IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 26842

GRANITE BUICK GMC, INC., formerly known as McKIE BUICK GMC, INC.
Plaintiff/Appellant
vs.
ADAM RAY and GATEWAY AUTOPLEX, LLC
Defendants/Appellees

and

McKIE FORD LINCOLN, INC.
Plaintiff/Appellant,
vs.
SCOTT HANNA and GATEWAY AUTOPLEX, LLC
Defendants/Appellees

ON APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

The Honorable Janine M. Kern
Circuit Court Judge

APPELLANT'S BRIEF

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NOTICE OF APPEAL FILED OCTOBER 22, 2013

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PRELIMINARY STATEMENT

For ease of reference, citations to the pleadings will be referred to as Settled Record ("SR") and the numbers assigned by the Clerk, and the pleading and any further designation as appropriate, e.g. "SR 0002, Complaint, ¶ 2," or "SR 1034, Plaintiffs' Objection to Jury Instructions and Submission of Court Ordered Jury Instructions." References to the documents in the Appendix will be referred to as, "Document" and Appendix ("App.") with the appropriate page number or paragraph assigned, e.g. "Order on Hearing for Preliminary Injunction, App. at A-1," or "Judgment, App. at C-2." Citations to the Trial Transcript will be denominated as TT with reference to the page and line, e.g. "TT – 260:1 – 260:15." Citations to the Preliminary Injunction Transcript will be denominated as PIT with reference to the page and line, e.g. "PIT – 5:4 – 5:15."

The Appellants, Granite Buick GMC, Inc. and McKie Ford Lincoln, Inc. will be referred to as "Granite" and "McKie" respectively. The Appellee, Adam Ray will be referred to as "Ray." The Appellee Scott Hanna will be referred to as "Hanna." The Appellee, Gateway Autoplex, LLC will be referred to as "Gateway Autoplex."

JURISDICTIONAL STATEMENT

This is an appeal from the Trial Court's Order granting Ray, Hanna, and Gateway Autplex's Demand for a Jury Trial (Order, App. at B-2), the Trial Court's denial of Granite and McKie's Motions for Judgment as a Matter of Law, made during trial and submitted again in writing after entry of the Judgment (Ordering Denying Plaintiffs' Renewed Motion for Judgment as a Matter of Law, App. at D-1-2), the Trial Court's denial of Granite and McKie's Motion for Summary Judgment asserting that Ray and Hanna did not have any ownership interest in Gateway Autoplex (Order, App. at B-2),

and the Trial Court's Order Granting Application for Taxation of Costs and Disbursements (App. at E-1-2).

The Judgment was signed by the Trial Court on August 8, 2013 and filed on August 12, 2013. App. at C-2. Granite and McKie filed a Motion for Judgment as a Matter of Law on August 30, 2013. SR 1177. The Trial Court entered an Order Denying Plaintiffs' Renewed Motion for Judgment as a Matter of Law on September 26, 2013. App. at D-2. The Appellants, Granite and McKie filed a Notice of Appeal on October 22, 2013. SR 1250. This Court has jurisdiction over this action pursuant to SDCL § 15-26A-3.

STATEMENT OF ISSUES

I. Whether the Defendants, Ray, Hanna, and Gateway Autoplex were entitled to a jury trial on their affirmative defenses to this action which seeks only equitable relief.

The Trial Court held in the affirmative.

MOST RELEVANT AUTHORITIES

Mundhenke v. Holm, 2010 SD 67, 787 N.W.2d 302

Durkee v. Van Well, 2002 SD 150, 654 N.W.2d 807

First Western Bank, Sturgis v. Livestock Yards, 466 N.W.2d 853 (S.D.1991)

II. Whether the Defendant Ray presented sufficient evidence at trial to survive Granite's Motion for Judgment as a Matter of Law.

The Trial Court held in the affirmative.

MOST RELEVANT AUTHORITIES

Law Capital, Inc. v. Ketterming, 2013 SD 66, 836 N.W.2d 642

Poeppel v. Lester, 2013 SD 17, 827 N.W.2d 580

SDCL § 53-8-5

Wilcox v. Vermeulen, 2010 SD 29, 781 N.W.2d 464

Wehrkamp v. Wehrkamp, 2009 SD 84, 773 N.W.2d 212

III. Whether the Defendant Hanna presented sufficient evidence at trial to survive McKie's Motion for Judgment as a Matter of Law.

The Trial Court held in the affirmative.

MOST RELEVANT AUTHORITIES

Wilcox v. Vermeulen, 2010 SD 29, 781 N.W.2d 464

Wehrkamp v. Wehrkamp, 2009 SD 84, 773 N.W.2d 212

IV. Whether the Defendants, Ray, Hanna, and Gateway Autoplex were entitled to taxation of costs and disbursements.

The Trial Court held in the affirmative.

MOST RELEVANT AUTHORITIES

SDCL § 15-17-37

Adkins v. Stratmeyer, 1999 SD 131, 600 N.W.2d 891

DeHaven v. Hall, 2008 SD 57, 753 N.W.2d 429

STATEMENT OF THE CASE

The appeal involves two separate cases. On April 4, 2013, Granite commenced an action against Ray and Gateway Autoplex. SR 0006, Certificate of Service on Gateway Autoplex; SR 0007, Certificate of Service on Adam Ray. Granite's claim involved the fact that Ray, a former employee of Granite, had signed a Non Competition and Disclosure Agreement prohibiting Ray, upon termination of his employment, from engaging in the same or a similar line of business as Granite. SR 0002, Complaint, ¶ 5.

The claim further alleged that Ray was acting as manager for Gateway Autoplex in direct violation of the Non Competition and Disclosure Agreement. SR 0002, Complaint, ¶ 6-8.

On that same date, McKie commenced an action against Hanna and Gateway Autoplex.[1] McKie's claim against Hanna involved the same facts. While employed at McKie, Hanna signed a Non Competition and Disclosure Agreement. Hanna, like Ray, was acting as a manager of Gateway Autoplex, in direct violation of the Non Competition and Disclosure Agreement. The Honorable Janine M. Kern was assigned to preside over both cases. Because of the similarities of the facts and witnesses involved in the cases, the parties stipulated to the consolidation of the actions. (SR 0141, Ordering Consolidating Actions (Civ. 13-456 is consolidated with Civ. 13-455).

Granite and McKie filed a Motion for Preliminary Injunction consistent with SDCL § 15-6-65(a). SR 0005. A hearing was set on the motions for May 7, 2013. After hearing testimony from sixteen witnesses, the Trial Court granted McKie a preliminary injunction against Hanna and denied Granite a preliminary injunction against Ray. Order on Hearing for Preliminary Injunction, App. at A-1-2. The Court denied both Granite and McKie a preliminary injunction against Gateway Autoplex so long as Hanna divested himself of any interest in Gateway Autoplex by May 17, 2013 at 8:00 a.m. A trial was set for July 30, 2013. Order on Hearing for Preliminary Injunction, App. at A-1-2.

In their Answer (SR 0008) and Amended Answer (SR 0267), Ray, Hanna, and Gateway Autoplex demanded a trial by jury. Granite and McKie opposed the request for a jury trial. SR 0634, Memorandum in Opposition to Defendants' Demand for Jury Trial.

[1] Although these actions were consolidated (SR 0141, Ordering Consolidating Actions (Civ. 13-456 is consolidated with Civ. 13-455), it is unclear from the Register of Actions received from the Clerk whether the preliminary pleadings from Civ. No. 13-456 were indeed placed in the Court file. As such, no citations to the Complaint and Affidavit of Service are provided herein.

Notwithstanding the fact that no legal relief was sought by any of the parties in this case, the Trial Court held that the affirmative defenses of fraud, waiver, and estoppel would be tried to a jury. Order, App. at B-2.

After the close of evidence, Granite and McKie moved for a Judgment as a Matter of Law on the basis that Ray and Hanna had not provided any facts which legally supported the affirmative defenses of fraud, waiver, or estoppel. TT – 406:19 – 425:8. The Trial Court denied the motions.

The jury returned a Verdict finding that Ray had established the affirmative defenses of fraud in the inducement, equitable estoppel, promissory estoppel, and waiver. SR 1086, Verdict. The jury found that Hanna had established the affirmative defenses of promissory estoppel and waiver. SR 1086, Verdict. The Trial Court entered a Judgment consistent with the jury's Verdict. Judgment, App. at C-1-2.

After the Judgment was entered, Granite and McKie renewed their Motion for Judgment as a Matter of Law. SR 1177. The Trial Court denied the Granite and McKie's renewed Motion for Judgment as a Matter of Law. App. at D-1-2.

Ray, Hanna, and Gateway Autoplex filed an Application for Taxation of Costs and Disbursements on August 16, 2013. SR 1158. Granite and McKie objected to the Application on the basis that Ray, Hanna, and Gateway Autoplex had not met the statutory requirements to establish their costs. SR 1169. After receiving the objection, Ray, Hanna, and Gateway Autoplex filed a supplemental affidavit. SR 1199. The Court entered an Order Granting Application for Taxation of Costs and Disbursements on September 26, 2013. App. at E-1-2.

STATEMENT OF THE FACTS

Ray became a sales consultant for Granite in June, 2005.[2] TT – 288:5 – 288:21. Ray had previously worked for others in the car business, making between $30,000 to $50,000 annually. TT – 328:25 – 329:2. Ray wanted to work for Granite so that he could make $100,000 annually. TT – 328:20 – 328:24. Sure enough, during Ray's first full year of employment, he made an annual salary of $70,000. TT – 330:7 – 330:9. By the time Ray left Granite, he was making $170,000 per year. TT – 330:10 – 330:12. During the course of his employment, Ray signed a Non Competition and Disclosure Agreement on August 14, 2006. App. at F-1. The Non Compete portion of the Non Competition and Disclosure Agreement provided:

> On termination of my employment, for any cause whatsoever, I will not engage to work for any individual, firm, or entity engaged in the same or similar business or be a principal, member, or owner of any entity who is engaged in the same or similar line of business within 200 miles of the city limits of Rapid City for a period of one year subsequent to such termination, such period not to include any period of violation or period of time required for litigation to enforce the covenants.

App. at F-1.

As an affirmative defense Ray alleges that Granite is barred from enforcing the Non Compete by fraud in the inducement, estoppel, and waiver. His affirmative defenses rely upon a sales meeting which occurred before Ray signed the Non Competition and Disclosure Agreement. At the meeting, the Non Competition and Disclosure Agreement was presented to all sales personnel. One of the employees asked if Granite would use the Non Competition and Disclosure Agreement to prevent the sales personnel from

[2] During the beginning of Ray's employment, the entity currently operated as Granite was named McKie Buick Pontiac GMC, Inc. The name was later changed to reflect the loss of the Pontiac dealership and the change in name from McKie to Granite.

moving into a better position. Ray testified specifically regarding the question and answer that were provided:

> I remember vividly the fact that, you know, the question was: What if I get an opportunity to move into management or ownership? And Troy Claymore said, if you make a lateral move, I'm going to enforce it. I want to stop it. If you make a lateral move from here to say Chevy. But if you ever get the chance to better yourself, your family, and I wouldn't hold you to it is what he said.

TT – 290:13 – 290:19. Based upon this representation, Ray asserts that the Covenant Not to Compete should not be enforced against him in this case. After signing the Non Competition and Disclosure Agreement, Ray did not have any further conversations with Troy Claymore, or anyone at Granite, regarding the enforcement of the Covenant Not to Compete. TT – 331:11 – 332:3.

After Ray had signed the Non Competition and Disclosure Agreement as an employee, Ray, as a member of the management team, presented and signed the Non Competition and Disclosure Agreement for 26 other employees of Granite. TT – 333:3 – 333:23; Trial Exhibit 4. Ray never informed any of the 26 other employees that the Covenant Not to Compete would not be enforced under certain conditions. TT – 334:3 – 334:9. As a member of management, Ray was aware that the Covenants Not to Compete were enforced against other employees, sometimes resulting in litigation. TT – 334:23 – 335:6.

Hanna became an employee of McKie in June, 2009. TT – 236:3 – 236:23. As a condition of his employment with McKie, Hanna signed a Non Competition and Disclosure Agreement on June 18, 2009. App. at G-1. Hanna's Non Competition and Disclosure Agreement contained the same provision:

> On termination of my employment, for any cause whatsoever, I will not engage to work for any individual, firm, or entity engaged in the same or

> similar business or be a principal, member, or owner of any entity who is engaged in the same or similar line of business within 200 miles of the city limits of Rapid City for a period of one year subsequent to such termination, such period not to include any period of violation or period of time required for litigation to enforce the covenants.

App. at G-1.

During his employment with McKie, Hanna earned over $140,000 per year. TT – 266:9 – 266:23. As an affirmative defense Hanna alleges that McKie is barred from enforcing the Non Compete by the doctrines of estoppel, and waiver. Before Hanna terminated his employment with McKie, Hanna had a conversation with Mark McKie which form the basis of his affirmative defenses.

Specifically, Hanna met with Mark McKie on February 1, 2013. This was the same day that Ray met with Troy Claymore to inform Claymore that he was leaving Granite. TT – 374:14 – 374:17. Hanna testified that he asked McKie if he was "gonna come after me in any way." TT – 247:4 – 247:11. According to Hanna's testimony, McKie replied, "Shit, no, Scotty, that will never be the case." TT – 247:16 – 247:18. Hanna acknowledges that he never mentioned the Non Competition and Disclosure Agreement or the Covenant Not to Compete during the meeting. TT – 260:1 – 260:11. In fact, according to Hanna's testimony, he was unaware that he had signed the Non Competition and Disclosure Agreement. TT – 237:10 – 237:16. Under cross examination, Hanna again stated that until this lawsuit started, he was unaware that he had signed the Non Competition and Disclosure Agreement. TT – 253:17 – 253:19. However, even though Hanna was unaware of the Non Competition and Disclosure Agreement, he testified that when he asked Mark McKie if he was going to come after him, that Mark McKie knew Hanna was talking about the Non Compete. TT – 260:7 –

260:13. Hanna, as a manager at McKie, reviewed the Non Competition and Disclosure Agreement with other employees and signed on behalf of the company. TT – 268:1 – 269:14.

Perhaps of more significance, Hanna's conversation with McKie, which is the basis for all of his affirmative defenses, occurred one day after Hanna had signed a lease for Gateway Autoplex. TT – 263:9 – 263:12. In fact, Ray and Hanna's efforts to manage a company that competes with Granite and McKie started in the summer of 2012. TT – 261:4 – 262:16. Ray and Hanna approached a rancher and multiple lending institutions in Rapid City before Dan Porter agreed to open Gateway Autoplex. TT – 261:24 – 262:16. At no point during their efforts did either Ray or Hanna approach Granite or McKie to tell them they were thinking about leaving. TT – 262:17 – 263:8. Hanna first informed Mark McKie after a lease was signed for the location of Gateway Autoplex. TT – 263:9 – 263:12. As managers for Gateway Autoplex, Ray and Hanna were paid $5,000 per month. TT – 270:20 – 270:25. During trial, the Trial Court found as a matter of law that Ray and Hanna were not owners or members of Gateway Autoplex. Jury Instruction No. 18(a).

