-51	22, 45, 46
SDCL § 15-26A-3	1
SDCL § 21-12-1	20, 22, 38, 39
SDCL § 21-12-2	38
SDCL § 21-24-7	18, 25, 26, 28 n.20, 30
SDCL § 47-1A-841	36
SDCL § 47-1A-842	36
SDCL § 53-4-1	35
SDCL § 53-11-2	20, 34, 35, 36, 38
SDCL § 53-3-2	35
SDCL § 55-3-5	19, 31, 32
SDCL § 55-3-20.1	19, 32

Secondary Sources

BLACK'S LAW DICTIONARY, 1144-1145 (9th ed. 2001)	20, 39
--	--------

JURISDICTIONAL STATEMENT

This Court granted permission for an intermediate appeal. *See*, ‘Order Granting Petition for Allowance of Appeal From Intermediate Order,’ 8/11/2025. Accordingly, this Court has jurisdiction under SDCL § 15-26A-3(6).

INTRODUCTION

This intermediate appeal relates to several other matters and appeals involving the O’Farrell family:

- *Victoria’s Lawsuit.* In June 2022, the matriarch of the family, Victoria O’Farrell, commenced a lawsuit seeking to halt a series of sudden, drastic changes that her husband Raymond had made to their estate plan and landholdings, alleging undue influence by their son Kelly.¹
- *Dismissal of Victoria’s Lawsuit.* Victoria died shortly after commencing her lawsuit. Raymond installed himself as the Special Administrator of Victoria’s Estate² and then dismissed Victoria’s

¹ *See*, 25CIV22-000038, *Victoria O’Farrell vs. Raymond O’Farrell.*

² *See*, 25PRO22-000011, *Estate of Victoria O’Farrell*

case pending against him, without prejudice. This Court affirmed that voluntary dismissal.³

- *Raymond's Appointment as Special Administrator.* Paul appealed the Order appointing Raymond as special administrator.⁴ This Court dismissed the attempted appeal because there were “pending motions before the circuit court to remove and replace the special administrator [which were] ‘pleadings related to the same subject matter’ and, consequently belong to the same proceeding.” *See*, #30532, Order Dismissing Appeal, 12/18/2024 (quoting *Estate of Petrik*, 2021 S.D. 49, ¶ 17). The probate questions were remanded.
- *Attempted Removal of Raymond as Special Administrator.* Upon remand, the Circuit Court considered the pending petitions for removal and replacement. The Circuit Court declined to remove and replace Raymond as special administrator. That decision is now the subject of a second probate appeal, #31106, which is pending.

³ Appeal #30508; Order, 12/18/2024.

⁴ Appeal #30532. Appeal dismissed, 12/18/2024

- *The Eviction of Paul & Skyline.* Shortly after Victoria’s death, in mid-August 2022, Raymond had been convinced to sell most of the family’s long-held farm ground, owned by their Trust and Trust Corporation (VOR, Inc.), including numerous parcels that had been designated for Paul (and his heirs) within the Trust. The \$3.2 million sale to Grand Valley Hutterite Colony closed in October 2022, which led to an eviction action in April 2023 by VOR and the Colony against Paul and Skyline.⁵ The judgment of eviction was affirmed by this Court. *VOR, Inc. v. Est. of O’Farrell*, 2025 S.D. 2, ¶ 45.
- *Paul’s Civil Suit.* Prior to the filing of that eviction claim, Paul had already commenced this (instant) lawsuit seeking multiple avenues of relief: to unwind the real estate sale; to remove Raymond as trustee; to invalidate Raymond’s other corporate and fiduciary actions which Raymond had taken in the name of VOR, Inc.; and for damages.⁶

⁵ See, 23CIV23-000018, *VOR, Inc., et al, v. Paul O’Farrell and Skyline Cattle Company*

⁶ See, 25CIV23-000015

- *Dismissal & First Appeal of Paul's Civil Suit.* Various defendants filed motions seeking dismissal of Paul's claims. The Circuit Court granted all such motions seeking dismissal, leading to the first appeal in this action. By a 3-2 majority, this Court determined that Judge Robert Spears had been "properly disqualified" under the "one bump" provisions of Chapter 15-12. Because Judge Spears was thus incapable of hearing or deciding further proceedings, this Court vacated all of the orders that he had entered and remanded for further proceedings. *Est. of O'Farrell v. Grand Valley Hutterian Brethren, Inc.*, 2024 S.D. 81, ¶ 32.⁷
- *Remand, Dismissal, and this Intermediate Appeal.* Following remand, various Defendants immediately renewed their motions seeking dismissal. The Circuit Court granted those motions, and Paul's Estate and Skyline sought permission for this intermediate appeal. The Order permitting this appeal stayed all further proceedings at the Circuit Court level.⁸

⁷ During the pendency of that first appeal, Paul O'Farrell died, and his Estate was substituted as a party. Appeal #30482, ORDER, 12/6/2024.

⁸ See, Appeal #31101, Order, 8/11/2025.

- *Creditor Lawsuit & Appeal.* Meanwhile, in a parallel proceeding, a creditor of Paul's and Skyline's sought judgment upon a crop input invoice (and to resolve a secured priority issue relative to VOR).⁹ Within that same suit, VOR brought cross-claims against Paul and Skyline upon loans assigned to VOR by Great Western Bank (now First Interstate Bank). VOR was granted summary judgment on those loans. Following oral argument on June 3, 2025, this Court issued a summary affirmance by a 3-2 majority. *See*, Appeal #30862, Order Directing Issuance of Judgment of Affirmance, 8/11/2025.
- *Motion to Consolidate.* We are submitting a Motion to this Court seeking to consolidate the two remaining O'Farrell matters: this appeal (#31101) and the probate appeal (#31106).

THE RECORD

References to the settled record of this appeal are denoted by [R.123]. In a handful of instances, this Brief or the Reply Brief may make reference to the appellate records of other, related appeals. For those, the citation will

⁹ *See*, 25CIV23-000027.

identify the appeal number and page number of the associated record, *e.g.*, [Appeal Record #30508 at AR.20-24].

The Circuit Court disposed of this matter on summary judgment, following a motions hearing on May 1, 2025. The Hearing Transcript is referred to by page number and date, such as [HT 123, 5/1/25]. The hearing transcript is found in the settled record at [R.1602-1668].

The summary judgment hearing on May 1, 2025, was held in conjunction with a parallel hearing in Victoria's probate. The portion of the transcript dealing with the probate hearing is included within the settled record of Appeal #30116. [Appeal Record #30116 at AR.383-409].

STATEMENT OF THE CASE & FACTS

Paul and Skyline brought this lawsuit in March 2023 to remove Raymond as Trustee, and to challenge the validity of Raymond's trust actions and VOR's corporate actions, including those which were a product of undue influence perpetrated by Kelly O'Farrell. The facts of this case,

and the related cases, have been the subject of extensive, prior briefing.¹⁰ A short summary follows here.

Victoria's Lawsuit

The efforts to stop Raymond and Kelly first began with Paul's mother, Victoria O'Farrell. In June of 2022, Victoria brought a lawsuit to halt Raymond from making further changes to the family's corporation and estate plan. Her Complaint describes an orchestrated campaign of undue influence exercised by their son Kelly, who was angry at his prospective inheritance under the Trust. [Appeal Record #30508, AR.5-29]. Her Complaint and contemporaneous affidavit alleged that Raymond had diminished capacity, couldn't read, and did not understand the corporate actions he was taking. *Id.*; [Appeal Record #30508, AR.5-29]; [R.76-85].

¹⁰ Excerpts of fact sections of the prior briefing are included in the Appendix. See, APP.71-124. Those fact excerpts include: Appellants' Brief #30482 (pp. 15-17); Appellants' Brief #30344 (pp. 9-17); Appellants' Reply Brief #30344 (pp. 2-7); Appellant's Brief #30532 (pp. 3-4); Appellant's Brief #30508 (pp. 4-6); Appellant's Reply Brief #30508 (pp. 1-2); Appellant's Brief #30862 (pp. 5-16); Appellant's Reply Brief #30862 (pp. 1-9).

In addition, the facts relied on in this Court's prior written decisions also provide background. See, *Estate of O'Farrell et al v. Grand Valley Hutterian Brethren, Inc.*, 2024 S.D. 81, ¶¶ 2-11 (the first appeal of this matter); and, *VOR, Inc. v. Estate of O'Farrell*, 2025 S.D. 2, ¶¶ 2-6 (the eviction appeal).

Victoria hired counsel to attempt to stop Raymond. In response, “Raymond’s counsel wrote a letter to [Victoria’s] lawyer claiming to terminate [her] attorney-client relationship.” [Appeal Record #30508, AR.66, ¶ 28-41]. In defense of this incredible action, “Raymond’s counsel claimed authority to terminate [her] attorney-client relationship based on...a power-of-attorney [instrument from 2011]” that Victoria had given to Raymond. *Id.*

Victoria revoked the power of attorney and proceeded with her lawsuit. *Id.* Unfortunately, Victoria died a few weeks later, during its initial stages.

On 9/29/2022, Paul attempted to intervene in that lawsuit, seeking “the relief requested in Vicki’s Complaint,” and a “declaratory judgment” relating to Raymond’s actions pertaining to the Trust and VOR, Inc. [Appeal Record #30508, AR.269; AR.264]. The Circuit Court entered an order on 10/26/2022 denying Paul’s intervention. [Appeal Record #30508, AR.552]. But, contemporaneously with that denial, the case was “voluntarily dismissed” by Victoria’s attorney (although *entirely at the direction of Raymond and his counsel*). [Appeal Record #30508, A.R. 553].

Paul attempted to appeal the denial of intervention, but this Court affirmed the voluntary dismissal of Victoria's lawsuit. *See*, #30508, Order Dismissing Appeal, 12/18/2024.

Paul's Complaint

In March 2023, Paul commenced his own action, formatted into three counts, including (i) declaratory relief about the validity of various corporate and trust actions, and, Raymond's ability to continue as Trustee; (ii) unwinding the \$3.2 million sale of the O'Farrell trust land; and (iii) damages arising from tortious interference. [R.7-90].

Declaratory Relief as to the Invalidity of Raymond's/VOR's actions. In many ways, Paul's lawsuit seeks relief similar to Victoria's lawsuit, including Count 1, which seeks, *inter alia*, to invalidate all of VOR's invalid actions. [R.20-24]. Count 1 also seeks to remove Raymond as Trustee. [R.2].

Unwinding the Land Sale. In Count 2 of Paul's Complaint, he sought rescission of the land transaction (which had occurred after Victoria's death, and which was not a part of her lawsuit). [R.24-27]. The Complaint alleges that the land sale is void, on the basis that it was the product of undue

influence, or, a lack of capacity, or, a failure of trust and corporate governance requirements. [R.24-27].¹¹

Tort Damages. Count 3 of Paul's Complaint seeks monetary damages, including from Kelly O'Farrell. [R.28-29]. As to questions of damages, the Complaint also sought recovery in the alternative, namely an equitable claim for the value by which the Defendants were unjustly enriched, measured by the value of Paul's structures which he had paid for and installed on the VOR property at his expense (including his home; Skyline's shop; and Skyline's cattle feed yard). [¶¶ 60-61, 83-86].

Immediately upon its commencement in Spring 2023, Paul's lawsuit elicited motions for dismissal and summary judgment by multiple Defendants. The Circuit Court granted all such motions, dismissing the case on procedural grounds. [R.440-455]. Paul and Skyline appealed.

In that first appeal, this Court vacated all of the Circuit Court's orders and reversed the dismissals. *See*, #30482; *Estate of O'Farrell et al v. Grand*

¹¹ Although there are many avenues, the simplest theory of invalidity is that the O'Farrell Trust became irrevocable upon Victoria's death, as to her interest in the Trust's assets. Thereafter, Raymond was legally incapable of divesting those assets to himself, or convey them to a third party, other than to provide for his basic needs. The deed from Raymond conveying the entirety of VOR's farmland was ineffective (because he did not have complete title to give) and would likely trigger coverage under Grand Valley's title insurance policy.

Valley Hutterian Brethren, Inc., 2024 S.D. 81 (all orders deemed void because the Circuit Judge had been “properly disqualified” yet continued to act in the case). The case was remanded on December 18, 2024, and an ‘Order Appointing Judge’ was entered January 15, 2025.

The 2025 Motions

Following remand, the Defendants began filing the same motions (or variations of them), each seeking outright dismissal of the claims against them. At the same time, Paul’s Estate and Skyline Cattle¹² filed two motions seeking to move the case forward (to amend the Complaint, and, to conduct a Rule 35(a) examination of Raymond). Paul’s Estate also submitted a Rule 56(f) affidavit.

A hearing was held on May 1, 2025. [R.1590-1601]. The Circuit Court granted the Defendants’ motions and denied each of Paul’s Estate’s motions.

Motions by Paul’s Estate

Rule 35(a) Motion. Paul’s Estate filed a Rule 35(a) motion seeking to conduct a mental and medical evaluation of Raymond O’Farrell. [R.1404-

¹² For convenience, subsequent references to Paul’s Estate and his entity, Skyline Cattle Company, will simply name “Paul’s Estate.”

1411]. That motion was denied. [R.1599]. The Circuit Court held that “undue influence or the lack of undue influence is not an issue in this case.” [R. 1599, Memorandum, at 10].

Motion to Amend Complaint & Realign the Parties. Paul’s Estate also filed a Rule 15(a) motion seeking to amend the Complaint and realign the parties. [R.1372-1374]. The amendments encompassed four, primary changes: (i) updating to the Complaint to reflect the death of Paul O’Farrell; (ii) realigning the parties to reflect that VOR had protested its role as plaintiff (and, that after Paul’s death, he could no longer assert claims as its ostensible officer); (iii) setting forth the removal of Raymond as Trustee within its own, separate count (Count 2)¹³; and (iv) editing the language of the damages claim, to make it clear that the plaintiffs intended to seek damages from Grand Valley, if the evidence so warranted.¹⁴ The motion to amend was denied. [R.1681-1682]. The Circuit Court ruled that “even the revised version cannot withstand summary judgment as to the Plaintiffs’ authority to litigate these claims and, at this stage in the proceedings, it

¹³ Paul’s original Complaint sought a declaration as to Raymond’s continued role as Trustee, but not framed as a standalone count. See, ¶¶ 4, 79, 80, and 81 [R.8, 22].

¹⁴ Paul’s original Complaint had adopted a conciliatory approach toward Grand Valley, stating that plaintiffs did not seek damages from it. The Amended Complaint abandons this approach.

would be inequitable and unreasonable to allow the amendments as presented by Plaintiffs' counsel. Additionally, the Court can't allow an amendment where Plaintiffs' counsel is representing VOR, Inc. in the Complaint, and now requesting an amendment that would have him litigating against his client, VOR, Inc., in the same action". [R.1682].

Paul's Estate's Rule 56(f) Affidavit

In response to the (arguably) premature filing of summary judgment motions so soon after remand, Paul's Estate submitted a Rule 56(f) affidavit. [R. 1412-1418]. The affidavit is seven pages in length, with 26 sub-sections, and includes extensive detail about the discovery anticipated in this case; its pertinence to summary judgment and the merits; and explains how the discovery process was interrupted for two years during the prior appeal. The Circuit Court refused the Affidavit, because "based on the Court's reasoning above, further discovery will not change the outcome of this proceeding." [R. 1597, Memorandum, at 8].

Grand Valley's Motion for Summary Judgment

Grand Valley renewed its prior motion to dismiss, but then asked the Circuit Court to address it as a motion for summary judgment. [R.1338].

In its briefing, Grand Valley's argument about Counts 1 and 3 was that those counts were not directed at Grand Valley specifically. Grand Valley's response to Count 2 was that neither a legal nor equitable rescission is available to Paul. The Circuit Court granted summary judgment to Grand Valley.

*Motions for Summary Judgment by
the Trust, VOR, and Victoria's Estate*

Raymond appeared in this lawsuit at the very outset in 2023, both personally, and in his fiduciary capacity for VOR, the Trust, and Victoria's Estate. [R.103-104]. At the outset, Raymond filed motions to dismiss. [R.341-343].

Following remand, Raymond filed (essentially) the same motions, but styled them as motions for summary judgment on behalf of VOR, the Trust, and Victoria's Estate.

As to Raymond's motions, the Circuit Court granted summary judgment:

- dismissing VOR as a plaintiff (even though the motion to amend sought to realign VOR as a defendant);
- dismissing Victoria's Estate as a plaintiff (even though the Estate was not named as a plaintiff);

- dismissing Count 1 “as it pertains to the Estate,” based its reasoning (with no authority or further explanation) that: “As Count 1 pertains to the Estate, it must be brought within the estate/probate proceeding.”
- dismissing the rescission claims within Count 2, on two theories: that Paul “was not a party to the contract,” and, on the basis that “Plaintiffs acknowledge that this claim is solely against Kelly.” [R. 1595, Memorandum, at 6]. (However, there is nowhere in the Record that Plaintiffs ever “acknowledge” that the rescission claim “is solely against Kelly.”) The Circuit Court appears to be conflating the existence of an *independent* tortious interference claim against Kelly (which would trigger monetary damages), with the underlying issue that the real estate transaction was wrongful and reversible (*i.e.*, grounds for rescission).

In its analysis of Count 1 and Count 2 of the Complaint, the Circuit Court concluded that it was “undisputed” that Raymond is the president of VOR solely because the “2022 Annual Report of VOR” filed with the

Secretary of State shows Raymond's name, and not Paul's. [R. 1593, Memorandum, at 4].

The Circuit Court also concluded that Paul's Complaint "includes VOR as a plaintiff [and] simultaneously names VOR as a defendant."¹⁵ [R. 1594, Memorandum at 5].

Raymond repudiates the Trust.

Contemporaneously with those summary judgment motions in the civil case, Raymond filed pleadings within Victoria's probate file, in connection with an attempt to remove him as Special Administrator.

Those matters are addressed fully within the other appeal (#30116). But we pause to point out one, key detail: Raymond has now taken an *overtly hostile* position relative to the Trust. He now claims that the Trust was never funded, and that the Trust is a nullity.¹⁶

¹⁵ This is inaccurate.

¹⁶ At the probate hearing (25PRO22-11, presently on appeal at #31106), Raymond sought to prove this via tax filings that ostensibly showed him as sole the shareholder of VOR, Inc. But the only witness who testified (Raymond's accountant) admitted that he did not know either way whether VOR's shares had been placed into the Trust; and, further admitted that Treasury Regulations permitted Raymond, as a trustor of a living trust, to report the trust's activities on K-1 forms in Raymond's name. Furthermore, the Trust contains a provision directing this manner of tax reporting, using either Raymond or Victoria's tax ID. Raymond's new position is also contrary to the prior filings of various parties, including his own.

Thus, Raymond had now taken a litigation position directly and overtly hostile to the Trust and its corpus. In short, Raymond has repudiated the Trust.

From these facts and procedure, Paul's Estate and Skyline appeal, and are joined in this appeal by Paul's brother Lance O'Farrell, the named successor trustee of the family trust.¹⁷

They assign five errors.

¹⁷ At the hearing, Lance appeared, joining the motions, see, [R.1605], and he joins this appeal.

STATEMENT OF THE ISSUES

1.

A declaratory judgment action is a flexible procedure by which a party can resolve disputes about the validity of corporate actions, trust interpretation, and other fiduciary activities. Anyone whose interests would be affected by the outcome “shall” be joined as a party. In corporate governance disputes, the entity must be a party, but its alignment can be as plaintiff or defendant. When a trustee, corporation, and personal representative refuse to pursue relief, other interested parties can do so. **Did the Circuit Court err by granting summary judgment upon any and all theories of declaratory relief sought in Count 1 of Paul’s Complaint?**

Yes, the Circuit Court erred. It failed to apply any of the above-mentioned rules and principles.

- *Hansmeyer v. Shotkoski*, No. CIV 17-4150, 2018 WL 3104437, at *3 (D.S.D. June 22, 2018)
- *In Re Betty Luhrs Trust*, 443 N.W.2d 646 (S.D. 1989).
- SDCL 21-24-7
- Ch. 21-24, generally

2.

A trustee must be removed when he is “unwilling” to administer the trust, or, commits a “serious breach of trust,” or, is “unfit” or, fails to “fulfill the purposes of the trust.” Here, Raymond breached an irrevocable trust by disgorging all of its assets to himself, and, then later disavowed the trust altogether, and thus is now “unwilling” to administer it. **Did the Circuit Court err by refusing further proceedings upon Raymond’s removal?**

Yes, the Circuit Court erred. Because he has now adopted a hostile position toward the existence of the trust, Raymond’s removal should be ordered as a matter of law, or, at the very least, upon further proceedings as to the underlying facts.

- SDCL 55-3-5
- SDCL 55-3-20.1

3.

Rescission is both a legal and an equitable remedy. As a legal remedy, the Court can enforce a unilateral rescission effectuated by “a party” on the basis of undue influence. As an equitable remedy, the Court can order a rescission upon application of “an aggrieved party” on grounds of undue influence, in circumstances where there is not an adequate remedy at law. Here, an ousted officer of a corporate party to a real estate transaction attempted to rescind the sale because his father’s assent for the corporation was procured by undue influence. **Did the Circuit Court err by concluding that neither legal or equitable rescission is available?**

Yes, the Circuit Court erred. Its decision failed to examine the disputed facts as to the rescinding officer’s authority to effectuate a legal rescission, and, incorrectly interpreted the phrase “aggrieved party” as to an equitable rescission.

- *Knudsen v. Jensen*, 521 N.W.2d. 415 (S.D. 1994)
- SDCL 53-11-2
- SDCL 21-12-1
- BLACK’S LAW DICTIONARY, 1144-1145 (9th ed. 2001) (providing same definition for both “aggrieved party” and “party aggrieved”).

4.

When a summary judgment motion is filed prematurely, the responding party can submit a Rule 56(f) affidavit seeking leave to conduct further discovery, prior to a decision upon the motion. The affidavit cannot be cursory, and instead, must identify essential facts, and, how additional time will enable the nonmovant to gather those facts and rebut the motion. Here, the discovery process was paused during a two-year period of motions to dismiss; an initial appeal; and remand in January 2025, whereupon these motions for summary judgment were filed immediately thereafter. **Did the Circuit Court err by refusing further discovery prior to ruling on the summary judgment motions?**

Yes, the Circuit Court erred. It refused discovery on the narrow basis that the matters in dispute were legal, rather than factual.

- SDCL 15-6-56(f)
- *Betty Jean Strom Tr. v. SCS Carbon Transp., LLC*, 2024 S.D. 48, ¶¶ 40-41, *reh'g denied* (Oct. 9, 2024)

5.

Attorney fees can be awarded when an action is dismissed and found to be “frivolous.” A dismissal does not mean an action is frivolous. Any doubt about whether or not a legal position is frivolous or taken in bad faith must be resolved in favor of the party whose legal position is in question. Here, we ask for reversal, or, for a fuller examination of the merits of the case. **Did the Circuit Court err by concluding that this action is frivolous and by awarding fees?**

Yes, the Circuit Court erred. If the dismissals are reversed, then the appeal is, by definition, not compensable as a frivolous action. Or, in the alternative, the Circuit Court misapplied the doctrine of ‘frivolous’ actions.

- SDCL 15-17-51
- *Gronau v. Weubker*, 2003 S.D. 116, ¶ 6

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*. *Est. of Olsen v. Agtegra Coop.*, 2024 S.D. 39, ¶ 12. The *de novo* standard also applies to the interpretation of statutes, rules of procedure, and contractual provisions. *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 15 (rules); *Uhre Realty Corp. v. Tronnes*, 2024 S.D. 10, ¶ 20 (contract interpretation); *Good Lance v. Black Hills Dialysis, LLC*, 2015 S.D. 83, ¶ 9 (statutes).

“A circuit court’s decision to grant or deny a continuance under Rule 56(f) is reviewed for an abuse of discretion.” *Betty Jean Strom Tr. v. SCS Carbon Transp., LLC*, 2024 S.D. 48, ¶ 39, 11 N.W.3d 71, 86, *reh’g denied* (Oct. 9, 2024).

“Decisions on whether to order a medical examination pursuant to SDCL 15-6-35(a)... are within the broad discretion of the trial court.” *Stormo v. Strong*, 469 N.W.2d 816, 822 (S.D. 1991).

“We review the decision denying [a] plaintiff’s request to amend pleadings under the abuse of discretion standard of review.” *McDowell v. Citicorp Inc.*, 2008 S.D. 50, ¶ 7.

“Of course, an error of law is never within the range of permissible choices and necessarily constitutes an abuse of discretion.” *Olson v. Huron Reg'l Med. Ctr., Inc.*, 2025 S.D. 34, ¶ 18 (citation omitted).

ARGUMENT

- 1. The Circuit Court erred by granting summary judgment on Count 1, which seeks a declaration of the invalidity of various corporate and trust actions undertaken by Raymond (and his removal as Trustee).**

Count 1 of Paul's Complaint seeks “to declare ‘void’ the improper corporate/trust maneuvers” undertaken by Raymond under the guise of his role as corporate officer of VOR and/or trustee of the Family Trust.¹⁸

In the words of Paul's original Complaint, in order to unwind all of Raymond's machinations will involve a declaration of invalidity of the “void and voidable acts...by those purporting to act on behalf of the Trust Corporation [*i.e.*, VOR]; by individuals purporting to act on behalf of the Family Trust; by individuals purporting to act as Victoria O'Farrell's power of attorney; by individuals purporting to act on behalf of Victoria's Estate, and by individuals purporting to act on behalf of Raymond O'Farrell or as his

¹⁸ Count 1 of Paul's Complaint also seeks a declaration that Raymond is not capable of serving as Trustee. In the proposed, amended Complaint, the Raymond's removal as trustee was moved to a stand-alone section and re-designated as Count 2. Raymond's role as Trustee is addressed in the next section. [R.1372-

power of attorney. Some of these maneuvers are known to the Plaintiffs; many are still unknown. Plaintiffs seek a declaration that would avoid all of these improper corporate, trust, probate, and individual actions. Such declarations are available via Chapter 21-24.” [R.20; Complaint, ¶¶ 68-71].

After that preamble, Count 1 then continues on for another 20 paragraphs, covering four pages, extensively detailing the need for declarations pertaining to corporate elections, corporate meetings, failures of notice, interpretation and applicability of trust provisions, actions by Victoria’s Estate, rights pertaining to Skyline as a farming partner and Paul as a tenant, the validity of Kelly’s power of attorney over Raymond, and other transactions expected to be uncovered by discovery. [R.20-23; Complaint, ¶¶ 72-91].

The Circuit Court ignored the *substance* of Count 1 and focused instead upon irrelevant issues, such as how the caption was aligned and whose name was listed as ‘president’ in the Secretary of State’s records.¹⁹

¹⁹ [R.1593-1594]. Counsel has found no cases in the United States where the name on file with the Secretary of State was dispositive in a corporate governance dispute. The practical problems with such a rule are obvious, including endless, warring filings with the Secretary.

Part of the problem with the Circuit Court’s analysis is that it failed to recognize the flexible nature of a declaratory judgment proceeding. “When declaratory relief is sought all persons *shall be made parties* who have or claim any interest which would be affected by the declaration....” SDCL 21-24-7 (emphasis added). As long as one or more plaintiffs are capable of seeking the “declaration,” then all other interested parties should be joined, either as co-plaintiffs, or as defendants.

Likewise, when a dispute involves corporate governance issues, the critical element is not the *alignment* of parties, but, instead that the entities are included as parties. It is commonplace in a corporate dispute that there may need to be a realignment of the subject entity, depending upon its ‘approval’ or ‘disapproval’ of the litigation. In a recent case, our federal district court addressed the same circumstances here, where a corporation is named as a plaintiff in a control lawsuit, *but*, management is antagonistic to that claim. The remedy is realignment, rather than dismissal. *Hansmeyer v. Shotkoski*, No. CIV 17-4150, 2018 WL 3104437, at *3 (D.S.D. June 22, 2018).

The *Hansmeyer* court noted that a lawsuit seeking to undo a business transaction is typically brought by the plaintiff, *on behalf of* the corporation. 2018 WL 3104437, at *3 (D.S.D. 2018). But, “[w]here management refuses

to take action to undo a business transaction or whenever it so solidly approves [of the transaction] that any demand to rescind would be futile, a court should find antagonism [and the corporation should be aligned as a defendant].” *Id.*

This draws upon the broader principle that a corporate entity subject to a control dispute is not, itself, an *adverse* party no matter how the lawsuit is captioned. Instead, a corporation is a *nominal* party who stands to benefit from the suit: “[Thus] although the corporation is named in the complaint as a defendant, its interests are not necessarily *adverse* to those of the plaintiff since [the corporation] will be the beneficiary of any recovery.” *In Cotter on behalf of Reading International, Inc. v. Kane*, 473 P.3d 451, 455 (Nev. 2020).

Applying those principles here, this is a control dispute lawsuit about VOR, whose operative shareholder is a Trust, and there are numerous parties whose interests would be affected by the declarations sought in Count 1: Paul (and now Paul’s Estate), Skyline, Raymond, Victoria’s Estate, Grand Valley, and, of course, the Trust itself (by and through its Trustee).

In addition, the Complaint also alleges that Raymond is unfit to serve as Trustee and should be replaced (and that his recent actions are being

challenged). Under the Trust document, Paul and Lance O'Farrell are successor Trustees.²⁰ And Lance and Paul's children are beneficiaries.²¹

Every single one of those parties has appeared in this lawsuit. And notably (in response to Paul's attempted appearance for the company) VOR appeared via its alternative corporate control group (Raymond) and roundly disapproved of this suit, as well as Paul's attempted rescission. To paraphrase *Hansmeyer*, VOR (through Raymond) "so solidly approves [of the land sale transaction] that any demand to rescind would be futile, a court should find antagonism [and the corporation should be aligned as a defendant]."

Total and complete opposition to rescinding the \$3.2 million sale has been Raymond's position from the outset. Thus, realignment of VOR from Plaintiff to Defendant *could* have (and should have) occurred back in April 2023. But it remains proper today for Paul's Estate to propose this realignment via the proposed, Amended Complaint. Seeking realignment *now* is no different than if it had taken place back then.

In addition to Raymond's opposition to this suit, there is also another important reason for realignment: with Paul's death, Paul is no longer a party,

²⁰ R.242, 1377.

²¹ R.243, 270-271.

and thus no longer an ousted officer capable of seeking relief under the theory that he remains the last, rightful President of VOR. Paul's corporate officer duties—whatever those were—could not extend past his death. In short, without Paul individually in this suit, the remaining plaintiffs are not capable of pursuing relief *as* alleged agents of VOR.

But Paul's death does not mean the end to all claims pertaining to VOR. Instead, in the vacuum left by Paul's death, the question is whether any of the other parties or proposed parties are capable of seeking relief for VOR's benefit. The answer is yes.

It is well settled in South Dakota that trust beneficiaries have a protectible interest in the trust, and, thus they have the ability to seek protection of trust assets, including when the Trustee fails to do so. *See, In Re Betty Luhrs Trust*, 443 N.W.2d 646 (S.D. 1989). Paul asked Raymond to pursue these claims back in September 2022, and Raymond refused. [R.1639; Appeal Record #31106, A.R.23-24]. More recently, Raymond has now disavowed the Trust altogether. As a result, the beneficiaries (and Lance as successor Trustee) are permitted to bring these claims.

In contrast to this approach, the Circuit Court's analysis of Count 1 was incomplete and flawed. It failed to conduct any of the foregoing analysis.

Sections 1.a. and 1.b. of the Circuit Court's decision dismissed VOR and Victoria's Estate 'as plaintiffs,' without any consideration of realignment. [R.1593-1594]. Section 1.c. of its decision dismissed Count 1 "as it pertains to the Estate," on the Circuit Court's assumption (with no authority) that "it must be brought within the estate/probate proceeding." [R.1594; Memorandum, p. 5].

In Section II.a, the Circuit Court's analysis regarding Grand Valley and Count 1 was similarly conclusory, holding that "the Complaint does not mention Grand Valley in Count 1" and that thus it does "not plead any cause of action against Grand Valley in Count 1." [R.196; Memorandum, p. 7].

Count 1 of Paul's lawsuit seeks a declaration of rights, including as to the validity of various corporate and trust acts. There is no question that Victoria's Estate and VOR, Inc., have an "interest which would be affected by the declarations" sought in this lawsuit, within the meaning of SDCL 21-24-7. Accordingly, Victoria's Estate and VOR, Inc., are proper parties, regardless of whether they are denominated as plaintiffs or defendants.

Likewise, even though it is not "mentioned" in Count 1, Grand Valley has an "interest which would be affected by the declarations." If Paul's

claims are proven (*i.e.*, that VOR's and the Trust's acts were void or voidable, and that Victoria's half of the Trust became irrevocable upon her death), then those rulings will affect the validity of Grand Valley's deed.

2. The Circuit Court erred by failing to rule on the other relief sought in Count 1: a declaration as to Raymond's removal as Trustee (found in Paragraphs 4, 79, 80, and 81 of the original Complaint, and, restructured as 'Count 2' of the proposed, Amended Complaint).

There are no grounds upon which the Circuit Court could grant summary judgment rejecting Paul and Skyline's effort to remove Raymond as Trustee. In fact, the Circuit Court's decision does not address the trustee issue at all. Discovery should have proceeded on this issue, and then the question should have been resolved on its merits. *See*, SDCL 55-3-5 (failing to "fulfill the purposes of the trust"); SDCL 55-3-20.1 ("serious breach of trust," or "unfitness, unwillingness, [or] persistent failure to administer the trust effectively").

The Record demonstrates in several places that Paul and Skyline were building a compelling, *prima facie* case for Raymond's removal. First, Victoria's affidavit identifies her contemporaneous observations of Raymond's unfitness and lack of understanding as to his role and actions as Trustee. [R. 76-85].

Second, at the time summary judgment was granted, Paul's Estate and Skyline were actively seeking to conduct a Rule 35(a) examination regarding Raymond's physical and cognitive condition, and thus to further inform the question as to his present fitness.

And third, Raymond's most recent litigation position (repudiating the Trust with his new claim that it has never held assets) demonstrates an inherent lack of fitness to remain as Trustee, perhaps as a matter of law. *E.g., In re Florence Y. Wallbaum Revocable Living Tr. Agreement*, 2012 S.D. 18, ¶¶ 32-33 ("trustee's first duty as a fiduciary is to act in all things wholly for the benefit of the trust...which requires the trustee to preserve trust assets") (citing, *inter alia*, Restatement (Second) of Trusts §§ 170, 175, 176 (1959)); SDCL 55-3-5 ("A trustee must fulfill the purposes of the trust as declared at its creation...and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested, and upon approval by the court.") As a matter of law, Raymond is "refusing" to administer the Trust. SDCL 55-3-20.1. He must be removed.

In many ways, Raymond's ongoing role as Trustee is an *a priori* question which should be resolved prior to dispensing with *any* of the other claims in the Complaint. Until it is clear who should serve as Trustee, it

remains unclear whether the Trust is being helmed by a capable fiduciary. Under the Trust Agreement, Paul's brother Lance O'Farrell is named as the successor trustee.²² Lance has joined this appeal, and he joins in seeking that relief.

Upon this Record, the Circuit Court could not have granted summary judgment upon the question of Raymond's removal.

3. The Circuit Court erred by granting summary judgment on the rescission claim in Count 2.

The route to rescission of the \$3.2 million land sale is either via a *legal* rescission, or, via an *equitable* rescission.²³ The Circuit Court erred in its analysis of both issues, both of which are questions of law.

“An action for rescission may be brought as a legal action pursuant to SDCL ch. 53-11, or as an equitable action pursuant to SDCL ch. 21-12.”

Knudsen v. Jensen, 521 N.W.2d 415, 417 (S.D. 1994).

Legal: “[Rescission] is legal, if the court is asked to enforce a completed rescission.” *N.W. Realty Co. v. Carter*, 338 N.W.2d 669, 672

²² [R. 242, 1377].

²³ As discussed above in footnote 11, there is also an alternative legal theory upon which the \$3.2 million deed would be unwound: if Raymond did not hold proper title, as a result of Victoria's death and its resulting irrevocability of her interest in the Trust, then the conveyance to Grand Valley would fail.

(S.D. 1983). *See, also, Skoglund v. Staab*, 312 N.W.2d 29, 31 (S.D. 1981) (in an action for legal rescission, the litigant “seek[s] to enforce her acts of rescission”).

Equitable: “If the action is in equity, the rescission is accomplished by court decree.” *Knudsen*, 521 N.W.2d at 417. A rescission in equity is available where a party does not have “an adequate and complete remedy at law.” *N.W. Realty Co.*, 338 N.W.2d at 672.

(a) The Circuit Court erred in its analysis of a *legal* rescission

In SDCL 53-11-2, the Legislature recognizes several grounds for a legal rescission:

- the parties can mutually agree to rescind, as in SDCL 53-11-2(5); and
- one of the parties can unilaterally rescind when there has been a failure of consideration, including the reasons outlined in SDCL 53-11-2(2), (3), and (4); and
- as is pertinent here, a unilateral, legal rescission is available when the consent of that party was not freely given. *See*, SDCL 53-11-2(1) (covering situations where consent was obtained by undue influence, fraud, or duress, including

“by” or “with the connivance of the party as to whom he rescinds”) (emphasis added). *See, also*, SDCL 53-3-2 (“Consent which is not free is not void but voidable and may be rescinded in the manner prescribed by the statutes on rescission.”); SDCL 53-4-1 (“An apparent consent is not real or free and is voidable when obtained through: (1) Duress; (2) Fraud; (3) Undue influence; (4) Mistake.”)

Under SDCL 53-11-2, a legal rescission can be pursued by “a party to a contract.” The Circuit Court held that Paul was not a “party,” and thus a legal rescission is unavailable.²⁴ The Circuit Court did not understand the premise of Paul’s legal rescission claim.

In this lawsuit, Paul alleged Raymond was unduly influenced into using VOR and the Trust to carry out the \$3.2 million land sale to Grand Valley...a transaction which violated the Trust, which was in contravention of corporate authority, which caused Raymond to breach his fiduciary duties to the Trust and to VOR, and which stood to benefit Kelly (the influencer).

²⁴ The Circuit Court concluded, further, that the “Plaintiffs acknowledge that this claim [for rescission] is solely against Kelly.” Memorandum, 6 [R. 1595]. There is no basis for this conclusion.

In this lawsuit, Paul further alleged that he had the *legal* ability to effectuate the unilateral rescission permitted under SDCL 53-11-2(1). This ability was based upon Paul's allegation that he had been improperly removed as an officer of VOR, and, thus, as the last, validly elected officer, he continued to hold the ability to act as President as of March 2023. *See*, SDCL 47-1A-841; SDCL 47-1A-842(3); *Schroder v. Scotten, Dillon Co.*, 299 A.2d 431, 435 (Del.Ch. 1972) (when corporate meetings are not lawfully convened, the previous directors and officers continue to hold office).

Under these basic assumptions, Paul believed he had authority to act for VOR, and therefore issued a Notice of Rescission. Grand Valley rejected that notice, and, VOR then appeared in this lawsuit, attempting to disavow the attempted rescission.

But if Paul is correct that he was still the President, then the legal rescission was effective, and Raymond's protests thereafter are moot. And, if Paul's legal rescission was effective in March 2023, then the Court can enforce it. But we admit that the question as to whether Paul had the ability

to effectuate the legal rescission is rife with disputed facts for which further discovery and a trial is necessary.²⁵

The Circuit Court's analysis sidestepped all of this. It concluded that Paul had no such authority because of VOR's Secretary of State filings for 2022. That is an insufficient basis upon which to grant judgment as a matter of law. If Paul still held authority on behalf of VOR, then Paul issued the rescission for VOR, which was a "party" to the land transaction.

Or, if this legal rescission was unsuccessful, an *equitable* rescission remains available. The Rules of Civil Procedure permit the pursuit of relief "in the alternative or of several different types." SDCL 15-6-8.

²⁵ The public filings with the Secretary of State undisputedly show that Paul remained President of VOR for all years from 2012 until 2022, which is when Victoria began sounding the alarm about Kelly's manipulation of Raymond with regard to VOR and the Trust. A reasonable inference from the existing Record, and which will likely be borne out from further discovery, is that Paul's removal as President was the product of undue influence and a failure of corporate authority, all of which was the product of Kelly's jealous orchestration. Notably, soon after the alleged manipulation begins, Kelly then appears on Secretary of State filings for the first time.

(b) The Circuit Court erred in its analysis of an *equitable* rescission.

If Paul, Paul's Estate, and Skyline cannot pursue a legal rescission, then, by definition, they do not have a remedy at law, opening the doors to a court-ordered, *equitable* rescission.

For an equitable rescission to be granted, there is no need to issue a notice of rescission, nor is there a requirement to “restore” or “offer to restore” the benefits of the transaction. “Although the grounds for legal rescission, SDCL 53-11-2, are incorporated into SDCL 21-12-2, the *procedures* required for legal rescission do not affect [a] claim for equitable rescission.” *Skoglund v. Staab*, 312 N.W.2d 29, 31 (S.D. 1981) (emphasis added).

Similar to its reasoning on the legal rescission theory, the Circuit Court rejected the theory of equitable rescission on the basis that Paul and Skyline were not ‘parties’ to the land transaction. But this analysis assumes that there is no difference between a “party” under SDCL 53-11-2, and “a party *aggrieved*” under SDCL 21-12-1.

By statute, the remedy of a legal rescission appears to be limited to parties to the contract. *See*, SDCL 52-11-2 (“A party to a contract may rescind...”)

But the Legislature used a different phrase in SDCL 21-12-1, making the remedy available to “a party aggrieved.” Using basic tools of statutory construction,²⁶ the inclusion of the word *aggrieved* tells us that this phrase means something *different* than a mere “party” to the contract. The phrase “aggrieved party” appears to be broader, and not limited to the contracting parties.

And, in fact, the term “aggrieved party” has a distinct definition in the dictionary: someone whose “personal, pecuniary, or property rights have been adversely affected by another person’s actions....” BLACK’S LAW DICTIONARY, 1144-1145 (9th ed. 2001) (providing same definition for both “aggrieved party” and “party aggrieved”).

Here the “aggrieved parties” include beneficiaries of the Trust (Paul, Lance, and Conner), and they also include Paul’s Estate and Skyline. Each of them have “pecuniary” and “property” rights which were affected by the unduly influenced land transaction.²⁷

²⁶ “Words and phrases in a statute must be given their plain meaning and effect. When the language of 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.” *Goetz v. State*, 2001 S.D. 138, ¶ 16 (emphasis removed).

²⁷ This broader definition also recognizes the broader category of litigants who would not have an adequate remedy at law as

Accordingly, *even if* Paul lacked authority to act for VOR, summary judgment is unavailable to defeat the *equitable rescission claim*. It is a claim which various “aggrieved parties” can pursue, including the original Plaintiffs; the remaining Plaintiffs; and would-be Plaintiffs (like Lance).

(c) Other grounds upon which to invalidate the deed

Although not addressed by the Circuit Court’s opinion, the \$3.2 million deed may also be invalid based upon grounds *beyond* undue influence.

Raymond claims to have effectuated the sale of the Trust land by withdrawing ‘his’ half of shares in VOR. But those shares could not be withdrawn simply because Raymond *wanted* to withdraw them.²⁸ During Victoria’s lifetime, her assent was necessary for VOR’s corporate acts, as well as certain Trust acts.²⁹ Victoria herself believed that the Trust document constrained Raymond and herself from withdrawing assets without the other’s consent.³⁰

contracting parties, but who have a pecuniary interest in the wrongful transaction.

²⁸ Response to Undisputed Facts, ¶¶ 4-14. [R.1364-1365].

²⁹ See, Response to Undisputed Facts, ¶¶ 4. [R.1487-1489].

³⁰ See, *Victoria’s Brief*, 6/28/2022. [R. 68-71]; Affidavit of Victoria O’Farrell. [R. 76-85].

Then, following Victoria's death, her interest in the Trust became irrevocable, meaning that her 50% of VOR was now permanently held within the Marital Trust, which would no longer permit withdrawing the shares.³¹ A deed that ignored this issue would be invalid. (And as a matter of property law, withdrawing Raymond's purported half of the shares was a legal impossibility after Victoria's death, because they were held as tenancy in common property.³²)

At best, following her death, Victoria's interest in the land and Trust could be used *only* for the limited purpose of supporting Raymond within "HEMS" limitations; and, any appointment of this interest could not be made to Raymond individually, but instead to the descendants.³³ Raymond was not free to sell the Trust real estate, unrestricted. Nor could Raymond sell the land for inadequate consideration.

In short, even if Raymond had capacity and was not unduly influenced, his attempted conveyance appears to be void.

³¹ Response to Undisputed Facts, ¶¶ 9. [R. 1491-1495].

³² Response to Undisputed Facts, ¶ 12. [R. 1495-1497].

³³ Response to Undisputed Facts, ¶¶ 9, 12. [R. 1491-1497].

And, in fact, the Colony's own purchase agreement recognized the existence of all of these potential problems.³⁴ So, the Colony cannot now complain. Nor can the Colony assert it is an innocent party.

In a light most favorable to Paul's Estate and Skyline, the Colony either connived with the undue influence perpetrated on Raymond, permitting rescission; or, the Colony took title with constructive knowledge that the conveyance was defective and prohibited by the irrevocability clause of the Trust. Summary judgment is not available on Count 2.³⁵

³⁴ See, R. 1331.

³⁵ Grand Valley's other theory is that it was a good faith purchaser for value. But this is an affirmative defense, and, a fact-intensive issue, not amenable for summary judgment here. See, *Muhlbauer v. Estate of Olson*, 2011 S.D. 42, ¶ 12. ("A party's status as a "good faith purchaser for value" is a fact-based inquiry that involves a "lack of notice" and the application of "the unique facts of [the] case.") This theory is also refuted by its own Purchase Agreement, which lists Victoria's lawsuit against Raymond.

4. The Circuit Court erred by refusing Plaintiffs' Rule 56(f) affidavit, which requested a stay of the summary judgment proceedings so that discovery could proceed on the claims in the Complaint (and Amended Complaint)

The simplest mechanism by which to reverse the Circuit Court is to hold that it erred by refusing to continue the motion proceedings so that discovery could take place on these claims. Counsel requested this via a lengthy Rule 56(f) affidavit. [R.1412-1418].

“Under [Rule 56(f)], the facts sought through discovery must be ‘essential’ to opposing the summary judgment. This requires a showing how further discovery will defeat the motion for summary judgment[, via] identification of the probable facts not available and what steps have been taken to obtain those facts, how additional time will enable the nonmovant to rebut the movant’s allegations of no genuine issues of material fact[,] and why facts precluding summary judgment cannot be presented at the time of the affidavit.” *Betty Jean Strom Tr.*, 2024 S.D. 48, at ¶¶ 40-41.

In their Rule 56(f) affidavit, Paul’s Estate and Skyline provided all of this information, including an extensive discussion about how the proposed document discovery and depositions would uncover facts necessary to oppose summary judgment on the basis of undue influence, corporate

machinations, and trust documents. The affidavit also pointed out that motion was pending for a Rule 35(a) examination of Raymond. [R.1416].

Further, as in the *SCS Carbon* case, “much of the information sought...is within the exclusive control of [Raymond and his counsel].... This weighs strongly in favor of granting...further discovery, contrary to the determinations by the circuit court that the information sought...has no bearing on any of the issues in the case.” *Betty Jean Strom Tr.*, 2024 S.D. 48 at ¶ 42.

Denial of further discovery was an abuse of discretion, and summary judgment was granted prematurely.

However, if this Court limits its holding *only* to the Rule 56(f) affidavit issue, the Circuit Court will lack any guidance as to the basic law underlying the claims in this case. Accordingly, we ask this Court to begin to fix the legal errors identified above, as part of the reversal and remand.

In addition, we ask this Court to address the motions filed by Paul’s Estate, attempting to move this case forward: the Rule 35(a) examination of Raymond, and, the motion to amend. Leave to amend “shall be freely given.” *Prairie Lakes Healthcare v. Wookey*, 1998 S.D. 99, ¶ 28 (quoting SDCL 15-6-15(a)). The motion to examine Raymond was relevant and

necessary given the facts of this case. SDCL 15-6-35(a); *Stormo v. Strong*, 469 N.W.2d 816 (S.D. 1991).

There was no, meaningful *substantive* opposition to these motions; instead, the resistance was procedural. The Circuit Court did not even address those motions on their merits, rejecting amendment of the Complaint because it would be “futile,” and in contravention of “judicial economy,” [R.1598], and, refusing the Rule 35(a) examination of Raymond because “Raymond’s mental status is not at issue.” [R.1599].

In both instances, the Circuit Court held that “this case does not center on the alleged undue influence of Raymond, but rather on whether the Plaintiffs have the authority to litigate this claim.” [R.1598]. Based upon the analysis in Sections 1, 2, and 3 above, this conclusion is erroneous. A Circuit Court abuses its discretion when its decision is premised upon legal mistakes. *Olson*, 2025 S.D. 34, ¶ 18 (“Of course, an error of law is never within the range of permissible choices and necessarily constitutes an abuse of discretion.”)

5. This is not a frivolous action.

The Circuit Court held that this action was frivolous under SDCL 15-17-51 and awarded fees. Paul’s Estate and Skyline ask for the

award of fees to be vacated, on either of two alternative grounds.

First, if this Court agrees that the Circuit Court's grant of summary judgment was in error, the statutory award of attorney's fees is *per se* erroneous. *See*, SDCL 15-17-51 ("dismissal" as a necessary element for recovery of fees); *Gronau v. Weubker*, 2003 S.D. 116, ¶ 6 (necessary element is that "the civil action is dismissed"). Paul's Estate and Skyline ask for a full reversal of the Circuit Court's dismissal because they have stated valid claims.

Or second, in the event this Court holds that some or all of those asserted claims should be dismissed, then, we ask this Court to apply the "prior caselaw in which [SDCL 15-17-51] has been interpreted." *Gronau*, 2003 S.D. 116 at ¶ 10.

"Simply because a claim or defense is adjudged to be without merit does not mean that it is frivolous....Any doubt about whether or not a legal position is frivolous or taken in bad faith must be resolved in favor of the party whose legal position is in question." *Id.* (quoting *Ridley v. Lawrence County Comm'n*, 2000 S.D. 143, ¶ 14). To paraphrase the analysis of *Gronau*, Paul's effort to pursue claims that would rectify substantial allegations of undue influence "cannot be

characterized as a legal position so wholly without merit as to be ridiculous.” *Id.* (quoting and citing *Behrens v. American Stores Packing Co.*, 236 Neb. 279, 460 N.W.2d 671, 677 (1990); *Ridley*, 2000 SD 143, ¶ 14).

It was a reasonable legal position for the ousted CEO of the family Trust Corporation to seek to rectify the challenged corporate acts, including the precipitous sale of the family’s farmland. It was a reasonable legal position for Victoria’s son to attempt to assert claims “for the benefit of” her Estate when Raymond, as fiduciary, was unable or refused to do so. And, it was a reasonable legal position for Paul and Skyline to assert unjust enrichment claims in the alternative. This is not a frivolous lawsuit. The facts of this case are a clear example of elder abuse. It is reasonable for all of these plaintiffs to attempt to stop and fix it.

CONCLUSION

Paul’s Estate, Skyline, and Lance O’Farrell ask this Court to reverse the grants of summary judgment; vacate the award of fees; and remand this matter for substantive proceedings. They ask for Raymond’s removal as trustee, as a matter of law, based upon his disavowal of the Trust. They ask

for the reversal of the orders denying the Rule 35(a) examination and motion to amend the Complaint.

And, so that there are no further questions as to the contours of relief available, and no further accusations that this is an unfounded, frivolous action, we ask for your opinion to set forth the pertinent law and facts that permit this action to proceed on its merits. In short, we ask for a substantive decision, rather than a procedural one, to the full extent permitted here.

Dated this 2nd day of October, 2025.

HOVLAND, RASMUS &
BRENDTRO, PROF. LLC

/s/ Daniel K. Brendtro
Daniel K. Brendtro
Mary Ellen Dirksen
Benjamin Hummel

326 E. 8th Street, Suite 107
PO Box 2583
Sioux Falls, South Dakota 57101-2583
Attorneys for Plaintiff/Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 8,110 words, exclusive of the Table of Contents, Table of Authorities, jurisdictional statement, statement of issues, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2025, I filed and served a true and correct copy of the foregoing Appellant's Brief using the Odyssey file and serve system upon the following:

Lee Schoenbeck
Joseph Erickson
Schoenbeck & Erickson, PC
1200 Mickelson Dr., Ste. 310
Watertown, SD 57201
lee@schoenbecklaw.com
joe@schoenbecklaw.com
**Counsel for the Raymond and Victoria
O'Farrell Living Trust, and, the Estate
of Victoria O'Farrell (and for
Raymond O'Farrell individually, as,
Special Administrator of the Estate;
and as Trustee), and as asserted
counsel for VOR, Inc., by and through
Raymond O'Farrell.**

Reed Rasmussen
Siegel, Barnett & Schutz, LLP
PO Box 490
Aberdeen, SD 57402
Rrasmussen@sbslaw.net
**Counsel for Grand Valley Hutterian
Brethren, Inc.**

William G. Beck
Seth A. Lopour
Woods, Fuller, Shultz & Smith, PC
300 S. Phillips Ave., Ste. 300
Sioux Falls, SD 57117
billbeck@woodsfuller.com
seth.lopour@woodsfuller.com
**Counsel for Grand Valley Hutterian
Brethren, Inc.**

Jack Hieb
Richardson Law Firm
1 Court Street
P.O. Box 1030
Aberdeen, SD 57402-1030
jhieb@rwwsh.com
Counsel for Kelly O'Farrell

/s/ Daniel K. Brendtro
Daniel K. Brendtro
One of the Attorneys for Appellants

APPELLANTS' APPENDIX
TABLE OF CONTENTS

Memorandum Decision **Appendix 1 - 12**

VOR's Statement of Undisputed Facts.....**Appendix 13 - 17**

Paul's Estate's Response to VOR's Undisputed Facts..... **Appendix 18-28**

Grand Valley's Statement of Undisputed Facts..... **Appendix 29 - 37**

Paul's Estate's Response to Grand Valley's Undisputed Facts.... **Appendix 38-70**

Statement of Facts, Appeal #30482.....**Appendix 71-73**

Statement of Facts, Appeal #30344.....**Appendix 75-84**

Statement of Facts, in Reply, Appeal #30344.....**Appendix 85-91**

Statement of Facts, Appeal #30532.....**Appendix 92-94**

Statement of Facts, Appeal #30508.....**Appendix 95-98**

Statement of Facts, in Reply Appeal #30508.....**Appendix 99-101**

Statement of Facts, Appeal #30862.....**Appendix 102-114**

Statement of Facts, in Reply Appeal #30862.....**Appendix 115-124**



STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT

PATRICK T. PARDY
Circuit Judge
200 E. Center Street
Madison, SD 57042
605-256-5035
605-256-5012

COUNTIES
Beadle, Brookings, Clark
Codington, Deuel, Grant
Hamlin, Hand, Jerauld
Kingsbury, Lake, Miner
Moody and Sanborn

DAN FELDHAUS
Court Reporter
200 E. Center Street
Madison, SD 57042
605-256-5285
605-256-5012

May 6, 2025

Daniel K. Brendtro
Hovland, Rasmus, Brendtro & Trzynka, Prof. LLC
PO Box 2583
Sioux Falls, SD 57101
Attorney for Plaintiffs Estate of Paul O'Farrell & Skyline Cattle Company, and Lance O'Farrell interested party.

Jack Hieb
Richardson Law Firm
1 Court Street
P.O. Box 1030
Aberdeen, SD 57402
Attorney for Defendant, Kelly O'Farrell

Reed Rasmussen
Siegel, Barnett & Schutz, LLP
P.O. Box 490
Aberdeen, SD 57402
Attorney for Defendant, Grand Valley Hutterian Brethren, Inc.

William G. Beck
Seth A. Lopour
Woods, Fuller, Shultz & Smith PC
300 S. Phillips Ave., ste. 300
Sioux Falls, SD 57117
Attorney for Defendant, Grand Valley Hutterian Brethren, Inc.

RE: Paul O'Farrell, Estate of Victoria O'Farrell, Skyline Cattle Co., Vor Inc., v. Kelly O'Farrell, Grand Valley Hutterian Brethren Inc., Raymond & Victoria O'Farrell Living Trust – 25CIV23-15; Defendant Raymond and Victoria O'Farrell Living Trust, VOR Inc., and the Estate of Victoria O'Farrell, Motion for Summary Judgment; Defendant Grand Valley Hutterian Brethren, Inc., Motion for Summary Judgment; Plaintiffs' Rule 56(f) Motion; Plaintiffs' Motion to Amend; Plaintiffs' Rule 35(a) Motion; and All Defendants' Motion for Attorney's Fees.

INTRODUCTION

The Estate of Paul O'Farrell ("Paul") individually, and ostensibly for the benefit of the Estate of Victoria O'Farrell ("Estate"), Skyline Cattle Co. ("Skyline"), and Vor Inc. ("VOR") filed a complaint on March 3, 2023. The Complaint alleges three counts: (1) declaratory judgment regarding void and voidable acts; (2) rescission of a \$3.2 million land sale contract; and (3) tort damages.

In this Court's view, the South Dakota Supreme Court invited the Plaintiffs to file a motion to consolidate this case, 25 Civ 23-15 with 25 Pro 22-11 and 25 Civ 23-18, when it stated the following:

While these five cases contain some overlapping issues, none have been consolidated.

None of the settled records contain a motion to consolidate any of the actions.

Consequently, we consider and resolve each case individually. *Estate of O'Farrell v. Grand Valley Hutterian Brethren, Inc.*, 15 N.W.3d 745 (2024).

Likewise, this Court will consider this case, 25 Civ 23-15, based solely on the record contained in 25 Civ 23-15.

These allegations are asserted against Kelly O'Farrell ("Kelly"), Grand Valley Hutterian Brethren Inc., ("Grand Valley") and Raymond & Victoria O'Farrell Living Trust ("Trust"). In response, the Trust, VOR, the Estate and Grand Valley filed Motions for Summary Judgment. Having considered the parties' briefs and other documentary evidence, the Court issues the following Memorandum Opinion GRANTING Defendants' Motions for Summary Judgment.

STATEMENT OF FACTS

Paul O'Farrell is one of five children of Raymond and Victoria O'Farrell. Raymond and Victoria own the farmland in dispute. In 2002, Raymond and Victoria established VOR to hold their farm assets, including the approximate 1,000 acres of farmland. Together, all three conducted their farming business through an entity called Skyline, which is owned by Paul.

In 2011, Raymond and Victoria created a Trust, transferring most or all of their assets into it, including their shares of VOR. The Trust allocated specific portions of land to each of their five children. However, as the Trust sits today, VOR has sold \$3.2 million worth of O'Farrell family farmland to Grand Valley. Additionally, VOR has terminated its lease with Skyline. Both actions were done on behalf of the VOR president, Raymond.

In this case, Paul alleges that his brother Kelly manipulated their father and engaged in misconduct to initiate a series of improper and unlawful actions intended to benefit Kelly at the expense of their parents and himself. According to Paul, in March 2022, Kelly secretly orchestrated efforts to alienate and isolate Raymond from his family, aiming to undermine key aspects of Raymond and Victoria's estate plan and disrupt their farming operations. Paul further claimed that Kelly's actions resulted in significant financial harm, including the \$3.2 million sale of O'Farrell family farmland to Grand Valley Hutterian Brethren, Inc. (Grand Valley) and the nonrenewal of Skyline's lease. He asserted that Kelly's conduct caused financial damage to the Estate, the Trust, VOR, Raymond, and himself, with the goal of disinheriting him. Paul also alleges that Kelly's scheme interfered with his business operations and that the purchase agreement for the land sale to Grand Valley was conducted in secrecy, without proper probate

authorization. Additionally, he contended that VOR's efforts to non-renew Skyline's lease were carried out without valid authority.¹

SUMMARY JUDGMENT STANDARD

Summary judgment is permitted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). The Court views the evidence most favorably to the nonmoving party and resolves all reasonable doubts against the moving party. *Thornton v. City of Rapid City*, 2005 SD 15, ¶ 4, 692 N.W.2d 525, 528. However:

[w]hen a motion for summary judgment is made and supported as provided in § 15-6-56, an adverse party may not rest upon the mere allegations or denials of his pleading, but [its] response, by affidavits or as otherwise provided in § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial. If [the adverse party] does not so respond, summary judgment, if appropriate, shall be entered....

