IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29298

GERALD PAWELTZKI,

Plaintiff/Appellee,

vs.

ROGER PAWELTZKI and LAWRENCE PAWELTZKI,

Defendants/Appellants.

Appeal from the Circuit Court
First Judicial Circuit
McCook County, South Dakota
The Honorable Chris S. Giles, Presiding Judge

BRIEF OF APPELLANTS

Timothy R. Whalen
Whalen Law Office, P.C.
PO Box 127
Lake Andes, SD 57356
Telephone: (605) 487-7645

Attorneys for Plaintiff/Appellee

Mitchell A. Peterson
Justin T. Clarke
Michael L. Snyder
Davenport, Evans, Hurwitz & Smith, L.L.P.
206 West 14th Street, PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880

Attorneys for Defendants/Appellants

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Oral Argument Requested

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PRELIMINARY STATEMENT

Citations to the settled record in this matter appear as "SR." followed by the page number assigned by the McCook County Clerk of Court in its indices. The December 6, 2013, Affidavit of Mitchell A. Peterson (SR. 77-103) is included in the Appendix of this Brief at (Appellant-Appx. 1-27), and the February 10, 2014, Supplemental Affidavit of Mitchell A. Peterson (SR. 191-94) is included in the Appendix of this Brief at (Appellant-Appx. 28-31). The transcript of the telephonic evidentiary hearing held on February 12, 2014, is included in the Appendix of this Brief at (Appellant-Appx. 32-55). For clarity, citations to that transcript will be denoted as "Evidentiary Tr.," followed by the page and line numbers as they appear in the transcript. The Circuit Court's Findings of Fact and Conclusions of Law on Defendants' Motion to Enforce Settlement and to Compel Arbitration (SR. 226-236) are included in the Appendix of this Brief at (Appellant-Appx. 56-66).

The Circuit Court's March 31, 2015 Memorandum Decision (SR. 530-47) is included in the Appendix of this Brief at (Appellant-Appx. 67-85), and the Circuit Court's May 8, 2015 Findings of Fact, Conclusions of Law, and Order on Defendants' Motion to Enforce Settlement Agreement (SR. 548-573) are included in the Appendix of this Brief at (Appellant-Appx. 68-109). The Circuit Court's December 8, 2016 Order Enforcing Settlement Agreement (SR. 832-34) is included in the Appendix of this Brief at (Appellant-Appx. 110-112). The Circuit Court's November 27, 2017 Order Denying Additional Motion to Enforce Settlement (SR. 1265-66) is included in the Appendix of this Brief at (Appellant-Appx. 113-14), and the Circuit Court's May 14, 2018 Order

Denying Renewed Motion to Enforce Settlement (SR. 1768) is included in the Appendix of this Brief at (Appellant-Appx. 115).

References to the January 2020 jury trial transcript will be denoted as "Trial Tr.," followed by the page and line numbers as they appear in the transcript. The Circuit Court's January 30, 2020, Memorandum Opinion (SR. 2459-64) is included in the Appendix of this Brief at (Appellant-Appx. 116-121). Finally, the Findings of Fact, Conclusions of Law, and Judgment filed by Appellee (SR.1414-26) are included in the Appendix of this Brief at (Appellant-Appx.122-139), and the Findings of Fact, Conclusions of Law, and Judgment filed by Appellants (SR. 1428-37) are included in the Appendix of this Brief at (Appellant-Appx. 140-49).

JURISDICTIONAL STATEMENT

Defendants-Appellants Roger Paweltzki ("Roger") and Lawrence Paweltzki ("Larry"), (together, the "Paweltzkis"), appeal from the Judgment dated February 27, 2020, in the matter numbered 44CIV12-000114, in the First Judicial Circuit Court of South Dakota, the Honorable Chris S. Giles, Circuit Court Judge, presiding, following a dual jury and bench trial in which the jury by its verdict found in favor of Plaintiff-Gerald Paweltzki ("Jerry") on the parties' legal claims, and the Court found in favor of Jerry on the parties' equitable claims. (SR. 1426.) Notice of Entry of the Judgment was filed on March 2, 2020. (SR. 1443.) Notice of Appeal was filed on April 1, 2020. (SR. 1563.)

STATEMENT OF THE ISSUES

1. Whether the Paweltzkis' motion to enforce settlement agreement and to compel arbitration should be granted in light of the parties' mediation settlement and their agreement to arbitrate any remaining disputes between them?

   The Circuit Court held in the negative.

- *Lewis v. Benjamin Moore & Co.*, 1998 S.D. 14, 574 N.W.2d 887
- *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 2011 S.D. 38, 800 N.W.2d 730
- *Setliff v. Akins*, 2000 S.D. 124, ¶ 14, 616 N.W.2d 878, 885
- *Melstad v. Kovac*, 2006 S.D. 92, 723 N.W.2d 699

2. Whether the affirmative defense of laches barred entirely the Paweltzkis' claim for unjust enrichment?

   The Circuit Court held in the affirmative.

- *Clarkson & Co. v. Cont'l Res., Inc.*, 2011 S.D. 72, 806 N.W.2d 615
- *Webb v. Webb*, 2012 S.D. 41, 814 N.W.2d 818
- *Wehrkamp v. Wehrkamp*, 2009 S.D. 84, 773 N.W.2d 212
- *Burch v. Bricker*, 2006 S.D. 101, 724 N.W.2d 604

STATEMENT OF THE CASE

The Paweltzkis appeal the Circuit Court's denial of their motion to enforce the parties' settlement agreement and to compel arbitration, and also the Circuit Court's conclusion that the Paweltzkis' unjust enrichment claim was wholly barred by laches. The case itself centers on the dissolution of the Paweltzki Brothers Partnership (the "Partnership"), a farming operation in McCook County, South Dakota, and claims asserted by the parties incidental thereto. Jerry filed suit against his two brothers, the Paweltzkis, in October 2012. (SR. 2-14.) The three Paweltzki brothers were partners in the Partnership. Jerry sought dissolution of the Partnership and a distribution of its assets, as well as reimbursement for Partnership distribution or "draw" payments. (*Id.*) The Paweltzkis answered and asserted counterclaims against Jerry including, as relevant here, a claim for unjust enrichment. (SR. 17-28.)

The case was tried as a dual trial with the jury adjudicating the parties' legal claims and the Circuit Court adjudicating the parties' equitable claims, which included

Jerry's claim for distribution of his share of Partnership assets following dissolution and the Paweltzkis' unjust enrichment claim. The jury returned its verdict in favor of Jerry on the parties' legal claims (SR. 2457-2458), while the Circuit Court determined Jerry's remaining share of Partnership assets and found the Paweltzkis' unjust enrichment claim was barred by the doctrine of laches. (Appellant-Appx. 116-121.) Following post-trial briefing, the Circuit Court entered Judgment on February 27, 2020. (*See* Appellant-Appx. 122-139; 140-149.) Notice of Entry of the Judgment was filed on March 2, 2020. (SR. 1443.) Notice of Appeal was filed on April 1, 2020. (SR. 1563.)

STATEMENT OF FACTS

This lawsuit was commenced in October 2012. (SR. 2.) By that time, and for at least thirty years prior, the parties had farmed together as partners in McCook County, South Dakota. (SR. 2, 17.) For years, the Paweltzkis suspected Jerry had misappropriated Partnership assets for his own personal farming operation or his own personal purposes (including misappropriating assets to benefit his son). (SR. 20.)

The parties agreed early on to mediate their disputes, with attorney Lon Kouri acting as mediator. Following a successful mediation session held on February 15, 2013, Mr. Kouri sent the parties a memorandum confirming the terms of the parties' settlement. (Appellant-Appx. 4-5) (December 6, 2013 Affidavit of Mitchell A. Peterson, Ex. 1) (". . . this confirms the terms of the settlement reached last evening.") On February 17, 2013, Jerry's then-current attorney responded to Mr. Kouri's correspondence, stating:

> Everything looks good except the equipment. We never discussed what list was in play, probably because the equipment and the agreement to a draft was agreed upon early in the day. However, we can't do the Wieman list as we believe there are a few items that are incorrect on it. We should use the bank list as everyone agrees that it contains partnership items. There may

> be a few items to argue about but I don't believe any of them aren't things that can't be worked out.
>
> And please don't misunderstand, the issue as to which list to use is NOT an attempt to blow this up or back out of the agreement.

(Appellant-Appx. 6) (Ex. 2.) For context, two lists of the Partnership's assets had been created at this time, with one made by Famers State Bank (referred to as "the bank list") and one made by Wieman Auction Services (referred to as "the Wieman list"). As Jerry's counsel's e-mail indicates, Jerry believed certain items appearing on the Wieman list were his personal property, as opposed to Partnership assets.

The list of Partnership equipment was addressed at a second mediation which was held on April 23, 2013, with Mr. Kouri again serving as mediator. (Appellant-Appx. 9-12) (Ex. 4.) This mediation was also successful, and Mr. Kouri sent the parties another settlement memorandum confirming the terms of the parties' settlement. (*Id*.) Also, though not reflected in the memorandum, the parties agreed in the event that further differences might arise to submit them to arbitration with Mr. Kouri acting as arbitrator. (Evidentiary Tr. 13:14-19.)

The parties then began carrying out the settlement terms, and also began the equipment draft with each party, including Jerry, choosing and taking possession of some of the property chosen in the draft. (Appellant-Appx. 2) (December 6, 2013 Affidavit of Mitchell A. Peterson, at ¶ 10); (s*ee also* Appellant Appx. 30-31) (February 10, 2014 Supplemental Affidavit of Mitchell A. Peterson, Ex. 8.) The parties later came to loggerheads over the disposition of certain items, and counsel for Jerry suggested the parties "should simply schedule a couple of days to arbitrate these issues with Lon Kouri for later this summer[.]) (Appellant-Appx. 31) (February 10, 2014 Supplemental

Affidavit of Mitchell A. Peterson, Ex. 8.) However, Jerry's counsel later disputed whether the parties had, in fact, agreed to submit any such unresolved disputes to arbitration. (Appellant-Appx. 24) (December 6, 2013 Affidavit of Mitchell A. Peterson, Ex. 7.) Ultimately, the parties agreed upon releasing their respective claims against one another and dividing approximately $6,000,000 of real estate, crops, livestock, and equipment, while Jerry's later alleged "misunderstandings" involved about one-half of 1% of the total value of Partnership assets. (SR. 283-303); (SR. 439-480 (Hrg. Exs. 21, 22, and 23) (appraisals of assets).)

Then, on October 30, 2013, Jerry filed an application for the appointment of a receiver and for a judicial sale of all Partnership property. (SR. 36.) Jerry also filed a 17-page affidavit in support of his motion. (SR. 38-54.) In response, the Paweltzkis filed a motion to enforce the parties' settlement agreement and to compel arbitration to the extent any particular disagreements remained. (SR. 75.)

The Circuit Court held an evidentiary hearing on February 12, 2014. (Evidentiary Tr.) The Circuit Court previously received documentary evidence and arguments from counsel. (Evidentiary Tr. 1:10-17.) Other than the admission of an affidavit, the only substantive evidence received at the hearing came in the form of Mr. Kouri's telephonic testimony concerning the parties' mediation sessions. (Evidentiary Tr. 3:1-17.)

The Circuit Court then entered its findings of fact, conclusions of law, and order denying the Paweltzkis' motion to enforce settlement agreement and to compel arbitration. (Appellant-Appx. 56-66) (July 31, 2014 Findings of Fact, Conclusions of Law, and Order on Defendants' Motion to Enforce Settlement.) According to the Circuit Court, "there was not a meeting of the minds on all the material issues involving the

partnership." (Appellant-Appx. 44) (Conclusion of Law, ¶ 42.) The Circuit Court similarly found the parties did not mutually agree to arbitrate any disputes they might have following the mediation sessions. (*Id.*) (Conclusion of Law, ¶ 44.) Finally, and alternatively, the Circuit Court concluded that even if the parties had reached a binding settlement agreement, that Jerry would be entitled to rescind the agreement based on mistake pursuant to SDCL 53-4-9. (Appellant-Appx. 65) (Conclusion of Law, ¶ 53.)

In the years that followed, the Circuit Court entered orders enforcing a majority of the terms of the parties' settlement agreement. First, on May 8, 2015, the Circuit Court entered an Order which held the parties had, either through an implied agreement, through ratification, or both, reached an enforceable settlement with respect to: the Partnership's real property; the Paweltzkis' buying-out of Jerry's interest in the farmstead; the equipment draft; allocation of Partnership debt related to a Sunflower disc; ownership of miscellaneous accessories such as a sprayer, grain cart, tractor cab, and planter; and the classification of certain Partnership assets as being either personal property or fixtures. (Appellant-Appx. 86-109) (May 8, 2015 Findings of Fact, Conclusions of Law, and Order on Defendants' Motion to Enforce Settlement.) And second, on December 8, 2016, the Circuit Court entered an Order effectuating the disposition of several hundred smaller pieces of equipment, tools, and odds and ends. (Appellant-Appx. 110-112) (December 8, 2016 Order Enforcing Settlement Agreement.)

Following these two Orders, the only remaining issues were as follows: (1) valuation of Partnership livestock, crops, and a few small property items (*e.g.*, electric fences, gates, posts, cattle panels) with a "true up" payment owed to Jerry for one-third of the remaining total value; (2) Jerry's breach of contract and fiduciary duty claims for

damages; and (3) the Paweltzkis' legal claims for misappropriation damages (breach of contract and fiduciary duty, civil theft, and conversion) and the equitable unjust enrichment claim. Ultimately, these items were resolved at trial in January 2020. Notably, in the various affidavits filed by Jerry opposing enforcement of the settlement, he did not assert any "misunderstanding" or "mistake" with respect to the Paweltzkis getting the Partnership's livestock and crops in exchange for mutual releases of the parties' legal and equitable claims. (SR. 38, 120, 659, and 807.)

As pertinent to this appeal, the Paweltzkis introduced evidence supporting their unjust enrichment claim, almost all of which the Circuit Court described as "properly and fully supported by the testimony of the witnesses." (Appellant-Appx. 116) (January 30, 2020 Memorandum Opinion.) Exhibit 200 is a top-level summary of Jerry's misappropriation, by category, by year from pre-2000 through 2011, showing that Jerry misappropriated $1,124,135 in Partnership assets. (SR 3234.) Exhibits 201 through 216 are more detailed summaries by category (*e.g.*, by vendor or type of misappropriation) of Jerry's misappropriation along with citations to pages in the supporting binder of documents for each line item. (SR. 3235-3259.) The aforementioned supporting binder of documents is divided by vendor/misappropriation type, page-numbered to correspond to each line item in the detailed summaries (Ex. 201-216), and appears as Exhibits 217 through 238. (SR. 3260-4855) (1,595 pages of supporting documents.) Finally, the following witnesses supported the accuracy of the top-level misappropriation summary (Ex. 200), the detailed categorical summaries (Exs. 201-216), and the supporting binder of documents (Exs. 217-238): Larry Paweltzki (Trial Tr. 957:16 – 957:24, 959:21 – 980:22), Roger Paweltzki (Trial Tr. 1038:5 – 1055:7), Alyce Paweltzki (Trial Tr. 1084:15

– 1110:5), and forensic accounting expert Eric Hansen of Eide Bailly (Trial Tr. 1134:10 – 1137:21, 1137:22 – 1148:23.)

The parties' legal claims were submitted to the jury and were resolved in favor of Jerry. (SR. 2454.) The parties' equitable claims, including the Paweltzkis' unjust enrichment claim, were adjudicated by the Circuit Court. (Appellant-Appx. 116-121) (January 30, 2020 Memorandum Opinion.) The Circuit Court concluded the affirmative defense of laches completely barred the Paweltzkis' unjust enrichment claim. (Appellant-Appx. 120-21.) The Paweltzkis then moved the Circuit Court to reconsider. (SR. 1339-41.) On February 28, 2020, the Circuit Court denied the Paweltzkis' motion for reconsideration. (SR. 1439.)

Both parties also submitted proposed findings of fact, conclusions of law, and a judgment for the Circuit Court's consideration. Each of the parties also submitted objections to the other side's proposed findings and conclusions. (SR. 1372-83; SR. 1402-03.) However, the Circuit Court did not resolve the parties' objections or reconcile the parties' proposed findings and conclusions. Rather, the Circuit Court executed both sets of proposed findings of fact and conclusions of law, and the judgments. (Appellant-Appx. 122-139; 140-149.)

It is unclear from the Clerk of Court's indices which executed set of findings, conclusions, and the judgment is which. The distinction matters because the parties' findings and conclusions are inconsistent with one another. The two judgments do not materially differ. Based on Chronological Index and the timestamps on the documents, it appears the first set at SR. 1414-26 (Appellant. Appx-122-139) (signed 2/27/2020 at 3:58:455 PM) is the set submitted by Jerry, and the second set at SR. 1428-38 (Appellant-

Appx. 140-149) (signed 2/27/2020 at 4:01:47 PM) is the set submitted by the Paweltzkis. Notice of Entry of the Judgment was filed on March 2, 2020. (SR. 1443). This appeal followed.

ARGUMENT

I. The Circuit Court Erred When it Denied the Paweltzkis' Motion to Enforce Settlement Agreement and to Compel Arbitration

A. Standard of Review

The Circuit Court's findings of fact are reviewed under the clearly erroneous standard. SDCL 15-6-52(a). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Eagle Ridge Estates Homeowners Ass'n, Inc. v. Anderson*, 2013 S.D. 21, ¶ 12, 827 N.W.2d 859, 864 (quotation omitted). Findings are also said to be clearly erroneous when they are made "against a clear preponderance of the evidence or not supported by credible evidence." *Nylen v. Nylen*, 2015 S.D. 98, ¶ 14, 873 N.W.2d 76, 80. The Circuit Court's conclusions of law are reviewed *de novo* and with no deference to the Circuit Court's ruling. *Leonhardt v. Leonhardt*, 2014 S.D. 86, ¶ 15, 857 N.W.2d 396, 400.

"The law favors the compromise and settlement of disputed claims." *Lewis v. Benjamin Moore & Co.*, 1998 S.D. 14, ¶ 8, 574 N.W.2d 887, 888. "Trial courts have the inherent power to summarily enforce a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous." *Id.* (internal quotations and emphasis removed). Settlement agreements are governed by the rules of contract. *Id.*, at ¶ 9. "An agreement exists when the following elements are present: (1) the parties are capable of

contracting; (2) the parties consent to the agreement; (3) the agreement is for a lawful object; and (4) the parties have sufficient cause or consideration." *In re Estate of Neiswender*, 2003 S.D. 50, ¶ 15, 660 N.W.2d 249, 252. Here, the only element in dispute is whether the parties consented to the terms of their settlement agreement.

The consent of contracting parties must be free, mutual, and communicated to one another. SDCL 53-3-1. In this case, the only question is whether the parties' consent was mutual. As this Court has explained,

> To form a contract, there must be a meeting of the minds or mutual assent on all essential terms. Mutual assent refers to a meeting of the minds on a specific subject and does not exist unless the parties all agree upon the same thing in the same sense. *To determine whether there was mutual assent, the court looks at the words and conduct of the parties*.

Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc., 2011 S.D. 38, ¶ 11, 800 N.W.2d 730, 734 (emphasis added) (internal citations and quotations omitted). The emphasized language is particularly important here given the conduct of the parties following the second mediation.

While the parties' agreement "must be sufficiently definite to enable a court to give it an exact meaning," this Court has recognized that "absolute certainty is not required; only reasonable certainty is necessary." *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 23, 714 N.W.2d 884, 892 (quotations omitted). "Minor points implementing the agreement, though not listed, can be implied as necessary to carry out the terms of the agreement." *Melstad v. Kovac*, 2006 S.D. 92, ¶ 22, 723 N.W.2d 699, 707 (quotation omitted). "Once there is an agreement on the terms of the contract, a contract is formed even though [the parties] intend to adopt a formal document with additional terms at a later date." *Setliff v. Akins*, 2000 S.D. 124, ¶ 14, 616 N.W.2d 878, 885 (citation

omitted). This is so "[e]ven when parties change their minds" after the agreement was reached. *Id.* at ¶ 14.

Finally, "[e]ven if the contract could be deemed defective or incomplete," the parties may ratify the agreement. *Ziegler Furniture & Funeral Home, Inc. v. Cicmanec*, 2006 S.D. 6, ¶ 31, 709 N.W.2d 350, 358. "Ratification can either be express or implied by conduct." *Id.* (quotation omitted). "A contract is ratified when an act by which an otherwise voidable and, as a result, invalid contract is conformed, and thereby made valid and enforceable." *Id.* (quotation omitted).

B. Argument

The Circuit Court's findings of fact that the parties did not reach an enforceable agreement following the April 23, 2013, mediation are clearly erroneous. Likewise, the Circuit Court's conclusions of law that the parties did not reach a meeting of the minds and that, even if they did, Jerry would be entitled to rescind the parties' agreement are contrary to law. Thus, this Court should reverse the Circuit Court and hold Jerry to the agreement he reached with the Paweltzkis over seven years ago.

The first mediation held on February 15, 2013, resolved the following: distribution of the Partnership's real property; divvying up of the Partnership's equipment through a "draft" procedure, with certain items going to Jerry and not subject to the draft; an apportionment of crops and crop receivables; and a distribution of all Partnership livestock to the Paweltzkis. The parties also agreed to release each other from their respective claims and to dismiss this lawsuit, with prejudice, with all parties bearing their own costs. A handful of other matters were addressed, too. These terms are all clearly and unambiguously reflected in the settlement confirmation e-mail sent by Mr. Kouri to the

parties on February 16, 2013. (Appellant-Appx. 4-5) (December 6, 2013, Affidavit of Mitchell A. Peterson, Ex. 1.)

Jerry, through his counsel, confirmed the accuracy of Mr. Kouri's summary of the agreement. (Appellant-Appx. 6) (Ex. 2.) The only issue he raised was to the list of Partnership equipment that would be used during the draft procedure. (*Id.*) Thus, other than this singular issue, the parties were mutually agreeable to the settlement terms reached. *Arrowhead Ridge I, LLC*, 2011 S.D. 38, at ¶ 11.

A complete list of Partnership equipment was one of the issues addressed at the April 23, 2013, mediation, where that and a handful of other ancillary issues were resolved. As before, Mr. Kouri sent a settlement memorandum to the parties confirming the terms of the agreement reached. (Appellant-Appx. 9-12) (December 6, 2013, Affidavit of Mitchell A. Peterson, Ex. 4.) The parties agreed to incorporate Mr. Kouri's February 15, 2013, settlement memorandum by reference. (*Id.*) Accordingly, the parties did not revisit the major points resolved by the first mediation, *i.e.*, the distribution of real estate, crops and crop receivables, and livestock. In addition, the parties reaffirmed their prior agreement to release each other from their respective claims and to dismiss the lawsuit, with prejudice, with all parties bearing their own costs. (*Id.*)

As for the equipment draft, the parties agreed certain items would go to the parties ahead of time and the rest would be handled through another draft using the Wieman list. (*Id.*) Other matters, such as the ownership of a few augers and silage unloaders, were also addressed. (*Id.*) The parties also agreed the Paweltzkis would buy-out Jerry's interest in non-Partnership land where Roger Paweltzki lived. (*Id.*) In addition, the parties agreed their attorneys would execute Mr. Kouri's settlement memorandum, and that its terms

"are binding on the parties pending preparation of final settlement documents by counsel." (*Id.*) Again, these terms are all clearly and unambiguously set forth in Mr. Kouri's correspondence to the parties. Neither party objected to Mr. Kouri's memorandum, or otherwise indicated it did not accurately reflect the settlement terms as mutually agreed upon by the parties.

Confirming as much, Mr. Kouri was the only witness who testified at the February 12, 2014, evidentiary hearing. He testified that, other than the February 17, 2013, correspondence from Jerry's counsel regarding the equipment list to use for the draft procedure, he received no other objections or concerns from the parties with his summaries of what was resolved during the two mediations. (Evidentiary Tr. 10:20-11:4.)

Mr. Kouri likewise confirmed that the sticking points that had been identified following the first mediation had all been resolved. For example, the first mediation concluded with the Paweltzkis' receiving all Partnership livestock. (Appellant-Appx. 4-5) (December 6, 2013 Affidavit of Mitchell A. Peterson, Ex. 1); (*see also* Appellant-Appx. 30-31) (February 10, 2014 Supplemental Affidavit of Mitchell A. Peterson, Ex. 8) (email from opposing counsel) ("I'm not sure that I agree the milking operation continued to be a partnership endeavor after February 15 *as the livestock all went to Roger/Larry*.") (emphasis added). While unrelated to the disposition of livestock, Jerry later claimed there was a dispute over who should own proceeds from the sale of thirteen (13) head of fat cattle that were sold prior to the first mediation. That item was specifically addressed in the second mediation (Appellant-Appx. 9-12) (December 6, 2013 Affidavit of Mitchell A. Peterson, Ex. 4), and Mr. Kouri agreed that "whatever that dispute was, that got resolved at the second mediation." (Evidentiary Tr. 7:20-25.)

As noted above, the only issue about which Jerry ever voiced disagreement during the mediation sessions was the equipment list for the draft. This, too, was specifically resolved at the second mediation. (Appellant-Appx. 9-12) (December 6, 2013 Affidavit of Mitchell A. Peterson, Ex. 2.) Mr. Kouri likewise confirmed, following the second mediation, that "I don't recall any disputes as to the equipment at that point. In fact, I thought we pretty much had figured it out over the course of the two mediations and reached an agreement as to the mechanics of the draft as set forth in the memorandum." (Evidentiary Tr. 9:19-10:2.) Mr. Kouri also testified that, while there were discrete items the parties had not entirely resolved, he

> . . . viewed [the two mediation settlements] as concrete agreements with the understanding that the parties had in place a mechanism for the division of equipment, and that to the extent there were ongoing issues with regarding -- or with regard to either the procedure for division or whatever may have been involved in the draft, that those would have been issues that had been subject to subsequent arbitration.