On April 4, 2013, Granite and McKie commenced an action against Ray, Hanna, and Gateway Autoplex for their violation of the Non Compete. SR 0002, Complaint. Granite and McKie filed a Motion for Preliminary Injunction consistent with SDCL § 15-6-65(a). SR 0005. A hearing was set on the motions for May 7, 2013. After hearing testimony from sixteen witnesses, the Trial Court granted McKie a preliminary injunction against Hanna and denied Granite a preliminary injunction against Ray. Order on Hearing for Preliminary Injunction, App. at A-1-2. In denying the preliminary injunction

against Ray, the Trial Court held that "the testimony has established for today's purposes that Adam Ray has established a viable affirmative defense of fraud in the inducement." PIT – 5:21 – 5:24. The Trial Court granted the preliminary injunction against Hanna holding that "the movant's probability of success on the merits against Mr. Hannah [sic] is strong." PIT – 7:3 – 7:5. The Trial Court specifically addressed the February 1, 2013 meeting. The Court held:

> The Court having weighed the credibility and the plausibility of the testimony of Scott Hannah and Mark McKie on the contents of this February 1 conversation, finds Mark McKie's testimony to be more credible. Mark McKie testified that he did not know whether or not Scott Hannah had ever signed a noncompete and that there was not a discussion of the noncompete at this February 1 meeting.
>
> The Court notes that Scott Hannah testified that at the time of the Febrary 1 meeting, he was 99 percent sure he did not sign a noncompete. He had one percent – he believed that there was a one percent chance that he had signed a convenant not to compete. The Court finds that implausible and less likely that he would inquire specifically about a noncompete with Mark McKie if he did not believe that he had signed one.
>
> Testimony of the two men is directly contradictory and the Court finds that the testimony of Mark McKie to be more compelling and more credible on this point.

PIT – 8:14 – 9:8. The testimony presented during the preliminary injunction hearing regarding this conversation was the same testimony presented at trial. Given the Trial Court's earlier finding, it is clear that the Trial Court found Mark McKie to be a more credible witness than Hanna.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE DEFENDANTS WERE ENTITLED TO A JURY TRIAL

A. STANDARD OF REVIEW

"A circuit court has broad discretion in an equitable action to determine whether to grant or deny a jury trial." *Mundhenke v. Holm,* 2010 SD 67, ¶ 11, 787 N.W.2d 302,

305 (citing *Fox v. Burden,* 1999 SD 154, ¶ 32, 603 N.W.2d 916, 924). "[This Court] will not disturb the circuit court's decision absent an abuse of discretion. *Id.* However, where the "pleadings and prayer for relief reflect that [the plaintiff] was seeking injunctive relief," there is "no right to trial by jury." *Durkee v. Van Well,* 2002 SD 150, ¶ 13, 654 N.W.2d 807, 813.

B. THE TRIAL COURT IMPROPERLY ALLOWED THE DEFENDANTS' REQUEST FOR A JURY TRIAL

It is not disputed that "Article VI, Section 6 of the South Dakota Constitution guarantees a right to a jury trial in all cases at law." *Mundhenke,* 2010 SD 67, ¶ 14 (citing SD Const. art. VI, § 60.) "The right, however, does not exist for all civil cases." *Id.* (quoting *First Nat. Bank of Philip v. Temple,* 2002 SD 36, ¶ 10, 642 N.W.2d 197, 201 (quoting *First W. Bank, Sturgis v. Livestock Yards,* 466 N.W.2d 853, 856 (S.D.1991)). SDCL § 15-6-39(a) provides that "[w]hen a trial by jury has been demanded…the action shall be designated upon the docket as a jury action…unless…[t]he court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of this state." As this Court has held, "[i]n cases where the pleadings seek equitable relief, a jury trial is a matter for the trial court's discretion." *Id.*

In this case, Granite and McKie brought a claim for equitable relief, for enforcement of the Non Compete contained in the Non Competition and Disclosure

Agreement. Specifically, Granite and McKie sought the following action in their prayer for relief:

> WHEREFORE, the Plaintiff prays for judgment against the Defendants, and each of them, as follows:
>
> 1. That the Court enforce the Agreement and enjoin the Defendants, and each of them, from violating the Agreement; and
> 2. For such other and further relief as the Court deems just and necessary.

SR 0002, Complaint. Neither Granite nor McKie sought any legal relief in the form of monetary damages. Ray, Hanna, and Gateway Autoplex answered, asserting a number of affirmative defense, including fraudulent inducement, waiver, and estoppel. SR 0267, Amended Answer. Ray, Hanna, and Gateway Autoplex's prayer for relief asked for:

> WHEREFORE, Defendants pray[sic] judgment as follows:
>
> 1. For judgment in favor of the Defendants and against the Plaintiff;
> 2. That the Plaintiff's Complaint be dismissed with prejudice, and for an award of attorney fees, costs and disbursements;
> 3. For such other and further relief as the Court deems just and equitable in the premises.

SR 0267, Amended Answer. Ray, Hanna, and Gateway Autoplex did not assert a counterclaim against Granite or McKie, or otherwise ask for any legal relief. Even though no legal relief was sought, Ray, Hanna and Gateway Autoplex did include a demand for trial by jury. SR 0267, Amended Answer.

"The determination of whether an action sounds in law or in equity is based on 'the pleadings including the complaint, answer, cross-complaint and prayer for relief.'" *Mundhenke,* 2010 SD 67, ¶ 14 (quoting *First W. Bank,* 466 N.W.2d at 856 (quoting *Nizielski v. Tvinnereim,* 453 N.W.2d 831, 832–33 (S.D.1990)). This Court has previously held that "[i]njunction is distinctly an equitable remedy." *Metropolitan Life Ins. Co. v. Jensen,* 9 N.W.2d 140, 142 (S.D. 1943). There is no question, after reviewing the

Complaint, Amended Answer, and prayers for relief from each of the parties, that this entire case, including all claims and defenses herein, is solely an equitable claim. The issue before this Court is whether the Trial Court abused its discretion in granting the Defendants' demand for a jury trial in this equitable action. Ray, Hanna, and Gateway Autoplex claim a right to a jury trial was based upon the assertion that "[a]lthough Plaintiffs are seeking an injunction, Defendants' affirmative defenses raise factual issues that should be tried to a jury." SR 0276, Defendants' Brief in Support of Demand for Jury Trial. This assertion directly contradicts South Dakota law.

In *First Western Bank, Sturgis v. Livestock Yards Co,* this Court set forth a detailed analysis concerning whether a party to a civil action is entitled to a jury trial and ultimately abrogated the incidental claim rule consistent with the United States Supreme Court's decisions in *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962) and *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). 466 N.W.2d 853, 856 (S.D. 1991). The Court held:

> We have considered whether a party to a civil action is entitled to a jury trial on a number of occasions. We stated our general rule most recently in *Nizielski v. Tvinnereim,* 453 N.W.2d 831 (S.D.1990):
>
> > The right to a jury trial is guaranteed both litigants in Article VI, § 6 of the South Dakota Constitution and SDCL 15-6-38(a), (b). This right, however, does not exist in all civil cases. In cases where the pleadings seek equitable relief or where the legal relief is incidental, a jury trial is a matter for the trial court's discretion. Conversely, when the action is at law, either party has a right to a jury trial. To determine whether the action arises at law or equity,

> we look to the pleadings, including the complaint, answer, cross-complaint and prayer for relief.
>
> *Id.* at 832-33 (citations omitted); *Skoglund v. Staab,* 312 N.W.2d 29, 31 (S.D.1981). In examining the development of this rule, however, we note that the United States Supreme Court has abolished the requirement that a legal claim must not be incidental. In *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962), the Court held that in view of the flexible procedures of the Federal Rules of Civil Procedure, the right to a jury trial of any legal issue raised by counterclaim in an equitable action cannot be denied, regardless of whether the legal issues presented are characterized as "incidental" to the equitable issues. *Id.* at 473, 82 S.Ct. at 897, 8 L.Ed.2d at 48. *See Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). *As a result, the analysis of whether a party raising a counterclaim in an equity action is entitled to a jury trial depends only on the nature of the counterclaim. If the relief sought is equitable, the decision of whether to empanel an advisory jury is wholly within the trial court's discretion. Nizielski,* at 833. If, however, the counterclaim seeks legal relief, the party raising a legal claim is entitled to a jury trial as a matter of right. *Dairy Queen,* 369 U.S. at 473, 82 S.Ct. at 897, 8 L.Ed.2d at 48; *United Transp. Union Local 74 v. Consolidated Rail Corp.,* 881 F.2d 282, 286 (6th Cir.1989), *vacated and remanded on other grounds,* 494 U.S. 558, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990). Our previous decisions imposing the additional requirement that the legal relief not be incidental are modified to the extent that they are inconsistent with this opinion.

466 N.W.2d at 856 (emphasis added). In deciding whether a right to jury trial existed, the Court held:

> *Bank's complaint seeking foreclosure of the mortgage is unquestionably an equitable action. See* SDCL 21-50-2; *Lounsberry v. Kelly,* 32 S.D. 160, 142 N.W. 180, on reh'g 32 S.D. 456, 143 N.W. 369 (1913). *Thus, we must determine whether Partnership's counterclaim is legal in nature.* In its prayer for relief, Partnership sought dismissal of Bank's complaint, judgment against Bank, and "[a]lternatively, for judgment against plaintiff in an amount adequate to compensate [Partnership] for the financial detriment caused by plaintiff's negligence[.]" At trial, Partnership introduced testimony regarding the decreased value of Partnership caused by Bank's foreclosure action and the resulting closure of the sales barn. Testimony was presented indicating a loss of approximately $600,000, well in excess of the amount Bank sought to recover on the loan to Madden. *Partnership's counterclaim sought a money judgment, and such claims are unquestionably legal. Dairy Queen,* 369 U.S. at 476, 82 S.Ct. at 899, 8 L.Ed.2d at 50; *Scott v. Neely,* 140 U.S. 106, 110, 11 S.Ct. 712, 714, 35 L.Ed. 358, 360 (1891). Thus, Partnership was entitled to a jury trial as a matter of right, and the trial court's ruling was proper.

Id. at 856-57 (emphasis added). The case now before this Court is different. Ray, Hanna, and Gateway Autoplex have not preserved a right to a jury trial by seeking any legal relief. The Defendants have sought only the dismissal of the Plaintiffs' claims and costs and disbursements. There is no legal claim. Where the "pleadings and prayer for relief reflect that [the plaintiff] was seeking injunctive relief," there is "no right to trial by jury." *Durkee v. Van Well,* 2002 SD 150, ¶ 13.[3] "Injunction is an equitable remedy for which [the parties are] not entitled to trial by jury. *Id.* (citing *Metropolitan Life Insurance Co.,* 9 N.W.2d at 142.

Because no legal relief is sought, there is no right to a jury trial. To suggest otherwise would allow all litigants, whether seeking an injunction, specific performance, or a decree of divorce, to create a right to a jury trial by pleading affirmative defenses "which raise factual questions." This disregards the fact that the Trial Court can, and oftentimes does, act as a fact finder. *See* SDCL §§ 15-6-39(b) and 15-6-52(a). The Trial Court abused its discretion when it granted Ray, Hanna, and Gateway Autoplex's demand for a jury trial.

II. THE TRIAL COURT ERRED WHEN IT DENIED GRANITE BUICK GMC, INC.'S MOTION FOR JUDGMENT AS A MATTER OF LAW

A. STANDARD OF REVIEW

"If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that

[3] The Defendant in *Durkee* brought a counterclaim for damages. 2002 SD 150, ¶ 5. *Durkee* was abrogated by *Mundhenke* on the basis that it invoked the incidental claim rule to deny the defendant a jury trial when a counterclaim was brought seeking legal relief. However, as set forth herein, the current case before this Court does not invoke the incidental claim rule or abrogation thereof because neither Ray, Hanna, nor Gateway Autoplex filed a counterclaim or otherwise sought any legal relief. The law included in *Durkee* regarding the right to a jury trial in a claim for injunctive relief has not been overruled by this Court.

issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a…defense that cannot…be maintained…without a favorable finding on that issue." SDCL § 15-6-50(a).

On review, this Court must "view the evidence and testimony in a light most favorable to the verdict." *Bertelsen v. Allstate Ins. Co.,* 2013 SD 44, ¶ 16, 833 N.W.2d 545, 554 (citing *Jacobs v. Dakota, Minn. & E. R.R. Corp.,* 2011 SD 68, ¶ 9, 806 N.W.2d 209, 212). "Then, 'without weighing the evidence, the [C]ourt must decide if there is evidence which would have supported or did support a verdict.'" *Id.* (quoting *Selle v. Tozser,* 2010 SD 64, ¶ 14, 786 N.W.2d 748, 752 (quoting *Alvine Family Ltd. P'ship v. Hagemann,* 2010 S.D. 28, ¶ 18, 780 N.W.2d 507, 512)). "If sufficient evidence exists so that reasonable minds could differ, [judgment as a matter of law] is not appropriate." *Id.* (quoting *Roth v. Farner–Bocken Co.,* 2003 S.D. 80, ¶ 8, 667 N.W.2d 651, 659 (quoting *In re Estate of Holan,* 2001 S.D. 6, ¶ 9, 621 N.W.2d 588, 591)).

"In reviewing a renewed motion for judgment as a matter of law after the jury verdict, the evidence is reviewed 'in a light most favorable to the verdict or to the nonmoving party.'" *Selle,* 2010 SD 64, ¶ 14 (citing *Alvine Family Ltd. P'ship,* 2010 SD 28, ¶ 18 (citing *Harmon v. Washburn,* 2008 SD 42, ¶ 9, 751 N.W.2d 297, 300)). "Then, '[w]ithout weighing the evidence, [the court] must decide if there is evidence which would have supported or did support a verdict.'" *Id.* "Similarly, a motion for new trial will not be granted if the jury's verdict can be explained with reference to the evidence, and the evidence is viewed in a light most favorable to the verdict." *Id.* In viewing the evidence in a light most favorable to the verdict, the Motion for Judgment as a Matter of

Law and this brief focus primarily on the testimony of Ray and Hanna themselves, even though much of that testimony is disputed.

B. THE TRIAL COURT IMPROPERLY DENIED GRANITE BUICK GMC, INC.'S MOTION FOR JUDGMENT AS A MATTER OF LAW

i. Fraudulent Inducement

After the close of evidence, Granite moved for a Judgment as a Matter of Law on the basis that Ray had not provided any facts which legally supported the affirmative defenses of fraud, waiver, or estoppel. TT – 406:19 – 425:8. The Trial Court denied the motion. Granite renewed the motion in a written Motion for Judgment as a Matter of Law. SR 1177.

"Fraudulent inducement entails willfully deceiving persons to act to their disadvantage." *Law Capital, Inc. v. Ketterming,* 2013 SD 66, ¶ 16, 836 N.W.2d 642 (citing *Johnson v. Miller,* 2012 S.D. 61, ¶ 13, 818 N.W.2d 804, 808). "Deceit is defined in SDCL 20–10–2 as:

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

Id. The only facts alleged by Ray in support of his claim for fraudulent inducement are the conversations he had with Claymore and Rittenour before signing the Non Competition and Disclosure Agreement. Specifically, Ray testified:

> I remember vividly the fact that, you know, the question was: What if I get an opportunity to move into management or ownership? And Troy Claymore said, if you make a lateral move, I'm going to enforce it. I want to stop it. If you make a lateral move from here to say Chevy. But if you ever get the chance to better yourself, your family, and I wouldn't hold you to it is what he said.