SDCL 15-6-56(e). "[M]ere general allegations and denials which [did] not set forth specific facts will not prevent the issuance of a judgment." *Casazza v. State*, 2000 SD 120, ¶ 16, 616 N.W.2d 872, 876 (citations omitted).

APPLICABLE LAW AND ANALYSIS

- I. **Defendant Trust, VOR, and the Estate's Motion for Summary Judgment.**
 - a. **Dismissing VOR, Inc. as a Plaintiff**

VOR asserts that the Plaintiffs have no authority to name VOR as a plaintiff in this lawsuit. Based on the record and evidence provided, it is undisputed that Raymond is the president of VOR. The 2022 Annual Report of VOR identifies Raymond as the president and does not list Paul as an officer, director, or shareholder. Furthermore, while Paul includes VOR

¹ The facts laid out in this paragraph are referenced from the *Est. of O'Farrell v. Grand Valley Hutterian Brethren, Inc.*, 2024 S.D. 81, ¶ 11, 15 N.W.3d 745, 749 and File 25-Civ 23-15.

as a plaintiff, he simultaneously names VOR as a defendant. VOR's summary judgment motion is GRANTED as it applies to VOR.

b. Dismissing the Estate of Victoria O'Farrell as a Plaintiff.

A personal representative or a specially appointed administrator is the only person allowed to bring a claim on behalf of an estate. SDCL 29A-3-617; SDCL 29A-3-711. It is undisputed that Paul is neither a personal representative nor a specially appointed administrator. Accordingly, the Court GRANTS the Estate's Motion for Summary Judgment as it applies to the Estate.

c. Count 1, as it pertains to the Estate.

As Count 1 pertains to the Estate, it must be brought within the estate/probate proceeding. Thus, Summary Judgment regarding Count 1 as it pertains to the Estate is GRANTED.

d. Count 2, Rescission of \$3.2 Million Land Sale.

An action for rescission may be brought as a legal action pursuant to SDCL § 53-11, or as an equitable action pursuant to SDCL § 21-12.

If the action is in equity, the rescission is accomplished by court decree. When an action is brought pursuant to SDCL ch. 53-11, however, the rescission has already been accomplished by the unilateral act of one of the parties to the contract. The rescinding party brings the legal action for rescission to enforce his rights arising from the rescission.

Jones v. Bohn, 311 N.W.2d 211, 213 (S.D. 1981). However, before rescission can be granted, the court must determine whether there are sufficient grounds to award the extraordinary remedy of rescission. *Knudsen v. Jensen*, 521 N.W.2d 415, 418.

Plaintiffs are requesting a rescission of the land transaction between VOR and Grand Valley, arguing "Raymond's consent for the transaction was procured via undue influence, or

without his full understanding, and without following necessary corporate formalities." The Plaintiffs acknowledge that this claim is solely against Kelly.

Assuming, for the sake of argument, that there are sufficient grounds to award the extraordinary remedy of rescission, Paul still must meet the statutory requirements of SDCL § 53-11 or SDCL § 21-12. The Plaintiffs articulated in its reply brief to the South Dakota Supreme Court, that their theory of rescission is "that [Kelly's] misconduct amounted to tortious interference with Paul's and Skyline's business relationships with VOR."

Plaintiffs are arguing legal rescission under SDCL 53-11-2(1):

A party to a contract may rescind the same in the following cases only: (1) If consent of the party rescinding or of any party jointly contracting with him was given by mistake or obtained through duress, fraud, or undue influence exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party;

S.D. Codified Laws § 53-11-2.

Here, it is undisputed that Paul is not a party to the contract. The record shows Raymond is VOR's president. Moreover, the notice of rescission Paul sent to Grand Valley has no legal effect because, again, he was not a party to the contract. Consequently, SDCL 53-11-2(1) does not permit him to rescind the agreement between VOR and Grand Valley.

Plaintiffs also argue equitable rescission under SDCL 21-12:

The rescission of a written contract may be adjudged on the application of a party aggrieved:

- (1) In any of the cases mentioned in § 53-11-2;
- (2) Where the contract is unlawful, for causes not apparent upon its face, and the parties were not equally in fault;
- (3) When the public interest will be prejudiced by permitting it to stand.

S.D. Codified Laws § 21-12-1. As stated above, SDCL 53-11-2 was not satisfied. Further, under SDCL 21-12-1(2), all parties would be equally at fault if the allegation that Grand Valley,

Raymond, and Kelly acted together is presumed true. As to SDCL 21-12-1(3), there has been no evidence provided to show that the public interest will be prejudiced by permitting the land sale contract to stand.

Accordingly, the Trust's Motion for Summary Judgment on Count 2 is GRANTED.

e. Count 3 as it pertains to the Trust.

Count 3 of the complaint alleges that Paul and Skyline are entitled to recover damages from Kelly for tortiously interfering with their expected and established relationships. By Paul's own assertion, this claim is against Kelly, not the Trust. Accordingly, Summary Judgment is GRANTED.

II. Defendant Grand Valley's Motion for Summary Judgment.

a. Count 1 and Count 3.

Because Grand Valley's motion was properly supported, Plaintiffs, as the adverse party, must have designated specific facts that revealed a genuine issue for trial. *U.S. Bank Nat'l Ass'n v. Scott*, 2003 SD 149, ¶ 39, 673 N.W.2d 646, 657. It is not sufficient for the nonmoving party to present evidence that would permit a finding in his favor on mere speculation, conjecture, or fantasy. *Id.* (citing *Estate of Elliott v. A & B Welding Supply Co., Inc.*, 1999 SD 57, ¶ 16, 594 N.W.2d 707, 710). "Proof of a mere possibility is never sufficient to establish a fact." *Gehrts v. Bateen*, 2001 SD 10, ¶ 12, 620 N.W.2d 775, 779 (quoting *Estate of Elliott*, 1999 SD 57, ¶ 16, 594 N.W.2d at 710).

Grand Valley argues that Count 1 fails to state an actionable cause of action against it. Specifically, it is undisputed that Plaintiffs do not plead any cause of action against Grand Valley in Count 1, as Grand Valley is not named in that count. Regarding Count 3, the complaint explicitly disclaims any tort damages against Grand Valley, stating: "[n]o tort damages are

sought from the Hutterian Brethren, and Paul sincerely apologizes that they must be made a part of this ordeal." Plaintiffs assert that Count 1 applies to Grand Valley because it seeks a declaration regarding Skyline Cattle's rental rights and Paul O'Farrell's occupancy rights.

It is undisputed that the complaint does not mention Grand Valley in Count 1. Additionally, it is undisputed that Grand Valley is not disputing Paul's and Skyline's occupancy and leasehold interests, as no such interests exist to dispute.² Further, Count 3 explicitly disclaims any claims against Grand Valley. Accordingly, the Court GRANTS Grand Valley's Motion for Summary Judgment as to Count 1 and Count 3.

b. Count 2.

Grand Valley's Motion for Summary Judgment on Count 2 is GRANTED for the same reasons articulated in Section I.d.

III. Plaintiffs' Rule 56(f) Motion.

Based on the Court's reasoning above, further discovery will not change the outcome of this proceeding, therefore the Plaintiffs' Motion is DENIED.

IV. Plaintiffs' Motion to Amend

This matter was remanded January 13, 2025. The Defendants filed the present motions on February 7th, 13th, and March 6th. The Plaintiffs' Motion to Amend was filed March 6, 2025, long after this case had been litigated, appealed, and remanded, and summary-judgment motions filed after remand based on the original complaint. They assert that the proposed amendments reflect the scope of discovery conducted thus far, add Raymond O'Farrell as a party, include a claim to

²The South Dakota Supreme Court has ruled that the eviction was proper. See *VOR, Inc. v. Est. of O'Farrell*, 2025 S.D.2, ¶45.

remove Raymond as Trustee, and incorporate Paul O'Farrell's estate following Paul's passing. Additionally, they seek to add Paul's son, Connor O'Farrell, and realign the parties. Plaintiffs have submitted a redlined version of the amended complaint, clearly identifying the proposed changes and additional allegations.

"A trial court may permit the amendment of pleadings before, during, and after trial without the adverse party's consent." *Klutman v. Sioux Falls Storm*, 2009 S.D. 55, ¶ 14, 769 N.W.2d 440, 446, quoting *Burhenn v. Dennis Supply Co.*, 2004 SD 91, ¶ 20, 685 N.W.2d 778, 783 (additional citations omitted). "SDCL 15-6-15(a) provides, in relevant part, that leave to amend shall be freely given when justice so requires." *Prairie Lakes Health CareSys., Inc. v. Wookey*, 1998 SD 99, ¶ 28, 583 N.W.2d 405, 417. However, a court "may appropriately deny leave to amend 'where there are compelling reasons such as ... futility of the amendment,' even when doing so will necessarily prevent resolution on the merits." *In re Wintersteen Revocable Tr. Agreement*, 2018 S.D. 12, ¶ 11, 907 N.W.2d 785, 789 (citing *Ash v. Anderson Merchandisers, LLC*, 799 F.3d 957, 963 (8th Cir. 2015)) (quoting *Horras v. Am. Capital Strategies, Ltd.*, 729 F.3d 798, 804 (8th Cir. 2013)); see *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962).

The Estate of Paul O'Farrell can amend its complaint to change the caption to substitute the Estate of Paul O'Farrell as Plaintiff. Based on the Court's review of the amended complaint, although the Plaintiffs have realigned the parties, added new parties to the litigation, and introduced an additional count, the complaint still fails to withstand a motion for summary judgment. This case does not center on the alleged undue influence of Raymond, but rather on whether the Plaintiffs have the authority to litigate this claim. After considering the pleadings, documents, and arguments submitted by the Plaintiffs, the Court finds that the amendments do not alter the outcome of its prior analysis above. For the purpose of argument only, even if the

amendments could alter the result of the summary judgment motions, the Court finds that judicial economy and fairness to all the parties requires denial of the amendment. At this point of the litigation, it would be inequitable and unreasonable to allow the amendment as presented by the Plaintiff. Additionally, there is concern that the attorney who claimed to represent VOR, Inc. is now requesting to litigate against Vor, Inc. in the same action. Accordingly, the Plaintiffs' motion for leave to amend their complaint is DENIED.

V. Plaintiffs' Rule 35(a) Motion.

In an action in which the mental or physical condition of a party or the consanguinity of a party with another person or party is in controversy, the court in which the action is pending may order such person or party to submit to a physical or mental examination or blood test by a physician. The order may be made only on motion for good cause shown and upon notice to the person or party to be examined and to all other persons or parties involved and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

S.D. Codified Laws § 15-6-35(a).

Plaintiffs contend that Raymond O'Farrell requires a mental examination because his actions—allegedly influenced by his son, Kelly O'Farrell—form the basis of the present lawsuit. However, undue influence or the lack of undue influence is not an issue in this case. Consequently, Raymond's mental status is not at issue, and the Plaintiffs' motion is DENIED.

VI. Defendants' Motion for Attorney's Fees.

If a civil action, including an action for appeal of a zoning decision, or special proceeding is dismissed or requested relief is denied, and if the court determines that it was frivolous or brought for malicious purposes, the court shall order the party whose claim, cause of action, or defense was dismissed or denied to pay part or all expenses incurred by the party defending the matter, including reasonable attorneys' fees.

SDCL § 15-17-51.

Frivolous or malicious are terms used in the alternative, and the statute is interpreted that way. *Johnson v. Miller*, 818 N.W.2d 804, 807 (S.D. 2012). To recover attorneys fees, the applicant must prove at least one of these conditions. In this instance, the Court finds that the Trust, VOR, and the Estate have proven the action is frivolous. Plaintiff are ordered to pay the reasonable expenses incurred by the Defendants, including reasonable attorneys' fees.

The Court finds that the complaint was frivolous. "A frivolous action exists when 'the proponent can present no rational argument based on the evidence or law in support of the claim'.... To fall to the level of frivolousness, there must be such a deficiency in fact or law that no reasonable person could expect a favorable judicial ruling.... Frivolousness 'connotes an improper motive or [a] legal position so wholly without merit as to be ridiculous.'" *Citibank (S.D.), N.A. v. Hauff*, 2003 S.D. 99, ¶ 31, 668 N.W.2d 528, 537 (quoting *Ridley v. Lawrence County Comm'n*, 2000 S.D. 143, ¶ 14, 619 N.W.2d 254, 259 (further citations omitted)).

In this matter, the claims in the Complaint were disallowed because the Plaintiffs' claims were not supported by law as outlined above. Regarding VOR, Paul named VOR as a plaintiff without the requisite authority to act on its behalf, and pursued claims on behalf of the Estate of Victoria O'Farrell without proper authority. Accordingly, the Defendants' Motion for Attorneys Fees is GRANTED.

The Defendants shall file their fees accompanied by a supporting affidavit within the time prescribed by law and serve them upon the Plaintiffs. The affidavit must demonstrate that counsel expended a reasonable number of hours defending the litigation

3. The 2022 Annual Report of VOR, Inc. identifies the president as Raymond Alvin O'Farrell, and does not identify Paul O'Farrell as an officer, director, or shareholder. (Ex. 1: 2022 Annual Report of VOR, Inc.)

4. VOR, Inc. retained Schoenbeck & Erickson, PC to represent it in this litigation and other prior litigation. (Notice of Appearance and Supplemental Notice of Appearance; Aff. of Raymond O'Farrell.)

5. Mr. Brendtro's pleadings are alleging actions against VOR, Inc., not on behalf of VOR, Inc. as a plaintiff. (Complaint pp. 18-21.)

6. Mr. Brendtro is seeking damages against VOR, Inc. in paragraphs 107 and 108 of his Complaint. (Complaint.)

7. Daniel K. Brendtro signed a Complaint naming the Estate of Victoria O'Farrell as a beneficial plaintiff. (Complaint.)

8. Mr. Brendtro's pleadings allege that his now deceased client, Paul O'Farrell, was an interested party in Victoria's Estate, and therefore, he can bring this suit on behalf of Victoria's Estate. (Complaint ¶ 6.)

9. Mr. Brendtro's pleadings recognize that his now deceased client, Paul O'Farrell, was not the personal representative of the Estate of Victoria O'Farrell. (Complaint ¶¶ 6, 54-58.)

10. Raymond A. O'Farrell is the special administrator of the Estate of Victoria O'Farrell. (Ex. 2: Order Appt. Spec. Admin. and Letters of Spec. Admin.)

11. Schoenbeck & Erickson, PC is the law firm retained by Raymond O'Farrell, as the Special Administrator of the Estate of Victoria O'Farrell. (Ex. 3: Notice of Appearance in Estate; Aff. of Raymond O'Farrell.)

12. Count 2 of Daniel Brendtro's Complaint seeks rescission of the \$3.2 million

dollar land sale that VOR, Inc. entered into with the Defendant, Grand Valley Hutterian Brethren, Inc. (Complaint pp. 18-21.)

13. Mr. Brendtro's Complaint references and incorporates the August 12, 2022, Purchase Agreement. (Complaint ¶¶95-97.)

14. The seller under the Purchase Agreement is VOR, Inc., and the individual signing on behalf of the corporation is Raymond A. O'Farrell. (Ex. 4: Purchase Agreement, p. 10 of 10.)

15. Raymond A. O'Farrell was the president, director, and owner of VOR, Inc. in August of 2022. (Ex. 1: 2022 Annual Report of VOR, Inc.)

16. The Chicago Title Insurance Company issued an Owner's Policy to Grand Valley Hutterian Brethren on completion of the transaction, which would indicate that VOR, Inc. conveyed good title to Grand Valley. (Ex. 5: Owner's Policy.)

17. Mr. Brendtro does not represent any plaintiff that has the legal capacity to challenge a real estate transaction between VOR, Inc. and Grand Valley. *VOR, Inc. v. Estate of Paul O'Farrell*, 2025 S.D. 2, ¶ 28.

18. Mr. Brendtro's now deceased client, Paul O'Farrell, is alleging that he would have been the beneficiary of an estate plan that would have given him some of the real property, if he had in fact inherited it. (Complaint ¶¶ 92-95, 97.)

19. There is no legal basis to assert a claim that you can bring a lawsuit because you had hoped to inherit certain assets that you, in fact, didn't inherit. *Estate of Lynch v. Lynch*, 2023 S.D. 23, ¶41, 991 N.W.2d 95, 109.

20. Mr. Brendtro alleges in paragraph 105 of the Complaint that his now deceased client, Paul O'Farrell, issued a Notice of Rescission to Grand Valley. (Complaint; Ex. 6: Notice of Rescission.)

21. Grand Valley responded with a rejection to the Notice of Rescission. (Ex. 7: Rejection to Rescission.)

22. Paul O'Farrell had no legal basis that he could have produced for the Court for how a party that had hoped to inherit real property could rescind a contract where the owner of the property sold it before the beneficiary ever inherited it. *Estate of Lynch v. Lynch*, 2023 S.D. 23, ¶41, 991 N.W.2d 95, 109.

23. The Purchase Agreement indicates in paragraph 11 on page 5 of 10 that no personal property was included in the transaction, it only included the real property owned by VOR, Inc. (Ex. 4: Purchase Agreement.)

24. Mr. Brendtro asserts in paragraphs 107 and 108 of the Complaint a claim for money damages against his alleged client, VOR, Inc.! (Complaint.)

25. Mr. Brendtro has plead on page 22 of the Complaint a Count 3 for "Tort Damages." (Complaint p. 22.)

26. Schoenbeck & Erickson, PC represents Raymond O'Farrell, the Estate of Victoria O'Farrell, VOR, Inc., and the Raymond and Victoria O'Farrell Living Trust. (Notice of Appearance and Supplemental Notice of Appearance; Aff. of Raymond O'Farrell.)

27. Mr. Brendtro does not represent, as he alleges in paragraph 111 of the Complaint, "Raymond, Victoria, her Estate, the Family Trust, and the Trust Corporation. (Complaint; Notice of Appearance and Supplemental Notice of Appearance; Aff. of Raymond O'Farrell.)

28. Count 1 is a collection of claims vaguely asserted by Paul O'Farrell with respect to VOR, Inc., the Raymond and Victoria O'Farrell Living Trust, Victoria

O'Farrell's Estate, and concerning occupancy rights of Skyline Cattle Company and Paul O'Farrell, pursuant to a 2022 oral ag lease. (Complaint pp. 14-18.)

29. Paul O'Farrell and Skyline Cattle Company have no rights to possession under 2022 oral ag lease. *VOR, Inc. v. Estate of Paul O'Farrell*, 2025 S.D. 2.

30. Paul O'Farrell sought to intervene in the litigation referred to in paragraph 53 of his Complaint. (Complaint.)

31. At the hearing from that proceeding, which hearing Mr. Paul O'Farrell was a party to, Circuit Court Judge Robert Spears issued the following Order on October 26, 2022:

ORDERED, ADJUDGED, AND DECREED that the Motion to Intervene is denied, as the Trust at issue is a Revocable Living Trust and, at a minimum, it allowed Raymond O'Farrell to withdraw certain assets and assign them to himself, including at least 50% of the shares of VOR, Inc. that were contributed;

(Ex. 8: Order.)

32. On December 18, 2024, the South Dakota Supreme Court dismissed Paul O'Farrell's appeal of the Order that denied his intervention. (Ex. 9: Order Dismissing Appeal.)

33. VOR, Inc. has never requested Daniel Brendtro to serve as their attorney. (Aff. of Raymond O'Farrell.)

34. The Estate of Victoria O'Farrell has never asked Daniel Brendtro to serve as their attorney. (Aff. of Raymond O'Farrell.)

35. With respect to the occupancy right, Mr. Brendtro in paragraph 85 of his Complaint refers to the Notice received by Skyline Cattle and Paul O'Farrell. (Ex. 10: Notices of Termination of Leases.)

the [Court] to focus on the conduct and role of [the party's] attorney rather than on the evidence"). Pleadings are the statements and claims of *the parties*, not of counsel.

Further, the pleadings speak for themselves. Describing the Complaint via pages and pages of commentary is not what is contemplated by "material facts." *See, Parsons v. Dacy*, 502 N.W.2d 108, 110 (S.D. 1993) (a fact is only "material" when "it would affect the outcome of the suit under the governing substantive law").

Thus, paragraphs 1, 2, 5, 6, 7, 8, 9, 12, 13, 17, 18, 20, 24, 25, 27, 33, 34, 35, and 36 are defective and fail to state "material facts" underlying the claims or defenses of the litigation as required by SDCL 15-6-56(c)(1). Each of those paragraphs should be stricken.

Objection as to Testimony by Raymond O'Farrell

The Defendants' motion relies upon an affidavit submitted by Raymond O'Farrell. Raymond's capacity is in question; and this lawsuit alleges that he is being manipulated into executing documents. A reasonable inference from the Record is that any fact he is alleging is untrue. Further, it will take discovery in this matter to verify to what extent Raymond can participate in these proceedings and submit affidavits and testimony.

Response to Undisputed Facts

In an effort to restate the facts that the Defendants *appear* to be asserting, Plaintiffs have adjusted Defendants' statements of fact, using brackets to remove the defective language and focus on actual facts.

Even if the Defendants had properly asserted their facts with reference to the record and without reference to counsel, over half of them are still disputed. And some of them are just statements of law.

1. [The Complaint] has named VOR, Inc., a South Dakota corporation, as a plaintiff in this proceeding because [Paul O'Farrell, now deceased] used to be an officer in the corporation. (Complaint ¶ 5.) **UNDISPUTED AS MODIFIED.**
2. In multiple paragraphs in the Complaint, [the Complaint] recognizes that [Paul] was not a current officer or president of the corporation. (Complaint ¶¶ 34 & 73.) **DISPUTED AS MODIFIED. The Complaint in paragraph 34 uses intentional quotation marks as to the assertion that Paul and Victoria were "removed" as directors and officers, with the intention of alleging that the purported removal was ineffective. Paragraph 73 states that the elections were void, and, thus ineffective, by which Paul would still be an officer of the corporation.**
3. The 2022 Annual Report of VOR, Inc. identifies the president as Raymond Alvin O'Farrell, and does not identify Paul O'Farrell as an officer, director, or shareholder. (Ex. 1: 2022 Annual Report of VOR, Inc.). **UNDISPUTED, BUT DISPUTED INFERENCE. Filing a form with the Secretary of State does not prove someone is or is not an officer or director or shareholder.**
4. VOR, Inc. retained Schoenbeck & Erickson, PC, to represent it in this litigation and other prior litigation. (Notice of Appearance and Supplemental Notice of Appearance; Aff. of Raymond O'Farrell.) **UNDISPUTED.**
5. [Plaintiffs'] pleadings are alleging actions against VOR, Inc., not on behalf of VOR, Inc. as a plaintiff. (Complaint pp. 18-21.) **DISPUTED AS MODIFIED. The Complaint sought relief on behalf of the corporation, and, Paul sought rescission on behalf of the corporation.**
6. [Plaintiffs are] seeking damages against VOR, Inc. in paragraphs 107 and 108 of [their] Complaint. (Complaint.) **DISPUTED AS MODIFIED. These paragraphs argue that in the alternative "if rescission is not available, then, in that case Paul O'Farrell [and, now his Estate] is entitled to an award of damages for unjust enrichment."**

7. [Plaintiffs issued] a Complaint naming the Estate of Victoria O'Farrell as a beneficial plaintiff. (Complaint.) **UNDISPUTED AS MODIFIED.**
8. [The Complaint] allege[s]...Paul O'Farrell, [now deceased] was an interested party in Victoria's Estate, and therefore, he can bring this suit on behalf of Victoria's Estate. (Complaint ¶ 6.) **UNDISPUTED AS MODIFIED. This is a legally true premise. In situations where the fiduciary of an estate is unwilling or unable to act, there is substantial authority allowing other interested parties to intervene. See, *Beachy v. Becerra*, 609 N.W.2d 648, 651-51 (Neb. 2000) (citing 31 AmJur2d *Executors and Administrators*, § 1285 (1989)) (interested party to an Estate is permitted to bring or enforce claims for the benefit of the Estate when the Personal Representative has failed to act, or when his interests are antagonistic to the Estate, or are otherwise collusive).**
9. [The Complaint] recognizes that...Paul O'Farrell, [now deceased] was not the personal representative of the Estate of Victoria O'Farrell. (Complaint ¶¶ 6, 54-58.) **UNDISPUTED AS MODIFIED, BUT DISPUTED INFERENCE. See, Response to ¶ 8.**
10. Raymond A. O'Farrell is the special administrator of the Estate of Victoria O'Farrell. (Ex. 2: Order Appt. Spec. Admin. and Letters of Spec. Admin.) **LEGALLY DISPUTED. Plaintiffs allege that Raymond's appointment was procedurally defective, and, that his service in the role of Special Administrator is subject to an unwaivable, inherent conflict of interest. See, *Estate of Victoria O'Farrell*, 25PRO22-11.¹**
11. Schoenbeck & Erickson, PC, is the law firm retained by Raymond O'Farrell, as the Special Administrator of the Estate of Victoria O'Farrell. (Ex. 3: Notice of Appearance in Estate; Aff. of Raymond O'Farrell.) **LEGALLY DISPUTED AS TO THE VALIDITY OF RAYMOND'S APPOINTMENT. See, Response to ¶ 10.**

¹ Raymond's role as special administrator would place his interests at odds with Victoria's interests in opposing the land transaction. He would end up on both sides of the VOR claims, which makes his interests "antagonistic to the Estate or otherwise collusive." See, *Hampshire v. Powell*, 10 Neb. App. 148, 155, 626 N.W.2d 620, 626 (2001) ("executor is not 'legally competent' to act in that capacity, where his duties would require him to prosecute on behalf of adversary litigants, a suit which he would at the same time defend as an individual.") (citations omitted). See, also, S.D.R.Civ.P. 17(a) (the real party in interest rule requires cognizable parties on both sides of a suit).

12. Count 2 of [the] Complaint seeks rescission of the \$3.2 million dollar land sale that VOR, Inc., entered into with the Defendant, Grand Valley Hutterian Brethren, Inc. (Complaint pp. 18-21.) **UNDISPUTED AS MODIFIED.**
13. [The] Complaint references and incorporates the August 12, 2022, Purchase Agreement. (Complaint ¶¶95-97.) **UNDISPUTED AS MODIFIED.**
14. The seller under the Purchase Agreement is VOR, Inc., and the individual signing on behalf of the corporation is Raymond A. O'Farrell. (Ex. 4: Purchase Agreement, p. 10 of 10.) **UNDISPUTED.**
15. Raymond A. O'Farrell was the president, director, and owner of VOR, Inc. in August of 2022. (Ex. 1: 2022 Annual Report of VOR, Inc.). **DISPUTED. The Complaint, the attachments to it, and the Record generally demonstrate that Raymond's election as president, director, and owner of VOR are disputed; the disputes include a failure to follow corporate formalities and notice provisions, and, capacity questions, and questions of undue influence.**
16. The Chicago Title Insurance Company issued an Owner's Policy to Grand Valley Hutterian Brethren on completion of the transaction, which would indicate that VOR, Inc. conveyed good title to Grand Valley. (Ex. 5: Owner's Policy.) **DISPUTED INFERENCE. Although a policy was issued, Defendants' assertion about its significance demonstrates a misunderstanding about title insurance. The issuance of a policy indicates that a premium was paid to insure against the risk that good title was not conveyed. The issuance of a title policy does not in any way mean that good title in fact was conveyed.**
17. [There is no] plaintiff that has the legal capacity to challenge a real estate transaction between VOR, Inc. and Grand Valley. *VOR, Inc. v. Estate of Paul O'Farrell*, 2025 S.D. 2, ¶ 28. **DISPUTED. Interested parties to the Trust, and interested parties to the Estate of Victoria can make such challenges. For example, Connor O'Farrell is such a party, as an heir of Paul, as a beneficiary of the Trust, and, as the personal representative of Paul's Estate.**
18. [Paul O'Farrell, now deceased was] alleging that he would have been the beneficiary of an estate plan that would have given him some of the real property, if he had in fact inherited it. (Complaint ¶¶ 92-95, 97.). **UNDISPUTED.**

19. There is no legal basis to assert a claim that you can bring a lawsuit because you had hoped to inherit certain assets that you, in fact, didn't inherit. *Estate of Lynch v. Lynch*, 2023 S.D. 23, ¶41, 991 N.W.2d 95, 109. **DISPUTED. This is a flawed statement of law, rather than a statement of undisputed fact. Trust beneficiaries have standing and ability to seek protection of trust assets, including when the Trustee fails to do so. See, *In Re Betty Luhrs Trust*, 443 N.W.2d 646 (S.D. 1989) (“Preservation of the trust and assurance that its purpose be served is of paramount importance in the law....The interests of the remaindermen in this trust must also be safeguarded.”); *Matter of Estate of Calvin*, 2021 S.D. 45, ¶ 18 (quoting Restatement (Third) of Trusts § 107 (2012) “[a] beneficiary may maintain a proceeding related to the trust or its property against a third party only if.. the trustee is unable, unavailable, unsuitable, or improperly failing to protect the beneficiary’s interest.”); *Estate of Lynch v. Lynch*, 2023 S.D. 23, ¶41.**
20. [Plaintiffs allege] in paragraph 105 of the Complaint that [Paul O’Farrell, now deceased] issued a Notice of Rescission to Grand Valley. (Complaint; Ex. 6: Notice of Rescission.) **UNDISPUTED, AS MODIFIED.**
21. Grand Valley responded with a rejection to the Notice of Rescission. (Ex. 7: Rejection to Rescission.) **UNDISPUTED.**
22. Paul O’Farrell had no legal basis that he could have produced for the Court for how a party that had hoped to inherit real property could rescind a contract where the owner of the property sold it before the beneficiary ever inherited it. **DISPUTED. Similar to Paragraph 19, this is a flawed statement of law, rather than a statement of undisputed fact. Trust beneficiaries have standing and ability to seek protection of trust assets, including when the Trustee fails to do so. See, Response to Paragraph 19.**
23. The Purchase Agreement indicates in paragraph 11 on page 5 of 10 that no personal property was included in the transaction, it only included the real property owned by VOR, Inc. (Ex. 4: Purchase Agreement.) **UNDISPUTED.**
24. [Plaintiffs assert] in paragraphs 107 and 108 of the Complaint a claim for money damages against [...] VOR, Inc.! (Complaint.) **UNDISPUTED, AS MODIFIED. These paragraphs argue that in the alternative “if rescission is not available, then, in that case Paul O’Farrell [and, now his Estate] is entitled to an award of damages for unjust enrichment.” The basis of this**

claim is because Paul personally invested over a million dollars of his own funds to improve the real estate, for which he was never compensated. Complaint, ¶¶ 107-108.

25. [Plaintiffs] plead on page 22 of the Complaint a Count 3 for “Tort Damages.” (Complaint p. 22.) **UNDISPUTED.**
26. Schoenbeck & Erickson, PC represents Raymond O’Farrell, the Estate of Victoria O’Farrell, VOR, Inc., and the Raymond and Victoria O’Farrell Living Trust. (Notice of Appearance and Supplemental Notice of Appearance; Aff. of Raymond O’Farrell.) **UNDISPUTED.**
27. Mr. Brendtro does not represent, as he alleges in paragraph 111 of the Complaint, “Raymond, Victoria, her Estate, the Family Trust, and the Trust Corporation. (Complaint; Notice of Appearance and Supplemental Notice of Appearance; Aff. of Raymond O’Farrell.). **DISPUTED. Paragraph 111 is reprinted below. This paragraph does not make any assertions as to representation. Paragraph 111 simply observes that various parties appear to have been damaged by Kelly O’Farrell’s wrongful acts, and that they may hold the right to recover under theories of conversion, fiduciary duty, and tortious interference.**

111. **Discovery will determine the extent and nature of the tort claims. At present, as a result of Kelly O’Farrell’s wrongful acts, a recovery of damages appears to be available for Raymond, Victoria, her Estate, the Family Trust, and the Trust Corporation. Such damages would be available as a result of conversion, breach of fiduciary duty, and tortious interference with their expected and established relationships.**

28. Count 1 is a collection of claims vaguely asserted by Paul O’Farrell with respect to VOR, Inc., the Raymond and Victoria O’Farrell Living Trust, Victoria O’Farrell’s Estate, and concerning occupancy rights of Skyline Cattle Company and Paul O’Farrell, pursuant to a 2022 oral ag lease. (Complaint pp. 14-18.) **This is not a statement of fact. Count 1 speaks for itself, and, it specifies several issues**

suitable for resolution in a declaratory judgment action.

29. Paul O'Farrell and Skyline Cattle Company have no rights to possession under 2022 oral ag lease. *VOR, Inc. v. Estate of Paul O'Farrell*, 2025 S.D. 2.
DISPUTED. The Court's opinion held that Paul and Skyline do not have rights to immediate possession.
30. Paul O'Farrell sought to intervene in the litigation referred to in paragraph 53 of his Complaint. (Complaint.) **UNDISPUTED. (This "litigation" is referring to Victoria O'Farrell's lawsuit, in which she explained that Raymond was being manipulated by Kelly O'Farrell into making corporate and trust changes that he did not understand. 22CIV22-38)**
31. At the hearing from that proceeding, which hearing Mr. Paul O'Farrell was a party to, Circuit Court Judge Robert Spears issued the following Order on October 26, 2022:

ORDERED, ADJUDGED, AND DECREED that the Motion to Intervene is denied, as the Trust at issue is a Revocable Living Trust and, at a minimum, it allowed Raymond O'Farrell to withdraw certain assets and assign them to himself, including at least 50% of the shares of VOR, Inc. that were contributed;
 (Ex. 8: Order.)

DISPUTED INFERENCE. The rulings in Victoria's case have no legal weight because they were not ever reduced to a final, appealable judgment. Instead, Raymond dismissed Victoria's case. The Court upheld that voluntary dismissal. *Est. of O'Farrell v. Grand Valley Hutterian Brethren, Inc.*, 2024 S.D. 81, ¶ 7. "A voluntary dismissal leaves the situation as if the lawsuit had never been filed...." FEDERAL CIVIL RULES HANDBOOK, 978 (2015); *Nelson v. Napolitano*, 657 F.3d 586, 588 (7th Cir. 2011) ("the effect of a voluntary dismissal is to turn back the clock; it is as if the plaintiff's lawsuit had never been brought"). Raymond cannot rely upon any of those rulings because his attorneys dismissed the case.

32. On December 18, 2024, the South Dakota Supreme Court dismissed Paul O'Farrell's appeal of the Order that denied his intervention. (Ex. 9: Order

Appendix 25

Dismissing Appeal.) **UNDISPUTED.**

33. VOR, Inc. has never requested Daniel Brendtro to serve as their attorney. (Aff. of Raymond O'Farrell.) **DISPUTED.** Paul O'Farrell, as an officer of VOR (and, alleging that any subsequent elections were void) brought a Complaint seeking relief on VOR's behalf. See, Complaint, including: ¶¶ 34; 73; 105; 106; 68-75.
34. The Estate of Victoria O'Farrell has never asked Daniel Brendtro to serve as their attorney. (Aff. of Raymond O'Farrell.) **UNDISPUTED.**
35. With respect to the occupancy right, [Plaintiffs] in paragraph 85 of [the] Complaint refers to the Notice received by Skyline Cattle and Paul O'Farrell. (Ex. 10: Notices of Termination of Leases.) **UNDISPUTED.**
36. The South Dakota Supreme Court has decided this issue, and [Plaintiffs] cannot assert that VOR, Inc. and Grand Valley lacked the authority to issue the notice. *VOR, Inc. v. Estate of Paul O'Farrell*, 2025 S.D. 2. **DISPUTED.** The Court ruled that Paul and Skyline did not have immediate occupancy rights, but left all other matters and disputes unresolved.

Dated this 6th day of March, 2025.

HOVLAND, RASMUS,
BRENDTRO, PLLC

/s/ Daniel K. Brendtro
Daniel K. Brendtro
326 E. 8th Street, Suite 107
PO Box 2583
Sioux Falls, SD 57101-2583
(605) 951-9011
dbrendtro@hovlandrasmus.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on the 6th day of March, 2025, a true and correct copy of the foregoing was filed and served through the Odyssey File & Serve System upon:

Lee Schoenbeck
Joseph Erickson
Schoenbeck & Erickson, PC
1200 Mickelson Dr., Ste. 310
Watertown, SD 57201
lee@schoenbecklaw.com
joe@schoenbecklaw.com

Reed Rasmussen
Siegel, Barnett & Schutz, LLP
PO Box 490
Aberdeen, SD 57402
Rasmussen@sbslaw.net

William G. Beck
Woods Fuller Shultz & Smith P.C.
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
William.Beck@woodsfuller.com

Jack Hieb
RICHARDSON LAW
1 Court Street
Aberdeen, SD 57401
jhieb@rwwsh.com

George Boos
Susan Yexley Jennen
Boos Jennen Law Firm, LLC
PO Box 254
Clark, SD 57225
George.boos@boosjennen.com
Susan.jennen@boosjennen.com

Appendix 27

/s/ Daniel K. Brendtro

Daniel K. Brendtro

STATE OF SOUTH DAKOTA COUNTY OF GRANT	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
THE ESTATE OF PAUL O'FARRELL, individually; and, as a beneficiary of the family trust; and, for the benefit of the Estate of Victoria O'Farrell; SKYLINE CATTLE COMPANY, a South Dakota corporation; & VOR, INC., a South Dakota corporation, Plaintiffs, vs. KELLY O'FARRELL, an individual; GRAND VALLEY HUTTERIAN BROTHERS, INC.; a South Dakota corporation; & THE RAYMOND AND VICTORIA O'FARRELL LIVING TRUST, a South Dakota trust, by and through its trustee; and any other necessary parties. Defendants.	25CIV 23-15 <p style="text-align: center;">GRAND VALLEY HUTTERIAN BROTHERS INC.'S STATEMENT OF UNDISPUTED MATERIAL FACTS</p>

Under SDCL § 15-6-56, Grand Valley Hutterian Brethren, Inc. ("Hutterian Brethren") offers the following Statement of Undisputed Material Facts, for purposes of its summary judgment motion only:

1. The Hutterian Brethren join and adopt all of The Raymond and Victoria O'Farrell Living Trust and vOr, Inc.'s Statement of Undisputed Material Facts.
2. Raymond and Victoria O'Farrell owned approximately 1,000 acres of farmland in Grant County, South Dakota (the "Property"). (Complaint, ¶ 26).
3. Raymond and Victoria put the Property into a corporation named vOr, Inc. ("vOr"). (Complaint, ¶ 25).
4. Raymond and Victoria owned all the shares of vOr and deposited these shares of

Appendix 29

25CIV23-15
Statement of Undisputed Material Facts

vOr into the Raymond and Victoria Living Trust (“Revocable Trust”), which was a revocable trust created in 2011. (Complaint, ¶¶ 4, 24–25; Beck Aff., Ex. 5 (Raymond and Victoria O’Farrell Living Trust)).

5. The Revocable Trust conditionally designated the majority of the Property to be inherited by their son, Paul, which included nine contiguous parcels comprising 703.33 acres. (Complaint, ¶ 29, 92).

6. The Revocable Trust also conditionally designated two other quarters of ground to be inherited by Raymond and Victoria’s other children, Lance, Marcie, Kelly, and Rita. (Complaint, ¶ 27, 29).

7. The Revocable Trust conditionally granted Paul an option to purchase those two parcels. (Complaint, ¶ 29).

8. Lance, Marcie, and Rita are not parties to this action, or any of the related actions: *VOR, Inc. and Grand Valley Hutterian Brethren v. Paul O’Farrell and Skyline Cattle Company* (25CIV23-18) (Eviction Action); *In the Matter of the Guardianship and Conservatorship of Raymond O’Farrell* (25GDN23-1) (Ray’s Guardianship); *Estate of Victoria O’Farrell* (25PRO22-11) (Victoria’s Estate); *Victoria O’Farrell v. Raymond O’Farrell, Kelly O’Farrell* (25CIV22-38) (Victoria’s Lawsuit); and *CHS Capital, LLC v. Skyline Cattle Co., Paul O’Farrell, VOR, Inc.* (25CIV23-27) (Collection Lawsuit).

9. The four conditions that must have occurred in order for Paul and his siblings to inherit the Property under the terms of the Revocable Trust were: (1) one of the parents had to die, (2) the other parent had to die, (3) the terms of the Revocable Trust must have remained unchanged upon the death of both parents, (4) the shares of vOr, which owned the Property, must have remained in the Revocable Trust. (Beck Aff., Ex. 5 (Raymond and Victoria O’Farrell Living Trust)).

4916-7814-6085, v. 1

Appendix 30

25CIV23-15

Statement of Undisputed Material Facts

10. Victoria died on July 11, 2022. (Complaint, ¶ 52).

11. By operation of the Revocable Trust, Victoria's shares of vOr and her beneficial interest in the Revocable Trust went to Raymond. (Beck Aff., Ex. 5 (Raymond and Victoria O'Farrell Living Trust)).

12. Raymond removed all shares of vOr from the Revocable Trust. (Complaint, ¶ 34).

13. On July 22, 2022, First Interstate Bank initiated a foreclosure on the Property.

14. On or about August 12, 2022, the Hutterian Brethren executed a Purchase Agreement for the sale of the nine contiguous parcels for \$3.2 million ("Purchase Agreement"). (Complaint, ¶ 95; Wipf Aff., Ex. 1 (Purchase Agreement)).

15. The Purchase Agreement also gave the Hutterian Brethren a right of first refusal to purchase the other two parcels of land held by vOr and leased the two parcels to the Hutterian Brethren. (Complaint, ¶ 97, 98; Wipf Aff., Ex. 1 (Purchase Agreement)).

16. As the only owner of vOr, Raymond signed the Purchase Agreement on behalf of vOr in his capacity as President of vOr. (Complaint, ¶ 96; Wipf Aff., Ex. 1 (Purchase Agreement)).

17. The land sale transaction closed in October 2022. (Complaint, ¶ 59).

18. The Hutterian Brethren and vOr initiated eviction proceedings, *vOr, Inc. and Grand Valley Hutterian Brethren v. Paul O'Farrell and Skyline Cattle Company* case number 25CIV23-000018, to evict Paul and Skyline Cattle Company from the Property.

19. This Court ordered Paul and Skyline Cattle Company to vacate the Property.

20. This holding was affirmed on appeal (2025 S.D. 2).

21. Paul died on October 13, 2024.

4916-7814-6085, v. 1

Appendix 31

25CIV23-15
Statement of Undisputed Material Facts

22. In their Complaint, the Plaintiffs allege acts by Paul's brother, Kelly O'Farrell ("Kelly") as the sole basis for their causes of action. (See Complaint, ¶¶ 1, 8, 11–13, 34, 36–39, 42–46, 64, 111–12).

23. In their Complaint, Plaintiffs' claim that "[i]n 2022, . . . Kelly O'Farrell manipulated his father Raymond and engaged in other misconduct, in order to set in motion an improper and illegal set of maneuvers, all of which were designed to enrich himself at the expense of his parents and his brother Paul." (Complaint, ¶ 8).

24. In their Complaint, Plaintiffs asserts that Kelly was at the center of all the various maneuvers taken by Raymond, the Revocable Trust, vOr, Victoria, and the Estate of Victoria O'Farrell, see Complaint, ¶ 11, and Kelly "secretly began an orchestrated effort to alienate and isolate Raymond from his family, with the intent of thwarting various features of Raymond and Victoria's Estate plan and disrupting farming operations. This included, for example: 'removing' shares of vOr, Inc., from the Trust; 'separating' Raymond's and Victoria's assets; interfering in Paul's lending and farming activities; 'removing' Paul and Victoria as officers and directors of vOr, Inc.; attempting to fire the attorneys that Victoria hired to stop all of this; and, ultimately, signing a secret agreement to sell nine parcels of family farm ground to the Hutterite Brethren." (Complaint, ¶¶ 11, 34).

25. In their Complaint, Plaintiffs further assert the Purchase Agreement signed between vOr and the Hutterian Brethren on August 12, 2022, was kept secret, no authority was obtained via the probate process, and no notice was given until after the closing occurred in October 2022. (Complaint, ¶ 59).

26. However, because Raymond owned all of Victoria's shares of vOr by operation of the Revocable Trust, and vOr owned all of the Property, the sale of the Property was not subject to the probate process.

4916-7814-6085, v. 1

Appendix 32

25CIV23-15
Statement of Undisputed Material Facts

27. Nearly seven months after the sale closed, Paul signed a document purporting to be a "Notice of Rescission." (Wipf Aff., Ex. 2 (Notice of Rescission)).

28. Paul signed the purported Notice of Rescission allegedly as VOR's president.
(*Id.*)

29. Other than recite the legal description of the property subject to the Purchase Agreement, the purported Notice of Rescission states, in full:

Paul O'Farrell, as duly-elected President, and on behalf of vOr, Inc., gives notice of rescission of that certain real estate transaction involving the real property listed below. By this Notice, vOr, Inc. offers to restore to Grand Valley Hutterian Brethren, Inc., that which vOr, Inc. has received from them under the contract, upon the condition that they shall do likewise.

(*Id.*)

30. Nearly seven months after the sale closed, Paul sent the purported Notice of Rescission to the Hutterian Brethren, ostensibly on behalf of vOr, and offered to restore to them that which vOr received from them under the contract, upon the condition that they shall do likewise.
(Complaint, ¶ 105; Wipf Aff., Ex. 2 (Notice of Rescission)).

31. Paul did not include First Interstate Bank in the purported Notice of Rescission.

32. Paul did not include his siblings in the purported Notice of Rescission.

33. Paul did not include Raymond in the purported Notice of Rescission.

34. Paul has not tendered the \$3.2 million to the Hutterian Brethren.

35. Paul did not present a proposed mortgage or note from First Interstate Bank, or any other bank.

36. Paul has not alleged that he has approval to restore the \$3.2 million or that he has \$3.2 million to give to the Hutterian Brethren on behalf of vOr.

37. No signatory to the land sale transaction has rescinded the Purchase Agreement or sought to unwind the land sale transaction.

4916-7814-6085, v. 1

Appendix 33

25CIV23-15

Statement of Undisputed Material Facts

38. Paul does not, and did not, own any shares of vOr.

39. Paul was not the President of vOr at the time of execution of the Purchase

Agreement.

40. Paul is not a director, owner, or shareholder of vOr.

41. Paul is not a trustee of the Trust.

42. Paul did not possess the authority to enter into the Purchase Agreement on behalf of vOr.

43. Paul lacks any authority to challenge and rescind the Purchase Agreement on behalf of any party to the contract.

44. Paul does not own the property subject to this lawsuit in his individual capacity or in any representative capacity for vOr or the Trust.

45. On March 30, 2023, Hutterian Brethren's counsel rejected Paul's purported Noticed of Rescission. (Wipf Aff., Ex. 3.)

46. Paul's Complaint requests the Court to rescind the land transaction and for the Court to "impose a constructive trust on the deeds of the land conveyed, as well as upon any funds flowing from the transaction." (Complaint, ¶ 106).

47. Alternatively, Paul requests "[i]f rescission is not available, then, in that case Paul O'Farrell is entitled to an award of damages for unjust enrichment, and, otherwise." (Complaint, 107).

48. Paul claims damages are available for Raymond, Victoria, Victoria's Estate, the Revocable Trust, and vOr based on Kelly's acts, and "[d]iscovery will determine the extent and nature of the tort claims...Such damages would be available as a result of conversion, breach of fiduciary duty, and tortious interference with their expected and established relationships." (Complaint, ¶ 111).

4916-7814-6085, v. 1

Appendix 34

25CIV23-15
Statement of Undisputed Material Facts

49. Raymond is not a party to this lawsuit.

50. Paul claims “[d]amages...appear to be available to Skyline Cattle and Paul O’Farrell as a result of Kelly O’Farrell’s tortious interference in their expected and established relationships.” (Complaint, ¶ 112).

51. Paul expressly disclaims any tort damages against the Hutterian Brethren. (Complaint, ¶ 114).

52. He states, “**No tort damages are sought from the Hutterite Brethren, and Paul sincerely apologizes that they must be made a part of this ordeal.**” (*Id.*) (emphasis in original).

53. The Complaint does not allege that the Hutterian Brethren are wrongdoers or had any notice of any alleged undue influence or fraud.

54. The Complaint does not allege Hutterian Brethren connived with Kelly.

55. Count 1 of Plaintiffs’ Complaint does not allege a cause of action against Hutterian Brethren.

56. Count 2 of Plaintiffs’ Complaint alleges a remedy, not a cause of action.

57. Count 3 of Plaintiffs’ Complaint does not seek any damages against Hutterian Brethren.

58. To date, there is no evidence of what Kelly did or said to Ray giving rise to this lawsuit.

59. To date, there is no evidence that whatever Kelly allegedly did or said to Ray cause Ray to change the estate plan.

4916-7814-6085, v. 1

Appendix 35

CERTIFICATE OF SERVICE

I certify that on the 6th day of March, 2025, a true and correct copy of the foregoing was served via EFSP upon the following:

Daniel K. Brendtro
Hovland, Rasmus, Brendtro &
Trzynka, Prof. LLC
PO Box 2583
Sioux Falls, SD 57101
*Attorney for Paul O'Farrell &
Skyline Cattle Company*

Jack Hieb
Richardson Law Firm
1 Court Street
PO Box 1030
Aberdeen, SD 57402-1030
Attorney for Kelly O'Farrell

Lee Schoenbeck
Joe Erickson
Schoenbeck & Erickson, PC
1200 Mickelson Dr., Suite 310
Watertown, SD 57201
*Attorneys for Raymond O'Farrell, the
O'Farrell Trust, VOR, Inc., and Estate
of Victoria O'Farrell*

George Boos
Susan Yexlen Jennen
Boos Jenne Law Firm, LLC
PO Box 254
Clark, SD 57225
Attorneys for Raymond O'Farrell

/s/ William G. Beck
*One of the Attorneys for Defendant Grand Valley
Hutterian Brethren*

Appendix 37

STATE OF SOUTH DAKOTA)
):: §§§
COUNTY OF GRANT)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

<p>THE ESTATE OF PAUL O'FARRELL, individually; and, as a beneficiary of the family trust; and, for the benefit of THE ESTATE OF VICTORIA O'FARRELL; SKYLINE CATTLE COMPANY, a South Dakota corporation; & VOR, INC, a South Dakota corporation</p> <p style="text-align: right;">PLAINTIFFS</p> <p style="text-align: center;">v.</p> <p>KELLY O'FARRELL, an individual; GRAND VALLEY HUTTERITE BROTHERS, INC.; a South Dakota corporation; and THE RAYMOND AND VICTORIA O'FARRELL LIVING TRUST, a South Dakota trust.</p> <p style="text-align: right;">DEFENDANTS</p>	<p style="text-align: center;">25CIV23-000015</p> <p style="text-align: center;">RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS (GRAND VALLEY)</p>
---	---

Pursuant to SDCL 15-6-56(c)(2), and as their response to the Statement of Undisputed Facts on Grand Valley's 3/6/2025 motion for summary judgment, Plaintiffs state:

General Objection

After Paul O'Farrell's passing, he was substituted as a party. Then, to reflect his passing, as well as later-discovered facts, Paul's Estate filed a motion to amend his original Complaint. That motion is pending. However, Grand Valley's summary judgment motion and undisputed facts relate to the claims within the original

Appendix 38

Complaint. They do not address the Complaint as proposed to be amended.

Therefore, Plaintiffs generally object to the Statement of Undisputed Facts. A summary judgment motion becomes moot upon the filing of a motion to amend the Complaint. Plaintiffs notified Grand Valley of the amended complaint prior to Grand Valley's decision to file its summary judgment motion. Grand Valley filed anyway.

"Revocable" Trust

In some instances, the facts offered by Grand Valley are legal contentions, rather than facts. For example, Grand Valley refers to the O'Farrell family trust as "the Revocable Trust" on fourteen separate occasions. See, ¶¶ 4, 5, 6, 7, 9, 11, 12, 24, 26, 48. As discussed below, the Trust was not titled a "revocable" trust, and, it was in fact *irrevocable* under certain conditions applicable here. The use of the term 'revocable' is disputed in those paragraphs.

Response to Undisputed Facts

Many of the facts in this case are disputed. Many more will be the subject of discovery, upon which it is reasonable to expect further disputes will become apparent. For its response, the Plaintiffs offer the following:

1. The Hutterian Brethren join and adopt all of The Raymond and Victoria O'Farrell Living Trust and vOr, Inc.'s Statement of Undisputed Material Facts. **DISPUTED. (Plaintiffs incorporate by reference their 3/6/2025 "Response to Statement of Undisputed Facts")**

Appendix 39

regarding VOR's motion for summary judgment.)

2. Raymond and Victoria O'Farrell owned approximately 1,000 acres of farmland in Grant County, South Dakota (the "Property"). (Complaint, ¶ 26). **UNDISPUTED.**

3. Raymond and Victoria put the Property into a corporation named vOr, Inc. ("vOr"). (Complaint, ¶ 25).

UNDISPUTED. However, further context is necessary regarding VOR and the Trust. The First Amendment to the Raymond and Victoria O'Farrell Living Trust, signed by Raymond and Victoria on August 26, 2021, reflects that VOR was synonymous with the farmland, and, that the farmland was synonymous with the Trust. The 2021 Amendment states in part:

Trustors recognize that the real property distributed below is currently owned by VOR, Inc. However, Trustors anticipate that the corporation will be dissolved at or prior to the death of the Surviving Trustor with minimal income tax liability. In the event VOR, Inc., is not dissolved prior to the death of the surviving spouse...or cannot be dissolved with minimal income tax impact, then the Trustees are instructed to follow the overall intent of the real property distributions set forth below by distributing shares of VOR,

Appendix 40

Inc., in proportion to the value of the underlying land, and subject to the purchase option set forth below.¹

The 2021 Amendment also added a “no contest” provision, under which any person challenging the Living Trust would lose their right to inherit under the Living Trust. The 2021 Amendment was sent to their children, including Kelly, on March 7, 2022, advising that the children, as beneficiaries, had 60 days by statute in which to challenge the trust amendment. No challenge was made. However, a reasonable inference is that this notice, and the 2021 Amendment was the precipitating event that caused Kelly O’Farrell to take subversive action to thwart the terms of the Trust, *i.e.*, since the Trust could not be changed and it greatly favored Paul, Kelly manipulated Raymond into attempting to withdraw assets from it.

Victoria testified to this. “After Raymond and I provided notice of the amendment to the Trust..., it is my understanding that Kelly and Rita were resentful more assets were to be distributed to Lance and Paul than to the other children.” *See, Victoria O’Farrell Affidavit, June 26, 2022, ¶ 11, found in 25CIV22-000038. The Trust*

¹ The First Amendment is found in the final three pages of Exhibit 5, Part 2, attached to Mr. Beck’s 3/6/2025 Affidavit.

named Paul as a primary beneficiary, and Paul's children as the beneficiaries of his share in the event of Paul's death.

4. Raymond and Victoria owned all the shares of vOr and deposited these shares of vOr into the Raymond and Victoria Living Trust ("Revocable Trust"),² which was a revocable trust created in 2011. (Complaint, ¶¶ 4, 24-25; Beck Aff., Ex. 5 (Raymond and Victoria O'Farrell Living Trust)).

DISPUTED IN PART. The Trust was not titled a 'revocable trust,' and, by its plain terms, it was not fully 'revocable.' Neither Trustor could withdraw the other's property, and, a reasonable construction is that neither could withdraw property without joint consent. And, it was not 'revocable' at the time of Victoria's death. Instead, it actually contained *irrevocability* provisions.

In particular, the Raymond and Victoria O'Farrell Living Trust ("Living Trust") upon certain conditions and occurrences, becomes irrevocable as to actions by interested individuals,

² Use of the term "Revocable Trust" is disputed throughout, for the reasons set forth in this #4, and throughout. This was a "Living Trust" which contained restrictions on altering its assets and its terms.

including Raymond and the descendant beneficiaries. *See, e.g.,* Living Trust Section 14.20. Section 16.08(l).

Any amendment after Victoria's death would be allowable only for the portion of the Trust known as the "Survivors Trust". And, any such amendment would require the surviving Trustor to have sufficient mental capacity, and be free from undue influence. The Survivors Trust only holds Victoria or Raymond's personal residence and their tangible personal property. Living Trust Section 1.04, 7.02. *See also, generally* Section 6.

The farmland and/or vOr shares, and the remainder of Victoria's property, is held in the portion of the Trust known as the Marital Trust. *See*, Section 6.08. Neither Raymond nor any of the beneficiaries have authority to amend or revoke that portion of the Trust. Living Trust Article 8. Section 14.20. Section 16.08(l).

In this lawsuit, Plaintiffs are seeking restoration of Raymond's vOR shares to the Trust (in addition to invalidating the sale he conducted). Plaintiffs further allege that Raymond qualifies as a "person who is incapacitated" under Living Trust Section 16.08(f). After the VOR shares and property are restored, a successor Trustee would then have the authority to steward Raymond's and Victoria's interests in the Living Trust, both for

Appendix 43

Raymond during his lifetime, and also for the descendant beneficiaries. However, any such stewardship must be carried out in a manner that is free from undue influence and manipulation, by a party with appropriate capacity. And, there are limitations on what can be done with the Trust's assets, discussed further, below.

5. The Revocable Trust conditionally designated the majority of the Property to be inherited by their son, Paul, which included nine contiguous parcels comprising 703.33 acres. (Complaint, ¶ 29, 92).

UNDISPUTED. However, the term “conditionally” is misleading, if the intent is to imply that the designation to Paul may be changed in an arbitrary or unlimited way. And, any change would have needed to be made by both Raymond and Victoria, jointly, as well as with sufficient mental capacity, and free from undue influence.

The intent of the Living Trust, as made clear in The First Amendment to the Living Trust in 2021, is to serve as an asset transition tool for the family farmland. The intent is that the beneficiary designations be hewed to as closely as possible with respect to the farmland or its proceeds. *See* The First Amendment to

Appendix 44

the Raymond and Victoria O'Farrell Living Trust, signed by Raymond and Victoria on August 26, 2021. Further, the plain language of the Trust designated Paul's children as the beneficiaries who would take Paul's share, upon his death.

The Marital Trust, funded by operation of the Living Trust upon Victoria's death, allows Raymond as surviving Trustee a **limited** power of appointment over the Marital Trust half of vOr shares to the descendant beneficiaries. *See*, Living Trust Section 8.05. However, Raymond's limited capacity (and the presence of undue influence) would preclude Raymond from exercising this power.

6. The Revocable Trust also conditionally designated two other quarters of ground to be inherited by Raymond and Victoria's other children, Lance, Marcie, Kelly, and Rita. (Complaint, ¶ 27, 29).

UNDISPUTED, but, again subject to the discussion above regarding the word "conditionally."

7. The Revocable Trust conditionally granted Paul an option to purchase those two parcels. (Complaint, ¶ 29).

UNDISPUTED, but now largely irrelevant, because the option

Appendix 45

terminated at Paul's death. Grand Valley's purported contract, however, clearly interfered with the intent of the Trust, which creates a further inference of the invalidity as to Raymond's actions.

8. Lance, Marcie, and Rita are not parties to this action, or any of the related actions: VOR, Inc. and Grand Valley Hutterian Brethren v. Paul O'Farrell and Skyline Cattle Company (25CIV23-18) (Eviction Action); In the Matter of the Guardianship and Conservatorship of Raymond O'Farrell (25GDN23-1) (Ray's Guardianship); Estate of Victoria O'Farrell (25PRO22-11) (Victoria's Estate); Victoria O'Farrell v. Raymond O'Farrell, Kelly O'Farrell (25CIV22-38) (Victoria's Lawsuit); and CHS Capital, LLC v. Skyline Cattle Co., Paul O'Farrell, VOR, Inc. (25CIV23-27) (Collection Lawsuit).

UNDISPUTED. However, under the statutes pertaining to Declaratory Judgment actions, any necessary party can be joined. See, SDCL 21-24-7.

9. The four conditions that must have occurred in order for Paul and his siblings to inherit the Property under the terms of the Revocable Trust were: (1) one of the parents had to die, (2) the other parent had to die,

Appendix 46

(3) the terms of the Revocable Trust must have remained unchanged upon the death of both parents, (4) the shares of vOr, which owned the Property, must have remained in the Revocable Trust. (Beck Aff., Ex. 5 (Raymond and Victoria O'Farrell Living Trust)).