(Evidentiary Tr. 21:4-11); (*see also* Evidentiary Tr. 16:6-16) (explaining "I really did think we had in a place a mechanism that was going to take care of the issues that we had addressed, the major problems or the major sticking points," and that "I think the expectation was that if we got the big things taken care of, the small things like tools would just sort of take care of themselves.") Lastly, while not reflected in Mr. Kouri's settlement memorandum, the parties agreed any further disputes that may arise would be submitted to arbitration with Mr. Kouri acting as arbitrator. (Evidentiary Tr. 13:14-19.)

Also of importance is the conduct of the parties following the second mediation. *Arrowhead Ridge I, LLC*, 2011 S.D. 38, at ¶ 11 ("To determine whether there was mutual assent, the court looks at the words and conduct of the parties."); *see also Ziegler*

Furniture & Funeral Home, Inc., 2006 S.D. 6, at ¶ 31 ("Even if the contract could be deemed defective or incomplete, this conduct constitutes ratification.") Following the second mediation, the parties began carrying out the settlement terms, and also began the equipment draft with each party, including Jerry, taking possession of some of the property chosen in the draft. (Appellant-Appx. 2) (December 6, 2013 Affidavit of Mitchell A. Peterson, at ¶ 10); (*see also* Appellant-Appx. 30-31) (February 10, 2014 Supplemental Affidavit of Mitchell A. Peterson, Ex. 8) (email from opposing counsel noting "Jerry had no control over the dairy operation after February 15," the date of the first mediation, and "that the dairy operation became [the Paweltzkis'] operation following our February 15 mediation.") Thus, the conduct of the parties likewise shows they believed they had reached a binding settlement agreement. Alternatively, even if the settlement agreement was initially defective, the parties' conduct in carrying out its terms demonstrates the parties had ratified it.

Finally, the words of Jerry's counsel are consistent with the parties having reached a settlement agreement. *Neiswender*, 2003 S.D. 50, at ¶ 16 ("Communications by counsel are binding on the parties"). Again, following the first mediation, Jerry's counsel affirmed that Jerry's concerns were limited to the equipment list for the draft, and that he was not attempting to "back out of the agreement." (Appellant-Appx. 6) (December 6, 2013 Affidavit of Mitchell A. Peterson, Ex. 2.) That there must first be an agreement before a party could attempt to back out of it is self-evident. Likewise, following the second mediation and after the parties had begun carrying out their settled terms, Jerry's counsel suggested with respect to certain issues the parties were working through that they "should simply schedule a couple of days to arbitrate these issues with Lon Kouri

for later this summer[.]) (Appellant-Appx. 30-31) (February 10, 2014 Supplemental Affidavit of Mitchell A. Peterson, Ex. 8.) This statement, too, aligns with the fact the parties had agreed to submit any residual issues between them to arbitration with Mr. Kouri acting as arbitrator.

In sum, at this time the following had been established:

(1) Mr. Kouri's April 23, 2013, settlement memorandum clearly and unambiguously set forth the terms of the parties' settlement agreement, which was never objected to by Jerry;

(2) While Mr. Kouri's settlement memorandum was not signed, its terms plainly contemplated the parties had agreed to be bound by it, and under South Dakota law "a contract is formed even though [the parties] intend to adopt a formal document with additional terms at a later date." *Setliff*, 2000 S.D. 124, ¶ 14; *see also In re Estate of Neiswender*, 2003 S.D. 50, at ¶¶ 6-7 (accepting agreements evidenced by the exchange of correspondence between counsel, even when there are variances in minor details);

(3) Mr. Kouri, the only disinterested witness testified at the evidentiary hearing that: (a) the parties reached "concrete agreements" on a resolution of the lawsuit and a disposition of the major affairs affecting the Partnership dissolution; (b) whatever issues remained would be wrapped up between the parties as needed; and (c) if the parties were unable to resolve those ancillary issues themselves, they had agreed to submit them to Mr. Kouri for resolution through arbitration; and

(4) The parties' conduct and the words of their counsel following the second mediation demonstrate they understood they had reached a settlement agreement. *Arrowhead Ridge I, LLC*, 2011 S.D. 38, at ¶ 11; *Neiswender*, 2003 S.D. 50, at ¶ 16. Alternatively, even if the agreement could have been deemed ineffective, the parties' conduct signified that the parties had ratified the agreement. *Ziegler Furniture & Funeral Home, Inc.*, 2006 S.D. 6, at ¶ 31.

Thus, under South Dakota law, the parties had at this time reached an enforceable agreement, regardless of whether Jerry later changed his mind. *Setliff*, 2000 S.D. 124, ¶ 14. The "misunderstandings" Jerry later alleged after changing his mind were immaterial and *de minimis*, amounting to about one-half of 1% of the total value of Partnership property. (SR. 283-303; SR. 439-480.) Importantly, in response to efforts to enforce the

settlement, Jerry failed to allege any misunderstanding regarding the Paweltzkis receiving Partnership livestock and crops in exchange for the parties mutually releasing one another, which were the issues tried to the jury and court. (SR. 38, 120, 659, and 807.)

Against this backdrop, the Circuit Court's findings and conclusions to the contrary and its denial of the Paweltzkis' motion to enforce settlement agreement and to compel arbitration are in clear error. The Circuit Court relied on an after-the-fact affidavit filed by Jerry, wherein Jerry claimed there were a number of contingencies to the parties' settlement agreement and various "misunderstandings" he had about to what, in fact, the parties agreed. (SR. 120-86.) For example, Jerry claimed confusion over whether certain structures like gates and fences were included in the real estate transfers as fixtures, and whether debt associated with a Sunflower disc selected by Larry in the draft should be paid by Larry or the Partnership (despite everyone expressly agreeing all Partnership debt is split three ways). (*Id.*) Jerry also claimed uncertainty over whether attachments and add-on items like movable GPS units should be included along with equipment selected in the draft. (*Id.*) Jerry asserted he had not received some of the hay to which he was entitled, an assertion the Circuit Court found to be wholly without merit. (*Id.*); (Appellant Appx. 119.)

However, none of these alleged uncertainties had been raised by Jerry during the parties' mediation sessions, and no objections were made to Mr. Kouri's settlement memorandum confirming the terms of the parties' agreement. Notably, after having a chance to view Jerry testify, the Circuit Court later found him not to be a credible witness. (Appellant-Appx. 116) (finding Jerry not "to be a very credible witness," that his "testimony and positions on the issues for the Court to decide were not properly

supported by the evidence" and that "his position concerning 42 unaccounted-for, or missing heifers to be completely preposterous.")

Nonetheless, according to the Circuit Court, Jerry's claimed misunderstandings meant the "parties reached an understanding as to the division of real property of the parties, but there were a number of unresolved issues" that had yet to be agreed upon. (Appellant-Appx. 58) (Finding of Fact, ¶ 19.) The Circuit Court opined that the settlement had left open essential terms. (Appellant-Appx. 63) (Conclusion of Law, ¶ 36.) Further, the Circuit Court held that "[a]lthough the parties reached an agreement on many of the partnership issues and attempted to resolve all the remaining disputed issues involving the partnership, the court finds that there was not a meeting of the minds on all the material issues involving the partnership," including the agreement to arbitrate future disputes. (Appellant-Appx. 64) (Conclusions of Law, ¶¶ 41-42.) Finally, because the Circuit Court found "there were several material mistakes of fact" between the parties, that Jerry would be entitled to rescind the agreement even if a binding settlement had been reached. (Appellant-Appx. 65) (Conclusion of Law, ¶ 51.)

The Circuit Court's finding the agreement reached involved only "the division of the real property" goes "against a clear preponderance of the evidence or [is] not supported by credible evidence." *Nylen,* 2015 S.D. 98 at ¶ 14. Jerry never expressed any genuine disagreement that the parties had reached an agreement to divvy up the Partnership's crops and livestock, in addition to its real property, along with the parties mutually exchanging a release and dismissal of each other's claims. Critically, *those* were the material terms of the deal. *LaMore Rest. Grp., LLC v. Akers*, 2008 S.D. 32, ¶ 17, 748

N.W.2d 756, 762 (defining "material terms" as those "dealing with significant issues" between the parties).

For context, the Wieman appraisal listed the value of the Partnership's real estate at $4,629,330, and its livestock at $339,873.00. (SR. 148-152) (copy of Wieman appraisal appended to Jerry's affidavit). The Partnership was a multi-million dollar enterprise. Yet the issues raised by Jerry in his affidavit concerned no more than $30,000 - $35,000 at most. In fact, shortly after the Circuit Court denied the Paweltzkis' motion to enforce settlement and to compel arbitration, the Paweltzkis filed a separate motion to enforce a portion of the settlement by agreeing to "Jerry's version" of events. (SR. 264-77.) When that motion was granted, Jerry received a mere $9,700.00 along with the accessories he alleged should have gone with some of the drafted equipment. (Appellant-Appx. 86-109) (May 8, 2015 Findings of Fact, Conclusions of Law, and Order on Defendants' Motion to Enforce Settlement.) Thus, the items Jerry took issue with in his affidavit were not material. Jerry simply changed his mind, which the law does not entitle him to do. *Setliff*, 2000 S.D. 124 at ¶ 14.

For the same reason, the Circuit Court's conclusion that there were "several material mistakes of fact" between the parties is also erroneous. While the parties may have not resolved all the minutiae related to the dissolution of the Partnership, the parties had agreed upon the material terms of a deal that would have apportioned more than 99% of Partnership assets and settled the lawsuit. The misunderstandings allegedly harbored by Jerry were not material and thus would not be sufficient to vitiate the parties' agreement. SDCL 53-4-9 (defining mistake of fact); *Schaefer v. Sioux Spine & Sport, Prof. LLC*, 2018 S.D. 5, ¶ 20, 906 N.W.2d 427, 434 (a mistake "must go to the essence of

the object in view, and not be merely incidental" to vitiate a contract). Rather, Jerry's approach toward mediation can be summarized as either withholding his true expectations during the mediation sessions, or by simply inventing new ones after the fact. But Jerry's subsequent change (or sleight) of heart cannot abrogate the parties' settlement agreement. *Setliff*, 2000 S.D. 124, at ¶ 14. Reviewing the entire evidence, this Court should conclude the Circuit Court's findings to the contrary are clearly erroneous. *Eagle Ridge Estates Homeowners Ass'n, Inc.*, 2013 S.D. 21, at ¶ 12.

The Circuit Court also overlooked that the parties had begun carrying out the agreement's terms and acting consistent with those terms. In fact, the Circuit Court appears not to have considered the parties' conduct following the April 23, 2013, mediation in its analysis at all. But that conduct is highly relevant to the question of whether the parties mutually assented to the agreement's terms–which the Circuit Court concluded the parties had not–as well as whether the parties had ratified the agreement. *Arrowhead Ridge I, LLC*, 2011 S.D. 38, at ¶ 11; *Ziegler Furniture & Funeral Home, Inc.*, 2006 S.D. 6, at ¶ 31. The Circuit Court thus erred by merely concluding the parties did not share a mutual understanding of the material terms reached without considering their conduct. Likewise, the Circuit Court should have considered whether that conduct indicated the parties had ratified the agreement, assuming it was initially defective. Again, reviewing the entire evidence, this Court should conclude the Circuit Court clearly erred. *Eagle Ridge Estates Homeowners Ass'n, Inc.*, 2013 S.D. 21, at ¶ 12.

Finally, the Circuit Court also erred when it concluded the parties did not agree to submit any remaining small issues to arbitration with Mr. Kouri acing as arbitrator. On this point, Mr. Kouri testified as follows:

Q: Did the counsel indicate that their clients agreed to resolve disputes with you as the arbitrator?

A: *Yes*[.]

(Evidentiary Tr. 13:14-19) (emphasis added) (adding "although at that time I do think that there was -- at least the thought was that after that second mediation everybody really thought that we sort of had things in hand.") Thus, the only disinterested witness confirmed the parties had agreed to submit any dispute that might arise in the future between the parties to arbitration with Mr. Kouri as arbitrator. The Circuit Court's findings and conclusions to the contrary are thus erroneous. *Nylen*, 2015 S.D. 98 at ¶ 14.

In summary, the parties reached a binding and enforceable settlement agreement following the April 23, 2013, mediation. The Circuit Court's findings of fact to the contrary are clearly erroneous, and its legal conclusions that the agreement lack mutuality are contrary to law. The Circuit Court's conclusions that the agreement could be rescinded based upon mistake are also erroneous. In addition, the Circuit Court erred when it did not consider whether the parties had ratified the agreement even if the agreement was initially unenforceable. For each and all of these reasons, this Court should conclude the parties' April 23, 2013, settlement agreement was enforceable, and reverse the Circuit Court.

II. Alternatively, the Circuit Court Erred When it Held the Defense of Laches Completely Barred the Paweltzkis' Unjust Enrichment Claim

C. Standard of Review

Whether the Circuit Court utilized the correct legal standard in applying the defense of laches is a question of law this Court reviews *de novo*. *Clarkson & Co. v. Cont'l Res., Inc.*, 2011 S.D. 72, ¶ 10, 806 N.W.2d 615, 618. If the Circuit Court's

application of the defense was correct, then the clearly erroneous standard applies to the Circuit Court's factual findings. *Id.* The Circuit Court's ultimate legal conclusion of whether the defense applies is reviewed *de novo*. *Webb v. Webb*, 2012 S.D. 41, ¶ 10, 814 N.W.2d 818, 822 ("We review de novo a court's ruling on the applicability of the doctrine of laches"); *Wehrkamp v. Wehrkamp*, 2009 S.D. 84, ¶ 11, 773 N.W.2d 212, 216 (same); *In re Admin. of C.H. Young Revocable Living Tr.*, 2008 S.D. 43, ¶ 7, 751 N.W.2d 715, 717 (same); *but see Clarkson*, 2001 S.D. 72, at ¶ 10 (". . . its application of the doctrine is reviewed for abuse of discretion").

Laches is an affirmative defense founded in equity. *Clarkson & Co.*, 2011 S.D. 72, at ¶ 12. To be entitled to it, Jerry was required to prove the following elements: (1) the Paweltzkis had full knowledge of the facts upon which their claims are based; (2) regardless of that knowledge, the Paweltzkis engaged in an unreasonable delay before commencing suit; and (3) that allowing the Paweltzkis to maintain the suit would prejudice Jerry. *Webb*, 2012 S.D. 41, at ¶ 10. However, "[p]rejudice will not be inferred from the mere passage of time." *Id.* "Thus, mere delay, short of the statute of limitations, will not estop a party from asserting his right . . . unless he has been guilty of some act, declaration, or statement that has, in some manner, misled the other party to his prejudice." *Burch v. Bricker*, 2006 S.D. 101, ¶ 15, 724 N.W.2d 604, 609 (quotation omitted) (alteration in original).

D. <u>Argument</u>

1. The Circuit Court's Findings and Conclusions

As a threshold matter, this Court should be aware of the discrepancies created by the Circuit Court's entry of two sets of findings of fact and conclusions of law. The

Circuit Court initially issued a memorandum decision addressing the parties' equitable claims, including the Paweltzkis' unjust enrichment claim, which should be considered as context for this issue. (Appellant-Appx. 116-121) (January 30, 2020 Memorandum Opinion.) First, the Circuit Court made a number of credibility findings. The Circuit Court found "the defendants' witnesses to be truthful and credible" and "[a]lmost all of the defendants' facts and evidence were properly and fully supported by the testimony of the witnesses." (Appellant-Appx. 116.) In contrast, the Circuit Court "did not find the plaintiff to be a very credible witness" and "the plaintiff's testimony and positions on the issues for the Court to decide were not properly supported by the evidence. In fact, the Court found his position concerning 42 unaccounted-for or missing heifers to be completely preposterous." (*Id.*)

The Circuit Court went on to resolve a number of asset valuation items, and then held the defense of laches completely barred the Paweltzkis' unjust enrichment claim. Specifically, the Circuit Court opined as follows:

> The Court has considered the defendants' claims for unjust enrichment. Based on the testimony and evidence presented, the Court believes the defense of laches applies to the defendants' unjust enrichment claim. The witnesses, especially Alyce Paweltzki, was adamant that she and the defendants were aware of the plaintiffs inappropriate activities as early as 2001 or before. Her testimony was that she and the defendants were certain of the plaintiff's misconduct during the time she and Larry were in charge of the partnership books. 2001 was the last year she was in charge of the partnership books.
>
> The Court believes that the defendants knew and did not take appropriate action concerning the plaintiff's improper conduct. The Court finds this delay to be unreasonable. Therefore, the Court will not award anything to the defendants under the claim of unjust enrichment.

(Appellant-Appx. 120-21.)

As previously noted, both parties submitted proposed findings of fact, conclusions of law, and a judgment for the Circuit Court's consideration, and each party also submitted objections to the other side's proposed findings and conclusions. (SR. 1372-83; SR. 1402-03.) However, the Circuit Court did not resolve the parties' objections or reconcile the parties' proposed findings and conclusions. Rather, the Circuit Court executed both sets of proposed findings of fact and conclusions of law, and the judgments. (Appellant-Appx. 122-139; 140-149.) The judgments are not materially different.

The distinction between the two sets of proposed findings and conclusions matters, however, because the set submitted by Jerry omits entirely the Circuit Court's credibility findings while inserting numerous claimed facts that the Circuit Court never found. By way of a single example, Jerry's findings state, "No evidence suggests that Jerry's actions or retention of property he obtained while actively engaged in [the Partnership] was unjust." (Appellant-Appx. 37) (Jerry's Finding of Fact, ¶ 37.) The Circuit Court never made such a finding. To the contrary, the Circuit Court largely found all of the Paweltzkis' "facts and evidence were properly and fully supported by the testimony of the witnesses." (Appellant-Appx. 116.)

Jerry's conclusions likewise claim, "[the Paweltzkis] failed to prove their unjust enrichment claim, as they failed to establish any of the elements of unjust enrichment as shown by the above and forgoing Findings of Fact." (Appellant-Appx. 135) (Jerry's Conclusion of Law, ¶ 3.) The Circuit Court never concluded that the Paweltzkis' unjust enrichment claim failed for lack of proof. Instead, the Circuit Court held the claim was barred by the affirmative defense of laches, which necessarily presupposes the claim had

otherwise been proven. Stated another way, if the Circuit Court had concluded the unjust enrichment claim had not been proven, then the Circuit Court never would have needed to consider whether laches (or other affirmative defenses) applied at all.

In contrast, the findings and conclusions submitted by the Paweltzkis essentially break the Circuit Court's memorandum into numbered sentences, and are otherwise consistent with what the Circuit Court decided. The Circuit Court's entry of both sets of findings and conclusions would ordinarily warrant a remand because the inconsistencies between the two sets make meaningful appellate review of what the Circuit Court actually decided impossible. *Wiswell v. Wiswell*, 2010 S.D. 32, ¶ 10, 781 N.W.2d 479, 482. However, the Paweltzkis submit that because their proposed set of findings and conclusions is both consist with the Circuit Court's memorandum opinion and also entered by the Circuit Court subsequent to those submitted by Jerry, that the Circuit Court intended for the Paweltzkis' submission to be controlling. This view would be consistent with Rule 52(a), which permits the Circuit Court to modify its findings and conclusions. However, if this Court disagrees, then the matter must remanded for the Circuit Court to enter a new, singular set of findings of fact and conclusions of law.

2. The Circuit Court's Adjudication of the Unjust Enrichment Claim

The Circuit Court erred in its adjudication of the Paweltzlkis' unjust enrichment claim. The Paweltzkis introduced evidence at trial showing Jerry had unjustly enriched himself by misappropriating over $1,000,000.00 in Partnership assets during the last decade of the Partnership's operation (*i.e.*, from 2000 – 2011). This total is the aggregate of thousands of transactions that occurred during this time, the evidence for which is

summarized in Trial Exhibit 200. (SR. 3234.) None of the particular transactions in question were successfully refuted by Jerry and, as explained previously, the fact the Circuit Court addressed Jerry's laches defense presupposes that the Paweltzkis otherwise had proved their unjust enrichment claim. There would be no reason for the Circuit Court to consider the defense otherwise.

Notably, the basis for the Circuit Court's conclusion that laches barred the unjust enrichment claim was because the Circuit Court found the Paweltzkis knew about Jerry's improper conduct for years before bringing suit. (Appellant-Appx. 120-21) (January 30, 2020 Memorandum Opinion) ("The Court believes that defendants knew and did not take appropriate action concerning plaintiff's improper conduct.") According to the Circuit Court, "this delay [was] unreasonable." (*Id.*) However, the Circuit Court's findings and conclusions only address the first two elements of laches. *Webb*, 2012 S.D. 41, at ¶ 10 (explaining the first two elements are full knowledge and unreasonable delay). The Circuit Court did not address whether allowing the Paweltzkis to maintain the suit would prejudice Jerry. This omission is critical because prejudice is a necessary element of the defense. *See Wehrkamp*, 2009 S.D. 84, at ¶ 8. And as this Court has explained, "[p]rejudice will not be inferred from the mere passage of time." *Webb*, 2012 S.D. 41, at ¶ 10. Thus, this Court should conclude the Circuit Court did not follow the correct legal standard when it adjudicated the Paweltzkis' unjust enrichment claim. *See Clarkson & Co.*, 2011 S.D. 72, at ¶ 10.

More substantively, this lawsuit was commenced in 2012. While the Paweltzkis disagree the doctrine of laches applies at all, this Court should conclude the defense cannot apply *at least* during the last years of the Partnership's operation (*i.e.*, in 2011,

2010, 2009, etc.). Each act of theft or embezzlement committed by Jerry during these years would give rise to an actionable unjust enrichment claim, and the Paweltzkis could not "unreasonabl[y] delay before commencing suit" with respect to those claims. *Webb*, 2012 S.D. 41, at ¶ 10; *see also* 30A Corpus Juris Secundum, Equity § 151 ("There can be no 'delay' for purposes of laches until a claim was ripe such that a court could entertain it.") For the 2011 claims, for example, the Paweltzkis sued Jerry within one year. That delay, to the extent there is one, could not be deemed unreasonable. *Cf. Conway v. Conway*, 487 N.W.2d 21, 25 (S.D. 1992) (holding laches did not bar a lawsuit commenced roughly one year after the plaintiff became aware of her cause of action).

The same would be true for at least several years immediately preceding the commencement of the lawsuit. For example, this Court held in *Bonde v. Boland*, 2001 S.D. 98, ¶ 19, 631 N.W.2d 924, 927, that a delay of five years before commencing suit was not unreasonable. Likewise, Jerry could not show any prejudice from the Paweltzkis failing to sue him any sooner during this time. If anything, the opposite is true, as Jerry managed to pilfer over $376,000 in the last three years of the Partnership's operation alone. That Jerry would have to return more ill-gotten gains than if he had been sued earlier could hardly be prejudicial to him.

The Circuit Court, however, held the Paweltzkis' claim for unjust enrichment was entirely barred due to application of laches. The Circuit Court did not explain how, for example, laches could apply to a claim that was less than a year old, let alone a claim two years, or three, or four years old, or when the prejudice to Jerry, if any, became sufficient to warrant the defense. Even if laches could apply to some of the Paweltzkis' older claims (*i.e.*, from 2001 or 2002), it cannot apply to the later years of Jerry's misappropriations.

Allowing laches to apply to all claims based on Jerry's bad behavior from years or decades earlier would cloak Jerry's theft with immunity before he even misappropriated partnership assets. Under the Circuit Court's ruling, even if the Paweltzkis had sued Jerry the day after he embezzled money in 2011, the claim would be immediately barred based on Jerry's theft from a decade prior. Such a rule is inequitable, and it cannot be the law. *Cf.* 30A Corpus Juris Secundum, Equity § 3 ("The object of equity is to do right and justice with some degree of flexibility, and the essence of equity jurisdiction is its flexibility rather than rigidity"). Accordingly, while the Paweltzkis do not believe laches applies at all, to the extent it does, the Circuit Court should not have applied it in an all-or-nothing fashion. Thus, the Court should reverse the Circuit Court's conclusion that laches bars entirely the Paweltzkis' unjust enrichment claim.

CONCLUSION

The Circuit Court erred when it denied the Paweltzkis' motion to enforce settlement and compel arbitration. This Court should conclude the parties reached a binding settlement agreement following the April 23, 2013, mediation session, or that the parties subsequently ratified that agreement, and that the same should be enforced. Alternatively, this Court should conclude the Circuit Court erred when it held the defense of laches wholly barred the Paweltzkis' unjust enrichment claim. Thus, under either outcome, the Circuit Court should be reversed.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument.

Dated at Sioux Falls, South Dakota, this 17th day of July, 2020.

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

Mitchell A. Peterson
Justin T. Clarke
Michael L. Snyder
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellants complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 7910 words and 50,130 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 17th day of July, 2020.

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

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206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Brief of Appellants" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on July 17, 2020.

The undersigned further certifies that an electronic copy of "Brief of Appellants" was emailed to the attorneys set forth below, on July 17, 2020:

Timothy R. Whalen
Whalen Law Office, P.C.
Attorneys for Plaintiff/Appellee

Pamela Reiter
Anthony Sutton
Johnson, Janklow, Abdallah, & Reiter, LLP
pamela@janklowabdallah.com
anthony@janklowabdallah.com
Attorneys for interest party Brian Paweltzki

Steve Huff
Marlow, Woodward, & Huff, Prof. LLC
steve@mwhlawyers.com
Attorneys for (former) Intervenor First State Bank

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

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Justin T. Clarke
Michael L. Snyder
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
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Attorneys for Appellants

APPENDIX TABLE OF CONTENTS

STATE OF SOUTH DAKOTA) : SS COUNTY OF MCCOOK)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
GERALD PAWELTZKI, Plaintiff, vs. ROGER PAWELTZKI and LAWRENCE PAWELTZKI, Defendants.	CIV. 12-114 **AFFIDAVIT OF MITCHELL A. PETERSON**

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

MITCHELL PETERSON, being duly sworn on his oath, deposes and states as follows:

1. I am one of the attorneys for Defendants in the above-captioned matter.

2. The parties agreed to submit this dispute to mediation. On February 15, 2013, we held a mediation session before Lon Kouri.