TT – 290:13 – 290:19. However, Claymore and Rittenour did not dispute the statements alleged by Ray. To the contrary, a major portion of the trial in this matter was focused on whether Ray did indeed "better" himself. By the time Ray left Granite, he was making $170,000 per year. TT – 330:10 – 330:12. As managers for Gateway Autoplex, Ray and Hanna were paid $5,000 per month, more than $100,000 less than Ray was making at Granite. TT – 270:20 – 270:25. In order to establish the first element of fraud, Ray must establish a suggestion or assertion as a fact, of that which is not true, by one who does not believe it to be true. Ray has made no effort to prove a misrepresentation. To the contrary, Ray spent much of the trial, and nearly the entire cross examination of Claymore in an effort to make Claymore acknowledge the statements he made in August, 2006. Claymore did just that. There was no misrepresentation in 2006, nor any evidence presented to the jury to establish a misrepresentation. Further, fraudulent inducement requires willful deceit and intent to induce another to alter his position. *Johnson,* 2012 S.D. 61, ¶ 13; *Schwaiger v. Mitchell Radiology Assocs., P.C.,* 2002 S.D. 97, ¶ 15, 652 N.W.2d 372, 379; *Fenske Media Corp. v. Banta Corp.,* 2004 S.D. 23, ¶ 12, 676 N.W.2d 390, 394; *Cleveland v. BDL Enters., Inc.,* 2003 S.D. 54, ¶ 26, 663 N.W.2d 212, 220. Again, no attempt has been made to establish deceit and no such deceit has been shown.

ii. Equitable Estoppel

This Court recently addressed the elements of equitable estoppel in *Wilcox v. Vermeulen,* 2010 S.D. 29, ¶ 19, n. 7, 781 N.W.2d 464, 471. The Court held:

In order to constitute equitable estoppel,

> (1) False representations or concealment of material facts must exist;
> (2) The party to whom it was made must have been without knowledge of the real facts;
> (3) The representations or concealment must have been made with the intention that it should be acted upon; and
> (4) The party to whom it was made must have relied thereon to his prejudice or injury.

Id. Again, Ray cannot establish the first element, a false representation.

Even so, the statements made by Claymore and Rittenour before Ray signed the Non Competition and Disclosure Agreement should not have been considered by the jury in deciding the claim for equitable estoppel under the parol evidence rule. "South Dakota's parol evidence rule provides: 'The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.'" *Poeppel v. Lester,* 2013 S.D. 17, ¶ 19, 827 N.W.2d 580, 584 (citing SDCL 53-8-5). "This rule 'is in no sense a rule of evidence, but a rule of substantive law.'" *Id.* (citing *Auto–Owners Ins. Co. v. Hansen Housing, Inc.,* 2000 S.D. 13, ¶ 14, 604 N.W.2d 504, 510 (quoting 9 John Wigmore, Evidence § 2400 at 4 (Chadbourn rev. ed. 1981)). The parol evidence rule clearly bars the admission of any conversations which occurred before Ray signed the Non Competition and Diclosure Agreement. However, these statements were admitted because the parol evidence rule does not apply in cases of fraud in the inducement. *Id.* The conversations which occurred before Ray signed the Non Competition and Disclosure Agreement were admissible for purposes of Ray's fraud in the inducement claim only. After signing the Non Competition and Disclosure Agreement, Ray did not have any further conversations with Troy Claymore, or anyone

at Granite, regarding the enforcement of the Covenant Not to Compete. TT – 331:11 – 332:3. As a matter of law, because Ray did not have any conversations regarding the enforcement of the Covenant Not to Compete, Ray has produced no other evidence in support of his claim for fraudulent inducement.

iii. Promissory Estoppel

"[P]romissory estoppel may be invoked where a promisee alters his position to his detriment in the reasonable belief that a promise would be performed." *Wilcox,* 2010 S.D. 29, ¶ 19, n. 6 (citing *Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.,* 2005 SD 82, ¶ 38, 700 N.W.2d 729, 739; *Garrett v. BankWest, Inc.,* 459 N.W.2d 833, 848 (S.D.1990); *Minor v. Sully Buttes Sch. Dist. No. 58-2,* 345 N.W.2d 48, 51 (S.D.1984)). The elements of promissory estoppel are as follows:

> (1) The detriment suffered in reliance must be substantial in an economic sense;
> (2) The loss to the promisee must have been foreseeable by the promisor; and
> (3) The promisee must have acted reasonably in justifiable reliance on the promise made.

Wilcox, 2010 S.D. 29, ¶ 19, n. 6. Again, even considering all of the evidence, Ray cannot identify a promise that was not performed by Granite. More importantly, the same principles apply with respect to the parol evidence rule. Ray did not have any conversations with anyone about the Covenant Not to Compete after he signed the None Competition and Disclosure Agreement. TT – 331:11 – 332:3. Any conversations he had before signing the Agreement are not admissible. As such, Ray cannot even establish a promise, whether it was performed or not.

Even where "the contract was executed upon the faith of the parol agreement… [parol evidence is not permitted] to cases in which the written contract is complete and unambiguous and the consideration contractual in its nature." *Kjerstad Realty, Inc. v.*

Bootjack Ranch, Inc., 2009 S.D. 93, ¶ 6, 774 N.W.2d 797, 799-800 (citations omitted). Just as in *Bootjack,* "[n]either party argues the contract is ambiguous or an incomplete agreement. Because the alleged oral modification occurred before the written agreement was made, the written agreement controls and defines the obligations of the parties." *Id.*

No evidence of conversations which occurred before the Non Competition and Disclosure Agreement was signed can be considered in deciding on this affirmative defense. No other evidence was submitted.

iv. Waiver

"A waiver exists 'where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his [or her] intention to rely upon it.'" *Wehrkamp v. Wehrkamp,* 2009 S.D. 84, ¶ 8, 773 N.W.2d 212, 215 (citing *Western Cas. and Sur. Co. v. American Nat'l Fire Ins. Co.,* 318 N.W.2d 126, 128 (S.D.1982)). Similar to the defenses of equitable and promissory estoppel, the parol evidence rule prohibits the consideration of any conversations which occurred before the Non Competition and Disclosure Agreement was signed by Ray. No other evidence was submitted and as such this defense must fail.

However, even if parol evidence could be considered, the defense of waiver still fails as a matter of law. "*A waiver exists 'where one in possession of any right*…does or forbears the doing of something *inconsistent with the existence of the right* or of his [or her] intention to rely upon it.'" *Wehrkamp,* 2009 S.D. 84, ¶ 8 (emphasis added). Granite could not waive a right that did not yet exist. To allow such an argument is contrary to the very premise of the defense of waiver. Because Granite did not have possession of

any right prior to Ray signing the Non Competition and Disclosure Agreement and because Granite could not doing something inconsistent with the existence of that right, there can be no waiver, as a matter of law.

III. THE TRIAL COURT ERRED WHEN IT DENIED McKIE FORD LINCOLN, INC.'S MOTION FOR JUDGMENT AS A MATTER OF LAW

A. STANDARD OF REVIEW

See Section II(A) above.

B. THE TRIAL COURT IMPROPERLY DENIED McKIE FORD LINCOLN, INC.'S MOTION FOR JUDGMENT AS A MATTER OF LAW

i. Equitable Estoppel

"[P]romissory estoppel may be invoked where a promisee alters his position to his detriment in the reasonable belief that a promise would be performed." *Wilcox,* 2010 S.D. 29, ¶ 19, n. 6 (citing *Canyon Lake Park,* 2005 SD 82, ¶ 38, 700 N.W.2d at 739; *Garrett,* 459 N.W.2d at 848; *Minor,* 345 N.W.2d at 51). The elements of promissory estoppel are as follows:

> (1) The detriment suffered in reliance must be substantial in an economic sense;
> (2) The loss to the promisee must have been foreseeable by the promisor; and
> (3) The promisee must have acted reasonably in justifiable reliance on the promise made.

Wilcox, 2010 S.D. 29, ¶ 19, n. 6. Where the reliance element of promissory estoppel is lacking, promissory estoppel does not apply. *Wilcox,* 2010 S.D. 29, ¶ 47. At the time of his conversation with Mark McKie, Hanna had already signed the guarantee on the lease for the operation of the business by Gateway Autoplex. TT – 263:9 – 263:12. This was the same day that Ray met with Troy Claymore to inform Claymore that he was leaving Granite. TT – 374:14 – 374:17. Hanna also signed the Articles of Organization for

Gateway Autoplex before meeting with McKie. Trial Exhibit 5. Even assuming the facts in a light most favorable to Hanna, and considering only Hanna's own testimony, Hanna cannot establish that he altered his position based upon a promise made by McKie. Ray and Hanna's efforts to manage a company that competes with Granite and McKie started in the summer of 2012. TT – 261:4 – 262:16. Ray and Hanna approached a number of potential financiers for a potential dealership. TT – 261:24 – 262:16. However, at no point during their efforts did either Ray or Hanna approach Granite or McKie to tell them they were thinking about leaving. TT – 262:17 – 263:8. It was only after the groundwork was laid and Gateway Autoplex established, that Hanna spoke with McKie. Hanna did not ask "If I leave, will you come after me?". Hanna asked "Are you going to come after me?". TT – 247:4 – 247:11. Because Hanna had already made his decision, he cannot establish that he relied upon any statements made by McKie.

Further, Hanna did not allege any facts that he suffered detriment which was substantial in an economic sense. To the contrary, the only evidence presented at trial regarding any economic matters was that Hanna made substantially more working for McKie than he did working for Gateway Autoplex. During his employment with McKie, Hanna earned over $140,000 per year. TT – 266:9 – 266:23. As managers for Gateway Autoplex, Ray and Hanna were paid $5,000 per month. TT – 270:20 – 270:25.

Promissory estoppel is not applicable if any of [the] elements are lacking or have not been proven by clear and convincing evidence." *Vander Heide v. Boke Ranch, Inc.,* 2007 S.D. 69, ¶ 28, 736 N.W.2d 824, 834 (citing *Hahne v. Burr,* 2005 SD 108, ¶ 18, 705 N.W.2d 867, 873; *Century 21 Associated Realty v. Hoffman,* 503 N.W.2d 861, 866

(S.D.1993)). Hanna did not present any evidence the he relied upon the alleged promise made by McKie or that he suffered detriment, substantial in an economic sense.

ii. Waiver

"A waiver exists 'where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his [or her] intention to rely upon it.'" *Wehrkamp,* 2009 S.D. 84, ¶ 8, (citing *Western Cas. and Sur. Co.* ,318 N.W.2d at 128). "To support the defense of waiver, there must be a showing of a clear, unequivocal and decisive act or acts showing an intention to relinquish the existing right." *Wehrkamp,* 2009 S.D. 84, ¶ 9 (citing *Norwest Bank South Dakota, N.A. v. Venners,* 440 N.W.2d 774, 775 (S.D.1989); *Auto-Owners Ins. Co., Inc.,* 2000 SD 13, ¶ 30).

There is no question that McKie was in possession of a right at the time of the conversation between Hanna and Mark McKie. However, there was no evidence to suggest that Mark McKie had "full knowledge" of the material facts or that there was a clear, unequivocal and decisive act showing an intention to relinquish that right. To the contrary, it was the testimony of both McKie and Hanna that neither was aware of the Non Competition and Disclosure Agreement. TT - 237:10 – 237:16; 253:17 – 253:19; 396:18 – 396:21. Hanna specifically acknowledges that he did not bring up the Non Competition and Disclosure Agreement and it was not discussed or even mentioned by either person. TT – 260:1 – 260:11. For Hanna to argue that McKie could waive a right set forth in a contract without even a passing reference to the contract itself is contrary to South Dakota caselaw regarding waiver. A waiver must consist of a clear, unequivocal

and decisive act showing an intention to relinquish a right. *Wehrkamp, supra.* If Hanna had wished for McKie to waive the right to enforce the Non Compete, Hanna should have brought the Non Compete to the attention of McKie. Hanna's testimony that McKie knew Hanna was referring to the Non Compete (TT – 260:7 – 260:13) flies in the fact of Hanna's own testimony that he himself was unaware he signed the Agreement. In addressing this matter during the preliminary injunction hearing, the Trial Court specifically addressed this issue, stating:

> The Court notes that Scott Hannah testified that at the time of the Febrary 1 meeting, he was 99 percent sure he did not sign a noncompete. He had one percent – he believed that there was a one percent chance that he had signed a convenant not to compete. The Court finds that implausible and less likely that he would inquire specifically about a noncompete with Mark McKie if he did not believe that he had signed one.
>
> Testimony of the two men is directly contradictory and the Court finds that the testimony of Mark McKie to be more compelling and more credible on this point.

PIT – 8:14 – 9:8. Hanna cannot himself conceal the right he wishes to have waived and then argue there was a clear, unequivocal waiver of that right. Even assuming Hanna's version of the facts related to the conversation with Mark McKie to be true, Hanna cannot establish a clear, unequivocal and decisive act waiving any rights under the Covenant Not to Compete, and Hanna's defense of waiver must fail.

IV. THE TRIAL COURT ERRED WHEN IT GRANTED THE DEFENDANTS' APPLICATION FOR TAXATION OF DISBURSEMENTS

A. STANDARD OF REVIEW

A denial or award of disbursements is reviewed under the abuse of discretion standard. *Culhane v. Michels,* 2000 S.D. 101, ¶ 32, 615 N.W.2d 580, 590 (citing *High Plains Genetics Research, Inc. v. JK Mill–Iron Ranch,* 535 N.W.2d 839, 846 (S.D.1995)).

"'Abuse of discretion' is discretion not justified by, and clearly against, reason and evidence." *Id.* (citing *Nelson v. Nelson Cattle Co.,* 513 N.W.2d 900, 906 (S.D.1994) (citing *Dacy v. Gors,* 471 N.W.2d 576, 580 (S.D.1991)).

B. THE TRIAL COURT IMPROPERLY AWARDED THE DEFENDANTS THEIR COSTS AND DISBURSEMENTS

The requirements for a "prevailing party" to recover disbursements under South Dakota law are contained in SDCL § 15-17-37. The statute provides, in its entirety, as follows:

> The prevailing party in a civil action or special proceeding may recover expenditures necessarily incurred in gathering and procuring evidence or bringing the matter to trial. Such expenditures include costs of telephonic hearings, costs of telephoto or fax charges, fees of witnesses, interpreters, translators, officers, printers, service of process, filing, expenses from telephone calls, copying, costs of original and copies of transcripts and reporters attendance fees, court appointed experts, and other similar expenses and charges.

The South Dakota Supreme Court addressed the specificity required in an Application for Taxation of Disbursements in *Adkins v. Stratmeyer,* 1999 SD 131, 600 N.W.2d 891 and *DeHaven v. Hall,* 2008 SD 57, 753 N.W.2d 429. "[A]llowable disbursements must be proven." *DeHaven*, 2008 SD 57, ¶ 52. "A party who wishes to recover disbursements must file an application that includes a 'statement in detail' of the disbursements claimed, which 'shall be verified by affidavit.'" *Id.* at ¶ 47 (citing SDCL § 15-6-54(b)). "The prevailing party who seeks disbursement bears the responsibility of documenting, itemizing, and justifying the necessary expenditures that it seeks." *Id.* at ¶ 52. To the extent a "report" is provided concerning the costs incurred, those costs may be appropriate under the statute. *Adkins,* 1999 SD 131, ¶ 32. Where no report, accounting, or statement in detail of the costs incurred has been provided, the Defendants cannot meet the burden of proving the costs requested.

The Defendants timely filed their Application for Taxation of Costs and Disbursements (SR 1158). However, the Defendants did not provide a report, accounting, or statement in detail for any of the costs incurred. Instead, the Defendants provided five general categories of costs for which the total costs equal $5,659.94. Those categories included "witness fees", "court reporter fees", "service fees", "copies", and "South Dakota Secretary of State". SR 1158. No further explanation was provided, nor is there any date indicating the timeframe during which such costs were incurred or reasoning or purpose for the fees. SR 1158.

A similar situation was encountered in *DeHaven v. Hall*, 2008 S.D. 57, 753 N.W.2d 429. In *DeHaven*, the Supreme Court addressed the Application for Costs as follows:

> A review of the exhibits attached to DeHavens' application and affidavit for "costs" reveals a list of *claimed disbursements with a lump sum amount for each item*. For example, DeHavens sought for $228.75 for copies and $195.00 for fax charges. *DeHavens did not, however, itemize the number of copies or faxes, the price per copy or fax, and the necessary purpose for the copies and faxes.* The same was true with other items requested. In addition, embedded within the list of disbursements sought, *DeHavens* inexplicably requested payment for cement, reflector tape, and two lunches with their attorney. *Under these circumstances, the trial court did not abuse its discretion in denying the omitted disbursements*.

(Emphasis added.)