DISPUTED. This is a legal conclusion masquerading as an undisputed "fact." Further, this is a gross simplification of a very complicated trust document, and an even more complicated set of circumstances.

And, regardless of how simple one can attempt to describe the Trust, it should be obvious that *none* of the terms of the Trust could be changed, and *none* of the assets could be withdrawn, if those changes or withdrawals were the product of undue influence, lack of capacity, or a failure of corporate authority and notice.

Further, upon Victoria's death, under no circumstances could Victoria's share of VOR or her share of proceeds of any land sale leave the Trust. The only condition remaining for the descendants to inherit Victoria's one-half interest in VOR (whether as land or as proceeds) is the death of Raymond O'Farrell.

Upon Victoria's death, her one-half ownership of vOr, Inc., became part of a Marital Trust, a sub-trust within the Living Trust. *See*, Section 1.03. Section 6.08. Article 8. The ultimate beneficiaries

Appendix 47

of this Marital Trust are her descendants. Section 8.08. *See also* Article 9.

The Marital Trust ensures Raymond receives lifetime trust income and/or principal under the health, education, maintenance and support (“HEMS”) standard, which is a limited and objectively ascertainable standard under the law. Section 8.02. *See Est. of Chancellor v. Comm’r*, 102 T.C.M. (CCH) 70 (Tax Court 2011).

Further, Raymond has no power to appoint Victoria’s one-half share of the vOr, Inc., shares to himself, under the Marital Trust’s “Limited Testamentary Power of Appointment.” He may *only* appoint the Marital Trust property among their descendants. *See*, Section 8.05. And, as an Interested Trustee, Raymond has no revocation authority or power over the Marital Trust. *See*, Article 8. Section 14.20. Section 16.08(I).

The restrictions on the Marital Trust are so specific in their protection of the descendant beneficiaries that Raymond would be required to execute a prenuptial agreement in the event of remarriage to protect the descendant beneficiaries of the Marital Trust. *See*, Section 8.03.

And as a matter of VOR’s corporate authority, there was no meaningful way in which Raymond could purport to act for VOR

Appendix 48

and sell its assets without interfering with the Marital Trust's interest in VOR.

What Victoria attempted to achieve in her Complaint was to restore the couple's longstanding estate planning wishes, including that Raymond's one-half shares of vOr, Inc., should return to the Living Trust. Victoria recounted, firsthand, that Raymond had no idea what he had done when she asked him about the transfers related to vOr, Inc., and the Living Trust during her lifetime. Affidavit of Victoria O'Farrell, June 26, 2022, Paragraphs 21-23, found in 25CIV22-000038.

The Plaintiffs' Complaint and Amended Complaint, and the existing facts within the Record, state a *prima facie* case that Raymond's shares of vOr, Inc., were improperly withdrawn from the Trust, and must return to the Trust and remain there until his death, at which point, Paul's descendants and Paul's siblings will inherit their designated portions of the farmland through vOr, Inc., and/or the Trust. *See*, Article 9.

Any other result would require Raymond and Grand Valley to demonstrate several things: that Raymond had cognitive capacity to withdraw his shares in 2022; that he has capacity to withdraw them now; that his abandonment of the longstanding trust plan is entirely

Appendix 49

free from undue influence; that each action pertaining to VOR followed corporate notice requirements; and, that the Trust provisions categorically permitted these actions. (Notably, Victoria's shares were never withdrawn from the Trust, and, thus those shares and any proceeds from them must remain in the Marital Trust, no matter what.)

10. Victoria died on July 11, 2022. (Complaint, ¶ 52).

UNDISPUTED.

11. By operation of the Revocable Trust, Victoria's shares of vOr and her beneficial interest in the Revocable Trust went to Raymond. (Beck Aff., Ex. 5 (Raymond and Victoria O'Farrell Living Trust)).

DISPUTED. Please see response to #9.

12. Raymond removed all shares of vOr from the Revocable Trust. (Complaint, ¶ 34).

UNDISPUTED that a *pro forma* attempt was made to remove all shares of vOr from the Living Trust.

However, the validity of this action is DISPUTED in several respects, including as a matter of law and fact. A reasonable

Appendix 50

inference from the Record is that Raymond lacked capacity and/or was subject to undue influence, and was carrying out Kelly's intentions, rather than his own.

Further, even assuming Raymond had capacity or acted free from undue influence while serving as Trustee of the Living Trust, Raymond acted beyond his authority to remove all the shares of vOR from the Marital Trust portion of the Living Trust. His authority to remove principal for his lifetime care was limited by the HEMS standard and he had no authority to appoint the Marital Trust property to himself, as described in the response to #9, above.³

Finally, Raymond's attempted transfer of 50% of the shares of vOr from the Living Trust fails as a legal impossibility. As an apparent 'tenancy-in-common' property in the Trust, Raymond's separate share was a right to an interest in the undivided whole: That is, a 50% interest in *each* share, not a 100% interest in 50% of the shares. Raymond's attempt to transfer a full interest in half the shares has no basis in property law. His rights were limited to an

³ There is further debate about Raymond's authority to remove his separate property interest in the vOr shares from the Living Trust. The shares presumably are held as tenancy-in-common property (although further discovery is needed to understand exact ownership) there is debate as to the effect of the transfer and authority of Raymond to sell vOr assets.

assignment from the Trust to himself of a one-half interest in 100% of vOr's shares, with the shares remaining in the name of the Trust.

Further, Raymond's dealings with a third-party on behalf of the Living Trust as co-tenant-in-common gave rise to a fiduciary duty. *See McEwen v. Gotthelf*, 31 S.D. 180, 140 N.W. 264, 266 (1913). The *McEwen* Court stated, "But the rule is firmly established that, when one tenant in common acts as agent for the sale of the whole property to a stranger, then the fiduciary relation arises," and, "the law raised a relation of trust between them that required honesty and fair dealing." On this basis, Raymond's sale of all of vOr's farmland, on behalf of vOr, was in derogation of the Living Trust's intent, it was legally impossible, and its attempt was breach of a fiduciary duty to the Living Trust.

13. On July 22, 2022, First Interstate Bank initiated a foreclosure on the Property. **UNDISPUTED.**

However, this raises a **DISPUTED INFERENCE**. As Victoria O'Farrell attested by Affidavit before her death:

Our lender...has called loans due and threatened foreclosure action because Raymond—under the negative influence of my son Kelly—decided he would not provide

Appendix 52

[the bank] with financial information that the bank required in order for vOr, Inc., to be eligible for refinancing and to avoid being declared in default.

vOr, Inc., was not in arrears on any of its own debt service or loan payments, and none of the other loans for which vOr, Inc., assets had been pledged as security were in arrears on any debt service or loan payments.”

Affidavit of Victoria O’Farrell, June 26, 2022, ¶¶ 10-11, found in 25CIV22-000038. Thus, despite the existence of foreclosure proceedings, the situation was not dire.

14. On or about August 12, 2022, the Hutterian Brethren executed a Purchase Agreement for the sale of the nine contiguous parcels for \$3.2 million (“Purchase Agreement”). (Complaint, ¶ 95; Wipf Aff., Ex. 1 (Purchase Agreement)).

UNDISPUTED., but INCOMPLETE.

The Hutterian Brethren, through acknowledgments in the Purchase Agreement for the sale of the family farmland, had actual and imputed knowledge that the sale by Raymond and VOR was the product of undue influence, lack of capacity, and was an *ultra vires* corporate act, and, that this affected the covenants of good title.

The Hutterian Brethren further had knowledge that vOr was not in genuine financial duress. There was no need for an urgent

Appendix 53

sale of the farmland without a competitive bidding process and without public marketing of the farmland. The circumstances of the sale corroborated the allegations in Victoria's Complaint in 25CIV22-00038. See, Wipf Affidavit, Exh. 1, Purchase Agreement, Section 12(b).

15. The Purchase Agreement also gave the Hutterian Brethren a right of first refusal to purchase the other two parcels of land held by vOr and leased the two parcels to the Hutterian Brethren. (Complaint, ¶ 97, 98; Wipf Aff., Ex. 1 (Purchase Agreement)).

UNDISPUTED.

16. As the only owner of vOr, Raymond signed the Purchase Agreement on behalf of vOr in his capacity as President of vOr. (Complaint, ¶ 96; Wipf Aff., Ex. 1 (Purchase Agreement)).

DISPUTED. See response to #34, and to #3, 4, 5, 9, 12, and 14, above.

17. The land sale transaction closed in October 2022. (Complaint, ¶ 59).

UNDISPUTED.

Appendix 54

18. The Hutterian Brethren and vOr initiated eviction proceedings, vOr, Inc. and Grand Valley Hutterian Brethren v. Paul O'Farrell and Skyline Cattle Company case number 25CIV23-000018, to evict Paul and Skyline Cattle Company from the Property.

UNDISPUTED.

19. This Court ordered Paul and Skyline Cattle Company to vacate the Property.

UNDISPUTED.

20. This holding was affirmed on appeal (2025 S.D. 2).

UNDISPUTED. However, disputed inference that the Circuit Court order and subsequent holding on appeal is binding on any of the separate, unrelated issues before the Court in the present matter. The holding of that case was nothing more than that Grand Valley was entitled to immediate possession.

21. Paul died on October 13, 2024.

UNDISPUTED.

Appendix 55

22. In their Complaint, the Plaintiffs allege acts by Paul's brother, Kelly O'Farrell ("Kelly") as the sole basis for their causes of action. (See Complaint, ¶¶ 1, 8, 11-13, 34, 36-39, 42-46, 64, 111- 12).

DISPUTED.

Plaintiff's Amended Complaint, filed by Motion in this matter on March 6, 2025, alleges 'connivance' by Grand Valley, and seeks tort damages as may be substantiated by discovery.

Complaint, Paragraphs 107-120. See, also, Response to Grand Valley's Motion to Dismiss, where this issue is fully briefed.

23. In their Complaint, Plaintiffs' claim that "[i]n 2022, . . . Kelly O'Farrell manipulated his father Raymond and engaged in other misconduct, in order to set in motion an improper and illegal set of maneuvers, all of which were designed to enrich himself at the expense of his parents and his brother Paul." (Complaint, ¶ 8).

UNDISPUTED.

24. In their Complaint, Plaintiffs asserts that Kelly was at the center of all the various maneuvers taken by Raymond, the Revocable Trust, vOr, Victoria, and the Estate of Victoria O'Farrell, see Complaint, ¶ 11, and

Appendix 56

Kelly “secretly began an orchestrated effort to alienate and isolate Raymond from his family, with the intent of thwarting various features of Raymond and Victoria’s Estate plan and disrupting farming operations. This included, for example: ‘removing’ shares of vOr, Inc., from the Trust; ‘separating’ Raymond’s and Victoria’s assets; interfering in Paul’s lending and farming activities; ‘removing’ Paul and Victoria as officers and directors of vOr, Inc.; attempting to fire the attorneys that Victoria hired to stop all of this; and, ultimately, signing a secret agreement to sell nine parcels of family farm ground to the Hutterite Brethren.” (Complaint, ¶¶ 11, 34).

UNDISPUTED, however, disputed inference that Plaintiffs’ claims solely relate to acts or omissions of Kelly O’Farrell. See, e.g. #22.

25. In their Complaint, Plaintiffs further assert the Purchase Agreement signed between vOr and the Hutterian Brethren on August 12, 2022, was kept secret, no authority was obtained via the probate process, and no notice was given until after the closing occurred in October 2022. (Complaint, ¶ 59).

UNDISPUTED.

26. However, because Raymond owned all of Victoria’s shares of vOr by

Appendix 57

operation of the Revocable Trust, and vOr owned all of the Property, the sale of the Property was not subject to the probate process.

DISPUTED. This is another legal conclusion masquerading as an ‘undisputed fact.’

Victoria’s Estate holds an active interest in the restoration of *all* shares of vOr to the Living Trust. And, further discovery will show whether any Victoria held any individual or other rights that existed adjacent to vOr’s sale of the farmland. For example, if Raymond breached his fiduciary duty to Victoria, and, if others facilitated such breach, her Estate would have an interest in pursuing recovery for such breach.

27. Nearly seven months after the sale closed, Paul signed a document purporting to be a “Notice of Rescission.” (Wipf Aff., Ex. 2 (Notice of Rescission)).

UNDISPUTED. The document speaks for itself. And, as argued in Plaintiffs’ Response to the Motion to Dismiss, there is no legal requirement that a rescission abide by specific formalities.

28. Paul signed the purported Notice of Rescission allegedly as VOR’s president. (Id.)

Appendix 58

UNDISPUTED. See #27.

29. Other than recite the legal description of the property subject to the Purchase Agreement, the purported Notice of Rescission states, in full:

Paul O'Farrell, as duly-elected President, and on behalf of vOr, Inc., gives notice of rescission of that certain real estate transaction involving the real property listed below. By this Notice, vOr, Inc. offers to restore to Grand Valley Hutterian Brethren, Inc., that which vOr, Inc. has received from them under the contract, upon the condition that they shall do likewise. (Id.)

UNDISPUTED. See #27.

30. Nearly seven months after the sale closed, Paul sent the purported Notice of Rescission to the Hutterian Brethren, ostensibly on behalf of vOr, and offered to restore to them that which vOr received from them under the contract, upon the condition that they shall do likewise. (Complaint, ¶ 105; Wipf Aff., Ex. 2 (Notice of Rescission)).

UNDISPUTED.

See #27.

31. Paul did not include First Interstate Bank in the purported Notice of Rescission.

Appendix 59

UNDISPUTED. See #27. Nor was there a need to include the Bank in the Notice. That is not how rescission works.

32. Paul did not include his siblings in the purported Notice of Rescission.

UNDISPUTED. See #27. Nor was there a need to include his Siblings in the Notice. That is not how rescission works.

33. Paul did not include Raymond in the purported Notice of Rescission.

UNDISPUTED. See #27. Nor was there a need to include Raymond in the Notice. That is not how rescission works.

34. Paul has not tendered the \$3.2 million to the Hutterian Brethren.

UNDISPUTED.

However, again, that is not required. A notice of rescission is valid if it offers to restore to the other party what was conveyed, if they do likewise.

35. Paul did not present a proposed mortgage or note from First Interstate Bank, or any other bank.

UNDISPUTED. Nor was this necessary. See, # 34.

Appendix 60

36. Paul has not alleged that he has approval to restore the \$3.2 million or that he has \$3.2 million to give to the Hutterian Brethren on behalf of vOr.

UNDISPUTED. Nor is it necessary to allege this. See, #34.

37. No signatory to the land sale transaction has rescinded the Purchase Agreement or sought to unwind the land sale transaction.

DISPUTED. If VOR is a “signatory” to the land transaction, then this is disputed, because a reasonable inference from the Record⁴ is that Paul was the last duly elected President until ousted via Raymond’s illegal acts, and, thus Paul, on behalf of VOR, rescinded the transaction.

38. Paul does not, and did not, own any shares of vOr.

UNDISPUTED. However, this is irrelevant. Paul was the President of VOR and did not need to be a shareholder to exercise

⁴ See, generally, Affidavit of Victoria O’Farrell, and Affidavit of Alex Hagen (Exhibits). Her affidavit and the various exhibits demonstrate a failure of corporate notice for the removal of officers.

that authority.

39. Paul was not the President of vOr at the time of execution of the Purchase Agreement.

DISPUTED. *See, # 37.*

It is undisputed that Paul O'Farrell was named vOr President in 2012, per records on file with the South Dakota Secretary of State, the year after Raymond and Victoria established the Living Trust in 2011.

It is undisputed that Paul remained President of vOr, per records filed with the South Dakota Secretary of State for all years thereafter until 2022, i.e., at the same time as Victoria is sounding the alarm about Kelly's manipulation of Raymond with regard to VOR. A reasonable inference from the existing Record, and which will likely be borne out from further discovery, is that Paul's removal as President was the product of undue influence and a failure of corporate authority, all of which was the product of Kelly's jealous orchestration. Notably, Kelly soon appears on Secretary of State filings, when his name had never previously appeared on any corporate filings.

As described in Victoria's Complaint and Affidavit, *pro*

Appendix 62

forma, but illegal actions were taken to make it *appear* Raymond had taken over as President of vOr. However, Victoria attested that Raymond did not understand what he had done, and her interactions support the conclusion Raymond lacked capacity to serve as officer of any business organization.

Paul was thus legally justified in claiming he remained the President of vOr.

40. Paul is not a director, owner, or shareholder of vOr.

Paul is deceased. However, DISPUTED, in that Paul was a Director and Officer of vOr at all times from 2012 until his attempted ouster in 2022. These attempts are without legal effect, for the reasons set forth in #39.

41. Paul is not a trustee of the Trust.

UNDISPUTED.

However, at the time of his original Complaint, Paul was named in the Living Trust as Successor Trustee. *See*, Living Trust Article 3. Paul sought Raymond's removal and to be appointed Trustee in place of Raymond. That same relief is available now, but to other individuals who can replace Raymond.

42. Paul did not possess the authority to enter into the Purchase Agreement

Appendix 63

on behalf of vOr.

DISPUTED. See #39-41. Like any corporate officer, Paul had authority to act for VOR as its President, provided that the actions were authorized by the Company and did not violate the terms of the Trust.

43. Paul lacks any authority to challenge and rescind the Purchase Agreement on behalf of any party to the contract.

DISPUTED. See #39-41. Paul is now deceased, and the Plaintiffs have authority to challenge the transaction.

44. Paul does not own the property subject to this lawsuit in his individual capacity or in any representative capacity for vOr or the Trust.

UNDISPUTED. Paul is deceased. However, the farmland was held in the title of vOr and the Trust, and for the reasons set forth above, and in his Complaint and in Plaintiffs' Amended Complaint, Paul held a legally cognizable interest in the transaction related to the farmland. The same is true of Skyline Cattle, as well as Paul's descendants as trust beneficiaries.

Appendix 64

45. On March 30, 2023, Hutterian Brethren's counsel rejected Paul's purported Noticed of Rescission. (Wipf Aff., Ex. 3.)

UNDISPUTED. Notably, the rejection of the Rescission did not challenge Paul's authority to issue the Notice, and simply said that Grand Valley did not agree to it.

46. Paul's Complaint requests the Court to rescind the land transaction and for the Court to "impose a constructive trust on the deeds of the land conveyed, as well as upon any funds flowing from the transaction." (Complaint, ¶ 106).

UNDISPUTED, except this relief is now found at ¶111 of the Amended Complaint.

47. Alternatively, Paul requests "[i]f rescission is not available, then, in that case Paul O 'Farrell is entitled to an award of damages for unjust enrichment, and, otherwise." (Complaint, 107)

UNDISPUTED, except this relief is now found at ¶112 of the Amended Complaint.

Appendix 65

48. Paul claims damages are available for Raymond, Victoria, Victoria's Estate, the Revocable Trust, and vOr based on Kelly's acts, and "[d]iscovery will determine the extent and nature of the tort claims...Such damages would be available as a result of conversion, breach of fiduciary duty, and tortious interference with their expected and established relationships." (Complaint, ¶ 111).

UNDISPUTED, except this assertion is now found at ¶116 of the Amended Complaint and has been revised.

49. Raymond is not a party to this lawsuit. **DISPUTED.** Raymond noticed his appearance in April 2023 and has not withdrawn as a party. His presence as a party is appropriate under SDCL 21-24-7.

50. Paul claims "[d]amages...appear to be available to Skyline Cattle and Paul O'Farrell as a result of Kelly O'Farrell's tortious interference in their expected and established relationships." (Complaint, ¶ 112).

UNDISPUTED, except this assertion is now found at ¶117 of the Amended Complaint and has been revised.

51. Paul expressly disclaims any tort damages against the Hutterian

Appendix 66

Brethren. (Complaint, ¶ 114).

DISPUTED. The Amended Complaint (formerly at ¶114 and now at ¶119) has been revised, and it no longer disclaims tort damages against the Hutterian Brethren. Instead, the Amended Complaint at ¶120 now seeks tort damages: “And, if and as discovery shows would be warranted, tort damages may be sought from the Hutterite Brethren.”

52. He states, “No tort damages are sought from the Hutterite Brethren, and Paul sincerely apologizes that they must be made a part of this ordeal.” (Id.) (emphasis in original).

DISPUTED. See #51.

53. The Complaint does not allege that the Hutterian Brethren are wrongdoers or had any notice of any alleged undue influence or fraud.

DISPUTED. See #51.

54. The Complaint does not allege Hutterian Brethren connived with Kelly.

DISPUTED. The Amended Complaint at ¶¶107-110 alleges the Hutterian Brethren connived as to the disputed transaction. The

Appendix 67

Record bears undisputed proof of their willful knowledge of the undue influence over Raymond and his lack of capacity. In short, Grand Valley had actual and constructive knowledge that the land transaction was a product of invalid corporate acts, fraud, and undue influence,” and that Raymond had limited capacity.

55. Count 1 of Plaintiffs’ Complaint does not allege a cause of action against Hutterian Brethren.

DISPUTED. See #51-54. See, also, Chapter 21-24 (Declaratory Judgment Act). Grand Valley is a necessary party to resolving questions related to the corporate acts of VOR.

56. Count 2 of Plaintiffs’ Complaint alleges a remedy, not a cause of action.

DISPUTED. See #51-54.

57. Count 3 of Plaintiffs Complaint does not seek any damages against Hutterian Brethren.

DISPUTED. See #51-54.

58. To date, there is no evidence of what Kelly did or said to Ray giving rise

Appendix 68

to this lawsuit.

DISPUTED, NOT MATERIAL. Undue influence can be shown with circumstantial evidence, rather than with evidence of certain statements. It is, of course, premature to seek summary judgment in an undue influence case when discovery is just beginning. *See*, Rule 56(f) Affidavit.

59. To date, there is no evidence that whatever Kelly allegedly did or said to Ray cause Ray to change the estate plan. **DISPUTED, NOT MATERIAL.** *See* #58.

Dated this 20th day of March, 2025.

HOVLAND, RASMUS,
BRENDTRO, PLLC

/s/ Daniel K. Brendtro

Daniel K. Brendtro
326 E. 8th Street, Suite 107
PO Box 2583
Sioux Falls, SD 57101-2583
(605) 951-9011
dbrendtro@hovlandrasmus.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on the 20th day of March, 2025, a true and correct copy of the foregoing was filed and served through the Odyssey File & Serve System upon:

Appendix 69

Lee Schoenbeck
Joseph Erickson
Schoenbeck & Erickson, PC
1200 Mickelson Dr., Ste. 310
Watertown, SD 57201
lee@schoenbecklaw.com
joe@schoenbecklaw.com

Reed Rasmussen
Siegel, Barnett & Schutz, LLP
PO Box 490
Aberdeen, SD 57402
Rrasmussen@sbslaw.net

William G. Beck
Woods Fuller Shultz & Smith P.C.
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
William.Beck@woodsfuller.com

Jack Hieb
RICHARDSON LAW
1 Court Street
Aberdeen, SD 57401
jhieb@rwwsh.com

George Boos
Susan Yexley Jennen
Boos Jennen Law Firm, LLC
PO Box 254
Clark, SD 57225
George.boos@boosjennen.com
Susan.jennen@boosjennen.com

/s/ Daniel K. Brendtro

Daniel K. Brendtro

Appendix 70

IN THE
Supreme Court
of the
State of South Dakota

No. 30482

PAUL O'FARRELL, individually; and, as a beneficiary of the family trust; and, for the benefit of The Estate of Victoria O'Farrell;
SKYLINE CATTLE COMPANY, a South Dakota corporation; &
VOR, INC, a South Dakota corporation

PLAINTIFFS/APPELLANTS

VS.

KELLY O'FARRELL, an individual; GRAND VALLEY
HUTTERIAN BRETHERN, INC.; a South Dakota corporation; and
THE RAYMOND AND VICTORIA O'FARRELL LIVING
TRUST, a South Dakota trust; RAYMOND O'FARRELL,
individually; as Trustee; and as Special Administrator of the Estate of
Victoria O'Farrell; and VOR, INC (by Raymond O'Farrell).

DEFENDANTS/APPELLEES

An appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota

The Hon. Robert L. Spears
CIRCUIT COURT JUDGE

APPELLANTS' BRIEF

Submitted by:

Daniel K. Brendtro; Mary Ellen Dirksen; Benjamin Hummel
Hovland, Rasmus, Brendtro & Trzynka, Prof. LLC
P.O. Box 2583
Sioux Falls, SD 57101

Attorneys for Plaintiffs/Appellants: Paul O'Farrell, Skyline Cattle Company, and VOR, Inc.

Appendix 71

STATEMENT OF THE FACTS

The facts of this case are now familiar to this Court, in light of the eviction appeal already pending and argued to it in November 2023. A few additional facts pertinent to this appeal are added here, while attempting to avoid duplication of the general factual background already established in the related appeal, and not repeating those set forth in the introduction and statement of the case, above.

The Colony's purchase agreement with VOR

On August 12, 2022, purportedly on behalf on VOR, Inc., Raymond O'Farrell signed a Purchase Agreement to sell most of the family's land to the Colony for \$3.2 million. [R.326-335].

The Colony's knowledge of Raymond's impairments

The Seller included a covenant that it could provide "good, marketable, and indefeasible" title, the Purchase Agreement, but this was modified by a provision in which the "BUYER HEREBY ACKNOWLEDGES" that Victoria had recently filed a lawsuit against Raymond "in his individual capacity and as Trustee of the Raymond and Victoria O'Farrell Living Trust" and then listed the civil file number ("25CIV22-000038"). [R.331] (emphasis in original).

As is apparent within the first page of her Complaint, Victoria's lawsuit sought to "unwind a covert, calculated, and unlawful scheme to deprive Victoria...of her residual ownership interest in, and control over 50% of the shares of VOR, Inc. [and that] Raymond...is a vulnerable, elderly person who appears to have no idea what he was doing, no role in conceiving the scheme, and no intention to implement its terms." [R.32].

And that's just what the Colony would find on page one. Victoria's Complaint spans 24 pages and details extensive concerns about Raymond, VOR, and Kelly O'Farrell's undue influence, which she said "reflects Kelly's desire to disrupt the estate plan of his mother and father." [R.35]. If there were any doubt, Victoria's civil file also included her Affidavit, which provided the same details and concerns about the validity of the corporate decisions being made for VOR. [R.76].

Notably, the proposed sale to the Hutterite Colony did not sell *all* of the family's land, just the large portion that Paul O'Farrell was slated to inherit. The purported sale documents also attempted to give the Colony the right of first refusal over all of the remaining family land, as well. [R.102, Purchase Agreement, ¶¶ 10.a].

Picking up where Victoria's lawsuit left off, Paul brought suit against the Colony, the Trust, and Kelly O'Farrell in an attempt to halt and reverse these changes. Paul included Victoria's lawsuit as an Exhibit and incorporated its factual assertions into his pleading. In addition, Paul included affidavits from Victoria and other parties that raised genuine concerns that Raymond was vulnerable, that he was being manipulated by Kelly, and, that Raymond did not understand his actions.

SUMMARY OF ARGUMENT

The *first* section of this brief reviews the *prima facie* claims made in the Complaint, and compares them to the basic requirements that a litigant must meet in order to survive a motion to dismiss under Rule 12(b)(5). In simplest terms, the allegations made in Paul's Complaint do not need to be extensive or exact; they must only make a "showing" that relief is plausible. The Complaint succeeds at this. Paul has alleged facts that present a familiar story of financial exploitation of an elderly, vulnerable father. The law forbids such misconduct, and, it affords several remedies to rectify the products of the abuse: declaratory relief, unwinding real estate transactions, and damages to punish the wrongdoers. This section addresses each of the three Counts, in turn.

IN THE
Supreme Court
of the
State of South Dakota

No. 30344

VOR, INC., & GRAND VALLEY
HUTTERIAN BRETHREN, INC.
PLAINTIFFS/APPELLEES

VS.

PAUL O'FARRELL &
SKYLINE CATTLE COMPANY
DEFENDANTS/APPELLANTS

An appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota

The Hon. Robert L. Spears
CIRCUIT COURT JUDGE

APPELLANTS' BRIEF

Submitted by:
Daniel K. Brendtro

Hovland, Rasmus, Brendtro & Trzynka, Prof. LLC
P.O. Box 2583
Sioux Falls, SD 57101

*Attorneys for Defendants/Appellants
(Paul O'Farrell and Skyline Cattle Company)*

Notice of Appeal filed on May 8, 2023

Appendix 75

The case law is clear that when other issues bear upon the ultimate question of possession, the[] ordinarily summary, special, speedy process always gives way to having all of the issues heard all at the same time. And so we ask for a judgment in favor of the defendants, or in the alternative, an order staying these proceedings until the conclusion of the other related matters.

[R.55]. Instead, the Circuit Court conducted the trial with its understanding that “[t]he only thing allowed by statute in an eviction proceeding is the facts and circumstances surrounding the eviction.” [TT 14:12-14].

Following the trial, the Circuit Court entered Findings and Conclusions [R.115] and a “Judgment and Order of Eviction” [R.120]. Notice of Entry was served May 8, 2023, and a notice of appeal was filed the same day. The Tenants appeal from the judgment of eviction and assign several errors of fact, law, and procedure.

STATEMENT OF THE FACTS

The facts of this eviction action relate to other preceding litigation. We begin with an overview of the factual and legal history that led up to the eviction.

Victoria’s undue influence lawsuit: June 2022.

In June 2022, Victoria O’Farrell filed a lawsuit in which she attempted to halt a drastic series of financial decisions purportedly made by her elderly,

vulnerable husband, Raymond O'Farrell. *See*, [App.34 (Complaint, 25CIV22—000038)].¹ Victoria alleged that those actions resulted in illegal changes to the family trust and estate plan, and that these changes occurred while she was temporarily living in a nursing home and recuperating from a surgery. *Id.*

In her Complaint, as well as in an affidavit, Victoria identified her husband Raymond as having an extensive history of alcohol abuse, a limited ability to read and write, and, an inability to explain any of the legal steps he had taken or what the documents intended to accomplish. *Id.* [Appendix 035, 040 (Complaint)]; [App.078, et seq. (Victoria's Affidavit, including ¶¶ 23-24)].

Victoria attributed these maneuvers as part of a scheme orchestrated by her son Kelly O'Farrell and her daughter Rita. [Appendix 045, Complaint, ¶¶ 55-60; and, *see, generally*, Complaint & Affidavit]. Victoria observed that Kelly was upset about the inheritance that his brothers Paul

¹ The Circuit Court took judicial notice of the various, related court files involving the O'Farrell Family. *See*, [TT 12-13]. (taking judicial notice of 25CIV22-38, 25PRO22-11, 25CIV23-15, 25GDN 23-01, "so that the Supreme Court has the ability to review all of those files").

The other files are available in their entirety via eCourts, and, the most pertinent pleadings are included in Appellants' Appendix.

and Lance were going to receive. [Appendix 045, Complaint ¶¶ 57-58]. Victoria alleged that Kelly was “fueled by his resentment” and began isolating and manipulating Raymond. [Appendix 082, Victoria’s Affidavit, ¶ 25]; [Appendix 045, Complaint ¶¶ 58]. And, Victoria forcefully demanded that Kelly would no longer be welcome to live with her and Raymond when she soon returned home, because he was such a problem. *Id.*, ¶ 48.

During this time, various actions were taken by other individuals, purportedly on behalf of Raymond. For example, when Victoria hired an attorney to help fix the situation, Raymond’s attorney immediately attempted to fire that lawyer, apparently relying upon a power of attorney that Raymond held over Victoria. [App.84., ¶ 38].

In addition to filing a Complaint, Victoria attempted to obtain a temporary restraining order. [App.61].

Other than her surgery, Victoria was in good health and was making plans to return home. But she died, unexpectedly, from surgery complications shortly after filing her affidavit and application for a TRO. Her death occurred before she could return home, and, prior to any hearings on her lawsuit.

Victoria's probate file: July 2022.

A probate file was immediately opened for Victoria's estate. *See*, [Appendix 093-095] (Petition, 25PRO22—000011). Victoria died on July 10, 2023, and, her probate was opened on July 8, 2022.

Via an *ex parte* pleading, and without any notice to any family members, Raymond's attorneys petitioned (and succeeded) in making Raymond the "Special Administrator" for his wife's estate, for the express purpose of putting Raymond in control of Victoria's lawsuit against him. The Petition claimed that "an emergency exists" because "the pending litigation requires immediate attention of a Special Administrator...." *Id.*, ¶ 6 [Appendix 094]. This Order now permitted Raymond to exercise control over Victoria's the lawsuit against him. [Appendix 096, Order Appointing Special Administrator].

The Order of Raymond's appointment recites the civil file number of Victoria's lawsuit, but, it omits the caption of the lawsuit. It appears that the proposed Order was drafted so as to help conceal from the Circuit Court that

granting that Order would now make Raymond both Plaintiff and Defendant to the same lawsuit.²

The bulk land sale to the Colony: August and October 2022.

Shortly after Victoria's death, Raymond began executing documents that initiated a sale of most of the family's farmland to the Grand Valley Hutterite Colony. *See, generally*, Eviction Complaint, and Exhibits 3 and 4 [R.3; R.99; R.109]. Notably, the proposed sale to the Hutterite Colony did not sell *all* of the family's land, just the large portion that Paul O'Farrell was slated to inherit. The purported sale documents also attempted to give the Colony the right of first refusal over all of the remaining family land, as well. [R.102, Purchase Agreement, ¶¶ 10.a].

Paul O'Farrell is one of Raymond and Victoria's five children. His pleadings allege that he has worked alongside his parents for several decades on their farm, and at their cattle auction barn. For at least a decade, Paul was

² It is elementary that a party cannot serve on both sides of a lawsuit. *Hampshire v. Powell*, 10 Neb. App. 148, 155, 626 N.W.2d 620, 626 (2001) ("executor is not 'legally competent' to act in that capacity, where his duties would require him to prosecute on behalf of adversary litigants, a suit which he would at the same time defend as an individual.") (citations omitted). *See, also*, S.D.R.Civ.P. 17(a) (real party in interest rule, which requires cognizable parties on both sides of a suit).

designated as the primary recipient of his parents' estate plan. For many years, Paul has lived on his family's trust land. Paul built, paid for, and resided in a house on the trust's land, and also built and paid for a shop in which to operate his business. *See*, Paul's Affidavit, ¶¶ 11-13 [App. 115-120]. For a considerable time, Paul served as a corporate officer and manager of the family's farming entity, until being told he had been removed, as part of Kelly's scheme to manipulate Raymond. *Id.*, ¶ 15.

Paul's attempts to intervene: October 2022.

Following his mother's death, Paul unsuccessfully attempted to intervene in his mother's civil action to carry it forward. *Id.*, ¶ 19. And, Paul unsuccessfully attempted to petition for the removal of Raymond as the representative of Victoria's estate.

Paul's civil lawsuit and guardianship proceeding: March 2023.

After those two attempts were rejected by the Circuit Court, Paul pursued a third legal path, namely a new civil action seeking to rescind the sale, and to unwind the various corporate and trust maneuvers, which he alleges were orchestrated by Kelly O'Farrell. *See*, [Appendix 009-032] (Complaint, 25CIV23—000015).

Paul filed and served his civil action in early March 2023. In addition to seeking a rescission of the sale, and for damages, and for other relief related to the Family Trust, Paul's civil action expressly asked for a declaratory judgment to resolve the dispute about whether Paul and his company Skyline Cattle are rightful occupants of the land putatively sold to the Hutterites.³ The Colony was named as a Defendant in that action.

Paul brought that lawsuit in his own name; and, in his company's name; and, 'for the benefit of' Victoria's Estate and the family trust;⁴ and, for VOR, Inc., on the basis that Paul was the last duly elected President of the corporation.⁵

³ Paragraphs 83 through 87 of Paul's civil lawsuit allege that Skyline Cattle has the ongoing right to continue farming the real estate for the 2023 crop season. Paragraphs 88 and 89 alleges that VOR "failed to issue a legally effective termination notice in 2022," and, accordingly, that the Plaintiffs ask for a declaration as to their legal right "to continue occupying the premises." In other words, both of the Defendants in the newly filed eviction action had already asserted the inverse, identical claims that the Plaintiffs sought to bring in this eviction action.

⁴ See, *Beachy v. Becerra*, 609 N.W.2d 648, 651-51 (Neb. 2000) (citing 31 AmJur2d *Executors and Administrators*, § 1285 (1989)) (interested party to an Estate is permitted to bring or enforce claims for the benefit of the Estate when the Personal Representative has failed to act, or when his interests are antagonistic to the Estate, or are otherwise collusive)

⁵ *Schroder v. Scotten, Dillon Co.*, 299 A.2d 431, 435 (Del. Ch. 1972) (when corporate meetings are not lawfully convened, the previous directors and officers continue to hold office)

In early March 2023, Paul also initiated a conservatorship action to try and protect Raymond from further harm. *See*, [Appendix 103-112.] (Petition, 25PRO23—000001). Paul does not have access to Raymond’s medical records, and, he alleges that Raymond is being isolated, so Paul does not have the ability to obtain the statutory evaluation report. *See*, SDCL 29A-5-306; [Appendix 113]. However, the Circuit Court has refused to allow the Petition to be filed without a report, and refused to order an evaluation. [Appendix 114].

In the wake of those proceedings, this eviction lawsuit emerged.

The eviction lawsuit: April 2023.

In mid-April 2023, which was now several weeks after Paul’s suit was filed and served, Grand Valley and Raymond (purportedly acting through VOR, Inc.) commenced this action for forcible entry and detainer. [*See*, R.19-20] (serving Summons on April 17, 2023).

Paul and Skyline promptly filed motions to dismiss, including a motion asserting that the eviction action was a compulsory counterclaim that needed to be brought within the pre-existing lawsuit. Those motions were denied, as were various other objections about the timing and notice of the proceeding, and, Defendants’ demand for a jury trial .

The Circuit Court convened a court trial on April 27, 2023. It entered findings, conclusions, and a judgment of eviction on May 1, 2023.

In addition to possession, the judgment also purported to create a forfeiture for all of Paul's machinery and equipment which remained on the property on the 10th day after trial.

The Circuit Court's judgment was interpreted by the Landlord as being actionable to acquire possession as of the 10th day after the trial date. However, at no time did the Circuit Court make express findings of "good cause" to shorten the 30-day stay under Rule 62(a).

Tenants filed an application to establish and approve an undertaking, and pointed out that Rule 62(a) afforded an automatic stay of the judgment of possession for 30 days. [R.160]. The Circuit Court rejected the Defendants' proposed undertaking, and, ignored the argument about Rule 62(a). [R.192].

Upon motion to this Court, an undertaking was established. Tenants posted a cash deposit on May 30, 2023, which stayed the operation of the eviction judgment.

Tenants appeal, raising three categories of issues.

IN THE
Supreme Court
of the
State of South Dakota

No. 30344

VOR, INC. & GRAND VALLEY
HUTTERIAN BRETHEREN, INC.
PLAINTIFFS/APPELLEES

VS.

PAUL O'FARRELL &
SKYLINE CATTLE COMPANY
DEFENDANTS/APPELLANTS

An appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota

The Hon. Robert Spears
CIRCUIT COURT JUDGE

APPELLANTS' REPLY BRIEF

Submitted by:
Daniel K. Brendtro
Mary Ellen Dirksen
Benjamin M. Hummel

HOVLAND RASMUS BRENDTRO & TRZYNKA, PROF. LLC
P.O. Box 2583
Sioux Falls, SD 57101

Attorneys for Defendants/Appellants

Notice of Appeal filed on May 8, 2023

Appendix 85

RESPONSE TO STATEMENT OF THE CASE & FACTS

The Colony's recitation of the Statement of the Case and Statement of the Facts is generally accurate, but with the following corrections. (And, due to the "legal" nature of some of the Colony's factual contentions, in some instances it was more efficient for Paul to lodge his legal "arguments-in-reply" within this section, rather than later in this reply brief.)

"Pursuant to..."

First, the Colony claims on page 3 that the Defendants' motions were filed "pursuant to SDCL 21-16-7." (emphasis added). This appears to be argumentative. Defendants did not file their motions "pursuant to" SDCL 21-16-7. Instead, they intended for their motions to be filed under Rule 12, on the belief that the Rules of Civil Procedure apply to eviction proceedings.

The significance of testimony from other proceedings

Second, Paul agrees that he asked the Circuit Court to take judicial notice of the related O'Farrell proceedings. However, that request did not seek to add the testimony of those proceedings into the court trial. Paul asked that it take judicial notice "for the existence of these other proceedings taking place and the contents of the file as far as what the litigants were arguing...." [[TT 12-13]]. The Circuit Court complied. *Id.*

Later in their brief (page 25), the Colony asserts that it was permissible for the Circuit Court to rely on the testimony and its recollections from those proceedings (including unsworn statements) because Paul "invited" this "error." Paul asks this Court to read the narrow request that he made for

judicial notice (related to the character of the underlying issues in dispute), and, the Court's response. [[TT 12-13]].

Paul did not invite error. Paul did not request four hours of prior testimony be added to the Record. And Paul did not request that the Circuit Court inject its observations of an unsworn witness¹ into the proceedings.

The significance of filings from other proceedings

Next, the Colony claims that "affidavits" and "allegations in his Complaint" are not "testimony in a judicial proceeding and...are hearsay." See, Appellees' Brief, p. 6, fn.2. This is an overbroad and incorrect assessment of the hearsay rule. For purposes of evaluating Paul's motion to dismiss (and, in the alternative, his motion for a stay), the "facts" are not evaluated for their truth or weight; instead all of the facts in the extended record are construed in a light most favorable to Paul's contentions. *Ex Parte Nautilus Insurance Company*, 260 So.3d 823, 830 (Ala. 2018) (to evaluate compulsory counterclaim "operative facts" include the "facts taken as a whole," and, the "facts upon which the original claim rests").

Kelly and Rita caused the family farm to go into foreclosure

In Section 2 on pages 6 to 7, the Colony asserts that Paul was responsible for the family's land going into foreclosure. In making this

¹ The Colony quibbles with the Transcript, claiming that "there is no indication in the actual record whether [Raymond O'Farrell] was not sworn." Appellees' Brief, p. 25, fn.7. Paul suggests that when a Court Reporter includes the phrase "not sworn" in the transcript, she did so because it is true.

allegation, the Colony omits key details, including the source of the debt, as well as the reason that the notes went delinquent.

As to the source of the debt: much of Skyline's and VOR's debt (which was secured by VOR's land) had been originally created by Raymond and Victoria back when they were the primary owners and operators of Skyline, and, some was borrowed directly by VOR. During that time, Paul "never had the checkbook," and "didn't write any of the checks out" for Skyline's or VOR's operations. [Victoria's HT, 72:24-25; Appellees' APP077]. "I didn't handle the banking. My mom did." [*Id.*, 73:25; APP078].

Later, when Paul's parents gave their Skyline shares to him, and when Paul took over the farming corporation, he began to inherit responsibility for managing that same debt (VOR's and Skyline's). But, Victoria continued to wield control over the checkbook until approximately 2018. [*Id.*, 79:17-18; APP84].

Eventually, Paul assumed full management of the finances, and he was then able to begin paying down the debt, including at the end of the year when harvest profits came in. [*Id.*, 56:8-9; APP061]. After Paul took over Skyline, Paul considered himself, Skyline, and VOR to be operating like "partners with cattle and buildings and equipment." [*Id.*, 57:6-7; APP062]. The debt was secured by the family's farming land (through VOR, which in turn was held by the Trust), and, throughout all of this time Paul remained the primary beneficiary of that Trust.

As to the reason for the debt going delinquent, it is Paul's claim (as was Victoria's claim) that Raymond was being unduly influenced not to renew the farming notes, and, that Raymond did not understand what he was doing by refusing to do so.

As background, each year, the operating notes would be renewed, including with Raymond and Victoria's signatures and consent. [*Id.*, 56:2; APP061]. It happened this way, without objection, every single year from 2003 until 2021. [*Id.*, 76:4-18; APP076].

In the spring of 2022, "Great Western Bank was going to refinance again," and "Raymond would have signed it [again], but [Paul's] sister [Rita] and [Paul's] brother [Kelly] started telling him not to sign anything...." [*Id.*, 76:24-25; APP081; and 55:4-7; APP060].

The foreclosure happened for the sole reason that Kelly would not let Raymond sign the renewal. [*Id.*, 66:15-17; APP071]. Kelly was living with his parents at this time, and he was "upset about the small amount of land he was going to get in the trust." [*Id.*, 77:6-15; APP082]. Kelly was coaching and manipulating his father into withholding his signature. *Id.*

The Colony also omits mention that Raymond's new and "independent legal counsel" was not someone Raymond found on his own, nor even someone he found in consultation with his wife Victoria; Rita "helped" Raymond hire this new attorney by taking him there. [*Id.*, 83:16; APP088].

To resolve the foreclosure, the only solution necessary was to renew the notes, as had been done for the past two decades, rather than to precipitously

sell nearly all of the family's land. It is incorrect for the Colony to claim that Paul caused the foreclosure.

Whether Paul's civil lawsuit was filed and pursued in "bad faith"

In Section 3 of their Facts, the Colony recount the procedural history of Paul's parallel, civil suit. Some of their descriptions are accurate; some are hyperbole. (The facts must be "stated fairly, with complete candor." *See*, Appellate Rule 60(5)).

The Colony asserts that they filed a motion to dismiss in an effort "point out that Mr. Brendtro is claiming to represent VOR, Inc., who he doesn't represent, and in the same Complaint, he is seeking a damage claim against VOR, Inc.,...and [that] Mr. Brendtro had no authority to file a complaint on the Estate's behalf." *See*, Appellees' Brief, pp. 7-8. The Colony offers these assertions as if they are legally undisputed.

Paul's Complaint chose to include VOR, Inc., as a Plaintiff, because Paul asserts that he is the most recent, validly elected president of that corporation. He asserts that subsequent attempts to remove him as President were invalid, along with other corporate acts. Paul's Complaint also chose to assert claims "for the benefit of Victoria's Estate, in order to preserve and protect her Estate's rights and interests," but not by claiming to represent the Estate. In his lawsuit, as well as in his opening brief, Paul demonstrated that there is legal authority for Paul to assert claims on behalf of the corporation, and on behalf of the Estate. *See*, Appellants' Brief, p. 15, fn.4 and 5.

Finally, Paul included a single paragraph in his Complaint, averring *in the alternative*, that he may be entitled to an award of damages for the value of the capital improvements he made upon the family land at his own expense and without compensation, which collectively have an estimated value in excess of a million dollars. [Appendix 29, Complaint ¶ 108.] In other words, Paul is pointing out that **if** his initial theory of relief on behalf of VOR, Inc., is incorrect, **then**, whoever is in charge of VOR will then be required to pay Paul those restitution damages. The Colony makes much ado about this, but it offers no legal authority why Paul cannot use his Complaint to mention alternate theories of relief. See, Rule 8(c).

Following Victoria's death, Paul has attempted to pick up where his mother left off. Like her, he seeks to preserve the farming operation established by his parents, and the estate plan contemplated by their estate plan prior to Rita and Kelly's meddling. Paul suggests this is not bad faith.

ARGUMENT-IN-REPLY

Litigants are entitled to the swiftest and most complete process warranted by the facts and issues of their unique dispute. This Court's standard in *Heiser* embraces a malleable approach to this principle. Some eviction cases are just more complicated than others.

The Colony's approach is the opposite of *Heiser*: a truncated proceeding in every instance, with minimal notice, and with a narrow view of the issues. The Colony's approach is self-serving. It is designed to avoid confronting the facts of what happened to Raymond O'Farrell. Their

IN THE
Supreme Court
of the
State of South Dakota

No. 30532

IN THE MATTER OF THE
ESTATE OF VICTORIA O. O'FARRELL,
DECEASED

An appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota

The Hon. Dawn Elshere
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

Submitted by:
Daniel K. Brendtro; Mary Ellen Dirksen; Benjamin Hummel
Hovland, Rasmus, Brendtro & Trzynka, Prof. LLC
P.O. Box 2583
Sioux Falls, SD 57101
Attorneys for Appellant, Paul O'Farrell

Notice of Appeal filed on November 7, 2023

Appendix 92

JURISDICTIONAL STATEMENT

Appellants appeal the Circuit Court's entry of an Order by the Hon. Dawn Elshere on 7/18/2022 [R.5]. No notice of entry was given of that Order, nor any subsequent action by the Circuit Court. Appellants filed their notice of appeal on 11/7/2023. [R.54].

This Court has jurisdiction under SDCL 15-26A-3(4) to consider an appeal from the circuit court's order appointing Raymond as special administrator. An order appointing a special administrator is a final action upon the petition seeking appointment. *See Matter of Est. of Petrik*, 2021 S.D. 49, ¶ 16, 963 N.W.2d 766, 770 ("orders determining individual petitions for relief in probate actions can constitute final orders when they dispose of all issues relative to a particular petition and leave nothing for decision").

STATEMENT OF THE CASE

In June of 2022, Victoria O'Farrell brought a lawsuit to halt Raymond from making further changes to the family's estate plan. Her Complaint describes an orchestrated campaign of undue influence exercised by their son Kelly, who was angry at his prospective inheritance under the Trust. [R.13-14]. The Complaint alleges that Raymond had diminished capacity, couldn't

read, and did not understand the actions he was taking. [R.14]. Victoria died prior to further proceedings, and the upcoming hearing was canceled.

Paul attempted to intervene in his mother's lawsuit, and, also attempted to alert the Court that Raymond was not a suitable representative for the Estate. The Circuit Court held a motions hearing on October 18, 2022, involving the Estate, and, involving Victoria's lawsuit against Raymond. [VHT 1-175]. At the outset of the hearing, the Circuit Court noted that, "I have two files set for hearing at the same time [including] 25CIV22-38...and...25PRO22-11," and it took up the civil file first. [VHT 6]. The Court discussed (but did not squarely address) the problems of Raymond's appointment.

Paul's appeals from the original order appointing Raymond, and he assigns two errors: that the appointment was *procedurally* void because of a failure of notice, or, that the appointment was *legally* void because it purported to install Raymond as the Plaintiff in a pending lawsuit against himself.

IN THE
Supreme Court
of the
State of South Dakota

No. 30508

VICTORIA O'FARRELL, in her individual capacity and as Trustee
of the Raymond and Victoria O'Farrell Living Trust dated January 14,
2011, restated March 29, 2017, and amended August 26, 2021;

PLAINTIFFS/APPELLEES

and

PAUL O'FARRELL,

INTERVENOR, APPELLANT

vs.

RAYMOND O'FARRELL, in his individual capacity and as Trustee
of the Raymond and Victoria O'Farrell Living Trust dated January 14,
2011, restated March 29, 2017, and amended August 26, 2021; KELLY
O'FARRELL,

DEFENDANTS/APPELLEES

An appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota

The Hon. Robert L. Spears
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

Submitted by:

Daniel K. Brendtro; Mary Ellen Dirksen; Benjamin Hummel
Hovland, Rasmus, Brendtro & Trzynka, Prof. LLC
P.O. Box 2583

Sioux Falls, SD 57101

Attorneys for Intervenor/Appellant: Paul O'Farrell

Notice of Appeal filed on October 25, 2023

Appendix 95

was given of any action by the Circuit Court. Appellants filed their notice of appeal on 10/25/2023. [R.748].

“[T]his Court has jurisdiction under SDCL 15-26A-3(2) to consider the appeal from the circuit court’s order denying [a] Motion [to intervene]”. *Matter of Shirley A. Hickey Living Tr.*, 2022 S.D. 53, ¶ 15 (citing *Southard v. Hansen*, 342 N.W.2d 231, 233 (S.D. 1984)).

“[T]his Court also has appellate jurisdiction to consider any error in [other matters affecting]...the ability [of the would-be intervenor] to participate at trial....” *Matter of Shirley A. Hickey Living Tr.*, 2022 S.D. 53, ¶ 17.

STATEMENT OF THE CASE

In June of 2022, Victoria O’Farrell brought this lawsuit to halt Raymond from making further changes to the family’s estate plan. Her Complaint describes an orchestrated campaign of undue influence exercised by their son Kelly, who was angry at his prospective inheritance under the Trust. The Complaint alleges that Raymond had diminished capacity, couldn’t read, and did not understand the actions he was taking.

The Complaint was served upon Raymond by admission on 6/29/2022. [R.231]. Victoria also sought immediate injunctive relief.

[R.30; R.33; R.49; R.51; R.58]. She died prior to further proceedings, and the July 2022 injunction hearing was canceled. [R.260].

Defendants Raymond and Kelly appear to be in default, having never served an Answer or other responsive pleading. *See*, Rule 12; Rule 55(a).

Instead of responding to this suit, Raymond (through counsel) attempted to serve a Suggestion of Death, noting Victoria died on July 11, 2022. [R.262]. This document was e-filed and e-served on July 26, 2022, but the notice was not personally served in the manner of a summons. *See*, SDCL 15-6-25(a) (“shall be served on the parties as provided in SDCL 15-6-5 and upon persons not parties in the manner provided in SDCL 15-6-4 for the service of a summons.”). The recipients of the e-service included Kelly’s lawyer and Victoria’s former attorney, Alex Hagen. [R.263]. No service was made upon a representative of the Estate, whether personal or otherwise. [R.263]. The Suggestion of Death was issued by an “attorney for Defendant, Raymond O’Farrell.” [R.262]

On 9/29/2022, Paul attempted to intervene in this lawsuit. [R.264]. This was 65 days after the Suggestion of Death. His filing asserted that he had an interest in the action as a beneficiary, and, that his interests “align with the interest of the Plaintiff [Victoria O’Farrell].” [R.265]. Although

Paul's motion discusses his role as a beneficiary of the Trust, his "Complaint-in-Intervention" further identifies his other interests in the suit, including that Paul "has contractual relationships with VOR, Inc.," and that he was improperly ousted as "director and officer" of VOR, Inc. [R.268].

Paul's prayer for relief sought: (i) "the relief requested in Vicki's Complaint;" (ii) a "declaratory judgment" relating to Raymond's actions pertaining the Trust and VOR, Inc.; (iii) Raymond's removal as Trustee; (iv) damages against Kelly O'Farrell; (v) injunctive relief; and (vi) further equitable relief as necessary. [R.269].

The Circuit Court held a motions hearing on October 18, 2022. [VHT 1-175]. At the outset of the hearing, the Circuit Court informed the parties, that "**I am going to take this matter under advisement. I am not going to rule from the bench....**" [VHT 8:6-8]. The Court noted that, "I have two files set for hearing at the same time [including] 25CIV22-38...and...25PRO22-11," and it took up the civil file first. [VHT 6].

The hearing began at 2:06 pm and concluded sometime around 5:30 pm. Three witnesses were called: Paul O'Farrell; Lance O'Farrell; and Raymond O'Farrell. Although Raymond testified, he did not testify under

IN THE
Supreme Court
of the
State of South Dakota

No. 30508

VICTORIA O'FARRELL, in her individual capacity and as Trustee
of the Raymond and Victoria O'Farrell Living Trust dated January 14,
2011, restated March 29, 2017, and amended August 26, 2021;

PLAINTIFFS/APPELLEES

and

PAUL O'FARRELL,

INTERVENOR, APPELLANT

vs.

RAYMOND O'FARRELL, in his individual capacity and as Trustee
of the Raymond and Victoria O'Farrell Living Trust dated January 14,
2011, restated March 29, 2017, and amended August 26, 2021;

KELLY O'FARRELL,

DEFENDANTS/APPELLEES

An appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota

The Hon. Robert L. Spears
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

Submitted by:

Daniel K. Brendtro; Mary Ellen Dirksen; Benjamin Hummel
Hovland, Rasmus, Brendtro & Trzynka, Prof. LLC
P.O. Box 2583

Sioux Falls, SD 57101

Attorneys for Intervenor/Appellant: Paul O'Farrell

Notice of Appeal filed on October 25, 2023

Appendix 99

RESPONSE TO RAYMOND'S STATEMENT OF FACTS

The Circuit Court denied intervention without citing any law; without even discussing the Rule governing intervention; without analyzing any Trust provisions; without evaluating the effect of undue influence on Trust actions; without giving a reason for failing to extend the 90-day period; and without consideration of the conflict-of-interest issue. [VHT 129:21-24]; [VHT 146:12-18]; [VHT 152:10-19]; [VHT 151:18-24].

In every respect, it is an indefensible decision. Raymond's Brief spends little effort attempting to defend it, and, instead serves up more procedural loopholes.

Raymond's Brief offers additional facts, but he ultimately cannot dispute that the Circuit Court's truncated evidentiary hearing failed to receive and consider all available evidence. As a result, the Circuit Court issued a hasty decision, off-the-cuff and from the bench, which was premised solely upon the revocability of the trust.

And, Raymond's further discussion of facts does not refute Paul's claim that the hearing established a *prima facie* showing of his interests in Victoria's lawsuit, including:

1. a *fiduciary* interest arising out of the concerns over Raymond's actions as Trustee; and Paul (as successor trustee) sought his removal. [R.315; § 3.02(c)].
2. a *pecuniary* interest in the outcome of Victoria's suit, as a named beneficiary of a Trust Raymond as alleged to be manipulating, either under influence or without capacity. [R.338; § 9.02, *et seq.*]
3. a *business* interest in Victoria's lawsuit arising out of his ongoing, integrated farming partnership with the Trust. [VHT 41:13-14]; [VHT 42:2-4]; [VHT 56:6-7]
4. his *corporate governance* interests, as a result of his ouster as an officer and director of the Trust corporation. [VHT 56:19—57:12].

Any single one of these was sufficient to grant the motion to intervene.

It is the Circuit Court's failure to grant that motion which has resulted in the subsequent multiplicity of litigation.

ARGUMENT-IN-REPLY

1. Raymond can't have it both ways.

Raymond's position has been that Paul's March 2023 lawsuit is an invalid mechanism for Paul to bring his claims. Yet now in Victoria's lawsuit, Raymond is claiming that Paul (and Victoria's Estate) would need to

IN THE
Supreme Court
of the
State of South Dakota

No. 30862

CHS CAPITAL, LLC,
PLAINTIFF, APPELLEE

vs.

SKYLINE CATTLE CO., AND
THE ESTATE OF PAUL O'FARRELL,
DEFENDANTS, APPELLANTS

and

VOR, INC.
DEFENDANT/INTERESTED PARTY, APPELLEE

An appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota

The Hon. Robert L. Spears
CIRCUIT COURT JUDGE

APPELLANTS' BRIEF

Submitted by:
Daniel K. Brendtro; Mary Ellen Dirksen; Benjamin Hummel
Hovland, Rasmus, Brendtro & Trzynka, Prof. LLC
P.O. Box 2583
Sioux Falls, SD 57101
Attorneys for Appellants

Notice of Appeal filed on October 2, 2024

Appendix 102

September 24, 2024 [R.851] (attorney's fees). Notice of entry was given on September 3, 2024. [R.832]. Appellants filed their notice of appeal on October 2, 2024. [R.856].

This Court has jurisdiction under SDCL 15-26A-3(1) and (4).

STATEMENT OF THE CASE AND FACTS

Pre-existing Lawsuit

Paul and Skyline are presently involved in a pre-existing lawsuit challenging the validity of VOR's corporate actions, including those which were a product of undue influence, perpetrated upon Raymond by Kelly O'Farrell. A summary of background facts is found in *Estate of O'Farrell et al v. Grand Valley Hutterian Brethren, Inc.*, 2024 S.D. 81, ¶¶ 2-11.⁷

The efforts to stop Raymond and Kelly first began with Paul's mother, Victoria O'Farrell. In June of 2022, Victoria brought a lawsuit to halt Raymond from making further changes to the family's corporation and estate plan. Her Complaint describes an orchestrated campaign of undue influence exercised by their son Kelly, who was angry at his prospective inheritance

⁷ Further background facts are also found within the briefing of the related appeals, including: Appellants' Brief #30482 (pp. 15-17); Appellants' Brief #30344 (pp. 9-17); Appellants' Reply Brief #30344 (pp. 2-7); Appellant's Brief # 30532 (pp. 3-4); Appellant's Brief #30508 (pp. 4-6); Appellant's Reply Brief #30508 (pp. 1-2).

under the Trust. [Appeal Record #30508, AR.5-29]. Her Complaint alleged that Raymond had diminished capacity, couldn't read, and did not understand the corporate actions he was taking. *Id.* Victoria died during the initial stages of that lawsuit.