3. Attached as Exhibit 1 is a true and correct copy of an email I received from Mr. Kouri on February 16, 2013.

4. Attached as Exhibit 2 is a true and correct copy of an email I received on February 17, 2013. from Michael Tobin, counsel for Plaintiff.

5. I believe that Plaintiff has farmed partnership land that was allotted to him in the February 15, 2013 mediation.

6. Plaintiff asserted that some of the items on the list of partnership property made by Wieman Auction Service were his personal property and also claimed ownership of several

bins and other items that Defendants believed were fixtures rather than equipment. Both sides continued to negotiate these issues, as well as the issue of how to split partnership hay and fuel.

7. When no resolution on the remaining issues was reached, the parties again agreed to mediation before Mr. Kouri. The second mediation session was on April 23, 2013.

8. Attached as Exhibit 3 is a true and correct copy of an email I received on April 23, 2010 from Mr. Kouri's associate.

9. Attached as Exhibit 4 is a true and correct copy of a memorandum Settlement Agreement drafted by Mr. Kouri that was attached to the email in Exhibit 3. Aside from a minor error as to the location of the silage unloaders and the number of alfalfa bales that were to go to Jerry, this letter accurately summarizes the agreement reached at the mediation.

10. The parties were able to complete part of the equipment draft. All parties, including Plaintiff, took possession of some of the property they had chosen in the draft.

11. However, the parties were not able to agree on whether some of the small equipment, tools, and various items around the former partnership properties were subject to the draft. The parties also continued to disagree on how to split up partnership expenses and income that had accrued during the controversy between the partners.

12. Attached as Exhibit 5 is a spreadsheet I drafted showing the remaining issues in the case and the proposals and counterproposals that have been exchanged between the parties as to the unresolved items.

13. Attached as Exhibit 6 is a true and correct copy of an email I received from Plaintiff's counsel on October 31, 2013.

14. Attached as Exhibit 7 is a true and correct copy of an email I received from Plaintiff's counsel on November 4, 2013.

Dated at Sioux Falls, South Dakota, this 6th day of December, 2013.

Mitchell Peterson

Subscribed and sworn before me this 6th day of December, 2013.

ASHLEY M. HOYT
NOTARY PUBLIC
SOUTH DAKOTA
SEAL SEAL

Notary Public, South Dakota
My Commission expires: 7/6/2016

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendants, hereby certifies that a true and correct copy of the foregoing "Affidavit of Mitchell A. Peterson" was served by mail upon:

Michael Tobin
Paul W. Tschetter
Boyce, Greenfield, Pashby & Welk, L.L.P.
P.O. Box 5015
Sioux Falls, SD 57117

Attorneys for Plaintiff

on this 6th day of December, 2013.

Mitch A. Peterson

From: Lon Kouri <LKouri@mayjohnson.com>
Sent: Saturday, February 16, 2013 9:13 AM
To: mftobin@bgpw.com; Mitch A. Peterson
Subject: Pawletzki v Pawletzki

Mike and Mitch, this confirms the terms of the settlement reached last evening in the above matter. Specifically, the parties have agreed to dismiss the pending litigation, including the counterclaim, with prejudice, all parties bearing their respective costs, fees and expenses. As consideration for the dismissal, the parties agree to the following disposition of partnership property:

REAL PROPERTY. Larry and Roger will receive those parcels designated during the mediation as 1, 2 and 3 including all structures attached to those parcels. Gerald will receive parcels 4 and 5, including all structures attached thereto. The parties will execute such documents as necessary to effectuate the transfer.

EQUIPMENT. The parties agree all equipment on the Wieman Auction list will be distributed by way of a "draft" whereby each party will be allowed to choose the piece of equipment he desires in the following order. Larry will choose first, Gerald will pick second and Roger will choose third. After each chooses their first piece, subsequent picks will be conducted in reverse ascending/descending order until all equipment has been chosen.

It is agreed that the following equipment belongs to Gerald and is not subject to the above draft procedure:

20' flatbed trailer
30' square bale elevator
Army surplus trailer

CROP INSURANCE. All crop insurance proceeds will be paid to Farmers State Bank to reduce the partnership loan. All partnership loan indebtedness remaining after said payment will be split equally between Larry, Gerald and Roger with each assuming liability for his 1/3 share.

LIVESTOCK. Larry and Roger will receive all livestock identified on the Wieman liar, including all proceeds from any sale or disposition thereof.

CROP INVENTORY/RECEIVABLES. Larry and Roger shall be entitled to all partnership crop inventory and receivables subject to the following:

1). Gerald will be entitled to 1/3 of the hay in inventory along with the silage currently stored at the Richards place.

2). All prepaid fertilizer/seed of approximately $200,000, will be divided equally between Larry, Gerald and Roger.

MISCELLANEOUS DEBT/ASSETS. Any other miscellaneous partnership assets or debt not mentioned herein or which may be acquired/incurred during close out will be split equally between Larry, Gerald and Roger.

GERALD PERSONAL PROPERTY. Gerald will be allowed to remove all of his personal property from the homestead on "Parcel 1" subject to the following:

1). The removal will be supervised by law enforcement officials at a time agreed upon by all parties.

2). Gerald may not remove any fixtures with the exception of the elk stained glass window.

LEASED LAND. The partnership has leased 300 acres referred to as the Liberda land. Larry, Gerald an Roger will each be entitled to lease 100 acres under that lease, with Gerald leasing either the North or South acres.

Please let me know if I missed anything. Thanks again to both of you for all your help in resolving this difficult dispute.
Lon

Sent from my iPad

Mitch A. Peterson

From: Michael Tobin <mftobin@bgpw.com>
Sent: Sunday, February 17, 2013 1:19 PM
To: Lon Kouri
Cc: Mitch A. Peterson
Subject: Re: Pawletzki v Pawletzki

Lon and Mitch,

Everything looks good except the equipment. We never discussed what list was in play, probably because the equipment and the agreement to a draft was agreed upon quite early in the day. However, we can't do the Weiman list as we believe there are a few items that are incorrect on it. We should use the bank list as everyone agrees that it contains partnership items. There may be a few items to argue about but I don't believe any of them aren't things that can't be worked out.

And please don't misunderstand, the issue as to which list to use is NOT an attempt to blow this up or back out of the agreement.

Best regards'

Sent from my iPad

On Feb 16, 2013, at 9:13 AM, "Lon Kouri" <LKouri@mayjohnson.com> wrote:

> Mike and Mitch, this confirms the terms of the settlement reached last evening in the above matter. Specifically, the parties have agreed to dismiss the pending litigation, including the counterclaim, with prejudice, all parties bearing their respective costs, fees and expenses. As consideration for the dismissal, the parties agree to the following disposition of partnership property:
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>
> It is agreed that the following equipment belongs to Gerald and is not subject to the above draft procedure:
> 20' flatbed trailer
> 30' square bale elevator
> Army surplus trailer
>
> CROP INSURANCE. All crop insurance proceeds will be paid to Farmers State Bank to reduce the partnership loan. All partnership loan indebtedness remaining after said payment will be split equally between Larry, Gerald and Roger with each assuming liability for his 1/3 share.
>
> LIVESTOCK. Larry and Roger will receive all livestock identified on the Wieman liar, including all proceeds from any sale or disposition thereof.

>
> CROP INVENTORY/RECEIVABLES. Larry and Roger shall be entitled to all partnership crop inventory and receivables subject to the following:
>
> 1). Gerald will be entitled to 1/3 of the hay in inventory along with the silage currently stored at the Richards place.
>
> 2). All prepaid fertilizer/seed of approximately $200,000, will be divided equally between Larry, Gerald and Roger.
>
> MISCELLANEOUS DEBT/ASSETS. Any other miscellaneous partnership assets or debt not mentioned herein or which may be acquired/incurred during close out will be split equally between Larry, Gerald and Roger.
>
> GERALD PERSONAL PROPERTY. Gerald will be allowed to remove all of his personal property from the homestead on "Parcel 1" subject to the following:
>
> 1). The removal will be supervised by law enforcement officials at a time agreed upon by all parties.
>
> 2). Gerald may not remove any fixtures with the exception of the elk stained glass window.
>
> LEASED LAND. The partnership has leased 300 acres referred to as the Liberda land. Larry, Gerald an Roger will each be entitled to lease 100 acres under that lease, with Gerald leasing either the North or South acres.
>
> Please let me know if I missed anything. Thanks again to both of you for all your help in resolving this difficult dispute.
Lon
>
> Sent from my iPad

Mitch A. Peterson

From: Terri Fink <tfink@mayjohnson.com>
Sent: Tuesday, April 23, 2013 5:24 PM
To: Paul Tschetter; Mitch A. Peterson
Cc: Lon Kouri
Subject: Paweltzki
Attachments: AR-M455N_20130423_160631.pdf

Categories: Urgent

Paul and Mitch,

Attached is a draft of the "Settlement Memorandum". Please get back to us with any changes. Thank you.

Terri Fink
May & Johnson, P.C.
6805 S. Minnesota Ave. Suite 100
P.O. Box 88738
Sioux Falls, SD 57109-8738
(605) 336-2565
(605) 336-2604 (fax)
tfink@mayjohnson.com

MAY & JOHNSON, P.C.

A TRADITION OF LEGAL EXCELLENCE

RICHARD MOE
LON J. KOURI
JEFF D. BRAKKE
RICHARD L. TRAVIS
JOHN H. BILLION
MARK J. ARNDT*
JASON W. SHANKS◊
ERIC D. DeNURE
DAVID A. GIBBNAN

* ALSO LICENSED IN NEBRASKA
◊ ALSO LICENSED IN MINNESOTA

6805 SOUTH MINNESOTA AVENUE, SUITE 100
P.O. BOX 88738
SIOUX FALLS, SOUTH DAKOTA 57109-8738
(605) 336-2565 • FAX (605) 336-2604

RETIRED
GEORGE O. JOHNSON
JAMES R. BECKER

R. G. MAY (1913-1996)
HAROLD C. DOYLE (1926-2009)

lkouri@mayjohnson.com

COPY

April 23, 2013

pwtschetter@bgpw.com
Paul W. Tschetter
Boyce, Greenfield, Pashby & Welk
P.O. Box 5015
Sioux Falls, SD 57117

mpeterson@dehs.com
Mitchell Peterson
Davenport, Evans, Hurwitz & Smith
P.O. Box 1030
Sioux Falls, SD 57101

RE: Gerald Paweltzki v. Roger & Lawrence Paweltzki

SETTLEMENT MEMORANDUM

Dear Paul and Mitch:

This confirms the terms of the settlement we reached today in the above matter. Specifically, the parties have agreed to dismiss the pending litigation, including all counterclaims (whether asserted or unasserted). The claims will be dismissed with prejudice, each party bearing their respective costs, fees and expenses. In consideration for the dismissal, the parties also agree that counsel will prepare a mutual release of all claims which will be signed by the parties. In addition, the parties incorporate the settlement memorandum from Lon Kouri dated February 16, 2013, which memorandum is incorporated herein by reference. The parties further agree to the following disposition of property:

EQUIPMENT: The parties agree that Jerry Paweltzki will receive the following equipment:

The 8200 tractor;
The 9610 combine;
The 893 cornhead;
The Rogator;
The JD 544 Wheel Loader.

Larry/Roger will receive the following equipment:

Mueller 1000 gallon cooler;
Westphalea vacuum pump and piping;
Washvat.

EQUIPMENT DRAFT: It is agreed that Larry/Roger will be allowed to pick eight items of their choice from the Weiman equipment inventory list. After Larry/Roger have made their eight choices, the remaining items on the list will be picked by way of a draft which will proceed with Larry having the first pick, Jerry having the second pick and Roger the third pick. From there, the parties will pick in reverse ascending/descending order until all equipment on the list has been chosen.

It is further understood and agreed that the parties shall have until July 31, 2013, to remove all equipment chosen during the default from the premises.

SILAGE UNLOADERS: It is agreed that Jerry will receive the two silage unloaders which are attached to the silos on Roger's place. Larry and Roger will receive the remaining four silage unloaders.

AUGERS: The parties agree there are three augers which will be distributed by draft with Larry/Roger having the first and second choice of the three augers. Jerry will receive the remaining auger which is not chosen by Larry or Roger.

JERRY'S PERSONAL PROPERTY: Jerry will be allowed to remove all of his personal property from the homestead on "Parcel 1". It is agreed that he will do so by May 31, 2013.

ROGER'S PLACE: It is agreed that the real property commonly known as "Roger's place" and which is currently owned jointly by Larry and Jerry will be conveyed as follows:

1. Jerry will convey his one-half interest in the real property, including all buildings or structures, to Roger. In return for the conveyance of Jerry's one-half interest in the property, Larry/Roger agree to pay Jerry $50,025.00.
2. The parties further agree to effectuate closing on the real property as soon as practicable with payment of said sum due on closing.

MISCELLANEOUS: The parties agree to the following miscellaneous issues:

1. Jerry will be entitled to retain the three alfalfa bales in dispute at the mediation;
2. Larry and Roger will be entitled to retain the proceeds from the thirteen fat cattle in dispute at the mediation;
3. Roger agrees to waive any and all claims he may have against the partnership of any nature, including all claims for equipment rental, feed, services or related issues.

EXECUTION: The parties agree that they have authorized their attorneys to execute this Settlement Memorandum on their behalf and that the terms of this Settlement Memorandum are binding on the parties pending preparation of final settlement documents by counsel.

Dated: April _____, 2013

Gerald Paweltzki

By Their Attorneys,
Paul Tschetter
Boyce, Greenfield, Pashby & Welk
P.O. Box 5015
Sioux Falls, SD 57117
336-2424
334-0618 (fax)
pwtschetter@bgpw.com

Dated: April _____, 2013

Larry Paweltzki
Roger Paweltzki

By Their Attorneys,
Mitchell Peterson
Davenport, Evans, Hurwitz & Smith
P.O. Box 1030
Sioux Falls, SD 57101
336-2880
335-3639 (fax)
mpeterson@dehs.com

Very truly yours,

MAY & JOHNSON, P.C.

By
Lon J. Kouri

LJK:taf

SHARED EQUIPMENT LIST

Order	Description	Disposition	Disposition (MAP 5.24.2013)	Disposition (PWT 5.30.13)	Disposition (MAP 6.5.2013)	Disposition (PWT 6.25.2013)	Disposition (MAP 6.8.2013)
1	1. Carrier of Drill Transport	Pick in draft	Draft	Draft	Agreed	Agreed	
2	2. Roger's: Railroad Timbers	Roger - ok	Roger	Roger	Agreed	Agreed	
3	3. Old Shed On Wheels	Pick in draft	Draft	Draft	Agreed	Agreed	
4	4. Corral Panels?	Pick in draft	Draft	Draft	Agreed	Agreed	
5	5. Gates	Pick in draft	Larry (Larry owns this; $200 cash paid at Mitchell TSC, Roger picked it up for Larry in 2011)	Provide receipt	[redacted]		
6	6. Round Bale Feeder	Pick in draft	Draft	Draft	Agreed	Agreed	
7	7. Electric Fencer	Pick in draft	Draft	Draft	Agreed	Agreed	
8	8. Auger at Richards	Pick in draft - went to Jerry previously	Draft (Jerry's auger is shown in #36; this is not Jerry's selected auger, and it is not on the Weiman list.)	Jerry is willing to trade to Larry/Roger the Patz silage unloader depicted in photo #80 in exchange for the items shown in photos #8 and 10 and the welding table shown in photo #60	[redacted]		
9	9. No Idea Misc lootfeed	? Draft	Draft (except Roger's tools are shown in picture, but Roger picked them up after the picture was taken)	Agree	Agreed	Agreed	
10	10. Feed Bunk at Richards	Pick in draft - went to Jerry previously	Draft (see #8; Jerry picked the equipment shown in #36, not #8 and #10)	See #8 above	[redacted]	Agreed	[redacted]
11	11. Liquid Feeder	Pick in draft	Draft	Draft	Agreed	Agreed	
12	12. Already on draft list 5 motors	Pick in draft	Draft	Draft	Agreed	Agreed	
13	13. No Idea Duplication of motors depicted on 12	? Same as 12	Draft	Draft	Agreed	Agreed	
14	14. No Idea Miscellaneous	? Draft	Draft	Draft	Agreed	Agreed	
15	15. Battery Charger: Roger	Roger - ok	Roger	Roger	Agreed	Agreed	
16	16. Property: Roger's Bin	Roger - Draft - taken off of bin and replaced; it is surplus	Draft (the grain spreader is in the draft, but Roger gets the bin)	Agree	Agreed	Agreed	
17	17. No Idea Bin Sweep	? Draft	Draft	Draft	Agreed	Agreed	
18	18. Scaffolding (already given to Jerry)	Jerry	Jerry	Jerry	Agreed	Agreed	
19	19. Steel at Roger's	Pick in draft	Draft	Draft	Agreed	Agreed	
20	20. Bin Sweep: Goes with bin	Draft - used for several bins - either power sweep in draft or this	Draft	Draft	Agreed	Agreed	[redacted]
21	21. Cab for 4010 - pair of nails is Jerry's	Pick in draft (pair of nails to Jerry)	Steve (this shows a bucket of stakes for traps that belong to Steve)	Cab with 4010. The items depicted are not stakes but large gate that Jerry and Leon Weber removed from a loading dock. To Jerry.	[redacted]		
22	22. Fence Poles or Plow ?? - Both and miscellaneous	Pick in draft	Draft	Draft	Agreed	Agreed	
23	23. Panel for Creep Feeder	Pick in draft	Panels should go to whomever selects the related creep feeder	Agreed, but have Larry/Roger pair (or label) the panels with the appropriate creep feeder ahead of draft.	[redacted]		Agreed
24	24. Panel for Creep Feeder	Pick in draft	Panels should go to whomever selects the related creep feeder	Agreed, but have Larry/Roger pair (or label) the panels with the appropriate creep feeder ahead of draft.	[redacted]		Agreed
25	25. Hay Pickup for Silage cutter	Pick in draft	Draft	Draft	Agreed	Agreed	[redacted]

Order	Description	Disposition	Disposition (MAP 5.24.2013)	Disposition (PWT 5.30.13)	Disposition (MAP 6.5.2013)	Disposition (PWT 6.25.2013)	Disposition (MAP 6.8.2013)
26	26. No Idea Panel for creep feeder (duplicate?)	? Draft unless duplicate	Panels should go to whomever selects the related creep feeder	Agreed, but have Larry/Roger pair (or label) the panels with the appropriate creep feeder ahead of draft.	[redacted]	[redacted]	Agreed
27	27. Part of Scaffolding (already given to Jerry) and Misc	Jerry - Miscellaneous in draft	Draft (except scaffolding goes to Jerry)	Draft (except scaffolding goes to Jerry)	Agreed	Agreed	
28	28. Old Disc	Pick in draft	Draft	Draft	Agreed	Agreed	
29	29. Combine Steve	Pick in draft	Draft	Draft	Agreed	Agreed	
30	30. Mineral Feeder	Pick in draft	Draft	Draft	Agreed	Agreed	
31	31. Auger	Pick in draft	Draft	Draft	Agreed	Agreed	
32	32 Swing Hopper	Pick in draft	Draft	Draft	Agreed	Agreed	[redacted]
33	33.Roger's Tires	Roger - ok	Roger	Roger	Agreed	Agreed	
34	34. No Idea Fence Posts	? Draft	Draft	Draft	Agreed	Agreed	
35	35. No Idea - Tub	? Draft	Draft (round tub in center of picture)	Draft (round tub in center of picture)	Agreed	Agreed	
36	36. Jerry already Picked (goes with Richards)	Jerry	Jerry	Jerry	Agreed	Agreed	
37	37. Steel: Roger's	Roger - ok	Roger	Roger	Agreed	Agreed	
38	38. Panels?	Pick in draft	Draft	Draft	Agreed	Agreed	
39	39. No Idea Misc Iron	? Draft	Draft	Draft	Agreed	Agreed	
40	40. Water Tank Parts	Pick in draft	Draft	Draft	Agreed	Agreed	
41	41. Steve's Steel and Misc	Steve - right angle sheet steel off of Holm place - draft	Steve (the steel belongs to Steve and we cannot tell what else in the picture Jerry referenced)	The sheet steel is off of the harvestor and feed bunk(s) in the draft. The other items to Steve.	[redacted]	Agreed	
42	42. Steve's Ladders	Steve Ok	Steve	Steve	Agreed	Agreed	
43	43. Roger's Old Fan	Roger Ok	Roger	Roger	Agreed	Agreed	
44	44. Ladder and jack	Pick in draft	Draft (jack is #46)	Draft (jack is #46)	Agreed	Agreed	
45	45. Attached to Farm	Goes with real property ok	Goes with real property	Goes with real property	Agreed	Agreed	
46	46. Jack	Pick in draft	Draft	Draft	Agreed	Agreed	
47	47. Calf Warmer	Pick in draft	Draft	Draft	Agreed	Agreed	
48	48. Head Gate and panels (4) with it	Goes with real property draft - it is portable	Draft (the one in this picture does not appear to be affixed to real property)	If Larry/Roger will allow Jerry to have this headgate, Jerry will agree the headgate shown in photo 132 goes with the real property.	[redacted]	[redacted]	[redacted]
49	49. Larry's Feed Bunk/shovel	Larry - bring receipt	Draft (shovel); Larry (Larry owns the feed bunks; he bought them 10-15 years ago at Weirson auction)	Provide receipt	[redacted]	[redacted]	Draft
50	50. Gate Attached to Barn	Goes with real property -draft - not attached to barn - one four panels with calving pen	Draft	Draft	Agreed	Agreed	[redacted]
51	51. panel	Goes with real property - draft	Roger (Roger personally bought this, plus it's affixed to the property)	Agree	Agreed	Agreed	
52	52. air compressor/Nipco-type heater	? Draft	Draft	Draft	Agreed	Agreed	
53	53. Larry's : Trespassing	Larry Ok	Larry	Larry	Agreed	Agreed	
54	54. Patz silage unloader/hay feeder	? Draft	Larry (the silage unloader is a fixture attached to Larry's silo); Draft (the hay feeder can be drafted)	Silage unloader is partnership property, but see response to #6 above	[redacted]	Agreed	[redacted]

SMALL EQUIPMENT LIST

Order	Description	Disposition	Disposition (MAP 5.24.2013)	Disposition (PWT 5.30.13)	Disposition (MAP 6.5.2013)	Disposition (PWT 6.25.2013)	Disposition (MAP 8.8.2013)
55	55. Gave Jerry pump on top shelf/misc	Jerry Draft	Draft (pump and items not on the top shelf shown in the picture); Jerry (Sunflower soil finisher attachments on the top shelf go with the Sunflower to Jerry); Roger (the 726 soil finisher attachments go to Roger as do the other miscellaneous items on the top shelf, other than the pump and Jerry's soil finisher attachments)	Agree, but hose in box on top left of shelf is partnership property to be included in the draft	Agreed	Agreed	
56	56. No Idea Misc - Bench in dralt/non	? Draft	Draft	Draft	Agreed	Agreed	
57	57: No Idea Misc	? Draft	Draft	Draft	Agreed	Agreed	
58	58. No Idea Misc - tire chains/buckets	? Draft	Draft	Draft	Agreed	Agreed	
59	59. Larry's Part's bin not things in bin/misc	Larry ok but items in draft/lots	Draft (all items except the actual parts bin); Larry (parts bin, but not its contents)	Agree	Agreed	Agreed	
60	60. No idea misc - air compressor/welding table with misc	? Draft (the welding table belongs to Jerry however)	Draft (the partnership paid for the welding table, not Jerry; all items should be drafted, except the toolbox, which goes with the hydroseeding)	See #9 above As demonstrated here, items intended for particular equipment will go with the equipment	[redacted]		
61	61. Welder & Cutting Torch (Jerry look)	Pick in draft Jerry will return upon draft	Draft	Draft	Agreed	Agreed	
62	62. Same as 61: No Idea	Pick in draft	Draft	Draft	Agreed	Agreed	
63	63. No Idea misc - bench	? Draft (define selection process)	Draft	Draft	Agreed	Agreed	
64	64. Anvil: Jerry took this Misc	Previously agreed Jerry could have	Jerry	Jerry	Agreed	Agreed	
65	65. Roger's Drill Press/Misc/Hydrolic press	Roger ok (power grease gun is Jerry's)	Roger (drill press); Jerry (power grease gun); Draft (other item(s) pictured)	Roger (drill press); Jerry (power grease gun); Draft (other item(s) pictured)	Agreed	Agreed	
66	66. No Idea Misc - selection process for	? Draft	Draft	Draft	Agreed	Agreed	
67	67. Roger's Press	Roger ok	Roger	Roger	Agreed	Agreed	
68	68. Chop Saw	Pick in draft	Draft	Draft	Agreed	Agreed	
69	69. Floor Jack	Pick in draft	Roger (after going through the pictures, Roger knows he bought this jack personally)	Roger (after going through the pictures, Roger knows he bought this jack personally)	Agreed	Agreed	
70	70. No Idea Grinder/Misc/Filter Box	? Draft	Draft	Draft	Agreed	Agreed	
71	71. Hitch/electric motor/band saw/parts washer	? Draft	Draft	Draft	Agreed	Agreed	
72	72. No Idea See 71	? Draft	Draft	Draft	Agreed	Agreed	
73	73. On Draft	Pick in draft	Draft	Draft	Agreed	Agreed	
74	74. No Idea Misc - filters/cords	? Draft	Draft	Draft	Agreed	Agreed	
75	75. Oil Reservoir	Pick in draft	Draft	Draft	Agreed	Agreed	[redacted]
76	76. No Idea Fittings/filters	? Draft/Lots	Draft	Draft	Agreed	Agreed	
77	77. Tires? Milk replace mixer tank	Pick in draft - 1 tire goes with Savage manure spreader	Draft (one tire goes as indicated)	Draft (one tire goes as indicated)	Agreed	Agreed	
78	78. Roger's Corrals/pay loader chains with Jerry	Roger ok/Jerry	Roger	Agree subject to loader chains to Jerry	Agreed	Agreed	