Just as in this case, there was no itemization of the witness fees (the date they were incurred, for which witness, and the amount), court reporter fees (the date they were incurred, for which witness, and the amount), service fees (the date they were incurred, for which witness, and the amount), and copies (the number of copies, the price per copy, and purpose).

After Granite and McKie objected to the Application for Taxation of Costs and Disbursements (SR 1169), Ray, Hanna, and Gateway Autoplex filed a supplemental affidavit containing additional detail. SR 1199. Pursuant to SDCL § 15-6-54(d), "[i]f a party wishes to have disbursements and costs of the action assessed, *that party must file* an application for taxation of costs, and a certificate of service, with the clerk of court. *The application shall include a statement in detail* of the costs and disbursements claimed and shall be verified by affidavit." (Emphasis added.) SDCL § 15-6-54(d) further provides that "[c]ost and disbursements under this section *shall be waived if proper application is not made within thirty days* of the entry of the judgment." *Id.* (Emphasis added.)

Notice of Entry of Judgment was provided by the Defendants on August 13, 2013. SR 1154. Under SDCL § 15-6-54(d), "proper application" must have been made within 30 days. No such application was made within the period prescribed by the statute. As the Supreme Court reiterated in *Cain v. Fortis Ins. Co.,* "SDCL 15–6–54(d) requires that an application for costs and disbursements be made within thirty days of the entry of judgment. Failure to make timely application waives the right to such costs." 2005 SD 39, ¶ 33, 694 N.W.2d 709, 716. Under certain circumstances "for good cause shown the court may extend the time period and allow request for costs after the thirty days." *Zarecky v. Thompson,* 2001 SD 121, ¶ 20, 634 N.W.2d 311, 316. In *Zarecky,* the "record indicate[d] that there was a mix-up as to when the parties received the signed judgment from the court. The trial court in this case found there was good cause to allow an extension of time." *Id.*

In this case, there is no such "mix-up." Ray, Hanna, and Gateway Autoplex were the parties who filed the Notice of Entry of Judgment on August 13, 2013. Ray, Hanna, and Gateway Autoplex then filed a statutorily deficient Application for Taxation of Costs and Disbursements. On August 29, 2013, the Granite and McKie filed Objections to Application for Taxation of Costs and Disbursements pointing out the Ray, Hanna, and Gateway Autoplex's failure to provide sufficient detail for the alleged costs. SR 1169. As of that date, Ray, Hanna, and Gateway Autoplex were aware of the law regarding the required specificity. There were 14 days thereafter during which the supplemental affidavit could have been filed so that proper application was made within 30 days. They failed to do so.

Under SDCL § 15-6-54(d), Ray, Hanna, and Gateway Autoplex failed to file a proper application with a "statement in detail of the costs and disbursements claimed" within the statutory time period. As a result, Ray, Hanna, and Gateway Autoplex's claim for costs and disbursements is waived.

CONCLUSION

For the foregoing arguments and authority contained herein, the Appellants, Granite and McKie, respectfully request that this Court reverse the Trial Court's decision to grant Ray, Hanna, and Gateway Autoplex's demand for a jury trial and remand for further proceedings before the Trial Court. Granite and McKie also respectfully request that this Court reverse the Trial Court's denial of Grantie and McKie's Motions for Judgment as a Matter of Law and remand to the Trial Court with the instructions to enter a Judgment in favor of Granite and McKie. Finally, Granite and McKie respectfully request this Court reverse the Trial Court's award of costs and disbursements to the

Defendants and hold that the Defendants did not timely file a proper application for taxation of costs and disbursements.

Dated this 12th day of May, 2014.

/s/ Robert J. Galbraith

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellant's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This brief contains 8,159 words and 40,530 characters ***with no spaces***. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated this 12th day of May, 2014.

/s/ Robert J. Galbraith

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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

GRANITE BUICK GMC, INC., formerly known as McKIE BUICK GMC, INC. Plaintiff, vs. ADAM RAY and GATEWAY AUTOPLEX, LLC, Defendants. McKIE FORD LINCOLN, INC., Plaintiff, vs. SCOTT HANNA and GATEWAY AUTOPLEX, LLC, Defendants.	Appeal No. 26842 **CERTIFICATE OF SERVICE**

I, John K. Nooney, attorney for the Appellants, hereby certify that a true and correct copy of the foregoing *Appellant's Brief* was served via electronic service on:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL 26842

GRANITE BUICK GMC, INC., formerly known as McKIE BUICK GMC, INC.,
Plaintiff/Appellant,
vs.
ADAM RAY and GATEWAY AUTOPLEX, LLC,
Defendants/Appellees

and

McKIE FORD LINCOLN, INC.,
Plaintiff/Appellant,
vs.
SCOTT HANNA and GATEWAY AUTOPLEX, LLC
Defendants/Appellees

APPELLEES' BRIEF

Appeal from the Circuit Court, Seventh Judicial Circuit,
Pennington County, South Dakota,
The Honorable Janine M. Kern, presiding.

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Notice of Appeal Filed October 22, 2013

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PRELIMINARY STATEMENT

References to pleadings and other documents in the record will be supported by a citation to the settled record, with corresponding page numbers, ("SR __"). The trial transcript will be cited by page number ("TT, p. __"). Transcripts of other hearings will be cited by date and page number ("TR, May 7, 2013, p. __.") Appellants Granite Buick GMC, Inc. and McKie Ford Lincoln, Inc. are referred to as "Granite" and "McKie", respectively. Appellees Adam Ray, Scott Hanna, and Gateway Autoplex, are "Ray", "Hanna", and "Gateway Autoplex."

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment filed on August 12, 2013. SDCL 15-26A-3(1). Granite and McKie also seek review of other orders, rulings, and determinations of the trial court. SDCL 15-26A-7. Appellees agree that the appeal is timely. SDCL 15-26A-6.

STATEMENT OF LEGAL ISSUES

I. Whether the trial court abused its discretion in bifurcating the case and allowing a jury trial on the affirmative defenses.

The trial court allowed a jury trial.

Most relevant authorities:

South Dakota Constitution, Article VI, Section 6; SDCL 15-6-39(a)

Mundhenke v. Holm, 2010 SD 67, 787 NW2d 302

Roth v. Farner – Bocken Company, 667 NW2d 651, 671 (S.D. 2003)

II. Whether the trial court erred in denying Granite's Motion for Judgment as a matter of law concerning Ray's

Affirmative Defenses.

The trial court denied Granite's Motion for Judgment as a matter of law.

Most relevant authorities:

Poeppel v. Lester, 2013 SD 17, 827 NW2d 580

Bertelsen v. All State Insurance Company, 2013 SD 44, ¶ 16, 833 NW2d 545, 554

Chrysalis Health Care, Inc. v. Brooks, 640 NE2d 915, 921 (Ct. App. Ohio 1994)

III. Whether the trial court erred in denying McKie's Motion for Judgment as a matter of law concerning Hanna's Affirmative Defenses.

The trial court denied McKie's Motion for Judgment as a matter of law.

Most relevant authorities:

Norwest Bank South Dakota, N.A. v. Venners, 440 N.W.2d 774, 775 (S.D. 1989)

Garrett v. BankWest, Inc., 459 NW2d 833 (S.D. 1990)

Chrysalis Health Care, Inc. v. Brooks, 640 NE2d 915, 921 (Ct. App. Ohio 1994)

IV. Whether the trial court abused its discretion in granting the application of costs and disbursements filed by Ray, Hanna, and Gateway Autoplex as the prevailing parties.

The trial court granted the application for taxation of costs.

Most relevant authorities:

SDCL 15-6-54(d); SDCL 15-17-37

Cain v. Fortis Insurance Company, 2005 SD 39, ¶ 8, 694 NW2d 709

Adkins v. Stratmeyer, 1999 SD 131, 600 NW2d 891

STATEMENT OF THE CASE

This case involves two automobile dealerships (Granite and McKie) attempting to enforce covenants not to compete against two former employees (Ray and Hanna). Granite commenced an action against its former employee, Ray, seeking to enforce a Noncompetition and Disclosure Agreement that Ray signed on August 14, 2006. SR 2. McKie commenced an action against Hanna seeking to enforce a similar agreement executed in June of 2009. Ray and Hanna raised affirmative defenses including fraud in the inducement, waiver, equitable estoppel and promissory estoppel. SR. 8 and 267. The separate actions were consolidated by Stipulation. SR 141.

Granite's motion for a preliminary injunction against Ray was denied, and McKie's motion for a preliminary injunction against Hanna was granted. SR 201. Thereafter, the trial court, the Honorable Janine M. Kern, bifurcated the case and scheduled the affirmative defenses for a jury trial as demanded by Ray and Hanna, and over the objections of Granite and McKie. SR 1076; Tr., July 2, 2013, p. 13:9-16; Tr., July 11, 2013, p. 10:5-10; Tr., July 24, 2013, p. 32:10-39:4. The affirmative defenses were tried to a jury, which returned a verdict in favor of Ray and Hanna. SR 1086. The trial court denied Granite and McKie's motions for judgment as a matter of law. SR 1238, 1148.

Granite and McKie now appeal that Judgment, arguing that the trial court erred in allowing a jury trial, denying their respective motions for judgment as a matter of law, and granting Ray's and Hanna's Application for Costs and Disbursements.

STATEMENT OF FACTS

This appeal involves two consolidated actions brought by separate Plaintiffs against separate Defendants. The facts will be stated as to each action.

A. *Granite Buick GMC, Inc. v. Adam Ray and Gateway Autoplex.*

Adam Ray began working for McKie Buick Pontiac GMC, Inc. in June of 2005 as a salesman. TR 288, 289. At that time, McKie Buick was part of what was called the "McKie Automotive Group" which consisted of various entities such as McKie Ford Lincoln Mercury, Inc., McKie Buick Pontiac GMC, Inc., McKie Hyundai, Inc., and Bismarck Honda, Nissan Hyundai, Inc. See TR 288; see also Exhibit 2. The owners of the various dealerships were Ross McKie, his cousin Mark McKie, and Steve Kalkman. TR 289. Ray had prior experience in selling cars, having worked for Jacobs Motors in Rapid City from 1999 until 2003. TR 286. Since he was seventeen years old, Ray's main source of income/employment had been derived from the automobile dealership business. See TR 286, 291-292.

The noncompete agreement at issue was presented to Ray and other sales staff during the course of a Monday morning sales meeting of the "McKie Automotive Group" in August of 2006. TR 290, 366. Troy Claymore, the General Sales Manager for the entities in the Group, conducted that portion of the meeting concerning the noncompete agreement. Id. Ray's immediate supervisor was Darrin Rittenour. TR 289-290.

There were 30 to 40 employees attending this Monday morning sales meeting in

August of 2006. TR 290. Ray was 26 years old at the time, and generally had been working in the car business since he was 17 years old. TR 291-292. Ray always had the desire of wanting to "move forward" in the business, with aspirations of someday owning his own car lot. Id. The covenant not to compete that was presented by Claymore "scared" Ray because, according to his testimony, "I don't have a lot of different backgrounds that I can just go and do something else. It concerned me." TR 290.

Other sales people were likewise concerned about the covenant, and questions were asked of Claymore. TR 291; see also TR 154, 361. Claymore expressly informed the sales staff that the covenant not to compete would only be enforced to prevent a salesperson from making a "lateral move" to another dealership. TR 290. Claymore told the entire sales staff, including Ray, that if the employee was not making a lateral move, but was instead "moving up" in the car business, the covenant would not be enforced. TR 290. Claymore advised that it was not his intention to prevent employees from "bettering" themselves or their families. TR 290.

Because the covenant concerned him, Ray did not execute it immediately. Instead, he waited for a week or two and talked to his wife about whether he should sign it. TR 291. Ray also talked with his immediate supervisor, Darin Rittenour, about the covenant not to compete. TR 293. Ray explained his reservations about the covenant to Rittenour, who advised Ray that "You don't have to worry about Troy [Claymore], he is a man of his word." TR 293, 141.

At trial, Darin Rittenour, who was also at the meeting, testified as follows:

Q: What did Troy Claymore tell the sales staff at that meeting as to how the noncompete agreement was going to work?

A: It was only for a lateral move. Meaning if you are a sales consultant and you go to another dealership and you become a sales consultant, that he would actually enforce it at that time. However, if you were making a move to advance yourself, he would never stop you from advancing yourself.

Q: Troy Claymore specifically said that at the meeting at which the noncompetition agreement was presented?

A: Yes.

TR 140.

A number of former and current employees confirmed these statements at trial. Heath Gustafson, for example, was a McKie Ford salesperson who attended the meeting. TR 120. Gustafson specifically remembers Claymore advising the sales staff that the covenant would only be enforced to prevent a "lateral transfer." In fact, because Gustafson did not sign the agreement right away, Claymore actually spoke with him about it a few days later to tell Gustafson that if he "wanted to leave and go somewhere else, he wouldn't bother me with it." TR 123.

Andrew Webster, another sales associate with the McKie's who attended the meeting, testified that Claymore advised him that the noncompete was to keep the employees from making "lateral moves to other companies" and that they "wouldn't hold us back from bettering our families' positions." TR 153-154. According to Webster "that's how he talked me into signing this noncompete clause at that point in time." TR 155.

Janet Tischler, a sales associate employed by Granite Buick at the time of trial,

specifically recalls Claymore stating that the covenant "would apply if you were to move laterally into a sales position, if you wanted to better yourself or move to a different position, then it would not apply." TR 198.

Timothy Fischer recalls Claymore telling the sales staff that the covenants would only be enforced to prevent lateral moves. TR 203-204. Wes Bjelland, a sales consultant employed by Granite at the time of trial, testified that Claymore advised the staff that the covenant was only to keep sales people from making lateral moves. TR 207. Claymore advised that he wouldn't stop people from "getting ahead." TR 207. Doug Escott testified that Claymore advised the staff that the covenant would only be used to prevent "lateral movement," and that he would not use it to prevent an employee from "moving up in the world." TR 216-217.

According to Jason Dimnicki, yet another sales person in attendance at the meeting, Claymore "clarified that the purpose of the agreement was to make sure that it would not prevent anybody from moving up." TR 222. Joe Hockhausen testified that Claymore informed the staff that "I would never hold you back from improving yourself." TR 358. Bobby Whitaker, another current Granite salesperson, testified that Claymore advised that the covenant would not be used to prevent employees from opening their own store or improving what they were doing other than sales. TR 361.

Ray testified that he relied 100% upon what Claymore had told him at the initial meeting in deciding to finally execute the covenant not to compete. TR 293. He also relied upon the statements of his immediate supervisor, Darin Rittenour, that the covenant would only be used to prevent a lateral move, and that Claymore was a "man

of his word." TR 293. Moreover, although Granite and McKie attempt to pass the covenants off as "voluntary," it is clear that the sales people were required to sign them if they wanted to be considered for promotions or "spiffs," i.e. bonuses. TR 142-143, 156, 199, 358, 362. This fact was confirmed at trial by Claymore, himself. TR 380-381.

In 2012, while Ray was working as a sales manager for Granite, the McKie Automotive Group "split up." TR 302, 395. As a result of that "split," after August of 2012, Mark McKie solely owned McKie Ford Lincoln Mercury. TR 302. Ross McKie owned McKie Buick GMC and McKie Nissan Honda. TR 302. Ray was working for McKie Buick GMC (now Granite), and he continued his employment with that dealership. TR 298, 302. The "split" concerned Ray, however, because of the uncertainty. TR 302, 303.

Ray and Scott Hanna are good friends and competitors. TR 298. In 2012, Hanna was employed as a sales manager for McKie Ford. TR 298. It was then that they first discussed the possibility of opening their own business at a facility that had been recently vacated by another dealership in Rapid City. TR 298. They ultimately associated with Dan Porter of North Dakota in the formation of Gateway Autoplex. TR 300. Porter, Hanna, and Ray agreed that the three of them would equally share in the profits generated by the dealership operated as "Gateway Autoplex." TR 182, 240-241, 325.