On 9/29/2022, Paul attempted to intervene in that lawsuit and sought “the relief requested in Vicki’s Complaint,” and a “declaratory judgment” relating to Raymond’s actions pertaining to the Trust and VOR, Inc. [Appeal Record #30508, AR.269; AR.264]. The Circuit Court entered an order on 10/26/2022 refusing Paul’s intervention. [Appeal Record #30508, AR.552]. The case was voluntarily dismissed by Victoria’s attorney, even though *that dismissal was entirely at the direction of Raymond and his counsel.* On December 18, 2024, this Court dismissed an appeal of that matter. *See, #30508.*

In March 2023, Paul commenced his own action seeking similar relief (such as Count 1, which sought, *inter alia*, to invalidate all of VOR’s invalid actions), as well as a remedy to unwind the real estate sale (in Count 2). [Appeal Record #30482, AR.7-A.R.90]. The Circuit Court dismissed that case on procedural grounds. This Court reversed that dismissal on 12/18/2024. *See, #30482; Estate of O’Farrell et al v. Grand Valley Hutterian Brethren, Inc., 2024 S.D. 81.*

This Lawsuit

In the interim, CHS Capital brought suit to collect an agricultural debt. CHS initiated this lawsuit in May 2023, seeking to collect \$98,000 related to crop inputs purchased by Paul O'Farrell and Skyline Cattle Co. during the 2022 planting season. [R.2; R.16].

CHS's Complaint also named VOR, Inc., as an "interested party" and Defendant. However, the Complaint identifies VOR's potential "interest" in the suit as merely that it "may have a secured interest in the collateral set forth in the U.C.C. financing statement." Complaint, ¶ 11 [R.3]. No actual claim was made against VOR by CHS. Likewise, in VOR's initial Answer, it did not make any claim against CHS, Paul, or Skyline. [R.28].

Within Paul and Skyline's initial Answer, [R.23], they asserted a cross-claim against Skyline that specifically questioned the validity of VOR's interest in the disputed collateral (it had acquired from First Interstate Bank), and further questioned the validity of VOR's attempted assignment of the promissory notes from First Interstate to VOR. However, even though the cross-claim asserted that "the underlying debt to VOR, Inc., is invalid," Paul and Skyline explained that "[t]his relief is intended to be

embraced by an existing suit, *O'Farrell, et al, v. O'Farrell, et al*, 25CIV23-000015, which seeks to avoid improper corporate action made by those purporting to act on behalf of VOR, Inc.” [R.24, ¶¶ 5-7].

Thus, Paul and Skyline’s cross-claim specifically advised that such relief was *only* requested in the instant suit “if unavailable or unresolved in that parallel suit [*i.e.*, the matter embraced by Appeal #30482].” *Id.* In conjunction with this, Paul and Skyline raised the affirmative defense of corporate capacity, because Paul was “the most recent duly elected executive officer of VOR, Inc., and that no other party has authority or capacity to proceed on behalf of VOR, Inc.” [R.24, ¶ 8].

Paul and Skyline made the same legal and factual assertions about Raymond and VOR in their 2023 lawsuit, 25CIV23-000015, and its Appeal #30482. *See, e.g.*,

- [Appeal Record #30482, AR.206] (in their Reply to VOR’s counterclaim in that action, Paul and Skyline alleged that VOR and Raymond “do not have authority or capacity to assert such claims”);
- [Appeal Record #30482, AR.209] (as an affirmative defense, asserting the principle that, “[w]hen corporate meetings are not

lawfully convened, the previous directors and officers continue to hold office.”);

- [Appeal Record #30482, AR.8] (in the Complaint, asserting that “attempts to remove Paul as President [of VOR] were invalid, as were various other corporate acts.”)⁸;
- [Appeal Record #30482, AR.21] (in the Complaint, asserting that “various corporate actions [of VOR] were taken in the name of Raymond O’Farrell. These were accomplished without prior corporate notice, without his full knowledge and understanding, and, as a result of undue influence and manipulation[,]” and “in derogation of established agreements....Such actions are void, *ultra vires*, or of a nature that the Corporation or its shareholders would be estopped to undertake them.”); and,
- [Appeal Record #30482, AR.23] (in the Complaint, asserting that “[d]iscovery is expected to identify further transactions

⁸ In her suit involving Raymond and VOR, Victoria alleged similar corporate wrongdoing and void actions; Paul’s Complaint incorporated all of those by reference (and attached her Complaint as an Exhibit). [Appeal Record #30482, AR.44-47] (Victoria’s Complaint, ¶¶ 60-81, attached as Exhibit 1 to Paul and Skyline’s Complaint).

and actions which would be subject to a declaratory judgment to nullify them, and those are incorporated herein.”)

Despite the existence of a prior, pending lawsuit regarding VOR’s corporate authority and actions (and which would serve as a basis for affirmative defenses and equitable offsets to Paul and Skyline), VOR attempted to use this lawsuit to collect disputed VOR debts, and to exercise its disputed rights to the collateral. [R.55 *et seq* (motion to amend); R.713-14 (VOR’s crossclaim)]. VOR also asserted that it held “a first priority interest as to the collateral at issue and agrees it should be sold by the sheriff and the proceeds paid over to VOR, Inc., as the first priority secured creditor.” [R.29, ¶ 9.b].

In particular, the VOR Crossclaim seeks to collect \$1.3 million from Paul and Skyline, based upon amounts “due and owing” under four promissory notes. [R.713, ¶ 2.a.-d]. VOR alleges that these loans were originally made between Skyline and First Interstate Bank, but, VOR asserts that it “is the assignee of these debts from First Interstate Bank” via a “denominated assignment.” [R.713, ¶ 4]. The purported assignment is dated October 17, 2022, and is allegedly based upon documents signed by Raymond O’Farrell as president of VOR, Inc. *Id.*

Of note, October 17, 2022, is not only the date of the purported assignment of the disputed VOR promissory notes, it is *also the same date* upon which Raymond and Kelly signed the disputed deed conveying most of the O'Farrell family's land to the Colony. *See*, Appeal Record #30344, A.R.109 ("Warranty Deed").

These promissory notes were Skyline's operating notes, under which Paul conducted the farming operations on VOR's land; for which VOR routinely signed guaranties for each year; and, through which Paul financed the home he built for himself on VOR's land.⁹

* *See*, [Appeal Record #30482, AR.16, n.10 (Paul's Complaint, describing the "long-standing arrangement by which Skyline's operating loans were secured by the land owned by [VOR]" and that "there was never an issue with any of our lenders [until] as a result of Kelly [O'Farrell's] influence, financial information was not provided to the Bank for the 2022 refinancing process, which led to the declaration of default." Or, in other words, the "default" upon which VOR pursued judgment for these notes was itself occasioned by undue influence.

See, also, [Appeal Record #30482, AR.27, ¶¶ 107-108 (Paul's Complaint, alleging in the alternative that Paul holds a claim "for unjust enrichment for the value of the capital improvements Paul has made to the Family Land at his expense, without compensation, including his residence and his shop, which have an estimated value substantially in excess of one million dollars.") Or, in other words, Paul's Complaint articulates the necessity of an offset to Skyline in conjunction with any recovery on the defaulted notes.

Paul and Skyline repeatedly objected to VOR's pursuit of the loan crossclaim because it embraced questions already at issue in the prior suits, raising the issue on at least five occasions:

- first, they objected to VOR's attempt to amend its pleadings and assert a crossclaim [R.91];
- they used their Answer to VOR's Crossclaim to request a dismissal or stay of the VOR crossclaim [R.750-51];
- they objected to VOR's pursuit of summary judgment in December 2023, and moved for "**for an order staying any further proceedings** pertaining to VOR, Inc., [because] in the earlier-filed case, Paul and Skyline assert that VOR's actions are *ultra vires*, and that Raymond O'Farrell's actions on behalf of VOR are the product of undue influence or lack of capacity;"[R.247; 250] (emphasis in original);
- they raised these issues at both hearings [R.899-904; R.916-924]; and,
- they raised a general objection to VOR's attempt to pursue summary judgment because "the matters raised by VOR...embrace several other legal disputes which are currently

on appeal; and, the Court’s resolution of this motion is premature or impermissible at this time,” which meant that the Court “lacks jurisdiction” and that “[t]here is also a danger of inconsistent results amongst the various cases which have equal or prior legal importance here....” [R.793-94; R.802-806] (listing all four appeals: # 30508; 30532; 30344; and 30482). [R.793].

In the alternative, Paul and Skyline opposed summary judgment by identifying numerous, disputed material facts that would preclude the entry of summary judgment. [R.796-800].

On August 26, 2024, the Circuit Court issued a letter decision granting summary judgment on the First Interstate loans now purportedly held by VOR. The Circuit Court believed it had jurisdiction over VOR’s crossclaim “because the issue presented is different than the issues that are presently on appeal in the other cases cited by defendants Skyline and O’Farrell.” [R.826-27]. The Circuit Court did not cite or apply an express legal standard.

The Circuit Court’s 8/26/2024 letter opinion referred to its earlier ruling on this topic, namely an Order concluding it had “subject matter

jurisdiction and this case is substantially different than the other proceeding brought by Paul O'Farrell.” [R.703; “Order on Paul O'Farrell and Skyline Cattle's Motion to Stay”]. *See, also*, [R.944; HT 33:14-16; 34:6-7, 12/21/2023] (the Circuit Court's oral ruling on that question: “In this Court's opinion, the issues on appeal are substantially different than the issues that are presented to me this afternoon....The issues are, in this Court's opinion, completely different.”) On this earlier occasion, the Circuit Court likewise did not cite or apply an express legal standard.

And, as the hearing transcript demonstrates, the Circuit Court mischaracterized Paul and Skyline's Complaint as only having two prongs: rescinding the land sale, and, issues that “should have been brought by a personal representative in a probate proceeding....” [R.944; HT 33:21-25, 12/21/2023]. The Circuit Court ignored most portions of Count 1, in which Paul and Skyline sought a declaration as to the invalidity of Raymond's VOR transactions as *ultra vires* and a product of Kelly's undue influence, and incorporated all of Victoria's prior allegations about VOR. *See*, Appeal Record #30508 at AR.20-24, including ¶¶ 69; 70-75; 91.

The Circuit Court granted summary judgment on both VOR's and CHS's debt claims, and, it awarded attorney's fees to VOR. [R.830] (summary judgment); [R.851] (attorney's fees).

As to the summary judgment motion against Paul and Skyline, the Circuit Court's letter decision refused to take judicial notice of their positions and contentions and pleadings within the pre-existing cases because the claims are "the subject of reasonable legal dispute and nothing in those cases have been proven at this point." [R.828].

Eight months prior to its summary judgment decision on the promissory notes, the Circuit Court also entered partial summary judgment on a priority issue between CHS Capital and VOR. [R.705-706] (holding that "VOR, Inc., has the superior priority interest over CHS Capital, LLC...as to assets of both Skyline Cattle Company and Paul O'Farrell."). This priority issue was the *only* reason that VOR was included in this lawsuit in the first place.¹⁰

¹⁰ See, [R.3, ¶ 11 "Complaint"]. The only reference to VOR in CHS's Complaint is this: "Upon information and belief, VOR, Inc., may have a secured interest in the collateral set forth in the U.C.C. Financing Statement."

However, within that same Order on priority, the Circuit Court added relief beyond the scope of those priority questions (and, prematurely). The order commanded that a grain proceeds check to payable to Skyline in the amount of \$185,973.06 “must be endorsed, transferred, and put in the possession of VOR, Inc.” *Id.*

From these facts, the Skyline and Paul’s Estate appeal and assign three errors.

IN THE
Supreme Court
of the
State of South Dakota

No. 30862

CHS CAPITAL, LLC,
PLAINTIFF, APPELLEE

vs.

SKYLINE CATTLE CO., AND
THE ESTATE OF PAUL O'FARRELL,
DEFENDANTS, APPELLANTS

and

VOR, INC.
DEFENDANT/INTERESTED PARTY, APPELLEE

An appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota

The Hon. Robert L. Spears
CIRCUIT COURT JUDGE

APPELLANTS' REPLY BRIEF

Submitted by:
Daniel K. Brendtro; Mary Ellen Dirksen; Benjamin Hummel
Hovland, Rasmus, Brendtro & Trzynka, Prof. LLC
P.O. Box 2583
Sioux Falls, SD 57101
Attorneys for Appellants

Notice of Appeal filed on October 2, 2024

Appendix 115

INTRODUCTION: CIRCULAR LAWSUITS

In their brief, VOR highlights the precise problem it created by failing to heed the compulsory counterclaim rule. VOR worries that dismissal of its crossclaim in this lawsuit could “result in an inefficient circular issue” where Paul’s original lawsuit ends up before this Court after the present appeal is resolved. Appellees’ Brief, p. 12.

This is a prime example of the “multiplicity” of competing lawsuits that Rule 13(a) seeks to avoid. Paul and Skyline attempted to warn VOR about this outcome on at least six occasions. VOR cannot now be heard to complain.

ARGUMENT-IN-REPLY

1. VOR’s 2023 litigation actions contradict (and defeat) its current argument about compulsory counterclaims

In the initial stages of Paul’s lawsuit, two competing corporate factions brought claims seeking relief for VOR.

First, on March 3, 2023, Paul’s Complaint included VOR as a Plaintiff. [#30508, R.7]. Paul alleged authority “on behalf of” VOR because his ouster as President was void, and he thus remained in office. [#30508, R.8, ¶ 5].

The second VOR faction¹ claimed the inverse of this. In their first responsive pleading (entitled “Answer, Counterclaim, and Motions of VOR, Inc., *et al*,”) they argued that “Paul *used to be* an officer in the corporation,” and that “Paul’s knowledge of his *lack of authority* is apparent....” [#30508; R.127, ¶ 2; R.140, ¶ 4; filed 4/5/2023) (emphasis added).

Of critical importance is that *within the second faction’s initial pleading, VOR filed actual counterclaims against Paul and Skyline.* [#30508, R.139-140].²

Now, two years later, this second faction of VOR claims that “VOR...had no obligation to file a responsive pleading [and thus] VOR cannot be required to have to file a compulsory counterclaim.” [Appellee’s Brief, p. 11]. This is VOR’s *only* substantive argument in Section B (pp. 8-11). Its assertion arises from its view that “VOR never appeared *as a named*

¹ [#30508, R.103; “[Counsel] hereby make an appearance as attorneys for Raymond O’Farrell, The Raymond and Victoria O’Farrell Living Trust, and VOR, Inc., in the above entitled action.”]

² [#30508, at R.126; “Comes now VOR, Inc., the Estate of Victoria O’Farrell..., and the...Living Trust, and make the following Answer, Counterclaim, and Motion to Dismiss...”; [#30508, at R.139-140; “Counterclaim Count 1: Tortious Interference with Contractual Rights...” The Plaintiff has caused damage to VOR, Inc.’s reputation. Count 2: Barratry...[T]he Trust and VOR, Inc. are entitled to an award of damages...”; and, [#30508 at R.140, (wherein VOR joins the prayer for relief)].

defendant in the First Lawsuit.” [*Id.*, p. 10]. This premise is wrong, both as a matter of the history of Paul’s lawsuit, as well as the plain text of Rule 13(a).

Whether VOR “had no obligation” to assert counterclaims is now irrelevant. VOR can no longer make this argument, since it voluntarily appeared in Paul’s lawsuit in 2023 via the second faction, and then *VOR voluntarily issued counterclaims against Paul and Skyline*. [#30508, R.139-140]

Once the second faction of VOR chose to take the step of pleading, it was then required to bring any other compulsory counterclaims at that time.

Other than broadly quoting the same case law as the Appellants, VOR cites only to one, single authority for its argument, namely, claiming that Rule 13(a) stands for the proposition that “[t]he pleadings control whether a compulsory counterclaim exists.” [*See*, Appellee’s Brief, p. 11 (citing SDCL 15-6-13(a))].

But Rule 13(a) does not say that. Nor is Rule 13(a) interpreted in a hyper-technical manner.³ In fact, Rule 13(a) does not even discuss

³ *See, e.g., Ainsworth v. First Bank of S. Dakota*, 420 N.W.2d 32, 34 (S.D. 1988) (the logical relation test under Rule 13(a) evaluated from “the record, taken as a whole” rather than “solely on the pleadings”)

‘plaintiffs’ or ‘defendants,’ nor does it discuss the concept of ‘named defendants.’

Instead, Rule 13(a) is directed at “pleaders.” In particular, it states that a “*pleader*” is required to bring “*any claim* which at the time of serving the pleading *the pleader has against an opposing party*, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party’s claim....” SDCL 15-6-13(a) (emphasis added).

Via the acts of its second corporate faction, VOR appeared in Paul’s lawsuit and began *pleading*. From this point forward, this second faction of VOR was required to bring “any claim” that arose out of the same transaction or occurrence. The status of VOR as a plaintiff or defendant is immaterial, as was Paul and Skyline’s response. Once this second faction of VOR began pleading, it was required to bring all related claims.

To determine which claims are under this umbrella, we look to *Olawsky v. Clausen*, 212 N.W.2d 653, 654 (S.D. 1973). Under the *Olawsky* test, the question is whether there is “*any logical relation*” between VOR’s crossclaims in this lawsuit and the operative facts of Paul’s lawsuit. The answer is yes.

VOR claims that our opening brief “does not include an analysis of the pleadings” of Paul’s lawsuit. [*See*, Appellee’s Brief, p. 11]. We think it does, but, here are ten examples of the logical relationships between VOR’s crossclaim and Paul’s lawsuit:

- VOR’s crossclaim seeks to recover upon loan debts that were purchased with the proceeds of the disputed \$3.2 million land sale to the Colony.⁴
- VOR’s purchase of the debt arose from Raymond’s act as purported officer of VOR, and, the validity of all of Raymond’s actions as an officer of VOR is in doubt.⁵ This would include authority for the transaction itself (to purchase the loans), as well as the purported efforts by VOR to enforce the loans.
- Skyline has legal and equitable defenses regarding VOR’s enforcement of the defaulted debt, including that VOR itself caused the default, and, VOR wrongfully prevented Skyline

⁴ [#30508; R.138, ¶ 47].

⁵ [#30508; R.14, ¶ 34; R.20, ¶¶ 66-78; R.34, ¶ 12 (As his wife Victoria asserted: “Raymond took these inexplicable actions because he is being unduly influenced by their son, Kelly, who resides in the couple’s house and who has worked to exert extensive control over Raymond while limiting other family members’ access to him.”)]

from continuing to farm the land, thus depriving Skyline of the ability to further repay the notes.⁶

- Prior to its purchase, this debt with Great Western was *only* “in foreclosure status” because Kelly manipulated Raymond into refusing to renew the notes for the 2022 crop year.⁷
- Prior to its purchase from Great Western, the debt was *owed by* Skyline and Paul, but guaranteed by the Trust’s/VOR’s farmground, as part of an ongoing farming partnership between VOR and Skyline.⁸
- The bulk of the VOR/Trust farmground that secured these loans was secretly and precipitously sold to the Colony.⁹
- That precipitous sale violated the terms of the Trust which held all of VOR’s shares.¹⁰
- Paul’s lawsuit alleged an equitable claim for the value of his home, shop, and feedlot that were constructed and financed by

⁶ [#30508, R.28, ¶ 111-112].

⁷ [#30505; R.34, ¶ 14-18].

⁸ [#30508; R.138, ¶ 45].

⁹ [#30508; R.18, ¶ 58-59].

¹⁰ [#30508, R.17, ¶ 53].

Skyline's debt to Great Western, which VOR then acquired, and now seeks to foreclose upon.¹¹

- VOR's newly-purchased debt may constitute a setoff against any monetary recovery against it by Skyline.¹²
- And, Paul's Complaint seeks a "constructive trust" as well as "an accounting of the proceeds of the land sale," which were used by VOR to purchase the Great Western debt.¹³

These are "essential facts alleged by [plaintiff that] constitute, in part, the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations does not matter." *Olawsky*, 212 N.W.2d at 655 (quoting *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926)).

Here, there are *many* logical relations between Paul's Complaint and the loans. (For an example of a case involving loans that have "*no* logical relationship" with the transaction and occurrences of the prior litigation, *see*, *Ainsworth v. First Bank of S. Dakota*, 420 N.W.2d 32, 35 (S.D. 1988)).

¹¹ [#30508; R.139, ¶ 49; R.18, ¶ 61; R.27, ¶ 107-108].

¹² *Id.*

¹³ [#30508; R.27, ¶ 109]

There is also a clear *legal* relationship between Paul's lawsuit and the recovery of the debts by VOR. Under the Uniform Commercial Code, VOR's "right to enforce the obligation [of Paul and Skyline] to pay [the debt] instrument is subject to" various defenses, *see*, SDCL 57A-3-305(a)(2), and "subject to... a claim in recoupment...if the claim arose from the transaction that gave rise to the instrument." *See*, SDCL 57A-3-305(a)(3). These provisions encompass defenses pertaining to Raymond's actions (undue influence, lack of capacity, failure of corporate authority), as well as "recoupment" because Skyline used the loans to pay for improvements which VOR then retained. In addition, VOR acquired the debt instruments "subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds." SDCL 57A-3-306. (Due to its imputed knowledge, VOR is not a holder in due course. *See*, SDCL 57A-3-203; SDCL 57A-3-302).¹⁴

¹⁴ And, because the Great Western loans that VOR seeks to enforce were secured, Paul and Skyline would have similar defenses regarding the collateral, governed by Chapter 57A-9 (Article 9). The operative facts of their Article 3 and Article 9 defenses are interwoven within Paul's Complaint.

Moreover, Raymond appeared in Paul's lawsuit personally (and not just in his role as Special Administrator). [#30508; R.103]. By his pleadings, Raymond further placed his own capacity and authority in issue within Paul's lawsuit, as well as questions about the ownership of VOR by the Trust. [See, #30508; at R.127, ¶ 4 and R.129 ¶ 5 (asserting Raymond's role as "president, director, and owner of VOR"); at R.134 ¶ 11 (denying that Raymond lacks capacity); at R.135 ¶ 15 ("the stock in VOR, Inc., that was in the Revocable Trust is no longer there."); at R.140, ¶ 3 ("Paul...can't legally act for...VOR")].

Thus, by April of 2023 (less than two months after filing) Paul's lawsuit (seeking declaratory, equitable, and legal relief) had acquired all of the necessary parties to resolve questions about VOR, the Trust, the land transaction, and VOR's acquisition of and attempts to enforce the Great Western debt. All of these issues are embraced by Paul's Complaint. In spite of the existence of that prior lawsuit, VOR then waited six months to attempt to amend its pleadings to assert its debt claims in this (CHS) lawsuit. [R.55; October 6, 2023].

"[C]ourts should give the phrase 'transaction or occurrence that is the subject matter of the suit' a broad realistic interpretation in the interest of

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 31101

THE ESTATE OF PAUL O'FARRELL, individually; and, as beneficiary of the family trust; and, for the benefit of THE ESTATE OF VICTORIA O'FARRELL; SKYLINE CATTLE COMPANY, a South Dakota corporation; and VOR, INC., a South Dakota corporation

Plaintiffs/Appellants,

v.

KELLY O'FARRELL, an individual; GRAND VALLEY HUTTERIAN BRETHERN, INC., a South Dakota corporation; THE RAYMOND AND VICTORIA O'FARRELL LIVING TRUST, a South Dakota trust.

Defendants/Appellees.

Intermediate Appeal from the Circuit Court
Fifth Judicial Circuit
Grant County, South Dakota

THE HONORABLE Patrick Pardy
Circuit Court Judge

APPELLEE GRAND VALLEY HUTTERIAN BRETHERN, INC.'S BRIEF

William G. Beck
Seth A. Lopour
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
William.Beck@woodsfuller.com
Seth.Lopour@woodsfuller.com

Reed Rasmussen
Siegel, Barnett & Schutz, LLP
PO Box 490
Aberdeen, SD 57402
rrasmussen@sbslaw.net

Attorneys for Grand Valley Hutterian Brethren, Inc.

Petition for Intermediate Appeal Filed on June 2, 2025

Daniel K. Brendtro
Hovland, Rasmus, Brendtro & Trzynka, Prof. LLC
PO Box 2583
Sioux Falls, SD 57101
*Attorney for Paul O'Farrell &
Skyline Cattle Company*

Lee Schoenbeck
Joe Erickson
Schoenbeck & Erickson, PC
1200 Mickelson Dr., Suite 310
Watertown, SD 57201
*Attorneys for Raymond O'Farrell,
the O'Farrell Trust, VOR, Inc., and
Estate of Victoria O'Farrell*

George Boos
Susan Yexley Jennen
Boos Jenne Law Firm, LLC
PO Box 254
Clark, SD 57225
Attorneys for Raymond O'Farrell

Jack Hieb
Richardson Law Firm
1 Court Street
PO Box 1030
Aberdeen, SD 57402-1030
Attorney for Kelly O'Farrell

TABLE OF CONTENTS

TABLE OF AUTHORITIES	- 2 -
PRELIMINARY STATEMENT	- 1 -
JURISDICTIONAL STATEMENT	- 1 -
STATEMENT OF THE ISSUES.....	- 2 -
STATEMENT OF THE CASE.....	- 4 -
STATEMENT OF THE FACTS	- 7 -
STANDARD OF REVIEW	- 15 -
ARGUMENT.....	- 16 -
1. Appellants failed to raise any triable issue of fact regarding Kelly’s alleged undue influence over Ray or causation for the same and, therefore, Appellants’ rescission claim must fail as a matter of law.....	- 16 -
2. Neither Paul nor his Estate have standing to seek rescission.....	- 19 -
3. Paul’s purported Notice of Rescission is defective as a matter of law because neither he nor his Estate have restored or offered to restore value to Brethren, the notice is untimely, and Paul failed to provide notice to all of the proper parties.	- 25 -
4. The lower court did not err in finding that Appellants failed to their strict burdens in filing a Rule 56(f) affidavit.....	- 27 -
5. The Colony’s summary judgment motion is premature, factually.....	- 30 -
CONCLUSION.....	- 32 -
REQUEST FOR ORAL ARGUMENT	- 34 -
CERTIFICATE OF COMPLIANCE.....	- 35 -
CERTIFICATE OF SERVICE	- 36 -
APPENDIX.....	- 37 -

TABLE OF AUTHORITIES

	Page(s)
Cases	
(2025 S.D. 2) (CR at 1500, ¶¶ 19-20).....	- 10 -
<i>Bordeaux v. Shannon County Sch.</i> , 2005 SD 117, 707 N.W.2d 123.....	- 19 -
<i>Brandt v. Cty. of Pennington</i> , 2013 S.D. 22, 827 N.W.2d 871.....	- 15 -
<i>Cable v. Union Cty. Bd. of Cty. Comm'rs</i> , 2009 S.D. 59, 769 N.W.2d 817.....	- 3 -, - 20 -
<i>Casazza v. State</i> , 2000 SD 120, 616 N.W.2d 872.....	- 2 -, - 4 -, - 6 -, - 18 -
<i>Chan v. Lund</i> , 188 Cal. App. 4th 1159 (2010).....	- 18 -
<i>Coyle v. McFarland</i> , 2025 S.D. 63.....	- 29 -, - 31 -
<i>First Dakota Nat'l Bank v. Ruba</i> , No. 4:16-CV-04007-RAL, 2016 WL 7410562 (D.S.D. Dec. 21, 2016).....	- 28 -
<i>Halvorson v. Birkland</i> , 84 S.D. 328, 171 N.W.2d 77 (S.D. 1969).....	- 3 -, - 25 -
<i>In re Florence Y. Wallbaum Revocable Living Tr. Agreement</i> , 2012 S.D. 18, 813 N.W.2d 111.....	- 3 -, - 20 -, - 21 -
<i>Jones v. Bohn</i> , 311 N.W.2d 211 (S.D. 1981).....	- 22 -
<i>Matter of Est. of Tank</i> , 2020 S.D. 2, 938 N.W.2d 449.....	- 2 -, - 5 -, - 19 -
<i>State Auto Ins. Companies v. B.N.C.</i> , 2005 S.D. 89, 702 N.W.2d 379.....	- 2 -, - 5 -, - 18 -
<i>Steel Co. v. Citizens for a Better Env't</i> , 523 U.S. 83 (1998).....	- 3 -, - 20 -
<i>Stern Oil Co. v. Border States Paving, Inc.</i> , 2014 S.D. 28, 848 N.W.2d 273.....	- 3 -, - 28 -
<i>Williams v. Van Sickle</i> , 659 N.W.2d 572 (Iowa 2003).....	- 18 -
<i>Zephier v. Catholic Diocese of Sioux Falls</i> , 2008 SD 56, 752 N.W.2d 658.....	- 2 -, - 5 -, - 6 -, - 19 -
Statutes	
SDCL Ch. 21-12.....	- 22 -
SDCL Ch. 53-11.....	- 22 -, - 23 -
SDCL chapter 21-12.....	- 22 -

SDCL chapter 53-11.....	- 22 -
SDCL § 15-6-33.....	- 29 -
SDCL § 15-6-30.....	- 29 -
SDCL § 15-6-45.....	- 29 -
SDCL § 15-6-27.....	- 29 -, - 30 -
SDCL § 15-6-56(c).....	- 2 -, - 18 -
SDCL § 15-6-56(e).....	- 2 -, - 7 -, - 17 -
SDCL § 15-6-56(f).....	- 3 -, - 27 -, - 28 -
SDCL § 15-6-54(b).....	- 29 -
SDCL § 15-6-56(c)(2).....	- 16 -
SDCL § 15-6-56(c)(3).....	- 16 -
SDCL § 15-26A-66(b)(4).....	- 35 -
SDCL § 19-19-804(b)(5).....	- 7 -
SDCL § 21-12-1.....	- 3 -, - 23 -, - 24 -
SDCL § 47-1A-742.....	- 3 -, - 25 -
SDCL § 53-11-2.....	- 3 -, - 23 -, - 24 -
SDCL § 53-11-5.....	- 3 -, - 25 -, - 26 -
SDCL § 53-11-3.....	- 3 -, - 23 -, - 26 -
SDCL § 53-11-1.....	- 22 -
SDCL § 53-11-2(1).....	- 24 -
SDCL §§ 15-6-56(c) and (e).....	- 17 -
SDCL §§ 19-19-801, 19-19-802.....	- 7 -

Other Authorities

10B Fed. Prac. & Proc. Civ. § 2741 (4th ed.).....	- 28 -
---	--------

PRELIMINARY STATEMENT

Throughout this brief, Paul O'Farrell, Kelly O'Farrell, and Raymond O'Farrell will be referred to as "Paul," "Kelly," and "Ray," respectively. The Estate of Paul O'Farrell will be referred to as "Paul's Estate." Skyline Cattle Company will be referred to as "Skyline." vOr, Inc. will be referred to as "VOR." The Estate of Victoria O'Farrell will be referred to as "Victoria's Estate." Grand Valley Hutterian Brethren, Inc. will be referred to as "Brethren." The Raymond and Victoria O'Farrell Living Trust will be referred to as "the Trust." The Grant County Clerk of Court's record will be referred to by the initials "CR" and the corresponding page numbers located in its September 26, 2025, Chronological and Alphabetical Indices. References to the May 1, 2025, hearing transcript will be made using "HT" followed by the page designation found in the hearing transcript.

To the extent necessary, the additional, related actions will be referred to as *VOR, Inc. and Grand Valley Hutterian Brethren v. Paul O'Farrell and Skyline Cattle Company* (25CIV23-18) ("Eviction Action"); *In the Matter of the Guardianship and Conservatorship of Raymond O'Farrell* (25GDN23-1) ("Ray's Guardianship"); *Estate of Victoria O'Farrell* (25PRO22-11) ("Victoria's Estate"); *Victoria O'Farrell v. Raymond O'Farrell, Kelly O'Farrell* (25CIV22-38) ("Victoria's Lawsuit"); and *CHS Capital, LLC v. Skyline Cattle Co., Paul O'Farrell, VOR, Inc.* (25CIV23-27) ("Collection Lawsuit").

JURISDICTIONAL STATEMENT

Without waiving any challenges to Appellants' standing, Brethren agree with and adopt Appellant's Jurisdictional Statement as if fully set forth herein.

STATEMENT OF THE ISSUES

1. On page 9 of their brief, the Appellants claim that, “[i]n Count 2 of Paul’s Complaint, he sought rescission of the land transaction (which had occurred after Victoria’s death, and which was not a part of her lawsuit). . . . The Complaint alleges that the land sale is void, on the basis that it was the product of undue influence, or, a lack of capacity, or, a failure of trust and corporate governance requirements.” (Citations omitted.) On page 35 of their brief, the Appellants concede that their allegations of undue influence are directly solely at Kelly’s alleged actions and their alleged effect on Raymond: “In this lawsuit, Paul alleged Raymond was unduly influenced into using VOR and the Trust to carry out the \$3.2 million land sale to Grand Valley . . . a transaction which violated the Trust, which was in contravention of corporate authority, which caused Raymond to breach his fiduciary duties to the Trust and to VOR, and which stood to benefit Kelly (the influencer).” In responding to Brethren’s motion for summary judgment, however, the Appellants cited no record evidence to dispute these two statements of undisputed material facts: “58. To date, there is no evidence of what Kelly did or said to Ray giving rise to this lawsuit.” and “59. To date, there is no evidence that whatever Kelly allegedly did or said to Ray cause Ray to change the estate plan.” Rule 56(c) requires that a party opposing summary judgment dispute facts with citations to the record and, in the absence of doing so, deems those facts admitted. **Because the Appellants therefore failed to raise a triable issue of fact regarding undue influence and, in the alternative, failed to raise a triable issue of fact regarding causation, should this Court affirm the summary dismissal of Brethren and the summary dismissal of Count 2 seeking rescission?**

State Auto Ins. Companies v. B.N.C., 2005 S.D. 89, 702 N.W.2d 379

Casazza v. State, 2000 SD 120, 616 N.W.2d 872

Matter of Est. of Tank, 2020 S.D. 2, 938 N.W.2d 449

Zephier v. Catholic Diocese of Sioux Falls, 2008 SD 56, 752 N.W.2d 658

SDCL § 15-6-56(c)

SDCL § 15-6-56(e)

2. VOR and Brethren are the only two parties to the Purchase Agreement. Paul was not a party to the Purchase Agreement in any personal or representative capacity. Paul did not plead that he was a party to the Purchase Agreement. Paul did not own the Property. Paul was not the president of VOR at the time of the Purchase Agreement and, even if he could have proven that he was, the Appellants now concede “that after Paul’s death, he could no longer assert claims as its ostensible officer.” (Appellants’ Brief at 12. See also Appellants’ Brief at 28-29.) Paul did not have an enforceable interest under the Trust. Paul was not Ray’s guardian or conservator. Connor and Lance lack any relationship to VOR, and, in their brief, Appellants concede that, “[i]n short, without Paul individually in this suit, the remaining plaintiffs are not capable of pursuing relief as alleged agents of VOR.” (Appellants’ Brief at 29 (emphasis deleted).) **Did Paul or do Connor and Lance**

have standing to bring the rescission claim? Even if one of them had or has standing, does he fail to satisfy the party requirement of the rescission statutes?

Cable v. Union Cty. Bd. of Cty. Comm'rs, 2009 S.D. 59, 769 N.W.2d 817

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998)

In re Florence Y. Wallbaum Revocable Living Tr. Agreement, 2012 S.D. 18, 813 N.W.2d

111

SDCL § 21-12-1

SDCL § 53-11-2

SDCL § 47-1A-742

3. The Purchase Agreement was signed on August 12, 2022 and closed in October 2022. Nearly seven months later, Paul sent a purported Notice of Rescission, merely reciting the statutory language, to only Brethren. Paul did not serve the purported Notice of Rescission on any of his siblings that have a similar unenforceable interest in the Property via the Trust and did not serve the notice on the bank that issued a note and mortgage on the Property, giving it an enforceable interest in the Property. Paul did not tender the \$3.2 million to restore to Brethren the value received under the Purchase Agreement either at the time of the Notice of Rescission or at any time before his death. Neither Connor nor Lance has tendered or can tender that \$3.2 million to restore to Brethren the value received under the Purchase Agreement. **Is the Notice of Rescission and any subsequent attempt to rescind defective under South Dakota law because it was untimely, because Appellants have not restored the \$3.2 million, and because the Appellants failed to name all parties in their Complaint and the Notice of Rescission?**

Halvorson v. Birkland, 84 S.D. 328, 171 N.W.2d 77 (S.D. 1969)

SDCL § 53-11-5

SDCL § 53-11-3

4. This case has been filed since March 3, 2023 and was based on claims Appellants were making in other lawsuits as early as 2022. The case was not stayed until this Court's August 11, 2025 Order. In the meantime, the Appellants' claims and the co-Defendants' barratry claims have been pending and available for discovery. The Appellants have conducted no discovery, and the Appellants cannot even identify a specific issue on which they would conduct discovery. **Did the trial court abuse its discretion by denying the Appellants Rule 56(f) motion?**

Stern Oil Co. v. Border States Paving, Inc., 2014 S.D. 28, 848 N.W.2d 273

SDCL § 15-6-56(f)

STATEMENT OF THE CASE

On March 3, 2023, Paul, individually, and purportedly on behalf of Victoria's Estate, Skyline, and VOR, filed suit against Kelly, Brethren, and the Trust for declaratory judgment, rescission, and unspecified tort damages. (CR at 7-90.) Attached to the Complaint were several pleadings from Victoria's Lawsuit: (i) the Complaint; (ii) Victoria's Brief filed in support of her Motion for Temporary Restraining Order; (iii) Affidavit of Victoria O'Farrell in support of her Motion for Temporary Restraining Order; (iv) an Affidavit of Victoria's physician's assistant. (CR at 32-90.) Appellants did not serve any written discovery on any Defendant with their Complaint. Indeed, Appellants have never served any written discovery on any defendant since the inception of this case.

On April 5, 2023, VOR, Victoria's Estate, and the Trust filed an Answer, Counterclaim, and Motions to Dismiss. (CR at 126-186.) In this filing, VOR and Victoria's Estate sought dismissal as parties and all parties moved to dismiss each Count of the Complaint and sought attorneys' fees. In addition, VOR, Victoria's Estate, and the Trust filed a Counterclaim for tortious interference with contractual rights and barratry.

On April 10, 2023, Kelly filed a Separate Answer and Counterclaim for barratry. (*Id.* at 187-199.) Kelly did not file a Motion to Dismiss.

On April 10, 2023, Brethren filed a pre-Answer Motion to Dismiss. (*Id.* at 200.) On June 23, 2023, Brethren filed its Brief in Support of Motion to Dismiss, attaching the Trust document, the Purchase Agreement that is the subject of the Complaint in this matter, as well as Paul's Notice of Rescission. (*Id.* at 214-336).

On July 11, 2023, a hearing was held on the various Motions to Dismiss before the Honorable Robert L. Spears. (*Id.* at 382-419.) Prior to this hearing, Paul did not file a Motion for Leave to Amend Complaint. Prior to his hearing, Paul did not submit a proposed Amended Complaint for Judge Spears to consider.

On August 8, 2023, Appellants filed a Notice of Deposition of Ray, but later canceled it. On August 9, 2023, the Circuit Court issued a Memorandum Decision, dismissing the Complaint in its entirety. (*Id.* at 425-432.)

On September 5, 2023, Judge Spears entered a Judgment of Dismissal and Rule 54(b) Certification. (*Id.* at 502-506). On September 9, 2023, Judge Spears entered an Opinion and Order on Brethren's Motions to Dismiss. (*Id.* at 440-501.) On September 7, 2023, Notice of Entry of the same was filed and served on Plaintiffs. (*Id.* at 507-509). Paul filed a Notice of Appeal on October 6, 2023, and an Amended Notice of Appeal on December 6, 2023. (*Id.* at 541-544, 679-682.)

No party sought a stay of the underlying case before the trial court while this case was on appeal. Nor did any party make a request to this Court to stay the case at the trial court level.

On October 13, 2024, Paul died. On December 6, 2024, this Court entered an Order substituting Paul's Estate in this case.

On December 18, 2024, this Court issued an opinion vacating all orders entered by Judge Spears in this case and remanded the same for further proceedings with a replacement judge. (*Id.* at 692-715.) Following this opinion, Appellants did not serve any written discovery to any defendant. And, Appellants did not seek to take any depositions.

On January 15, 2025, Judge Patrick T. Pardy was assigned to this case. (*Id.* At 718.) Appellants still did not serve any written discovery or seek to schedule a single deposition.

On February 7, 2025, Ray, the Trust, VOR, and Victoria's Estate moved for summary judgment. (*Id.* at 722-731). On March 6, 2025, Brethren moved for summary judgment. (*Id.* at 1200-1201). That same day, Appellants filed a Motion to Amend Complaint, Motion for Rule 35(a) Examination, and a Rule 56(f) Affidavit. (*Id.* at 1372-1418).

On May 1, 2025, a hearing was held before Judge Pardy on the various motions that were filed after this Court's remand. (*Id.* at 1602-1668). On May 6, 2025, Judge Pardy issued a Memorandum Decision, granting all motions for summary judgment, awarding fees to the Trust, VOR, and Victoria's Estate, and denying, in full, Plaintiffs' requests for relief. (*Id.* at 1590-1601).

On June 2, 2025, Plaintiffs filed a Petition for Intermediate Appeal. (*Id.* at 1733) On August 11, 2025, this Court entered an Order Granting Petition for Allowance of Appeal from Intermediate Order. (*Id.* at 1733-1734). For the very first time in this case, proceedings at the trial court level were stayed by this Court's August 11, 2025 Order.

On August 18, 2025, Victoria's Estate and the Trust filed a Motion to Supplement Record with pleadings from the Collection Lawsuit including: (1) the circuit court's summary judgment against Paul and Skyline for loans assigned to VOR from First Interstate Bank in the amount of \$1,290,545.88 plus attorneys' fees and costs in the amount of \$18,50913; and (2) this Court's Order Directing Issuance of Judgment of

Affirmance. On September 19, 2025, this Court granted the Motion to Supplement Record. (*Id.* at 1735-1736)

Appellants have never sought to consolidate this action with any of the other actions at the trial court level. Their first and only attempt to do so was on October 14, 2025 on motion to this Court to consolidate this appeal (#31101) with Victoria's Estate appeal (#31106). Brethren incorporates by reference all of its arguments against consolidation contained in its October 29, 2025 Opposition to Motion to Consolidate. On November 13, 2025, this Court entered an Order deferring on the motion until the appeals are taken up on their merits.

STATEMENT OF THE FACTS

Brethren's Statement of the Facts is drawn largely from the Appellants' Response to Brethren's Statement of Undisputed Material Facts. The Appellants' response to Brethren's SUMF cited only their Complaint, their proposed Amended Complaint, the Purchase Agreement, the Trust, and an Affidavit filed by Victoria O'Farrell in Victoria's Lawsuit. The Appellants cannot rely on their pleadings, that is, the Complaint and Amended Complaint. SDCL § 15-6-56(e). The Appellants cannot rely on Victoria's Affidavit because it is hearsay, SDCL §§ 19-19-801, 19-19-802, and, because this is not an action, suit, or proceeding by or against the representatives of deceased persons including proceedings for the probate of wills. SDCL § 19-19-804(b)(5). *See also* Grand Valley's Opposition to Motion to Consolidate, ¶ 25. So, the only admissible evidence the Appellants gave to the lower court was the Purchase Agreement and the Trust.

The following recitation of the facts is presented in the light most favorable to Appellants.

Ray and Victoria owned approximately 1,000 acres of farmland in Grant County, South Dakota (the "Property"). (CR at 12, ¶ 26.) (Pls.' Resp. to Brethren's SUMF, ¶ 2.) (Appx. 003). Ray and Victoria put the Property into a corporation named VOR. (CR at 12, ¶ 25) (Pls.' Resp. to Brethren's SUMF, ¶ 3) (Appx. 003). Ray and Victoria owned all the shares of VOR and deposited these shares of VOR into the Trust. (CR at 8, ¶4; 12, at ¶¶ 24-25; *see also* The Trust (CR at 230-325)) (Pls.' Resp. to Brethren's SUMF, ¶ 4.) (Appx. 005).

The Trust conditionally designated the majority of the Property to be inherited by their son, Paul, which included nine contiguous parcels comprising 703.33 acres. (CR at 13, ¶ 29; 24, ¶ 92) (Pls.' Resp. to Brethren's SUMF, ¶ 5) (Appx. 007). The Trust also conditionally designated two other quarters of ground to be inherited by Ray and Victoria's other children, Lance, Marcie, Kelly, and Rita. (CR at 12, ¶ 27; 13, ¶ 29) (Pls.' Resp. to Brethren's SUMF, ¶ 6) (Appx. 008). The Trust granted Paul an option to purchase those two parcels. (CR at 13, ¶ 29) (Pls.' Resp. to Brethren's SUMF, ¶ 7) (Appx. 008). However, by Appellants' own admission, that option terminated upon Paul's death. (CR at 1490-1491, ¶ 7) (Pls.' Resp. to Brethren's SUMF, ¶ 7) (Appx. 008-009).

Lance, Marcie, and Rita are not parties to this action, the Eviction Action, Ray's Guardianship, Victoria's Estate, Victoria's Lawsuit, or the Collection Lawsuit. (CR at 1491, ¶ 8) (Pls.' Resp. to Brethren's SUMF, ¶ 8) (Appx. 009). The Appellants that Lance wants to be a party but they did not file a motion at the trial court level to make him one.

Victoria died on July 11, 2022. (CR at 17, ¶ 52) (Pls.' Resp. to Brethren's SUMF, ¶ 10) (Appx. 013). By operation of the Trust, Victoria's shares of VOR and her beneficial interest in the Trust went to Ray. (See The Trust, CR at 230-325) (Pls.' Resp. to Brethren's SUMF, ¶ 11) (Appx. 013).

Raymond removed all shares of VOR from the Trust. (CR at 14, ¶ 34) (Pls.' Resp. to Brethren's SUMF, ¶ 12) (Appx. 013). Upon Victoria's death, Ray became the only trustee of the Trust. Under Section 8.02 of the Trust, Ray as Trustee could, in his sole and absolute discretion, pay out principle to himself as beneficiary. (CR at 1256.) Under Article 15 of the Trust, Ray, as trustee, had broad, almost unfettered power. (CR at 1295-1306). Ray, as trustee, could execute any instruments he deemed necessary (Section 15.02); invest in any type of investment (Section 15.03); act as an officer and vote as a shareholder for any business held by the trust (Section 15.05); sell trust property on terms Ray deemed advisable (Section 15.06); sell any farm or ranch interest even if Ray had a personal interest in the same (Section 15.09); encumber trust property (Section 15.11); manage and sell real estate as Ray deemed appropriate (Section 15.17); and settle, release, or abandon claims involving the trust (Section 15.21). (CR at 1295-1306).

On July 22, 2022, First Interstate Bank initiated a foreclosure on the Property. (CR at 1497, ¶ 13) (Pls.' Resp. to Brethren's SUMF, ¶ 13) (Appx. 015). On August 12, 2022, Brethren and VOR entered into a Purchase Agreement whereby VOR sold the Property to Brethren for \$3,200,000.00. (CR at 1498, ¶ 14) (Pls.' Resp. to Brethren's SUMF, ¶ 14) (Appx. 016). The Purchase Agreement also gave the Hutterian Brethren a right of first refusal to purchase the other two parcels of land held by vOr and leased the two parcels

to the Brethren. (CR at 26, ¶¶ 97-98; 1323-1335) (Pls.' Resp. to Brethren's SUMF, ¶ 15) (Appx. 017).

The Purchase Agreement was signed on behalf of VOR by Ray, Paul's father, as its president and only owner of VOR. (CR at 1499, ¶ 16) (Pls.' Resp. to Brethren's SUMF, ¶ 16) (Appx. 017) The land sale transaction closed in October 2022. (CR at 18, ¶ 59) (Pls.' Resp. to Brethren's SUMF, ¶ 17) (Appx. 017). Brethren and VOR initiated eviction proceedings, *vOr, Inc. and Grand Valley Hutterian Brethren v. Paul O'Farrell and Skyline Cattle Company* case number 25CIV23-000018, to evict Paul and Skyline from the Property. (CR at 1500, ¶ 18) (Pls.' Resp. to Brethren's SUMF, ¶ 18) (Appx. 018). The trial court ordered Paul and Skyline to vacate the Property and that holding was affirmed on appeal. (2025 S.D. 2) (CR at 1500, ¶¶ 19-20) (Pls.' Resp. to Brethren's SUMF, ¶¶ 19-20) (Appx. 018).

In their Complaint, Appellants assert the Purchase Agreement signed between VOR and Brethren on August 12, 2022, was kept secret, no authority was obtained via the probate process, and no notice was given until after the closing occurred in October 2022. (CR at 18, ¶ 59) (Pls.' Resp. to Brethren's SUMF, ¶ 24) (Appx. 019-020). However, because Ray owned all of Victoria's shares of VOR by operation of the Trust, and VOR owned all of the Property, the sale of the Property was not subject to the probate process. (CR at 1502-1503, ¶ 26) (Pls.' Resp. to Brethren's SUMF, ¶ 26) (Appx. 020-021).

Nearly seven months after the land sale closed, Paul signed a document purporting to be a "Notice of Rescission." (CR at 336) (Pls.' Resp. to Brethren's SUMF, ¶ 27) (Appx. 021). Paul sent the purported Notice of Rescission to the Brethren,

ostensibly on behalf of vOr, and offered to restore to them that which vOr received from them under the contract, upon the condition that they shall do likewise. (CR at 27, ¶ 105; 1336) (Pls.' Resp. to Brethren's SUMF, ¶ 30) (Appx. 022). Paul signed the Notice of Rescission allegedly as VOR's president. (CR at 27, ¶ 105; 1336) (Pls.' Resp. to Brethren's SUMF, ¶ 28) (Appx. 021-022). Other than recite the legal description of the property subject to the Purchase Agreement, the Notice of Rescission states, in full:

Paul O'Farrell, as duly-elected President, and on behalf of vOr, Inc., give notice of rescission of that certain real estate transaction involving the real property listed below. By this Notice, vOr, Inc. offers to restore to Grand Valley Hutterian Brethren, Inc., that which vOr, Inc. has received from them under the contract, upon the condition that they shall do likewise.

(CR at 1336) (Pls.' Resp. to Brethren's SUMF, ¶ 29) (Appx. 022). On March 30, 2023, Brethren's counsel rejected Paul's purported Notice of Rescission. (CR at 1337) (Pls.' Resp. to Brethren's SUMF, ¶ 45) (Appx. 028).

Paul did not tender \$3.2 million to Brethren. (CR at 1505, ¶ 34) (Pls.' Resp. to Brethren's SUMF, ¶ 34) (Appx. 023). Paul has not alleged that he has approval to restore the \$3.2 million or that he has \$3.2 million to give to Brethren on behalf of VOR. (CR at 1506, ¶ 36) (Pls.' Resp. to Brethren's SUMF, ¶ 36) (Appx. 024). Paul did not have or present a proposed mortgage or note from First International Bank, or any other bank. (CR at 1505, ¶ 35) (Pls.' Resp. to Brethren's SUMF, ¶ 35) (Appx. 023).

Paul lacks any authority to challenge and rescind the Purchase Agreement on behalf of any party to the contract. (CR at 1509, ¶ 43) (Pls.' Resp. to Brethren's SUMF, ¶ 43) (Appx. 027). Paul did not possess the authority to enter into the Purchase Agreement on behalf of VOR. (CR at 1508-1509, ¶ 42) (Pls.' Resp. to Brethren's SUMF, ¶ 42) (Appx. 026-027). On the contrary, Appellants admit that the Complaint

incorporates the Purchase Agreement and, of most import, the seller under the Purchase Agreement is VOR and the individual signing on behalf of VOR is Ray. (CR at 1365,) (Pls.' Resp. to VOR's SUMF, ¶¶ 12-14) (Appx. 038, ¶¶ 12-14). Appellants further admit that VOR retained Schoenbeck & Erickson, PC, to represent it in this and in prior litigation, and that Schoenbeck & Erickson, PC, represents VOR. (CR at 1363, 1367) (Pls.' Resp. to VOR's SUMF, ¶¶ 4, 26) (Appx. 036, 040). Paul does not own the Property in his individual capacity or in any representative capacity for VOR or the Trust. (CR at 1509, ¶ 44) (Pls.' Resp. to Brethren's SUMF, ¶ 44) (Appx. 027). Paul was not and is not the president of VOR at the time of the execution of the Purchase Agreement. (CR at 143-144; 1507, ¶ 39) (Pls.' Resp. to Brethren's SUMF, ¶ 39) (Appx. 025). Paul is not and was not a director, owner, or shareholder of VOR. (CR at 143-144; 1508, ¶ 40) (Pls.' Resp. to Brethren's SUMF, ¶ 40) (Appx. 026). Even if Paul had been able to prove he was a director or officer of VOR, Appellants concede that (1) "after Paul's death, he could no longer assert claims as its ostensible officer" (Appellants' Brief at 12); (2) "without Paul individually in this suit, the remaining plaintiffs are not capable of pursuing relief as alleged agents of VOR" (Appellants' Brief at 29); and (3):

Paul can no longer pursue claims as an officer on behalf of the Corporation [(VOR)]. Whatever corporate powers Paul had terminated upon death.

(CR at 1348, ¶ 20).

Paul is not a trustee of the Trust. (CR at 230-325; 1508, ¶ 41) (Pls.' Resp. to Brethren's SUMF, ¶ 41) (Appx. 026). Indeed, Paul alleges that he is merely a "Successor Co-Trustee" in the event Ray is "unable" to serve. (CR at 8, ¶ 4). Paul did

not include First National Bank, Ray, or any of his siblings in the Notice of Rescission. (CR at 336; 1504-1505, ¶¶ 31-33) (Pls.' Resp. to Brethren's SUMF, ¶¶ 31-33) (Appx. 023-024). No signatory to the land sale transaction has rescinded the Purchase Agreement or sought to unwind the land sale transaction. (CR at 1506, ¶ 37) (Pls.' Resp. to Brethren's SUMF, ¶ 37) (Appx. 024).

Paul's Complaint requests the Court to rescind the land transaction and for the Court to "impose a constructive trust on the deeds of the land conveyed, as well as upon any funds flowing from the transaction." (CR at 27, ¶ 106). Alternatively, Paul requests "[i]f rescission is not available, then, in that case Paul O'Farrell is entitled to an award of damages for unjust enrichment, and, otherwise." (CR at 27, ¶ 107).

In their Complaint, the Plaintiffs allege acts by Paul's brother, Kelly O'Farrell ("Kelly") as the sole basis for their causes of action. (CR at 7-28, ¶¶ 1, 8, 11-13, 34, 36-39, 42-46, 64, 111-12). (Pls.' Resp. to Brethren's SUMF, ¶ 22) (Appx. 019). Plaintiffs' claim that "[i]n 2022, . . . Kelly O'Farrell manipulated his father Raymond and engaged in other misconduct, in order to set in motion an improper and illegal set of maneuvers, all of which were designed to enrich himself at the expense of his parents and his brother Paul." (CR at 9, ¶ 8; 1501, ¶ 23) (Pls.' Resp. to Brethren's SUMF, ¶ 23) (Appx. 019).

Plaintiffs assert that Kelly was at the center of all the various maneuvers taken by Raymond, the Revocable Trust, vOr, Victoria, and the Estate of Victoria O'Farrell, and Kelly "secretly began an orchestrated effort to alienate and isolate Raymond from his family, with the intent of thwarting various features of Raymond and Victoria's Estate plan and disrupting farming operations. (CR at 10, ¶ 11; 14, ¶ 34) (Pls.' Resp. to

Brethren's SUMF, ¶ 24) (Appx. 019-020). This included, for example: 'removing' shares of vOr, Inc., from the Trust; 'separating' Raymond's and Victoria's assets; interfering in Paul's lending and farming activities; 'removing' Paul and Victoria as officers and directors of vOr, Inc.; attempting to fire the attorneys that Victoria hired to stop all of this; and, ultimately, signing a secret agreement to sell nine parcels of family farm ground to the Hutterite Brethren." (CR at 10, ¶ 11; 14, ¶ 34) (Pls.' Resp. to Brethren's SUMF, ¶ 24) (Appx. 019-020).

Paul claims damages are available for Raymond, Victoria, Victoria's Estate, the Revocable Trust, and vOr based on Kelly's acts, and "[d]iscovery will determine the extent and nature of the tort claims...Such damages would be available as a result of conversion, breach of fiduciary duty, and tortious interference with their expected and established relationships." (CR at 28, ¶ 111) (Pls.' Resp. to Brethren's SUMF, ¶ 48) (Appx. 029).

Paul claims "[d]amages...appear to be available to Skyline Cattle and Paul O'Farrell as a result of Kelly O'Farrell's tortious interference in their expected and established relationships." (CR at 28, ¶ 112) (Pls.' Resp. to Brethren's SUMF, ¶ 50) (Appx. 029). Paul expressly disclaims any tort damages against Brethren. (CR at 28, ¶ 114) (Pls.' Resp. to Brethren's SUMF, ¶ 51) (Appx. 029-030). He states, "**No tort damages are sought from the Hutterite Brethren, and Paul sincerely apologizes that they must be made a part of this ordeal.**" (CR at 28, ¶ 114) (Pls.' Resp. to Brethren's SUMF, ¶ 52) (Appx. 030).

The Complaint does not allege that Brethren are wrongdoers or had any notice of any alleged undue influence or fraud. (CR at 1512, ¶53) (Pls.' Resp. to Brethren's

SUMF, ¶ 53) (Appx. 030). The Complaint does not allege Brethren connived with Kelly. (CR at 7-90; 1512-1513, ¶ 54) (Pls.' Resp. to Brethren's SUMF, ¶ 54) (Appx. 030).

Count 1 of Plaintiffs' Complaint does not allege a cause of action against Brethren. (CR at 49-51, ¶¶ 99-111) (Pls.' Resp. to Brethren's SUMF, ¶ 55) (Appx. 030). Count 2 of Plaintiffs' Complaint alleges a remedy, not a cause of action. (CR at 51-52, ¶¶ 112-118) (Pls.' Resp. to Brethren's SUMF, ¶ 56) (Appx. 030). Count 3 of Plaintiffs' Complaint does not seek any damages against Brethren. (CR at 52-53, ¶¶ 119-125) (Pls.' Resp. to Brethren's SUMF, ¶ 57) (Appx. 030).

To date, there is no evidence of what Kelly did or said to Ray giving rise to this lawsuit. (CR at 1513-1514, ¶ 58) (Pls.' Resp. to Brethren's SUMF, ¶ 58) (Appx. 030-031). To date, there is no evidence that whatever Kelly allegedly did or said to Ray caused Ray to change the estate plan. (CR at 1514, ¶ 59) (Pls.' Resp. to Brethren's SUMF, ¶ 59) (Appx. 031). At the May 1, 2025 motions hearing, Appellants' counsel admitted that there is no evidence to support these claims:

MR. BRENDTRO: And so what did Kelly do? I don't know exactly what Kelly did. But the circumstantial evidence indicates that this was a product of undue influence.

(HT at 22:21-23; CR at 1623.)

STANDARD OF REVIEW

Brethren agrees with the Standards of Review set forth by Appellants. Brethren emphasizes that, "[i]f there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper." *Brandt v. Cty. of Pennington*, 2013 S.D. 22, ¶ 7, 827 N.W.2d 871, 874.

ARGUMENT¹

1. Appellants failed to raise any triable issue of fact regarding Kelly's alleged undue influence over Ray or causation for the same and, therefore, Appellants' rescission claim must fail as a matter of law.

In their opening brief to this Court, Appellants claim:

[i]n Count 2 of Paul's Complaint, he sought rescission of the land transaction (which had occurred after Victoria's death, and which was not part of her lawsuit)...The Complaint alleges that the land sale is void, on the basis that it was the produce of undue influence, or, a lack of capacity, or, a failure of trust and corporate governance requirements.

(Appellants' Br., at 9) (citations omitted). At the same time, they concede that their allegations of undue influence are directly solely at Kelly's alleged actions and their alleged effect on Raymond:

In this lawsuit, Paul alleged Raymond was unduly influenced into using VOR and the Trust to carry out the \$3.2 million land sale to Grand Valley...a transaction which violated the Trust, which was in contravention of corporate authority, which caused Raymond to breach his fiduciary duties to the Trust and to VOR, and which stood to benefit Kelly (the influencer).