SMALL EQUIPMENT LIST

Order	Description	Disposition	Disposition (MAP 5.24.2013)	Disposition (PWT 5.30.13)	Disposition (MAP 6.5.2013)	Disposition (PWT 6.25.2013)	Disposition (MAP 8.8.2013)
79	79. Bin Sweep: Goes with bin - Weiman's appraisal separate	Goes with bin - not bought with pigs	Draft	Draft	Agreed	Agreed	[redacted]
80	80. No Idea Misc	? Draft	Roger (Roger bought the stand itself); Draft (everything else, except the stand itself)	Agree	Agreed	Agreed	
81	81. No Idea Mscllnn	? Draft	Draft	Draft	Agreed	Agreed	
82	82. Tires: Go with Tractor/Feed in True - up	Goes with tractor ok	Go with tractor (tires); the feed has been used already	Feed adjusted in the partnership true-up	Agreed	Agreed	
83	83. Tractor Weights	Pick in draft 4 weights on Roger's 4020 in draft too (see pic 212)	Draft (draft all tractor weights)	The 4010 weights should go with the 4010 as they were specifically purchased for that tractor. All other tractor weights in draft as none purchased specifically for a piece of equipment	[redacted]		
84	84. Oil Pails	Pick in draft	Draft	Draft	Agreed	Agreed	
85	85. No Idea Misc	? Draft	Draft	Draft	Agreed	Agreed	
86	86. No Idea Misc	? Draft	Draft	Draft	Agreed	Agreed	
87	87. Jerry Already took one (wire winder)	Pick in draft - one belongs to Roger	Roger (Jerry took Roger's wire winder and needs to return it); Draft (all other wire winders are partnership property, including the brand new one and the one Jerry lost last year)	Agree. Jerry will return Roger's wire winder upon completion of the equipment draft. Jerry is unaware of having lost a wire winder.	[redacted]		Agreed
87	87. Wire Winder: Roger's	Roger ok	See above	See above	Agreed	Agreed	
88	88. No Idea Misc (Other wire winder)	? Draft	Draft	Draft	Agreed	Agreed	
89	89. Same Picture: Larry's Part Bin - items draft	Larry/Draft items	Draft (except the parts bin itself); Larry (parts bin itself)	Agree. Items in background subject to draft unless otherwise agreed.	Agreed	Agreed	
90	90. No Idea Misc	? Draft	Draft (except the parts bin itself); Larry (parts bin itself)	Agree. Items in background subject to draft unless otherwise agreed.	Agreed	Agreed	
91	91. Larry's Battery Charger	Larry - bring receipt	Larry (Larry bought this 10-12 years ago and we will not be providing a receipt)	Provide receipt	[redacted]		
92	92. Roger's Sump Pump	Roger ok	Roger	Roger	Agreed	Agreed	
93	93. No Idea Misc tools	? Draft	Draft	Draft	Agreed	Agreed	
94	94. Manure Tools	Pick in draft	Draft	Draft	Agreed	Agreed	
95	95. Gas Cans	Pick in draft	Draft	Draft	Agreed	Agreed	
96	96. Hip Lift	Pick in draft	Draft	Draft	Agreed	Agreed	
97	97. Dairy Chemicals	Split into thirds/inventory on 2/15	Split *	Split *	Agreed	Agreed	[redacted]
98	98. Dairy Supplies	Split into thirds/inventory on 2/15	Split *	Split *	Agreed	Agreed	
99	99. No Idea Calf pulling equipment	? Draft	Draft	Draft	Agreed	Agreed	
100	100. Empty Containers ????	? Draft	Draft	Draft	Agreed	Agreed	
101	101. Milk Bucket	Pick in draft	Draft	Draft	Agreed	Agreed	
102	102. No Idea Cabinet with Misc	? Draft/Lots	Draft	Draft	Agreed	Agreed	
103	103. No Idea Misc	? Draft	Draft	Draft	Agreed	Agreed	
104	104. Junk: No Idea Misc	Pick in draft	Draft	Draft	Agreed	Agreed	
105	105. Junk .misc	Pick in draft	Draft	Draft	Agreed	Agreed	
106	106. Junk (4010 duals to Jerry)	Pick in draft	Draft	Draft	Agreed	Agreed	[redacted]
107	107. On Draft	Pick in draft	Draft	Draft	Agreed	Agreed	
108	108 Water Tank - North of home place	Jerry	Jerry	Jerry	Agreed	Agreed	

SMALL EQUIPMENT LIST

Order	Description	Disposition	Disposition (MAP 5.24.2013)	Disposition (PWT 5.30.13)	Disposition (MAP 6.5.2013)	Disposition (PWT 6.25.2013)	Disposition (MAP 6.8.2013)
109	109 Steve's	Steve ok	Steve	Steve	Agreed	Agreed	
110	110 Steve's	Steve ok	Steve	Steve	Agreed	Agreed	
111	111. Steve's	Steve ok	Steve	Steve	Agreed	Agreed	
112	112. Goes with Farm (panels in draft)	Draft	Draft (unattached panels, including the ones Jerry has at Guenter Quarters); Go with the land (attached or affixed panels)	There are no known partnership panels at Guenter Quarters. Agree affixed panels go with land subject to proposed horse-trading described herein.	[redacted]		
113	113. Larry's Feed Bunks	Draft - receipts	Larry (Larry is taking these to balance against the feed bunks that Jerry already took)	Jerry is not aware of any feed bunks he has taken. Feed bunks depicted go in draft	[redacted]		
114	114. Same as 113	Draft - receipts	See #113		[redacted]		
115	115. Hay Feeder	Pick in draft	Draft	Draft	Agreed	Agreed	
116	116. No Idea	?	?	?	Agreed	Agreed	
117	117. Old Auger/Misc	Pick in draft	Draft	Draft	Agreed	Agreed	
118	118. Junk/Misc	Pick in draft	Draft	Draft	Agreed	Agreed	
119	119. Misc	? Draft	Draft	Draft	Agreed	Agreed	
120	120. Horse Collars	Pick in draft	Draft	Draft	Agreed	Agreed	
121	121. No Idea Misc	? Draft	Draft	Draft	Agreed	Agreed	
122	122. No idea Misc	? Draft	Draft	Draft	Agreed	Agreed	
123	123. No Idea Misc	? Draft	Draft	Draft	Agreed	Agreed	
124	124. Mediated: Pay Jerry Part (pails and calf feeding)	Settled via mediation (draft)	Draft (pails and calf feeding equipment); As Mediated (the other items pictured)	Agree subject to comment to #127	[redacted]		
125	125. Dairy Supplies ??	Pick in draft/inventory 2/15	Split *	Split *	Agreed	Agreed	
126	126. Dairy Chemicals ??	Pick in draft/inventory 2/15	Split *	Split *	Agreed	Agreed	
127	127-130: Mediated: Pay Jerry Part	Settled via mediation Draft - at mediation Larry/Roger identified vacuum/tubes and bulk tank and wash vat - not other equipment - willing to horse trade	Larry/Roger (this was included in what they paid for at mediation...they are not horsetrading when consideration has already been given for these items)	Lon's summary letter following the April 23 mediation listed three specific items - Mueller 1000 gallon cooler; Westphalen vacuum pump and piping; and wash vat as the items selected The rest are subject to the draft.	[redacted]		
131	131. Empty Containers: same as #100	? Ok	Draft	Draft	Agreed	Agreed	
132	132. Part of Barn - draft (let have d Jerry can have (48))	Goes with real property	Panels/gates that are affixed go with the land (we are not demolishing or disassembling real property, just like we are not drafting individual 2 x 4 boards, floor coverings, windows, etc. that are parts of buildings); if panels/gates are sitting loose, they are to be drafted	Jerry will agree to allow 132 to remain with the farm if he is allowed to have the item depicted on photo 48	[redacted]		

SMALL EQUIPMENT LIST

Order	Description	Disposition	Disposition (MAP 5.24.2013)	Disposition (PWT 5.30.13)	Disposition (MAP 6.5.2013)	Disposition (PWT 6.25.2013)	Disposition (MAP 8.8.2013)
133	133. Steve's Fork	Steve - ok; where are other forks?	Steve, Larry and Roger are happy to look around Jerry's place in town to find other forks....let me know if Jerry would like my clients to investigate	Alice has already conducted an investigation. In addition, we've previously provided a complete listing of partnership property in Jerry's control.	Steve gets the fork as indicated		
134	134. Calf Puller	Pick in draft	Draft	Draft	Agreed	Agreed	
135	135. Shovels	Pick in draft	Draft	Draft	Agreed	Agreed	
136	136. No Idea Misc	? Draft	Draft	Draft	Agreed	Agreed	
137	137-139: Already Pictured	Duplicate	-	-	Agreed	Agreed	
140	140. Bin Fan: Goes with Bin -portable	Draft	Draft	Draft	Agreed	Agreed	
141	141. Tools: Roger's (Step in Draft)	Roger ok step - draft	Draft (step); Roger (tools)	Agree	Agreed	Agreed	
142	142: Junk/misc	Pick in draft	Draft	Draft	Agreed	Agreed	
143	143. Trailer	Pick in draft	Draft	Draft	Agreed	Agreed	
144	144. Junk/misc	Pick in draft	Draft	Draft	Agreed	Agreed	
145	145 Feed Bunk: On Draft	Pick in draft	Draft	Draft	Agreed	Agreed	
146	146. Old Corn Head: Junk	Pick in draft	Draft	Draft	Agreed	Agreed	
147	147. Junk/misc	Pick in draft	Draft	Draft	Agreed	Agreed	
148	148. On Draft	Pick in draft	Draft	Draft	Agreed	Agreed	
149	149. Larry's	Larry ok	Larry	Larry	Agreed	Agreed	
150	150. Larry's Auger	Larry ok	Larry	Larry	Agreed	Agreed	
151	151. On equipment Draft	Pick in draft	Draft	Draft	Agreed	Agreed	
152	152. Trailer	Pick in draft	Draft	Draft	Agreed	Agreed	
153	153. Pig Carrier: Jerry Already has one at Brian's place	Larry/Roger Both carriers part of draft process	Draft	Draft	Agreed	Agreed	
154	154 Junk/misc	Pick in draft	Draft	Draft	Agreed	Agreed	
155	155. Junk/misc	Pick in draft	Draft	Draft	Agreed	Agreed	
156	156. Silage Conveyor	Pick in draft	Draft	Draft	Agreed	Agreed	
157	157. Silage Blower	Pick in draft	Draft	Draft	Agreed	Agreed	
158	158-164: On Equipment Draft	Pick in draft	Draft	Draft	Agreed	Agreed	
165	165. Goes with Skidloader	Goes with loader ok	Goes with skidloader	Goes with skidloader	Agreed	Agreed	
166	165-168: On Equipment Draft	Pick in draft	Draft	Draft	Agreed	Agreed	
169	169. No Idea - sides for army trailer	? Jerry	Jerry	Jerry	Agreed	Agreed	
170	170. Old Water Tank	Pick in draft	Draft	Draft	Agreed	Agreed	
171	171. Old Fuel Tank	Pick in draft	Draft	Draft	Agreed	Agreed	
172	172. Junk/misc	Pick in draft	Draft	Draft	Agreed	Agreed	
173	173. Silage Auger	Pick in draft	Draft	Draft	Agreed	Agreed	
174	174. Bale Carrier	Pick in draft	Draft	Draft	Agreed	Agreed	
175	175. Junk/misc	Pick in draft	Draft	Draft	Agreed	Agreed	
176	176. Junk/misc	Draft	Draft	Draft	Agreed	Agreed	
177	177. Old Hoist	Pick in draft	Draft	Draft	Agreed	Agreed	
178	178. Larry's	Larry ok	Larry	Larry	Agreed	Agreed	
179	179. Junk - carrier for red cattle working shoot	goes with shoot	Goes with shoot	Goes with shoot	Agreed	Agreed	
180	180. Junk/misc	Pick in draft	Draft	Draft	Agreed	Agreed	
181	181. Junk/misc	Pick in draft	Draft	Draft	Agreed	Agreed	
182	182. Old Sprayer	Belongs to Richard's Farms	Richards Farms	Richards Farms	Agreed	Agreed	
183	183. Steve's Crate	Steve - crate ok	Steve	Steve	Agreed	Agreed	
184	184. On Equipment Draft	Pick in draft	Draft	Draft	Agreed	Agreed	[redacted]
185	185. Old Grain Vac	Pick in draft	Draft	Draft	Agreed	Agreed	
186	186. On Equipment Draft	Pick in draft	Draft	Draft	Agreed	Agreed	
187	187. Larry's	Larry ok	Larry	Larry	Agreed	Agreed	
188	188. Old Truck Frame	Pick in draft	Draft	Draft	Agreed	Agreed	
189	189. Old Bell Tower	Pick in draft	Draft	Draft	Agreed	Agreed	

SMALL EQUIPMENT LIST

Order	Description	Disposition	Disposition (MAP 5.24.2013)	Disposition (PWT 5.30.13)	Disposition (MAP 6.5.2013)	Disposition (PWT 6.25.2013)	Disposition (MAP 8.8.2013)
190	190. Drag	Pick in draft	Draft	Draft	Agreed	Agreed	
191	191-193: On Equipment Draft	Pick in draft	Draft	Draft	Agreed	Agreed	
194	194. Electric Fencer: Goes with Farm	Goes with real property - Ok for purposes of not interrupting operation	Goes with real property	Goes with real property	Agreed	Agreed	
195	195. Water Tank - same as 196	Draft	Draft	Draft	Agreed	Agreed	
196	196. Water Tank - same as 195	Draft	Draft	Draft	Agreed	Agreed	
197	197. Metal gates - no affixed	Draft	Larry (Larry will take these two); Jerry (Jerry can get two from Brian's place to compensate him)	There are no known partnership gates at Brian's place. Those shown on 197 in draft.	[redacted]	Agreed	
198	198. Junk/misc	Draft	Draft	Draft	Agreed	Agreed	
199	199. Fence Poles	Pick in draft	Draft	Draft	Agreed	Agreed	[redacted]
200	200. Rock: No idea/rail raod ties	? Draft	Roger (these are Roger's railroad ties shown in #2 that Jerry said Roger could have)	Agree	Agreed	Agreed	
201	201. Tires:	Pick in draft	Draft	Draft	Agreed	Agreed	
202	202. Old Disc Blades	Pick in draft	Draft	Draft	Agreed	Agreed	
203	203. Junk/Misc	Pick in draft	Draft	Draft	Agreed	Agreed	[redacted]
204	204. Junk/Misc	Pick in draft	Draft	Draft	Agreed	Agreed	
205	205. Junk/Misc	Pick in draft	Draft	Draft	Agreed	Agreed	
206	206. Misc	?Draft	Draft	Draft	Agreed	Agreed	[redacted]
207	207. Tools: Equipment Draft	Pick in draft	Draft	Draft	Agreed	Agreed	
208	208. Misc Tools	? Draft	Draft	Draft	Agreed	Agreed	
209	209. Misc	?Draft	Draft	Draft	Agreed	Agreed	
210	210: Tractor Hook Up (duplicate)	Pick in draft	Draft	Draft	Agreed	Agreed	[redacted]
211	211: Misc (Duplicate)	Draft	Draft	Draft	Agreed	Agreed	
212	212: Tractor weights/parallel car	Draft	Draft (draft all tractor weights)	Agree...subject to 4010 exception	[redacted]		

SMALL EQUIPMENT LIST

Order	Description	Disposition	Disposition (MAP 5.24.2013)	Disposition (PWT 6.30.13)	Disposition (MAP 6.5.2013)	Disposition (PWT 6.25.2013)	Disposition (MAP 6.6.2013)
213	213: Walk behind weed eater	Draft	Draft	Draft	Agreed	Agreed	
214	214: Weight for 4010 - go with 4010; Misc	Draft - misc	Draft (draft all tractor weights)	As previously agreed, items such go with tractors if intended for a particular tractor. Otherwise, draft	[redacted]		
215	215: 3 pt hitch	Draft	Roger/Larry (my clients will keep this one, and Jerry can keep the one he took and put on his tractor in town)	3-pt hitch in Jerry's possession is off of 8200 and it came with 8200 and, per our previous agreement, shall remain with the 8200. This hitch in draft.	[redacted]		
216	216: Duplicate	Draft	Draft	Draft	Agreed	Agreed	
217	217: Duplicate	Draft	Draft	Draft	Agreed	Agreed	
218	218: Duplicate	Draft	Draft	Draft	Agreed	Agreed	
219	219: Duplicate	Draft	Draft	Draft	Agreed	Agreed	
220	220: Duplicate	Draft	Draft	Draft	Agreed	Agreed	
221	221: Duplicate	Draft	Draft	Draft	Agreed	Agreed	
222	222: Duplicate	Draft	Draft	Draft	Agreed	Agreed	
	Additional items not depicted in Jerry's photographs						
223	GPS unit 1		Draft (this is movable and not affixed to real property, so should be drafted like any other piece of equipment)	We have agreed since the outset that tires, toolboxes, and other items that are for a particular piece of equipment stay with that equipment. There is no difference with the GPS units. Each unit was purchased for a particular piece of equipment and has been used exclusively in that equipment	[redacted]		
224	GPS unit 2		Draft (this is movable and not affixed to real property, so should be drafted like any other piece of equipment)	~~See above #223~~	[redacted]		
225	GPS unit 3		Draft (this is movable and not affixed to real property, so should be drafted like any other piece of equipment)	See above #223	[redacted]		
226	Poly/plastic water tank at Stanley Corner		Draft	Only one tank exists and it belongs to Jerry	[redacted]		
227	Poly/plastic water tank at Stanley Corner		Draft	Only one tank exists and it belongs to Jerry.	[redacted]		

SMALL EQUIPMENT LIST

Order	Description	Disposition	Disposition (MAP 5.24.2013)	Disposition (PWT 5.30.13)	Disposition (MAP 6.5.2013)	Disposition (PWT 6.25.2013)	Disposition (MAP 6.8.2013)
228	3/4" socket set		Draft	Purchased by Jerry from Art Swenson prior to partnership. We previously resolved this item	[redacted]	[redacted]	[redacted]
229	1/2" metric socket set		Draft	Agree	Agreed	Agreed	
230	Railroad jack (gift to Larry from George Smith)		Larry	Jerry purchased this jack from John Walker. To Jerry.	[redacted]		
231	Old snowblower		Draft	Agree	Agreed	Agreed	
232	New red gate at Richards place			Draft	Agreed	Agreed	
233	Fan on 20,000 bu bin at Roger's place			Draft	Agreed	Agreed	
234	Fan on bin #3 on Schable place			Draft	Agreed	Agreed	
235	Old drill located on home place			Draft	Agreed	Agreed	
236	5-section drag				[redacted]	Agreed	
237	10 Stroberg cattle panels (Richard's lot)				[redacted]	[redacted]	
238	3 gates at Richards place				[redacted]	[redacted]	
239	Brooder for baby chicks (homeplace)				[redacted]	Agreed	
240	26x80 Harvester silo at Hohm Place					[redacted]	
241	20x30 Harvester silo at Hohm Place					[redacted]	
242	15 horse driver fan at Roger's Place					[redacted]	
243	OMC Stirrator at Roger's place					[redacted]	
244	Power sweep at Roger's place					[redacted]	
245	10 horse driver fan at Home place					[redacted]	
246	Suck-up stirrator at Home place					[redacted]	
247	Calving pen, panels in barn at Home					[redacted]	
248	3 styles of stanchions in barn at home place					[redacted]	
249	2 grain spreaders - 1 at Roger's and 1 at Home					[redacted]	
250	Fence line feed bunk at Roger's					[redacted]	
251	3 wood H-style bunks - 2 at home place and 1 at Hohm					[redacted]	

SMALL EQUIPMENT LIST

Order	Description	Disposition	Disposition (MAP 5.24.2013)	Disposition (PWT 5.30.13)	Disposition (MAP 6.5.2013)	Disposition (PWT 6.25.2013)	Disposition (MAP 8.8.2013)
252	Railroad ties part of unfinished fence at Roger's place						
253	Various bin unloading equipment						
254	Measuring wheel						
255	4-wheel sprayer						
256	aluminum pick-up ramps						
255	hay rack mounted on old truck frame (last seen in Brian's corn crib)						
266	transfer pump for two water poly tanks						
267	hand pump for fuel (outside of Jerry's shed)						
268	everything in the shed at Stanley Corner (inventory needed)						
269	mailbox Jerry took from the home place						
270	sump pump Jerry took from the home place						
271	cabinet Jerry removed from above the steps at home place (made by Uncle Nick)						
272	junk Jerry left at the home place						

Other issues	MAP 8.8.2013
True-up	
Real estate tax	
Utilities	
Rent	
Fuel	
Animal proceeds	
Bale count	

Mitch A. Peterson

From: Michael Tobin <mftobin@bgpw.com>
Sent: Thursday, October 31, 2013 1:26 PM
To: Mitch A. Peterson; Paul Tschetter
Cc: Beverly Brady
Subject: RE: Paweltzki

Mitch,

Everything since February was done with the hope that we could actually reach an agreement. Unfortunately, as the last several months have proven, an agreement cannot be reached. With seemingly every step forward, we collectively take 1 if not 2 back. Any agreement to arbitrate, to the extent there ever was such an agreement, was certainly contingent upon the overall agreement of pushing this to an amicable resolution. Selling it all at auction and splitting the proceeds is the only way to get this resolved, pure and simple.

Best regards,

Michael Tobin
Boyce, Greenfield, Pashby & Welk, LLP
P.O. Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424

From: Mitch A. Peterson [mailto:MPeterson@dehs.com]
Sent: Thursday, October 31, 2013 11:02 AM
To: Michael Tobin; Paul Tschetter
Subject: Paweltzki

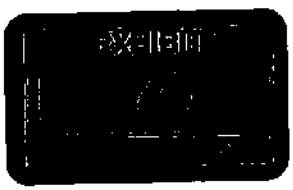
So what happened to your client's agreement to arbitrate any unresolved issues? Am I going to have to file a motion to enforce arbitration?

Best regards,

Mitch Peterson

Begin forwarded message:

> **From:** "canon4th@dehs.com" <canon4th@dehs.com>
> **To:** "Catherine A. Miller" <CMiller@dehs.com>, "Mitch A. Peterson" <MPeterson@dehs.com>
> **Subject: Attached Image**



Mitch A. Peterson

From: Michael Tobin <mftobin@bgpw.com>
Sent: Monday, November 04, 2013 10:55 AM
To: Mitch A. Peterson
Cc: Steve Huff (steve@jmmwh.com); Paul Tschetter; Beverly Brady
Subject: RE: Paweltzki

Mitch,

If you are trying to intimate that Paul has done something wrong, or that we are going done this path unintelligently, I can assure you neither is correct. We are no closer to resolution today than we were when I left for my sabbatical. I also reject the suggestion that there can be piecemeal meetings of the mind toward a settlement. We had understandings and agreements as to certain items, but it was all contingent upon resolution of the entire dispute, to which we are no where near close. And I ask again: what would we arbitrate? The list of unresolved issues that your clients think we have is going to be different, maybe even extremely different, than our list. Yours may be longer, or ours maybe longer, but the point is that we won't even be able to agree about what we disagree about.

Be that as it may. Resolving such issues is why Judges are so important.

Best regards,

Michael Tobin
Boyce, Greenfield, Pashby & Welk, LLP
P.O. Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424

From: Mitch A. Peterson [mailto:MPeterson@dehs.com]
Sent: Monday, November 04, 2013 10:29 AM
To: Michael Tobin
Cc: Steve Huff (steve@jmmwh.com); Paul Tschetter; Beverly Brady
Subject: RE: Paweltzki

Ok. I will be filing a motion to enforce the portion of the settlement actually agreed upon and to compel arbitration as to the unresolved items. Mike, I know you were on sabbatical during a fair portion of the time when issues were resolved, so I trust you will visit with Paul about what was agreed upon (including arbitration as to unresolved issues).

Best regards.

Mitch Peterson
Davenport, Evans, Hurwitz & Smith, L.L.P.
(605) 357-1242

DAVENPORT EVANS
LAWYERS

From: Michael Tobin [mailto:mftobin@bgpw.com]
Sent: Monday, November 04, 2013 10:24 AM
To: Mitch A. Peterson
Cc: Steve Huff (steve@jmmwh.com); Paul Tschetter; Beverly Brady
Subject: FW: Paweltzki

Mitch,

We have discussed the request to return to the mediation table with our client, and we have no interest at this time as we do not believe the discussions would be worthwhile.

Best regards,

Michael Tobin
Boyce, Greenfield, Pashby & Welk, LLP
P.O. Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424

From: Michael Tobin
Sent: Friday, November 01, 2013 10:26 AM
To: 'Mitch A. Peterson'
Cc: Paul Tschetter; Beverly Brady; Steve Huff
Subject: RE: Paweltzki

Mitch,

We will discuss it with our client and let you know. Thanks.

Best regards,

Michael Tobin
Boyce, Greenfield, Pashby & Welk, LLP
P.O. Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424

From: Mitch A. Peterson [mailto:MPeterson@dehs.com]
Sent: Thursday, October 31, 2013 4:55 PM
To: Michael Tobin
Cc: Paul Tschetter; Beverly Brady; Steve Huff
Subject: RE: Paweltzki

Do you guys think a half-day mediation would make sense? Mediation has not finally resolved all issues, but there has always been significant progress following the last two mediations. Perhaps we conclude with disagreeing over $10,000-$20,000 in issues, but we can negotiate an amenable process for resolution (e.g., sell the disputed items, arbitrate the positions, and split the cash based on the arbitrator decision). Let me know if you think it is worth considering.

From: Michael Tobin [mailto:mftobin@bgpw.com]
Sent: Thursday, October 31, 2013 3:34 PM
To: Mitch A. Peterson

Cc: Paul Tschetter; Beverly Brady; Steve Huff
Subject: RE: Paweltzki

Mitch,

If we arbitrate, we will still be seeking a sale of the machinery, equipment and personal property. I believe the court system is a far more efficient and effective means of accomplishing that.