In connection with that arrangement, Ray and Hanna personally guaranteed the lease agreement for Gateway. TR 242-243; Exhibit 7. They are also listed on and

executed an indemnity agreement for the dealer bond, and personally guaranteed open accounts with companies such as M.G. Oil Company for the purchase of fuel and related products/services. TR 243-245; Exhibits E and F. Ray and Hanna manage the operation, and are in charge of hiring and firing all personnel. They are their own bosses. TR 250.

Gateway Autoplex opened for business on March 2, 2013. TR 230. It currently employs six individuals. It sells only *used* cars. It also sells recreational vehicles, boats, watercraft, motorcycles, campers, and trailers. Gateway Autoplex does not have a service department or a parts department. Both Granite and McKie, on the other hand, sell new and used vehicles, and both have service and parts departments. McKie's annual sales revenue is approximately $135-$145 Million, while Granite's is approximately $40 Million. Tr. May 7, 2013, p. 89, 180-181.

On February 1, 2013, Ray contacted Ross McKie to advise him that he was leaving to start Gateway Autoplex. TR 304. The conversation occurred over the telephone because Ross McKie was on his way to attend the Super Bowl. TR 304. Ross McKie requested that Ray contact Claymore. TR 304. At this time, McKie said nothing about the enforcement of the covenant not to compete. TR 307

On that same date, Ray also met with Claymore to advise him of his plans to leave and create Gateway Autoplex. TR 305-306. According to Ray, Claymore wished him well, and asked if he could remain working for a couple of weeks to help train his replacement. TR 305-306. Ray did so, and did not actually leave the employ of Granite until February 15, 2013. TR 306-308.

On February 15, 2013, which was to be Ray's last day at Granite, Ross McKie approached him and handed him an envelope. TR 308-309. Ray believed initially that it was perhaps his final paycheck, until he saw that it came from Granite's attorney. TR 309. As he handed him the envelope, Ross McKie told Ray "good luck with that." TR 309.

The envelope contained a letter from attorney John Nooney, on behalf of and representing Granite, dated February 7, 2013 – eight days earlier. TR 310; Exhibit 12. The letter threatened immediate legal action against Ray in the event he continued with his plans to start Gateway Autoplex. In the letter, Mr. Nooney states:

> This firm represents McKie Buick GMC, Inc. It has come to my attention that you have recently terminated your employment with McKie Buick and that you anticipate opening a used car location in Rapid City. Your involvement in such a business operation would be in direct violation of your Non-Competition and Disclosure Agreement ("Agreement") and will result in the immediate filing of a lawsuit against you. In that lawsuit we will ask that the court enter a temporary restraining order and that it prohibit you from being associated with any business which would violate the terms of your agreement.

Exhibit 12 (emphasis added).

Gateway Autoplex had not even opened its doors, and Ray had not even left the employment of Granite, at the time this letter was prepared (February 7th) and delivered to Ray (February 15th). Id. Granite followed through with its threat, and commenced this litigation against Ray on or about April 3, 2013. SR 1. Granite is now attempting to do exactly what Claymore and Rittenour expressly told Ray it would not do to induce him to sign an agreement he otherwise would never have signed.

B. ***McKie Ford Lincoln, Inc. vs. Scott Hanna***

Scott Hanna had also been involved in the automobile sales business for a number of years prior to working for the McKies. See TR 230-235. Hanna pretty much grew up in the car business. See Id. His father, Brooks Hanna, has owned car lots, and actually worked for the McKies for a number of years in the 1980's. TR 233-234. Brooks Hanna had been the general sales manager for the McKie entities and for a time Brooks was Mark McKie's supervisor. TR 398-399. According to Mark McKie, Scott Hanna working for the McKies was "like family coming full circle." TR 399.

At the time of trial, Scott Hanna was 37 years old. TR 230. When he was in high school living in Rapid City, he worked for his father, Brooks, washing cars at the dealership. TR 231. After completing two years of college, he worked as a dealership service advisor, in Spearfish, South Dakota. TR 231. Thereafter, he moved to Butte, Montana, with his father and worked there for twelve years for a Ford dealership where he started selling cars. TR 232. Hanna was also promoted to finance business manager and ultimately a sales manager position. TR 232. He learned the trade of a car salesman by growing up around it. TR 232. After working in Iowa for a short period of time, Hanna became a sales manager for the Ford dealership in Laurel, Montana. TR 235.

Hanna was working at the Laurel dealership when he was hired by McKie in June of 2009. TR 236. Hanna recalls that the conversation with Troy Claymore occurred on a Wednesday or Thursday, and he was advised that he needed to be in Rapid City by the coming Monday if he wanted the job. TR 236. Hanna does not recall signing the covenant not to compete at issue because he was presented with a number of different documents that he was required to sign four or five days after he began

work. TR 237-238. As stated in the above section, Hanna, along with Ray, signed the Articles of Organization for Gateway Autoplex, LLC and also personally guaranteed the lease agreement. TR 241-243. Exhibit C and Exhibit 7. He also guaranteed open accounts for the purchase of gasoline and the dealer bond. TR 243-244; Exhibits E and F. Hanna had never done any of these things at other car dealerships. TR 245-246. He is sharing equally in the profits of Gateway Autoplex with Ray and Dan Porter. TR 240-241.

Hanna discussed his departure with Mark McKie on February 1, 2013. At that time, Mark McKie was the sole owner of McKie Ford Lincoln Mercury, Inc. Hanna was very specific in testifying about his conversation with Mark McKie, explaining in detail to McKie what he and Ray were going to do. TR 246-248.

Hanna was concerned about two things – whether McKie was going to prevent him from opening his own dealership, and whether these circumstances would harm the long relationship between the families. Hanna specifically asked McKie whether he was going to come after him in any way whatsoever. TR 247. Hanna also inquired as to whether his departure to start Gateway Autoplex was going to affect the family's relationship in any manner. TR 247. In response, Mark McKie threw his hands in the air and said "Shit, no, Scotty, that will never be the case." TR 247. He further stated that "This is the car business" and I "wish you the best of luck." McKie further informed Hanna that his father had worked for the McKies twice before and that Hanna may even be back again. TR 247. They shook hands. TR 248.

At the time these statements were made, the only thing Hanna had guaranteed

was the lease. TR 264. He had not yet left his employment with McKie, nor had he undertaken other obligations relative to Gateway Autoplex, such as guaranteeing the M.G. Oil account, or signing the indemnity for the dealer bond. TR 264. Hanna relied upon McKie's statement in terminating his employment on that date. TR 248. Hanna testified that "[u]nder no circumstances would I want to be in a position where I am at now, if I would have known there would have been a problem with what's going on here when I left McKie's office." TR 248.

Mark McKie also testified about the meeting with Scott Hanna. McKie confirmed the friendship with Hanna's father, Brooks. TR 398-399. Despite the fact that he was the sole owner of McKie, Mark McKie testified that he did not know at that time whether Hanna had signed a noncompete covenant. Mark McKie did not refute Hanna's testimony about the conversation that took place, and what he said. Instead, McKie simply testified that he "didn't recall." TR 399-400.

Adam Ray received a letter on February 15th, drafted February 7th, threatening litigation. Exhibit 12. Hanna never received such a letter from McKie, and did not learn about the decision to enforce the covenant against him until a month and a half later. TR 279-280. McKie is now attempting to enforce the covenant, despite these representations to Hanna and Hanna's reliance upon those statements.

ARGUMENT AND AUTHORITIES

I. The Trial Court correctly granted Ray's and Hanna's Request for a Jury Trial. The Trial Court did not abuse its discretion.

A circuit court has broad discretion in an equitable action to determine whether

to grant or deny a jury trial. Mundhenke v. Holm, 2010 SD 67, ¶ 11, 787 NW2d 302, 305 (citing Fox v. Burden, 1999 SD 154, ¶ 32, 603 NW2d 916, 924). This court "will not disturb the circuit court's decision absent an abuse of discretion." Id.

In this instance, the trial court bifurcated the proceedings, with the jury determining the legal issues raised by Ray and Hanna in their Answers, pursuant to and consistent with Mundhenke v. Holm, 2010 SD 67, 787 N.W.2d 302. The equitable issues were reserved for the court.

> The Court: Well, there are complicated and legal and equitable issues in this. I have bifurcated – it's my intention to bifurcate the legal and equitable issues, try the legal issues to the jury. The issue regard the equitable issues will be tried to the court.

Tr. July 2, 2013, p. 13; see also Id. p. 9-12; see also Tr., July 11, 2013, p. 10:5-10; and Tr., July 24, 2013, p. 32-39.

Granite and McKie completely decline to address this Court's holding in Mundhenke v. Holm, despite the fact that Judge Kern expressly relied upon this case in granting a jury trial. Tr., July 2, 2013, p. 10:17-11:4. Granite and McKie also completely fail to address how, exactly, the trial court abused its discretion in allowing a jury trial.

In Mundhenke, the Plaintiff filed a complaint seeking an accounting, disassociation, and dissolution of a partnership. In his Answer, the Defendant denied the existence of a partnership and demanded a jury trial on that issue. Id. at ¶ 7 (stating that the Defendant "argued that a right to a jury trial existed on the factual issue of whether the partnership had been formed.") The circuit court concluded that the claims

brought by the Plaintiff were equitable in nature "despite the need to determine the factual issue of whether a partnership existed." Id. at ¶ 8. The Defendant's request for a jury trial was denied.

On appeal, the South Dakota Supreme Court reversed, holding that the question of whether a valid partnership existed implicated an action at law. Id. at ¶ 18. "Because it is an action at law and we have abandoned the incidental claim rule, the South Dakota Constitution and SDCL 15-6-38(b) give [the Defendant] the right to demand a jury trial, which he did in this answer to [the Plaintiff's] Complaint. Thus, the trial court erred when it denied [the Defendant] a jury trial on the issue of whether a partnership existed." Id. at ¶ 18.

Article VI, Section 6 of the South Dakota Constitution guarantees a right to jury trial in all cases at law. "In cases where the pleadings seek equitable relief …, a jury trial is a matter for the trial court's discretion. Conversely, when the action is at law, either party has a right to a jury trial." Mundhenke, 2010 SD 67 at ¶ 14. The determination of whether an action stands in law or in equity is based on "the pleadings, including the complaint, answer, cross complaint and prayer for relief." Id. The right to a jury trial on any legal issue raised cannot be denied, even in an equitable action, regardless of whether the legal issue is presented and characterized as "incidental" to the equitable issues. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); see also SDCL 15-6-39(a).

Ray and Hanna properly raised affirmative defenses in their Answers. See SR 8 and 267. The nature of these defenses were such that they were entitled to a jury trial.

Ray pled fraud in the inducement. Id. This Court very recently held that a jury should resolve factually disputed claims involving fraud, specifically fraud in the inducement. Poeppel v. Lester, 2013 SD 17, 827 NW2d 580. The South Dakota Legislature has enacted a statute detailing the elements of fraud, stating that "[a]ctual fraud is always a question of fact" and that fraud renders a contract voidable. SDCL 53-4-1; SDCL 53-4-5. This is no different than Mundhenke, wherein it was noted that the Legislature had enacted statutes setting forth the elements of a partnership, thus implicating an action at law. Mundhenke at ¶ 18.1

Ray and Hanna also pled waiver, equitable estoppel and promissory estoppel. Waiver and estoppel are likewise jury questions for which a verdict will not be disturbed when there is a conflict in the evidence. See Winans v. Light, 217 N.W. 635 (S.D. 1928)(whether waiver was proven was a "question for the jury" when there was a conflict of evidence); see also, L.A. Tucker Truck Lines v. Baltimore American Insurance Co. of New York, 97 F.2d 801, 806 (8th Cir. 1938); Schultz v. Heritage Mutual Insurance Company, 902 F.Supp. 1051 (D.S.D. 1995)(noting that "[e]stoppel depends on the facts of each case and ordinarily presents a question for the jury.")

Granite and McKie seem to argue that there can never be a jury trial in any case seeking injunctive relief, regardless of the defenses raised. SDCL 15-6-65(a) contradicts this argument, however, as it expressly recognizes that there may be instances where a jury trial is available in cases involving injunctive relief. Rule 65(a)

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1 In Mundhenke, the question for the jury was whether a partnership existed based upon the Defendant's Answer, not a counterclaim. Id. at ¶ 7.

states:

> Before or after commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received on an application for a preliminary injunction which would be admissible on the trial on the merits, becomes part of the record on the trial and need not be repeated at the trial. This paragraph shall be construed and applied to save the parties any rights they may have to trial by a jury. (emphasis added).

Again, the granting or denying of a jury trial "is within the broad discretion of the trial court and will not be disturbed absent a clear showing of abuse of discretion." Roth v. Farner – Bocken Company, 667 NW2d 651, 671 (S.D. 2003)(trial court affirmed in granting a jury trial in its discretion). "In cases where the pleadings seek equitable relief or where the legal relief is incidental, a jury trial is a matter for the trial court's discretion." Nizielski v. Tvinnereim, 453 NW2d 831, 833 (S.D. 1990) (emphasis added); Mundhenke, 2010 SD 67 at ¶ 14.

Granite and McKie argue that Ray and Hanna were not entitled to a jury trial as a matter of right. This argument misses the point. Granite and McKie fail to make any argument why it was an abuse of discretion to have a jury decide the affirmative defenses. They point to no evidence, and do not raise any argument, supporting how the trial court's decision to have a jury consider the affirmative defenses prejudiced their rights in any regard, resulted in an unjust verdict, or otherwise affected the outcome of the case. Granite and McKie rely upon cases wherein a trial court was reversed for

denying a jury trial2, and where a court was affirmed for denying a jury trial.3 They even cite cases where the trial court was affirmed for properly granting a jury trial.4 What Granite and McKie fail to cite, however, is a single case in which the trial court was reversed for *allowing* a jury trial in its discretion.

Ray and Hanna were entitled to a jury trial on their affirmative defenses as a matter of right. SDCL 15-6-39(a); Mundhenke v. Holm, 2010 SD 67. The trial court should be affirmed.

II. The Trial Court correctly denied Granite's Motion for Judgment as a matter of law as to Ray's Affirmative Defenses.

1. Fraudulent Inducement.

The jury found in favor of Ray on his affirmative defense of fraudulent inducement. SR 1086. This defense was based upon the statements Troy Claymore made to Ray in order to get him to sign the agreement. The statements were that Granite/McKie would only enforce the covenant to prevent a "lateral move" to a competitor. Claymore further stated he would not enforce the covenant against employees who were moving up in the business, or bettering themselves. These statements were reinforced by Rittenour, who told Ray that Claymore was a man of his word. Every current and former employee in attendance at that meeting who testified at trial confirmed these statements from Claymore. TR 120-123; 153-155; 198; 203-204; 207; 216-217; 222; 358; 361.

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2 Mundhenke v. Holm, supra; Nizielski v. Tvinnereim, 453 N.W.2d 831 (S.D. 1990).
3 First National Bank of Philip v. Temple, 2002 SD 36, 642 N.W.2d 197; Metropolitan Life Insurance Company v. Jensen, 9 N.W.2d 140 (S.D. 1943).

Granite (and McKie) would have this court believe that an employer can tell an employee anything it wants in connection with the signing of a covenant not to compete, and then be able to enforce that covenant at a later date regardless of those statements. This is a particularly untenable argument, especially considering that these types of contracts are void to begin with, and are only enforceable if they satisfy specific requirements. SDCL 53-9-8, 53-9-9. Courts have refused to enforce noncompetition agreements based upon an employee's reliance on the representations and conduct of an employer. Chrysalis Health Care, Inc. v. Brooks, 640 NE2d 915, 921 (Ct. App. Ohio 1994) (employer estopped from enforcing noncompete agreement because of assurances that the covenant would not be enforced); Braun v. Ryder Systems, Inc., 430 So.2d 567 (Fla. App. 1983) (preliminary injunction denied due to material issues of facts as to whether agreement had been modified by employer's representations); Ikon Office Solutions, Inc. v. American Office Products, 178 F.Supp.2d 1154 (D.OR. 2001) (covenant not to compete ruled unenforceable based upon representations of employer).