(*Id.* at 35.) Essentially, all of Paul's claims in this case stem from the alleged undue influence caused by Kelly. Indeed, Paul has gone to great lengths to plead alleged undue influence across multiple lawsuits including the Eviction Action, Victoria's Estate, Ray's Guardianship, and this case.

Under SDCL § 15-6-56(c)(2), "The opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record." Additionally, under SDCL § 15-6-56(c)(3):

¹ Brethren incorporates by reference all of its arguments against consolidation contained in its October 29, 2025 Opposition to Motion to Consolidate not only for purposes of opposing the Motion to Consolidate, but also to challenge the merits of Appellants' appeal.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

SDCL § 15-6-56(e) further requires:

an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Yet, when challenged with a motion for summary judgment and responding to Brethren's Statements of Undisputed Material Facts, Appellants cite no record evidence to dispute the absence of any evidence to support their allegations:

58. To date, there is no evidence of what Kelly did or said to Ray giving rise to this lawsuit.

DISPUTED, NOT MATERIAL. Undue influence can be shown with circumstantial evidence, rather than with evidence of certain statements. It is, of course, premature to seek summary judgment in an undue influence case when discovery is just beginning. See, Rule 56(f) Affidavit.

59. To date, there is no evidence that whatever Kelly allegedly did or said to Ray cause Ray to change the estate plan. **DISPUTED, NOT MATERIAL. See #58.**

(CR at 1513-1514.) Even more, at the hearing on Appellees' Motions for Summary Judgment, Appellants' counsel admitted the same:

MR. BRENDTRO: And so what did Kelly do? I don't know exactly what Kelly did. But the circumstantial evidence indicates that this was a product of undue influence.

(HT at 22:21-23; CR at 1623.)

Under SDCL §§ 15-6-56(c) and (e), as well as controlling caselaw, Brethren's motion for summary judgment was properly supported. Therefore, Appellants, "as the

adverse party, must have designated specific facts that revealed a genuine issue for trial.”
State Auto Ins. Companies v. B.N.C., 2005 S.D. 89, ¶ 6, 702 N.W.2d 379, 383. ²

Not only do Appellants’ responses to Brethren’s Statements fail to meet the statutory requirements under SDCL § 15-6-56(c), thereby constituting admissions, but they wholly fail to comply with the burden placed on them in resisting summary judgment, justifying the lower court’s granting of the same. *See Casazza v. State*, 2000 SD 120, ¶ 16, 616 N.W.2d 872, 876 (“[M]ere general allegations and denials which [did] not set forth specific facts will not prevent the issuance of a judgment.”) (citations omitted).

In failing to meet their obligations in resisting summary judgment, Appellants also attempt to misrepresent the strict standard for undue influence by asserting mere “circumstantial evidence” is all that is required. The whole standard is as follows:

A will contestant has the burden to prove undue influence by the greater weight of the evidence. For influence to be undue it must be of such a character as to destroy the free agency of the testator and substitute the will of another for that of the testator. We have stated that claims of undue influence are generally questions of fact. A party seeking to prove undue influence must establish: (1) the decedent’s susceptibility to undue influence; (2) an opportunity to exert such influence and effect the wrongful purpose; (3) a disposition to do so for an improper purpose; and, (4) a result clearly showing the effects of undue influence. Therefore, to successfully resist summary judgment, Children must show that they will

² On appeal, Appellants do not state any other evidence of connivance on the part of Brethren other than a reference to the Purchase Agreement. This Court need not reach the connivance issue because Appellants cannot establish undue influence or causation nor is such a finding supported by the vague disclosure of a lawsuit in the Purchase Agreement, particularly where there was adequate consideration. *See Williams v. Van Sickle*, 659 N.W.2d 572, 579 (Iowa 2003) (defining “connivance” as “conduct that is intentional and likely to be aggravated by cruel and tyrannical motives. Such conduct lies far beyond a showing of mere ‘lack of care’ or ‘disregard for the rights of another.’”); *Chan v. Lund*, 188 Cal. App. 4th 1159, 1174 (2010) (finding inadequate consideration to be evidence that a contracting party acted with connivance).

be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof.

Matter of Est. of Tank, 2020 S.D. 2, ¶ 33, 938 N.W.2d 449, 459 (citations and quotations omitted). In failing to cite any record evidence, or even allege facts regarding the undue influence, the character of the alleged undue influence, and how it destroyed Ray's free will and substituted the will of Kelly, Appellants, as a matter of law, have failed to place any evidence in the record to support a finding on those things or the other elements of undue influence. See, e.g., *Bordeaux v. Shannon County Sch.*, 2005 SD 117, ¶ 14, 707 N.W.2d 123, 127 (stating, "those resisting summary judgment must show that they will be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof"); *Zephier v. Catholic Diocese of Sioux Falls*, 2008 SD 56, ¶ 6, 752 N.W.2d 658, 662 ("Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

Brethren request this Court affirm the lower court's summary dismissal of Count 2 seeking rescission claim.

2. Neither Paul nor his Estate have standing to seek rescission.

Appellants cannot meet the basic standing requirements to confer subject matter jurisdiction to this Court or the statutory party requirements under the rescission statutes. Because Appellants know that they cannot satisfy this threshold issue of standing, they now allege that this action is some sort of derivative claim. However, by Appellants' own admission, Paul's death cut off any and all corporate capacity he had with VOR, thereby defeating Appellants' new theory of the case.

a. Paul and his Estate lack jurisdictional standing.

For a court to have subject matter jurisdiction over a case, the plaintiff must establish standing as an aggrieved person. *Cable v. Union Cty. Bd. of Cty. Comm'rs*, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825. "Standing to sue is part of the common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102, 118 S. Ct. 1003, 1016, 140 L. Ed. 2d 210 (1998). To establish standing, the plaintiff must show (1) injury-in-fact, (2) causation, and (3) redressability. *Cable*, 2009 S.D. 59, ¶ 21, 769 N.W.2d at 825-26. Injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (citation omitted). Second, a causal connection must exist between the plaintiff's injury and the conduct in the plaintiff's complaint. *Id.* The causal connection is met "when the injury is 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Id.* (citation omitted). Finally, redressability is met when the plaintiff shows "it is likely, and not merely speculative, that the injury will be redressed by a favorable decision." *Id.* "Standing is established through being a 'real party in interest' 'The real party in interest requirement for standing is satisfied if the litigant can show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *In re Florence Y. Wallbaum Revocable Living Tr. Agreement*, 2012 S.D. 18, ¶ 40, 813 N.W.2d 111, 121 (citation omitted).

Paul alleges that he was damaged by the sale of the Property as a beneficiary of the Trust because he was set to inherit the Property pursuant to the terms of the Trust.

(CR at 8, ¶¶ 3-4). However, the Trust was revocable, and Paul has no enforceable interest until the Trust becomes irrevocable upon Ray's death.

Paul is not a real party in interest. Nor is Paul a trustee of the Trust. Paul is not a beneficiary under the Trust and has no enforceable interest under the same until it becomes irrevocable.

Paul had no interest in the Property as VOR was the sole owner of the Property and the Trust holds no shares of VOR. Paul has not and cannot plead an interest in the Property through his former role in VOR. Therefore, Paul suffered no "actual or threatened injury" by the land sale transaction based on his status as a remainder beneficiary and has no standing to challenge the land sale transaction. *See In re Florence Y. Wallbaum Revocable Living Tr. Agreement*, 2012 S.D. 18, ¶ 41, 813 N.W.2d at 121 (finding the remainder beneficiaries had no standing to challenge the trustee's actions because they had no interest in the income distributed to the beneficiary of a revocable trust, even though the distributions did not adhere to the terms of the trust). Because he does not own the property and has no interest in the same, he is not damaged by its sale and does not have standing to seek rescission of the same.

Even more, Appellants cannot meet the redressability prong of the standing analysis, given the various admissions made to the trial court, below. Appellants have admitted that VOR retained Schoenbeck & Erickson, PC, to represent in this and in prior litigation. (Appellee's Appx., at 36, ¶ 4; CR at 1363.) Appellants have admitted that Schoenbeck & Erickson, PC represents VOR. (*Id.*, at 40, ¶ 26; CR at 1367.) Appellants have also admitted that Count 2 seeks rescission, the Complaint incorporates the Purchase Agreement, and, of most import, the Seller under the Purchase Agreement is

VOR and the individual signing on behalf of VOR is Ray. (*Id.*, at 38, ¶¶ 12-14; CR at 1365.) In their submissions below, Appellants admitted:

Paul can no longer pursue claims as an officer on behalf of the Corporation [(VOR)]. Whatever corporate powers Paul had terminated upon death.

(CR at 1348.) This creates an inherent and insurmountable obstacle for Appellants to satisfy the redressability prong of the standing analysis and it follows that Paul and Paul's Estate lack standing to seek rescission.

Rescission would put the land back under the ownership of VOR. VOR is represented by Schoenbeck & Erickson, PC. In VOR's submission to this Court, it explicitly stated that it neither wants rescission nor the land back under its control.

b. Paul and his Estate lack standing under the rescission statutes.

Even if this Court found Paul to have standing, by statute, he cannot seek a rescission claim because he was not a party to the contract. "A contract may be extinguished . . . by rescission, alteration, and cancellation, as provided by statute." SDCL § 53-11-1. An action for rescission may be brought as a legal action under SDCL chapter 53-11, or as an equitable action pursuant to SDCL chapter 21-12. *Jones v. Bohn*, 311 N.W.2d 211, 213 (S.D. 1981). "If the action is in equity, the rescission is accomplished by court decree. When an action is brought pursuant to SDCL Ch. 53-11, however, the rescission has already been accomplished by the unilateral act of one of the parties to the contract. The rescinding party brings the legal action for rescission to enforce his rights arising from the rescission." *Id.* (emphasis added). Rescission is a remedy that may be available to a party to a contract only after the party establishes grounds for rescission as provided in SDCL Ch. 53-11 or SDCL Ch. 21-12.

Pursuant to SDCL § 21-12-1,

The rescission of a written contract may be adjudged on the application of a party aggrieved:

- (1) In any of the cases mentioned in § 53-11-2;
- (2) Where the contract is unlawful, for causes not apparent upon its face, and the parties were not equally in fault;
- (3) When the public interest will be prejudiced by permitting it to stand.

(Emphasis added.) Under SDCL § 53-11-2,

A party to a contract may rescind the same in the following cases only:

- (1) If consent of the party rescinding or of any party jointly contracting with him was given by mistake or obtained through duress, fraud, or undue influence exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party;
- (2) If through fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part;
- (3) If the consideration becomes entirely void from any cause;
- (4) If such consideration before it is rendered to him fails in a material respect from any cause; or
- (5) By consent of all the other parties.

(Emphasis added.) Thus, to rescind, Paul needs to plead that he is a “party aggrieved,” a party to the contract, and that he either is “the party rescinding” or a “party jointly contracting with him . . .” SDCL §§ 21-12-1, 53-11-2-(1). Other statutes in SDCL Ch. 53-11 support the proposition that only parties to the contract have standing to rescind the same. *See, e.g.*, SDCL §§ 53-11-3 (“Rescission, when not effected by consent can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with §§ 53-11-4 and 53-11- 5.” (Emphasis added.)); 53-11-4 (“The party rescinding a contract must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, undue influence, or disability, and is aware of his right to rescind.” (Emphasis added.)); 53-11-5 (“The party rescinding a contract must restore to the other party everything of value which he has received from him under the

contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so.” (Emphasis added.)). Paul cannot truthfully plead the basic requirements of SDCL §§ 21-12-1 or 53-11-2.

The only parties to the Purchase Agreement were Brethren and VOR, through its president, Ray. Ray and Brethren have not elected to rescind under SDCL § 53-11-2(1). Ray is not even a party in this lawsuit. Paul is not Ray’s guardian or conservator. Paul provides no authority for his apparent belief that he can pursue several lawsuits, simultaneously, on Ray’s behalf when he has not been appointed as Ray’s guardian and conservator.

Paul did not own the Property, and was not the seller under the Purchase Agreement, in his individual capacity or in any representative capacity as part of VOR or the Trust. Paul was not a party, in any capacity, to the Purchase Agreement. Therefore, as a matter of basic statutory application, Paul cannot rely on or utilize SDCL § 53-11-2 to rescind, regardless of how he pleads his rescission claim, because he is not a party to the Purchase Agreement.

c. Paul and his Estate cannot rescue their standing by drawing a faulty analogy to the corporate derivative claim statutes.

The Appellants, perhaps acknowledging that they lack both jurisdictional and statutory standing, attempt to draw an analogy to the corporate shareholder derivative claim statutes. Yet, at the hearing below, the Appellants acknowledge the derivative claim statutes do not save them:

I understand that it’s not an exact match for a derivative case, although I believe it is when we’re pursuing relief on behalf of who would be the ultimate shareholder, Victoria’s interests in her portion of the trust.

(HT at 58:25-59:4; CR at 1659-1660.) As stated above, Appellants also acknowledge Paul's death stripped him of any rights under VOR. (CR at 1348). Even more, Paul was not an owner of VOR and, by statute, you have to be an owner to bring a derivative claim. SDCL § 47-1A-742. Appellants even concede that the option contained in the Trust terminated upon Paul's death. (CR at 1490-1491, ¶ 7) (Pls.' Resp. to Brethren's SUMF, ¶ 7) (Appx. 008-009).

Appellants simply cannot escape their failure to satisfy the threshold burden of standing and all of their claims must fail as a matter of law.

- 3. Paul's purported Notice of Rescission is defective as a matter of law because neither he nor his Estate have restored or offered to restore value to Brethren, the notice is untimely, and Paul failed to provide notice to all of the proper parties.**

Pursuant to SDCL § 53-11-5, "[t]he party rescinding a contract must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." *See also Halvorson v. Birkland*, 84 S.D. 328, 333, 171 N.W.2d 77, 80 (1969) ("As a condition to rescission 'the party rescinding a contract must restore to the other party everything of value which he has received from him under the contract'." (citation omitted)).

Neither Paul nor Paul's Estate has tendered or offered \$3.2 million to Brethren—even if he is a proper party to rescind the contract. Paul did not have and Paul's Estate has not presented a proposed mortgage or note from First International Bank, or any other bank. Paul has not even alleged that he has approval or authority to restore the \$3.2 million or that he has \$3.2 million to give to Brethren on behalf of VOR. At the time the Purchase Agreement was signed, Paul did not own any shares of VOR and was not its

President. Paul is not and was not a director, owner, or shareholder of VOR. Neither Paul nor his Estate has rights or authority over the \$3.2 million and did not receive anything of value in the transaction. Neither Paul nor his Estate have tendered any evidence or allegation that he has the means to restore value to Brethren. In sum, neither Paul nor Paul's Estate has "restored" the value received by Brethren under the terms of the Purchase Agreement.

Beyond failing to restore Brethren, Appellants have also failed to meet the temporal requirement under South Dakota law to successfully attempt rescission. Under SDCL § 53-11-3, "[r]escission, when not effected by consent can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with §§ 53-11-4 and 53-11- 5." (emphasis added). Thus, more is required by a party seeking rescission than simply quoting SDCL § 53-11-5 in a Notice of Rescission. You not only have to give the money back, but you have to do it in a timely manner. Paul (and, now, Paul's Estate) must have engaged in "reasonable diligence" to restore value to Brethren. No showing was pled in Paul's Complaint and no record evidence exists to support such a claim. Without any authority or alleged means to restore value, Paul has not and cannot exercise the requisite reasonable diligence in accomplishing rescission of the Purchase Agreement.

Lastly, in order to successfully rescind, Appellants were required to include the right parties in the Notice of Rescission. For Paul and his siblings to have a colorable claim of an interest in the Property under the terms of the Trust, four conditions must have occurred: (1) one of the parents had to die, (2) the other parent had to die, (3) the terms of the Trust must have remained unchanged upon the death of both parents, and (4)

the shares of VOR, which owned the Property, must have remained in the Trust. (CR at 230-325.)

If Paul is held to have an interest in the Property sufficient to bring a rescission action, then his siblings, Lance, Marcie, and Rita also have an interest in the Property. Lance, Marcie, and Rita are not parties to this action, or any of the related actions. If the Court deems Paul to have an interest in the Property, the siblings would also have a similar interest in the Property pursuant to the terms of the Trust and would have needed to be included in the Notice of Rescission and as parties to this action.

At the very least, however, First International Bank has a legitimate and enforceable interest in the Property given its issuance of a note and mortgage. As such, even if Paul is rendered to have authority to issue a Notice of Rescission, which he doesn't, he did not include First International Bank and it is, therefore, deficient.

4. The lower court did not err in finding that Appellants failed to their strict burdens in filing a Rule 56(f) affidavit.³

Appellants have appealed Judge Pardy's denial of their request under SDCL § 15-6-56(f). Judge Pardy ruled that, based upon the lower court's analysis of the summary judgment motions, "further discovery will not change the outcome of this proceeding...." As will be explained below, the lower court did not err in denying Appellant's Rule 56(f) motion as Appellants were not only dilatory in seeking discovery, but they failed to meet the strict requirements if obtaining such relief.

³Below, Appellants also filed a Motion to Amend Complaint, which was denied by Judge Pardy. Appellants are not appealing this issue. Appellants failed to raise the lower court's denial in their issue statement, and only briefly mention the Motion to Amend Complaint while discussing the 56(f) issue. (Appellant's Brief, p. 44-45). In any case, the lower court did not err in denying the Appellants' Motion to Amend Complaint for the same reasons it did not err in denying Appellants' 56(f) motion.

This Court has explained the strict burden that must be met under SDCL

§15-6-56(f):

SDCL 15-6-56(f) provides that a party opposing a motion for summary judgment is entitled to conduct discovery when necessary to oppose the motion. Under [Rule 56(f)], the facts sought through discovery must be 'essential to opposing the summary judgment[.] This requires a showing how further discovery will defeat the motion for summary judgment. To make this showing, the Rule 56(f) affidavit must include identification of the probable facts not available and what steps have been taken to obtain those facts, how additional time will enable [the nonmovant] to rebut the movant's allegations of no genuine issue of material fact[.] and why facts precluding summary judgment cannot be presented at the time of the affidavit.

Stern Oil Co. v. Border States Paving, Inc., 2014 S.D. 28, ¶ 26, 848 N.W.2d 273, 281-82 (citations omitted). Dilatory conduct on the part of a Rule 56(f) movant can be a basis to deny relief. *First Dakota Nat'l Bank v. Ruba*, No. 4:16-CV-04007-RAL, 2016 WL 7410562, at *2 (D.S.D. Dec. 21, 2016). As stated in a leading treatise:

[T]he rule will not be applied to aid a party who has been lazy or dilatory ... The courts will not delay a case to allow discovery when the discovery sought could have been instituted earlier, especially when there is no reason to believe that it will lead to a denial of the motion... Thus, the earliest possible use of the discovery procedures seems imperative for a party seeking to avoid summary judgment.

Wright & Miller, 10B Fed. Prac. & Proc. Civ. § 2741 (4th ed.) (footnotes omitted).

This action has been filed since March 3, 2023. Since that time and presumably since 2022, Appellants have been aware of the issues in this case and all of the collateral cases, including the Eviction Action (filed April 6, 2023), Ray's Guardianship (filed March 8, 2023), Victoria's Estate (filed July 18, 2022), Victoria's Lawsuit (filed June 2022), and the Collection Lawsuit (filed May 18, 2023). Central to all these cases are Appellants' allegations that Kelly committed some unknown acts of undue influence over Ray and that those acts of Kelly actually unduly influenced Ray to take actions regarding

VOR and the Trust that Ray would otherwise not have taken. Appellants claim to have made these allegations since 2022 but have undertaken no meaningful discovery in almost three years.⁴

Under SDCL § 15-6-33, Appellants could have served written discovery upon all the defendants in this case in March 2023 and expected answers in April or May of 2023. Appellants have served no written discovery to date. Under SDCL § 15-6-30, Appellants could have started taking depositions in April 2023. Appellants have taken no depositions to date. Appellants noticed Ray's deposition but then canceled it. Appellants apparently claim that Judge Spears's dismissals of some of the parties interrupted their discovery, but they do not explain how. While part of this case came before this Court under SDCL § 15-6-54(b), no stay was entered, and discovery could have progressed at least among the then-remaining parties. Moreover, they provide no explanation as to why they did not do any discovery on their barratry defense. Notably, Appellants asserted to this Court that Judge Spears did not dismiss their purported claims against Kelly, but Appellants did not even attempt to conduct discovery with Kelly.

And, Judge Spears's dismissal of some of the parties did not prevent Appellants from seeking discovery from the dismissed parties either by the normal discovery rules used between parties or, in the alternative, by invoking SDCL § 15-6-45 to issue document and deposition subpoenas. *See also* SDCL § 15-6-27 (allowing depositions to

⁴This is one of the reasons why the Appellants cannot rely on this Court's recent opinion in *Coyle v. McFarland*, 2025 S.D. 63. In *Coyle*, the motion for summary judgment was filed less than three weeks after the answer, before any discovery occurred. *Id.* at ¶ 34. The Court emphasized that there was "minimal time" for the nonmovant to procure disputed facts, which explained "why facts precluding summary judgment could not be presented." *Id.* This is inapposite to the current case because, as explained above, Appellants have had years to conduct discovery on parties and non-parties alike and has failed to do so.

preserve testimony of parties and non-parties). Indeed, all the non-party discovery that Appellants now seek in their Rule 56(f) affidavit could have been obtained long ago with that subpoena power.

A study of Appellants' filings reveals no "specific facts further discovery might uncover" regarding Appellants' purported claims⁵ against Brethren. *See Stern Oil*, quoted *supra*. Appellants' brief in opposition to Brethren's motion for summary judgment says only the following about Rule 56(f):

5. The Colony's summary judgment motion is premature, factually.

The Record in this case is still a work-in-progress. Facts that bear upon Raymond's capacity and the influence over him will be further developed. If the Record is insufficient to prevent summary judgment now, then the remedy is further discovery. *See*, Rule 56(f) Affidavit.

(CR at 1523.) Appellants' response to Brethren's fact statement contains one vague statement about facts:

Response to Undisputed Facts

Many of the facts in this case are disputed. Many more will be the subject of discovery, upon which it is reasonable to expect further disputes will become apparent.

⁵ As stated elsewhere in this Brief, Appellants cannot even decide at this stage in the litigation whether they are bringing any claims against Brethren or, more importantly, what those claims are. Appellants' counsel admitted as much at the May 1, 2025 hearing:

At this point in time, the amended complaint does not seek actual damages for an actual tort against the Colony. But an amendment was made between the original complaint and now, to make clear that it's possible that that may occur, depending on what discovery bears out, what involvement they had, whether it was -- you know, whether the Colony had direct involvement in this process. There may be, but that's not something that we need to decide now.

(HT at 41:2-9; CR at 1642.) *See also* HT at 17:14-18:1; CR at 1618-1619 ("it is, in essence, not that the Colony is being sued.").

(Appellee's Appx., at 2.)⁶

While Appellants' response to Brethren's fact statement also references Rule 56(f), it only does so once and then only in relation to Kelly:

58. To date, there is no evidence of what Kelly did or said to Ray giving rise to this lawsuit.

DISPUTED, NOT MATERIAL. Undue influence can be shown with circumstantial evidence, rather than with evidence of certain statements. It is, of course, premature to seek summary judgment in an undue influence case when discovery is just beginning. See, Rule 56(f) Affidavit.

59. To date, there is no evidence that whatever Kelly allegedly did or said to Ray cause Ray to change the estate plan. **DISPUTED, NOT MATERIAL. See #58.**

(Appellee's Appx. At 31-32.)

Appellants lack an excuse for their delay in conducting discovery. And, Appellants fail to cite a single specific fact that further discovery might uncover to support their purported claims against Brethren. The Circuit Court did not err by refusing to allow Appellants' Rule 56(f) Affidavit to delay summary judgment in favor of Brethren.

Given the dispositive deficiencies in this case and Appellants' pleadings, amazingly, they make an affirmative request to this Court to re-plead their case for them:

⁶ This is another reason Appellants cannot rely on *Coyle*. The *Coyle* affidavit asserted that the boundaries of the Lot were in dispute and identified specific missing legal recordings and ordinance violations directly material to the case. 2025 S.D. 63, ¶ 35-36. Here, Appellants' Counsel's affidavit does not even mention Brethren until paragraph 11, where he makes a vague, speculative claim that the information requested will show "assertions, knowledge, and other indicia" that Brethren were aware of Ray's supposed mental incapacity. (CR at 1417.) It is not apparent how any of the requested discovery will show any such "indicia," and no attempt is made to clarify this tenuous connection. As such, Appellants have not identified "how additional time will enable [the nonmovant] to rebut the movant's allegations." *Id.* at ¶ 36.

And, so that there are no further questions as to the contours of relief available, and no further accusations that this is an unfounded, frivolous action, we ask for your opinion to set forth the pertinent law and facts that permit this action to proceed on its merits. In short, we ask for a substantive decision, rather than a procedural one, to the full extent permitted here.

(Appellants' Br., at 48.) In other words, Connor and Lance want this Court to choose the proper Plaintiffs in this action that will survive dispositive motions practice and appellate review. Connor and Lance want this Court to choose the proper Defendants that will survive dispositive motions practice and appellate review. Connor and Lance want this Court to choose the proper causes of action that will survive dispositive motions practice and appellate review. They apparently even want this Court to draft their responses to Brethren's SUMF and add citations to that response to save a lawsuit against Brethren. That is not this Court's purpose or function. Such a request entirely supplants the purposes behind the South Dakota Rules of Civil Procedure, and, this Court's appellate review.

CONCLUSION

Rescission is a remedy, not a cause of action. For all the reasons set forth above, the Appellants have never been able to articulate a cause of action against Brethren. The Appellants' admissions at the hearing crystalized that they have no claim against Brethren.

This is a declaratory-judgment action, and so it doesn't look like a normal case. It is not a plaintiff-versus-defendant case. The analogy that I use is that it's a soup case. As long as you have parties that are entitled to a declaration of rights and you have an adversarial process, the identity of the parties isn't as important as making sure that all the parties that are necessary are present.

And so it is, in essence, not that the Colony is being sued. It is that the Colony is a necessary party because they were a participant to the deed, and the deed can be unwound. There is statutory authority for that and

common-law authority for unwinding a transaction like this that is a product of undue influence.

(HT at 17:14-18:1; CR at 1618-1619.) The Court should take the Appellants' admissions at the hearing as the final proof it needs to dismiss this action against Brethren and to dismiss Count 2 seeking rescission. Brethren respectfully request this Court affirm Judge Pardy's decisions below.

Dated this 2nd day of December, 2025.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ William G. Beck
William G. Beck
Seth A. Lopour
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
William.Beck@woodsfuller.com
Seth.Lopour@woodsfuller.com

Reed Rasmussen
Siegel, Barnett & Schutz, LLP
PO Box 490
Aberdeen, SD 57402
rrasmussen@sbslaw.net
*Attorneys for Grand Valley Hutterian
Brethren, Inc.*

APPENDIX

1. Response to Statement of Undisputed Material Facts (Grand Valley)
2. Response to Statement of Undisputed Material Facts (VOR)
3. May 1, 2025 Hearing Transcript

STATE OF SOUTH DAKOTA)
):: §§§
COUNTY OF GRANT)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

<p>THE ESTATE OF PAUL O'FARRELL, individually; and, as a beneficiary of the family trust; and, for the benefit of THE ESTATE OF VICTORIA O'FARRELL; SKYLINE CATTLE COMPANY, a South Dakota corporation; & VOR, INC, a South Dakota corporation <p style="text-align: center;">PLAINTIFFS</p> <p style="text-align: center;">v.</p> <p>KELLY O'FARRELL, an individual; GRAND VALLEY HUTTERITE BROTHERS, INC.; a South Dakota corporation; and THE RAYMOND AND VICTORIA O'FARRELL LIVING TRUST, a South Dakota trust. <p style="text-align: center;">DEFENDANTS</p> </p></p>	<p style="text-align: center;">25CIV23-000015</p> <p style="text-align: center;">RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS (GRAND VALLEY)</p>
--	---

Pursuant to SDCL 15-6-56(c)(2), and as their response to the Statement of Undisputed Facts on Grand Valley's 3/6/2025 motion for summary judgment, Plaintiffs state:

General Objection

After Paul O'Farrell's passing, he was substituted as a party. Then, to reflect his passing, as well as later-discovered facts, Paul's Estate filed a motion to amend his original Complaint. That motion is pending. However, Grand Valley's summary judgment motion and undisputed facts relate to the claims within the original

APPENDIX - 001

Complaint. They do not address the Complaint as proposed to be amended.

Therefore, Plaintiffs generally object to the Statement of Undisputed Facts. A summary judgment motion becomes moot upon the filing of a motion to amend the Complaint. Plaintiffs notified Grand Valley of the amended complaint prior to Grand Valley's decision to file its summary judgment motion. Grand Valley filed anyway.

"Revocable" Trust

In some instances, the facts offered by Grand Valley are legal contentions, rather than facts. For example, Grand Valley refers to the O'Farrell family trust as "the Revocable Trust" on fourteen separate occasions. See, ¶¶ 4, 5, 6, 7, 9, 11, 12, 24, 26, 48. As discussed below, the Trust was not titled a "revocable" trust, and, it was in fact *irrevocable* under certain conditions applicable here. The use of the term 'revocable' is disputed in those paragraphs.

Response to Undisputed Facts

Many of the facts in this case are disputed. Many more will be the subject of discovery, upon which it is reasonable to expect further disputes will become apparent. For its response, the Plaintiffs offer the following:

1. The Hutterian Brethren join and adopt all of The Raymond and Victoria O'Farrell Living Trust and vOr, Inc.'s Statement of Undisputed Material Facts. **DISPUTED. (Plaintiffs incorporate by reference their 3/6/2025 "Response to Statement of Undisputed Facts")**

APPENDIX - 002

regarding VOR's motion for summary judgment.)

2. Raymond and Victoria O'Farrell owned approximately 1,000 acres of farmland in Grant County, South Dakota (the "Property"). (Complaint, ¶ 26). **UNDISPUTED.**

3. Raymond and Victoria put the Property into a corporation named vOr, Inc. ("vOr"). (Complaint, ¶ 25).

UNDISPUTED. However, further context is necessary regarding VOR and the Trust. The First Amendment to the Raymond and Victoria O'Farrell Living Trust, signed by Raymond and Victoria on August 26, 2021, reflects that VOR was synonymous with the farmland, and, that the farmland was synonymous with the Trust. The 2021 Amendment states in part:

Trustors recognize that the real property distributed below is currently owned by VOR, Inc. However, Trustors anticipate that the corporation will be dissolved at or prior to the death of the Surviving Trustor with minimal income tax liability. In the event VOR, Inc., is not dissolved prior to the death of the surviving spouse...or cannot be dissolved with minimal income tax impact, then the Trustees are instructed to follow the overall intent of the real property distributions set forth below by distributing shares of VOR,

APPENDIX - 003

Inc., in proportion to the value of the underlying land, and subject to the purchase option set forth below.¹

The 2021 Amendment also added a “no contest” provision, under which any person challenging the Living Trust would lose their right to inherit under the Living Trust. The 2021 Amendment was sent to their children, including Kelly, on March 7, 2022, advising that the children, as beneficiaries, had 60 days by statute in which to challenge the trust amendment. No challenge was made. However, a reasonable inference is that this notice, and the 2021 Amendment was the precipitating event that caused Kelly O’Farrell to take subversive action to thwart the terms of the Trust, *i.e.*, since the Trust could not be changed and it greatly favored Paul, Kelly manipulated Raymond into attempting to withdraw assets from it.

Victoria testified to this. “After Raymond and I provided notice of the amendment to the Trust..., it is my understanding that Kelly and Rita were resentful more assets were to be distributed to Lance and Paul than to the other children.” *See, Victoria O’Farrell Affidavit, June 26, 2022, ¶ 11, found in 25CIV22-000038. The Trust*

¹ The First Amendment is found in the final three pages of Exhibit 5, Part 2, attached to Mr. Beck’s 3/6/2025 Affidavit.

named Paul as a primary beneficiary, and Paul's children as the beneficiaries of his share in the event of Paul's death.

4. Raymond and Victoria owned all the shares of vOr and deposited these shares of vOr into the Raymond and Victoria Living Trust ("Revocable Trust"),² which was a revocable trust created in 2011. (Complaint, ¶¶ 4, 24-25; Beck Aff., Ex. 5 (Raymond and Victoria O'Farrell Living Trust)).

DISPUTED IN PART. The Trust was not titled a 'revocable trust,' and, by its plain terms, it was not fully 'revocable.' Neither Trustor could withdraw the other's property, and, a reasonable construction is that neither could withdraw property without joint consent. And, it was not 'revocable' at the time of Victoria's death. Instead, it actually contained *irrevocability* provisions.

In particular, the Raymond and Victoria O'Farrell Living Trust ("Living Trust") upon certain conditions and occurrences, becomes irrevocable as to actions by interested individuals,

² Use of the term "Revocable Trust" is disputed throughout, for the reasons set forth in this #4, and throughout. This was a "Living Trust" which contained restrictions on altering its assets and its terms.

including Raymond and the descendant beneficiaries. *See, e.g.,* Living Trust Section 14.20. Section 16.08(l).

Any amendment after Victoria's death would be allowable only for the portion of the Trust known as the "Survivors Trust". And, any such amendment would require the surviving Trustor to have sufficient mental capacity, and be free from undue influence. The Survivors Trust only holds Victoria or Raymond's personal residence and their tangible personal property. Living Trust Section 1.04, 7.02. *See also, generally* Section 6.

The farmland and/or vOr shares, and the remainder of Victoria's property, is held in the portion of the Trust known as the Marital Trust. *See*, Section 6.08. Neither Raymond nor any of the beneficiaries have authority to amend or revoke that portion of the Trust. Living Trust Article 8. Section 14.20. Section 16.08(l).

In this lawsuit, Plaintiffs are seeking restoration of Raymond's vOR shares to the Trust (in addition to invalidating the sale he conducted). Plaintiffs further allege that Raymond qualifies as a "person who is incapacitated" under Living Trust Section 16.08(f). After the VOR shares and property are restored, a successor Trustee would then have the authority to steward Raymond's and Victoria's interests in the Living Trust, both for

APPENDIX - 006

Raymond during his lifetime, and also for the descendant beneficiaries. However, any such stewardship must be carried out in a manner that is free from undue influence and manipulation, by a party with appropriate capacity. And, there are limitations on what can be done with the Trust's assets, discussed further, below.

5. The Revocable Trust conditionally designated the majority of the Property to be inherited by their son, Paul, which included nine contiguous parcels comprising 703.33 acres. (Complaint, ¶ 29, 92).

UNDISPUTED. However, the term “conditionally” is misleading, if the intent is to imply that the designation to Paul may be changed in an arbitrary or unlimited way. And, any change would have needed to be made by both Raymond and Victoria, jointly, as well as with sufficient mental capacity, and free from undue influence.

The intent of the Living Trust, as made clear in The First Amendment to the Living Trust in 2021, is to serve as an asset transition tool for the family farmland. The intent is that the beneficiary designations be hewed to as closely as possible with respect to the farmland or its proceeds. *See* The First Amendment to

APPENDIX - 007

the Raymond and Victoria O'Farrell Living Trust, signed by Raymond and Victoria on August 26, 2021. Further, the plain language of the Trust designated Paul's children as the beneficiaries who would take Paul's share, upon his death.

The Marital Trust, funded by operation of the Living Trust upon Victoria's death, allows Raymond as surviving Trustee a limited power of appointment over the Marital Trust half of vOr shares to the descendant beneficiaries. *See*, Living Trust Section 8.05. However, Raymond's limited capacity (and the presence of undue influence) would preclude Raymond from exercising this power.

6. The Revocable Trust also conditionally designated two other quarters of ground to be inherited by Raymond and Victoria's other children, Lance, Marcie, Kelly, and Rita. (Complaint, ¶ 27, 29).

UNDISPUTED, but, again subject to the discussion above regarding the word "conditionally."

7. The Revocable Trust conditionally granted Paul an option to purchase those two parcels. (Complaint, ¶ 29).

UNDISPUTED, but now largely irrelevant, because the option

APPENDIX - 008

terminated at Paul's death. Grand Valley's purported contract, however, clearly interfered with the intent of the Trust, which creates a further inference of the invalidity as to Raymond's actions.

8. Lance, Marcie, and Rita are not parties to this action, or any of the related actions: VOR, Inc. and Grand Valley Hutterian Brethren v. Paul O'Farrell and Skyline Cattle Company (25CIV23-18) (Eviction Action); In the Matter of the Guardianship and Conservatorship of Raymond O'Farrell (25GDN23-1) (Ray's Guardianship); Estate of Victoria O'Farrell (25PRO22-11) (Victoria's Estate); Victoria O'Farrell v. Raymond O'Farrell, Kelly O'Farrell (25CIV22-38) (Victoria's Lawsuit); and CHS Capital, LLC v. Skyline Cattle Co., Paul O'Farrell, VOR, Inc. (25CIV23-27) (Collection Lawsuit).

UNDISPUTED. However, under the statutes pertaining to Declaratory Judgment actions, any necessary party can be joined. See, SDCL 21-24-7.

9. The four conditions that must have occurred in order for Paul and his siblings to inherit the Property under the terms of the Revocable Trust were: (1) one of the parents had to die, (2) the other parent had to die,

APPENDIX - 009

(3) the terms of the Revocable Trust must have remained unchanged upon the death of both parents, (4) the shares of vOr, which owned the Property, must have remained in the Revocable Trust. (Beck Aff., Ex. 5 (Raymond and Victoria O'Farrell Living Trust)).

DISPUTED. This is a legal conclusion masquerading as an undisputed "fact." Further, this is a gross simplification of a very complicated trust document, and an even more complicated set of circumstances.

And, regardless of how simple one can attempt to describe the Trust, it should be obvious that *none* of the terms of the Trust could be changed, and *none* of the assets could be withdrawn, if those changes or withdrawals were the product of undue influence, lack of capacity, or a failure of corporate authority and notice.

Further, upon Victoria's death, under no circumstances could Victoria's share of VOR or her share of proceeds of any land sale leave the Trust. The only condition remaining for the descendants to inherit Victoria's one-half interest in VOR (whether as land or as proceeds) is the death of Raymond O'Farrell.

Upon Victoria's death, her one-half ownership of vOr, Inc., became part of a Marital Trust, a sub-trust within the Living Trust. *See*, Section 1.03. Section 6.08. Article 8. The ultimate beneficiaries

APPENDIX - 010

of this Marital Trust are her descendants. Section 8.08. *See also* Article 9.

The Marital Trust ensures Raymond receives lifetime trust income and/or principal under the health, education, maintenance and support (“HEMS”) standard, which is a limited and objectively ascertainable standard under the law. Section 8.02. *See Est. of Chancellor v. Comm’r*, 102 T.C.M. (CCH) 70 (Tax Court 2011).

Further, Raymond has no power to appoint Victoria’s one-half share of the vOr, Inc., shares to himself, under the Marital Trust’s “Limited Testamentary Power of Appointment.” He may *only* appoint the Marital Trust property among their descendants. *See*, Section 8.05. And, as an Interested Trustee, Raymond has no revocation authority or power over the Marital Trust. *See*, Article 8. Section 14.20. Section 16.08(I).

The restrictions on the Marital Trust are so specific in their protection of the descendant beneficiaries that Raymond would be required to execute a prenuptial agreement in the event of remarriage to protect the descendant beneficiaries of the Marital Trust. *See*, Section 8.03.

And as a matter of VOR’s corporate authority, there was no meaningful way in which Raymond could purport to act for VOR

APPENDIX - 011

and sell its assets without interfering with the Marital Trust's interest in VOR.

What Victoria attempted to achieve in her Complaint was to restore the couple's longstanding estate planning wishes, including that Raymond's one-half shares of vOr, Inc., should return to the Living Trust. Victoria recounted, firsthand, that Raymond had no idea what he had done when she asked him about the transfers related to vOr, Inc., and the Living Trust during her lifetime. Affidavit of Victoria O'Farrell, June 26, 2022, Paragraphs 21-23, found in 25CIV22-000038.

The Plaintiffs' Complaint and Amended Complaint, and the existing facts within the Record, state a *prima facie* case that Raymond's shares of vOr, Inc., were improperly withdrawn from the Trust, and must return to the Trust and remain there until his death, at which point, Paul's descendants and Paul's siblings will inherit their designated portions of the farmland through vOr, Inc., and/or the Trust. *See*, Article 9.

Any other result would require Raymond and Grand Valley to demonstrate several things: that Raymond had cognitive capacity to withdraw his shares in 2022; that he has capacity to withdraw them now; that his abandonment of the longstanding trust plan is entirely

APPENDIX - 012

free from undue influence; that each action pertaining to VOR followed corporate notice requirements; and, that the Trust provisions categorically permitted these actions. (Notably, Victoria's shares were never withdrawn from the Trust, and, thus those shares and any proceeds from them must remain in the Marital Trust, no matter what.)

10. Victoria died on July 11, 2022. (Complaint, ¶ 52).

UNDISPUTED.

11. By operation of the Revocable Trust, Victoria's shares of vOr and her beneficial interest in the Revocable Trust went to Raymond. (Beck Aff., Ex. 5 (Raymond and Victoria O'Farrell Living Trust)).

DISPUTED. Please see response to #9.

12. Raymond removed all shares of vOr from the Revocable Trust. (Complaint, ¶ 34).

UNDISPUTED that a *pro forma* attempt was made to remove all shares of vOr from the Living Trust.

However, the validity of this action is DISPUTED in several respects, including as a matter of law and fact. A reasonable

APPENDIX - 013

inference from the Record is that Raymond lacked capacity and/or was subject to undue influence, and was carrying out Kelly's intentions, rather than his own.

Further, even assuming Raymond had capacity or acted free from undue influence while serving as Trustee of the Living Trust, Raymond acted beyond his authority to remove all the shares of vOR from the Marital Trust portion of the Living Trust. His authority to remove principal for his lifetime care was limited by the HEMS standard and he had no authority to appoint the Marital Trust property to himself, as described in the response to #9, above.³

Finally, Raymond's attempted transfer of 50% of the shares of vOr from the Living Trust fails as a legal impossibility. As an apparent 'tenancy-in-common' property in the Trust, Raymond's separate share was a right to an interest in the undivided whole: That is, a 50% interest in *each* share, not a 100% interest in 50% of the shares. Raymond's attempt to transfer a full interest in half the shares has no basis in property law. His rights were limited to an

³ There is further debate about Raymond's authority to remove his separate property interest in the vOr shares from the Living Trust. The shares presumably are held as tenancy-in-common property (although further discovery is needed to understand exact ownership) there is debate as to the effect of the transfer and authority of Raymond to sell vOr assets.

assignment from the Trust to himself of a one-half interest in 100% of vOr's shares, with the shares remaining in the name of the Trust.

Further, Raymond's dealings with a third-party on behalf of the Living Trust as co-tenant-in-common gave rise to a fiduciary duty. *See McEwen v. Gotthelf*, 31 S.D. 180, 140 N.W. 264, 266 (1913). The *McEwen* Court stated, "But the rule is firmly established that, when one tenant in common acts as agent for the sale of the whole property to a stranger, then the fiduciary relation arises," and, "the law raised a relation of trust between them that required honesty and fair dealing." On this basis, Raymond's sale of all of vOr's farmland, on behalf of vOr, was in derogation of the Living Trust's intent, it was legally impossible, and its attempt was breach of a fiduciary duty to the Living Trust.

13. On July 22, 2022, First Interstate Bank initiated a foreclosure on the Property. **UNDISPUTED.**

However, this raises a **DISPUTED INFERENCE**. As Victoria O'Farrell attested by Affidavit before her death:

Our lender...has called loans due and threatened foreclosure action because Raymond—under the negative influence of my son Kelly—decided he would not provide

APPENDIX - 015

[the bank] with financial information that the bank required in order for vOr, Inc., to be eligible for refinancing and to avoid being declared in default.

vOr, Inc., was not in arrears on any of its own debt service or loan payments, and none of the other loans for which vOr, Inc., assets had been pledged as security were in arrears on any debt service or loan payments.”

Affidavit of Victoria O’Farrell, June 26, 2022, ¶¶ 10-11, found in 25CIV22-000038. Thus, despite the existence of foreclosure proceedings, the situation was not dire.

14. On or about August 12, 2022, the Hutterian Brethren executed a Purchase Agreement for the sale of the nine contiguous parcels for \$3.2 million (“Purchase Agreement”). (Complaint, ¶ 95; Wipf Aff., Ex. 1 (Purchase Agreement)).

UNDISPUTED., but INCOMPLETE.

The Hutterian Brethren, through acknowledgments in the Purchase Agreement for the sale of the family farmland, had actual and imputed knowledge that the sale by Raymond and VOR was the product of undue influence, lack of capacity, and was an *ultra vires* corporate act, and, that this affected the covenants of good title.

The Hutterian Brethren further had knowledge that vOr was not in genuine financial duress. There was no need for an urgent

APPENDIX - 016

sale of the farmland without a competitive bidding process and without public marketing of the farmland. The circumstances of the sale corroborated the allegations in Victoria's Complaint in 25CIV22-00038. *See*, Wipf Affidavit, Exh. 1, Purchase Agreement, Section 12(b).

15. The Purchase Agreement also gave the Hutterian Brethren a right of first refusal to purchase the other two parcels of land held by vOr and leased the two parcels to the Hutterian Brethren. (Complaint, ¶ 97, 98; Wipf Aff., Ex. 1 (Purchase Agreement)).

UNDISPUTED.

16. As the only owner of vOr, Raymond signed the Purchase Agreement on behalf of vOr in his capacity as President of vOr. (Complaint, ¶ 96; Wipf Aff., Ex. 1 (Purchase Agreement)).

DISPUTED. See response to #34, and to #3, 4, 5, 9, 12, and 14, above.

17. The land sale transaction closed in October 2022. (Complaint, ¶ 59).

UNDISPUTED.

APPENDIX - 017

18. The Hutterian Brethren and vOr initiated eviction proceedings, vOr, Inc. and Grand Valley Hutterian Brethren v. Paul O'Farrell and Skyline Cattle Company case number 25CIV23-000018, to evict Paul and Skyline Cattle Company from the Property.

UNDISPUTED.

19. This Court ordered Paul and Skyline Cattle Company to vacate the Property.

UNDISPUTED.

20. This holding was affirmed on appeal (2025 S.D. 2).

UNDISPUTED. However, disputed inference that the Circuit Court order and subsequent holding on appeal is binding on any of the separate, unrelated issues before the Court in the present matter. The holding of that case was nothing more than that Grand Valley was entitled to immediate possession.

21. Paul died on October 13, 2024.

UNDISPUTED.

APPENDIX - 018

22. In their Complaint, the Plaintiffs allege acts by Paul's brother, Kelly O'Farrell ("Kelly") as the sole basis for their causes of action. (See Complaint, ¶¶ 1, 8, 11-13, 34, 36-39, 42-46, 64, 111- 12).

DISPUTED.

Plaintiff's Amended Complaint, filed by Motion in this matter on March 6, 2025, alleges 'connivance' by Grand Valley, and seeks tort damages as may be substantiated by discovery.

Complaint, Paragraphs 107-120. See, also, Response to Grand Valley's Motion to Dismiss, where this issue is fully briefed.

23. In their Complaint, Plaintiffs' claim that "[i]n 2022, . . . Kelly O'Farrell manipulated his father Raymond and engaged in other misconduct, in order to set in motion an improper and illegal set of maneuvers, all of which were designed to enrich himself at the expense of his parents and his brother Paul." (Complaint, ¶ 8).

UNDISPUTED.

24. In their Complaint, Plaintiffs asserts that Kelly was at the center of all the various maneuvers taken by Raymond, the Revocable Trust, vOr, Victoria, and the Estate of Victoria O'Farrell, see Complaint, ¶ 11, and

APPENDIX - 019

Kelly “secretly began an orchestrated effort to alienate and isolate Raymond from his family, with the intent of thwarting various features of Raymond and Victoria’s Estate plan and disrupting farming operations. This included, for example: ‘removing’ shares of vOr, Inc., from the Trust; ‘separating’ Raymond’s and Victoria’s assets; interfering in Paul’s lending and farming activities; ‘removing’ Paul and Victoria as officers and directors of vOr, Inc.; attempting to fire the attorneys that Victoria hired to stop all of this; and, ultimately, signing a secret agreement to sell nine parcels of family farm ground to the Hutterite Brethren.” (Complaint, ¶¶ 11, 34).

UNDISPUTED, however, disputed inference that Plaintiffs’ claims solely relate to acts or omissions of Kelly O’Farrell. See, e.g. #22.

25. In their Complaint, Plaintiffs further assert the Purchase Agreement signed between vOr and the Hutterian Brethren on August 12, 2022, was kept secret, no authority was obtained via the probate process, and no notice was given until after the closing occurred in October 2022. (Complaint, ¶ 59).

UNDISPUTED.

26. However, because Raymond owned all of Victoria’s shares of vOr by

APPENDIX - 020

operation of the Revocable Trust, and vOr owned all of the Property, the sale of the Property was not subject to the probate process.

DISPUTED. This is another legal conclusion masquerading as an ‘undisputed fact.’

Victoria’s Estate holds an active interest in the restoration of *all* shares of vOr to the Living Trust. And, further discovery will show whether any Victoria held any individual or other rights that existed adjacent to vOr’s sale of the farmland. For example, if Raymond breached his fiduciary duty to Victoria, and, if others facilitated such breach, her Estate would have an interest in pursuing recovery for such breach.

27. Nearly seven months after the sale closed, Paul signed a document purporting to be a “Notice of Rescission.” (Wipf Aff., Ex. 2 (Notice of Rescission)).

UNDISPUTED. The document speaks for itself. And, as argued in Plaintiffs’ Response to the Motion to Dismiss, there is no legal requirement that a rescission abide by specific formalities.

28. Paul signed the purported Notice of Rescission allegedly as VOR’s president. (Id.)

APPENDIX - 021

UNDISPUTED. See #27.

29. Other than recite the legal description of the property subject to the Purchase Agreement, the purported Notice of Rescission states, in full:

Paul O'Farrell, as duly-elected President, and on behalf of vOr, Inc., gives notice of rescission of that certain real estate transaction involving the real property listed below. By this Notice, vOr, Inc. offers to restore to Grand Valley Hutterian Brethren, Inc., that which vOr, Inc. has received from them under the contract, upon the condition that they shall do likewise. (Id.)

UNDISPUTED. See #27.

30. Nearly seven months after the sale closed, Paul sent the purported Notice of Rescission to the Hutterian Brethren, ostensibly on behalf of vOr, and offered to restore to them that which vOr received from them under the contract, upon the condition that they shall do likewise. (Complaint, ¶ 105; Wipf Aff., Ex. 2 (Notice of Rescission)).

UNDISPUTED.

See #27.

31. Paul did not include First Interstate Bank in the purported Notice of Rescission.

APPENDIX - 022

UNDISPUTED. See #27. Nor was there a need to include the Bank in the Notice. That is not how rescission works.

32. Paul did not include his siblings in the purported Notice of Rescission.

UNDISPUTED. See #27. Nor was there a need to include his Siblings in the Notice. That is not how rescission works.

33. Paul did not include Raymond in the purported Notice of Rescission.

UNDISPUTED. See #27. Nor was there a need to include Raymond in the Notice. That is not how rescission works.

34. Paul has not tendered the \$3.2 million to the Hutterian Brethren.

UNDISPUTED.

However, again, that is not required. A notice of rescission is valid if it offers to restore to the other party what was conveyed, if they do likewise.

35. Paul did not present a proposed mortgage or note from First Interstate Bank, or any other bank.

UNDISPUTED. Nor was this necessary. See, # 34.

APPENDIX - 023

36. Paul has not alleged that he has approval to restore the \$3.2 million or that he has \$3.2 million to give to the Hutterian Brethren on behalf of vOr.

UNDISPUTED. Nor is it necessary to allege this. See, #34.

37. No signatory to the land sale transaction has rescinded the Purchase Agreement or sought to unwind the land sale transaction.

DISPUTED. If VOR is a “signatory” to the land transaction, then this is disputed, because a reasonable inference from the Record⁴ is that Paul was the last duly elected President until ousted via Raymond’s illegal acts, and, thus Paul, on behalf of VOR, rescinded the transaction.

38. Paul does not, and did not, own any shares of vOr.

UNDISPUTED. However, this is irrelevant. Paul was the President of VOR and did not need to be a shareholder to exercise

⁴ See, generally, Affidavit of Victoria O’Farrell, and Affidavit of Alex Hagen (Exhibits). Her affidavit and the various exhibits demonstrate a failure of corporate notice for the removal of officers.

that authority.

39. Paul was not the President of vOr at the time of execution of the Purchase Agreement.

DISPUTED. *See, # 37.*

It is undisputed that Paul O'Farrell was named vOr President in 2012, per records on file with the South Dakota Secretary of State, the year after Raymond and Victoria established the Living Trust in 2011.

It is undisputed that Paul remained President of vOr, per records filed with the South Dakota Secretary of State for all years thereafter until 2022, i.e., at the same time as Victoria is sounding the alarm about Kelly's manipulation of Raymond with regard to VOR. A reasonable inference from the existing Record, and which will likely be borne out from further discovery, is that Paul's removal as President was the product of undue influence and a failure of corporate authority, all of which was the product of Kelly's jealous orchestration. Notably, Kelly soon appears on Secretary of State filings, when his name had never previously appeared on any corporate filings.

As described in Victoria's Complaint and Affidavit, *pro*

APPENDIX - 025

forma, but illegal actions were taken to make it *appear* Raymond had taken over as President of vOr. However, Victoria attested that Raymond did not understand what he had done, and her interactions support the conclusion Raymond lacked capacity to serve as officer of any business organization.

Paul was thus legally justified in claiming he remained the President of vOr.

40. Paul is not a director, owner, or shareholder of vOr.

Paul is deceased. However, DISPUTED, in that Paul was a Director and Officer of vOr at all times from 2012 until his attempted ouster in 2022. These attempts are without legal effect, for the reasons set forth in #39.

41. Paul is not a trustee of the Trust.

UNDISPUTED.

However, at the time of his original Complaint, Paul was named in the Living Trust as Successor Trustee. *See*, Living Trust Article 3. Paul sought Raymond's removal and to be appointed Trustee in place of Raymond. That same relief is available now, but to other individuals who can replace Raymond.

42. Paul did not possess the authority to enter into the Purchase Agreement

APPENDIX - 026

on behalf of vOr.

DISPUTED. See #39-41. Like any corporate officer, Paul had authority to act for VOR as its President, provided that the actions were authorized by the Company and did not violate the terms of the Trust.

43. Paul lacks any authority to challenge and rescind the Purchase Agreement on behalf of any party to the contract.

DISPUTED. See #39-41. Paul is now deceased, and the Plaintiffs have authority to challenge the transaction.

44. Paul does not own the property subject to this lawsuit in his individual capacity or in any representative capacity for vOr or the Trust.

UNDISPUTED. Paul is deceased. However, the farmland was held in the title of vOr and the Trust, and for the reasons set forth above, and in his Complaint and in Plaintiffs' Amended Complaint, Paul held a legally cognizable interest in the transaction related to the farmland. The same is true of Skyline Cattle, as well as Paul's descendants as trust beneficiaries.

APPENDIX - 027

45. On March 30, 2023, Hutterian Brethren's counsel rejected Paul's purported Noticed of Rescission. (Wipf Aff., Ex. 3.)

UNDISPUTED. Notably, the rejection of the Rescission did not challenge Paul's authority to issue the Notice, and simply said that Grand Valley did not agree to it.

46. Paul's Complaint requests the Court to rescind the land transaction and for the Court to "impose a constructive trust on the deeds of the land conveyed, as well as upon any funds flowing from the transaction." (Complaint, ¶ 106).

UNDISPUTED, except this relief is now found at ¶111 of the Amended Complaint.

47. Alternatively, Paul requests "[i]f rescission is not available, then, in that case Paul O 'Farrell is entitled to an award of damages for unjust enrichment, and, otherwise." (Complaint, 107)

UNDISPUTED, except this relief is now found at ¶112 of the Amended Complaint.

APPENDIX - 028

48. Paul claims damages are available for Raymond, Victoria, Victoria's Estate, the Revocable Trust, and vOr based on Kelly's acts, and "[d]iscovery will determine the extent and nature of the tort claims...Such damages would be available as a result of conversion, breach of fiduciary duty, and tortious interference with their expected and established relationships." (Complaint, ¶ 111).

UNDISPUTED, except this assertion is now found at ¶116 of the Amended Complaint and has been revised.

49. Raymond is not a party to this lawsuit. **DISPUTED.** Raymond noticed his appearance in April 2023 and has not withdrawn as a party. His presence as a party is appropriate under SDCL 21-24-7.

50. Paul claims "[d]amages...appear to be available to Skyline Cattle and Paul O'Farrell as a result of Kelly O'Farrell's tortious interference in their expected and established relationships." (Complaint, ¶ 112).

UNDISPUTED, except this assertion is now found at ¶117 of the Amended Complaint and has been revised.

51. Paul expressly disclaims any tort damages against the Hutterian

APPENDIX - 029

Brethren. (Complaint, ¶ 114).

DISPUTED. The Amended Complaint (formerly at ¶114 and now at ¶119) has been revised, and it no longer disclaims tort damages against the Hutterian Brethren. Instead, the Amended Complaint at ¶120 now seeks tort damages: “And, if and as discovery shows would be warranted, tort damages may be sought from the Hutterite Brethren.”

52. He states, “No tort damages are sought from the Hutterite Brethren, and Paul sincerely apologizes that they must be made a part of this ordeal.” (Id.) (emphasis in original).

DISPUTED. See #51.

53. The Complaint does not allege that the Hutterian Brethren are wrongdoers or had any notice of any alleged undue influence or fraud.

DISPUTED. See #51.

54. The Complaint does not allege Hutterian Brethren connived with Kelly.

DISPUTED. The Amended Complaint at ¶¶107-110 alleges the Hutterian Brethren connived as to the disputed transaction. The

APPENDIX - 030

Record bears undisputed proof of their willful knowledge of the undue influence over Raymond and his lack of capacity. In short, Grand Valley had actual and constructive knowledge that the land transaction was a product of invalid corporate acts, fraud, and undue influence,” and that Raymond had limited capacity.

55. Count 1 of Plaintiffs’ Complaint does not allege a cause of action against Hutterian Brethren.

DISPUTED. See #51-54. See, also, Chapter 21-24 (Declaratory Judgment Act). Grand Valley is a necessary party to resolving questions related to the corporate acts of VOR.

56. Count 2 of Plaintiffs’ Complaint alleges a remedy, not a cause of action.

DISPUTED. See #51-54.

57. Count 3 of Plaintiffs Complaint does not seek any damages against Hutterian Brethren.

DISPUTED. See #51-54.

58. To date, there is no evidence of what Kelly did or said to Ray giving rise

APPENDIX - 031

to this lawsuit.

DISPUTED, NOT MATERIAL. Undue influence can be shown with circumstantial evidence, rather than with evidence of certain statements. It is, of course, premature to seek summary judgment in an undue influence case when discovery is just beginning. *See*, Rule 56(f) Affidavit.

59. To date, there is no evidence that whatever Kelly allegedly did or said to Ray cause Ray to change the estate plan. **DISPUTED, NOT MATERIAL.** *See* #58.

Dated this 20th day of March, 2025.