I guess the point is that we don't have any agreement. Every concession, every move, was conditioned upon another concession, another move. As I said, we collectively took one step forward and then two back.

As for your "offer" from 2.5 months ago, it wasn't an offer at all. You basically said that your clients would give no more, that they would make no concessions, and you told us to take it or leave it. Besides, Paul Tschetter has sent you emails since then asking for information, asking questions, trying to move things forward. We don't get any response.

What "disputes" do believe are subject to arbitration? I have no doubt that, whatever list you and your clients come up with, we won't agree. Similarly, whatever list my client and I came up with, you and your clients would reject it. I guess that's the point. We are no where nearer a resolution than we were in February. We are tired of the silliness of arguing whether a GPS system for a tractor stays with it or not. We are tired of the silliness of arguing whether a propane tank stays with the land or not. We are tired of the silliness of your clients blocking driveways and fence openings with equipment so that my client cannot get to his fields. We are tired of the silliness that some debts for equipment apparently go with the equipment, yet other debts for equipment don't. The quickest way to end it all is to sell it and, after appropriate debts are paid, split the proceeds. Will be far, far easier to split pennies than combines, discs, and screwdrivers.

Best regards,

Michael Tobin
Boyce, Greenfield, Pashby & Welk, LLP
P.O. Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424

From: Mitch A. Peterson [mailto:MPeterson@dehs.com]
Sent: Thursday, October 31, 2013 2:32 PM
To: Michael Tobin
Cc: Paul Tschetter; Beverly Brady; Steve Huff
Subject: Re: Paweltzki

How could an agreement to arbitrate unresolved issues be contingent upon everything being resolved? That makes zero sense.

I'll file the motion. Perhaps you guys can get around to responding to our offer from 2.5 months ago.

Best regards,

Mitch Peterson

On Oct 31, 2013, at 11:27 AM, "Michael Tobin" <mftobin@bgpw.com> wrote:

> Mitch,

Everything since February was done with the hope that we could actually reach an agreement. Unfortunately, as the last several months have proven, an agreement cannot be reached. With seemingly every step forward, we collectively take 1 if not 2 back. Any agreement to arbitrate, to the extent there ever was such an agreement, was certainly contingent upon the overall agreement of pushing this to an amicable resolution. Selling it all at auction and splitting the proceeds is the only way to get this resolved, pure and simple.

Best regards,

Michael Tobin
Boyce, Greenfield, Pashby & Welk, LLP
P.O. Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424

From: Mitch A. Peterson [mailto:MPeterson@dehs.com]
Sent: Thursday, October 31, 2013 11:02 AM
To: Michael Tobin; Paul Tschetter
Subject: Paweltzki

So what happened to your client's agreement to arbitrate any unresolved issues? Am I going to have to file a motion to enforce arbitration?

Best regards,

Mitch Peterson

Begin forwarded message:

> **From:** "canon4th@dehs.com" <canon4th@dehs.com>
> **To:** "Catherine A. Miller" <CMiller@dehs.com>, "Mitch A. Peterson" <MPeterson@dehs.com>
> **Subject: Attached Image**

STATE OF SOUTH DAKOTA) : SS COUNTY OF MCCOOK)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
GERALD PAWELTZKI, Plaintiff, vs. ROGER PAWELTZKI and LAWRENCE PAWELTZKI, Defendants.	CIV. 12-114 **SUPPLEMENTAL AFFIDAVIT OF MITCHELL A. PETERSON**

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

MITCHELL PETERSON, being duly sworn on his oath, deposes and states as follows:

1. I am one of the attorneys for Defendants in the above-captioned matter and make this Supplemental Affidavit to provide an additional document for the Court's consideration of Defendants' motion to enforce the settlement and motion to compel arbitration as to any unresolved issues.

2. Attached hereto as Exhibit 8 is a true and correct copy of an email Paul Tschetter, counsel for Plaintiff, sent to me on June 26, 2013. At this point in the resolution, both mediations had occurred and counsel for the parties were continuing to negotiate primarily over selection of equipment and truing-up partnership debts and expenses.

3. In the highlighted paragraph at the end of Exhibit 8, Mr. Tschetter wrote the following:

> As we continue our back-and-forth on these issues, **it appears we may be approaching an impasse on several of the items. Perhaps we should simply schedule a couple of days to arbitrate these issues with Lon Kouri** for later

this summer, although with his schedule, we may be looking at dates in September. [Emphasis added]

Dated at Sioux Falls, South Dakota, this 10th day of February, 2014.

Mitchell Peterson

Subscribed and sworn before me this 10th day of February, 2014.

Catherine A. Miller

Notary Public, South Dakota
My Commission expires: 11-03-2017

CATHERINE A. MILLER
NOTARY PUBLIC
SOUTH DAKOTA
SEAL SEAL

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendants, hereby certifies that a true and correct copy of the foregoing "Supplemental Affidavit of Mitchell A. Peterson" was served by mail and email upon:

Michael Tobin
Paul W. Tschetter
Boyce, Greenfield, Pashby & Welk, L.L.P.
P.O. Box 5015
Sioux Falls, SD 57117
mftobin@bgpw.com
pwtschetter@bgpw.com
Attorneys for Plaintiff

on this 10th day of February, 2014.

Mitch A. Peterson

From: Paul Tschetter <pwtschetter@bgpw.com>
Sent: Wednesday, June 26, 2013 4:22 PM
To: Mitch A. Peterson
Cc: Andrea K. Hammer
Subject: Paweltzki
Attachments: 06.25.13 Equipment List (running dialogue).xlsx

Mitch: Attached is an updated table with the remaining outstanding issues. When the list was sent to me via email on June 5, you indicated that your clients had not yet had a chance to confirm the disposition of the equipment reflected in the table and I have not heard from you following receipt of that document that any of the information changed following your clients' review. I believe I've addressed the outstanding issues, but with the volume of items we are still working through, there may be some thing I missed.

FSA and Other Signatures Jerry had an appointment with the FSA office yesterday. According to Jerry, all documents with the FSA office which presently require a signature have been signed by him. I understand all of the diary paperwork has been signed.

Partnership Tax Preparation: I think it better to close out the partnership account when all matters are resolved. The tax preparer can send a bill to each of the three brothers, rather than you and me having to get involved on the payment issue when that times comes. Assuming we can get the remaining issues resolved, I think it better not to keep a financial string of the parties' connected, but instead, have each be responsible for 1/3 of the tax preparation cost.

True-up
We are approaching the true-up from two different perspectives and perhaps our difference in numbers is due, at least in part, to the fact that "line of credit" is used both in reference to the partnership's total debt as well as a particular note at the bank. In any event, Jerry's proposal is that we remove the dairy operation from the calculation entirely – Roger/Larry get all of the revenue and expenses after the February 15 mediation (with the exception of milk checks which were received after February 15 for milk sold/delivered prior to February 15 due to the fact that there is a lag in the receipt of the milk checks). I'm not sure that I agree the milking operation continued to be a partnership endeavor after February 15 as the livestock all went to Roger/Larry. Jerry had no control over the diary operation after February 15 and should not be responsible for any expenses Larry/Roger incurred. All decisions relating to grain and hay use for the diary operation were made by Roger/Larry – Jerry had no input into the management. If we remove the dairy operation from both the revenue and expense sides of the balance sheet, the partnership is not saddled with any more or less revenue than it has corresponding expenses. Instead, Larry/Roger can run the revenue/expenses through their new partnership. Larry/Roger's use of their personally owned grain/hay/silage need not be accounted for. Once we remove the milking operation from the calculation and use the fuel and other measurements taken at your clients' suggestion, we will be able to work backwards to the partnership's cash/debt position as of our February 15th mediation. Although you state fuel and equipment was used for partnership business, given that the diary operation became Larry/Roger's operation following our February 15 mediation, their use of the fuel, etc. does not constitute partnership business. Further, although Jerry did use fuel after the February 15 mediation and after the measurements of the fuel were taken, Jerry's use was inarguably de minimis as compared to the daily use of equipment by Larry/Roger. My email of May 23 outlines the various amounts of the partnership debt and payments towards the same. I do not see it necessary to include those again, but would refer you to that email. Jerry does not take issue with the deposits made in the partnership account, but simply identifies those as belonging to the three brothers, rather than being related to the milking operation. Perhaps it would be worthwhile for us to sit-down – maybe even with a third-party - in an effort to sort through these issues. I fail to see how including the milking operation revenue and expenses is necessary given Jerry's removal from the same following the first mediation.

In addition to the above, we have a disagreement as to the resolution of the following although I believe they can be resolved in truing up the financial arrangements:

- Real estate tax payment.
- Utilities expense at home place. Is it your clients' position that Jerry should have shut off the propane to the house on the home place? How is protecting partnership property – not knowing how the real property issue would be resolved – not a partnership expense?
- Regarding the parties' respective claims for rent, following the various phases of our mediation this spring, it was agreed that Jerry would have a certain amount of time to remove his belongings from the home place – one period of time relating to the house itself and a separate period of time relating to the removal of items Jerry has selected thus far in the draft. There was never any discussion of periods of time for Larry or Roger's livestock to be on Jerry's pasture, consuming Jerry's feed. Jerry also is concerned about damage to items that Larry/Roger may be moving out of storage before Jerry has had a chance to pick the equipment/tools up.
- Undocumented proceeds of animals taken to lock prior to February 15 mediation.
- Discrepancy in bale count.

As we continue our back-and-forth on these issues, it appears we may be approaching an impasse on several of the items. Perhaps we should simply schedule a couple of days to arbitrate these issues with Lon Kouri for later this summer, although with his schedule, we may be looking at dates in September. Paul

Paul W. Tschetter
Boyce, Greenfield, Pashby & Welk, L.L.P.
300 S. Main Avenue
P.O. Box 5015
Sioux Falls, SD 57117-5015
Telephone: (605) 336-2424
Facsimile: (605) 334-0618

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)ss
COUNTY OF MCCOOK) FIRST JUDICIAL CIRCUIT

****

GERALD PAWELTZKI,

Plaintiff,

TELEPHONIC
EVIDENTIARY HEARING

-vs-

44CIV12-000114

ROGER PAWELTZKI and LAWRENCE PAWELTZKI,

Defendants.

****

DATE & TIME: February 12, 2014
9:25 a.m.

BEFORE: THE HONORABLE STEVEN JENSEN
CIRCUIT COURT JUDGE
Union County Courthouse
Elk Point, South Dakota 57025

LOCATION: McCook County Circuit Courtroom
McCook County Courthouse
Salem, South Dakota 57058

APPEARANCES: For the Plaintiff:
Mr. Michael F. Tobin
Attorney at Law
300 S. Main Avenue
Sioux Falls, SD 57104

For the Defendants:
Mr. Mitchell A. Peterson
Attorney at Law
206 West 14th Street, PO Box 1030
Sioux Falls, SD 57101-1030

THE COURT: All right. Okay. So then for the record this is Gerald Paweltzki versus Roger Paweltzki and Lawrence Paweltzki. This is McCook County civil file 12-114. The parties are all participating in this hearing this morning by telephone. And the plaintiff Mr. Paweltzki is present with his attorney Mike Tobin, and the defendants appear through their counsel Mitchell Peterson. And then we have a witness also appearing by phone.

And I would just note for the record that this is a continuation of the hearing on the motion to enforce settlement agreement and also to compel arbitration. The Court originally scheduled this hearing in McCook County, received affidavits and arguments at the time of that hearing, and then scheduled today's date to receive additional oral testimony that the Court had indicated it would like to receive.

And my understanding is that the parties are, with the Court's permission, in agreement to handle this by phone this morning and that any evidence that the Court receives today will be treated as substantive evidence. Is that correct, Mr. Tobin?

MR. TOBIN: Yes, Your Honor.

THE COURT: And, Mr. Peterson?

MR. PETERSON: Yes, Your Honor.

THE COURT: And then the other matter is I did receive a supplemental affidavit and attachments from Mr. Peterson I believe a day or two ago. Are you intending, Mr. Peterson, to offer that as substantive evidence in support of your motions?

MR. PETERSON: I would, Your Honor.

THE COURT: Is there any objection to that, Mr. Tobin?

MR. TOBIN: We would object on grounds of timeliness, Your Honor.

THE COURT: Okay. Well, I'm going to receive it as I've received the other affidavits and I'll give it the consideration the same as I will the other evidence that I received to date.

And then we have Mr. Kouri also on the phone and I understand we're going to take some testimony from him. So, Mr. Kouri, if you'd raise your right hand.

LON KOURI,

called as a witness, being first duly sworn, testified as follows:

THE WITNESS: I do.

THE COURT: Okay. Who wants to start the examination?

MR. PETERSON: Judge, this is Mitch Peterson. Since it's our motion to enforce settlement and compel

arbitration, I think it would be appropriate if we go first.

THE COURT: Okay.

MR. PETERSON: But I'd certainly defer to the Court.

THE COURT: That's fine. Any objection to that, Mr. Tobin?

MR. TOBIN: No, Your Honor.

THE COURT: Okay. Go ahead then.

DIRECT EXAMINATION

Q. (BY MR. PETERSON) Good morning, Lon.

A. Good morning.

Q. For the record go ahead and state your name, please.

A. Lon Kouri.

Q. And, Lon, did you serve as mediator in this case at two separate mediations in February and April of 2013?

A. I did.

Q. Have you had a chance to look at your email dated February 16th, 2013, that summarizes what was resolved at the first mediation?

A. I have had a chance to briefly go over it. Yes.

MR. PETERSON: Okay. Judge, for the record

that's Exhibit 1 to my affidavit.

THE COURT: Okay.

Q. (BY MR. PETERSON) Lon, the section that's entitled real property on your email, you state that, you know, which parcels are going to which brother and then state including all structures attached to those parcels. What recollection do you have about discussions about structures or fixtures of the real property?

A. My recollection is that there were at least a couple of issues, primarily two issues that dealt with the structures that were attached. And those would have been I believe the bins, storage bins as well as some storage tanks that were affixed to the real property.

Q. And what do you recall in terms of what was resolved with respect to those items at the first mediation?

A. My recollection is that it was decided between the parties that any structures which were attached to the property, to the realty, would be considered part of the realty.

Q. Do you recall any particular items that would have been carved out that are not set forth in your email that's Exhibit 1?

A. You know, at this point I guess I don't. I just remember that there was a discussion between the

parties about whether the bins, whether the tanks would be considered part of the realty. And ultimately the agreement was that those -- whatever bins and storage tanks were attached to the property would in essence be considered part of the real property.

Q. I'm going to move on here. There's a section entitled crop insurance. It's a couple paragraphs down on the first page of your email. Do you have that document with you? If you don't, I can just read the particular language and then ask you questions about it, but --

A. I do have it in front of me.

Q. Okay. There's a reference here to crop insurance proceeds to be paying down the debt at Farmers State Bank and then there's a discussion about the bank debt. Do you recall any agreement other than the debt would be split three ways between the brothers?

A. Well, but there were some discussions about did that pertain to particular pieces of equipment that were going to be divided and whether the debt which applied to a particular piece of equipment would, in effect, follow that equipment if that particular piece of equipment would have been taken by one of the parties pursuant to the draft.

Q. And are you aware, were there any equipment

specific loans that were not through Farmers State Bank?

A. I don't recall, Mitch.

Q. I realize we're stretching your memory now almost a year ago, so --

A. Right.

Q. The next section is entitled livestock and states that all the livestock identified on the Wieman list, I think it's a typo, including all proceeds will be going to Larry and Roger. Do you remember anything with respect to division of livestock proceeds beyond what's set forth in your email?

A. Well, I do recall that there were some follow-up issues regarding fat cattle and whether they were or were not to be included, but I -- and I know that there was a bit of a disagreement about that, but that was ultimately resolved at the second mediation.

Q. Okay.

A. So other than that, I don't have any specific recollection of any issues with regard to the cattle.

Q. So following the first mediation there was a dispute with respect to certain livestock?

A. As I recall thirteen fat cattle, yes.

Q. And whatever that dispute was, that got resolved at the second mediation?

A. Correct.

Q. Okay. Were there any unresolved issues with respect to livestock or the proceeds from livestock that you can recall that weren't ultimately resolved by the second mediation?

A. Not that I recall at this time.

Q. All right. For the Court's information I'm going to -- I want to talk about Exhibit 2 to my affidavit. And, Lon, this is the email from Mike Tobin to you the day after your settlement email. Have you had a chance to take a look at that email?

A. That's the email dated February 25?

Q. February 17th. It starts out, Lon and Mitch, everything looks good except the equipment, and then it continues.

A. You know, I do recall seeing that email. I'm having trouble finding it in my notes. I'm a little bit disorganized this morning. I had everything set up at my house and then when we had the little delay I had to throw everything in my briefcase, but I do recall that email.

Q. Was there some question about whether the Wieman list the parties had been using at the first mediation maybe didn't include certain items that Jerry Paweltzki believed should be partnership items?

A. Well, I know that that was an issue that was

raised in the email.

Q. I'm going to turn -- try to expedite this matter and just get to the meat of things here. The second mediation was concluded with a settlement memorandum that you drafted in April 23 of 2013. Do you have that document in front of you?

A. I do.

MR. PETERSON: Okay. And, Judge, for the record this is Exhibit 4 to my affidavit.

THE COURT: Okay. I've got it.

Q. (BY MR. PETERSON) And, Lon, just big picture here, I mean, the agreement speaks for itself. But there's an arrangement where certain pieces of equipment were selected by Jerry to be taken out of the draft and then Larry and Roger would have a certain number of picks. Does that refresh your memory on what happened with the equipment?

A. Yes.

Q. Okay. Do you recall at that point at mediation any issues with what list was being used or whether there were any disputes what should be on that list, anything of that nature?

A. I don't recall any disputes as to the equipment at that point. In fact, I thought we pretty much had figured it out over the course of the two mediations and

reached an agreement in terms of the mechanics of the draft as set forth in the memorandum.

Q. On the second page of Exhibit 4 there's a section entitled silage unloaders. Do you see that?

A. Yes.

Q. And it looks like here that the brothers were divvying up silage unloaders that were actually attached to silos on what is called Roger's place?

A. Yes.

Q. Were there any other discussions at the second mediation about carving out particular items that were affixed to either real property or structures that were part of real property?

A. Not that I recall offhand, Mitch.

Q. Finally, at the bottom under miscellaneous number two, is that what you referenced earlier about resolving this dispute with the thirteen fat cattle that arose between the two mediations?

A. Right. That's it.

Q. Other than the one email from Mr. Tobin that came right after the first mediation about, you know, whether the Wieman list included all equipment, do you recall getting any other emails from Jerry's attorneys or Jerry that took issue with your summary of what was actually resolved at the two mediations?

A. If you can just bear with me for one moment, I'm trying to look through my stack of emails here. Right offhand I don't see any other than that, the one you referenced.

Q. The second mediation in April, is that the last time that you participated in assisting a resolution to this dispute?

A. Yes. In terms of formal attendance at a mediation conference, correct.

Q. Following the second mediation I'll represent to you the parties directly with their attorneys engaged in the equipment draft that's referenced in your settlement memorandum. Were you present at that -- at the equipment draft or any of the sessions where pieces of equipment were being picked back and forth?

A. I was not.

Q. Do you recall at all any discussions about once an impasse was reached whether the parties would arbitrate any unresolved issues?

A. Yes. We had those discussions at the second mediation.

Q. What do you recall about those discussions?

A. Well, I know that we had discussions about it. I think that at least my recollection of the tenor of the discussions was that everybody at least was hopeful that

we had in place an agreement that was pretty much just going to flow and that everything would be done. But because there were some at least potential issues with regard to, for example, how some of the small tools were going to be split up and to the extent that there were maybe some executory things that were going to be contemplated under the agreement, we had a discussion that wherein we talked about using me as an arbitrator to resolve any disputes that may arise as you guys were going through what I'll call a finishing up, if you will, or the carrying out of the agreement. I do recall during the course of the discussion I had mentioned I think probably to both of you that I had agreed to do so in a similar fashion on another case that I had mediated and had, in fact, been called upon to arbitrate a dispute about that, so we discussed that as a possibility as well in our situation.

Q. For example, and as the parties were to be engaging in this equipment draft that's set forth in your settlement memorandum, if there was a disagreement about, you know, whether a particular piece of equipment was actually bought by the partnership or bought individually by one of the brothers, was that the sort of thing that you had agreed to be the arbitrator to resolve?

A. Yes.

Q. Did the parties or attorneys talk to you about why it made sense for you to be the arbitrator?

A. Yeah. There were discussions about it and I think they centered around the notion that just because of my involvement as the mediator that I was maybe the most familiar with some of those issues and that for purposes of efficiency and expediency it made sense for you guys to retain me.

Q. Did either -- any of the parties or any of the attorneys indicate to you that they were -- they were not wanting to use you as an arbitrator to resolve any impasses?

A. Not to my recollection.

Q. Did the counsel indicate that their clients agreed to resolve disputes with you as the arbitrator?

A. Yes, although at that time I do think that there was -- at least the thought was that after that second mediation everybody really thought that we sort of had things in hand. I mean, I sure did, but --

Q. And have you had any further contact from the parties about actually scheduling an arbitration following the second mediation?

A. No.

MR. PETERSON: Those are all my questions. Thank you.

THE COURT: All right. Mr. Tobin, any questions?

MR. TOBIN: Thank you, Your Honor.

CROSS-EXAMINATION

Q. (BY MR. TOBIN) Good morning, Lon.

A. Good morning.

Q. In your testimony with Mr. Peterson you talked about briefly with some debt issues about debt going with particular pieces of equipment?

A. Yes.

Q. And what do you remember being discussed and agreed upon as far as debt and equipment that was going to be selected by the parties?

A. My recollection, Mike, with regard to the equipment was that if one of the brothers drafted a particular piece of equipment that he would also take that equipment subject to whatever indebtedness there was with that equipment.

Q. And do you remember any discussions as to particular debts or particular equipment or was it just more in a broad sense that debt goes with the equipment?

A. More in a broad sense.

Q. Before the equipment draft a lot of the focus was on larger pieces of equipment, would you agree?

A. I'm sorry, Mike. I missed your question.

Q. Would you agree that the focus of the equipment draft discussion was on larger pieces of equipment?

A. During the first draft or was there a particular time, Mike?

Q. Well, when we were discussing doing the draft and when the first draft occurred the focus was on larger pieces of equipment as opposed to wrenches, nuts and bolts?

A. I'm still not quite sure I'm following your question, but I think that's a fair characterization.

Q. Well, I mean, what I'm driving at is that the discussion was on who's going to get what tractors and combines and grain carts as opposed to who's going to get hammers and saws?

A. No question about that. I mean, that was the -- one of the major issues was the division of the significant pieces of equipment.

Q. And in those discussions was it ever mentioned or contemplated that parties would go into the equipment and remove items, for example, GPS units out of tractors or other equipment?

A. Never mentioned.

Q. And what about removing scales from grain carts? Was that ever discussed or mentioned?

A. Not to my recollection.

Q. With the issue to arbitrate, I take it from your testimony you certainly didn't have a thought or an anticipation that you would be contacted in the days or weeks following that second mediation to actually do an arbitration?

A. No, I didn't. In fact, I -- I mean, candidly I really did think we had in place a mechanism that was going to take care of the issues that we had addressed, the major problems or the major sticking points, and that some of the smaller things which we had all agreed during the mediation that we would maybe try to avoid because they were more minutia and kind of irritants, for example, tools that you had mentioned. We just sort of -- I think the expectation was that if we got the big things taken care of, the small things like tools would just sort of take care of themselves.

Q. And I certainly appreciate and agree with that, Lon, but it sounds like you had an understanding that this mechanism, you called it, but that it contemplated that the parties had additional work to do?

A. No question. No question.

Q. And you anticipated and hoped that the parties in doing that additional work would act in mutual good faith with each other?

A. Sure.

Q. And I think you indicated that at no time in the weeks and months following that last mediation were you ever contacted in a capacity to serve as the arbitrator?

A. I was not.

Q. I don't know if you'll recall exactly which equipment my client Jerry Paweltzki drafted, but do you recall him drafting -- I think he had the first four picks. Does that comport with your memory?

A. Yeah. There were four picks which I -- and I believe that the agreement was that those were, in effect -- in fact, that was decided at the mediation is my understanding that there were four or five pieces that were separated out. And then from there, there was an equipment draft mechanism that was set in place under the agreement where I think Larry and Roger picked the next eight and then it followed from there.

Q. Would it surprise you and be violative of this good faith concept that when Jerry went to pick up some of that equipment GPS units had been dewired and taken out of that equipment?

A. I guess I'd have no knowledge about any of those things as to whether there were any GPS units that were part of the equipment before. Those issues did not come up during the mediation so I'm a little hesitant to

attribute any ill motives or bad faith of anybody because I wasn't aware of it until you just mentioned it, Mike.

Q. That's fair. When Mr. Peterson discussed the debt and how the debt would be split three ways following the first mediation with the bank?

A. Yes.

Q. Would it surprise you to learn that following that mediation the bank continued to advance funds on the partnership account that were used for Larry and Roger?

A. You know, I would be the first to tell you, Mike, that I don't have really any sort of familiarity with the dealings between the bank and the partnership or the individuals, so I'd also be a little hesitant to offer any judgments about that.

Q. And I appreciate that as well that you, you know, didn't have that follow-up discussion. In the first mediation in your email, which I believe was Exhibit 1, there was that discussion that the parties would use the Wieman Auction list for the equipment?

A. Yes.

Q. Were you aware that grain bins and LP storage tanks were actually on that equipment list?

A. I wouldn't -- I don't recall, Mike. But if you tell me they are, I'd have absolutely no reason to disagree with you.

Q. If -- Lon, if the Court compels arbitration and you serve in the role as arbitrator, would you appreciate receiving from the Court as much power and authority to resolve this matter in whatever expeditious manner you saw fit?

A. To the extent that the parties would want me to work in coordination with Judge Jensen to administer a decision on this deal, I obviously would be willing to do whatever that might operate to those ends.