Ray informed Ross McKie and Claymore that he was leaving to form Gateway Autoplex on February 1, 2013. At that time, Ross McKie was leaving town to attend the Super Bowl. TR 304. By February 7, 2013, however, Granite's attorney had drafted a letter to Ray threatening to sue "immediately" if he opened Gateway Autoplex. Exhibit 12. This letter was personally delivered to Ray by Ross McKie on February 15,

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4 First Western Bank, Sturgis v. Livestock Yards, 466 N.W.2d 853 (S.D. 1991).

2013. TR 309. *Whether Ray was making a "lateral move," moving up, or was otherwise improving himself by working at Gateway Autoplex was entirely irrelevant to Granite.* According to Mr. Nooney's February 7, 2013 letter, Granite was going to sue him anyway. Ray had not even left Granite at the time Exhibit 12 was drafted, which was (at most) only six (6) days after he informed Ross McKie that he was leaving, during which part of the time McKie was at the Super Bowl. Gateway Autoplex hadn't even yet opened its doors for business. TR 230.

The jury was instructed on fraudulent inducement. Instruction 20 (SDPJI 20-110-20 and Instruction 19 (SDPJI 30-10-140). Instruction No. 20 stated:

> On the defense of fraudulent inducement, the Defendant Adam Ray must prove:
>
> (1) The Plaintiff made a representation as a statement of fact;
>
> (2) The representation was untrue;
>
> (3) The Plaintiff knew the representation was untrue or he made the representation recklessly;
>
> (4) The Plaintiff made the representation with intent to deceive Defendant Ray and for the purpose of inducing Defendant Ray to act upon it;
>
> (5) Defendant Ray justifiably relied on the representation; and
>
> (6) Defendant Ray suffered damage as a result

Instruction 20.

The timing of the decision to sue Ray, and the fact that this lawsuit was commenced, clearly demonstrate that Granite never intended to follow through on the representations that Claymore made at the August 2006 meeting. Those statements were either false when they were made, or they were recklessly made. The only

reasonable inference is that the statements were made to induce Ray's signature, and that Ray relied upon those statements to his detriment. All reasonable inferences are drawn in favor of Ray. Bertelsen v. All State Insurance Company, 2013 SD 44, ¶ 16, 833 NW2d 545, 554. "If sufficient evidence exists so that reasonable minds could differ, [judgment as a matter of law] is not appropriate." Id. at ¶ 16.

The jury was properly instructed on the law. See also, Poeppel v. Lester, 2013 SD 17 (fraudulent inducement proper question for jury). The jury heard the testimony of Ray, Claymore, Rittenour, and may other witnesses, and unanimously found in favor of Ray. "Questions of fraud and deceit are generally questions of fact and as such are to be determined by a jury." Ehresmann v. Muth, 2008 SD 103 ¶ 20, 757 NW2d 402. The jury's verdict should be considered unassailable based upon the evidence in this record. Granite's Motions for Judgment as a Matter of Law were properly denied, which ruling is presumed correct. The Supreme Court will not seek reasons to reverse. Osman v. Karlen & Associates, 2008 SD 16, 746 NW2d 437.

The primary focus is on the fact that Granite never intended to honor the promise to not enforce the covenant regardless of Ray's advancement.5 It was a fraud from the beginning. The trial court did not abuse its discretion in denying the motions for judgment as a matter of law.

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5 Granite's argument that Ray has not "bettered" himself missed the point — although clearly he has. The move to open Gateway Autoplex was not a lateral move. He is sharing the profits of Gateway Autoplex with Porter and Hanna (TR 240-41), and has the potential to increase his economic financial standing. As a response to the argument that Ray is earning less money than when he worked at Granite, consider that Gateway Autoplex had only been open for four months at the time of trial, and, although he

2. Promissory Estoppel.

The jury also found for Ray on the defenses of waiver, promissory estoppel and equitable estoppel. "The elements of promissory estoppel or detrimental reliance are a promise, which promissor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance. Such a promise is binding if injustice can be avoided only by enforcement of the promise." Jacobson v. Gulbransen, 2001 SD 33, ¶ 27, 623 NW2d 84.

In Chrysalis Health Care, Inc. v. Brooks, 640 NE2d 915 (Ohio Mun 1994) the employee invoked promissory estoppel, seeking enforcement of the employer's verbal assurances that the non competition agreement would not be enforced. These assurances were made at the time the agreement was executed because the defendant/employee was already employed with a competitor, and the employer represented that the agreement would not be enforced against her. Thereafter, the employer sought to enforce the agreement.

The court refused to enforce the covenant not to compete on the theory of promissory estoppel. "This court finds by a preponderance of the evidence that plaintiff promised defendant that the non competition clause would not be enforced and reasonably expected that promise to induce defendant to sign the employment agreement." Id. at 921. See also Jacobson, 2001 SD 33 at ¶ 27.

The jury found for Ray on the promissory estoppel claim. There is substantial

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received a draw of $5000 per month, the partners had yet to divide any profits. He is entitled to one-third of the profits, and he is his own boss.

evidence to support that verdict. At the time the contract was executed, Ray was informed that it would only be enforced to prevent lateral moves to a competitor. Ray relied upon that promise when he executed the covenant. This is squarely in line with the Chrysalis Health Care case which addressed the same issue relative to promissory estoppel and the enforcement of a covenant not to compete. As with fraud, "estoppel depends on the facts of each case and ordinarily presents a question for the jury." Garrett v. BankWest, Inc., 459 NW2d 833 (S.D. 1990).

3. Equitable Estoppel and Waiver.

The jury found for Ray on his affirmative defense of equitable estoppel. In order to constitute equitable estoppel, false representations or concealment of material facts must exist, the party to whom the representation was made must have been without knowledge of the real facts, the representations or concealment must have been made with the intention that it should be acted upon, and the party to whom it was made must have relied thereon to his prejudice or injury. Century 21 Associated Realty v. Hoffman, 503 NW2d 861, 866 (S.D. 1993) "An essential element of equitable estoppel is fraud." Id.6

The facts clearly satisfy the elements of equitable estoppel. Granite suggests that Ray is somehow constrained by the parol evidence rule as it relates to this defense. The trial court concluded that these defenses were "intertwined" factually and legally. Tr., July 11, 2013, p. 10. The parol evidence rule does not apply to prevent the

6 "There must be some intended deception in the conduct or declaration of the party to be estopped or such gross negligence on his part as to amount to constructive fraud." Century 21, 503 NW2d at 866.

introduction of this testimony as it relates to equitable estoppel. Poeppel, 2013 SD 17, ¶ 20, 827 NW2d 580 ("The parol evidence rule is simply not applicable when fraud has been employed as enticement to enter a contract.") Ray relied upon Claymore's representations to his obvious detriment.

The evidence also clearly supports Ray's waiver defense. Here, based upon the representations of Claymore, Granite had voluntarily abandoned and surrendered any right to enforce the agreement. Norwest Bank South Dakota, N.A. v. Venners, 440 NW2d 774 (S.D. 1989). The principals underlying the doctrine of equitable estoppel are similar. Minnesota Mining and Manufacturing Company v. Kirkevold, 87 FRD 324, 328 (D.Minn. 1980). (In order to find a waiver of contractual rights, the facts must "reasonably lead to the inference that the person against whom it is to operate did in fact intend to waive his known right.") Ray's waiver defense is further based upon and supported by the fact that he was not informed that the covenant not to compete was going to be enforced until February 15, 2013, after he had agreed to remain in the employ of Granite for two weeks and train his replacement. "A waiver can be inferred from conduct or silence." Id. at 335.

The trial court correctly denied the motion for judgment as a matter of law.

III. The Trial Court correctly denied McKie's Motion for Judgment as a Matter of Law as to Hanna's Affirmative Defenses.

1. Waiver.

Hanna's waiver defense centers on the meeting between Scott Hanna and Mark McKie on February 1, 2013. At that meeting, Hanna inquired whether his leaving to

form Gateway Autoplex was going to cause problems between McKie and the Hanna family, and whether McKie was going to come after him for any reason. In response, McKie stated "Shit, no, Scotty, that will never happen." Scott Hanna's testimony as to this conversation was very specific and detailed. TR 246-248. In contrast, Mark McKie did not deny these statements. Instead, McKie testified that he "couldn't recall" whether these comments were made. TR 399-400. The jury believed Hanna's version over Mark McKie's testimony. "The sole judge of the witnesses' credibility is the jury, and it is up to them to determine how much of the evidence of certain witnesses they believe." LDL Cattle Co. v. Guetter, 1996 SD 22 ¶ 20, 544 N.W.2d 523.

> The jury was instructed:
>
> To establish the defense of waiver, the Defendants must prove each of the following elements:
>
> (1) The Plaintiffs were in possession of a right conferred by the noncompetition and disclosure agreement;
>
> (2) The Plaintiffs had full knowledge of the material facts;
>
> (3) The Plaintiffs voluntarily and intentionally did or refrained from doing something inconsistent with the existence of the right or of their intention to rely upon it. To support the defense of waiver, there must be a showing of a clear, unequivocal and decisive act or acts showing an intention to relinquish the existing right.

Instruction No. 23; Norwest Bank South Dakota, N.A. v. Venners, 440 N.W.2d 774, 775 (S.D. 1989).

A waiver can be express or implied. Id. "Waiver is a voluntary abandonment or surrender by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such persons forever deprived of its benefits." Northwestern Fire and Marine Insurance Company v. Tollard, 238 P. 594 (Mont. 1925). "Waiver is the volitional relinquishment, by act or word, of a known, existing right conferred in law or contract." Auto Owners Insurance Company v. Hansen Housing, Inc., 2000 SD 13, ¶ 30, 604 NW2d 504.

McKie claimed that he did not know whether Scott Hanna had executed a non competition agreement. TR 396-397. The jury, however, did not believe McKie because he was not telling the truth. McKie is the sole shareholder of McKie Ford, and prior to that was an owner of the entities that made up the McKie Automotive Group. The covenants not to compete had been in place since August of 2006. McKies had enforced the covenants in the past. See, TR 225-226.

Additionally, Ray received a letter from Ross McKie on February 15, 2013 (which letter had been drafted on February 7, 2013) threatening a lawsuit. *Scott Hanna received no such letter from Mark McKie*. TR 279-280. McKie claims he only learned of Hanna's covenant the week following his February 1st meeting. TR 403. Despite a decades long friendship between the McKies and the Hannas, however, Mark McKie didn't think to contact Hanna to advise him that he had learned of the covenant and was going to enforce it. TR 403. McKie's credibility was further damaged when he

"couldn't recall" when he had first discussed with Ross McKie7 enforcing the covenants against Ray and Hanna. TR 403. If it was a question he didn't want to answer, Mark McKie just "couldn't remember." See TR 403.

The reasonable inference to be drawn from these facts is that Mark McKie had told Hanna he wouldn't come after him and that they – unequivocally - were talking about the covenant not to compete. There is nothing else that the two could have been talking about, other than the covenant not to compete. It was for the jury to determine which party was being truthful. L.A. Tucker Truck Lines, 97 F.2d at 806; LDL Cattle Co., 1996 SD 22 at ¶ 20. They obviously believed Hanna, finding that McKie had full knowledge of the material facts, that he relinquished his right to enforce the covenant, and that Hanna relied upon those statements.

Hanna relied upon McKie's statements in deciding to leave his employment. He had not obligated himself on anything other than guaranteeing the lease. TR 264. Reasonable inferences from the evidence support the jury's verdict, and all such doubts are to be resolved in favor of Hanna. Bertelsen, at ¶ 16. The Court will "view the evidence and testimony in a light most favorable to the verdict" and then, "without weighing the evidence, the court must decide if there is evidence which would have supported or did support the verdict." Id. (citing Selle v. Tozser, 2010 SD 64, ¶ 14, 786 NW2d 748, 752.) The denial of McKie's Motion for Judgment as a matter of law should be affirmed.

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7 Ross McKie, the sole owner of Granite at all relevant times, chose not to testify at trial.

2. Promissory Estoppel.

"Estoppel depends on the facts of each case and ordinarily presents a question for the jury." Garrett v. BankWest, Inc., 459 N.W.2d at 848. The jury found for Hanna on his promissory estoppel defense. The motion for judgment was denied, correctly.

Concerning estoppel, "there must have been some act or conduct on the part of the party to be estopped, which has in some manner misled the party in whose favor the estoppel is sought and has caused such party to part with something of value or do some other act relying upon the conduct of the party to be estopped, thus creating a condition that would make it inequitable to allow the guilty party to claim what would otherwise be his legal rights." A-G-E Corp. v. State, 2006 SD 66, 719 NW2d 780, 789; see also Chrysalis Health Care, 640 NE2d 915 (Ohio Mun. 1994). Hanna testified that he relied upon McKie's statement in deciding to leave his employment at McKie. At that time, Hanna had only obligated himself on the guarantee for the lease. Other obligations relative to Gateway Autoplex had not yet been undertaken. To the extent Hanna had undertaken any other efforts in creation of Gateway prior to February 1st, none of those matters as identified by McKie establish any binding obligation on the part of Hanna, and do not refute to Hanna's reliance upon McKie's statements.

The doctrine of promissory estoppel is "bottomed on principals of morality and fair dealing and is intended to subserve the ends of justice. It seeks to accomplish that which is fair between man and man." Estate of Williams, 348 NW2d 471, 475 (S.D. 1984). This Court has held that "when the exact representations and the reasonableness of the reliance upon them are disputed, the issue of estoppel should be presented to a

fact finder." Garrett v. BankWest, 459 NW2d at 848. The trial court did not abuse its discretion in denying McKie's motion and should be affirmed.

IV. The Trial Court correctly granted Ray's and Hanna's Application for Taxation of Costs.

Ray and Hanna timely submitted their Application for Taxation of Costs and Disbursements. SR 1158. This Application was supported by the Affidavit of Attorney Roger A. Tellinghuisen, signed under oath, certifying the costs that were incurred and subject to taxation in accordance with SDCL 15-17-37 and 44. Id.; SDCL 15-6-54(d). This Application was sufficient. Id.

Granite and McKie, of course, objected. SR 1169. Ray and Hanna submitted a supplemental affidavit, addressing the issues raised in the objections. This affidavit was again signed under oath detailing the recoverable expenses that were actually incurred in defending the claims brought by Granite and McKie, and in taking the matter to trial to obtain a favorable verdict. SR. 1199. The Court had all of the necessary information before it sufficient to make a reasoned decision in accordance with the statutes.

A trial court's rulings on the allowance or disallowance of costs are reviewed under an abuse of discretion standard. Cain v. Fortis Insurance Company, 2005 SD 39, ¶ 8, 694 N.W.2d 709. Ray and Hanna filed their application for costs well within the 30 days after the entry of Judgment. SDCL 15-6-54(d). Granite's and McKie's only argument is that they believe Ray and Hanna did not submit a complete application. Apparently, Granite and McKie also believe that Ray and Hanna were not entitled to supplement their application in response to objections. This is nonsense.

The case of Adkins v. Stratmeyer, 1999 SD 131, 600 N.W.2d 891 actually supports Ray and Hanna. "As Adkins provided a report with the specific amount expended for in office photocopies, the trial court should have awarded Adkins such fees." Id. at ¶ 32. Here, Ray and Hanna submitted a report (affidavit) detailing the specific amounts that were incurred. Upon objection, a supplemental affidavit was filed. Granite's and McKie's reliance upon DeHaven v. Hall, 2008 SD 57, 753 N.W.2d 492 is entirely misplaced. In DeHaven, the trial court was never provided a sufficiently itemized report detailing the necessary information. In this instance, the Court was provided with all necessary information.8

Granite and McKie do not argue that Ray and Hanna were not "prevailing parties," or that the trial court was not provided with all of the appropriate information in accordance with SDCL 15-17-37 and SDCL 15-6-54(d). Granite and McKie do not argue that the costs requested are for items not specifically authorized by SDCL 15-17-37, and do not argue that the costs are excessive.