HOVLAND, RASMUS,
BRENDTRO, PLLC

/s/ Daniel K. Brendtro

Daniel K. Brendtro
326 E. 8th Street, Suite 107
PO Box 2583
Sioux Falls, SD 57101-2583
(605) 951-9011
dbrendtro@hovlandrasmus.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on the 20th day of March, 2025, a true and correct copy of the foregoing was filed and served through the Odyssey File & Serve System upon:

APPENDIX - 032

Lee Schoenbeck
Joseph Erickson
Schoenbeck & Erickson, PC
1200 Mickelson Dr., Ste. 310
Watertown, SD 57201
lee@schoenbecklaw.com
joe@schoenbecklaw.com

Reed Rasmussen
Siegel, Barnett & Schutz, LLP
PO Box 490
Aberdeen, SD 57402
Rrasmussen@sbslaw.net

William G. Beck
Woods Fuller Shultz & Smith P.C.
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
William.Beck@woodsfuller.com

Jack Hieb
RICHARDSON LAW
1 Court Street
Aberdeen, SD 57401
jhieb@rwwsh.com

George Boos
Susan Yexley Jennen
Boos Jennen Law Firm, LLC
PO Box 254
Clark, SD 57225
George.boos@boosjennen.com
Susan.jennen@boosjennen.com

/s/ Daniel K. Brendtro

Daniel K. Brendtro

APPENDIX - 033

the [Court] to focus on the conduct and role of [the party's] attorney rather than on the evidence"). Pleadings are the statements and claims of *the parties*, not of counsel.

Further, the pleadings speak for themselves. Describing the Complaint via pages and pages of commentary is not what is contemplated by "material facts." *See, Parsons v. Dacy*, 502 N.W.2d 108, 110 (S.D. 1993) (a fact is only "material" when "it would affect the outcome of the suit under the governing substantive law").

Thus, paragraphs 1, 2, 5, 6, 7, 8, 9, 12, 13, 17, 18, 20, 24, 25, 27, 33, 34, 35, and 36 are defective and fail to state "material facts" underlying the claims or defenses of the litigation as required by SDCL 15-6-56(c)(1). Each of those paragraphs should be stricken.

Objection as to Testimony by Raymond O'Farrell

The Defendants' motion relies upon an affidavit submitted by Raymond O'Farrell. Raymond's capacity is in question; and this lawsuit alleges that he is being manipulated into executing documents. A reasonable inference from the Record is that any fact he is alleging is untrue. Further, it will take discovery in this matter to verify to what extent Raymond can participate in these proceedings and submit affidavits and testimony.

Response to Undisputed Facts

In an effort to restate the facts that the Defendants *appear* to be asserting, Plaintiffs have adjusted Defendants' statements of fact, using brackets to remove the defective language and focus on actual facts.

Even if the Defendants had properly asserted their facts with reference to the record and without reference to counsel, over half of them are still disputed. And some of them are just statements of law.

1. [The Complaint] has named VOR, Inc., a South Dakota corporation, as a plaintiff in this proceeding because [Paul O'Farrell, now deceased] used to be an officer in the corporation. (Complaint ¶ 5.) **UNDISPUTED AS MODIFIED.**
2. In multiple paragraphs in the Complaint, [the Complaint] recognizes that [Paul] was not a current officer or president of the corporation. (Complaint ¶¶ 34 & 73.) **DISPUTED AS MODIFIED. The Complaint in paragraph 34 uses intentional quotation marks as to the assertion that Paul and Victoria were "removed" as directors and officers, with the intention of alleging that the purported removal was ineffective. Paragraph 73 states that the elections were void, and, thus ineffective, by which Paul would still be an officer of the corporation.**
3. The 2022 Annual Report of VOR, Inc. identifies the president as Raymond Alvin O'Farrell, and does not identify Paul O'Farrell as an officer, director, or shareholder. (Ex. 1: 2022 Annual Report of VOR, Inc.). **UNDISPUTED, BUT DISPUTED INFERENCE. Filing a form with the Secretary of State does not prove someone is or is not an officer or director or shareholder.**
4. VOR, Inc. retained Schoenbeck & Erickson, PC, to represent it in this litigation and other prior litigation. (Notice of Appearance and Supplemental Notice of Appearance; Aff. of Raymond O'Farrell.) **UNDISPUTED.**
5. [Plaintiffs'] pleadings are alleging actions against VOR, Inc., not on behalf of VOR, Inc. as a plaintiff. (Complaint pp. 18-21.) **DISPUTED AS MODIFIED. The Complaint sought relief on behalf of the corporation, and, Paul sought rescission on behalf of the corporation.**
6. [Plaintiffs are] seeking damages against VOR, Inc. in paragraphs 107 and 108 of [their] Complaint. (Complaint.) **DISPUTED AS MODIFIED. These paragraphs argue that in the alternative "if rescission is not available, then, in that case Paul O'Farrell [and, now his Estate] is entitled to an award of damages for unjust enrichment."**

7. [Plaintiffs issued] a Complaint naming the Estate of Victoria O'Farrell as a beneficial plaintiff. (Complaint.) **UNDISPUTED AS MODIFIED.**
8. [The Complaint] allege[s]...Paul O'Farrell, [now deceased] was an interested party in Victoria's Estate, and therefore, he can bring this suit on behalf of Victoria's Estate. (Complaint ¶ 6.) **UNDISPUTED AS MODIFIED. This is a legally true premise. In situations where the fiduciary of an estate is unwilling or unable to act, there is substantial authority allowing other interested parties to intervene. See, *Beachy v. Becerra*, 609 N.W.2d 648, 651-51 (Neb. 2000) (citing 31 AmJur2d *Executors and Administrators*, § 1285 (1989)) (interested party to an Estate is permitted to bring or enforce claims for the benefit of the Estate when the Personal Representative has failed to act, or when his interests are antagonistic to the Estate, or are otherwise collusive).**
9. [The Complaint] recognizes that...Paul O'Farrell, [now deceased] was not the personal representative of the Estate of Victoria O'Farrell. (Complaint ¶¶ 6, 54-58.) **UNDISPUTED AS MODIFIED, BUT DISPUTED INFERENCE. See, Response to ¶ 8.**
10. Raymond A. O'Farrell is the special administrator of the Estate of Victoria O'Farrell. (Ex. 2: Order Appt. Spec. Admin. and Letters of Spec. Admin.) **LEGALLY DISPUTED. Plaintiffs allege that Raymond's appointment was procedurally defective, and, that his service in the role of Special Administrator is subject to an unwaivable, inherent conflict of interest. See, *Estate of Victoria O'Farrell*, 25PRO22-11.¹**
11. Schoenbeck & Erickson, PC, is the law firm retained by Raymond O'Farrell, as the Special Administrator of the Estate of Victoria O'Farrell. (Ex. 3: Notice of Appearance in Estate; Aff. of Raymond O'Farrell.) **LEGALLY DISPUTED AS TO THE VALIDITY OF RAYMOND'S APPOINTMENT. See, Response to ¶ 10.**

¹ Raymond's role as special administrator would place his interests at odds with Victoria's interests in opposing the land transaction. He would end up on both sides of the VOR claims, which makes his interests "antagonistic to the Estate or otherwise collusive." See, *Hampshire v. Powell*, 10 Neb. App. 148, 155, 626 N.W.2d 620, 626 (2001) ("executor is not 'legally competent' to act in that capacity, where his duties would require him to prosecute on behalf of adversary litigants, a suit which he would at the same time defend as an individual.") (citations omitted). See, also, S.D.R.Civ.P. 17(a) (the real party in interest rule requires cognizable parties on both sides of a suit).

12. Count 2 of [the] Complaint seeks rescission of the \$3.2 million dollar land sale that VOR, Inc., entered into with the Defendant, Grand Valley Hutterian Brethren, Inc. (Complaint pp. 18-21.) **UNDISPUTED AS MODIFIED.**
13. [The] Complaint references and incorporates the August 12, 2022, Purchase Agreement. (Complaint ¶¶95-97.) **UNDISPUTED AS MODIFIED.**
14. The seller under the Purchase Agreement is VOR, Inc., and the individual signing on behalf of the corporation is Raymond A. O'Farrell. (Ex. 4: Purchase Agreement, p. 10 of 10.) **UNDISPUTED.**
15. Raymond A. O'Farrell was the president, director, and owner of VOR, Inc. in August of 2022. (Ex. 1: 2022 Annual Report of VOR, Inc.). **DISPUTED. The Complaint, the attachments to it, and the Record generally demonstrate that Raymond's election as president, director, and owner of VOR are disputed; the disputes include a failure to follow corporate formalities and notice provisions, and, capacity questions, and questions of undue influence.**
16. The Chicago Title Insurance Company issued an Owner's Policy to Grand Valley Hutterian Brethren on completion of the transaction, which would indicate that VOR, Inc. conveyed good title to Grand Valley. (Ex. 5: Owner's Policy.) **DISPUTED INFERENCE. Although a policy was issued, Defendants' assertion about its significance demonstrates a misunderstanding about title insurance. The issuance of a policy indicates that a premium was paid to insure against the risk that good title was not conveyed. The issuance of a title policy does not in any way mean that good title in fact was conveyed.**
17. [There is no] plaintiff that has the legal capacity to challenge a real estate transaction between VOR, Inc. and Grand Valley. *VOR, Inc. v. Estate of Paul O'Farrell*, 2025 S.D. 2, ¶ 28. **DISPUTED. Interested parties to the Trust, and interested parties to the Estate of Victoria can make such challenges. For example, Connor O'Farrell is such a party, as an heir of Paul, as a beneficiary of the Trust, and, as the personal representative of Paul's Estate.**
18. [Paul O'Farrell, now deceased was] alleging that he would have been the beneficiary of an estate plan that would have given him some of the real property, if he had in fact inherited it. (Complaint ¶¶ 92-95, 97.). **UNDISPUTED.**

19. There is no legal basis to assert a claim that you can bring a lawsuit because you had hoped to inherit certain assets that you, in fact, didn't inherit. *Estate of Lynch v. Lynch*, 2023 S.D. 23, ¶41, 991 N.W.2d 95, 109. **DISPUTED. This is a flawed statement of law, rather than a statement of undisputed fact. Trust beneficiaries have standing and ability to seek protection of trust assets, including when the Trustee fails to do so. See, *In Re Betty Luhrs Trust*, 443 N.W.2d 646 (S.D. 1989) (“Preservation of the trust and assurance that its purpose be served is of paramount importance in the law....The interests of the remaindermen in this trust must also be safeguarded.”); *Matter of Estate of Calvin*, 2021 S.D. 45, ¶ 18 (quoting Restatement (Third) of Trusts § 107 (2012) “[a] beneficiary may maintain a proceeding related to the trust or its property against a third party only if.. the trustee is unable, unavailable, unsuitable, or improperly failing to protect the beneficiary’s interest.”); *Estate of Lynch v. Lynch*, 2023 S.D. 23, ¶41.**
20. [Plaintiffs allege] in paragraph 105 of the Complaint that [Paul O’Farrell, now deceased] issued a Notice of Rescission to Grand Valley. (Complaint; Ex. 6: Notice of Rescission.) **UNDISPUTED, AS MODIFIED.**
21. Grand Valley responded with a rejection to the Notice of Rescission. (Ex. 7: Rejection to Rescission.) **UNDISPUTED.**
22. Paul O’Farrell had no legal basis that he could have produced for the Court for how a party that had hoped to inherit real property could rescind a contract where the owner of the property sold it before the beneficiary ever inherited it. **DISPUTED. Similar to Paragraph 19, this is a flawed statement of law, rather than a statement of undisputed fact. Trust beneficiaries have standing and ability to seek protection of trust assets, including when the Trustee fails to do so. See, Response to Paragraph 19.**
23. The Purchase Agreement indicates in paragraph 11 on page 5 of 10 that no personal property was included in the transaction, it only included the real property owned by VOR, Inc. (Ex. 4: Purchase Agreement.) **UNDISPUTED.**
24. [Plaintiffs assert] in paragraphs 107 and 108 of the Complaint a claim for money damages against [...] VOR, Inc.! (Complaint.) **UNDISPUTED, AS MODIFIED. These paragraphs argue that in the alternative “if rescission is not available, then, in that case Paul O’Farrell [and, now his Estate] is entitled to an award of damages for unjust enrichment.” The basis of this**

claim is because Paul personally invested over a million dollars of his own funds to improve the real estate, for which he was never compensated. Complaint, ¶¶ 107-108.

25. [Plaintiffs] plead on page 22 of the Complaint a Count 3 for “Tort Damages.” (Complaint p. 22.) **UNDISPUTED.**
26. Schoenbeck & Erickson, PC represents Raymond O’Farrell, the Estate of Victoria O’Farrell, VOR, Inc., and the Raymond and Victoria O’Farrell Living Trust. (Notice of Appearance and Supplemental Notice of Appearance; Aff. of Raymond O’Farrell.) **UNDISPUTED.**
27. Mr. Brendtro does not represent, as he alleges in paragraph 111 of the Complaint, “Raymond, Victoria, her Estate, the Family Trust, and the Trust Corporation. (Complaint; Notice of Appearance and Supplemental Notice of Appearance; Aff. of Raymond O’Farrell.). **DISPUTED. Paragraph 111 is reprinted below. This paragraph does not make any assertions as to representation. Paragraph 111 simply observes that various parties appear to have been damaged by Kelly O’Farrell’s wrongful acts, and that they may hold the right to recover under theories of conversion, fiduciary duty, and tortious interference.**

111. **Discovery will determine the extent and nature of the tort claims. At present, as a result of Kelly O’Farrell’s wrongful acts, a recovery of damages appears to be available for Raymond, Victoria, her Estate, the Family Trust, and the Trust Corporation. Such damages would be available as a result of conversion, breach of fiduciary duty, and tortious interference with their expected and established relationships.**

28. Count 1 is a collection of claims vaguely asserted by Paul O’Farrell with respect to VOR, Inc., the Raymond and Victoria O’Farrell Living Trust, Victoria O’Farrell’s Estate, and concerning occupancy rights of Skyline Cattle Company and Paul O’Farrell, pursuant to a 2022 oral ag lease. (Complaint pp. 14-18.) **This is not a statement of fact. Count 1 speaks for itself, and, it specifies several issues**

suitable for resolution in a declaratory judgment action.

29. Paul O'Farrell and Skyline Cattle Company have no rights to possession under 2022 oral ag lease. *VOR, Inc. v. Estate of Paul O'Farrell*, 2025 S.D. 2.
DISPUTED. The Court's opinion held that Paul and Skyline do not have rights to immediate possession.
30. Paul O'Farrell sought to intervene in the litigation referred to in paragraph 53 of his Complaint. (Complaint.) **UNDISPUTED. (This "litigation" is referring to Victoria O'Farrell's lawsuit, in which she explained that Raymond was being manipulated by Kelly O'Farrell into making corporate and trust changes that he did not understand. 22CIV22-38)**
31. At the hearing from that proceeding, which hearing Mr. Paul O'Farrell was a party to, Circuit Court Judge Robert Spears issued the following Order on October 26, 2022:

ORDERED, ADJUDGED, AND DECREED that the Motion to Intervene is denied, as the Trust at issue is a Revocable Living Trust and, at a minimum, it allowed Raymond O'Farrell to withdraw certain assets and assign them to himself, including at least 50% of the shares of VOR, Inc. that were contributed;
 (Ex. 8: Order.)

DISPUTED INFERENCE. The rulings in Victoria's case have no legal weight because they were not ever reduced to a final, appealable judgment. Instead, Raymond dismissed Victoria's case. The Court upheld that voluntary dismissal. *Est. of O'Farrell v. Grand Valley Hutterian Brethren, Inc.*, 2024 S.D. 81, ¶ 7. "A voluntary dismissal leaves the situation as if the lawsuit had never been filed...." FEDERAL CIVIL RULES HANDBOOK, 978 (2015); *Nelson v. Napolitano*, 657 F.3d 586, 588 (7th Cir. 2011) ("the effect of a voluntary dismissal is to turn back the clock; it is as if the plaintiff's lawsuit had never been brought"). Raymond cannot rely upon any of those rulings because his attorneys dismissed the case.

32. On December 18, 2024, the South Dakota Supreme Court dismissed Paul O'Farrell's appeal of the Order that denied his intervention. (Ex. 9: Order

Dismissing Appeal.) **UNDISPUTED.**

33. VOR, Inc. has never requested Daniel Brendtro to serve as their attorney. (Aff. of Raymond O'Farrell.) **DISPUTED.** Paul O'Farrell, as an officer of VOR (and, alleging that any subsequent elections were void) brought a Complaint seeking relief on VOR's behalf. See, Complaint, including: ¶¶ 34; 73; 105; 106; 68-75.
34. The Estate of Victoria O'Farrell has never asked Daniel Brendtro to serve as their attorney. (Aff. of Raymond O'Farrell.) **UNDISPUTED.**
35. With respect to the occupancy right, [Plaintiffs] in paragraph 85 of [the] Complaint refers to the Notice received by Skyline Cattle and Paul O'Farrell. (Ex. 10: Notices of Termination of Leases.) **UNDISPUTED.**
36. The South Dakota Supreme Court has decided this issue, and [Plaintiffs] cannot assert that VOR, Inc. and Grand Valley lacked the authority to issue the notice. *VOR, Inc. v. Estate of Paul O'Farrell*, 2025 S.D. 2. **DISPUTED.** The Court ruled that Paul and Skyline did not have immediate occupancy rights, but left all other matters and disputes unresolved.

Dated this 6th day of March, 2025.

HOVLAND, RASMUS,
BRENDTRO, PLLC

/s/ Daniel K. Brendtro
Daniel K. Brendtro
326 E. 8th Street, Suite 107
PO Box 2583
Sioux Falls, SD 57101-2583
(605) 951-9011
dbrendtro@hovlandrasmus.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on the 6th day of March, 2025, a true and correct copy of the foregoing was filed and served through the Odyssey File & Serve System upon:

Lee Schoenbeck
Joseph Erickson
Schoenbeck & Erickson, PC
1200 Mickelson Dr., Ste. 310
Watertown, SD 57201
lee@schoenbecklaw.com
joe@schoenbecklaw.com

Reed Rasmussen
Siegel, Barnett & Schutz, LLP
PO Box 490
Aberdeen, SD 57402
Rasmussen@sbslaw.net

William G. Beck
Woods Fuller Shultz & Smith P.C.
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
William.Beck@woodsfuller.com

Jack Hieb
RICHARDSON LAW
1 Court Street
Aberdeen, SD 57401
jhieb@rwwsh.com

George Boos
Susan Yexley Jennen
Boos Jennen Law Firm, LLC
PO Box 254
Clark, SD 57225
George.boos@boosjennen.com
Susan.jennen@boosjennen.com

APPENDIX - 043

/s/ Daniel K. Brendtro

Daniel K. Brendtro

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS
COUNTY OF GRANT) THIRD JUDICIAL CIRCUIT

--oOo--

THE ESTATE OF PAUL O'FARRELL,
individually and as beneficiary
of the family trust; and for the
benefit of THE ESTATE OF VICTORIA
O'FARRELL; SKYLINE CATTLE COMPANY,
a South Dakota corporation; & VOR,
INC., a South Dakota corporation,

Plaintiffs,

Case No. 25CIV23-000015

vs.

KELLY O'FARRELL, an individual;
GRAND VALLEY HUTTERTIAN BRETHREN,
INC., a South Dakota corporation;
and THE RAYMOND AND VICTORIA
O'FARRELL LIVING TRUST, a South
Dakota trust.

Defendants./

Before

The Honorable Patrick T. Pardy
Circuit Court Judge

Grant County Courthouse
Milbank, South Dakota

Thursday, May 1, 2025

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 045

1 **APPEARANCES:**

2 FOR PLAINTIFFS THE ESTATE OF PAUL O'FARRELL & SKYLINE CATTLE
3 COMPANY; AND LANCE O'FARRELL, INTERESTED PARTY; AND CONNER
4 O'FARRELL:

5 DANIEL K. BRENDTRO, ESQ.
6 Hovland, Rasmus & Brendtro, PLLC
7 326 East Eighth Street, Suite 107
8 Sioux Falls, South Dakota 57103

9 FOR DEFENDANTS RAYMOND O'FARRELL; THE O'FARRELL TRUST; VOR,
10 INC.; and the ESTATE OF VICTORIA O'FARRELL:

11 LEE A. SCHOENBECK, ESQ.
12 Schoenbeck & Erickson, P.C.
13 1200 Mickelson Drive, Suite 310
14 P.O. Box 1325
15 Watertown, South Dakota 57201

16 -and-

17 GEORGE BOOS, ESQ.
18 Boos Jennen Law Firm, LLC
19 312 S. Main Street, Suite 102
20 P.O. Box 1013
21 Milbank, South Dakota 57252

22 FOR DEFENDANT GRAND VALLEY HUTTERIAN BRETHERN, INC.:

23 WILLIAM G. BECK, ESQ.

24 -and-

25 SETH LOPOUR, ESQ.
Woods, Fuller, Shultz & Smith, P.C.
300 South Phillips Avenue, Suite 300
P.O. Box 5027
Sioux Falls, South Dakota 57117-5027

-and-

REED RASMUSSEN, ESQ.
Siegel, Barnett & Schutz, LLP
415 South Main Street, Suite 400
P.O. Box 490
Aberdeen, South Dakota 57402-0490

--oOo--

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 046

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX OF PROCEEDINGS

<u>Description</u>	<u>Page</u>
Defendants' Motions to Dismiss and Motion for Summary Judgment	5
Plaintiffs' Motion to Amend and Plaintiffs' Motion for a 35(a) Examination	57
Plaintiffs' Motion to Take Judicial Notice of Lance Farrell's Affidavit	45
Defendant's Motion to Take Judicial Notice of Probate Ruling	62
Court Decisions (re judicial notice)	65

--o0o--

OBJECTIONS:

FOR GRAND VALLEY HUTTERIAN BROTHERS (BECKI:

Line/Page

48/24

--o0o--

INDEX OF EXHIBITS

<u>Exhibit</u>	<u>Description</u>	<u>Marked</u>	<u>Offered</u>	<u>Rec'd</u>
----------------	--------------------	---------------	----------------	--------------

(No exhibits were offered.)

--o0o--

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 047

1 THURSDAY, MAY 1, 2025, 10:00 A.M.

2 MILBANK, SOUTH DAKOTA

3 --oOo--

4 THE COURT: Good morning, everybody.

5 MR. BECK: Good morning.

6 THE COURT: For the record, your right, my left, please
7 state your names for my court reporter and who you represent.

8 MR. BECK: Bill Beck, representing Defendant Grand Valley
9 Lutheran Brethren, Inc.

10 MR. RASMUSSEN: Reed Rasmussen, also representing Grand
11 Valley.

12 MR. SCHOENBECK: Lee Schoenbeck, representing VOR and
13 Raymond O'Farrell and any of the hats that Raymond wears.

14 THE COURT: And what was that last part?

15 MR. SCHOENBECK: I said, any of the hats that Raymond
16 wears. He is the special administrator of the estate.

17 I'm co-counsel with George Boos. Your Honor, George Boos
18 is -- because he's not up until the probate matter.

19 MR. BOOS: George Boos. I represent Victoria O'Farrell's
20 estate, Your Honor.

21 THE COURT: Okay. And, Mr. Brendtro?

22 MR. BRENDTRO: And Dan Brendtro for the Plaintiffs,
23 including Conner O'Farrell and Lance O'Farrell.

24 THE COURT: Is there anybody else in the audience that
25 thinks they're going to talk? Attorneys? Mr. Lopour?

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 048

1 MR. LOPOUR: No, Your Honor.

2 THE COURT: All right. Okay, we are going to start off
3 with 25CIV23-15.

4 The Defendants each have filed motions for summary
5 judgment. Grand Valley also filed a motion to dismiss. We'll
6 take those two motions first, and then we'll talk about the
7 motion to amend and the Rule 35 Examination.

8 Mr. Beck, are you going first?

9 MR. BECK: I can, Your Honor.

10 Do you want argument on any particular issue? We briefed
11 it extensively.

12 THE COURT: Yes. So sometimes I jump in and ask
13 questions, sometimes I don't. I'll be honest with you, this
14 is your opportunity to give argument if you wish. I've read
15 everything. I have studied it. I may or may not have
16 questions.

17 So basically, I'm going to give you about five to
18 ten minutes to say what you want; and I may jump in, I may
19 not.

20 MR. BECK: Okay, Judge. Knowing that you've read
21 everything and that we've briefed it extensively, I'm probably
22 going to start at the end.

23 What we have is my folks, the Colony, signed an agreement
24 to purchase land; and the Plaintiffs want to rescind that
25 land.

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 049

1 And as I sit here today, I'm left asking questions that
2 I've been asking for a very long time. Prior, was in a
3 motion-to-dismiss context. This is a motion-for-summary-
4 judgment context.

5 And here are my questions: I am left here, not knowing
6 who is suing the Colony. VOR signed a contract with the
7 Colony; and now the Plaintiffs have suggested that VOR is no
8 longer a plaintiff, which I believe is the position that VOR,
9 through Mr. Schoenbeck, has been taking for a very long time.
10 So the Plaintiffs now want to relegate VOR, through their
11 amended complaint, into a nominal defendant in some sort of
12 derivative action. That is the position they're taking. So
13 we don't know who is suing the Colony, who is seeking relief
14 from us; right?

15 Secondly, we are trying to figure out what we're being
16 sued for. Is the Colony being sued as a direct action or as
17 an accessory tort? And as best as I can decipher, the Colony
18 is being sued as an accessory to a tort, a conniver, in the
19 statutes that allow rescission.

20 So there needs to be an underlying tort. And apparently,
21 to the Plaintiffs, that is something Kelly did or didn't do,
22 Kelly being represented by Jack Hieb.

23 And what we have is -- apparently, what the Plaintiffs
24 want to claim is, Kelly did something. Sometimes it's
25 characterized as tortious interference with a contract;

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 050

1 sometimes it's characterized as undue influence. The statutes
2 don't allow rescission for tortious interference. It's not a
3 statutory category for rescission, no underlying tort. We
4 have briefed and put in our statement of undisputed material
5 facts that, as we sit here today, at least two, if not more
6 years longer, that there are no factual allegations against
7 Kelly for undue influence. There is conversation that he
8 unduly influenced Ray, but there is no evidence of that.

9 And I want to find the spot, just to highlight it. But
10 when we filed our factual statement, among other things, we
11 pointed that out. And in particular, we pointed out -- and I
12 want to find the quote, so I don't misstate it -- that there
13 were no factual allegations against Kelly; there was just
14 recitation of five factors against Kelly. And what we were
15 told was, it is disputed whether there's factual allegations
16 against Kelly; but for some reason, it's immaterial as we sit
17 here today.

18 If the Colony is being sued as some sort of accessory
19 under the statute, the conniver to a tort, there needs to be a
20 tort alleged and there needs to be facts alleged; and there
21 haven't been. And we're sitting here, still waiting for that.
22 So we don't know what the tort is, we don't know what the
23 connivance is.

24 We're told that somehow, because a lawsuit was
25 referenced, the Victoria lawsuit was referenced in the

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 051

1 purchase agreement, that we were on notice of everything
2 Kelly must have done. The lawsuit doesn't specifically say
3 Victoria's lawsuit -- which is hearsay, as we briefed -- but
4 even if you take a look at it, it doesn't say what Kelly did
5 or didn't do. It doesn't say it in Victoria's lawsuit; it
6 doesn't say it in Victoria's affidavit. All it says is,
7 "These are the four elements," right? It wants to talk about
8 the elements. But it doesn't talk about, there needs to be
9 some affirmative act that Kelly did that made Ray do something
10 he wouldn't have otherwise done. We don't know what that fact
11 is as we sit here today.

12 We also note, if you look at Victoria's lawsuit, that
13 what she wanted in that lawsuit, apparently, is, she wanted
14 50 percent of the VOR shares to go back to her. Victoria then
15 died, and then the transaction between the Colony and VOR
16 happens. And at that point, there was no way that Victoria's
17 lawsuit could get those things back to her. She died. So at
18 that point, Raymond was in charge of his 50 percent of the
19 shares of VOR, and he became in charge of her 50 percent.

20 THE COURT: Is the Trust anywhere in the record in this
21 case?

22 MR. BECK: The Trust is, Your Honor. I put it into my
23 affidavit --

24 THE COURT: I looked for it yesterday, and I couldn't
25 find it.

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 052

1 MR. BECK: And I can try to find you the affidavit.
2 Otherwise, I think it's also attached to our brief in
3 response -- or our brief in support of our motion to dismiss.
4 But let me try to find you the date of that affidavit, Your
5 Honor.

6 And I apologize, this might take me a second.

7 MR. BRENDTRO: It's March 6th, 2025.

8 MR. BECK: March 6th, 2025. Thank you, Counsel.

9 MR. BRENDTRO: Exhibit 5.

10 THE COURT: March 6th -- and when was it filed? Do you
11 know? Because it doesn't show up here.

12 MR. BECK: Well, hold on here, Your Honor.

13 Yes, 2:37 p.m., March 6th, 2025, there is a transcript --

14 THE COURT: And that's the affidavit of counsel?

15 MR. BECK: Yes, yes. And then Exhibit 5 is what we
16 believe to be the true and correct copy of the Trust. And I
17 don't think anybody disputes that, Your Honor, that that is --

18 THE COURT: Okay, go ahead and tell me what you're
19 arguing with the Trust.

20 MR. BECK: What we're arguing regarding the Trust?

21 THE COURT: Please.

22 MR. BECK: Okay, when Victoria dies, the shares of VOR
23 are going to go to Raymond in one of three ways: Either as
24 the trustee, the remaining surviving trustee of this Trust, or
25 they're going to go -- because he was appointed the special

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 053

1 administrator by Judge Spears, or they're going to -- absent
2 those two things, he is going to inherit it in some way, and
3 then he is in control of all the shares, okay. And then he
4 can exercise, being a hundred percent owner of VOR -- and
5 maybe in different hats -- but being a hundred percent owner
6 of VOR, he can then complete the transaction that the Colony
7 entered into.

8 And so what we're left with is somewhat of a red herring
9 on Victoria's old lawsuit in her old affidavit, because,
10 again, she wanted the shares back. Her affidavit is hearsay,
11 regardless. When she died, her claim to get the shares back
12 went away; and it would have gone to Raymond in one of those
13 three ways: Trustee, special administrator, or by
14 inheritance.

15 Then we get to the remedy, which we've briefed
16 extensively -- which we shouldn't get to; right? There is
17 no -- there's no underlying tort that triggers the rescission
18 statute, because we don't have any allegations against Kelly,
19 so we can't get to undue influence. Tortious interference
20 doesn't trigger the rescission statute. And then we have, as
21 we have briefed, and I won't go through again, a faulty
22 rescission notice. It doesn't include all the parties, it
23 doesn't put the money back. And now, in the latest filings,
24 you're being asked to perform a rescission and figure out what
25 to do with any debt that might be on the land, should it come

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 054

1 back to VOR. And, apparently, the assumption -- the requests
2 you're getting from the Plaintiffs is to assign it to, I
3 believe, Skyline. They want you to assign it to a stranger to
4 the contract.

5 Rescission doesn't allow that. Everybody -- if you're
6 going to rescind, everybody has got to be put back where they
7 were. And that can't happen. There's not \$3.2 million. It
8 has never been offered back, and so the remedy request is
9 defective.

10 And, Your Honor, again, we've briefed everything else.

11 Absent questions, that's my opening.

12 THE COURT: Thank you.

13 And closing? Unless you got something else.

14 MR. BECK: I'm good.

15 THE COURT: Counsel?

16 MR. RASMUSSEN: I join in what Mr. Beck has said.

17 THE COURT: Thank you.

18 Mr. Schoenbeck?

19 MR. SCHOENBECK: Thank you, Your Honor.

20 If I might add one thing to what Mr. Beck said, there is
21 actually a fourth way. I think the evidence is going to show
22 that the fourth way is actually what happened here, which is
23 that Raymond O'Farrell, for tax reasons, from the breakup of
24 his brother's original partnership, was the sole owner of the
25 stock. And when he -- the documents show that. And when he

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 055

1 put the stock in under that Trust -- and I am no trust
2 lawyer -- under that Trust, there's a part of it that provides
3 that if you put some of your individual property in and it
4 comes back, you control it. That's going to end up being, I
5 think in the end, what the evidence would show. So I think
6 there's actually four different ways.

7 But if I might get to where our motion is, and since the
8 Court has read everything, I want to -- and I'm not going to
9 go through the whole thing. But I think one of the points
10 where this discussion has to start, is a point where Mr. Beck
11 ended, because that's really where the story starts. And it's
12 encapsulated in a judgment that the Estate has against Paul
13 O'Farrell, now Paul O'Farrell's estate, which is currently
14 one point two eight eight, five hundred twenty-seven and
15 sixty-six cents -- million. That's on appeal. The argument
16 on that is going to be in June, before the Supreme Court.

17 But we have a judgment against Paul O'Farrell, his
18 estate; and it has to do with the very point Mr. Beck was
19 making about, there was money owed to a bank, and that is why
20 this sale took place. Paul had run up a big debt, pledging
21 VOR's collateral for it, and had gotten his parents to sign.

22 The whole story starts when Raymond refuses to sign
23 anymore for his land to be used for Paul's debt. That's where
24 this starts.

25 And I want to walk, if I could, through Paul's lawsuit --

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 056

1 we call it "Paul's lawsuit." We've been living with this
2 thing for three years now. I didn't even know the O'Farrells
3 before; and now it's like I should be at Christmas with them,
4 I've been so involved. But if you go back to what we call
5 Paul's lawsuit -- this lawsuit -- and if I might, I walked
6 through the steps, the logic of what happened here, taking it
7 right out of their complaint. And this is actually from a
8 brief that went to the Supreme Court in one of the five
9 appeals that have gone to the Supreme Court out of this. If
10 you walk through it, they're alleging: Paul was the primary
11 beneficiary of his parents' estate plan. They say Paul was
12 the president of VOR. Paul believes his mother's estate has
13 claims that aren't being pursued. Paul's company rented VOR,
14 Inc.'s land. This is all their version from their complaint.
15 Paul's father, Raymond, needs protection. Paul's father has
16 been manipulated by Paul's brother Kelly. Raymond should be
17 found in need of protection.

18 So there's the first legal step. There's a collection of
19 dominoes this lawsuit is based on.

20 First, that Raymond needs protection. And this would
21 have been a couple years ago, not even the 86-year-old Raymond
22 that's with us here today. Paul should be appointed as
23 guardian and conservator of Raymond.

24 Now, remember, this is the person that's run up debt
25 against Raymond's assets and wants to do more.

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 057

1 And the second domino they have is to get a
2 conservatorship; and then Paul, of all people, would be
3 appointed by a court as the fiduciary in charge of Raymond.

4 Raymond shouldn't be allowed to serve as a trustee of his
5 family trust. They need a court to take away that from
6 Raymond as well, being the trustee of the Trust.

7 Paul should be named the successor co-trustor of the
8 family trust. So the guy who is renting the land, not paying
9 rent, that had to be evicted, who ran up the debt, that a
10 court would appoint him as the fiduciary to be the successor
11 of the family trustee. These are the dominoes that this
12 lawsuit is based on.

13 Any change in the family trust agreement that diminishes
14 Paul's inheritance should be voided by the trial court.
15 Another part to the lawsuit is, the guy convinced the Court
16 that the decisions made by the trustees have to be voided.

17 The trial court should declare the sale of VOR, Inc.,
18 land to Grand Valley invalid. So he's got to win that. And
19 it isn't just declare it invalid, you've got to do something
20 more than that because they've paid good money for it, a big
21 piece of which went to the bank that had the mortgage.

22 The trial court should unwind the 3.2 million real
23 estate transaction. That's their exact quote, "unwind the
24 \$3.2 million real estate transaction." And this is a -- no
25 trial court has holy water or a magic wand. I mean, it's tied

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 058

1 to what Mr. Beck said about how rescission works.

2 Next, that the trial court should void any corporate
3 actions that kept Paul from controlling the company. So,
4 again, there's all these fiduciary things that have to happen,
5 and he's got to win all these.

6 And then Paul should receive the right to farm the VOR,
7 Inc., land, and then Paul should be able to keep living on
8 the residential property on the VOR, Inc., land.

9 And then -- this is all from their complaint, right
10 from -- I'm quoting paragraphs out of it.

11 Then if the trial court doesn't find rescission is
12 available, then Mr. Brendtro is pleading that Paul, now his
13 estate, should receive a damage award against VOR, Inc., whom
14 Mr. Brendtro has also named as one of his clients, the
15 plaintiff.

16 VOR, I represent VOR. Mr. Brendtro has filed that he
17 represents VOR and they are his client. And he's also, in the
18 same complaint, alleging a damage claim against VOR as part of
19 his alternative relief.

20 We are asking in our summary judgment that we be
21 dismissed out of this case because -- for multiple reasons:
22 He decided to be our lawyer. He sued us in the same
23 complaint. There is no world in which you can do that.
24 That's why, full-stop, we should be out of this case. He
25 can't sue us. We want him to stop representing us. And he

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 059

1 has got an argument in his amendment here that ties in here.
2 He said, "Well, it's a derivative suit." In South Dakota, a
3 derivative suit, you have to be a shareholder. He doesn't
4 represent, and has never represented a shareholder in VOR.
5 This could never be a derivative suit. The only authority he
6 cites is where in the derivative suit a corporation is
7 nominally named. We don't -- we're not a nominal entity;
8 we're a real entity. We want to be out of this case. We
9 don't think he should have named us. But he chose to be our
10 attorney, but he can't sue us and he can't amend the
11 complaint, and now just make us defendants that he's suing;
12 because it's more than nominal when you're trying to create
13 liability for the corporation for \$3.2 million.

14 We have a very real interest in this.

15 So, Your Honor, I won't argue the rest of it. You've
16 read it. But the main thing is, he can't keep representing us
17 and suing us. VOR, Inc., needs to be out of this case.

18 Thank you.

19 THE COURT: Thank you.

20 Mr. Brendtro?

21 MR. BRENDTRO: Thanks, Judge.

22 So the questions that Mr. Beck is asking in oral argument
23 are different than the ones that were asked in his brief.

24 Who is suing the Colony is an easy answer: The
25 Plaintiffs are. The Plaintiffs in the amended complaint will

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 060

1 be slightly different because Paul has passed away. Lance
2 O'Farrell, his brother, is planning on joining the suit;
3 Conner, his son, both in his individual capacity, on his own,
4 and on behalf of Paul's estate. All of these individuals,
5 including Skyline as well, that's already a plaintiff, have a
6 vested interest in whether or not this was a valid deed.

7 Nobody actually briefed the issue of standing. If you
8 had actually, as defendants, briefed the issue of standing and
9 brought it before the Court, you would have seen the elements
10 of standing briefed and arguments made and facts presented on
11 those three elements of standing. That's not there. It's
12 sort of a shadow argument that they're suggesting without
13 actually addressing it, because we can meet standing.

14 This is a declaratory-judgment action, and so it doesn't
15 look like a normal case. It is not a plaintiff-versus-
16 defendant case. The analogy that I use is that it's a soup
17 case. As long as you have parties that are entitled to a
18 declaration of rights and you have an adversarial process, the
19 identity of the parties isn't as important as making sure that
20 all the parties that are necessary are present.

21 And so it is, in essence, not that the Colony is being
22 sued. It is that the Colony is a necessary party because they
23 were a participant to the deed, and the deed can be unwound.
24 There is statutory authority for that and common-law authority
25 for unwinding a transaction like this that is a product of

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 061

1 undue influence.

2 What Mr. Beck then says next is: "What are we being sued
3 for?" And then goes along this straw-man path of an accessory
4 tort.

5 Undue influence is not a tort. Undue influence is a
6 basis upon which to unwind a deed or a transaction. The
7 complaint and the amended complaint spell that out, and
8 explain why it is that we think that the transaction can be
9 unwound.

10 Victoria's affidavit, as well as -- there is a reference
11 to it in Lance O'Farrell's affidavit from the original
12 lawsuit, it was referenced in the record -- identified that it
13 was Kelly that was manipulating Raymond, that Raymond was
14 susceptible, that Kelly was motivated to do so by his ill will
15 or his anger about the estate plan that he found out about,
16 and then there is a result. Those are the four elements of
17 undue influence.

18 Once you have that as a basis, then it is clear that a
19 declaratory judgment could then unwind the deed.

20 What the Colony's defense is, is that they were a
21 good-faith purchaser. That's not something that we have to
22 get into in a complaint; that is their affirmative defense
23 that should show up in their answer: You can't unwind it
24 because we're a good-faith purchaser.

25 So then the question is, what exists in the record to

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 062

1 suggest that they're not? And can you, as a matter of law,
2 declare today that they were absolutely a good-faith
3 purchaser? We can't, for the simple reason that Victoria's
4 lawsuit is referenced in the purchase agreement. That's
5 enough to put anybody on notice that this is not a fair and
6 above-board transaction.

7 The statute talks about connivance, meaning, that another
8 party, a third party that didn't commit the undue influence
9 can be made part of the unwinding process if they connived, or
10 involving connivance in that process of undue influence.

11 The case law has similar language going back to 1921, the
12 *Whitford v. Dodson* case, which Grand Valley cited in their
13 original motion to dismiss back in June of 2023. You're not a
14 good-faith purchaser for value if you have actual knowledge of
15 a defect or knowledge of facts and circumstances that would
16 put a prudent man on inquiry. And when you, in a purchase
17 agreement, identify that there are problems with title,
18 problems with covenants to title because of an existing
19 lawsuit, you are on notice of everything that's in that file.

20 In their briefing, although not in their oral argument
21 today, in their briefing, the Colony claimed that that was a
22 sealed file; that they couldn't have found their way inside it
23 to read it.

24 That's not true. It was not sealed until December of
25 2022, two months after the deed transaction occurred.

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 063

1 Because of that, knowing that the lawsuit existed,
2 knowing that the lawsuit was connected to a problem with
3 title, and having access to the courthouse to go and look, a
4 prudent man would have done so. Whether they had actual
5 knowledge I guess could be determined by further discovery.
6 But they cannot, as a matter of law, at this summary-judgment
7 stage, declare that they were a good-faith purchaser in this
8 and are exempt from further proceedings.

9 THE COURT: When you say "as a matter of law," tell me
10 what law you're talking about. Because -- I'm just trying to
11 follow you. So the purchase agreement says there's this
12 lawsuit, and that's going to affect -- you know, potentially
13 cloud the title.

14 MR. BRENDTRO: Yes.

15 THE COURT: And you're saying that "as a matter of law."
16 So what's the law you're relying on?

17 MR. BRENDTRO: Meaning, summary judgment as a matter of
18 law, Rule 56, that they only could walk out of here today with
19 a judgment --

20 THE COURT: So there's no law that says that's notice.
21 That's what I'm getting at.

22 MR. BRENDTRO: Oh, right. So I'm saying that that is a
23 fact within the record that precludes them from obtaining --

24 THE COURT: You're talking about summary-judgment
25 standards then?

1 MR. BRENDTRO: Yes.

2 THE COURT: All right, I'm following. Keep going.

3 MR. BRENDTRO: Okay, the other important thing to
4 recognize is that these good-faith-purchaser defenses follow
5 a reasonable-person test, that would put a reasonable and
6 prudent person on notice. Rarely, do we have summary judgment
7 granted in a situation where that's the test. And so it's not
8 for this Court to decide. It's for a jury to decide whether
9 or not they were reasonably on notice of defects with the
10 title.

11 The next issue that they argue is that they're not sure
12 what Kelly did or that we didn't assert specific elements as
13 to Kelly that's not necessary. I mean, a complaint can be --

14 THE COURT: They're not saying you didn't argue elements.
15 I believe they're arguing that you didn't state any facts to
16 support the elements.

17 MR. BRENDTRO: So I believe we did.

18 In the complaint --

19 THE COURT: And I don't want to put words in your mouth,
20 Mr. Beck, but is that --

21 MR. BECK: That's the argument, Your Honor. Thank you.

22 MR. BRENDTRO: So the record does contain that -- I mean,
23 the complaint does -- Victoria O'Farrell's affidavit does, and
24 then Lance O'Farrell's affidavit does as well. It's not as
25 extensive, but it was filed at the same time as Victoria's.

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 065

1 it's referenced in one of our pleadings. And it says
2 essentially the same thing: That Raymond had cognitive
3 deficits; that it was Kelly that was manipulating him; Kelly
4 had a reason to, and so it is --

5 THE COURT: Isn't that kind of just a restatement of the
6 elements?

7 MR. BRENDTRO: The way that the affidavit reads, it's not
8 a restatement of the elements. I'm paraphrasing. But, yes,
9 it's sufficient for what we're trying to accomplish here,
10 which is:

11 Is there evidence of susceptibility? Yes.

12 Is there evidence of an opportunity? Yes. He is living
13 with him.

14 Is there a motive? Yes. That's wrongful disposition.

15 And is there a clear result? The answer is yes.

16 It doesn't take much. In fact, the last time I checked,
17 there wasn't a single case where an undue-influence case was
18 granted summary judgment. They are fact-intensive questions
19 for the jury, and it's an area of the law that's based upon
20 circumstantial evidence rather than direct evidence.

21 And so what did Kelly do? I don't know exactly what
22 Kelly did. But the circumstantial evidence indicates that
23 this was a product of undue influence.

24 The next piece of this is this series of suggestions
25 about getting the shares back to Victoria. Now, it's not

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 066

1 getting them back to her. Her lawsuit was attempting to
2 restore these things to the Trust, or whatever had been done
3 to the Trust. She was not attempting to claim them
4 personally. She was seeking this relief on behalf of herself
5 as an interested party to the Trust.

6 An important part of -- I mean, we briefed it extensively
7 and showed it both in the briefing, as well as in the
8 responses to the statement of undisputed facts -- this Trust,
9 although revocable in some ways, the moment that Victoria dies
10 is no longer revocable as to her assets. It becomes
11 irrevocable. That puts it on a clear trajectory on half of
12 the assets, meaning that half of the assets can only be used
13 to support Raymond for his health, education, maintenance, and
14 support. Her half stays in there.

15 There are defects with how Raymond withdrew whatever he
16 was attempting to withdraw from the Trust. Anything that he
17 was accomplishing, at the same time, appears to be a product
18 of undue influence, and therefore voidable; or, without
19 capacity, as Victoria's affidavit suggests as well, that
20 Raymond was substantially impaired.

21 Grand Valley's last point was that the remedy is
22 defective, meaning, that we are asking at some point that
23 these debts be assigned. There is no such thing as defective
24 remedy if equity warrants it. Skyline is a party, and if
25 Skyline is entitled to equitable relief based upon that, at

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 067

1 the end of restoring the status quo, the Court is allowed to
2 award damages to fix whatever is necessary to be fixed.

3 I think, ultimately, Grand Valley's summary-judgment
4 motion boils down to the part where they don't think they were
5 anything but a good-faith purchaser for value. There is
6 enough evidence in the record at this point in time that would
7 suggest that they should have been on notice, and that's
8 enough to forestall summary judgment.

9 This is also an early stage of the proceedings. You
10 know, the goal, after remand, is to start the discovery
11 process. We're getting through the motions phase right now.
12 But that's the purpose of the Rule 56 affidavit, is to point
13 out to the Court that this is an early enough stage that it
14 may not be possible to have all the facts that you would need.

15 But I do believe that there is at least a basic bare
16 minimum of what would be necessary to forestall summary
17 judgment at this point on Grand Valley's motion.

18 The next set of summary-judgment motions on behalf of
19 VOR weren't really discussed at all. Instead, counsel walked
20 through just a litany of, I would say, sort of secondary
21 issues, and not from a point that was in a light most
22 favorable to --

23 THE COURT: Before you leave Grand Valley, I'm sorry.

24 MR. BRENYTRO: Yes?

25 THE COURT: So you're asking for a rescission?

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 068

1 You used the term "unwind." Are you looking for a
2 rescission --

3 MR. BRENDTRO: Yes.

4 THE COURT: -- or unwinding?

5 MR. BRENDTRO: I believe it's --

6 THE COURT: And I'm going by statutory. So you're
7 looking at 53-11 as a legal action, or 21-12 as an equitable
8 action. Is that a fair statement?

9 MR. BRENDTRO: Yes.

10 THE COURT: So under 53-11-2, "A party to a contract may
11 rescind."

12 And you're not arguing your clients are a party to the
13 contract?

14 MR. BRENDTRO: So the distinction here, a 53-11-2
15 rescission versus a Title 21 rescission, is when a law
16 versus --

17 THE COURT: We'll get to that one next.

18 MR. BRENDTRO: Yes, but they're interrelated. And at
19 this stage of a summary judgment, it's important to recognize
20 the distinction.

21 THE COURT: But the way they're interrelated is, in the
22 equity, it says anything that would be covered by 53-11 is the
23 first option. That is how they're interrelated; is it not?

24 MR. BRENDTRO: As a matter of defining them, yes. But as
25 far as how they relate to the facts of this case, I wanted to

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 069

1 point out one aspect of that, which is that at this stage, you
2 don't know which one you'll ultimately rule on.

3 THE COURT: No, I understand; but I can also look to see
4 if there is any that we can rule on.

5 And my question is very simple: Are you arguing he is a
6 party to the contract under 53-11-2?

7 MR. BRENDTRO: So the answer is that Paul, when he
8 brought his original lawsuit, did so after issuing notice of
9 rescission as president of VOR; or at least he attempted to
10 do so as president of VOR and issue a legal rescission.

11 So if that legal rescission that he attempted was valid
12 at that point in time, in March of 2023, then as a matter of
13 a declaratory-judgment action, anybody could then --

14 THE COURT: But are you still arguing today that he was
15 president of VOR when he hired you and sued VOR?

16 MR. BRENDTRO: Again, the argument is that he validly
17 was able to pursue that rescission. The notice of rescission
18 was issued by Paul, that -- on whatever, March 1st of 2023.

19 THE COURT: So does that make him a party, or does that
20 make -- that would make VOR -- assuming for a second that
21 that is a --

22 MR. BRENDTRO: The party question is secondary to that.

23 So the first question is, was there a legal rescission?
24 Well, it looks like there is. If you look at the document, it
25 looks like a notice of rescission issued by VOR. They are

1 saying that Paul didn't have authority; we're saying Paul did.
2 So in order to decide whether there was an actual attempted
3 legal rescission, you have to have a court case, you have to
4 have discovery and have to have findings to determine whether
5 or not there was.

6 THE COURT: What are you relying on that says Paul was
7 the president of VOR?

8 MR. BRENDTRO: That his removal was sudden and based
9 upon the same set of circumstances where Raymond is making
10 decisions that he doesn't understand.

11 THE COURT: That it was sudden?

12 MR. BRENDTRO: Yes. Paul had been the president of this
13 corporation for a decade, possibly, maybe not quite that long,
14 and suddenly is removed, but not by Vicky participating, but
15 by -- it appears to be Raymond's sole act. And Raymond is the
16 party whose capacity and independence is being questioned as
17 part of the rest of the lawsuit.

18 If Paul's removal as president was void because of either
19 of those reasons -- or failure of corporate formality, the
20 presence of undue influence, or lacking capacity, then Paul
21 remained the president as of March 1st of 2023.

22 THE COURT: Okay, so I want you to stop right there; and
23 I want -- I want to hear from over here on that issue only,
24 please, from somebody on the removal -- he says it was sudden,
25 and Raymond didn't have the authority to do it, is basically

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 071

1 if i was to sum that up.

2 Does somebody wish to address that?

3 MR. SCHOENBECK: Yes, Your Honor. Raymond is a
4 shareholder. This gets back to why I laid out all the
5 dominoes --

6 THE COURT: I get it. But between him and Victoria, did
7 he need her support?

8 MR. SCHOENBECK: No, he did not.

9 THE COURT: Explain that to me.

10 MR. SCHOENBECK: Because at one point -- and I can't
11 remember the dates how this happened -- but he could vote
12 her -- he could vote the shares -- and I ought to have Susan
13 here, but -- and then all the shares eventually were
14 distributed out to Raymond. He could vote all the shares, but
15 he voted the shares either as the trustee or as the owner.

16 THE COURT: Well, this happened before the -- before she
17 died.

18 MR. BECK: I believe the transaction happened after she
19 passed.

20 THE COURT: After? Raymond was removed. Not the
21 transaction for the purchase. When was he removed from VOR?

22 MR. BECK: When was Paul removed, you mean?

23 THE COURT: Correct, as president.

24 MR. SCHOENBECK: Your Honor, could i defer to -- in
25 fairness, Susan is the lawyer in our office, but George --

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 072

1 THE COURT: So I don't know who Susan is, but if --

2 MR. BOOS: That's my partner, Your Honor. Susan Jennen.

3 THE COURT: Okay, so for my court reporter, state your
4 name again.

5 MR. BOOS: I agree that Raymond removed Paul as president
6 of VOR months before the transaction involving -- basically,
7 there was threat of the foreclosure by a bank, on VOR's land.
8 Raymond reacted to the bank's threat of foreclosure on their
9 land, on VOR corporate lands --

10 THE COURT: So my only question is, what was his
11 authority to remove Raymond from the record?

12 MR. BOOS: To remove Paul?

13 THE COURT: Excuse me, to remove Paul.

14 MR. BOOS: Raymond is the -- was the owner of 100 percent
15 of the shares of the stock as trustee or as an individual.

16 THE COURT: And that's in the record? In this file?

17 MR. BOOS: It is part of my motion on the report. I'm
18 not finding any assets that shows that the --

19 THE COURT: But that's a different file.

20 I'm asking, is that in the record in this file?

21 MR. SCHOENBECK: I make it a habit of not misleading
22 courts, so I'm going to tell you, I can't tell you that as I
23 sit here at this moment.

24 MR. BECK: Your Honor, I don't think that particular
25 document got filed that Mr. Boos is talking about.

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 073

1 THE COURT: So when I look squarely at this record, how
2 do I know that Raymond had the authority to remove Paul as
3 president?

4 MR. BECK: I think --

5 THE COURT: I'm bound by the record.

6 MR. BECK: Yep. I think you can take judicial notice of
7 what was filed in the other case that you're about to hear in
8 a little bit. And I also think in -- this is a thought, that
9 I haven't gone through and studied this because it doesn't
10 necessarily pertain to my client, but I think Raymond had a
11 power of attorney.

12 THE COURT: So I want to back up. Just so everybody is
13 on fair ground, it's mind-boggling to me that these cases have
14 not been consolidated, and I'm not consolidating them today.
15 Judge Spears apparently thought they were consolidated, and
16 the Supreme Court pointed out to him they weren't. I think
17 they sent an invitation to the parties, while these five cases
18 contain some overlapping issues, none have been consolidated.
19 None of the settled records contain a motion to consolidate
20 any of the actions. Consequently, we consider and resolve
21 each case individually, just exactly what I'm doing today.

22 Now, you said I could do something. Nobody has asked me
23 to do anything. I'm just telling you right now, I'm trying to
24 settle this case on this record and each of the others.

25 MR. BECK: Your Honor, if I may. I think what happened

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 074

1 was, Judge Spears was asked to take judicial notice of the
2 various cases.

3 THE COURT: That's a whole different issue, and there's
4 a dissent. And I'm very familiar with Judge Myren's position
5 when he wrote the decision, and Justice DeVaney and
6 Judge Kerr, their dissent. I get all of it. And I also
7 understand what he did out of memory from stuff. But I'm
8 staying out of that. And this Court has not been asked to
9 take judicial notice of anything.

10 So unless somebody figures out some way to get something
11 in front of me that may or may not be critical, I'm just
12 telling you, from the record, I'm trying to figure out, did
13 Raymond have the authority to remove Paul as president, and
14 that's my question I'm laying out.

15 MR. SCHOENBECK: I would say that what is in the record
16 for this motion is that Raymond is the president. In the
17 annual report, it shows he is the president of the
18 corporation.

19 You're actually asking about something that happened
20 before that.

21 THE COURT: I think that's the argument, is it not, that
22 he was improperly removed; and therefore, as the president of
23 VOR, he would have had to be a part of the sale, maybe?

24 MR. SCHOENBECK: But there is no shareholder that is
25 contesting the removal of Paul and the appointment of Raymond.

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 075

1 as president. There is no shareholder making that allegation.

2 THE COURT: Okay.

3 MR. SCHOENBECK: And the shareholders elect the officers.

4 THE COURT: All right. You may continue, Mr. Brendtro.

5 MR. BRENDTRO: I think where we left off and -- or do you
6 want to go somewhere else --

7 THE COURT: I pulled you back to this, to the Hutterian
8 Brethren or the Colony.

9 MR. BRENDTRO: Yes.

10 THE COURT: You can move on to your next issue.

11 MR. BRENDTRO: Even if we see a document that says
12 somehow that Raymond could have authority to do this, the
13 secondary question is, was he manipulated into doing so. And
14 so you can't rely upon a document at this stage because there
15 is enough evidence in the record to suggest that Raymond was
16 both susceptible to undue influence and that his actions were,
17 indeed, the product of undue influence.

18 If, however, Paul was not the president as of March 1st
19 of 2023 and could not issue a legal rescission, then we fall
20 back to the equitable rescission, meaning, we just go back and
21 ask the question: Was this transaction a product of undue
22 influence? And then the question would be: Who is able to
23 seek a remedy like that? And the answer is, somebody who has
24 got an interest in the outcome.

25 The parties that have an interest in that outcome would

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 076

1 be Skyline, as a company that had a long-term farming
2 partnership and is --

3 THE COURT: So I want to stay on that then, if you want
4 to.

5 MR. BRENYTRO: Okay.

6 THE COURT: So under the equitable rescission, you have
7 to first be able to do it under 15-11-2. That's number one.
8 And to do that, you have to be a party to that contract.

9 The second one in rescission is, "Where a contract is
10 unlawful for cause not apparent upon its face and the parties
11 were not equally at fault." Again, you would have to be a
12 party to the contract.

13 And, three, "When the public interest will be prejudiced
14 by permitting it to stand." I don't -- I mean, there may be
15 interest between the parties. I don't see a public interest
16 here.

17 But those are the three that are under the "equitable"
18 statute, or the equitable ways of doing it.

19 MR. BRENYTRO: I don't think the equitable statute
20 defines it in terms of parties.

21 THE COURT: I'm reading it. It says, "Where the contract
22 is unlawful for cause not apparent upon its face and the
23 parties were not equally in fault."

24 MR. BRENYTRO: Which statute in 21?

25 THE COURT: 21-12-1.

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 077

1 MR. BRENDTRO: And so the lead-in says that, "On
2 application of a party aggrieved." I don't think it has the
3 same meaning as the "party to the contract."

4 But even if it does, as a declaratory-judgment action,
5 anybody who is a beneficiary of an irrevocable trust and
6 anybody else that has an interest in this action can ask for
7 that relief, ask for a declaration that this is an invalid
8 deed, meaning, that Victoria's half, the irrevocable half, can
9 seek that relief; and any other party who is permissible under
10 a declaratory-judgment action, meaning, somebody that has a
11 threatened or actual injury and is able to demonstrate
12 causation between the injury and the present circumstances,
13 and then a remedy.

14 And the purpose of the equitable statute is sort of the
15 wrap-around, that if it wasn't a completed legal rescission,
16 as a matter of equity, you were able to go look at it and fix
17 it that way.

18 THE COURT: Does this count pertain to the Trust?
19 Meaning, the Trust as a party?

20 Your client has agreed that his allegations are against
21 Kelly, not the Trust. Is that a true statement?

22 MR. BRENDTRO: For this count? Are you talking about the
23 rescission count?

24 THE COURT: Yes, Count 3, as it relates to the Trust.

25 MR. BRENDTRO: Well, Count 2 is the rescission -- well,

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 078

1 which version are we talking about?

2 THE COURT: The current one that we're working off of.

3 MR. BRENDTRO: Okay, so that Count 2 is rescission.

4 THE COURT: Okay.

5 MR. BRENDTRO: Count 3 is tortious interference against
6 Kelly and whatever tort damages.

7 THE COURT: Under that count, Count 3, he is not after
8 the Trust, he is alleging it against -- his allegations are
9 against Kelly; correct?

10 MR. BRENDTRO: For the tort damages, at this point in
11 time, yes.

12 THE COURT: Okay.

13 MR. BRENDTRO: But, again, undue influence is not a tort;
14 undue influence is the basis for unwinding or invalidating an
15 agreement.

16 THE COURT: All right.

17 MR. BRENDTRO: And so you don't plead undue influence
18 against a party, you plead it against a document. And that's
19 what's going on in Count 2, and that's what's going on in a
20 declaratory judgment action, which is saying: "This is an
21 invalid document. There are other parties that would have an
22 interest in whether or not this is valid or not."

23 My clients, the Plaintiffs in the existing complaint, and
24 the Plaintiffs in the amended complaint, all have a vested
25 interest in resolving that issue, as does Victoria's estate,

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 079

1 Victoria, her half of the trust.

2 And so the remedy then, or the procedural remedy is a
3 declaratory-judgment action. You put it all together and try
4 to figure out the answer.