Q. And maybe more directly, and you had no reason to know about this, but we've filed a motion essentially requesting a judicial sale as we believe that's going to be the best way to get through a lot of these issues that still are in front of us. If you are appointed as the arbitrator, would you be open to having that ability to selling matters if you believed that it was best for all involved?

A. In all candor, Mike, what I would tell you is that when we were discussing arbitration I would have contemplated that any disputes that I might have been asked to resolve would have been any issues pertaining to division of property, issues relative to, for example, things you've been talking about with GPS and those sort of things and whether the parties did, in fact, do what was necessary and appropriate to carry out the mediated

settlement. I will tell you, though, that obviously one of the main reasons that we mediated the dispute on the occasions that we did work as hard as we did to reach mediated settlement was to avoid the very obstacle of a judicial sale. Frankly what I would tell you is that as being called in to be an arbitrator with authority to order a judicial sale, I would tell you, Mike, it's beyond my contemplation of what I would have expected any subsequent arbitration proceedings to involve.

Q. And I appreciate that. But if the Judge empowered you, would you accept that responsibility?

A. Well, as you know, arbitrations are uniquely a question of the agreement of the parties. And what I would tell you is that to the extent the parties are willing to submit the matter to arbitration and if Judge Jensen was to include as part of the authority of subsequent arbitration proceedings to enforce a judicial sale of the property, well, then so be it. Yes.

MR. TOBIN: Thanks. I have no further questions.

THE COURT: Okay. Mr. Peterson, anything else?

REDIRECT EXAMINATION

Q. (BY MR. PETERSON) Just a couple quick questions. Actually just one. Lon, the two summaries that you've set forth for your summary of what was

actually mediated and settled, were those to your understanding concrete agreements or were they contingent upon resolving everything else with the equipment?

A. Well, I viewed them as concrete agreements with the understanding that the parties had in place a mechanism for the division of equipment, and that to the extent there were ongoing issues with regarding -- or with regard to either the procedure for division or whatever may have been involved in the draft, that those would have been issues that had been subject to subsequent arbitration.

Q. And an issue with the GPS where if Jerry takes the position that he gets a GPS if it just happens to be located in a piece of equipment that he uses versus a contrary position that these are after-market items that are switched between pieces of equipment depending on where they're needed, that's the kind of issue that you could arbitrate?

A. Well, certainly. But again it's an issue that is absolutely fresh for me today. And I would tell you, at least to my recollection, that those issues were not discussed during either of the previous mediations and so I really don't know anything about it other than what you're telling me today.

MR. PETERSON: Those are all my questions.

THE COURT: I just have one question, Mr. Kouri. I think I heard you say in questioning that there were discussions about using this arbitration process for items that remained unresolved or issues that came up in the winding-down process. I guess my question is were those just discussions or did you think that there was an agreement between the parties that they would submit to binding arbitration if there were issues that needed to be resolved as the parties wrapped things up?

THE WITNESS: There were discussions, Judge. And what I would tell you is that I had indicated to the parties that I would be willing to act as an arbitrator to the extent that there were ongoing problems. From my perspective, though, as I indicated earlier, I'll tell you is that I really did sort of think that we had in place a mechanism that was going to take care of most everything with the exception of perhaps a few issues that might come up.

THE COURT: Okay. All right. Anything else for either party from Mr. Kouri before we let him go?

MR. PETERSON: Not from the defendant, Judge.

MR. TOBIN: Nor from the plaintiff, Your Honor.

THE COURT: Okay. So, Mr. Kouri, if you want to disconnect, you can do that. I'm not going to rule

today. I'll get a written decision out to the parties shortly. Is there anything else that either party wants to submit before I enter a ruling?

MR. TOBIN: Not from the plaintiff, Your Honor.

MR. PETERSON: And not from the defendants, Your Honor.

THE COURT: Okay. We'll disconnect the phone line then and that will terminate the hearing and I'll get a written decision out to the parties.

MR. TOBIN: Thank you, Your Honor.

MR. PETERSON: Thank you.

THE COURT: Thank you. Bye.

(Proceedings concluded at 9:56 a.m.)

STATE OF SOUTH DAKOTA)
)ss CERTIFICATE
IN CIRCUIT COURT)

I, Jeanne M. Bossman, Court Reporter and Notary Public in and for the State of South Dakota, do hereby certify that the foregoing transcript, consisting of pages 1-24, inclusive, is a full, true and correct transcript of my original stenograph notes of the evidence offered and received and proceedings had in the aforementioned action.

Dated this 14th day of May, 2020.

Jeanne M. Bossman, RPR
Official Court Reporter
Notary Public
Commission expires: 12-12-22

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF MCCOOK	)	FIRST JUDICIAL CIRCUIT

GERALD PAWELTZKI,

Plaintiff,

vs.

ROGER PAWELTZKI and
LAWRENCE PAWELTZKI,

Defendants.

Civ. 12-114

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AND TO COMPEL ARBITRATION

The Court held an initial hearing on January 10, 2014, on Defendants' Motion to Enforce Settlement Agreement and to Compel Arbitration. At the hearing, Plaintiff personally appeared and was represented by his attorneys, Michael F. Tobin and Paul W. Tschetter. Defendants personally appeared and were represented by their attorney, Mitchell A Peterson. Following that hearing, the Court received additional oral testimony by phone from attorney and mediator Lon Kouri on February 15, 2014. Counsel for the parties attended the telephonic proceeding and examined Mr. Kouri. On June 17, 2014, the Court issued a letter decision denying Defendants' Motion to Enforce Settlement Agreement and to Compel Arbitration, said letter decision being expressly incorporated herein. Based upon that letter decision, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Gerald, Roger and Lawrence Paweltzki are brothers that have farmed together under a partnership arrangement for a number of years.

2. In an effort to resolve disputes that have arisen between them and to resolve the pending litigation, the parties agreed to a voluntary mediation with Kouri.

3. On February 15, 2013, the parties initially met for mediation.

4. Following the February 15, 2013, mediation, issues persisted between the parties that lead them to a second mediation with Kouri on April 23, 2013.

5. Following the April 23, 2013, mediation, Kouri sent out a letter entitled SETTLEMENT MEMORANDUM dated April 23, 2013, to the attorneys which stated, "[t]his confirms the terms of settlement we reached today . . ."

6. The Memorandum outlined the terms of settlement, including the incorporation of the "settlement memorandum from Lon Kouri dated February 16, 2013 . . ."

7. The April 23, 2013, Settlement Memorandum included signature lines for the attorneys on behalf of their clients.

8. The April 23, 2013, Settlement Memorandum was never signed by the attorneys or their clients.

9. Kouri testified that, following the April 23, 2013, mediation, the parties had resolved the bulk of the issues and that they had created a mechanism for resolving disputes after the mediation.

10. Kouri acknowledged that he understood there were a number of smaller issues which could create potential issues but was hopeful the parties could work through them.

11. Kouri suggested to the attorneys the potential that any unresolved issues following the second mediation could be arbitrated and that he would be willing to serve as the arbitrator, if needed.

12. Kouri was not present for the draft of equipment that followed the second mediation.

13. Kouri confirmed in his testimony that some of the issues Gerald claims still remain concerning certain equipment were not discussed at the second mediation.

14. Lawrence and Roger presented an affidavit alleging that the written document is an accurate summary of the parties' agreement at the time of the second mediation.

15. Gerald agrees that an "apparent" agreement was negotiated at the time of the second mediation as reflected in the Memorandum.

16. However, Gerald alleges that that were a number of issues regarding the equipment and partnership wrap up which were not addressed or resolved at either mediation.

17. Gerald also alleges that he was operating under different assumptions from Lawrence and Roger at the time of the mediation on a number of issues that the parties never reached an agreement on because of these differing assumptions.

18. Some of these differing assumption claimed by Gerald included 1) whether the grain storage equipment, fencing and gates, and other equipment that was a part of the real estate to be divided; 2) the increased partnership debt and payment of the debt following the time of the mediation; 3) the inventory of hay to be divided; 4) whether "add-on" equipment was to be included with the machinery selected in the draft; 5) whether the equipment debt went with the equipment selected or was to be divided three ways.

19. The written documents suggest that the parties reached an understanding as to the division of the real property of the parties, but there were a number of unresolved issues with the partnership personal property, debt, and inventories of feed, fuel and the like which the parties continued to discuss and attempt to resolve following the second mediation in April.

20. Exhibit 5 is a spreadsheet presented by Lawrence and Roger.

21. The spreadsheet shows that between May and August of 2013 the parties continued to go back and forth between them in an attempt to resolve some of these issues.

22. During this time, the record shows that the attorneys continued to email in attempt to resolve the parties' differences.

23. In one of the June 2013 emails between counsel, Gerald's attorney suggested the possibility of scheduling an arbitration with Kouri to resolve the remaining issues.

24. There is no showing, however, that this was agreed to by the parties.

25. By the fall of 2013, the parties continued to discuss unresolved issues between them.

26. In November of 2013, counsel for Lawrence and Roger suggested, by email, that the parties again attempt to mediate the unresolved issues.

27. In the email, he suggested that with another mediation they could perhaps narrow the issues down to a difference of only $10,000 to $20,000 and then negotiate or arbitrate these remaining smaller issues.

28. Counsel for Gerald rejected the request for further mediation.

29. Any findings of fact more properly characterized as conclusions of law (and vice versa) are to be taken as such.

Based upon the foregoing findings of fact, the Court hereby makes the following

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter before it.

2. "'The law favors the compromise and settlement of disputed claims.'" *Kroupa v. Kroupa*, 1998 SD 4, 1125, 574 N.W.2d 208, 212 (quoting *Johnson v. Norfolk*, 76 S.D. 565, 572, 82 N.W.2d 656, 660 (1957)).

3. Trial courts have, "the inherent power to summarily enforce a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous." *Lewis v. Benjamin Moore & Co.*, 1998 S.D. 14, 574 N.W.2d 887, 888.

4. The court must hold an evidentiary hearing when the terms of the agreement or the situation presents complex factual issues. *Id.*

5. In this case, the parties agreed to present the factual issues by affidavit and documents submitted with the exhibits.

6. The parties agreed that these documents, along with Kouri's testimony constitute all the facts for the court's consideration.

7. In determining whether an agreement was reached between the parties the court must find that the (1) the parties are capable of contracting; (2) that the parties consent to the agreement; (3) that the agreement is for a lawful object; and (4) that the parties have sufficient cause or consideration. SDCL 53-1-2.

8. The only element in dispute here is whether the parties all consented to the purported terms of the agreement.

9. The South Dakota Supreme Court has stated:

> "To form a contract, there must be a meeting of the minds or mutual assent on all essential terms." *Jacobson v. Gulbransen*, 2001 SD 33, ¶ 22, 623 N.W.2d 84, 90. "Mutual assent refers to a meeting of the minds on a specific subject" and "does not exist 'unless the parties all agree upon the same thing in the same sense.'" *Read v. McKennan Hosp.*, 2000 SD 66, ¶ 25, 610 N.W.2d 782, 786 (quoting SDCL 53-3-3). To determine whether there was mutual assent, "the court looks at the words and conduct of the parties." *Jacobson*, 2001 SD 33, ¶ 22, 623 N.W.2d at 90. Whether the parties had a meeting of the minds is a question of fact. *Id.*
>
> *Melstad v. Kovac*, 2006 S.D. 92, 723 N.W.2d 699, 707.

10. In determining whether there mutual assent exists, the contract must be sufficiently definite:

> "An agreement must be sufficiently definite to enable a court to give it an exact meaning." *In re Estate of Eberle*, 505 N.W.2d 767, 770 (S.D.1993) (citing *Deadwood Lodge No. 508 Benevolent and Protective Order of Elks of the United States of Am. v. Albert*, 319 N.W.2d 823, 826 (S.D.1982)). "However, absolute certainty is not required; only reasonable certainty is necessary." *Id.* (citing 17A AmJur2d Contracts § 196 (1991)). If an agreement leaves open essential terms and calls for the parties to agree to agree and negotiate in the future on essential terms, then a contract is not established. *Werner*, 499 N.W.2d at 142 (citing *Transamerica Equip. Leasing Corp, v. Union Bank*, 426 F.2d 273 (9thCir. 1970)).
>
> *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, 714 N.W.2d 884, 894.

11. The two documents authored by Kouri set out the purported agreement between the parties following the each mediation session.

12. The record is clear that the parties did not reach agreement on the material terms for dissolving the partnership following the first mediation.

13. Gerald's counsel made it clear that he was not in agreement with respect to the identification of which equipment was to be drafted.

14. The record shows that a disagreement existed about whether all the equipment was included on the equipment list, and whether the list included some equipment that was owned individually the partners.

15. A disagreement on which equipment was subject to the drafting process was clearly a material term to settle the partnership disputes.

16. Because a material question remained about which equipment was to be drafted, the parties did not agree on the "same thing in the same sense".

17. As a result any agreement lacked mutual assent.

18. After the second mediation, Kouri again summarized his understanding of the parties' agreement, which included the incorporation of his summary from the first mediation.

19. Kouri testified that it was his understanding that most of the issues between the parties had been resolved at this time, however, he acknowledged that he was not privy to discussions between the parties following the second mediation.

20. Following the second mediation, the parties resolved some of the issues involving the equipment and actually drafted some pieces of equipment.

21. However, even by Lawrence and Roger's own admission in their materials there were still a number of issues which remained unresolved, or for which there was not a mutual understanding between the parties.

22. Exhibit 5, presented by Lawrence and Roger, following the second mediation is a spreadsheet showing the unresolved issues involving the some of the personal property including various gates and panels, augers, add-on pieces to various equipment, dairy equipment, and miscellaneous tools.

23. Moreover, Exhibit 5 also shows a disagreement as various partnership and personal expenses, such as payment of real estate taxes, utilities, rent, use of fuel inventory, fat cattle receipts, and the division of the hay inventory.

24. Gerald claims in his affidavit that there was not an actual agreement reached on several of these issues because the parties did not have a mutually agreed to understanding on issues.

25. Gerald claims that the discussion at the mediation was that only the barns, houses, and similar structures were to go with the real estate that was being divided.

26. He understood that the gates, fencing, and various equipment used in conjunction with some of these structures was not included.

27. The first mediation agreement only refers to "structures" going with the real property.

28. No definition or clarification is included in the settlement memoranda as to what in included in the term "structures.

29. Gerald also claims that his agreement to split the partnership debt was premised on the belief that additional partnership debt would not be incurred following the mediation and that the fat cattle previously sold had been used to reduce the partnership debt.

30. Gerald claims that neither of his understandings in this regard was correct.

31. Gerald also asserts that his understanding of whether the "add-ons" would go along with the equipment was different than Larry and Roger's understanding.

32. Lawrence and Roger apparently assert that the add-ons should be drafted separately and do not go with the equipment.

33. Finally, Gerald asserts that there was a misunderstanding between the parties at the mediation as to how the various partnership inventories of feed, fuel and the like would be used and divided between the parties.

34. Exhibit 5 supports Gerald's claims of a number of unresolved issues between the parties, even following the second mediation.

35. Likewise, the email communications between the attorneys even into November of 2013 show that there was not an agreement between these parties on a number of matters material to the partnership wrap-up.

36. Kouri's testimony that they attempted to put in a process for any unresolved issues going forward, further suggests that there were "essential terms" open that had not been agreed to.

37. The court finds that Lawrence and Roger have not met their burden to show that there was a meeting of the minds on all of the issues material to the resolution of the partnership.

38. Lawrence and Roger argue that if any issues remain to be resolved these should be resolved by arbitration.

39. They assert that the parties agreed to arbitrate any remaining issues between the parties following the second mediation.

40. The evidence shows that at most there was a discussion between the attorneys and Kouri about possibly arbitrating any remaining issues following the second mediation.

41. The evidence does not support Lawrence and Roger's claim that the parties agreed to binding arbitration on any issues remaining following the second mediation.

42. Although the parties reached agreement on many of the partnership issues and attempted to resolve all the remaining disputed issues involving the partnership, the court finds that there was not a meeting of minds on all the material issues involving the partnership.

43. Although the law favors settlement agreements, and the court believes a settlement would be in all three parties' interests, the court cannot impose an agreement where the parties did not agree on several issues material to the resolution.

44. Likewise, because the parties did not have a meeting of the minds of arbitration, the court cannot compel arbitration.

45. Even if a complete agreement had been reached, the court determines that Gerald would be entitled to recission of any agreement.

46. SDCL 53-11-2 allows a party to rescind an agreement where the parties consent was obtain by mistake.

47. A mistake of fact is defined by SDCL 53-4-9 as "an unconscious ignorance or forgetfulness of a fact" that is material to the contract, or a "belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed".

48. The Court has stated that a party may rescind an agreement for unilateral mistake where the "mistake [is] material, and the fact must be such that it animated and controlled the conduct of the party.

49. It must go to the essence of the object in view, and not be merely incidental.

50. The court must be satisfied, that but for the mistake the [complaining party] would not have assumed the obligation from which he seeks to be relieved." *Vermilyea v. BDL Enterprises. Inc.*, 462 N.W.2d 885, 888-89 (S.D. 1990).

51. Under these circumstances, the court finds that there were several material mistakes of fact between Gerald, Lawrence and Roger as to their respective understanding and assumption on the issues involved in the settlement.

52. The court has outlined these above.

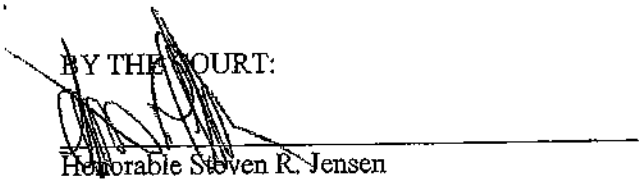
53. These facts would support rescission of the contract, even if a complete agreement had been reached between the parties.

54. Because the parties did not reach a meeting of the minds as to all the material issues, and because of material mistakes of fact, the court determines that there was no agreement reached between the parties either as to the terms of the settlement agreement or to arbitrate any disputes between the parties.

55. For these reasons, the court denies the Motions to Enforce the Settlement Agreement and to Compel Arbitration.

Dated this 31st day of July, 2014.

BY THE COURT:



Honorable Steven R. Jensen
Circuit Court Judge

ATTEST:

Cheryl J. Miller, Clerk

By_____
Deputy

STATE OF SOUTH DAKOTA) : SS COUNTY OF MCCOOK)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
GERALD PAWELTZKI, Plaintiff, vs. ROGER PAWELTZKI and LAWRENCE PAWELTZKI, Defendants.	44CIV12-000114 **NOTICE OF ENTRY**

Please take notice that the Court, the Honorable Steven R. Jensen, entered a Memorandum Decision dated March 31, 2015, which relates to the Order, Findings of Fact, and Conclusions of Law (Defendants' Motion to Enforce Settlement) dated May 8, 2015, notice of entry of which was previously given May 8, 2015.

Dated at Sioux Falls, South Dakota, this 1st day of April, 2020.

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

Mitchell Peterson
206 West 14th Street, PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
map@dehs.com
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date indicated above, a true and correct copy of the foregoing document was served electronically upon the following using the Odyssey system: Tim Whalen (whalawtim@cme.coop).

Mitchell A. Peterson

EXHIBIT H

First Judicial Circuit Court

Steven R. Jensen
Circuit Court Judge
209 E. Main St., Suite 230
Elk Point, SD 57025
Phone: 605.761.1200
Fax: 605.356.3687

Jeanne Bossman
Official Court Reporter
P.O. Box 10
Parker, SD 57053
Phone: 605.297.4096
Fax: 605.297.4090

Circuit Administrator
Kim L. Allison
Chief Court Services Officer
Charles R. Prieberg
Circuit Assistant
Joan Novak

Presiding Judge
Steven R. Jensen
Circuit Judges
Glen W. Eng
Bruce V. Anderson
Timothy W. Bjorkman
Cheryle Gering
Patrick T. Smith
Magistrate Judges
Tami A. Bern
Gordon D. Swanson

March 31, 2015

Mr. Michael Tobin
Attorney at Law
300 South Main Avenue
P.O. Box 5015
Sioux Falls, SD 57104

Mr. Mitchell Peterson
Attorney at Law
206 West 14th Street
P.O. Box 1030
Sioux Falls, SD 57101

MEMORANDUM DECISION

Re: Plaintiff's Motion for Determination of Fixtures, *Paweltzki v. Paweltzki and Paweltzki* Civ. 12-114 (McCook County)

Dear Counsel,

This matter comes before the court on Plaintiff's Motion for Determination of Fixtures and Plaintiff's request for the court to reconsider its oral decision to enforce the settlement agreement entered by the court on January 16, 2015. An evidentiary hearing was held on March 20, 2015. The court, having heard the testimony, and record in this matter, and arguments of counsel, and having reviewed the parties' submissions and exhibits, now rules.

FACTUAL BACKGROUND

On January 16, 2015, the court considered a number of motions filed by the parties including the Defendants' Motion to Enforce Settlement (hereinafter individually referred to as Larry and Roger). The court had denied an earlier Motion to Enforce Settlement filed by the Defendants as set out in the court's written Memorandum Decision dated June 17, 2014.

Following the January 16, 2015, hearing the court determined that the parties had reached an implied agreement by their actions over the past two years, or otherwise ratified their mediated agreement for the division of partnership real estate and equipment, and for the ownership of non-partnership real estate referred to as Roger's Place. In granting the Motion to Enforce filed by Defendants, the court ordered that the real estate be deeded over from the partnership to the individual parties consistent with the agreement and that the parties prepare bills of sale as to the items of equipment that were drafted in the equipment draft. Plaintiff (hereinafter Jerry) submitted both a substantive and procedural objection to the ruling. Based upon the procedural objection the court afforded Jerry further opportunity to present evidence or argument on the issue of the agreement by implication or ratification.

At the evidentiary hearing on March 20, the court gave both parties further opportunity to present evidence and argument on the issue of the enforcement of the settlement agreement. Jerry also filed the present Motion for Determination of Fixtures, which the court also considers. At issue on Plaintiff's fixture motion is a determination of whether LP gas tanks, grain bins, and electric fencing are considered fixtures that go with the land. Also at issue are various items of equipment that were drafted in the equipment draft.

ANALYSIS AND DECISION

1. Motion to Reconsider Court's Decision to Enforce Settlement.

Jerry objects to portions of the court's decision to enforce a settlement agreement between the parties. He does not object to the portion of the court's order requiring the parties to transfer deeds of real property from the partnership to the individuals consistent with the court's finding at the January hearing. However, Jerry asserts that the court does not have jurisdiction to require the transfer of Roger's Place consistent with the court's ruling in January and that an agreement by implication was not reached as to this property because he did not receive the bargained for consideration for this property. Jerry also argues that agreements were not reached on items in the equipment draft because of misunderstandings by the parties concerning the condition of certain equipment during the draft.

a. Roger's Place.

The partnership owns five tracts of real property which was valued prior to the initial mediation in February of 2013. These five tracts and their values are described in the Broker's Opinion of Value, prepared by Wieman, and introduced as Exhibit 21. The parties agreed during the mediations that Larry and Roger would receive Tracts 1, 2 and 3, and that Jerry would receive Tracts 4 and 5. Jerry does not object to the portion of the court's order distributing these tracts consistent with the mediated agreement between the parties.

The three brothers also own and farm real property separate from the partnership. Most of the non-partnership real property has not been discussed and is not relevant to the partnership dispute, with the exception of what the parties have referred to as Roger's Place. Roger's Place is approximately six acres of real property, including buildings and other improvements. Jerry

and Larry own this property and Roger has lived there for a number of years. Prior to the second mediation on April 23, 2013, Wieman's provided a Broker's Opinion of Value as set out in Exhibit 23 for Roger's Place. The settlement memorandum drafted by the mediator following the April 23 mediation provided as one of terms of settlement of the partnership issues that Jerry would convey his one-half interest in Roger's Place to Roger for a cash payment of $50,025. As a part of the court's January 2015 bench ruling, the court determined that this transaction should be completed as a part of the enforcement of the settlement agreement.

Jerry initially asserts that this court does not have jurisdiction with respect to Roger's Place because it was not part of the partnership that is the subject of this action. The lawsuit seeks dissolution of the partnership and makes other equitable and legal claims as it relates to the partnership. There is no specific claim involving Roger's Place in the original pleadings. However, the disposition of Roger's Place was discussed in the mediation as a part of the resolution of the partnership dispute and has been raised by both parties at this hearing and in other prior hearings and pleadings. There has never been an objection to the court's jurisdiction to hear issues as to the validity of any settlement involving Roger' Place prior to the March 20 hearing. Further, Jerry admitted that his decision to convey his interest in Roger's Place was based, in part, upon certain consideration he received as a part of winding up the partnership. All the parties with an interest in the Roger's Place or its disposition are parties to this action and all the parties have presented testimony and argument on the appropriate disposition of Roger's Place on several occasions in this litigation. "[A] trial court has broad jurisdiction to redress a wrong in a civil action and has jurisdiction to grant equitable remedies when properly invoked and pursuant to the principles of equity. This equitable jurisdiction encompasses property rights." *Alexander v. Hamilton*, 525 N.W.2d 41, 46 (S.D. 1994). Under the circumstances, the

court determines that it has jurisdiction to consider the validity of the settlement involving Roger's Place.

Jerry claims that even if this court has jurisdiction to enforcement any settlement with respect to Roger's Place, he argues that a settlement was never reached between the parties. Jerry testified that he agreed to convey his interest in Roger's Place for $50,025 with the understanding that he would be permitted to make the first four picks in the equipment draft. Although there is no documentation or other evidence to support this claim, the evidence shows that Jerry received the first four picks of equipment.