Granite and McKie have not cited any authority directly supporting the argument that the Application for taxation of costs was statutorily deficient in this case, or that Ray and Hanna were not entitled to supplement their Application with an additional affidavit prior to the hearing on the objections. The trial court did not abuse

8 In DeHaven, the trial court did not deny all disbursements, but instead took a restrictive view of the particular cost and disbursement statutes, and was "also concerned with the lack of itemization for some of the disbursements claimed."DeHaven, 2008 SD 57 at ¶ 53. DeHaven also apparently sought reimbursement for cement, tape, and meals with their attorney, none of which were allowed under the statute. "Under these circumstances" the trial court did not abuse its discretion in denying "some" of the disbursements. DeHaven at ¶ 55.

its discretion in awarding these costs and should be affirmed.

CONCLUSION

Ray and Hanna respectfully request that the Trial Court be affirmed on all issues.

Respectfully submitted on June _____, 2014.

_____
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CERTIFICATE OF SERVICE

I hereby certify that on June _____, 2014, I served two true and correct copies of the foregoing **Appellees' Brief** by placing the same in the United States mail, postage prepaid, addressed as follows:

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CERTIFICATE OF COMPLIANCE

This brief is submitted under SDCL § 15-26A-66(b). I certify that the brief complies with the type volume limitation. In reliance upon the document properties provided by Microsoft Word, in which this brief was prepared, the brief contains 7,968 words and 47,442 characters, excluding the table of contents, table of cases, preliminary statement, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

Dated: June _____, 2014.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 26842

GRANITE BUICK GMC, INC., formerly known as McKIE BUICK GMC, INC.
Plaintiff/Appellant
vs.
ADAM RAY and GATEWAY AUTOPLEX, LLC
Defendants/Appellees

and

McKIE FORD LINCOLN, INC.
Plaintiff/Appellant,
vs.
SCOTT HANNA and GATEWAY AUTOPLEX, LLC
Defendants/Appellees

ON APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

The Honorable Janine M. Kern
Circuit Court Judge

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NOTICE OF APPEAL FILED OCTOBER 22, 2013

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Cases:

Statutes:

Consistent with the provisions of SDCL § 15-26A-62, Granite Buick GMC, Inc. ("Granite) and McKie Ford Lincoln, Inc. ("McKie") respectfully submit this Reply Brief to address those new issues raised in the Appellees' Brief. All references to the persons, parties or the record shall have those same meanings as set forth in Granite and McKie's initial brief.

STATEMENT OF THE FACTS

Ray became a sales consultant for Granite in June, 2005. TT – 288:5 – 288:21. During the course of his employment, Ray signed a Non Competition and Disclosure Agreement on August 14, 2006. App. at F-1. Hanna became an employee of McKie in June, 2009. TT – 236:3 – 236:23. As a condition of his employment with McKie, Hanna signed a Non Competition and Disclosure Agreement on June 18, 2009. App. at G-1. The Non Compete portion of both Non Competition and Disclosure Agreements provided:

> On termination of my employment, for any cause whatsoever, I will not engage to work for any individual, firm, or entity engaged in the same or similar business or be a principal, member, or owner of any entity who is engaged in the same or similar line of business within 200 miles of the city limits of Rapid City for a period of one year subsequent to such termination, such period not to include any period of violation or period of time required for litigation to enforce the covenants.

App. at F-1.

Neither Ray nor Hanna argue that the Non Compete is ambiguous or void. Ray's affirmative defenses of fraud, estoppel, and waiver rely upon a sales meeting which occurred before Ray signed the Non Competition and Disclosure Agreement. At the meeting, the Non Competition and Disclosure Agreement was presented to all sales personnel. One of the employees asked if Granite would use the Non Competition and

Disclosure Agreement to prevent the sales personnel from moving into a better position.

Ray testified specifically regarding the question and answer that were provided:

> I remember vividly the fact that, you know, the question was: What if I get an opportunity to move into management or ownership? And Troy Claymore said, if you make a lateral move, I'm going to enforce it. I want to stop it. If you make a lateral move from here to say Chevy. But if you ever get the chance to better yourself, your family, and I wouldn't hold you to it is what he said.

TT – 290:13 – 290:19. Claymore testified similarly regarding this question:

> Well, I remember the one question in particular because it was the question that stirred most of the conversation and as I remember it and please forgive me, this is in 2006. But somebody at the back of the room raised their hand and asked and said, particularly what I remember, what if Rapid Chevrolet calls me and wants to hire me as a used car manager? And to answer that, I said, "it is not my intent to stop anybody from bettering theirselves." I said, "however" -- and then after I answered that question, "however from my experience in the automobile industry, dealerships do not call you up as a salesperson and offer you a management position." When they do that, they use that as an enticement tool. You go over there as a salesperson and then all bets are off. Just so everybody understands. So some of these people were new. They don't understand the car business. They are new in the car business. They were training with us and so on and so forth and some of them were veterans.

TT – 268:4 – 368:21.

Based upon Claymore's statement from August, 2006, Ray asserts that the Covenant Not to Compete should not be enforced against him. After he signed the Non Competition and Disclosure Agreement, Ray did not have any further conversations with Troy Claymore, or anyone at Granite, regarding the Covenant Not to Compete. TT – 331:11 – 332:3. Even though Ray, on behalf of management, had 26 other employees sign the Non Compete, Ray never informed any other employees that the Covenant Not to Compete would not be enforced under the conditions testified to by Ray and Claymore. TT – 334:3 – 334:9.

Hanna's affirmative defenses of estoppel and waiver result from a conversation Hanna had with Mark McKie after he decided to terminate his employment.

Specifically, Hanna met with Mark McKie on February 1, 2013. This was the same day that Ray met with Troy Claymore to inform Claymore that he was leaving Granite. TT – 374:14 – 374:17. Hanna testified that he asked Mark McKie if he was "gonna come after me in any way." TT – 247:4 – 247:11. According to Hanna's testimony, Mark McKie replied, "Shit, no, Scotty, that will never be the case." TT – 247:16 – 247:18. Hanna acknowledges that he never mentioned the Non Competition and Disclosure Agreement or the Covenant Not to Compete during the meeting. TT – 260:1 – 260:11. In fact, according to Hanna's testimony, he was unaware that he had signed the Non Competition and Disclosure Agreement. TT – 237:10 – 237:16. Even though Hanna was unaware of the Agreement, he testified that when he asked Mark McKie if he was going to come after him, that Mark McKie knew Hanna was talking about the Non Compete. TT – 260:7 – 260:13.

Perhaps of more significance, Hanna's conversation with Mark McKie, which is the basis for all of his affirmative defenses, occurred one day after Hanna had signed a lease for Gateway Autoplex and on the day Ray and Hanna agreed to inform their employers of their new venture. TT – 263:9 – 263:12.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE DEFENDANTS WERE ENTITLED TO A JURY TRIAL

Ray and Hanna argue that a Trial Court can be reversed for denying a jury trial, but that no Trial Court has ever been reversed for granting a jury trial. It is not disputed that the Trial Court has "broad discretion in an equitable action to determine whether to

grant or deny a jury trial." *Mundhenke v. Holm,* 2010 S.D. 67, ¶ 11, 787 N.W.2d 302, 305. "The right, however, does not exist for all civil cases." *Id.* (citations omitted). To the contrary, a party does not have a right to a jury trial unless that right is granted by the South Dakota Constitution or a South Dakota statutes. *See* SDCL § 15-6-39(a) (holding "[w]hen a trial by jury has been demanded…the action shall be designated upon the docket as a jury action…*unless…[t]he court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of this state.*") (emphasis added); *See also* SDCL § 15-6-39(c) which provides that in action "not triable of right by a jury" that the parties may consent to a jury trial.

"The determination of whether an action sounds in law or in equity is based on 'the pleadings including the complaint, answer, cross-complaint and prayer for relief.'" *Mundhenke,* 2010 S.D. 67, ¶ 14 (citations omitted). This Court has previously held that "[i]njunction is distinctly an equitable remedy." *Metropolitan Life Ins. Co. v. Jensen,* 9 N.W.2d 140, 142 (S.D. 1943). Ray and Hanna do not dispute that this entire case, including all claims and defenses herein, involve solely an equitable claim for enforcement of the Non Competition and Disclosure Agreement.

Instead, Ray and Hanna argue that because the existence of factual questions related to the affirmative defenses, that they are entitled to a jury trial. Ray and Hanna rely primarily on *Mundhenke* in support of their argument. In *Mundhenke,* the Court held "when a case presents both a request for equitable relief and legal relief, the proper course of action is for the trial court to bifurcate the issues and try the equitable claims to the court and the legal claims to a jury." 2010 S.D. 67, ¶ 16 (citations omitted). In

Mundhenke, the parties agreed that the determination of whether a valid partnership existed under SDCL § 48-1-2 was a determination that "implicated an action at law."[1] *Id.* at ¶ 18. The Court held that "[b]ecause it is an action at law and we have abandoned the incidental claim rule, the South Dakota Constitution and SDCL 15–6–38(b) gave Holm the right to demand a jury trial." *Id.*

Here, there is no action at law. Ray and Hanna asserted fraud, waiver, and estoppel as affirmative defenses to Granite and McKie's equitable claim. Ray and Hanna did not seek damages or otherwise assert any legal claim. This differs greatly from *Mundhenke,* as the parties in *Mundhenke* agreed that an action at law existed and the Court, relying on the parties' assertion, held that the South Dakota Constitution gave Holm the right to a jury trial. "Article VI, Section 6 of the South Dakota Constitution guarantees a right to a jury trial in all cases at law." *Mundhenke,* 2010 S.D. 67, ¶ 14 (citing S.D. Const. art. VI, § 60.) There is no such guarantee for equitable claims. Where the right to trial by jury does not exist, the action may be tried to an advisory jury, or *with consent of both parties,* be tried to a jury. SDCL § 15-6-39(c). No such consent was obtained.

Most cases previously decided by this Court involving a right to trial by jury in an equitable claim have all also included legal claims. *Mundhenke,* 2010 S.D. 67, ¶ 18 (the parties agreed the claim "implicated an action at law"); *First Western Bank, Sturgis v. Livestock Yards Co.,* 466 N.W.2d 853, 856-57 (S.D. 1991) (holding "[p]artnership's counterclaim sought a money judgment, and such claims are unquestionably legal"); *Nizielski v. Tvinnereim,* 453 N.W.2d 831 (S.D. 1990) (holding that plaintiffs were entitled to jury trial on undue influence claim for damages).

[1] This Court, without determining the merits of the issue, applied the law argued by the parties.

Where this Court has had an opportunity to rule on the right to a jury trial in cases involving only equitable issues, the Court has held that a jury trial is not appropriate. *Metropolitan Life Ins. Co. v. Jensen,* 9 N.W.2d 140, 142 (S.D. 1943) (holding that an "[i]njunction is distinctly an equitable remedy" and denying a claim for a jury trial); *Durkee v. Van Well,* 2002 S.D. 150, ¶ 13, 654 N.W.2d 807, 813 (holding "the pleadings and prayer for relief reflect that Durkee was seeking injunctive relief for which there was no right to trial by jury. Injunction is an equitable remedy for which Durkee was not entitled to trial by jury."). *Durkee* has been abrogated to the extent it relied upon the incidental claim rule. However, the principle of law related to the right to a jury trial in a claim for an injunction remains.[2] In *Durkee,* the plaintiff brought a claim seeking to enjoin the defendant from relocating a fence. *Id.* at ¶ 5. The Defendant asserted promissory estoppel and brought a claim for damages. *Id.* at ¶¶ 5-6. The Court bifurcated the equitable issues related to the claim for an injunction from the defendant's counterclaim for damages.[3] This Court affirmed the Trial Court's holding that an injunction, and the defenses thereto involve equitable claims, triable to the Court.

In this case, neither party has brought a claim for damages. The sole issue before the Trial Court was whether Ray and Hanna should be enjoined from competing with Granite and McKie, a purely equitable issue. The existence of factual issues does not create a right to trial by jury. SDCL § 15-6-52 deals with how a Court can make findings of fact in a case without a jury or with an advisory jury. It is not disputed that this case

[2] The incidental claim rule would not have applied in this case as there is no claim for legal relief, incidental or otherwise.

[3] As stated in *First Western Bank,* "the right to a jury trial of any legal issue raised by counterclaim in an equitable action cannot be denied, regardless of whether the legal issues presented are characterized as 'incidental' to the equitable issues." 466 N.W.2d at 856. While the Defendant's counterclaim in *Durkee* would give both parties a right to a jury trial under this rule, there is no such counterclaim in this case.

involved the determination of factual issues. In *Poeppel v. Lester,* this Court held that "[f]raud as an inducement to enter a contract is a question of fact for the jury." 2013 S.D. 17, ¶ 20, 827 N.W.2d 580, 585. However, the claim in *Poeppel* was a claim for damages for breach of contract. "A suit for money damages [] preserves the … right to a jury trial." *Rindal v. Sohler,* 658 N.W.2d 769, 772-73 (S.D. 2003). Because the parties were entitled to a jury trial, the jury was tasked with determining the factual issues, including fraudulent inducement.

In this case, fraudulent inducement is pled only as an affirmative defense to Granite and McKie's equitable claim. Neither party has asserted a claim for damages. Because no legal relief is sought, there is no right to a jury trial. To suggest otherwise would allow all litigants, whether seeking an injunction, specific performance, or a decree of divorce, to create a right to a jury trial by pleading affirmative defenses which raise factual questions. The Trial Court abused its discretion when it granted Ray, Hanna, and Gateway Autoplex's demand for a jury trial.[4]

---

[4] While this Court has not held that a party appealing a jury trial must show prejudice, Granite and McKie were prejudiced by the submission of this matter to the jury. The Trial Court granted the preliminary injunction against Hanna holding that "the movant's probability of success on the merits against Mr. Hannah [sic] is strong." PIT – 7:3 – 7:5. The Trial Court specifically addressed the February 1, 2013 meeting. The Court held:

> The Court having weighed the credibility and the plausibility of the testimony of Scott Hannah and Mark McKie on the contents of this February 1 conversation, *finds Mark McKie's testimony to be more credible.* Mark McKie testified that he did not know whether or not Scott Hannah had ever signed a noncompete and that there was not a discussion of the noncompete at this February 1 meeting.
>
> The Court notes that Scott Hannah testified that at the time of the Febrary 1 meeting, he was 99 percent sure he did not sign a noncompete. He had one percent – he believed that there was a one percent chance that he had signed a convenant not to compete. *The Court finds that implausible and less likely that he would inquire specifically about a noncompete with Mark McKie if he did not believe that he had signed one.*
>
> *Testimony of the two men is directly contradictory and the Court finds that the testimony of Mark McKie to be more compelling and more credible on this point.*

II. THE TRIAL COURT ERRED WHEN IT DENIED GRANITE BUICK GMC, INC.'S MOTION FOR JUDGMENT AS A MATTER OF LAW

A. Fraudulent Inducement

Ray asserts that "[t]his defense was based upon the statements Troy Claymore made to Ray in order to get him to sign the agreement. The statements were that Granite/McKie would only enforce the covenant to prevent a 'lateral move' to a competitor. Claymore further stated he would not enforce the convent against employees who were moving up in the business, or bettering themselves." *See Appellees' Brief, p. 17.* Ray testified specifically regarding the representations that were made:

> I remember vividly the fact that, you know, the question was: What if I get an opportunity to move into management or ownership? And Troy Claymore said, if you make a lateral move, I'm going to enforce it. I want to stop it. If you make a lateral move from here to say Chevy. But if you ever get the chance to better yourself, your family, and I wouldn't hold you to it is what he said.