5 The series of motions that were actually filed by VOR
6 are very narrow: Narrowly focused, narrowly described. And
7 they only take a handful of pages to describe them all. And
8 they do not provide a basis for judgment as a matter of law
9 under Rule 56.

10 VOR's -- I should point out, too, the motion is brought
11 ostensibly on behalf of VOR, the Trust, and the Estate. The
12 problem with the Estate is, the Estate shouldn't be acting --
13 there's a petition for removal. And once there is a petition
14 in place, you're not supposed to take any further action on
15 behalf of the Estate until that question is resolved. So the
16 Estate shouldn't be joining this in the first place.

17 Whether Raymond has the capacity to do so as trustee is,
18 I think, an open question. VOR is asking for this relief as
19 an entity.

20 The first motion asks to dismiss VOR as a plaintiff. The
21 amended complaint resolves this in the same way that the
22 recent federal district court case in South Dakota did, which
23 is that when you're bringing claims that are in some way
24 derivative and asking a corporation to act, you can do so as
25 a plaintiff. When the corporation objects, then you make the

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 080

1 corporation a defendant; but you're still able to pursue that
2 same relief, because they're a nominal party.

3 The derivative part of this is that Victoria's trust, the
4 irrevocable half of that, is or should be a rightful
5 shareholder to VOR. VOR is not just this random company that
6 floats out there; VOR was populated by two shareholders, both
7 of which put their shares in there as part of a trust
8 agreement. So it's not this independent company that we would
9 think of in the same context as every other ordinary
10 derivative suit.

11 At this point in time, Victoria's estate and/or
12 Victoria's half of her irrevocable trust have an interest in
13 resolving that as a derivative action or just for its own
14 sake. But VOR is a proper party to this action.
15 They're a necessary party. And if they need to be put in the
16 defendants' column, that's fine. It's a nominal position. It
17 doesn't affect any conflict-of-interest rules. We have
18 briefed that extensively. It's not an actual thing.

19 The second motion that they filed was to dismiss the
20 Estate as a plaintiff. If you read the complaint, if you read
21 the caption, the Estate is not a plaintiff. Paul brought the
22 relief on behalf of -- or for the benefit of Victoria's estate,
23 not claiming that he was her personal representative or
24 claiming that he was the estate.

25 There are pretty specific and direct elements of common

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 081

1 law and treatises that say that this is permissible. It's
2 permissible when somebody refuses to act and to bring their
3 relief on behalf of the Estate.

4 We know that the Estate refused because Dave Geyer filed
5 an affidavit back in the probate file back in 2022, showing
6 that he asked Raymond's counsel to pursue Victoria's lawsuit
7 on her behalf; they refused. And so ever since, Paul has been
8 attempting to pursue the relief that Victoria was attempting
9 to pursue, as well as his own relief.

10 So there's -- the second motion for summary judgment on
11 behalf of VOR should be denied. There is nothing to dismiss.
12 The Estate is not a plaintiff; and nobody has refuted the
13 basic premise that when a fiduciary for an estate fails to act
14 and leaves a claim out there that needs to be pursued, that
15 someone else can do so on behalf. That is what's happening
16 here.

17 The third motion for summary judgment on rescission
18 should be denied on its face. They provide two pieces of
19 fact: That there was title insurance, and that the South
20 Dakota Secretary of State's records show that Raymond is the
21 president. But those are not determinative. Those don't
22 prove anything. Those are -- they just aren't. They're not
23 determinative of an issue of whether or not title was validly
24 given in this case. There are numerous other facts that play
25 into that.

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 082

1 There is an allegation that Paul brought this because he
2 hoped to inherit. Well, once Victoria dies, section 5 of the
3 Trust makes part of this irrevocable, meaning, that Paul was
4 going to inherit. Paul passed on in October; and so Paul's
5 children are now going to inherit that half of the trust as
6 an absolute certainty. It is irrevocable. It was the moment
7 that Victoria died, making sure that the assets that are
8 supposed to be in that portion of the trust is part of what
9 this lawsuit is about. And anybody who is a beneficiary --
10 Paul at the time, now Paul's children, and Lance, his
11 brother --

12 THE COURT: I'm trying to keep this -- stay as narrow as
13 I can between the two cases. How does any of the property get
14 into the Trust, as the file sits today?

15 MR. BRENDTRO: As the file sits today --

16 THE COURT: As the probate file sits today. There has
17 been a will discovered but not an original.

18 MR. BRENDTRO: How does the property get into the Trust?

19 THE COURT: It's a pourover will; correct?

20 MR. BRENDTRO: Yes.

21 THE COURT: And if that will doesn't exist, it's an
22 intestate inheritance to her spouse.

23 MR. BRENDTRO: So there are a couple of steps to that.
24 One, is that you can petition the Court to accept, for probate,
25 a copy of a will. We can provide testimony from her attorneys

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 083

1 that helped her draft the will and explained what the will was
2 for. There is no evidence that it was actually revoked. And
3 so the next step will be -- you know, and I'll just tell you,
4 that's the plan. We're going to submit that will. Lance is
5 going to submit that and ask it to be probated.

6 But I don't know that that necessarily impacts the Trust
7 because if the assets were improperly removed from the Trust,
8 then the remedy is to put them back in the Trust. It doesn't
9 have to go to her estate first and then go back in.

10 I think it's a direct link. That if these transactions
11 were wrong, meaning, someone put their hand in the cookie jar
12 and took things out, you put them back in the jar, and then
13 that's how that works.

14 There is -- next, the fourth motion for summary judgment,
15 saying that there is no such thing as tort damages, the
16 heading is broad on purpose. Count 3 in the original
17 complaint, Count 4 in the amended complaint, specifically
18 identify a tort that certain plaintiffs have against Kelly,
19 tortious interference. And it outlines, for the purpose of
20 everybody else to see, that there are other potential tort
21 claims that may be brought; that parties may want to bring or
22 may need to bring in order to pursue the correct remedies,
23 including Victoria's estate. To the extent that she was
24 personally damaged by breaches of fiduciary duty of either
25 her son or her husband would have claims that could be pursued

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 084

1 that way.

2 At this point in time, the amended complaint does not
3 seek actual damages for an actual tort against the Colony.
4 But an amendment was made between the original complaint and
5 now, to make clear that it's possible that that may occur,
6 depending on what discovery bears out, what involvement they
7 had, whether it was -- you know, whether the Colony had direct
8 involvement in this process. There may be, but that's not
9 something that we need to decide now.

10 But as to VOR's motion for summary judgment, the fourth
11 one, the only actual argument that's made in that is the
12 sentence that, "No tort claims are pled against the Trust."
13 Against the Trust. That's true. We're not suing the Trust
14 for tort claims. So, yes, there's nothing -- I mean, if
15 that's what summary judgment is granted on today, that the
16 complaint doesn't seek tort damages against the Trust, I guess
17 you can do that. But the complaint doesn't even ask for that,
18 so it's a silly judgment to get.

19 And then -- and it certainly wouldn't dispense with the
20 rest of the relief that's claimed in there. And Kelly,
21 himself, has not filed a motion to dismiss Count 3.

22 The fifth motion for summary judgment in VOR's packet
23 then relates to Count 1. And it's a bit confusing, and they
24 don't necessarily say it out loud; but what they're arguing is
25 that none of the plaintiffs can obtain relief because of two

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 085

1 arguments of res judicata. Neither of the res judicata
2 arguments are spelled out that way; neither of them are
3 sustainable. They're not valid arguments.

4 The first one is this idea that Judge Spears, in October
5 2022, made a conclusion that it was an irrevocable -- or that
6 it was a revocable trust and Raymond could do whatever he
7 wanted to do with it. Judge Spears certainly said that,
8 but that ruling has no force whatsoever because they dismissed
9 that case. It just disappears. And we cited to the case law
10 that that is what happens: When you dismiss a case, it's as
11 if it never happened.

12 The second piece is they cite to a paragraph in the
13 eviction appeal, the 2023 SD 2, saying that there are no such
14 claims because of one paragraph in that.

15 Judge, you've read it. It doesn't say that, and it
16 doesn't stand for that proposition.

17 The whole point of the appeal was us saying, "We have an
18 affirmative defense or a counterclaim relative to these
19 eviction claims. They should be heard in the same suit."

20 And the Court said, "No. Immediate possession goes to
21 Grand Valley." Everything else then is reserved for later.
22 There is no res judicata argument that arises out of that
23 case. You can read it backwards and forwards, it's just not
24 there.

25 The factual rendition that VOR's counsel offered is far

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 086

1 afield from the filings. I mean, it's way beyond what they
2 argued. But I think it's important for the Court to recognize
3 that this farm debt that's attached to this land in 2022 had
4 been there for a while. Like most farms, there is an
5 operating note that gets renewed each year. And so when Paul
6 took over the farm, he owns Skyline, the company that's
7 farming it; and VOR as the entity that owned the land, as part
8 of the Trust, secured the farming loans. But each year that
9 Paul was involved, generally, he is farming efficiently and
10 starting to pay that down, meaning, he inherited debt on the
11 whole process when he first started. And the evidence will
12 show, eventually, when we get to that point, that he is paying
13 it down. He borrows money to build a house on that land that
14 Skyline borrows, meaning, his own company borrows it; and then
15 it's secured by the land itself.

16 Lance, as well, borrows money from -- he borrows money to
17 build a house, and it's secured by VOR's land. Lance then
18 sells his house and then pays down that debt. And so there
19 is debt. It's a million dollars; but it's four, five million
20 dollars' worth of farmland. And it's not anything unusual.

21 And every single year -- the evidence is clear in the
22 record, every single year the family renewed the notes at the
23 bank because that's what they did. And there was no concern
24 that somehow anybody was looting anything or running up big
25 debts. It was a sustainable operation. And Paul proved that,

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 087

1 as Paul was paying down the debts.

2 The idea that Paul wasn't paying rent is also false. The
3 documents that eventually, when we get to that point, show
4 that Paul did pay rent. Paul had a partnership that lasted a
5 decade or so with VOR.

6 Judge, it's a complicated case. It's a complicated
7 complaint. The amended complaint doesn't make it simpler. I
8 mean, it fixes some things and clarifies what we do with
9 parties.

10 I assure you that if I thought there were a simpler way
11 to do this, I would do it. If there were a one-page, you
12 know, simple Rule 8(b) complaint that would fix this, I would
13 do it.

14 The fact that it's complicated, though, is not the
15 Plaintiffs' fault. This is a circumstance that we're trying
16 to fix that has so many pieces. It's like the proverbial
17 opening of a pillow case and dumping the feathers in the
18 river; right? Getting them back into that pillow case is
19 incredibly hard. That's where this is at, that's why the
20 complaint is so long, the procedure is complicated. But there
21 is authority for every single piece of the law that we've
22 provided. In the pleadings, there is authority for every
23 single response that we made in our briefing.

24 Victoria's affidavit, Lance's affidavit, also from the
25 probate file --

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 088

1 THE COURT: So -- and that's what I'm looking for right
2 now, is Victoria's affidavit. Where is that at? I'm trying
3 to find it.

4 MR. BRENDTRO: So we attached that to the original
5 complaint. So if you go back to the --

6 THE COURT: I've got it.

7 MR. BRENDTRO: -- third document, I think.

8 And then, Judge, I would ask -- it's mentioned in some
9 of the pleadings, it's available for the Court to find; but we
10 would ask the Court to take judicial notice of Lance Farrell's
11 affidavit in the probate -- sorry, in Victoria's original
12 file, 25CIV22-38. And that was filed on 6/28/22. It's
13 approximately -- well, it is 32 paragraphs long. And so it's
14 not just a cursory recitation of the elements. It provides
15 specifics relative to the various elements of undue influence,
16 and suggests also that Raymond lacks capacity.

17 Based upon that, based upon Lance's affidavit, Victoria's
18 affidavit, the rest of the documents, the fact that the Trust
19 contains an irrevocability provision upon Victoria's death
20 granting standing to any of her beneficiaries, and because of
21 the way the purchase agreement was written, where it says,
22 "Hey, guess what? When we covenant good title, there's a
23 potential issue because of Victoria's lawsuit," you can't
24 grant summary judgment today.

25 When all the facts are in, I certainly expect that we

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 089

1 will be here again to walk through each element of each claim;
2 but today, you can't do that.

3 MR. SCHOENBECK: Your Honor, would there be a brief
4 opportunity to reply?

5 THE COURT: Yes. I'm just trying to -- I might have
6 another question for him. I'm just trying to find something
7 that I read earlier.

8 I'm here all day. And from reading the transcripts,
9 that is probably a good assumption.

10 So show me in Victoria's affidavit, which was attached
11 to the complaint, "I think" -- "I believe my husband is
12 vulnerable, and I believe he was manipulated." And that's
13 paragraphs 24 and 25.

14 There was an earlier paragraph, I can't find it, where
15 she said something along that same line, where, something
16 like, "I think" or "I thought." But show me in the record --
17 in this record -- where there is something other than
18 speculation. "I think he's vulnerable," something other than
19 conjecture. I won't use the word "fantasy," but that's what
20 the standard is.

21 So specific allegations towards undue influence that's
22 in this record.

23 MR. BRENTRO: Is there a specific element? So we have
24 susceptibility --

25 THE COURT: I know the elements. But she's got to have

1 underlying facts alleged to beat a summary judgment.

2 MR. BRENDTRO: Okay, so I don't think anybody disputes
3 opportunity.

4 I'll do the easy ones first: Opportunity. Kelly is
5 living with Raymond, and Victoria is moved to a nursing home
6 at the time this happens.

7 THE COURT: And she says that in her affidavit, Kelly
8 lived with him -- him and his wife, or whoever took care of
9 him.

10 MR. BRENDTRO: Yes. So that's opportunity.

11 A clear result, the \$3.2 million transaction, as well as
12 a whole bunch of things taking place before that, that
13 Victoria is talking about relative to the corporation. So
14 that is the fourth element.

15 You're asking then about susceptibility. The case law --

16 THE COURT: I'm asking about some overt act that Kelly
17 did.

18 MR. BRENDTRO: So that's an error. And that's the issue
19 that caused the Tank case to go up on appeal in 2020, and it
20 was sent back because the judge was looking for direct
21 evidence of undue influence --

22 THE COURT: That's in summary judgment. But I've still
23 got to have something that the jury can look at and say -- are
24 you saying the result is self-proving?

25 MR. BRENDTRO: No, I'm not. I haven't gotten to

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 091

1 susceptibility yet.

2 THE COURT: Go ahead.

3 MR. BRENDTRO: So susceptibility, the case law says you
4 can prove that people that are old are going to be susceptible
5 as a baseline; and people that have health problems would be
6 susceptible, and people with cognitive impairments.

7 So Vicky describes, in a handful of paragraphs, specifics
8 related to Raymond's health and his mental abilities. Those
9 would go towards susceptibility.

10 Lance's affidavit does the same. He uses different
11 language. But he -- he says, "In my view, my father does not
12 have the understanding, sophistication, or motivation to
13 formulate a plan to remove my mother and brother from a
14 corporation board of directors," so, meaning, firsthand
15 observation, "That's not the kind of dad that I know. He's
16 not capable of doing that."

17 Lance's affidavit says --

18 THE COURT: Lance's affidavit is not in this file.

19 I'm asking about Victoria right now.

20 MR. BRENDTRO: Okay. I've asked you to take judicial
21 notice of it.

22 THE COURT: And I might. I haven't decided yet.

23 MR. BRENDTRO: Okay.

24 MR. BECK: Your Honor, can I just lodge an objection to
25 that, before I forget?

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 092

1 THE COURT: To the --

2 MR. BECK: Taking judicial notice of Lance's affidavit.

3 The Victoria file, according to Mr. Brendtro, has been
4 sealed since, what, December of what year?

5 MR. BRENDTRO: '22.

6 MR. BECK: Okay. I can't access it. My secretary can't
7 even get a docket sheet for me. Lance's affidavit was not
8 filed here. I shouldn't have to contest with Lance's
9 affidavit today at the summary-judgment hearing. If that was
10 going to be filed, it needed to be filed pursuant to Rule 56.

11 I object to judicial notice of it. I object to Lance's
12 affidavit in whole as untimely.

13 THE COURT: And then so I'll rule on that before I leave.
14 If I forget, remind me.

15 But please address it through Victoria's affidavit.
16 Because I believe that's the only document -- and you can
17 correct me if I'm wrong -- that lays out potential undue
18 influence in this file.

19 And then I'll follow up with another question: If
20 there is no undue influence -- well, let me say this -- or
21 go ahead, just address this and we'll follow up.

22 MR. BRENDTRO: I want to point out as well, that her
23 affidavit also raises a question of fact as to Raymond's
24 capacity, which is a separate question, that she is saying
25 that he's had a lot of strokes, alcoholic, eighth-grade

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 093

1 education, not capable of making decisions. So either of
2 those would be enough.

3 I will point out as well that one of the documents that
4 we did file in March of this year included quotes to Lance's
5 affidavit, and a footnote for where the Court could go to find
6 it. And so --

7 THE COURT: But that was a brief.

8 MR. BRENDTRO: Right. But it's not a surprise that
9 Mr. Deck is arguing. It's not a legitimate defense. It was
10 referred to; and he didn't ask for a copy.

11 THE COURT: All right. We'll come back to that.

12 I'll let you wrap up.

13 MR. BRENDTRO: You asked me to find stuff in the
14 affidavit.

15 THE COURT: Well, I don't want to sit here for 20 minutes
16 while you read it. If you had something off the top of your
17 head that you could argue, I'll let you.

18 MR. BRENDTRO: Sure.

19 THE COURT: It speaks for itself.

20 MR. BRENDTRO: It does. But as for the elements then,
21 the ones that are missing are susceptibility and Kelly's
22 wrongful disposition.

23 There is a -- but Victoria's affidavit, in at least five
24 or six places, talks about items that a jury could use to find
25 susceptibility. And then Victoria's affidavit also then

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 094

1 explains the basis for why Kelly would be motivated to do
2 something like this.

3 THE COURT: Is that affidavit even admissible?

4 MR. BRENDTRO: Yes.

5 THE COURT: Subject to cross-examination?

6 MR. BRENDTRO: It doesn't have to be. Decedent's
7 statements under the dead man's statute are liberally allowed
8 in actions like this. I went through about a page and a half
9 of that in our brief.

10 THE COURT: Okay, I'll give each of you a response on
11 this file.

12 MR. SCHOEENDECK: All right, Your Honor, if I might. Way
13 early on, you pegged, this is really about a case against
14 Kelly for undue influence. The rest of us are dragged into
15 this in questionable methods.

16 But I want to point out the main point that I argued,
17 that cites right to his pleadings that he hasn't answered,
18 and that's this, Judge: He says, "VOR is nominally a part,"
19 a direct quote. Paragraphs 107 and 108 of his complaint, he
20 is seeking damages against VOR in the same complaint where --
21 and he didn't want to answer your question when you asked him,
22 "Are you representing VOR?" And he danced and he danced, and
23 he never did answer it. But, in fact, in the pleadings,
24 that's what he is doing. And he is suing VOR for money
25 damages in paragraphs 107 and 108, and nobody that's ever gone

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 095

1 to law school could say when you're suing somebody for damages,
2 that they're only nominally involved.

3 When he says the federal court recently allowed a
4 corporation to be nominally involved, he's talking about, if
5 you go read the *Hansmeier* case, it's a shareholder derivative
6 suit. It's the suit he didn't bring, because he can't bring
7 it, because under the statute, he has to be representing a
8 shareholder.

9 So the number one thing that he isn't answering for you
10 is: How can you sue VCR for money damages and claim that
11 you're also their lawyer? And if you've already done that,
12 you can't even amend and now just sue them, because the rules
13 don't let you do that in the same lawsuit.

14 He keeps referencing Victoria's lawsuit. What he hasn't
15 mentioned to the Court is this: Not only was that dismissed;
16 he attempted, in one of the appeals, to resurrect it, and the
17 Supreme Court turned him down. That's a dead, done deal.

18 You heard that there's never been a decision --

19 THE COURT: Of course, they affirmed the dismissal
20 without prejudice is what the Supreme Court order said.

21 MR. SCHOENBECK: Correct.

22 THE COURT: Okay, so it could theoretically be brought
23 again?

24 MR. SCHOENBECK: If they had somebody that could do it.

25 THE COURT: I understand. Go ahead.

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 096

1 MR. SCHOENBECK: Yes, yes.

2 He told you that he's reviewed the case law, and summary
3 judgment has never been granted on an undue-influence claim.

4 Of course, the Tank case, the Supreme Court affirmed
5 three parties being dismissed on undue influence. That was
6 affirmed. That's the Tank case. Mr. Rasmussen, Mr. Brendtro
7 were the parties. So he knows that, in fact, there is a body
8 of case law.

9 MR. RASMUSSEN: I was an attorney, not a party.

10 MR. SCHOENBECK: Oh, I'm sorry. He wasn't a party. It
11 felt like it, but it's been a long time.

12 Lastly, I would just say, Your Honor, VOR doesn't belong
13 in this, and certainly not in a lawsuit where our lawyer is
14 suing us for money damages.

15 MR. BECK: I'm going to be less brief, and I apologize in
16 advance.

17 So if you look at the statement of undisputed material
18 facts that Grand Valley filed, and the response to statement
19 of undisputed material facts that the Plaintiffs filed,
20 paragraphs 58 and 59 is where we start. Pretty simple. "To
21 date, there is no evidence of what Kelly did or said to Ray
22 giving rise to this lawsuit."

23 The response: "Disputed, not material." No citation to
24 Victoria's affidavit or lawsuit. No citation to Lance's
25 affidavit.

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 097

1 Instead, we get this: "Undue influence can be shown with
2 circumstantial evidence, rather than with evidence of certain
3 statements. It is, of course, premature to seek summary
4 judgment in an undue influence case when discovery is just
5 beginning," citing the Rule 56 affidavit.

6 Paragraph 59: "To date, there is no evidence that
7 whatever Kelly allegedly did or said to Ray" caused "Ray to
8 change the estate plan."

9 Response: "Disputed, not material." See paragraph 58.

10 No evidence, Judge, what Kelly did. Nothing presented to
11 you.

12 We hear that undue influence isn't a tort.

13 The Supreme Court, second Tank case, paragraph 49, "Our
14 rule reflects the pernicious nature of undue influence being a
15 special type of theft that begins while the testator is alive
16 and continues until their death."

17 It sounds like a tort.

18 Then we have what the Plaintiff continues to ignore. The
19 Plaintiff wants to talk about the elements of the tort of
20 undue influence but forgets the definition. We go to the
21 same Tank case, the second Tank case, 23 South Dakota 59.

22 "For influence to be undue, it must be of such a
23 character as to destroy the free agency of the testator and
24 substitute the will of another for that of the testator."

25 We keep talking about the elements that come after that,

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 098

1 but that's the definition. That definition has not been
2 satisfied legally, factually, even attempted to be satisfied
3 in any of these briefings. That definition is ignored.
4 That's the end of the case, Your Honor.

5 The Plaintiff wants to claim -- and, again, I don't know
6 who the plaintiff is now. Now, we have allegations, we have a
7 proposed amended complaint. It doesn't mention Lance.
8 Apparently, Lance wants to join the lawsuit. We have a
9 proposed amended complaint that wants to add a bunch of
10 defendants but doesn't tell us who they are. I don't know if
11 I'm supposed to figure that out or you're supposed to figure
12 that out. An amended complaint needs to be complete before
13 you can grant it. It needs to be what it is so the parties
14 can contest it. And we don't have that here today.

15 We hear a citation that somehow Victoria's property was
16 frozen in time, the shares of VOR were frozen in time. A
17 citation to section 5, which I presume is something in
18 Article 5, but it ignores the rest of the document.

19 Article 8 of the Trust, the marital trust, which I think
20 is what the Plaintiff cites in its briefing as to where these
21 shares allegedly went when Victoria died. Section 8.02,
22 Distributions of Principal, talks about what an independent
23 trustee might do. There is no independent trustee.

24 "if no independent trustee is then serving, the trustee,"
25 Raymond, "shall distribute as much principal of the marital

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 099

1 trust to the surviving trustor," Raymond, "as the trustee
2 determines is necessary or advisable for the surviving
3 trustor's health, education, maintenance, and support."

4 There was a foreclosure action starting, Your Honor.
5 That doesn't say it's irrevocable. It doesn't say that it's
6 frozen in time.

7 And, practically, how could it be? How could you have a
8 piece of land that's frozen in time? If they're claiming that
9 the VOR shares had to be frozen in time, then the claim
10 necessarily means the land had to be frozen in time, and loans
11 couldn't be taken against it because that's just -- you can
12 sell it, you can encumber it. It's one stick in the bundle.
13 If their claim is that land could never be sold, it must also
14 mean it could never be mortgaged. It doesn't make sense under
15 any of their theories.

16 Your Honor -- and I think this has become very obvious --
17 there is no party to the contract seeking its rescission. The
18 Plaintiffs now must acknowledge they don't represent VOR. VOR
19 is represented by Mr. Schoenbeck. You've got to have a party
20 to the contract to rescind the contract. You cannot
21 substitute the declaratory-judgment action statutes for the
22 rescission statutes; and that's what the Plaintiffs are asking
23 you to do.

24 That ends my comments.

25 THE COURT: Thank you.

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 100

1 (Off the record at 11:21 a.m.)

2 [Back on the record at 12:03 p.m.]

3 THE COURT: And I realized, after we got into this one, I
4 left two motions hanging on the table in the other one. I
5 will ask -- I don't try to be a slave driver, it's now noon.

6 Do the attorneys wish to just keep rolling? Or are you
7 the type of people that like to eat?

8 MR. BECK: I can certainly delay eating. If it works for
9 you and the court reporter, Your Honor, let's just keep going.

10 THE COURT: Do you agree with that?

11 MR. RASMUSSEN: Yes.

12 THE COURT: Any objections? Mr. Brendtro, any objection
13 to rolling?

14 MR. BRENDTRO: No, Your Honor.

15 THE COURT: All right. I left on the table a motion to
16 amend and a motion for a Rule 35 Examination. I'm going to
17 try to keep this brief.

18 Is five minutes a reasonable amount of time to argue
19 those, Mr. Brendtro, or do you need more time? I don't want
20 to short you, but I also don't want to go four hours on these
21 two motions.

22 MR. BRENDTRO: I don't think it will take even five.

23 THE COURT: Okay. I'll let you go first.

24 He'll set the standard, and the rest of you can follow.

25 Mr. Brendtro, go ahead.

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 101

1 MR. BRENNER: Judge, for much of the life of this case,
2 it was on appeal or subject to motions to dismiss; and during
3 the pendency of this process, Paul O'Farrell died. That
4 necessitated the obvious need to change the parties in the
5 caption, but also then go through, line by line, and see how
6 the relief sought in the complaint changes based upon an
7 estate versus Paul. And so that process is what is reflected
8 in the amended complaint. It also attempts to spell out
9 particular facts that Grand Valley asserted were missing. We
10 do not agree that they are necessarily required to be there.

11 The way I've explained it is, I don't think that
12 rescission needs to be pled with particularity. That's the
13 rule for fraud under 9B. It doesn't say "rescission" in
14 there. But for clarity's purpose, we put it in there and
15 identified what it is that forms the basis.

16 We also separated -- or proposed to separate the claim
17 removing Raymond as trustee to make that clear and more
18 obvious, and allow it to proceed on a declaratory-judgment
19 action as soon as possible.

20 The objections to this, or that there's a conflict of
21 interest, that doesn't defeat a motion to amend. Regardless
22 of whoever would have a conflict, the pleading can be amended.

23 For the relief that's sought relative to VOR, VOR is
24 being recaptioned as a defendant, in line with the theory of
25 relief in derivative cases. I understand that it's not an

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 102

1 exact match for a derivative case, although I believe it is
2 when we're pursuing relief on behalf of who would be the
3 ultimate shareholder, Victoria's interests in her portion of
4 the trust.

5 Again, relief can be pursued on behalf of a trust or to
6 rectify a trust when the trustee has failed to pursue that
7 relief. That's what's happening here.

8 And one of the cases that we cited pointed out that,
9 ultimately, these types of claims, when it's a nominal party,
10 you're trying to assert relief on behalf of the party, the
11 claim is, "Hey, you failed to pursue this, and we need to
12 preserve the claim in order to move forward."

13 An assertion was made as to prejudice by VOR. The
14 standard was not briefed as to what prejudice actually is, nor
15 does this rise to that. VOR did not even submit its answer in
16 this case until March 6th of 2025, which was the day after we
17 warned them that we were going to be filing an amended
18 complaint, and asked them to hold off on their summary-
19 judgment motion because it would be simpler for purposes of
20 procedure to respond to the actual complaint rather than that
21 one.

22 It's apparent an amended complaint is needed. VOR was
23 warned. This is -- and, again, their claim is that it would
24 affect somehow their summary-judgment process. Again, this is
25 not an ordinary summary-judgment proceeding; this is a

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 103

1 converted motion to dismiss, and so it's an amplified motion
2 to dismiss that allows us to look to matters outside the
3 pleadings. The intent, though, is not to try to resolve the
4 case on the merits, unless there is some insuperable bar to
5 relief based on apparent and plain evidence that cannot be
6 refuted. That does not exist. There is no actual prejudice.

7 And then futility was argued, I think unsuccessfully in
8 each instance. Again, without reiterating the same points,
9 each one of the proposed plaintiffs has a unique and special
10 interest, can seek this type of relief, and is permitted to
11 move forward with this type of action in a declaratory-
12 judgment action.

13 In any declaratory-judgment action, the option remains
14 open for the parties and the court to add defendants, add
15 plaintiffs, in order to make sure that everybody is
16 participating that needs to be.

17 This starts that process. To the extent that there are
18 other necessary parties, we assume that those will be added
19 pursuant to the liberal statutes regarding declaratory-
20 judgment actions.

21 So this is the next step, and then we can move forward
22 with discovery.

23 THE COURT: Counsel?

24 And then you're not going to address your 35(a)

25 Examination --

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 104

1 MR. BRENDTRO: Oh, do you want them both at the same
2 time?

3 THE COURT: Yes.

4 MR. BRENDTRO: Sorry.

5 Even simpler, a necessary piece of the discovery process
6 is to get a factual understanding of the physical and mental
7 condition of Raymond O'Farrell. It's necessary to evaluate
8 capacity, because there are allegations of capacity that are
9 raised in the complaint and the amended complaint. It would
10 be necessary to evaluate the degree of susceptibility. Those
11 allegations are also raised in the complaint and the amended
12 complaint. And it is also relevant to the claims seeking to
13 remove Raymond for being, quote, "unable to act," close quote,
14 pursuant to the trust documents.

15 The only defense raised to this motion was that Raymond
16 is not a party. Raymond, of course, appeared as a party in
17 April of 2023, and has never removed himself as a party from
18 this lawsuit.

19 To the extent that he needs to be a party, then the Court
20 should order him to be so, and then this Rule 35(a)
21 Examination can move forward.

22 THE COURT: Where are we starting here?

23 MR. SCHOENBECK: If I might, Your Honor.

24 THE COURT: Go ahead.

25 MR. SCHOENBECK: If I could take the last one first. To

1 obtain that examination, Raymond has to be a party. He isn't
2 a party in the lawsuit.

3 There is a separate -- and the Supreme Court noted
4 this -- there is a separate conservatorship petition that
5 Mr. Brendtro has filed that they could attempt to get an
6 examination in, but there are protections in place before you
7 can evaluate people. And they failed to meet those
8 protections before, and they're not going back into that one;
9 they're trying to do an end-around, which leads me into
10 the response to the motion to amend.

11 First -- I'll just say this: I think the Court should
12 take judicial notice of the ruling it just made, with
13 everybody here in the courtroom just 10 or 15 minutes ago,
14 because that is, at least in part, relevant to this motion to
15 amend.

16 The shares of the corporation are owned by -- were owned
17 by Raymond. There isn't any dispute that if Raymond put his
18 separate one in, the trust document says he controls it, that
19 doesn't become irrevocable. And there has been no evidence in
20 any place that they've ever presented to show that Victoria
21 has any ownership in any stock. So -- and that matters,
22 because you heard the reference, this is kind of like a
23 shareholder derivative action. You can't be a little bit
24 pregnant when it comes to a shareholder derivative action. By
25 statute, 47-1A-741, "No shareholder may commence or maintain a

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 106

1 derivative proceeding unless the shareholder" -- and it's got
2 some things you have to do.

3 He doesn't have a shareholder for a client. He hasn't
4 complied with the statute. And when he says there's a federal
5 case that looks kind of like this, it's the *Hansmeier*
6 decision, and it was about a shareholder derivative suit.

7 So he can't bring and call this -- it's like a derivative
8 suit because it is not in any respect -- and it gets us back
9 to where I started this morning, Your Honor: VOR, he started
10 a lawsuit representing VOR; and in that same complaint, sued
11 VOR for money damages. And now, in this very same lawsuit, he
12 wants to move his client from a plaintiff to a defendant; and
13 they are not present nominally. They are being pursued for
14 money damages certainly in the first complaint.

15 I must admit, I didn't go look and see if his amended
16 complaint still attempts to sue them for money damages; but I
17 would point out, the law doesn't let him -- it's much broader
18 than this. But unquestionably, it says in a case, you can't
19 represent against your client. And that's what he's trying to
20 do right here.

21 The amendment shouldn't be granted. VOR should be out of
22 this.

23 Thank you.

24 THE COURT: Counsel?

25 MR. BECK: Your Honor, I don't have a comment on the

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 107

1 35(a) motion, so I'll just talk about the motion to amend.

2 When you get a motion to amend -- and I think I touched
3 on this earlier -- there needs to be a posed amendment that is
4 what the plaintiff is asking to amend.

5 Here, we had earlier conversation about Lance O'Farrell
6 suddenly being a plaintiff. That's not here.

7 We're moving around parties. Apparently, the amendment
8 wants to move Ray in as a defendant, wants to move the Estate
9 of Victoria O'Farrell in from a plaintiff to a defendant, and
10 then VCR, again, from a plaintiff to a nominal defendant.

11 The upshot of it is this: This doesn't moot anything
12 that just happened with the summary judgment, whether you
13 allow it or not. But there is no reason to allow it because
14 it still doesn't allege any facts. There is no factual
15 allegations that get anywhere; and, again, for the reasons
16 stated at the summary-judgment argument. And that's the
17 reason we filed our briefs, as a joint brief in opposition to
18 the motion to amend, and a brief in support of the alternative
19 motion for summary judgment. This doesn't add anything to the
20 mix. It's futile. There is no factual allegations that
21 change the math on your granting summary judgment to the
22 Colony.

23 So, Your Honor -- and for the reasons we briefed, we
24 would oppose the motion to amend the complaint, and certainly
25 any argument that somehow this moots out our summary-judgment

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 108

1 motion.

2 THE COURT: All right. Well, I'm going to send out a
3 decision on that one.

4 I am going to address -- there was a motion to take
5 judicial notice of a sealed record in another file that not
6 all the parties have access to. I'm going to deny that
7 motion. I don't believe it would comply with the spirit of
8 15-6 as it relates to summary judgments. So that motion is
9 denied. And specifically noting that one of the parties did
10 not have access to it and no ability to respond, and then I'll
11 issue a written decision.

12 That leaves the final motion in the last file.

13 Dan, do you need a break?

14 THE COURT REPORTER: No, I'm fine.

15 MR. BECK: Your Honor, can I ask one more thing before
16 you move on?

17 THE COURT: Go ahead.

18 MR. BECK: I think Mr. Schönbeck asked you to take
19 judicial notice of your probate ruling in the main Paul file.
20 I think he did that.

21 MR. SCHOENBECK: I did, Your Honor.

22 THE COURT: And I'm going to deny that for the same
23 reason.

24 I mean, this is a summary-judgment motion; and we're
25 bringing in new evidence -- you don't take evidence in a

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 109

1 summary-judgment motion at the hearing. So the work was done.

2 (The hearing concluded at 12:17 p.m.)

3 --o0o--

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 110

1 STATE OF SOUTH DAKOTA }
2 COUNTY OF LAKE }SS
}

3 --oOo--

4
5 **CERTIFICATE OF REPORTER**

6 I hereby certify:

7 That the foregoing proceedings were duly reported by me
8 at the time and place herein specified;

9 That the proceedings were reported by me, a duly
10 certified shorthand reporter and a disinterested person;

11 That my shorthand notes were transcribed into typewriting
12 by computer-aided technology; and

13 That this transcript contains a true and correct record
14 of the foregoing proceedings.

15 In witness whereof, I have hereunto set my hand on
16 May 15, 2025.

17
18
19
20
21 /s/ Daniel P. Feldhaus

22 Daniel P. Feldhaus
23 Official Court Reporter
24 Registered Diplomat Reporter
25 Certified Real-time Reporter
Certified Shorthand Reporter

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

APPENDIX - 111

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 31101

ESTATE OF PAUL O'FARRELL, individually and as a beneficiary of the family trust; and for the benefit of the Estate of Victoria O'Farrell; SKYLINE CATTLE COMPANY, a South Dakota corporation; and VOR, INC., a South Dakota corporation,

Plaintiffs and Appellants,

vs.

KELLY O'FARRELL, an individual; GRAND VALLEY HUTTERIAN BRETHREN, INC., a South Dakota corporation; and THE RAYMOND AND VICTORIA O'FARRELL LIVING TRUST, a South Dakota trust.

Defendants and Appellees.

Intermediate Appeal from the Circuit Court
Third Judicial Circuit, Grant County, South Dakota

HONORABLE PATRICK PARDY
Presiding Judge

APPELLEES' BRIEF

(VOR, Inc., O'Farrell Trust, & Estate of Victoria O'Farrell)

HOVLAND, RASMUS & BRENDTRO
PRO. LLC
Daniel Brendtro
Mary Ellen Dirksen
Benjamin Hummel
P.O. Box 2583
Sioux Falls, SD 57101
Attorneys for Appellants

SCHOENBECK & ERICKSON, PC
Lee Schoenbeck
Joe Erickson
1200 Mickelson Dr., STE. 310
Watertown, SD 57201
*Attorneys for Appellees VOR,
Inc., O'Farrell Trust, Estate of
Victoria O'Farrell*

SIEGEL, BARNETT &
SCHUTZ, LLP
Reed Rasmussen
P.O. Box 490

Aberdeen, SD 57402
Attorneys for Appellees
Grand Valley

WOODS, FULLER, SHULTZ
& SMITH PC
William G. Beck
300 S. Phillips Ave., STE. 300
Sioux Falls, SD 57117
Attorneys for Appellees
Grand Valley

RICHARDSON, WYLY, WISE,
SAUCK & HIEB
Jack Hieb
P.O. Box 1030
Aberdeen, SD 57402
Attorneys for Appellee
Kelly O'Farrell

Petition for Intermediate Appeal filed June 2, 2025; Granted August 11, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
PRELIMINARY STATEMENT.....	2
JURISDICTIONAL STATEMENT.....	2
THE OTHER O'FARRELL MATTERS.....	2
STATEMENT OF LEGAL ISSUES.....	5
1. Whether the Circuit Court erred when it dismissed VOR as a plaintiff (or defendant).....	5
2. Whether the Circuit Court erred when it dismissed Victoria's Estate as a plaintiff in this lawsuit.....	5
3. Whether the Circuit Court erred when it dismissed the Revocable Trust.....	6
4. Whether the Circuit Court erred when it awarded attorney's fees to the Estate, the Trust, and VOR, Inc. under SDCL 15-17-51.....	6
5. Whether the Circuit Court abused its discretion when it did not allow the Appellants to amend their complaint, did not allow a medical examination of Raymond O'Farrell, and did not delay the summary judgment proceeding under rule 56(f).....	6
STATEMENT OF THE CASE.....	6
STATEMENT OF THE FACTS.....	8
STANDARD OF REVIEW.....	11
ARGUMENT.....	12
1. While acting on behalf of VOR, Paul and his attorney cannot simultaneously or later attack VOR in the same lawsuit.....	13
2. Paul did not provide competent evidence that he had authority to initiate suit on behalf of VOR.....	18
3. Victoria's Estate should be dismissed as a party.....	20
4. The Revocable Trust should be dismissed.....	21
5. As to all parties, the evidence does not support rescission.....	24
6. The Trial Court correctly exercised its discretion to not allow amendment of the complaint.....	24
7. The Trial Court correctly exercised its discretion to not allow a Rule 35(a) medical examination of Raymond O'Farrell.....	25
8. The Trial Court did not abuse its discretion when it declined to delay the summary judgment proceedings under Rule 56(f).....	27
9. The complaint against the Estate, Trust, and VOR was frivolous.....	28

CONCLUSION.....	28
CERTIFICATE OF COMPLIANCE	30
CERTIFICATE OF SERVICE	30

TABLE OF AUTHORITIES

CASES

<i>Adrian v. Vonk</i> , 2011 S.D. 84, 807 N.W.2d 119	11
<i>Citibank (S.D.), N.A. v. Hauff</i> , 2003 S.D. 99, 668 N.W.2d 528	6, 28
<i>Cotter on behalf of Reading International, Inc. v. Kane</i> , 473 P.3d 451 (Nev. 2020)	5, 17
<i>Davies v. GPHC, LLC</i> , 2022 S.D. 55, 980 N.W. 2d 251	6, 27
<i>Ellingson v. Ammann</i> , 2013 S.D. 32, 830 N.W.2d 99	14
<i>Estate of O'Farrell v. Grand Valley Hutterian Brethren, Inc.</i> , 2024 S.D. 81, 15 N.W.3d 745	7
<i>First Dakota Nat'l Bank v. Ruba</i> , No. 4:16-CV-04007-RAL, 2016 WL 7410562 (D.S.D. Dec. 21, 2016)	6, 27
<i>Hass v. Wentzlaff</i> , 2012 S.D. 50, 816 N.W.2d 96	11
<i>Jensen v. Department of Corrections</i> , 2025 S.D. 35, 24 N.W.3d 396	5, 20
<i>Johnson v. Miller</i> , 818 N.W. 2d 804 (S.D. 2012)	6, 28
<i>Matter of Estate of Jones</i> , 2022 S.D. 9, 970 N.W. 2d 520	5, 21
<i>Pearson v. Adams</i> , 279 N.W.2d 674 (S.D. 1979)	3
<i>Plato v. State Bank of Alcester</i> , 1996 S.D. 133, 555 N.W.2d 365	11
<i>Quinn v. Farmers Ins. Exchange</i> , 2014 S.D. 14, 844 N.W.2d 619	5, 6, 18
<i>Redlin v. First Interstate Bank as Co-Trustee of Helene M. Redlin Trust, u/t/d December 14, 2004</i> ,	

2024 S.D. 5, 2 N.W.3d 729	5, 6, 19
<i>Roden v. General Cas. Co. Of Wisconsin</i> , 2003 S.D. 130, 671 N.W.2d 622	5, 20
<i>Saathoff v. Kuhlman</i> , 2009 S.D. 17, 763 N.W.2d 800	11
<i>Stormo v. Strong</i> , 469 N.W.2d 816 (S.D. 1991)	6, 25
<i>VOR, Inc. v. Estate of O'Farrell</i> , 2025 S.D. 2, 17 N.W.3d 252	4, 11
<i>Zhang v. Rasmus</i> , 2019 S.D. 46, 932 N.W.2d 153	6, 25
STATUTES	
SDCL 15-6-8(e)(2)	5, 14
SDCL 15-6-17(a)	5, 14
SDCL 15-6-35(a)	6, 8, 11, 23, 25, 26
SDCL 15-6-56(f)	6, 7, 8, 11, 13, 27
SDCL 15-17-51.....	6, 28
SDCL 15-26A-3(6).....	2
Appendix to SDCL 16-18, Rules of Prof. Conduct, Rule 1.7	15
Appendix to SDCL 16-18, Rules of Prof. Conduct, Rule 1.9(a)	5, 15
Appendix to SDCL 16-18, Rules of Prof. Conduct, Rule 1.13 (Comment 10)	5, 15, 16
SDCL 19-19-802	19
SDCL 19-19-804(b)(1)-(6)	5, 19
SDCL 21-12-1	24
SDCL 29A-3-617	5, 21
SDCL 29A-3-711	5, 21
SDCL 47-1A-741	5, 16, 17

SDCL 47-1A-742	17
SDCL 53-11-2	24

INTRODUCTION

Paul's Estate seeks to require VOR, Inc., the Revocable Trust, and Victoria's Estate to be subject to this ongoing lawsuit that alleges Kelly O'Farrell unduly influenced Raymond O'Farrell. None of these parties wish to be included in the lawsuit and were dismissed by summary judgment. Paul has appealed their dismissal and asked this Court to return them to this lawsuit under a misguided legal theory.

The lawsuit began with Paul (and his attorney) claiming to act on behalf of VOR, Inc. to rescind the sale of land to the Grand Valley Hutterian Brethren, Inc. Specifically, Paul named VOR as a Plaintiff that he was acting on behalf of regarding that request for rescission. Within that same complaint, Paul—for himself—asked for damages against VOR. Thus, in the same complaint, Paul (and his attorney) wanted to act on behalf of VOR, but also recover damages against VOR.

Now, Paul's Estate and the same attorney want to make VOR a defendant only in this action because Paul claims that VOR is merely a nominal defendant in relation to his declaratory judgment action. The law does not allow a party to act on behalf of an entity and sue the same entity in the same action. Further, it does not allow an attorney to act against a client that he formerly purported to act on behalf of in the same matter.

Additionally, through an incorrect interpretation of the statutes in the declaratory judgment action, Paul seeks to keep the Revocable Trust and Victoria's Estate as parties to this lawsuit. The trial court is right under the law

that neither of these parties are necessary to the claims asserted in the lawsuit. Further, because of the intertwined nature of VOR's shares with the Trust, Paul's Estate (with the same attorney) cannot be allowed to continue litigation with VOR or the Trust as a defendant in the same lawsuit where he originally acted on behalf of VOR.

The Revocable Trust, VOR, and Victoria's Estate respectfully ask this Court to uphold Judge Pardy's ruling and allow these parties to be dismissed.

PRELIMINARY STATEMENT

Appellants, the Estate of Paul O'Farrell and interested party Lance O'Farrell, will be referred to as "Paul" or "Appellants"; Appellee VOR, Inc. will be referred to as "VOR"; Appellee the Raymond and Victoria O'Farrell Living Trust shall be referred to as "Revocable Trust" or "Trust"; Appellee the Estate of Victoria O'Farrell as "Victoria's Estate"; the motions hearing transcript as "HT" followed by the appropriate page number; and the Appendix for this brief as "App." For consistency's sake, this brief will follow Appellants' manner of referencing the settled record "R. __."

JURISDICTIONAL STATEMENT

This Court has jurisdiction under SDCL 15-26A-3(6). The Court granted permission for this intermediate appeal.

THE OTHER O'FARRELL MATTERS

Judge Pardy expressly described that he was deciding the summary judgment motions of the defendants based on the record in front of him—because

no party had filed a motion to consolidate:

THE COURT: So I want to back up. Just so everybody is on fair ground, it's mind-boggling to me that these cases have not been consolidated, and I'm not consolidating them today. Judge Spears apparently thought they were consolidated, and the Supreme Court pointed out to him they weren't. I think they sent an invitation to the parties, while these five cases contain some overlapping issues, none have been consolidated. None of the settled records contain a motion to consolidate any of the actions. Consequently, we consider and resolve each case individually, just exactly what I'm doing today.

HT p. 30:12-21.

In the same manner, this Court reviews this appeal upon the record the trial court had—that is the settled record.¹ This Court supplemented the settled record on September 19, 2025. (R. 1735.) The supplementation included the affirmance of the judgment against Paul O'Farrelle and Skyline Cattle Company for \$1,290,545.88 and \$18,509.13 in favor of VOR, Inc. (R. 1737-1744.)

Recently, the Appellants moved this Court to consolidate this appeal with the appeal in Victoria's Estate. The decision on consolidation was deferred until after briefing is complete. For that reason, Appellees' VOR, the Revocable Trust, and Victoria's Estate will limit the legal and factual analysis of this brief to the settled record of this lawsuit.

For purposes of context, the following legal matters exist between the O'Farrell family:

1. Victoria's Lawsuit: Victoria O'Farrell began a lawsuit that was eventually voluntarily dismissed by her previous attorney of record,

¹ *Pearson v. Adams*, 279 N.W.2d 674, 676 (S.D. 1979).

Alex Hagan. The dismissal was appealed and upheld by this Court, which noted that her attorney had an “ethical obligation to take the necessary steps to protect a deceased client’s interests immediately following a client’s death.” Appeal No. 30508.

2. Eviction of Paul and Skyline Cattle: In April of 2023, VOR and Grand Valley Hutterian Brethren, Inc. evicted Paul and Skyline Cattle Company from the real property that Paul’s Estate attempts to put at issue in this lawsuit. This Court upheld the judgment of eviction in *VOR, Inc. v. Estate of O’Farrell*, 2025 S.D. 2, ¶15, 17 N.W.3d 252, 255.
3. CHS and VOR collection lawsuit against Paul and Skyline Cattle: In an action originally brought by CHS Capital, LLC against Paul and Skyline Cattle Company, VOR cross-claimed against Paul and Skyline Cattle on the loan assigned to VOR by Great Western Bank. VOR was granted summary judgment on these loans against Paul and Skyline Cattle Company. Paul and Skyline Cattle appealed, and this Court upheld the granting of summary judgment on August 11, 2025. Appeal No. 30862.
4. Guardianship of Raymond O’Farrell: Paul O’Farrell petitioned to seek a guardianship and/or conservatorship over Raymond O’Farrell in 2023. The file has not progressed since 2023, except that Judge Parady was assigned to the case on January 15, 2025.
5. Estate of Victoria O’Farrell: Paul appealed the appointment of Raymond as special administrator, which was dismissed by this Court on December 18, 2024. Appeal No. 30532. Following a hearing on May 1, 2025, the circuit court closed the special administration and denied

Paul's new attempt to remove Raymond as special administrator. The circuit court's ruling in relation to the special administration is currently up on appeal with this Court. Appeal No. 31106.

STATEMENT OF LEGAL ISSUES

1. Whether the Circuit Court erred when it dismissed VOR as a plaintiff (or defendant).

No, the Circuit Court did not err when it dismissed VOR as a party in this lawsuit.

SDCL 15-6-8(e)(2)
SDCL 15-6-17(a)
SDCL 47-1A-741
SDCL 19-19-804(b)(5)
Appendix to SDCL 16-18, Rules of Prof. Conduct, Rule 1.9(a)
Appendix to SDCL 16-18, Rules of Prof. Conduct, Rule 1.13 (Comment 10)

Cotter on behalf of Reading International, Inc. v. Kane, 473 P.3d 451, 455 (Nev. 2020)
Quinn v. Farmers Ins. Exchange, 2014 S.D. 14, ¶20, 844 N.W.2d 619, 624-25
Redlin v. First Interstate Bank as Co-Trustee of Helene M. Redlin Trust, u/t/d December 14, 2004, 2024 S.D. 5, ¶24, 2 N.W.3d 729, 737
Roden v. General Cas. Co. Of Wisconsin, 2003 S.D. 130, ¶30, 671 N.W.2d 622, 629

2. Whether the Circuit Court erred when it dismissed Victoria's Estate as a plaintiff in this lawsuit.

No, the Circuit Court did not err when it dismissed Victoria's Estate as a plaintiff and Appellants' claim that Victoria's Estate is not a party to the lawsuit.

SDCL 29A-3-617
SDCL 29A-3-711

Jensen v. Department of Corrections, 2025 S.D. 35, ¶27, 24 N.W.3d 396, 403
Matter of Estate of Jones, 2022 S.D. 9, 970 N.W. 2d 520

3. Whether the Circuit Court erred when it dismissed the Revocable Trust.

No, the Circuit Court did not err.

Quinn v. Farmers Ins. Exchange, 2014 S.D. 14, ¶20, 844 N.W.2d 619, 624-25
Redlin v. First Interstate Bank as Co-Trustee of Helene M. Redlin Trust, u/t/d December 14, 2004, 2024 S.D. 5, ¶24, 2 N.W.3d 729, 737

4. Whether the Circuit Court erred when it awarded attorney's fees to the Estate, the Trust, and VOR, Inc. under SDCL 15-17-51.

No, the Circuit did not err when it awarded attorney's fees for finding the claim to be frivolous.

SDCL 15-17-51

Johnson v. Miller, 818 N.W. 2d 804, 807 (S.D. 2012)
Citibank (S.D.), N.A. v. Hauff, 2003 S.D. 99, ¶31, 668 N.W.2d 528, 537

5. Whether the Circuit Court abused its discretion when it did not allow the Appellants to amend their complaint, did not allow a medical examination of Raymond O'Farrell, and did not delay the summary judgment proceeding under rule 56(f).

No, the Circuit Court did not err when it did not allow the plaintiffs to amend their complaint and did not allow a medical examination of a non-party, Raymond O'Farrell.

SDCL 15-6-35(a)
SDCL 15-6-56(f)

Zhang v. Rasmus, 2019 S.D. 46, ¶ 33, 932 N.W.2d 153, 163
Stormo v. Strong, 469 N.W.2d 816, 822 (S.D. 1991)
Davies v. GPHC, LLC, 2022 S.D. 55, ¶51, 980 N.W. 2d 251, 265
First Dakota Nat'l Bank v. Ruba, No. 4:16-CV-04007-RAL, 2016 WL 7410562, at *2 (D.S.D. Dec. 21, 2016)

STATEMENT OF THE CASE

On March 3, 2023, Paul, individually, and on behalf of Victoria's Estate, Skyline, and VOR, filed suit against Kelly, Grand Valley Hutterian Brethren, Inc.,

and the Revocable Trust for a declaratory judgment, recession, and unspecified tort damages. The suit also alleged damages in favor of Paul against VOR, Inc. (R. 7-30.)

On April 5, 2023, VOR, Victoria's Estate, and the Revocable Trust filed an answer, counterclaim, and motions to dismiss. (R. 126-186.) The Grand Valley Hutterian Brethren filed a motion to dismiss on April 10, 2023. (R. 200.)

On July 11, 2023, a hearing was held on various motions to dismiss before the Honorable Robert L. Spears. (R. 382-419.) On August 9, 2023, the Circuit Court issued a memorandum decision dismissing the complaint in its entirety. (R. 425-432.) After judgment was entered on September 5, 2023, and September 9, 2023, Paul filed a notice of appeal on October 6, 2023, and the matter was reversed because this Court held that Judge Spears should have been removed as the presiding judge on the case. *Estate of O'Farrell v. Grand Valley Hutterian Brethren, Inc.*, 2024 S.D. 81, ¶28, 15 N.W.3d 745, 752.

Following remand, VOR, Victoria's Estate, the Revocable Trust, and Grand Valley all motioned the court for summary judgment. (R. 722-786, 1200-1343.) In response to the motion for summary judgment, the plaintiffs sought to amend their complaint and to subject Raymond O'Farrell to a medical examination. (R. 1372-1418.) Additionally, the plaintiffs sought to delay the summary judgment proceeding by utilizing Rule 56(f) to request additional discovery. (R. 1412-1418.) These efforts were resisted by VOR, the Estate, the Trust, and Grand Valley. (R. 1532-1547, 1526-1531, 1452-1455, 1449-1450.)

A hearing was held on May 1, 2025, and Judge Pardy took the matter under advisement. (R. 1602-1668.) The trial court issued a memorandum

decision on May 6, 2025, and granted VOR, Inc., Victoria's Estate, the Revocable Trust's, and Grand Valley's motions for summary judgment. (R. 1590-1601.) On May 16, 2025, Paul O'Farrell and Skyline Cattle filed an objection to the memorandum opinion but did not file a motion for reconsideration or request a hearing date. (R. 1669-1678.) The court entered orders that denied plaintiffs' Rule 35(a) examination of Raymond O'Farrell; denied plaintiffs' motion to amend complaint; denied plaintiff's motion for additional discovery under Rule 56(f); and granted the defendants' motions for summary judgment. (R. 1679-1685.) Notice of entry was entered on May 21, 2025. (R. 1686.) On June 2, 2025, VOR, Inc., the Estate of Victoria O'Farrell, and the Revocable Trust provided their application for attorney's fees. (R. 1688.) The court entered an order awarding attorney's fees to VOR, Inc., Estate of Victoria O'Farrell, and the Revocable Trust on June 17, 2025. (R. 1729.)

On August 14, 2025, this Court granted petition for allowance of appeal from an intermediate order. (R. 1733.)

On September 24, 2025, this Court granted Appellees' motion to supplement the record. (R. 1735-1744.)

On November 13, 2025, this Court ruled to defer ruling on Appellants' motion to consolidate this appeal with Appellants' appeal of Victoria's Estate.

STATEMENT OF THE FACTS

The Appellants' brief attempts to introduce and rely on facts outside the settled record. The settled record establishes the following facts:

- The Revocable Trust was funded by shares of VOR, Inc.² (R. 135.)

- The shares were the separate property of Raymond O'Farrell's when they were assigned to be held by VOR, Inc.² (R. 135.)
- The VOR corporation was funded with real property of approximately 1,000 acres of farmland in Grant County, South Dakota. (R. 1485.)
- The four conditions that must have occurred for Paul O'Farrell and his siblings to inherit the property owned by VOR under the terms of the Revocable Trust were:
 1. One of the parents had to die;
 2. The other parent had to die;
 3. The terms of the Revocable Trust must have remained unchanged upon the death of parents; and
 4. Shares of VOR, which owned the property, must have remained in the Revocable Trust.

(R. 1491-1492.)

- Victoria O'Farrell died on July 11, 2022. (R. 1495.)
- By operation of the Revocable Trust, Victoria's shares of VOR under beneficial interest in Revocable Trust went to Raymond. (R. 1495.)
- Raymond removed all shares of VOR from the Revocable Trust. (R. 1495.)

² Although outside of this settled record, this fact was established in the probate file in Victoria's Estate, which is currently up on appeal. This fact is included in this appeal because Appellants claim that Raymond is taking the position that the Trust was never funded and is hostile to the Trust. Appellants' Brief, pp. 16-17. That has not been his position. Rather, the shares were funded as his own separate property and were freely navigable by him.

- On July 12, 2022, Interstate Bank initiated a foreclosure on the property held by VOR. (R. 1497.)
- On August 12, 2022, the Hutterian Brethren executed a purchase agreement for the sale of nine contiguous parcels for \$3.2 million. (R. 1498.)
- Raymond signed the purchase agreement on behalf of VOR in his capacity as president of VOR. (R. 1499.)
- The land sale transaction closed on October 2022. (R. 1499.)
- Paul O'Farrell started this lawsuit on March 3, 2023. (R. 1-7.)
- The complaint subject to this appeal alleged acts by Paul's brother, Kelly O'Farrell, as the sole basis for their causes of action. (R. 1501.)
- Paul O'Farrell and his Estate do not own any shares of VOR, and Paul was not the president of VOR at the time of the execution of the purchase agreement. (R. 1507.)
- Paul does not own the property subject to this lawsuit in his individual capacity or in any representative capacity for VOR or the Trust. (R. 1509.)
- In his 2023 complaint, Paul asserted to be acting on behalf of VOR, Inc. as an officer in the corporation of VOR. (R. 1363.)
- Paul sought damages against VOR, Inc. in paragraphs 107 and 108 of the same complaint he said to be acting on behalf of VOR, Inc. (R. 1363.)
- The complaint named the Estate of Victoria O'Farrell as a beneficial plaintiff. (R. 8-9.)

- Paul O'Farrell, before he was deceased, alleged in his complaint that he would have been the beneficiary of an estate plan that would have given him some of the real property, if he in fact inherited it. (R. 8-9, 12.)
- The South Dakota Supreme Court has already ruled that Paul and Skyline Cattle did not have possession rights of the real property (*VOR, Inc. v. Estate of O'Farrell*, 2025 S.D. 2, ¶30) and that Paul and Skyline Cattle owed a judgment of \$1,290,545.88, plus attorney fees, to VOR, Inc. (*CHS Capital, LLC v. Skyline Cattle*, Appeal No. 30862).

STANDARD OF REVIEW

“This Court reviews entry of summary judgment *de novo*.” *Hass v. Wentzloff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101 (citing *Adrian v. Vonk*, 2011 S.D. 84, ¶ 8, 807 N.W.2d 119, 122). On appeal, this Court “determine[s] only whether a genuine issue of material fact exists and whether the law was correctly applied. *Id.* (citing *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804). If any legal basis to support the court’s ruling appears, this Court must affirm. *Plato v. State Bank of Alcester*, 1996 S.D. 133, ¶ 3, 555 N.W.2d 365, 366 (citation omitted); *see also Hass*, ¶ 11, 816 N.W.2d at 101 (“If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.”).