Jerry testified that when he made these picks he made certain assumptions, which turned out to be incorrect, and as a result he did not receive the consideration he believed he was entitled to receive for Roger's Place. Specifically, Jerry claims that he drafted four pieces of equipment with the understanding that (1) the bank debt associated with the disc was to go with the disc; (2) the sprayer he chose would include the GPS unit; and (3) the grain cart he chose would include the scale. Jerry testified that based upon these understanding he did not choose the $35,000 disc as one of the first four pieces because the bank debt for the disc was approximately the same. Subsequently, he paid one-third of the partnership debt at the bank, including the $38,000 debt on the disc. As a result, he claims he was shorted nearly $13,000. He also claims he would not have drafted the grain cart and the sprayer as one of his picks if he had known they would not come complete.

Despite Jerry's testimony, the court finds that the $50,000 bargained to transfer Jerry's interest in the property was fair consideration. The opinion of value provided prior to the mediation provided an opinion of value for Roger's Place from $75,000 to $95,000, with the

most probable price of $85,000. Jerry has not presented any evidence to dispute this value. The purported agreement by Larry and Roger to pay $50,025 for Jerry's interest would suggest the agreed price was a full price, if not a premium. Further, the settlement memorandum drafted by the mediator on the day of the second mediation does not state that there was any other consideration for Jerry's conveyance of his one-half interest.

The court does not find Jerry's claim that he misunderstood the status of the debt on the disc to be credible. The first mediation summary drafted by the mediator provided that the partners would each pay 1/3 of *all* the partnership debt, except as otherwise stated. There was no language or other suggestion following either mediation that any debt specifically associated with the equipment would be paid individually by the partner receiving that item of equipment. Jerry did not present any evidence to show that he inquired or attempted to clarify whether the debt for an item of equipment would go with the equipment contrary to the discussions confirmed following the mediation.

Following the second mediation, Jerry participated in the draft of the equipment. In the nearly two years since the draft Jerry has continued to possess and use the equipment he chose in the draft. He has never sought to return any of the equipment drafted following the mediation. Moreover, Jerry also testified that he paid his portion of the debt at the Bridgewater Bank, including the debt associated with the disc. There is no evidence that he objected to this payment or argued this was inconsistent with the parties' agreements.

Larry and Roger testified at the prior hearing that since the mediations they have retained possession of all the real property which the parties agreed to divide, including Roger's Place. Moreover, they testified that they have also paid the property taxes on all this real estate for the

past two years. Jerry has not presented any evidence that he has paid the real property taxes for Roger's Place since the mediation, or that he has attempted to obtain possession of this property or remove Roger from the property during the past two years.

The Court has stated that an implied agreement may be found by all the circumstances and considering the actions of the parties. *Setliff v. Akins*, 2000 S.D. 124, ¶ 13, 616 N.W.2d 878, 885. Moreover an incomplete or voidable contract may be ratified by a party's actions:

> Even if the contract could be deemed defective or incomplete, this conduct constitutes ratification. A contract is ratified when "an act by which an otherwise voidable and, as a result, invalid contract is conformed, and thereby made valid and enforceable." (citations omitted). Ratification can either be "express or implied by conduct." (citations omitted). "In addition, failure of a party to disaffirm a contract over a period of time may, by itself, ripen into a ratification, especially if rescission will result in prejudice to the other party.

Ziegler Furniture & Funeral Home, Inc. v. Cicmanec, 2006 S.D. 6, ¶ 31, 709 N.W.2d 350, 358.

Under the circumstances, the court finds that Jerry action's since the mediation support the determination of an implied contract as well as a ratification of the agreement negotiated at the mediation with respect to the real property, including the conveyance of Roger's Place from Jerry to Roger for the consideration of $50,025. The agreement to resolve Roger's Place was an integral part of the bargained for consideration of the parties in resolving the partnership, and their agreement with respect to Roger's Place is appropriately enforced in this action.

b. Equipment draft

Jerry also disputes that an agreement was made with respect to some or all the equipment. He also asserts that mutual mistakes of fact should allow him to rescind or void any such agreements. During the second mediation the parties discussed that Jerry would receive his first

choice of certain items of equipment and that the parties would draft items of equipment in a specified order. Following the mediation, Jerry accepted the specific items of equipment set out in the settlement memorandum. Thereafter, Jerry participated in the equipment draft and accepted the equipment that he drafted in the mediation. Jerry has continued to use and possess all the equipment that he received and drafted consistent with the parties bargaining at the mediation.

Jerry argues that he did not give assent to the equipment he received because he did not receive accurate information about the nature and status of certain items of equipment that he drafted following the mediation. As discussed above, Jerry testified that he would have selected the disc valued at $35,000 on the Wieman's appraisal as one of his first four pieces of equipment if he had known that the partnership was going to be responsible for the bank debt on the disc which was approximately the same amount as disc value. However, Jerry admitted on cross-examination that there were other items of equipment he received in the draft for which there was still remaining debt at the bank that was paid by all of the partners. He also acknowledged that he was aware of the memorandum drafted by the mediator following the first mediation, providing that the partnership would be responsible for all debt, except as otherwise stated. Jerry has presented no evidence to show that there was ever any discussion that the bank debt on the disc would be paid by the individual partner receiving the disc in the draft. Jerry's claims that he understood otherwise are not consistent with the evidence showing that the partners all understood, at least immediately following the mediation, that the partnership would be responsible for all debt, except as otherwise listed. Jerry's actions of receiving and using all the equipment he received in the draft and paying the partnership debt at the bank demonstrates his intent to be bound by the agreements at the mediation regarding the equipment.

Jerry also claims some of the equipment he drafted did not include all the components he understood would be received as part of the equipment. The evidence shows that Jerry did not receive all the parts of the equipment he bargained for at the mediation. There is evidence that Larry and Roger also did not receive all the pieces of the equipment they bargained for at the mediation. The court finds that these issues do not affect the formation or validity of the contracts between the parties based upon the evidence showing that the parties have agreed to the mediated settlement by their actions and have ratified the terms concerning the equipment over the past two years by their actions. However, the court does believe that each party has a contractual remedy to receive the equipment, or equivalent value, they bargained for during the mediation and that this is the remedy for any breach of the terms agreed to between the parties. The court discusses these remedies more fully below.

After reviewing all the evidence submitted, the court determines on this record that the parties fairly and fully bargained the terms of the division of the partnership as to all the real estate and equipment, including Roger's Place. As the court previously found, there were material terms that were not fully resolved in dissolving the partnership, but the parties, by their actions over the past two year, have affirmed and ratified the terms of the dissolution relating to the real estate and equipment. The terms of these agreements by implication and ratification are appropriately enforced by this court.

2. Determination of Fixtures and Rights in the Equipment.

Jerry avers that if the court determines there is a binding agreement between the parties as to all the real property, including Roger's Place, then the court must determine which improvements to the real property should be considered personal property or chattel property,

rather than fixtures that would go with the land. Similarly, if the court determines there is a valid agreement as to the equipment, Jerry urges the court to determine his rights as to certain parts of the equipment he drafted and did not receive.

South Dakota Codified Laws Chapter 43-33 applies to fixtures. "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws." SDCL § 43-33-1. Additionally, except as provided in § 43-33-1, when one "affixes his property to the land of another without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land unless he chooses to require the former to remove it." SDCL § 43-33-2.

The South Dakota Supreme Court has recognized a number of factors to consider in determining whether property is a fixture. Those factors include: "(1) annexation to the realty; either actual or constructive; (2) its adaptability to the use and purpose for which the realty is used; and (3) the intention of the party making the annexation." *Rushmore Shadows, LLC v. Pennington County Bd. of Equalization*, 2013 SD 73, ¶ 9, 838 N.W.2d 814, 817 (citing *In re Tax Appeal of Logan & Assocs.*, 331 N.W.2d 281, 282 (S.D. 1983)). Of the factors, intent is controlling as the others "derive their chief value as evidence of such intention." *Id.* (internal citations omitted). "[I]ntent is not the secret intent in the mind, but the intent that may be deduced from...the circumstances of the particular case." *Id.* (quoting *First Nat'l Bank of Aberdeen v. Jacobs*, 273 N.W.2d 743, 746 (S.D. 1978)).

a. LP gas tanks

Jerry testified that it was his intention and understanding that the LP tanks on the real property were personal property and not fixtures because they are easily moved. He also points to the Wieman valuation which treats the LP tanks as machinery and equipment, rather than real estate. The appraisal includes five LP tanks as equipment valued separate from the real estate appraisal. Jerry testified that four of the tanks are owned by the partnership and that he purchased one 500-gallon propane tank with his own funds. Defendants argue that the propane tanks should be treated as fixtures.

Defendants did not specifically dispute Jerry's testimony he always believed the propane tanks were personal property and not connected to the real estate. Further, there is no dispute that the parties relied upon the Wieman valuations in bargaining the terms of the partnership wind-up during the mediations. The Wieman valuations list the propane tanks on the machinery list, as personal property, and place values on the tanks separate from the real property valuations. There is no evidence that the parties discussed any understanding or intention regarding the propane tanks, aside from their treatment on the Wieman appraisals. Moreover, there was no evidence showing how, or if, LP tanks are affixed to the land. As such, the court finds that the parties intended that the tanks would be treated as personal property and not fixtures.

The court also finds that Jerry owns one 500-gallon LP tank personally, separate from the partnership as Jerry presented unrebutted testimony of his proof of payment from his personal funds for the LP tank. The other four tanks are partnership personal property. All five of the tanks are located on real property which will be owned by either Larry or Roger under the court's order enforcing the settlement. All the parties agreed at the hearing that it would be more appropriate for each party to receive the value of these tanks, rather than remove them from their

current locations. Based upon this agreement, the court determines the five-hundred gallon tanks to have a value of $400 each and one-thousand gallon tanks to have a value of $800 each. Larry and Roger shall retain possession of all five LP tanks. Jerry should receive payment of $1,200 based upon his full interest in one five-hundred gallon tank and his 1/3 interest in the other four tanks. This payment should be paid by Defendants at or before the closing on the real property.

b. Grain bins

Jerry argues that the grain bins should also be considered personal property. He provided a list of nine bins purchased by the partnership on Exhibit 29. All nine of these bins are located on real property to be received by Larry and Roger as part of the settlement. Jerry testified that he also purchased two additional bins with his own funds, separate from the partnership. These consist of a 7,000 bushel bin located on Tract 1 and a 25,000 bushel bin at Roger's Place. Jerry claims that these bins were not intended to be included as a part of the realty.

Eight of the partnership bins were described and valued as part of the real estate improvements in the Wieman valuations prior to the mediations. All eight of these bins are located on partnership property and there was no separate valuation determination made as to these eight bins. The ninth partnership bin, a 16,000 bushel bin, is located on Roger's Property. This bin was valued on the Wieman personal property appraisal for $11,000. This bin was also described as part of the "outbuildings" on the Wieman valuation of Roger's Property, but states, "It is my opinion that the two metal grain bins have value – but would have the most value to a farmer engaged in crop production versus a normal acreage buyer."

Jerry presented evidence that he purchased the 7,000 bushel bin and the 25,000 bushel bin. Jerry presented loan documents and bids in his name for these bins when they were

purchased. As a part of the loan documentation, the lending institutions loaning money for each bin took a "chattel mortgage" on the bins by filing financing statements claiming a separate security interest in the bins from the real estate. Defendants presented evidence that the 25,000 bushel grain bin was not purchased individually by Jerry, but that Jerry took out a loan, put the money from the loan into his separate account, and repaid the loan with partnership money. Jerry acknowledged that he received payments from the partnership for "bin rent" for the 25,000 bushel bin. There is evidence that both Jerry and the partnership were separately depreciating the 25,000 bin. The court finds from the evidence that Jerry purchased both the 7,000 and 25,000 bushel bins in his name, but that the partnership reimbursed Jerry for the cost of the 25,000 bushel bin. This bin should be considered a partnership bin. There is no evidence that Jerry was reimbursed for the 7,000 bushel bin and the court finds that Jerry purchased the 7,000 bushel bin with his own funds.

The court must next decide whether the grain bins are separate personal property or part of the realty. Under SDCL § 43-33-1 a "thing is deemed to be affixed to land when it is attached to it by ... permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screws." The evidence is undisputed that all of the bins are bolted or anchored to concrete foundations on the real property. This evidence establishes that the bins would be considered affixed to the land consistent with SDCL § 43-33-1. However, "[t]he controlling criterion in determining whether an article becomes a 'fixture,' and thus a part of the realty, is the intention of the party placing the article on the land" as that intent is determined from the relation of the parties and circumstances. *First Nat. Bank of Aberdeen v. Jacobs*, 273 N.W.2d 743, 746 (S.D. 1978).

As to the eight partnership bins located on partnership property the court finds the parties valued these bins as part of the real estate to be divided between the partners at the time of the mediations. The evidence does not show that the partners placed any value on these bins separate from the real estate. The evidence does not support Jerry's claim that he believed the bins were separate from the real estate. The evidence shows that the parties divided up the real estate based upon the Wieman valuations that included these eight bins as improvements on the real estate for the purpose of the valuation. The court does not find that there was any agreement or discussion that the bins would be considered separate from the real estate during the mediations. Each party then took possession of the respective real estate and improvements and split up the equipment based upon the draft. The parties have continued their farming operations based upon their discussions during the mediation. Jerry's claim of a "secret intention" otherwise is not supported by the facts and circumstances in the record. [1]

The ninth bin purchased by the partnership is located on Roger's Place. This bin was separately valued by Wieman on the machinery appraisal. The valuation of Roger's Place by Wieman appears to place little, if any, value on this bin in reaching an opinion of value. The court makes the same findings for the 25,000 bushel bin, which the court has determined to have ultimately been paid for with partnership funds. Although both bins are affixed to the real property, the circumstances do not suggest an intention by the parties to value these two bins as a part of the improvements at Roger's Place. Rather, the partners recognized a value for these bins

[1] Jerry argues that the South Dakota Supreme Court case *Mack v. Mack* held that grain bins are personal property and not realty. 2000 S.D. 92, 613 N.W.2d 64. The court finds the facts in this case are distinguishable from *Mack*. In *Mack*, the parties stipulated to an exhibit entitled "Partnership Personal Property and Values" which reflected the grain bins, which the Court found was clear evidence of the parties' treatment of grain bins as personal property. *Id.* at ¶ 36. Here, the evidence is the opposite. The parties relied on the Wieman appraisals in mediation of real property and the equipment draft. The grain bins are not listed on the machinery appraisal, but rather in the real estate appraisal. The parties' reliance on the appraisals in mediation of real property and the lack of objection to the inclusion of grain bins as part of the valuation of the real property shows a clear intent that the grain bins were intended to be fixtures that go with the land, and not personal property.

separate from the real property and as such this intention is controlling. The court accepts the values placed on these two bins in the Wieman machinery appraisal of $11,000 for the 16,000 bushel bin and $7,000 for the 25,000 bushel bin. Roger and Larry are ordered to pay Jerry his one-third interest in these two bins of $6,000 at or before the time of the closing on the real estate.

Finally, the 7,000 bushel bin Jerry purchased is listed in the Wieman real estate valuation as one of the improvements valued as a part of the real estate.[2] The bin is not separately valued in the personal property appraisal and Jerry has not shown that there was any other agreement or discussion to exclude this bin from agreement to divide the real property. The parties made a fair division of real property, including the improvements, based upon the Wieman valuations and Jerry cannot claim a different intention now. SDCL § 43-33-2 provides that "when a person affixes his property to the land of another without an agreement permitting him to remove it, the thing belongs to the owner of the land...." Jerry took possession of the property he agreed to assume at the mediation without any agreement that the bin would be separated from Tract 1 to be received by the Defendants. He has continued to farm and possess the property he assumed for the past two years. The evidence does not convince the court that the circumstances here demonstrate an intention or agreement to separate this bin from the real property. The court determines that the 7,000 bushel bin is a part of the realty to be conveyed as Tract 1.

c. Electric fencing

Jerry argues the electric fencing that is owned by the partnership and found on Tracts 1, 2, and 3 should be considered personal property, not fixtures. He testified that he also intended

[2] This bin is identified as a 6,000 bushel bin in the real estate valuation.

that the lined fences (or border fences) to be treated as fixtures, but that the corral fences which confine livestock or hogs are not fixtures. Defendants did not dispute the testimony offered by Jerry as to the electric fencing and corral fencing. The court finds from the evidence that the electric fencing and corral fencing is easily removable, adaptable, and is often used on a temporary basis in one area, then moved around to another area. This is distinguished from border fencing that is embedded into the ground and not easily removed.

The Wieman equipment appraisal includes some miscellaneous livestock equipment such as feeders, chutes and gates which would be included as personal property. It is unclear if some of these items are encompassed in Jerry's claim to the corral fencing. However, since the evidence offered by Jerry is undisputed, the court accepts this testimony and determines that Jerry is entitled to his one-third interest in any partnership electric or corral fencing on the real property to be received by Larry and Roger. To the extent any of this partnership fencing is located on the property to be received by Jerry he will be responsible to pay Larry and Roger for their one-third interest in such property. Since the evidence does not establish a value for this property, the court directs the parties to attempt to reach an agreement as to the one-third value of this fencing, or if an agreement is not reached, to set the matter for further hearing on the value of this fencing.

d. Equipment

Jerry argues that certain equipment that he drafted was transferred to him after the draft incomplete. Specifically, he drafted a sprayer that included a GPS unit, a grain cart that included a scale, and a tractor with a removable cab. Jerry testified when he received these items, the GPS unit was missing from the sprayer, the scale was not included with the grain cart, and the cab had been removed from the tractor. Additionally, Defendants argue that Larry drafted a corn

planter from the equipment draft, and, when received, it was missing corn units, a turnbuckle hitch, a control box, and a monitor.

The court finds that the condition the equipment was in during the appraisal and the description used in the Wieman Machinery Appraisal is evidence of intent of the parties and what the parties relied upon in drafting pieces of equipment. Therefore, since the Wieman Machinery Appraisal listed "Starfire – Auto Steer Ready" in the description of the sprayer and the GPS was considered in valuing the sprayer at $27,500, the court finds that Jerry is entitled to the return of the GPS unit or the fair market value of such a unit. Likewise, the Wieman Machinery Appraisal described the grain cart "with Scale" in valuing this piece at $10,500. The court finds that Jerry is entitled to the scale or its fair market value. Defendants agree that the removable cab on the 4010 tractor should go with the tractor, and agree to provide the cab for this tractor.

The court also finds the corn planter drafted by Larry was valued in working condition complete with its corn units, turnbuckle hitch, control box, and monitor. Larry is entitled to these parts or the fair market value of these parts.

The parties in possession of any of the parts of the above equipment shall provide these parts to the partner that drafted the equipment at or before the time that the bills of sale are signed in this matter. If any of the items are not returned for any reason, then the parties shall attempt to agree on the fair market value(s) of the missing item(s). Larry and Roger shall pay Jerry for the fair market value of any parts missing from the above equipment he drafted. Jerry shall pay Larry and Roger for the fair market value of any parts missing from the above equipment they drafted. If the parties are unable to reach an agreement on such value, the issue should be set for further hearing.

CONCLUSION

The court incorporates by reference the order and findings of fact and conclusions of law entered by the court following the hearing on January 16, 2015, the same as if fully set forth herein. The court orders the parties to transfer the property consistent with the above determinations or otherwise make the payments as ordered herein. The parties shall execute legal documentation transferring the real property and personal property consistent with this decisiont within 30 days from the date of the entry of the court order in this matter. Any issues remaining outstanding after completing this settlement shall be set for trial.

The court requests Mr. Peterson to prepare Findings of Fact, Conclusions of Law, and an Order consistent with this Memorandum Decision. The prior oral decision and written decision may be incorporated by reference in lieu of setting out separate findings of fact and conclusions of law.

BY THE COURT:

Steven R. Jensen
Circuit Court Judge

FILED

MAY 0 8 2015

Cheryl J. Miller

McCOOK COUNTY CLERK OF COURTS
FIRST JUDICIAL CIRCUIT COURT OF SD

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MCCOOK)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

GERALD PAWELTZKI,

Plaintiff,

vs.

ROGER PAWELTZKI and LAWRENCE PAWELTZKI,

Defendants.

CIV. 12-114

ORDER, FINDINGS OF FACT, AND CONCLUSIONS OF LAW (DEFENDANTS' MOTION TO ENFORCE SETTLEMENT)

The Court held a hearing on Friday, January 16, 2015, at the McCook County courthouse on Defendants' Motion to Enforce Settlement, Plaintiff's Application for Appointment of Receiver, and Plaintiff's Motion for Partial Summary Judgment. The Court heard testimony from Plaintiff Gerald Paweltzki ("Jerry"), Defendant Lawrence Paweltzki ("Larry"), Defendant Roger Paweltzki ("Roger"), and Sheriff Mark Norris, and considered exhibits, affidavits submitted prior to the hearing, and briefs of the parties. Based on the information considered by the Court, the Court issued its bench decision and directed counsel for Defendants to prepare a formal order, findings of fact, and conclusions of law. Thereafter, and with the Court's permission, Jerry requested an additional hearing to address certain details pertaining to the Court's decision enforcing the settlement as to real property and equipment.

On March 20, 2015, the Court held an additional evidentiary hearing to consider additional issues related to the Court's prior decision enforcing a portion of the parties' settlement agreement and Jerry's Motion for Determination of Fixtures. The Court issued its Memorandum Decision dated March 31, 2015, and enters the following order, findings of fact, and conclusions of law.

EXHIBIT 9

DEFENDANTS' MOTION TO ENFORCE SETTLEMENT

The Court incorporates by reference the Findings of Fact and Conclusions of Law dated July 31, 2014. The Court also incorporates by reference its Memorandum Decision dated March 31, 2015. To the extent any finding of fact or conclusion of law set forth herein conflicts with the Court's prior findings of fact or conclusions of law, the Court hereby modifies its prior findings of fact and conclusions of law.

Any finding of fact determined to be a conclusion of law shall be considered a conclusion of law. Any conclusion of law determined to be a finding of fact shall be considered a finding of fact.

A. Partnership Real Estate

Findings of Fact

1. At the time of the February 15, 2013, and April 23, 2013, mediations, the parties did not agree upon all of the same essential terms of settlement reflected in the settlement memoranda prepared by mediator Lon Kouri, marked as Hearing Exhibits 12 and 14 respectively.

2. According to the settlement memoranda, Larry and Roger received Parcels 1, 2, and 3 (including structures), while Jerry received Parcels 4 and 5 (including structures).

3. The legal descriptions of Parcels 1 through 5 correspond with Tracts 1 through 5 labels reflected in the January 5, 2013, Wieman appraisal marked as Hearing Exhibit 11.

4. Grain bins and other outbuildings located on Parcels 1 through 5 were appraised as part of the real estate to which such items are attached in the January 5, 2013, Wieman appraisal marked as Hearing Exhibit 11.

5. In the two years following the mediations, Jerry has possessed, used, and farmed Parcels 4 and 5 (including all structures, grain bins, homes, barns, or other outbuildings) separately and to the exclusion of Larry and Roger.

6. In the two years following the mediations, Larry and Roger have possessed, used, and farmed Parcels 1, 2, and 3 (including all structures, grain bins, homes, barns, or other outbuildings) separately and to the exclusion of Jerry.

7. According to the January 5, 2013, Wieman appraisal marked as Hearing Exhibit 11, the total value of Parcels 1 through 5, including structures, grain bins, houses, barns, and other outbuildings attached to the real estate, is $4,629,330.

8. According to the January 5, 2013, Wieman appraisal marked as Hearing Exhibit 11, Parcels 4 and 5 allocated to Jerry have a value of $1,544,455, which is 33.4% of the total value of the partnership real estate.

9. Distributing Parcels 1, 2, and 3 to Larry and Roger and Parcels 4 and 5 to Jerry would result in a fair, equitable, and equal distribution of the partnership's real estate based on the January 5, 2013, Wieman appraisal marked as Hearing Exhibit 11.

10. Jerry's actions since the mediations support a determination of an implied contract as well as ratification of the agreement negotiated at mediation with respect to division and transfer of Parcels 1 through 5.

11. As acknowledged by Jerry and his counsel at the March 20, 2015, hearing, Jerry does not object to the portion of the Court's order distributing Parcels 1 through 5 consistent with the mediated agreement between the parties.

Conclusions of Law

12. The parties have an enforceable settlement agreement (through an implied agreement, ratification, or both) pertaining to disposition of Parcels 1 through 5, as follows: (a) Parcels 1, 2, and 3 shall be transferred to Larry and Roger to be divided between them, jointly farmed, or further disposed of as mutually agreed between Larry and Roger; (b) Parcels 4 and 5 shall be transferred to Jerry; and (c) the real estate transfers shall include all structures, houses, barns, grain bins, outbuildings, and border fences attached to the land.

13. The Court incorporates by reference the conclusions of law set forth in *infra* § I (Post-mediation Acts: Implied Agreement and Ratification).

B. Roger's Place

Findings of Fact

14. Until the March 20, 2015, hearing, Jerry never objected to this Court's jurisdiction to resolve disputes related to Roger's place.

15. According to the settlement memoranda, Jerry agreed to sell his 50% interest in Roger's place in exchange for $50,025.00

16. The purchase price of $50,025.00 is more than 50% of the market value as reflected in the appraisal and is a premium above fair market value.

17. Jerry receiving the first four picks in the equipment draft was not part of the consideration Jerry received for selling his one-half interest in Roger's place.

18. Grain bins and other outbuildings located at Roger's place were appraised as part of the real estate to which such items are attached in the April 22, 2013, Wieman appraisal marked as Hearing Exhibit 20.

19. In the approximate two years following the mediations, Roger has possessed and used Roger's place (including all structures, grain bins, homes, barns, or other outbuildings) to the exclusion of Jerry.

20. Jerry has not presented any evidence that he has paid the real property taxes for Roger's place since the mediation, or that he has attempted to obtain possession of this property or remove Roger from the property during the past two years.

21. Jerry's actions since the mediations support a determination of an implied agreement as well as ratification of the agreement negotiated at mediation with respect to Roger's place.

Conclusions of Law

22. This Court has jurisdiction to grant relief related to the real estate referred to as "Roger's place," the legal description of which is set forth in the April 22, 2013, Wieman appraisal marked as Hearing Exhibit 20. *See Alexander v. Hamilton*, 525 N.W.2d 41, 46 (S.D. 1994) (discussing trial court's broad jurisdiction and equitable powers).