TT – 290:13 – 290:19. After signing the Non Competition and Disclosure Agreement, Ray did not have any further conversations with Troy Claymore, or anyone at Granite, regarding the enforcement of the Covenant Not to Compete. TT – 331:11 – 332:3.

To establish fraud or deceit, Ray must prove:

(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;

PIT – 8:14 – 9:8 (emphasis added). The testimony presented during the preliminary injunction hearing regarding this conversation was the same testimony presented at trial. Given the Trial Court's earlier finding, it is clear that the Trial Court found Mark McKie to be a more credible witness than Hanna. Further, as discussed below, the parol evidence rule barred evidence of any conversations Ray had before he signed the Non Competition and Disclosure Agreement for each of the affirmative defenses other than fraud in the inducement. While a Trial Court would be able to consider these conversations for only the fraud in the inducement claim, no reasonable jury could be asked to exclude these from consideration after all of the testimony was received.

(3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or

(4) A promise made without any intention of performing.

SDCL § 20-10-2. It is undisputed that Claymore made certain assertions of fact, however, Ray must then prove that the fact is not true and made by a person who does not believe it to be true.

At trial, Troy Claymore testified regarding the statements that were made. He testified:

> Well, I remember the one question in particular because it was the question that stirred most of the conversation and as I remember it and please forgive me, this is in 2006. But somebody at the back of the room raised their hand and asked and said, particularly what I remember, what if Rapid Chevrolet calls me and wants to hire me as a used car manager? And to answer that, I said, "it is not my intent to stop anybody from bettering theirselves." I said, "however" -- and then after I answered that question, "however from my experience in the automobile industry, dealerships do not call you up as a salesperson and offer you a management position." When they do that, they use that as an enticement tool. You go over there as a salesperson and then all bets are off. Just so everybody understands. So some of these people were new. They don't understand the car business. They are new in the car business. They were training with us and so on and so forth and some of them were veterans.

TT – 268:4 – 368:21. Claymore's testimony mirrored the statements as alleged by Ray. There was absolutely no evidence produced at trial that Claymore's statements were untrue or otherwise believed to be untrue. To the contrary, a major portion of the trial in this matter was focused on whether Ray did indeed "better" himself. By the time Ray left Granite, he was in a management role making $170,000 per year. TT – 330:10 – 330:12. As managers for Gateway Autoplex, Ray and Hanna were paid $5,000 per month, more than $100,000 less than Ray was making at Granite. TT – 270:20 – 270:25. In other

words, Granite did not sue Ray in spite of the statements made by Claymore; Granite sued Ray consistent with the statements made by Claymore.

Fraudulent inducement also requires willful deceit and intent to induce another to alter his position. *Johnson v. Miller,* 2012 S.D. 61, ¶ 13, 818 N.W.2d 804, 808. There was no evidence presented at trial and there is no evidence highlighted in Ray's brief which establishes that Granite, or Claymore acting on its behalf, willfully deceived Ray.

With no misrepresentation, there can be no fraud. Assuming all evidence in a light most favorable to Ray, Ray's fraudulent inducement claim fails as a matter of law.

B. Equitable Estoppel, Promissory Estoppel, and Waiver

As it concerns Ray's arguments for equitable estoppel, promissory estoppel, and waiver, Ray has cited to no admissible evidence in support of these defenses. Under the parol evidence rule, '[t]he execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.'" *Poeppel,* 2013 S.D. 17, ¶ 19 (citing SDCL 53-8-5). "This rule 'is in no sense a rule of evidence, but a rule of substantive law.'" *Id.* (citing *Auto–Owners Ins. Co. v. Hansen Housing, Inc.,* 2000 S.D. 13, ¶ 14, 604 N.W.2d 504, 510 (quoting 9 John Wigmore, Evidence § 2400 at 4 (Chadbourn rev. ed. 1981)). In other words, notwithstanding that parol evidence was admitted as evidence to determine Ray's claim for fraud in the inducement, as a matter of substantive law that evidence cannot be considered in addressing Ray's claims for estoppel and waiver. The only evidence provided by Ray as it concerns each of these affirmative defenses are the conversations Ray had with Claymore and Darin Rittenour before Ray signed the Agreement. *See Appellee's Brief pp. 20-23.* These conversations

("oral negotiations or stipulations") were superseded when Ray signed the Non Competition and Disclosure Agreement. As a matter of substantive law, they cannot be used as evidence in Ray's affirmative defenses for estoppel and waiver.

Further, in order to prove equitable estoppel, Ray must prove a false representation. As set forth *supra.,* there was no evidence of a misrepresentation presented a trial. Claymore's version of the representation was nearly identical to Ray's. "[P]romissory estoppel may be invoked where a promisee alters his position to his detriment in the reasonable belief that a promise would be performed." *Wilcox v. Vermeulen,* 2010 S.D. 29, ¶ 19, n. 6, 781 N.W.2d 464, 471 (citing *Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.,* 2005 S.D. 82, ¶ 38, 700 N.W.2d 729, 739; *Garrett v. BankWest, Inc.,* 459 N.W.2d 833, 848 (S.D.1990); *Minor v. Sully Buttes Sch. Dist. No. 58-2,* 345 N.W.2d 48, 51 (S.D.1984)). Again, there was no promise made by Granite that was not performed. Further, "[t]he detriment suffered in reliance [on the promise] must be substantial in an economic sense[.] *Wilcox,* 2010 S.D. 29, ¶ 19, n. 6. Ray produced no evidence that he suffered any detriment. "A waiver exists 'where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his [or her] intention to rely upon it.'" *Wehrkamp v. Wehrkamp,* 2009 S.D. 84, ¶ 8, 773 N.W.2d 212, 215 (citing *Western Cas. and Sur. Co. v. American Nat'l Fire Ins. Co.,* 318 N.W.2d 126, 128 (S.D.1982)). Granite could not waive a right that did not yet exist. To allow such an argument is contrary to the very premise of the defense of waiver. Because Granite did not have possession of any right prior to Ray signing the Non

Competition and Disclosure Agreement and because Granite could not doing something inconsistent with the existence of that right, there can be no waiver, as a matter of law.

III. THE TRIAL COURT ERRED WHEN IT DENIED McKIE FORD LINCOLN, INC.'S MOTION FOR JUDGMENT AS A MATTER OF LAW

A. Promissory Estoppel

"[P]romissory estoppel may be invoked where a promisee alters his position to his detriment in the reasonable belief that a promise would be performed." *Wilcox,* 2010 S.D. 29, ¶ 19, n. 6 (citations omitted). The elements of promissory estoppel are as follows:

> (1) The detriment suffered in reliance must be substantial in an economic sense;
> (2) The loss to the promisee must have been foreseeable by the promisor; and
> (3) The promisee must have acted reasonably in justifiable reliance on the promise made.

Wilcox, 2010 S.D. 29, ¶ 19, n. 6. Where the reliance element of promissory estoppel is lacking, promissory estoppel does not apply. *Wilcox,* 2010 S.D. 29, ¶ 47. At the time of his conversation with Mark McKie, Hanna had already signed the guarantee on the lease for the operation of the business by Gateway Autoplex. TT – 263:9 – 263:12. This was the same day that Ray met with Troy Claymore to inform Claymore that he was leaving Granite to manage Gateway Autoplex with Hanna. TT – 374:14 – 374:17. Hanna also signed the Articles of Organization for Gateway Autoplex before meeting with McKie. Trial Exhibit 5. Assuming the facts in a light most favorable to Hanna, and considering only Hanna's own testimony, Hanna cannot establish that he altered his position based upon a promise made by Mark McKie on the day Hanna informed him of his decision to leave McKie.

In the summer of 2012, more than six months prior to informing their respective bosses of their decision to leave their employment, Ray and Hanna began to create a

business designed to compete with their employers. TT – 261:4 – 262:16. Ray and Hanna approached a number of potential financiers for a potential dealership. TT – 261:24 – 262:16. However, at no point during their efforts did either Ray or Hanna approach Granite or McKie to tell them they were thinking about leaving. TT – 262:17 – 263:8. It was only after the groundwork was laid and Gateway Autoplex established, that Hanna spoke with Mark McKie. Hanna did not ask "If I leave, will you come after me?". Hanna asked "Are you going to come after me?". TT – 247:4 – 247:11. Because Hanna had already made his decision, he cannot establish that he relied upon any statements made by McKie.

Further, Hanna did not allege any facts that he suffered detriment which was substantial in an economic sense. To the contrary, the only evidence presented at trial regarding any economic matters was that Hanna made substantially more working for McKie than he did working for Gateway Autoplex. During his employment with McKie, Hanna earned over $140,000 per year. TT – 266:9 – 266:23. As managers for Gateway Autoplex, Ray and Hanna were paid $5,000 per month. TT – 270:20 – 270:25.

Promissory estoppel is not applicable if any of [the] elements are lacking or have not been proven by clear and convincing evidence." *Vander Heide v. Boke Ranch, Inc.,* 2007 S.D. 69, ¶ 28, 736 N.W.2d 824, 834 (citing *Hahne v. Burr,* 2005 S.D. 108, ¶ 18, 705 N.W.2d 867, 873; *Century 21 Associated Realty v. Hoffman,* 503 N.W.2d 861, 866 (S.D.1993)). Hanna did not present any evidence the he relied upon the alleged promise made by McKie or that he suffered detriment, substantial in an economic sense.

B. Waiver

Hanna asserts that the during the conversation on February 1, 2013, that McKie and Hanna "unequivocally" were talking about the Non Compete. *See Appellees' Brief, p. 25.* However, it was the uncontroverted testimony of both McKie and Hanna that neither was aware of the Non Competition and Disclosure Agreement at the time of the conversation. TT - 237:10 – 237:16; 253:17 – 253:19; 396:18 – 396:21. Hanna specifically acknowledges that he did not bring up the Non Competition and Disclosure Agreement and it was not discussed or even mentioned by either person. TT – 260:1 – 260:11.

"A waiver exists 'where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his [or her] intention to rely upon it.'" *Wehrkamp,* 2009 S.D. 84, ¶ 8. "To support the defense of waiver, there must be a showing of a clear, unequivocal and decisive act or acts showing an intention to relinquish the existing right." *Wehrkamp,* 2009 S.D. 84, ¶ 9 (citations omitted). There was no evidence at trial to suggest that Mark McKie had "full knowledge" of the material facts related to the rights possessed by McKie. Further, there was no "clear, unequivocal and decisive" act showing an intention to relinquish any right. Hanna cannot rationally argue that McKie could "clearly, unequivocally, and decisively" waive a right set forth in a contract without even a passing reference to the contract itself. If Hanna wanted Mark McKie to waive the right to enforce the Non Compete, Hanna was required by law to bring the Non Compete to the attention of Mark McKie and obtain a clear, decisive, and unequivocal waiver. Hanna's testimony that McKie knew Hanna was referring to the Non

Compete (TT – 260:7 – 260:13) is contrary to Hanna's own testimony that he himself was unaware he signed the Agreement. In addressing this matter during the preliminary injunction hearing, the Trial Court specifically addressed this issue, stating:

> The Court notes that Scott Hannah testified that at the time of the Febrary 1 meeting, he was 99 percent sure he did not sign a noncompete. He had one percent – he believed that there was a one percent chance that he had signed a convenant not to compete. The Court finds that implausible and less likely that he would inquire specifically about a noncompete with Mark McKie if he did not believe that he had signed one.
>
> Testimony of the two men is directly contradictory and the Court finds that the testimony of Mark McKie to be more compelling and more credible on this point.

PIT – 8:14 – 9:8. Hanna cannot conceal the right he wishes to have waived and then argue there was a clear, unequivocal waiver of that right.

IV. THE TRIAL COURT ERRED WHEN IT GRANTED THE DEFENDANTS' APPLICATION FOR TAXATION OF DISBURSEMENTS

The South Dakota Supreme Court addressed the specificity required in an Application for Taxation of Disbursements in *Adkins v. Stratmeyer,* 1999 S.D. 131, 600 N.W.2d 891 and *DeHaven v. Hall,* 2008 S.D. 57, 753 N.W.2d 429. "[A]llowable disbursements must be proven." *DeHaven*, 2008 S.D. 57, ¶ 52. "A party who wishes to recover disbursements must file an application that includes a 'statement in detail' of the disbursements claimed, which 'shall be verified by affidavit.'" *Id.* at ¶ 47 (citing SDCL § 15-6-54(b)). "The prevailing party who seeks disbursement bears the responsibility of documenting, itemizing, and justifying the necessary expenditures that it seeks." *Id.* at ¶ 52. To the extent a "report" is provided concerning the costs incurred, those costs may be appropriate under the statute. *Adkins,* 1999 S.D. 131, ¶ 32. Where no report, accounting, or statement in detail of the costs incurred has been provided, the Defendants cannot meet

the burden of proving the costs requested. It is undisputed that Ray and Hanna provided no report with their initial application. SR 1158, Application for Taxation of Costs and Disbursements. Instead, the Defendants provided five general categories of costs for which the total costs equal $5,659.94. Those categories included "witness fees", "court reporter fees", "service fees", "copies", and "South Dakota Secretary of State". SR 1158. No further explanation was provided, nor is there any date indicating the timeframe during which such costs were incurred or reasoning or purpose for the fees. SR 1158. Ray and Hanna do not address how their initial application is legally sufficient, but only blindly state that it was. *See Appellees' Brief, p. 27.*

Even so, Granite and McKie objected to the Application for Taxation of Costs and Disbursements based upon the lack of detail. SR 1169. Ray, Hanna, and Gateway Autoplex, recognizing the deficiencies filed a supplemental affidavit containing additional detail. SR 1199. However, Notice of Entry of Judgment was provided by the Defendants on August 13, 2013. SR 1154. Under SDCL § 15-6-54(d), "proper application" must have been made within 30 days. No such application was made within the period prescribed by the statute. As the Supreme Court reiterated in *Cain v. Fortis Ins. Co.,* "SDCL 15–6–54(d) requires that an application for costs and disbursements be made within thirty days of the entry of judgment. Failure to make timely application waives the right to such costs." 2005 S.D. 39, ¶ 33, 694 N.W.2d 709, 716.

CONCLUSION

For the foregoing arguments and authority contained herein, Granite and McKie, respectfully request that this Court reverse the Trial Court's decision to grant Ray, Hanna, and Gateway Autoplex's demand for a jury trial and remand for further

proceedings before the Trial Court. Granite and McKie also respectfully request that this Court reverse the Trial Court's denial of Grantie and McKie's Motions for Judgment as a Matter of Law and remand to the Trial Court with the instructions to enter a Judgment in favor of Granite and McKie. Finally, Granite and McKie respectfully request this Court reverse the Trial Court's award of costs and disbursements to the Defendants and hold that the Defendants did not timely file a proper application for taxation of costs and disbursements.

Dated this 14th day of July, 2014.

/s/ John K. Nooney

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellant's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This brief contains 4,991 words and 24,405 characters ***with no spaces***. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated this 14th day of July, 2014.

/s/ John K. Nooney

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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

GRANITE BUICK GMC, INC., formerly known as McKIE BUICK GMC, INC. Plaintiff, vs. ADAM RAY and GATEWAY AUTOPLEX, LLC, Defendants. McKIE FORD LINCOLN, INC., Plaintiff, vs. SCOTT HANNA and GATEWAY AUTOPLEX, LLC, Defendants.	Appeal No. 26842 **CERTIFICATE OF SERVICE**

I, John K. Nooney, attorney for the Appellants, hereby certify that a true and correct copy of the foregoing *Appellants' Reply Brief* was served via electronic service on:

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