As to each of Appellants’ motions, which included a motion to amend their complaint, a motion for Rule 35(a) examination of Raymond, and a motion to delay the summary judgment proceedings under Rule 56(f), this Court reviews

each of Circuit Court rulings under an abuse of discretion standard. Citations, *infra*.

ARGUMENT

The actions of Paul (and now his Estate) have consequences. Paul initiated a lawsuit claiming to act on behalf of VOR—a position he continues to this day. Paul's *benevolence* ignores that in the same lawsuit he sought damages against VOR. It is not alternative pleading to change the party from a plaintiff to a defendant in the same lawsuit. This is frivolous conduct and permeates Paul's entire case.

Compounding that error, Paul brought his lawsuit on "behalf of Victoria's Estate." This language in the Complaint made Victoria's Estate a plaintiff in this action. Paul did this while he knew he had no authority to act on behalf of Victoria's Estate. Now, Paul claims the Estate is not a party at all. If that is true, why would the Complaint include that language? If there is a trial, do Paul's pleadings have an effect on the parties that can recover?

Apart from the clear nature, the Trust moved for summary judgment as to the claims against it. In response, the Appellants provided no evidence that prevented summary judgment on those counts as they relate to the Trust.

In an attempt to avoid summary judgment, after the motions were filed, the Appellants sought to amend their Complaint to name VOR as a defendant (instead of a plaintiff); require Raymond O'Farrell to be subject to a medical examination despite him not being a party and Appellants' pending open guardianship/conservatorship lawsuit; and sought to delay the hearing through

Rule 56(f). The Appellants chose these avenues, instead of providing the Circuit Court with any competent evidence. A review of these maneuvers shows their futility.

1. While acting on behalf of VOR, Paul and his attorney cannot simultaneously or later attack VOR in the same lawsuit.

At the hearing, Judge Pardy asked Appellants' attorney a question that counsel did not answer. The question and nonanswer drive the frivolous nature of Appellant's Complaint including VOR as a party Appellants sought damages from and as a party Appellants were acting on behalf of:

[Judge Pardy]: But are you still arguing today that he was president of VOR when he hired you and sued VOR?

[Appellants' Attorney]: Again, the argument is that he validly was able to pursue that rescission. The notice of rescission was issued by Paul, that—on whatever, March 1st of 2023.

(R. 1627.)

The Appellants' attorney's response avoids the difficult part of the question—the fact that Paul (while apparently bringing this lawsuit as the president of VOR) also sued VOR for money damages in the same complaint. The lack of response is rational because there is no adequate way to answer it. The pleading is not allowed by Paul, nor his attorney.

a. Alternative pleading does not allow Paul and his attorney to assert claims on behalf of VOR and against VOR.

The Appellants hope to avoid their own pleading by arguing that the law allows pleading in the alternative. Alternative pleading is statutorily allowed and

allows a party to plead various alternative theories of claims and defenses; however, it does not allow a pleading to alternate a party between plaintiff and defendant:

A party may set forth **two or more statements of a claim or defense alternatively or hypothetically**, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as **many separate claims** or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in § 15-6-11.

SDCL 15-6-8(e) (2) (emphasis added).

Apart from the express statutory definition of alternative pleading, a pleading must satisfy the real party in interest rule under SDCL 15-6-17(a). The Court has described the purpose of that rule:

The purpose of the real party in interest provision is to assure that a defendant is required only to defend an action brought by a proper party plaintiff and that such an action must be defended only once.

Ellingson v. Ammann, 2013 S.D. 32, ¶6, 830 N.W.2d 99, 101 (citations omitted).

In Appellants' complaint, the switch of VOR from a plaintiff to a defendant makes the real-party-in-interest rule a nullity. The defending party, VOR, is also a plaintiff—a party cannot defend an action and pursue itself at the same time.

b. The Amended Complaint does not fix the problem.

In response to VOR's summary judgment, Appellants (in their amended

complaint) moved VOR to a defendant—in a sort of “no-harm-no-foul” approach. This argument ignores that Paul initiated his lawsuit on behalf of VOR’s interests—he cannot now be only adverse to their interests. At the very least, the attorney that previously represented VOR cannot now act against VOR.

As to Appellants’ attorney, Rule 1.9 (a) describes his duties to VOR, his former client that he plead a complaint on behalf of its interests:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Rules of Professional Conduct, Rule 1.9(a), Appendix to SDCL 16-18.

Appellants’ attorney cannot just move VOR to a defendant, as he was previously pleading to act on behalf of VOR. Within the original complaint, the Appellants’ attorney would also be in violation of Professional Conduct Rule 1.7—as it was a current conflict of interest.

To side-step the conflict rules, the Appellants previously argued that the comments of Professional Conduct Rule 1.13 allow the original complaint and the later shifting of VOR to a defendant-only role. To the contrary, the comments of Professional Conduct Rule 1.13 support that Appellants’ attorney had a conflict from the start of representing both VOR and Paul—where the complaint sought damages from VOR:

There are times when the organization’s interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, **whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that**

the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Rules of Professional Conduct, Rule 1.13 (Comment 10), Appendix to SDCL 16-18.

It cannot be disputed that Paul's request for damages against VOR was adverse to VOR. The representation of VOR to argue for control of the corporation and simultaneously represent Paul for damages against the corporation was not allowed for an attorney at the outset of this case. The fact that Paul is now deceased does not erase that reality, as the rules apply to former clients.

c. This is not a derivative action.

Appellants also argue that in this lawsuit VOR is just two different factions that are arguing about who had control of the company—in short, whether Paul or Raymond was the president when VOR sold assets to Grand Valley. The law in relation to derivative actions contains various examples of cases where the corporation is both a plaintiff and defendant. However, this is not a derivative action and, further, this lawsuit is not even like a derivative action.

In South Dakota, a derivative proceeding of a corporation is driven by specific statutes that control the proceeding. To begin, Paul admitted he was not a shareholder of any VOR shares—under SDCL 47-1A-741, Paul would not have standing to bring a derivative proceeding:

No shareholder may commence or maintain a derivative proceeding unless the shareholder:

- (1) Was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder through transfer by operation of law from one who was a shareholder at that time; and
- (2) Fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.

SDCL 47-1A-741.

Even if Paul was a shareholder, a derivative action cannot commence until the shareholder provides a written demand upon the corporation. SDCL 47-1A-742. Paul has never alleged or provided evidence that he complied with the specific requirements of a derivative proceeding—instead, he just wants to argue that the concept applies because he is *sort-of* like a shareholder because the Trust could have resulted in him owning shares of VOR.

Apart from the difference between *potentially* owning shares and *being* a shareholder, this case is not factually like a derivative action because of Paul's adverse interests. To the circuit court, Paul cited the following Nevada holding:

"[Thus] although the corporation is named in the complaint as a defendant, its interests are not necessarily adverse to those of the plaintiff since [the corporation] will be the beneficiary.

Cotter on behalf of Reading International, Inc. v. Kane, 473 P.3d 451, 455 (Nev. 2020).

By Appellants' own admissions, Paul is seeking to recover from VOR money damages for himself. (R. 1553.) Obviously, the request for money damages does not create a situation where VOR is the beneficiary of Paul's lawsuit.

Further, Paul, and now his estate, wants to rescind VOR's \$3,200,000 land sale because Paul wanted to inherit that land. Again, these remedies sought by Paul and his Estate do not result in the corporation being a beneficiary. Instead, they are admittedly Paul attempting to force certain actions to fit within what he expected to inherit.

This is not a derivative lawsuit and Paul (and his attorney) cannot escape that suing on behalf of VOR and against VOR in the same lawsuit is frivolous.

2. Paul did not provide competent evidence that he had authority to initiate suit on behalf of VOR.

If Paul were allowed to bring a suit on behalf of VOR and against VOR in the same case, the trial court's memorandum decision further describes the evidence in the record that shows Paul did not have authority to do so: "it is undisputed that Raymond is the president of VOR." (R. 1593.) The competent evidence in the settled record supports that finding.

The circuit court is not to weigh competing evidence at the summary judgment level. However, the evidence of the party objecting to summary judgment must be "beyond mere speculation, conjecture, or fantasy." *Quinn v. Farmers Ins. Exchange*, 2014 S.D. 14, ¶20, 844 N.W.2d 619, 624-25.

At the hearing, Appellants argued that the sudden nature of the change of presidents of VOR—from Paul to Raymond—was evidence that Raymond was not the valid president of VOR. This argument is merely speculation and raises no issues of genuine material fact.

In response to the applicable statement of undisputed material facts, the Appellants rely on their own allegations in their complaint, the allegations in

Victoria's lawsuit, and the affidavit of Victoria. First, the allegations in either complaint are not competent evidence—they are merely allegations:

“[M]ere speculation and general assertions, without some concrete evidence, are not enough to avoid summary judgment.”

Redlin v. First Interstate Bank as Co-Trustee of Helene M. Redlin Trust, u/t/d
December 14, 2004, 2024 S.D. 5, ¶24, 2 N.W.3d 729, 737.

Second, the affidavit of Victoria O'Farrell is inadmissible hearsay. The affidavit fits within SDCL 19-19-802. It is understood Appellants will argue a version of the dead-man's exception, which is now codified under SDCL 19-19-804. Within that statute, the affidavit would only be admissible if it fit one of the exceptions in SDCL 19-19-804(b)(1-6). The only potential exception is SDCL 19-19-804(b)(5), which states:

(5) Decedent's statements. In actions, suits, or proceedings by or against the representatives of deceased persons including proceedings for the probate of wills, any statement of the deceased whether oral or written shall not be excluded as hearsay, provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was in good faith and on decedent's personal knowledge.

The only reason this matter includes a representative of Victoria's Estate is because Appellants improperly named the Estate as a party. This process of improperly naming an Estate cannot transform this proceeding to fit within the limited exception of SDCL 19-19-804(b)(5). Further, the judge never made any rulings on whether the affidavit was in good faith or based on Victoria's personal knowledge—and, more importantly, Appellants did not put forth the evidence to meet those hurdles.

Additionally, the affidavit of Victoria O'Farrell states mere speculations regarding Raymond's change of presidents in VOR, rather than facts in which Victoria had firsthand knowledge—using the phrase “I believe” frequently. (R. 79.) Further, the main allegation (R. 79 ¶22) regarding Raymond's reasoning for changing presidents is based on an apparent recollection of a phone call with Raymond—this is an example of hearsay within hearsay and is not competent evidence. See *Roden v. General Cas. Co. Of Wisconsin*, 2003 S.D. 130, ¶30, 671 N.W.2d 622, 629.

The inability of Paul to provide competent evidence as to VOR's inclusion in this lawsuit and his allegations for and against VOR provided the trial court with legal grounds to dismiss VOR. As it pertains to the declaratory action in count 1, the result is the same due to the conflict that has been present since the outset of this case.

3. Victoria's Estate should be dismissed as a party.

The Appellants claim that Victoria's Estate should continue to be included in this lawsuit because of the broad reach of a declaratory judgment action. However, a declaratory judgment action does not create any rights greater than those conferred upon Appellants. This Court recently described the mechanics of a declaratory judgment action:

The intent of the declaratory judgment statutes is not to give parties greater rights than those which they previously possessed, but to permit the declaration of those rights before they mature. The declaratory judgment acts do not create or change any substantive rights, or bring any other additional rights into being.

Jensen v. Department of Corrections, 2025 S.D. 35, ¶27, 24 N.W.3d 396, 403.

Like VOR, Paul does not have any authority to act on behalf of Victoria's Estate. Paul claims that Victoria's Estate is not a party at all. Therefore, dismissal should occur based on that judicial admission. If they have no role as a party, then they do not need to participate in any manner.

The problem is that Appellants also claim the Estate is beneficial plaintiff of the litigation. (R. 1364.) It is clear that South Dakota law does not allow Paul to act on behalf of the Estate. SDCL 29A-3-617 and SDCL 29A-3-711.

This was further demonstrated in this Court's holding in *Matter of Estate of Jones*, 970 N.W. 2d 520, 2022 S.D. 9. In *Jones*, the Court described that the circuit court would be "determining who shall pursue a wrongful death claim on behalf of an estate." *Id.* at ¶33. This Court did not describe that any interested party can file a lawsuit on behalf of the estate without being first appointed as a special administrator. Regardless of Appellants' complaint alleging a declaratory action, such an action does not include a new special right to require the Estate to be a party or "beneficial" party.

4. The Revocable Trust should be dismissed.

The Revocable Trust should be dismissed from this litigation for many of the same reasons identified in relation to VOR and Victoria's Estate. As to count 3, the tort damages claim—the Appellants admitted at the hearing that was only in relation to Kelly O'Farrell. (HT p. 35.) So, that count is quickly dispensed.

As to count 1, the declaratory judgment action, the record is void of any substantive evidence. Again, for all allegations that may impact the Trust, the only evidence proffered is speculation and allegations. Although the Appellees'

motions were like the motions to dismiss that were previously filed, the summary judgment requirements require more than a prima facie case based on allegations in the Complaint. It is understood that a declaratory judgment action can be utilized to determine various questions as to the administration of the Trust, but Appellants failed to provide any evidence as to the documents and actions they question in relation to the Trust.

As it relates to the Revocable Trust, the Appellants rely on the Trust document itself to question Raymond's withdrawal of VOR shares from the Trust to sell the VOR owned land to Grand Valley. Although that question has an answer in the plain terms of the Trust, it is important to note that Raymond was the president of VOR—to which there is no competent evidence disputing—the president of VOR has the authority to sell assets of VOR—even if 50% of the VOR shares remained in the Trust. See Article Fifteen of the Trust that describes Raymond's vast powers as the trustee. (R. 301-312.)

When moving to the terms of the Trust, the Trust expressly anticipates that separate property is to be treated as freely movable before or after the death of Victoria or Raymond. (R. 239.) Even if Raymond's shares were not his separate property, at least based upon what is contained in this settled record, upon Victoria's death, Raymond had the freedom to remove the shares from the Trust. If the VOR shares flow to the marital trust under Section 8, based upon a viewing of the potential facts most favorable to Appellants, the trustee (Raymond) can distribute as much of the principal of the marital Trust to himself for his health, education, support, maintenance, or support. (R. 262.) Further, in making those distributions, Raymond has "**sole and absolute discretion**, may consider the

needs of Raymond and other income and resources available to the surviving trustor.” (R. 262 (emphasis added.) Even under the terms of the Trust that view the facts and interpretations in the most favorable light to Appellants, it does not change that Raymond had the ability to transfer any principal in the marital Trust in his sole and absolute discretion. Factually, it is important to note that at the time of these transfers, VOR’s land was being foreclosed on. (R. 138, 1497.)

a. The evidence does not support Raymond’s removal.

Also, in count 1 in the original complaint, the Appellants stated that they “will be filing a Petition for Removal within these proceedings.” (R. 22.) The Petition never happened. In response to the summary judgment motions, the Appellants sought to change their amended complaint to seek removal of Raymond. This appears to be a maneuver to require the examination of Raymond under Rule 35(a). Regardless, even if the amended complaint was allowed, the record does not contain viable evidence to support removal.

The Appellants provide three sources that provide evidence: Victoria’s affidavit, Appellants’ request for a Rule 35(a) examination, and incorrect statement of Raymond’s position on the Trust. Victoria’s affidavit is hearsay as previously explained and cannot provide a sufficient basis to remove Raymond. The Appellants’ request to examine a nonparty cannot be a basis of evidence for removal—it is merely a request. Finally, although not a part of this settled record and not what was ever presented to the circuit court, Raymond did not repudiate the Trust.

5. As to all parties, the evidence does not support rescission.

It is expected Grand Valley will describe at length why rescission is not a viable claim—whether equitable or legal rescission. VOR joins those arguments—as previously stated in the briefing to the circuit court.

In short, rescission is not available because of the lack of evidence presented by Appellants. When faced with Grand Valley's statement of facts, Appellants routinely relied on hearsay documents or merely allegations. (R. 1483-1514.) At a fundamental level, and as expressly described under SDCL 21-12-1 and SDCL 53-11-2, rescission is only available to the parties to the purchase agreement—VOR and Grand Valley. Neither of those parties seek to rescind, and Appellants provided no competent evidence that they can act on behalf of either.

It is worth noting that upon the dismissal of the rescission claim, the inclusion of any other party, outside of Kelly, is unnecessary. If there can be no unwinding, the only remedy available is money damages for undue influence—to which, Appellants have conceded are only against Kelly. (HT p. 35.)

6. The Trial Court correctly exercised its discretion to not allow amendment of the complaint.

Judge Parady correctly denied the motion because it was futile, it was inequitable and unreasonable at this time to allow it, and the attorney who claimed to represent VOR wants to make VOR a defendant. These reasons were not abuse of discretion.

The futility of the amendment and the Appellants' attorney now wanting to move VOR to a defendant role only go together. As previously discussed, the moving of VOR is not a "no-harm-no-foul" situation. The attorney has continuing

duties to a former client—VOR. Further, from the outset of this case, the rules would not allow Paul’s actions on behalf of and against VOR in the same complaint.

Further, based upon the timeline of events—the fact that this case was started in 2023—and the amendment of the Complaint came after the motions for summary judgment on several complicated issues—the Court correctly found that allowing amendment would be inequitable, unfair, and contrary to judicial economy. This exercise of discretion is supported by South Dakota law: “The circuit court’s denial of a party’s request to amend the pleadings is reviewed under an abuse of discretion standard.” *Zhang v. Rasmus*, 2019 S.D. 46, ¶ 33, 932 N.W.2d 153, 163. “An abuse of discretion is a fundamental error of judgment, a choice outside the reasonable range of permissible choices, a decision, which, on full consideration is arbitrary or unreasonable.” *Id.*

7. The Trial Court correctly exercised its discretion to not allow a Rule 35(a) medical examination of Raymond O’Farrell.

In *Stormo*, this Court described the court’s discretion as it relates to a Rule 35(a) medical examination:

SDCL 15-6-35(a) does not give defendants the right to compel Stormo to submit to additional medical examinations until they secure an expert who will agree with their theory of the case.

Stormo v. Strong, 469 N.W.2d 816, 822 (S.D. 1991). The *Stormo* Court also held:

The requirement that “good cause” be established to obtain a physical or mental examination of a party indicates that the moving party must establish a greater showing of necessity than to obtain other forms of discovery.

Id.

The order of the circuit court described that it denied the Rule 35(a) examination because Raymond did not fit within the group of persons described under the rule. The rule requires the individual to be a party to the litigation:

In an action in **which the mental or physical condition of a party** or the consanguinity of a party with another person or party is in controversy, the court in which the action is pending may order such person or party to submit to a physical or mental examination or blood test by a physician. The order may be made only on motion for good cause shown and upon notice to the person or party to be examined and to all other persons or parties involved and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

SDCL 15-6-35(a) (emphasis added).

Raymond was not personally a party to the litigation. Although there are notices of appearance that include Raymond, it is undisputed that he was never added as a party. Instead, Appellants attempted to add him as a party in their amended complaint. (R. 1376.) The trial court's discretion to not allow an amendment to complete a 35(a) examination was not an abuse of discretion.

Further, although not mentioned by the trial court, the good cause provided by the Appellants was limited to Victoria's hearsay affidavit and Lance's affidavit which was not part of the record for the trial court. (R. 1404-1409.) Beyond that, the "good cause" was merely based upon allegations in the various complaints—rather than competent evidence.

8. The Trial Court did not abuse its discretion when it declined to delay the summary judgment proceedings under Rule 56(f).

In *Davies*, when reviewing whether the trial court abused its discretion, this Court recently described the factors considered for a Rule 56(f) affidavit:

To make this showing, the Rule 56(f) affidavit must include identification of “the probable facts not available and what steps have been taken to obtain” those facts, “how additional time will enable [the nonmovant] to rebut the movant’s allegations of no genuine issue of material fact[,]” and “why facts precluding summary judgment cannot be presented” at the time of the affidavit.

Davies v. GPHC, LLC, 2022 S.D. 55, ¶51, 980 N.W. 2d 251, 265.

To start, the additional discovery would not cure the problem Appellants have with the case continuing with VOR as a party, given the conflict that exists with Appellants’ counsel. Nor does additional discovery create any additional right that would allow the Appellants to bring a declaratory judgment on behalf of Victoria’s Estate. Similarly, the circuit court held that further discovery will not change the outcome of the summary judgment proceeding.

Additionally, the circuit court’s denial of the 56(f) motion is supported by the time that many of these discovery request could have been completed—at some point over the last 3 years! As noted in the District Court of South Dakota, in *First Dakota National Bank v. Ruba*, the use of a 56(f) affidavit “is extremely unlikely to succeed when the party seeking the delay had failed to take advantage of discovery.” No. 4:16-CV-04007-RAL, 2016 WL 7410562, at *2 (D.S.D. Dec. 21, 2016). (See R. 1526-1530: Grand Valley’s Brief succinctly explains the dilatory nature of Appellants.)

9. The complaint against the Estate, Trust, and VOR was frivolous.

The circuit court granted attorney fees to the Estate, Trust, and VOR for the frivolous nature of the complaint, under SDCL 15-17-51. Under SDCL 15-17-51, attorney fees can be awarded where conduct is frivolous or malicious. *Johnson v. Miller*, 818 N.W. 2d 804, 807 (S.D. 2012). A claim is frivolous when there is a "deficiency in fact or law that no reasonable person could expect a favorable judicial ruling..." *Citibank (S.D.), N.A. v. Hauff*, 2003 S.D. 99, ¶31, 668 N.W.2d 528, 537 (citations omitted).

As noted by the circuit court, the frivolous nature of the complaint is highlighted by Appellants' attempt to act on behalf of VOR and against VOR in the same complaint. (R. 1600.) The Appellants did not object to the amount of the attorney fees at the trial court level and, instead, only argue that no fees should have been awarded. Because Appellants' conduct also included filing a complaint on behalf of Victoria's Estate when they knew they were not in a position to do so, the circuit court had an adequate basis for awarding attorney fees.

CONCLUSION

Judge Pardy examined the record before him and got this matter right. The Appellants have a recourse, but are not entitled to make a litigation soup just by filing a declaratory judgment action. The lack of evidence and the inability to bring claims on behalf of various parties are dispositive as to this case for the various Appellees. Therefore, Appellees VOR, the Revocable Trust, and Victoria's

Estate respectfully ask this Court to affirm the circuit court's summary judgments and its denial of Appellants' various motions.

DATED this 2nd day of December, 2025.

Respectfully submitted,

SCHOENBECK & ERICKSON, PC

By: /s/ Joe Erickson
LEE SCHOENBECK
JOE ERICKSON
Attorneys for Appellees VOR, Inc.
O'Farrell Trust, Estate of Victoria O'Farrell
1200 Mickelson Dr., STE. 310
Watertown, SD 57201
(605) 886-0010
lee@schoenbecklaw.com
joe@schoenbecklaw.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in SDCL 15-26A-66(b)(4). This brief was prepared using Microsoft Word 2013, with 12 point Georgia font. This brief contains 6,959 words, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificate of counsel. I relied on the word count feature in Microsoft Word 2013 to prepare this certificate.

DATED this 2nd day of December, 2025.

SCHOENBECK & ERICKSON, PC

_____/s/ Joe Erickson _____
LEE SCHOENBECK
JOE ERICKSON
*Attorneys for Appellees VOR, Inc.
O'Farrell Trust, Estate of Victoria O'Farrell*
1200 Mickelson Dr., STE. 310
Watertown, SD 57201
(605) 886-0010
lee@schoenbecklaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on December 2, 2025, I served a true and correct copy of the foregoing *Appellees' Brief* via electronic means on the following:

Daniel K. Brendtro
Hovland Rasmus & Brendtro, PLLC
P.O. Box 2583
Sioux Falls, SD 57101
Attorney for Plaintiffs/Appellants

Reed Rasmussen
Siegel, Barnett & Schutz, LLP
P.O. Box 490
Aberdeen, SD 57402

and

William G. Beck
Woods Fuller Shultz & Smith P.C.
300 South Phillips Ave., STE. 300
Sioux Falls, SD 57117

Attorneys for Grand Valley

Jack Hieb
Richardson, Wyly, Wise, Sauck & Hieb
1 Court Street
Aberdeen, SD 57401
Attorney for Kelly O'Farrell

____/s/ Joe Erickson_____
Attorney for Appellees

IN THE
Supreme Court
of the
State of South Dakota

No. 31101

ESTATE OF PAUL O'FARRELL, individually, and, as a
beneficiary of the family trust; and, for the benefit of The Estate of
Victoria O'Farrell;
SKYLINE CATTLE COMPANY, a South Dakota corporation; and
VOR, INC, a South Dakota corporation,
PLAINTIFFS/APPELLANTS

vs.

KELLY O'FARRELL, an individual;
GRAND VALLEY HUTTERIAN BRETHERN, INC., a South
Dakota corporation;
THE RAYMOND AND VICTORIA O'FARRELL LIVING
TRUST, a South Dakota trust; and
RAYMOND O'FARRELL, individually, as Trustee, and as Special
Administrator of the Estate of Victoria O'Farrell; and
VOR, INC. (by Raymond O'Farrell).
DEFENDANTS/APPELLEES

An intermediate appeal from the Circuit Court
Third Judicial Circuit, Grant County, South Dakota

The Hon. Patrick Pardy
CIRCUIT COURT JUDGE

APPELLANTS' REPLY BRIEF

Submitted by: Daniel K. Brendtro; Mary Ellen Dirksen; & Benjamin Hummel
Hovland, Rasmus & Brendtro, Prof. LLC; P.O. Box 2583; Sioux Falls, SD 57101
Attorneys for Plaintiffs/Appellants, including Lance O'Farrell

Petition for Intermediate Appeal Granted on August 11, 2025

Lee Schoenbeck
Joseph Erickson
Schoenbeck & Erickson, PC
1200 Mickelson Dr., Ste. 310
Watertown, SD 57201
lee@schoenbecklaw.com
joe@schoenbecklaw.com

Counsel for the Raymond and Victoria O'Farrell Living Trust, and, the Estate of Victoria O'Farrell (and for Raymond O'Farrell individually, as, Special Administrator of the Estate; and as Trustee), and as asserted counsel for VOR, Inc., by and through Raymond O'Farrell.

Reed Rasmussen
Siegel, Barnett & Schutz,
LLP PO Box 490
Aberdeen, SD 57402
Rrasmussen@sbslaw.net

Counsel for Grand Valley Hutterian Brethren, Inc.

William G. Beck
Seth A. Lopour
Woods, Fuller, Shultz & Smith, PC
300 S. Phillips Ave., Ste. 300
Sioux Falls, SD 57117
billbeck@woodsfuller.com
seth.lopour@woodsfuller.com

Counsel for Grand Valley Hutterian Brethren, Inc.

Jack Hieb
Richardson Law Firm
1 Court Street
P.O. Box 1030
Aberdeen, SD 57402-1030
jhieb@rwwsh.com
Counsel for Kelly O'Farrell

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT-IN-REPLY	1
1. Raymond’s repudiation of the Trust provides a simple basis for reversing the Circuit Court’s dismissal of Count 1, which sought Raymond’s removal as Trustee.	1
2. Removing Raymond for repudiating the Trust provides a simple answer to questions of “standing”	2
3. We are not dealing with a revocable trust	7
4. This case is very much like a shareholder derivative suit.	10
5. The Hutterite Colony conflates and also misapplies the doctrines of equitable and legal rescission	11
6. Dismissal of VOR, the Estate, and the Trust is error	16
7. VOR is a nominal party, and, thus its alignment does not define the scope of relief available, nor does it impair the ability of Paul and his Estate to seek claims for it and against it.	18
8. Raymond, as the current Trustee (and also as the alleged President of VOR) voluntarily made himself a party to these proceedings, which provides the basis for a Rule 35(a) examination of his mental and physical condition.	19

9.	A claim of undue influence does not require direct evidence of specific actions or statements	20
10.	A claim for rescission is a recognized “cause of action” in South Dakota	21
11.	The Circuit Court abused its discretion by denying the motion to amend the Complaint and the Rule 56(f) affidavit seeking postponement of summary judgment proceedings during the pendency of discovery.	21
	CONCLUSION	24
	CERTIFICATE OF COMPLIANCE	25
	CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

Cases

<i>Arrowsmith v. Odle</i> , 2025 S.D. 70	22
<i>Olson v. Huron Reg'l Med. Ctr., Inc.</i> , 2025 S.D. 34	22
<i>Barefoot v. Jennings</i> , 456 P.3d 447, 450 (Cal. 2020)	9, 10, 17
<i>Beachy v. Becerra</i> , 609 N.W.2d 648, 651-51 (Neb. 2000)	17
<i>Beatty v. Depue</i> , 103 N.W.2d 187 (S.D. 1960)	12
<i>Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.</i> , 2005 S.D. 82	2
<i>Est. of Chancellor v. Comm'r</i> , 102 T.C.M. (CCH) 70 (Tax Court 2011).	8
<i>Halvorson v. Birkland</i> , 171 N.W.2d 77 (S.D. 1969)	12
<i>Hansmeyer v. Shotkoski</i> , No. CIV 17-4150, 2018 WL 3104437 (D.S.D. June 22, 2018)	18
<i>Healy Ranch P'ship v. Mines</i> , 2022 S.D. 44.....	2
<i>In Cotter on behalf of Reading International, Inc. v. Kane</i> , 473 P.3d 451, 455 (Nev. 2020).	19
<i>In re Murrin Bros. 1885, Ltd.</i> , 603 S.W.3d 53, 60-61 (Tex. 2019).	19
<i>Jones v. Bohn</i> , 311 N.W.2d 211, 213 (S.D. 1981).	21
<i>Granite Buick GMC, Inc. v. Ray</i> , 2014 S.D. 78, ¶ 10, n.5	21
<i>Knudsen v. Jensen</i> , 521 N.W.2d 415, 421 (S.D. 1994)	12
<i>Matter of Est. of Calvin</i> , 2021 S.D. 45	10

<i>Matter of Est. of Tank</i> , 2020 S.D. 2	20
<i>Noble for Drenker v. Shaver</i> , 1998 S.D. 102	11
<i>Schroder v. Scotten, Dillon Co.</i> , 299 A.2d 431, 435 (Del. Ch. 1972)	17
<i>Skoglund v. Staab</i> , 312 N.W.2d 29, 31 (S.D. 1981).	12
<i>Starr v. Ashbrook</i> , 304 Cal. Rptr. 3d 275, 288 (2023)	9, 10, 17
<i>Vanderwerf v. Kirwan</i> , 1998 S.D. 119	14
<i>Whitford v. Dodson</i> , 181 N.W. 962 (S.D. 1921)	14
<i>Williams v. Van Sickel</i> , 659 N.W.2d 572 (2003).	13-14

Statutes

SDCL § 15-6-8(a)	5
SDCL § 21-12-1	15
SDCL § 21-24-7	16
SDCL § 53-11-2	13
SDCL § 55-1-8	8
SDCL § 55-1-24	8
SDCL § 55-1-43	8
SDCL § 55-2-1, -3, -6, -7	8
SDCL § 55-3-6	8

Secondary Sources

<i>Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel</i> , 80 Nw.U.L.Rev. 1244, 1249 (1986)).	2
Dan B. Dobbs, <i>Handbook on the Law of Remedies: Damages–Equity–Restitution</i> 294 (1973)	21
RESTATEMENT (THIRD) OF TRUSTS § 107 (2012)	10
Hon. T. Schroeder, “ <i>Toward a More Apparent Approach to Considering the Admission of Expert Testimony</i> ,” 95 NOTRE DAME L. REV. 2043 (quoting <i>Joiner</i> , 522 U.S. 136, 142 (1997))	22

INTRODUCTION

This case is stuck has been stuck in ‘procedural mode’ since its filing three years ago. The Colony’s and VOR’s reluctance to defend Paul’s case on the merits is understandable. What happened to Raymond is indefensible.

This case remains one of the few (if any) reported instances where undue influence was identified contemporaneously *while it was occurring*. Victoria saw it, and her lawsuit attempted to stop it. Despite spirited procedural challenges by all Defendants, Paul’s lawsuit is a proper mechanism by which to carry out the repair. Paul’s brother Lance, his son Connor, his Estate, and Skyline Cattle are capable of carrying it forward.

The first step is to remove Raymond as Trustee, a claim and remedy for which there is no longer a defense: when Raymond repudiated the Trust, he provided an airtight, undisputable basis for his own removal.

ARGUMENT-IN-REPLY

- 1. Raymond’s repudiation of the Trust provides a simple basis for reversing the Circuit Court’s dismissal of Count 1, which sought Raymond’s removal as Trustee.**

Neither of the Appellees disputes the premise that Raymond has repudiated the very *existence* of the Trust at the core of this litigation. We

discussed this in our opening Brief in this appeal at pages 16-17 and 31-33. Specifically, within Victoria's Probate file, Raymond now asserts that the farmland at issue was never placed into the Trust, and, therefore that the Trust never came into existence. *See, generally*, Appeal #31106.

Raymond is wrong about the Trust, as we have pointed out in that parallel appeal. But, under the principles of judicial estoppel, Raymond is now bound by the implications of his theory, including as it pertains to this appeal. “[J]udicial estoppel requires neither privity between parties in the two proceedings nor detrimental reliance by the other party.” *Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.*, 2005 S.D. 82, ¶ 34 (quoting *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw.U.L.Rev. 1244, 1249 (1986)). “The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather it is the intentional assertion of an inconsistent position that perverts the judicial machinery.” *Id.* This Court can take judicial notice of Raymond's repudiation of the Trust and use it within this proceeding as evidence of his inherent unfitness as Trustee.¹

¹ *Healy Ranch P'ship v. Mines*, 2022 S.D. 44, ¶ 59 (“Judicial estoppel is not limited to situations in which the party has prevailed on the merits by pressing the prior position; rather, it requires only “judicial acceptance” of the prior position, meaning that

There is no scenario under which Raymond can continue to act as the Trustee of a Trust he has disavowed. As a matter of law, undisputable grounds now exist for Raymond's removal as Trustee. This was relief sought by Paul's Complaint in Count 1, and which is also proposed in Connor's Amended Complaint, in Count 2.

Again, nobody in this appeal has offered any defense of (nor explanation of) Raymond's repudiation. As a result, Raymond has greatly simplified this case, paving the way for his removal, and, simplifying the standing analysis.

2. Removing Raymond for repudiating the Trust provides a simple answer to questions of "standing"

We note, first, that the word "standing" does not appear anywhere in Judge Pardy's opinion. Nor did any of the parties brief the issue of "standing" below. The first time the issue appears is in the Hutterite Colony's appellate brief, filed on 12/2/2025. That is why we have not addressed standing questions until this Reply Brief.

the court "adopted the position urged by the party, *either as a preliminary matter or as part of a final disposition.*" (emphasis added)

There are at least five, independent theories of standing that permit various plaintiffs/appellants to challenge the corporate acts of VOR, and to pursue a rescission of the land sale. In light of Raymond's repudiation, the simplest of these is that Lance O'Farrell now has a clear path to being named the successor trustee, replacing Raymond.

- *Lance as Successor Trustee.* Raymond and Victoria's Trust named Paul and Lance as co-successor trustees. Lance O'Farrell is the only living successor trustee. At the Circuit Court level, Lance joined the plaintiffs' claims; and Lance has also joined in this intermediate appeal. As the designated successor trustee, Lance has a valid interest in pursuing relief for the Trust, to protect it, and to enforce its rights.
- *Skyline Cattle Company's Interests.* Paul's farming corporation did not die with Paul; as a corporation it outlived him and maintains its rights and claims. The Complaint identifies damages to that corporation arising out of VOR's abrupt, wrongful termination of its farming partnership with Skyline, which operated the land; and the Complaint seeks declaratory relief for Skyline's benefit as to the invalidity of the various

corporate machinations. These claims arise *both* out of the purported sale of the land, as well as from VOR's bad faith refusal to renew the operating notes.

- *Paul's Estate's Equitable Claim.* Independent of any trust and rescission issues, Paul (and now Paul's Estate) holds an equitable claim for the value of the improvements he made to the property at his expense, but which were then taken from him without compensation when the land was sold. In other words, even if all of the trust challenges fail, Paul was never compensated for his house, shop, and cattle feedlot improvements, and his Estate is entitled to compensation.²
- *Paul's Children as Contingent Beneficiaries.* Paul's children, including Connor O'Farrell, as contingent beneficiaries of Paul's share of the Trust, have a pecuniary interest in the land sale, and, in the proper administration of Trust assets, and also

² This equitable claim is the *only* claim that Paul brought "against" VOR. It was sought in the alternative. The rules of pleading permit him to assert this without jeopardizing his other claims. SDCL 15-6-8(a) ("A party may also state as many separate claims or defenses as he has regardless of consistency..."); SDCL 15-6 Appendix, Form 2 ("this chapter permits alternative and inconsistent pleading")

have an articulated interest in a declaratory judgment as to the validity of VOR's corporate actions.

- *Victoria's Estate & Pour-over Will.* In March 2025 (after the summary judgment motions had been briefed), Raymond finally revealed the existence of a signed, notarized copy of Victoria's Will, which contains a pour-over provision into the Trust. *Someone* on her behalf should be advocating for her Estate's rights, but *any* downstream beneficiary of her Trust would similarly be an interested party within her Estate to pursue the pecuniary effects of the pour-over provision. (We address Victoria's 50% of the Trust in greater detail in the next section.)

As to the elements of standing: (i) each of these parties alleges pecuniary harm arising from the land transaction and/or VOR's corporate actions (*i.e.*, an "injury-in-fact"); (ii) each of these parties identifies the cause of this harm to be Raymond's actions on behalf of VOR and the Trust, which were compromised by undue influence; lack of capacity; or a failure of corporate notice and formalities (*i.e.*, "causation"); and (iii) each of these parties identifies a path to unwind the misconduct, or, for an award of money damages (*i.e.*, "redressability").

3. We are not dealing with a revocable trust.³

The Appellees suggest that none of the Plaintiffs have viable claims because Raymond was free to remove “his” assets from this “living trust,” as well as to revoke or and change the trust at any time. But this is inaccurate in several respects.

Although the O’Farrell’s family trust contained *some* features of a “revocable living trust,” it also contains features which constrained Raymond and Victoria’s conduct regarding the trust and its assets. Foremost among these was the unanimity provision that required joint action regarding assets during her lifetime.

Equally significant is that upon Victoria’s death, her one-half ownership of VOR, Inc., became part of a Marital Trust, a *sub-trust* within the Living Trust, which thereafter contains *irrevocability* features.

See, Section 1.03; Section 6.08; Article 8. The ultimate beneficiaries of this Marital Trust are her descendants, not Raymond, and the primary beneficiaries are now Paul’s children. *See*, Section 8.08; Article 9.

The Marital Trust (*i.e.*, this sub-trust) ensures Raymond receives lifetime trust income and/or principal under the health,

³ Responsive to Hutterite Colony’s brief, Issue 2; VOR’s brief, Issue 2.

education, maintenance and support (“HEMS”) standard, which is a *limited* and objectively ascertainable standard under the law. *See*, Section 8.02; and, *e.g.*, *Est. of Chancellor v. Comm’r*, 102 T.C.M. (CCH) 70 (Tax Court 2011). Further, Raymond has no power to appoint Victoria’s one-half share of the VOR, Inc., shares to himself, under the Marital Trust’s “Limited Testamentary Power of Appointment.” And, as an Interested Trustee, Raymond has no revocation authority or power over the Marital Trust. *See*, Article 8; Section 14.20; Section 16.08(l). *See also* SDCL 55-3-6.

Nonetheless, Raymond claims that in the summer of 2022, he unilaterally removed the remaining shares of VOR from the Marital Trust in his individual capacity, and it is clear from his judicial admissions that the Marital Trust was not replenished with property of equivalent value. This distribution of the entire Marital Trust corpus was void, and far in excess of Raymond’s health, education, maintenance, and support needs, *i.e.*, in excess of the distribution standard.

Distributions in excess of an ascertainable standard like this are capable of legal challenge by downstream beneficiaries. *See*, SDCL 55-1-8; SDCL 55-1-24.1; SDCL 55-1-43; SDCL 55-2-1, -3, -6, and -7. And, any of

Raymond's withdrawals or other acts which violated the unanimity provisions would be similarly actionable now.

Further, because this Trust has *some* features of a revocable living trust, we acknowledge the *general rule* that a beneficiary of a living trust does not yet have a vested interest that conveys standing to challenge trust actions. But this is a *general rule* which contains necessary exceptions for the circumstances here. Otherwise, there would be no remedy to protect Trustors of a living trust from manipulation.

Accordingly, courts have adopted sensible exceptions to the general rule, thus creating an avenue for beneficiaries of a living trust to challenge actions which are infected by undue influence or a lack of capacity.

For example, courts have held that a beneficiary of a revocable trust has standing *during* the trustor's lifetime in when seeking to challenge trust actions which are the result of undue influence or incompetence. *Starr v. Ashbrook*, 304 Cal. Rptr. 3d 275, 288 (2023), as modified on denial of reh'g (Jan. 26, 2023), review denied (Apr. 12, 2023). When the Settlor "is subject to fraud and undue influence[,]....[he] lacks legal capacity... and cannot presently revoke the Trust." 304 Cal. Rptr. 3d at 287. *Accord, Barefoot v. Jennings*, 456 P.3d 447, 450 (Cal. 2020) (settlor's exclusive standing to

pursue trust claims applies “as long as settlor is alive...*and* the settlor is *competent*”) (emphasis added). “[W]e permit those whose well-pleaded allegations show that they have an interest in a trust—because the amendments purporting to disinherit them are invalid—to petition the probate court.” *Id.*, at 451. This exception is necessary to protect vulnerable parties, their assets, and their intended heirs.

This Court has already voiced a similar exception in *Matter of Est. of Calvin*. Although “the trustee, and not a beneficiary, is *ordinarily* the only proper person to bring (and to decide whether to bring) an action on behalf of the trust against a third party...[a] beneficiary may maintain a proceeding related to the trust or its property against a third party only if ... the trustee is unable, unavailable, unsuitable, or improperly failing to protect the beneficiary’s interest.” *Matter of Est. of Calvin*, 2021 S.D. 45, ¶¶ 17-18 (quoting RESTATEMENT (THIRD) OF TRUSTS § 107 (2012) (emphasis added).

4. This case is very much like a shareholder derivative suit⁴

Although both of the Appellees dispute that this action is akin to a corporate derivative action, it remains an apt analogy. The sole shareholder

⁴ Responsive to VOR’s brief, Issue 1(c), and the Hutterite Colony’s brief, Issue 2(c).

of VOR was the Trust, into which Raymond and Victoria had deposited their own shares of VOR. Raymond, as trustee, is the primary person who would ordinarily bring a shareholder suit against VOR. But this would have placed Raymond in a position of bringing suit against himself in his director role. Raymond has refused to do so. And in addition to those various conflicts of interest, he has now repudiated the Trust (and thus repudiated the Trust's role as a shareholder altogether).

In spite of the formalities associated with shareholder derivative actions, a litigant need not make a demand upon the directors as a prerequisite to suit if such demand would be futile. It is clear that, at the time the complaint was filed, demand upon Raymond would have been futile. *Noble for Drenker v. Shaver*, 1998 S.D. 102, ¶ 17, n.3. Given that procedural and factual posture, the plaintiffs here are suitable parties to bring this action.

5. The Hutterite Colony conflates and also misapplies the doctrines of equitable and legal rescission⁵

Six points are sufficient to clarify the law of rescission.

⁵ Responsive to the Hutterite Colony's Brief, Issues 2(b) and 3.

First, the procedural requirements for rescission apply solely to a *legal* rescission. *Skoglund v. Staab*, 312 N.W.2d 29, 31 (S.D. 1981).

Second, Paul complied with those requirements via his notice of rescission on behalf of VOR, Inc. The statute merely states that the rescinding party must *offer* to restore value, rather than *tender payment*. The notice *offered* this. The statute does not require notice to the longer list of persons envisioned by the Colony (such as Paul's siblings or the Bank). Moreover, by then, VOR had already acquired the Bank's interest in the mortgages, which was the subject of Appeal #30862.

Third, the rescission statute does not require "timeliness" and instead, merely *reasonable diligence*. The land sale closed (*i.e.*, the deed was transferred) in mid-October 2022, rather than in August of 2022. Paul's Notice of Rescission was issued on March 1, 2023. The attempted legal rescission occurred less than five months of the deed transfer. There is no South Dakota case suggesting that five months lacks promptitude. *E.g.*, *Halvorson v. Birkland*, 171 N.W.2d 77 (S.D. 1969) (holding 2 years sufficiently prompt); *Beatty v. Depue*, 103 N.W.2d 187 (S.D. 1960) (1.5 years sufficient); *Knudsen v. Jensen*, 521 N.W.2d 415, 421 (S.D. 1994) (1 year sufficient).

Fourth, although Paul’s death in October of 2024 extinguishes his ability to pursue relief as *an ousted officer* in this lawsuit, Paul’s death does *not* retroactively extinguish the validity of his attempted legal rescission. Instead, the validity of that legal rescission would be evaluated based upon the corporate facts and procedure of VOR up through March 1, 2023.

Fifth, a successful *legal* rescission claim does not require proof that the Colony itself exerted undue influence upon Raymond. Instead, it is sufficient if the Colony is shown to have “connived” with the undue influence, or, if the Colony connived in obtaining the agreement from Raymond at a time when it knew or should have known he lacked capacity. exerted undue influence upon Raymond. *See*, SDCL 53-11-2(1) (“connivance”).

Connivance is defined as “knowledge of and active or passive consent to wrongdoing.” *See*, Merriam-Webster.com (also listing “complicit” as a synonym) (emphasis added). It is also defined as “ignoring another person’s wrongdoing.” *See*, dictionary.nolo.com

In contrast, the Colony offers a much narrower view of ‘connivance,’ for which it offers the Iowa case of *Williams v. Van Sickle*, 659 N.W.2d 572

(2003). But *Williams* is not a rescission case. Instead, that case addresses Iowa's common law standard for recovery of attorney's fees.

Moreover, the quotations offered by the Colony are inaccurate and misleading. Instead, the language of *Williams* indicates that connivance is the equivalent of "willful blindness." *Id.* Or, in other words, complicity.⁶

The Colony's complicity is demonstrated by the land sale contract, which alerted it to Victoria's lawsuit that sounded the alarms about Raymond. The Colony was told *at the time of its purchase agreement* that VOR's ability to give clear title was conditioned upon resolving the problem that Raymond was allegedly not making his own decisions. The Colony moved ahead anyway. The Colony was complicit.

Although Paul's original Complaint did not expressly discuss or allege the Colony's "knowledge," this was soon remedied by Raymond's decision to add the Purchase Agreement into the Record. Paul's counsel also pointed

⁶ "Connivance" within the rescission statute appears to be a variation of the same standard for setting aside a deed that was first announced by this Court a century ago. See, *Vanderwerf v. Kirwan*, 1998 S.D. 119, ¶ 19 (quoting *Whitford v. Dodson*, 181 N.W. 962, 964 (S.D. 1921) (deed can be set aside when buyer either has "knowledge" of the defect, or "*knowledge of facts or circumstances sufficient to put an ordinarily prudent [person] upon inquiry*"). Under either rule, the Colony is not an innocent purchaser for value.

this out to the Circuit Court at the first hearing, [R.412; HT 31:9-25], and then Connor's counsel made the allegations specifically in the Amended Complaint, which referenced the original purchase agreement and incorporated by reference the allegations in Victoria's lawsuit. [R.1399; ¶¶ 108-110].

And, *sixth*, the Colony is misreading SDCL 21-12-1. An equitable remedy is available to "an *aggrieved* party" whether or not they are parties to the contract. This remedy is available to a broader class of litigants than the legal rescission contemplated by Chapter 53-11. The plaintiffs here are within that class.

In sum, the Colony's view of rescission is inaccurate. The notice of rescission was sufficient, and, Paul arguably had corporate authority to issue it. Or, if he lacked corporate authority, Paul and various other litigants are *aggrieved parties* who can pursue an equitable rescission, because they lack an adequate remedy at law.⁷

⁷ This is also the simple response to VOR's argument in Issue 2, asserting that Paul lacked authority to initiate suit on behalf of VOR. Discovery will bear out the answer to that, but, even if he lacked authority, this merely means that the remaining remedy is an *equitable* rescission, for which he did have standing to bring.

6. Dismissal of VOR, the Estate, and the Trust is error⁸

The Trust and Victoria's Estate have a pecuniary interest in the relief sought in this action. As such, the declaratory judgment statutes indicate that they should be made parties. SDCL 21-24-7 ("all persons shall be made parties who have or claim any interest which would be affected by the declaration").

Whether the Estate, VOR, and the Trust are captioned as plaintiffs or defendants is immaterial. As long as any one of the parties discussed in Section 2, above, has standing to pursue relief, then Victoria's Estate, the Trust, and the Corporation need to be joined as parties.

⁸ Responsive to VOR's Brief, Issues 3 and 4, as well as Issue 9.

Throughout this litigation, we have provided authority demonstrating that Paul could plausibly pursue relief *for the benefit of* the Corporation,⁹ *for the benefit of* the Estate,¹⁰ and *for the benefit of* the Trust.¹¹

If the existing Plaintiffs are not the proper parties to bring suit *for the benefit of* the Corporation, the Estate, and the Trust, the solution is to recaption them as defendants. They are *nominal* parties, and still necessary parties to the adjudication. The current plaintiffs can pursue the same relief, which may in fact benefit the Corporation, Estate, and Trust.

And, based upon the great weight of authority cited above, it was not *frivolous* to attempt to bring action for their benefit, given Raymond's conflicts and refusals. A frivolous action is one with no reasonable basis in law or fact.

⁹ Paul believed he had the right to pursue relief for VOR on the basis that he continued to hold office because his ouster was impermissibly achieved. *See, Schroder v. Scotten, Dillon Co.*, 299 A.2d 431, 435 (Del. Ch. 1972) (when corporate meetings are not lawfully convened, the previous directors and officers continue to hold office).

¹⁰ There is substantial authority permitting interested parties like Paul to assert claims on behalf of an Estate like Victoria's. *See, Beachy v. Becerra*, 609 N.W.2d 648, 651-51 (Neb. 2000) (citing 31 Am.Jur.2d *Executors and Administrators*, § 1285 (1989)) (interested party to an Estate is permitted to bring or enforce claims for the benefit of the Estate when the Personal Representative has failed to act, or when his interests are antagonistic to the Estate, or are otherwise collusive).

¹¹ *See, e.g., Starr v. Ashbrook*, 304 Cal. Rptr. 3d 275, 288 (2023); *Barefoot v. Jennings*, 456 P.3d 447, 450 (Cal. 2020), discussed *infra*.

7. VOR is a nominal party, and, thus its alignment does not define the scope of relief available, nor does it impair the ability of Paul and his Estate to seek claims for it and against it.

Paul's lawsuit sought to rectify corporate wrongdoing and declare invalid his ouster as President; or, in the alternative, to recover equitable damages for unjust enrichment. In the first instance, he would be attempting to help the corporation by rectifying its invalid corporate acts and restoring him to office; or, in the alternative, he would be seeking money damages from the corporation. In either case, the corporation is a necessary party. But, in both instances the corporation would be a *nominal* party.

Such an action does not "make the real-party-in-interest rule a nullity," as VOR suggests in Issue 1(a). Nor would it require disqualification of an attorney who brought these claims, no matter if the corporation were aligned as a plaintiff or later realigned as a defendant.¹²

This case is emblematic of the lesson from *Hansmeyer v. Shotkoski*, No. CIV 17-4150, 2018 WL 3104437, at *3 (D.S.D. June 22, 2018). A lawsuit seeking to undo a business transaction is typically brought by the plaintiff, *on behalf of* the corporation, but "[w]here management refuses to take action to

¹² When disputes arise about a corporation's action or inaction, a lawsuit "may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization." S.D. Rule of Prof. Cond. 1.13, Comment 13.

undo a business transaction or whenever it so solidly approves [of the transaction] that any demand to rescind would be futile, a court should find antagonism [and the corporation should be re-aligned as a defendant].” *Id.*

“[A]lthough the corporation is named in the complaint as a defendant, its interests are not necessarily *adverse* to those of the plaintiff since [the corporation] will be the beneficiary of any recovery.” *In Cotter on behalf of Reading International, Inc. v. Kane*, 473 P.3d 451, 455 (Nev. 2020).

But in each instance, the corporation’s designation as plaintiff or defendant does not matter. “At bottom, this is a fairly straightforward case about which ownership group controls the company’s decisions. [It] boils down to a fight between the Murrin Group and the Hickman Group, both of which are well represented by the lawyers of their choice.” *In re Murrin Bros. 1885, Ltd.*, 603 S.W.3d 53, 60–61 (Tex. 2019).

8. Raymond, as the current Trustee (and also as the alleged President of VOR) voluntarily made himself a party to these proceedings, which provides the basis for a Rule 35(a) examination of his mental and physical condition.

The only defense offered against a mental examination of Raymond was that he is not a “party” to these proceedings, and, thus outside the reach of Rule 35(a). But Raymond volunteered himself into these

proceedings. He is the trustee, and he is the ostensible president of VOR. His mental capacity is in dispute. It was error to refuse an examination of him.

9. A claim of undue influence does not require direct evidence of specific actions or statements.¹³

The Hutterite Colony misapprehends the law of undue influence by suggesting that the absence of *specific* knowledge about “exactly what Kelly did” is an admission which sinks the case. Colony Brief, pp. 15-18. Direct evidence of the wrongdoing is not required. *Matter of Est. of Tank*, 2020 S.D. 2, ¶ 39 (“There seldom is [direct proof of undue influence]. Undue influence is not usually exercised in the open. It is therefore usually solely through inferences drawn from surrounding facts and circumstances that a court arrives at the conclusion that a will is the product of undue influence working on the mind of the testator.”) (quotations omitted). A plausible claim of undue influence exists here, if discovery is allowed to proceed.

¹³ Responsive to the Colony’s Issue 1.

10. A claim for rescission is a recognized “cause of action” in South Dakota

Without citing authority, the Hutterite Colony twice asserts that “rescission is a remedy, not a cause of action,” in the apparent hope that this immunizes them from suit. *See*, Colony Brief, pp. 15, 32.

Regardless of the Colony’s semantics, this Court has held otherwise: “an *action for rescission* may be brought as a *legal action* pursuant to SDCL ch. 53-11, or as an *equitable action* pursuant to SDCL ch. 21-12.” *Jones v. Bohn*, 311 N.W.2d 211, 213 (S.D. 1981). *Accord*, *Granite Buick GMC, Inc. v. Ray*, 2014 S.D. 78, ¶ 10, n.5 (quoting Dan B. Dobbs, *Handbook on the Law of Remedies: Damages–Equity–Restitution* 294 (1973) (“In equity the suit is not *on* rescission, but *for* rescission...”)).

11. The Circuit Court abused its discretion by denying the motion to amend the Complaint and the Rule 56(f) affidavit seeking postponement of summary judgment proceedings during the pendency of discovery.

Although not yet cited by any party, the controlling standard for ‘abuse of discretion’ review was clarified by this Court in two recent cases. Abuse of discretion analysis involves three parts:

[i] [W]e review the circuit court’s findings of fact under the clearly erroneous standard; [ii] we apply the *de novo* standard when reviewing its conclusions of law; [and] [iii] we then evaluate “the circuit court’s ultimate decision...for an abuse of discretion. An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.

Arrowsmith v. Odle, 2025 S.D. 70, ¶ 12 (quoting, *inter alia*, *Olson v. Huron Reg'l Med. Ctr., Inc.*, 2025 S.D. 34, ¶¶ 17-19 (numbering added)).¹⁴

[Discretion is abused] when the circuit court clearly errs in weighing the relevant factors. This includes instances where the court fails to consider a relevant factor that should have received significant weight, or gives significant weight to an improper or irrelevant factor.

Olson v. Huron Reg'l Med. Ctr., Inc., 2025 S.D. 34, ¶ 19 (citations and quotations omitted).

Here, the Circuit Court abused its discretion on the Rule 56(f) affidavit and the motion to amend the complaint by committing an error of law. It resolved both issues upon a very narrow legal conclusion, namely, that the amended complaint could not state a valid claim (and was thus

¹⁴ Although those two cases involved the failure to prosecute, the three-part standard for abuse of discretion review appears to be universal in its application. Many (or most) of the cases cited in the standard of review paragraphs in *Olson* were not ‘failure to prosecute’ cases. *See, also*, Hon. T. Schroeder, “*Toward a More Apparent Approach to Considering the Admission of Expert Testimony*,” 95 NOTRE DAME L. REV. 2043 (quoting *Joiner*, 522 U.S. 136, 142 (1997)) (explaining three-part abuse of discretion review as applied to Rule 702 evidentiary questions).

futile), and likewise that “further discovery will not change the outcome of the proceeding...” since the Circuit Court saw no valid claims.

A Circuit Court commits a *per se* abuse of discretion when it makes an error of law. If the Complaint and Amended Complaint contain valid claims, then discovery should proceed, and, the amendment should be allowed.

The Hutterite Colony’s primary objection to further discovery is newly minted for this appeal: that this case has been pending for three years, during which discovery should have already taken place. This was not argued below, and this finding was not part of the Circuit Court’s decision.

Nor is this argument tenable. It was a reasonable, efficient use of attorney and court resources for Paul to pause discovery until the procedural elements of this case were resolved, and, when the dismissed parties could resume participating. Otherwise, the discovery would have been fractured, having been conducted with only some of the parties on some of the claims. In any event, the Rule 56(f) affidavit was not rejected for reasons of “laziness” or “dilatatory” action. Instead, the Circuit Court’s only rationale was based upon its erroneous legal conclusion that the Complaint raised no valid claims, and, thus no further discovery would make a difference.

CONCLUSION

Lance, Skyline, Connor, and Paul's Estate ask this Court to reverse the grants of summary judgment; vacate the award of fees; and remand this matter for substantive proceedings. They ask for Raymond's removal as trustee, as a matter of law, based upon his disavowal of the Trust. They ask for the reversal of the orders denying the Rule 35(a) examination and motion to amend the Complaint.

Dated this 2nd day of January, 2026.

HOVLAND, RASMUS &
BRENDTRO, PROF. LLC

/s/ Daniel K. Brendtro

Daniel K. Brendtro
Mary Ellen Dirksen
Benjamin Hummel

326 E. 8th Street, Suite 107
PO Box 2583
Sioux Falls, South Dakota 57101-2583
Attorneys for Plaintiff/Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Reply Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 4,821 words, exclusive of the Table of Contents, Table of Authorities, jurisdictional statement, statement of issues, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of January, 2026, I filed and served a true and correct copy of the foregoing Appellants' Reply Brief using the Odyssey file and serve system upon the following:

Lee Schoenbeck
Joseph Erickson
Schoenbeck & Erickson, PC
1200 Mickelson Dr., Ste. 310
Watertown, SD 57201
lee@schoenbecklaw.com
joe@schoenbecklaw.com
**Counsel for the Raymond and Victoria
O'Farrell Living Trust, and, the Estate
of Victoria O'Farrell (and for
Raymond O'Farrell individually, as,
Special Administrator of the Estate;
and as Trustee), and as asserted
counsel for VOR, Inc., by and through
Raymond O'Farrell.**

Reed Rasmussen
Siegel, Barnett & Schutz, LLP
PO Box 490
Aberdeen, SD 57402
Rasmussen@sbslaw.net
**Counsel for Grand Valley Hutterian
Brethren, Inc.**

William G. Beck
Seth A. Lopour
Woods, Fuller, Shultz & Smith, PC
300 S. Phillips Ave., Ste. 300
Sioux Falls, SD 57117
billbeck@woodsfuller.com
seth.lopour@woodsfuller.com
**Counsel for Grand Valley Hutterian
Brethren, Inc.**

Jack Hieb
Richardson Law Firm
1 Court Street
P.O. Box 1030
Aberdeen, SD 57402-1030
jhieb@rwwsh.com
Counsel for Kelly O'Farrell

/s/ Daniel K. Brendtro
Daniel K. Brendtro
One of the Attorneys for Appellants