23. The parties have an enforceable settlement agreement (through an implied agreement, ratification, or both) pertaining to disposition of Roger's place as follows: (a) Jerry shall transfer his 50% interest in Roger's place to Roger in exchange for $50,025.00; and (b) the real estate transfer shall include all structures, houses, barns, grain bins, outbuildings, and border fences attached to the land.

24. The Court incorporates by reference the conclusions of law set forth in *infra* § I (Post-mediation Acts: Implied Agreement and Ratification).

C. **Equipment**

Findings of Fact

25. According to the settlement memoranda, Jerry received four larger pieces of equipment as the first four picks in the equipment draft, Larry and Roger had the right to select the next eight pieces of equipment in the draft, and then the parties would alternate selections of equipment through a draft process. The twelve initial equipment selections and the additional alternating selections in the equipment draft will be referred to as "the draft."

26. Following the two mediations, the parties in fact participated in the draft in which the parties selected several dozen pieces of equipment, machinery, or tools, primarily consisting of the most valuable partnership equipment.

27. In the two years following the mediations and the draft, Jerry has possessed and used the equipment selected by him through the draft to the exclusion of Larry and Roger, including for farming land other than Parcels 4 and 5.

28. Jerry has not sought to return any equipment he selected in the draft.

29. In the two years following the mediations and the draft, Larry and Roger have possessed and used the equipment selected by them in draft to the exclusion of Jerry, including for farming land other than Parcels 1, 2, and 3.

30. Larry and Roger have purchased substitute equipment to replace the equipment selected by and exclusively used by Jerry following the mediations and the draft.

31. In the two years following the mediations and the draft, Larry and Roger have maintained, repaired, and insured the equipment selected by them in the draft.

32. The 1998 JD 9300 tractor selected by Larry in the draft had approximately $50,000 in debt against the tractor with creditor Ag Direct, which debt Larry has assumed and kept current in the two years following the mediations and the draft.

33. Jerry had personal property located in the house on Parcel 1 that he removed in May and June of 2013 consistent with the mediation memoranda.

34. Jerry's actions since the mediations support a determination of an implied contract as well as ratification of the agreement negotiated at mediation with respect to selection and division of equipment selected through the draft.

Conclusions of Law

35. The parties have an enforceable settlement agreement (through an implied agreement, ratification, or both) pertaining to the equipment selected by each party through the draft as follows: (a) the parties shall execute bills of sale, or other appropriate transfer documents, transferring title in the drafted equipment to the party selecting each piece of drafted equipment; (b) the Ag Direct debt associated with the 1998 JD 9300 is to be assumed by Larry, which the evidence shows has already been done.

36. The Court incorporates by reference the conclusions of law set forth in infra § I (Post-mediation Acts: Implied Agreement and Ratification).

D. Sunflower Disc Debt

Findings of Fact

37. Jerry testified that he believed Farmers State Bank ("FSB") debt related to the Sunflower disc selected in the draft by Larry and Roger was supposed to be assigned or transferred to Larry or Roger.

38. The parties unambiguously agreed that all FSB debt was to be split into equal thirds between them.

39. The parties in fact paid the FSB debt equally with each party paying his one-third share.

40. Jerry paid approximately $13,000 of FSB debt that he claims is related to the Sunflower disc.

41. There were items of equipment, other than the Sunflower disc, that Jerry received in the draft for which there was still remaining FSB debt that was paid equally by all of the parties.

42. The first mediation summary drafted by the mediator provided that each party would pay one-third of all bank (FSB) debt, except as otherwise stated.

43. There was no language or other suggestion following either mediation that any debt specifically associated with the equipment would be paid individually by the party receiving that item of equipment.

44. Jerry did not present any evidence to show that he inquired or attempted to clarify whether the debt for an item of equipment would go with the equipment contrary to the discussions confirmed following the mediation.

45. Jerry testified that he paid his one-third portion of the FSB debt, including the portion associated with the Sunflower disc.

46. Jerry's claim that he understood the FSB debt associated with the Sunflower disc would be paid by the party selecting the Sunflower disc in the draft is not consistent with the evidence of the parties' understandings at the time of mediation and at the draft following the second mediation.

47. The Court does not find Jerry's testimony that he misunderstood the status of the bank debt on Sunflower disc to be credible.

48. Jerry's actions of receiving and using all the equipment he received in the draft and paying the partnership's FSB debt demonstrate Jerry's intent to be bound by the agreements reached at mediation regarding the equipment.

Conclusions of Law

49. The Court concludes that the FSB debt was properly paid in equal shares by the parties.

50. The FSB debt Jerry alleges is associated with the Sunflower disc was properly paid equally by the parties.

51. Jerry is not entitled to reimbursement of the approximate $13,000 in FSB debt related to the Sunflower disc that he claims he wrongfully paid.

E. Missing Accessories: Sprayer, Grain Cart, Tractor Cab, and Planter

Findings of Fact

52. Jerry testified that he believed the sprayer he selected in the draft was supposed to include a GPS unit, but the sprayer was missing a GPS unit when Jerry received the sprayer after the draft.

53. Jerry testified that he believed the grain cart he selected in the draft was supposed to include a scale, but the scale was missing when Jerry received the grain cart after the draft.

54. Larry and Roger also did not receive all the pieces or accessories for all of the equipment they selected in the draft, in particular the corn planter drafted by Larry is missing several accessories or pieces.

55. The fact that certain pieces or accessories were missing from various pieces of equipment does not affect the formation or validity of the agreements reached or the Court's finding that ratification occurred; rather, the parties have contractual remedies for any breaches.

56. The condition the equipment was in during the Wieman appraisal and the description used in the Appraisal is evidence of the intent of the parties and what the parties relied upon in drafting equipment.

Conclusions of Law

57. The Court incorporates by referenced the conclusions of law in *supra* § C related to distribution of the drafted equipment.

58. Jerry is entitled to return of the GPS unit for the sprayer or its fair market value.

59. Jerry is entitled to a scale for the grain cart or its fair market value.

60. Jerry is entitled to the removable cab for the 4010 tractor and Larry and Roger have agreed to provide this to Jerry.

61. Larry is entitled to the missing parts for the corn planter (*e.g.*, corn units, turnbuckle hitch, control box, and monitor) or their fair market value.

62. The respective accessories or parts that each party owes the other shall be delivered at or before the time bills of sale are executed. If any such items are not returned, then the parties shall agree upon fair market value compensation or set the matter for further hearing if an agreement cannot be reached.

F. LP Tanks

Findings of Fact

63. Jerry asserts that LP tanks should not be considered fixtures or structures that transfer as part of the real property to which they are affixed.

64. Four LP tanks were purchased by the partnership, while Jerry personally purchased one LP tank.

65. Jerry testified that it was his intention and understanding that the LP tanks were never fixtures, as they are easily moved

66. There is no evidence that the parties discussed any understanding or intention regarding the propane tanks being anything other than personal property.

67. There was no evidence showing how the LP tanks were physically affixed to the land.

68. The parties intended to treat LP tanks as personal property.

69. All the parties agreed at the hearing that it would be more appropriate for each party to receive the value of the LP tanks in lieu of physically removing and transferring LP tanks.

Conclusions of Law

70. The Court refers to SDCL 43-33-1 for guidance on what is determined a structure, and that statute provides, "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws."

71. When one "affixes his property to the land of another without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land unless he chooses to require the former to remove it." SDCL § 43-33-2.

72. The South Dakota Supreme Court has recognized a number of factors to consider in determining whether property is a fixture. Those factors include: "(1) annexation to the realty; either actual or constructive; (2) its adaptability to the use and purpose for which the realty is used; and (3) the intention of the party making the annexation." *Rushmore Shadows, LLC v. Pennington County Bd. of Equalization*, 2013 SD 73, ^ 9, 838 N.W.2d 814, 817 (citing *In re Tax Appeal of Logan & Assocs.*, 331 N.W.2d 281, 282 (S.D. 1983)). Of the factors, intent is controlling as the others "derive their chief value as evidence of such intention." *Id.* (internal citations omitted). "[I]ntent is not the secret intent in the mind, but the intent that may be deduced from ... the circumstances of the particular case." *Id.* (quoting *First Nat'l Bank of Aberdeen* v. *Jacobs*, 273 N.W.2d 743, 746 (S.D. 1978)).

73. The Court concludes that the LP tanks are not fixtures attached to real property.

74. Jerry is entitled to the total payment of $1,200.00 from Larry and Roger to compensate him for his interest in the LP tanks, with such payment to occur at or before closing on the real property.

G. <u>Grain Bins</u>

Findings of Fact

75. Jerry asserts that grain bins (and a Quonset building at Roger's place) should not be considered fixtures or structures that transfer as part of the real property to which they are affixed.

76. Exhibit 29 lists grain bins purchased by the partnership, all of which are located on real property going to Larry and Roger.

77. In addition to the grain bins Jerry admits the partnership purchased, Jerry testified that he personally purchased an additional 7,000 bushel grain bin that is located on Parcel 1 and a 25,000 bushel bin located at Roger's place.

78. Jerry purchased the 7,000 bushel grain bin with his own funds.

79. The partnership reimbursed Jerry for his purchase of the 25,000 bushel grain bin, therefore, the 25,000 bushel bin shall be considered a partnership grain bin.

80. The physical locations of the grain bins described above (the bins indisputably purchased by the partnership, Jerry's 7,000 bushel bin, and the 25,000 bushel bin) are as follows: (a) the 25,000 bushel bin, valued at $7,000, is located at Roger's place (non-partnership land); (b) one 16,000 bushel bin (valued at $11,000) is located at Roger's place (non-partnership land); and (c) the other bins are located on Parcels 1 through 3 (partnership land).

81. For the grain bins located on Parcels 1 through 3, on partnership land, the Court find the parties intended for these bins to be part of the real estate to be divided between the parties at the time of the mediations.

82. The evidence does not show that the parties placed any value on the grain bins located on Parcels 1 through 3 separate from the real estate.

83. The evidence does not support Jerry's claim that he believed the grain bins located on Parcels 1 through 3 were separate from the real estate.

84. The evidence shows that the parties divided up the real estate based upon the Wieman valuations that included the grain bins on Parcels 1 through 3 as improvements on the real estate for the purpose of the valuation.

85. There was no agreement that the grain bins on Parcels 1 through 3 would be considered separate from the real estate during the mediations.

86. The parties' reliance on the Wieman appraisals of Parcels 1 through 3 during mediation, and the lack of objection by Jerry to the inclusion of grain bins as part of the valuation of the real property, shows a clear intent that the grain bins on Parcels 1 through 3 were intended to be fixtures that go with the land, as opposed to personal property.

87. The two grain bins at Roger's place, the 25,000 bushel bin (valued at $7,000) and the 16,000 bushel bin (valued at $11,000), and the Quonset building at Roger's place (valued at $7,500.00) were not intended by the partnership to be affixed to Roger's place, as Roger's place is owned by Larry and Jerry, not by the partnership.

88. The Wieman appraisal utilized by the parties at mediation separately valued the two grain bins at Roger's place.

89. There was no intention by the parties to value the two grain bins at Roger's place as a part of the improvements at Roger's place.

Conclusions of Law

90. The Court incorporates by reference *supra* ¶¶ 70-72 pertaining to the definition of, statutes related to, and case law addressing fixtures.

91. The Court concludes that the grain bins located on Parcels 1, 2, and 3 are fixtures that are attached to and transfer with the real property.

92. The Court concludes that the two grain bins and Quonset building at Roger's place are not fixtures, but are personal property of the partnership.

93. Larry and Roger are ordered to pay Jerry for his one-third interest in the two grain bins at Roger's place, which is the total sum of $6,000.00, with such payment to occur at or before closing on the real property.

94. Larry and Roger are ordered to pay Jerry for his one-third interest in the Quonset building at Roger's place (valued at $7,500.00), which is the total sum of $2,500.00, with such payment to occur at or before closing on the real property.

H. Electric Fencing and Corral Fencing

Findings of Fact

95. Jerry claims that electric fencing and corral fencing (but not border fences) are not fixtures that transfer by deed with the real property on which such items are presently located.

96. The electric fencing and corral fencing are easily removable, adaptable, and are often used on a temporary basis in one area, then moved to another area. This is distinguished from border fencing that is embedded into the ground and not easily removed.

Conclusions of Law

97. The Court incorporates by reference *supra* ¶¶ 70-72 pertaining to the definition of, statutes related to, and case law addressing fixtures.

98. The Court concludes that the electric fencing and corral fencing are not fixtures attached to real property, but are personal property of the partnership.

99. Jerry is entitled to his one-third interest in any partnership-purchased electric fencing or corral fencing on the real property to be received by Larry and Roger.

100. Likewise, Larry and Roger are entitled to their combined two-thirds share in any partnership-purchased electric fencing or corral fencing on the real property to be received by Jerry.

101. The Court directs the parties to attempt to reach an agreement as to compensation for the parties' respective interests in the electric fencing and corral fencing or to set the issue for further hearing if an agreement is not reached.

I. Post-mediation Acts: Implied Agreement and Ratification

Findings of Fact

102. In the two years following the mediations, all three parties have conducted themselves unambiguously in a manner consistent with the agreed-upon distribution of real estate in the settlement memoranda.

103. In the two years following the mediations, all three parties have paid real estate taxes on Parcels 1 through 5 and Roger's place separately, with the exception of the May 2013 real estate taxes relating back to 2012 partnership tax liabilities for which partnership funds were used.

104. In the two years following the mediations, Jerry has not used the grain bins located on Parcels 1 through 3 or Roger's place and has instead rented or made other arrangements for grain storage.

105. The parties' conduct following the mediations is evidence of an implied agreement related to settlement and distribution of certain partnership assets, specifically Parcels 1 through 5 and the selected equipment, as well as Roger's place.

106. The parties' conduct following the mediations is evidence of ratification of particular settlement terms set forth in the mediation memoranda, specifically, the distribution of Parcels 1 through 5, drafted equipment, and Roger's place.

107. In the two years following the mediations, all three parties have conducted themselves unambiguously in a manner consistent with the agreed upon distribution of equipment selected through the draft.

108. The parties fairly and fully bargained the terms of the division of the partnership as to all the real estate and equipment, including Roger's place.

109. There were material terms that were not fully resolved in dissolving the partnership, but the parties, by their actions over the past two years, have affirmed and ratified the terms of the dissolution relating to the real estate and equipment.

Conclusions of Law

110. The law favors the compromise and settlement of disputed claims. *See Kroupa v. Kroupa*, 1998 S.D. 4, 574 N.W.2d 208.

111. The Court has the inherent power to summarily enforce a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous. *See Lewis v. Benjamin Moore & Co.*, 1998 SD 14, 574 N.W.2d 887.

112. If a contract is defective or incomplete, the conduct of parties may ratify an agreement thereby making the agreement valid and enforceable. *See Ziegler Furniture & Funeral Home, Inc. v. Clemanec*, 2006 S.D. 6, ¶ 31, 709 N.W.2d 350, 358.

113. As stated in *Ziegler*, "[e]ven if the contract could be deemed defective or incomplete, this conduct constitutes ratification. A contract is ratified when 'an act by which an otherwise voidable and, as a result, invalid contract is conformed, and thereby made valid and

enforceable.' 17A CJS Contracts § 138 (1998). *See also* Restatement (Second) of Contracts § 380 cmt. a (1981) (Ratification by Affirmance). Ratification can either be 'express or implied by conduct.' *Bank of Hoven v. Rausch*, 382 N.W.2d 39, 41 (S.D.1986) (citation omitted). 'In addition, failure of a party to disaffirm a contract over a period of time may, by itself, ripen into a ratification, especially if rescission will result in prejudice to the other party.' " 2006 S.D. 6, ¶ 31, 709 N.W.2d at 358.

114. Ratification of an agreement can either be express or implied by conduct. *See Ziegler* ¶ 31 (quoting *Bank of Hoven v. Rausch*, 382 N.W.2d 39, 41 (S.D. 1986)).

115. Jerry, Larry, and Roger ratified the portion of the settlement the parties reached at mediation pertaining to disposition of the real estate (Parcels 1 through 5 and Roger's place) and the equipment selected by the parties through the draft.

116. The existence and terms of an implied contract are manifested by the parties' conduct, which includes both acts and words. *See Mathews v. Twin City Const. Co. Inc.*, 357 N.W.2d 500, 507 (S.D. 1984)

117. Jerry, Larry, and Roger reached an implied agreement pertaining to disposition of the real estate (Parcels 1 through 5 and Roger's place) and the equipment selected through the draft as manifested by the parties' words and acts.

118. The parties have an enforceable settlement agreement (through an implied agreement, ratification, or both) pertaining to disposition of the real estate (Parcels 1 through 5 and Roger's place) and the equipment selected through the draft, as follows: (a) Parcels 1, 2, and 3 shall be transferred to Larry and Roger to be divided between them, jointly farmed, or further disposed of as mutually agreed between Larry and Roger; (b) Parcels 4 and 5 shall be transferred to Jerry; (c) Jerry shall transfer his 50% interest in Roger's place to Roger in exchange for

$50,025.00; (d) the real estate transfers shall include all structures, houses, barns, grain bins, outbuildings, and border fences attached to the land (although Larry and Roger owe Jerry compensation for the grain bins at Roger's place and Quonset building at Roger's place as set forth above); (e) the real estate transfers shall not include LP tanks, electric fencing, or corral fencing; and (f) the equipment selected by each party through the draft shall be transferred to each party as selected with all accessories (or compensation for missing accessories as set forth above), with the Ag Direct debt associated with the 1998 JD 9300 to be assumed by Larry, and with Jerry not being entitled to compensation or reimbursement for his claim related to payment of FSB debt associated with the Sunflower disc.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Court orders that the parties take the necessary action to accomplish the following within thirty days of entry of this Order:

1. On behalf of the partnership, Larry, Roger, and Jerry shall execute a quit claim deed transferring ownership of Parcels 1, 2, and 3 to Larry and Roger (or as directed by Larry and Roger) and Parcels 4 and 5 to Jerry (or as directed by Jerry). The quit claim deed shall include all structures, houses, barns, grain bins, outbuildings, and border fences attached to the land. The quit claim deed shall include the legal descriptions for each parcel as reflected in the January 5, 2013, Wieman appraisal marked as Hearing Exhibit 11.

2. Roger shall pay Jerry $50,025.00 in exchange for Jerry executing a quit claim deed transferring Jerry's 50% ownership interest in Roger's place to Roger. The quit claim deed shall include all structures, houses, barns, grain bins, outbuildings, and border fences attached to

the land. The quit claim deed shall include the legal descriptions for each parcel as reflected in the April 22, 2013, Wieman appraisal marked as Hearing Exhibit 20.

3. On behalf of the partnership, Larry, Roger, and Jerry shall execute a bill of sale or other appropriate document transferring ownership of all equipment drafted by each party, a list of which equipment is attached as Exhibit A.

4. Jerry shall not be reimbursed or compensated by Larry and Roger for the FSB debt associated with the Sunflower disc that Jerry paid.

5. At or before the time the bills of sale are executed, Larry and Roger shall provide Jerry all accessories related to the sprayer (GPS unit), grain cart (scale), and the 4010 tractor (removable cab), or compensate Jerry for these items as set forth above.

6. At or before the time the bills of sale are executed, Jerry shall provide Larry and Roger all accessories related to the planter (*e.g.*, corn units, turnbuckle, hitch, control box, and monitor), or compensate Larry and Roger for these items as set forth above.

7. The LP tanks shall transfer with the deeds related to the real property on which the LP tanks are located, but Larry and Roger shall pay Jerry the total amount of $1,200.00 for compensation for this personal property at or before the time of closing.

8. The grain bins on Parcels 1 through 3 and Roger's place, and the Quonset building at Roger's place, shall transfer with the deeds related to the real property on which these structures are located, but Larry and Roger shall pay Jerry the total amount of $8,500.00 for compensation for the structures located at Roger's place at or before the time of closing.

9. The parties shall resolve (or set for further hearing) compensation for the electric fencing and corral fencing which the Court concluded were not fixtures attached to real property.

10. The parties shall submit a scheduling order to the Court establishing deadlines for discovery, pretrial filings, and trial briefing deadlines related to the equitable portion of this case, which includes an accounting, dissolution, distribution of remaining partnership assets, true-up of revenue and expenses, and partnership wind-up issues.

11. Jerry's claim against Defendants for unpaid draws and Defendants' counterclaims related to embezzlement, conversion, fraud, and misappropriation against Jerry shall be resolved by a jury trial. The scheduling order submitted to the Court shall establish appropriate deadlines related to the jury trial portion of this case.

PLAINTIFF'S APPLICATION TO APPOINT RECEIVER

1. As set forth in the Court's Order, Findings of Fact, and Conclusions of Law pertaining to enforcement of the settlement reached by the parties, the partnership real estate (Parcels 1 through 5) and equipment selected through the draft have been allocated and will be distributed in accordance with the Court's Order.

2. An appointment of a receiver to manage, to distribute, or to sell the remaining partnership assets is not necessary or prudent at this point in time.

3. The Court denies Jerry's request for appointment of a receiver.

4. Through the Court's equitable powers, the Court will resolve the accounting, dissolution, distribution of remaining partnership assets, true-up of revenue and expenses, and partnership wind-up issues.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court finds that there are genuinely disputed facts material to resolving Defendants' counterclaim, in particular, facts related to Defendants' knowledge of Plaintiff's alleged acts and omissions, Plaintiff's alleged fraudulent concealment, and the accrual dates for Defendants' various claims. Therefore, the Court denies Plaintiff's motion for partial summary judgment.

Dated this 1st day of May 2015.

BY THE COURT:

Honorable Steven R. Jensen
Circuit Court Judge

ATTEST: Cheryl J. Miller

Cheryl J. Miller, Clerk

By _____ Deputy

Equipment	Value	Owner
1995 JD 8200	53500	Jerry
1999 JD 9610 Combine	47500	Jerry
1994 Rogator #664	27500	Jerry
2004 JD 893 Cornhead	18500	Jerry
JD 544 Wheel Loader with Cab	12500	Jerry
JM 620 Grain Cart with Scale	10500	Jerry
Sunflower5033 Field Cultivator	8500	Jerry
1995 Jet 34'All Metal Hopper	7750	Jerry
Haybuster#266 Plus Bale Processor	6500	Jerry
1984 Mack R690 ST Semi Tractor	5500	Jerry
1980 IHC Truck	5500	Jerry
1963 JD 4010 Diesel	6000	Jerry
1999 H-W 8' x 30' GN Flatbed Trailer (Jerry Proved)	4500	Jerry
2007 Featherlite STL 7' x 22 GN Stock Trailer	4000	Jerry
AC 185 Diesel	3500	Jerry
1993 JD 930 Flexhead	3500	Jerry
JD148 Loader with 8 ' bucket with Grapple	3200	Jerry
Army Surplus 28 Semi Flatbed	2500	Jerry
alfalfa seed	2500	Jerry
Kelly Ryan Silage Accumulator Box	2000	Jerry
Demco 3 pt 300-400 Gal Sprayer with Drive Pump	2000	Jerry
JD 345 Gas Riding Mower	1500	Jerry
1980 Titan 7' x 22' Stock Trailer	1500	Jerry
(2) Patz 18' Silage Unloaders with Motors: 650 ea.	1300	Jerry
Feterl 10 x 60 Auger PTO	1250	Jerry
1998 Yamaha Kodiak 4.4 ATV Average	1000	Jerry
20 Ft Flatbed on Electric 5026 Running Gear	900	Jerry
(1) portable Calf Self Feeder (1 Jerry proved)	750	Jerry
(1) portable Calf Self Feeder (1 Jerry did not prove)	750	Jerry
Danuser 3 Pt Post Auger w/9" and 12" Bits	650	Jerry
(6) 10' Sections of New Augers for Bunk Feeder	600	Jerry
2004 Sunflower1434=36 Rock Flex Disk36	35000	Larry
1998 JD 9300: Approx $60,000 Farm Credit: App 82,000	32000	Larry
JD 1780 Planter16/31 Row	13000	Larry
JD #680 Chisel Plow	12000	Larry
1998 Jet 34' All Metal Grain Trailer	11000	Larry
JD 750 No Till 15'Drill, 7.5" Spacing	8500	Larry
Knight 1140 Tandem Axle Manure Spreader	7500	Larry
JD 3970 Forage Harvestor with 3 Row	7000	Larry
1996 OMC Mustang 940	5500	Larry
JD 843 Cornhead	5500	Larry
Knight 3300 Reel Type Mixer Feeder Wagon	4500	Larry
Westfild MK Auger	3750	Larry
Gehl 520Wheel Rake:14 Wheel	3750	Larry
Meyerink #M12 Box Scraper	3000	Larry
1 Factory Header Trailer - 30' head	1750	Larry
1 Factory Header Trailer - 22' head	1750	Larry
Mustang OMC 440 Skidloader	1750	Larry
Richardton 14' Silage Dump Box	1500	Larry
Betterbilt 2100 Gal Liquid Manure Wagon/w P/H	1500	Larry
1000 Gal Fuel Tank	1200	Larry
16' Bumper Style Flatbed	750	Larry
2001 JD 7510	52500	Roger
1991 JD 9500 Combine	29000	Roger

Exhibit A

1985 JD 4450	28000	Roger
JD635 Rock Flex Dish29"10	11500	Roger
Metal Grain Dryer Bin: (Not on Equipment Draft) (15k bu)	11000	Roger
2004 JD#567 Round Baler	10500	Roger
1977 JD 4430	10000	Roger
Metal Quonset (Not on Equipment Draft)	7500	Roger
1975 4230	7000	Roger
Brock 36' Metal Storage Bin with unloading Auger (25k bu)	7000	Roger
White Volvo Semi	6000	Roger
1981 Ford 700SA Truck V8 5-2 SPD	5500	Roger
1998 JD 922 Flexhead	5000	Roger
NH #1475 Mower Conditioner 16'	4500	Roger
NH #355 Grinder Mixer with Scale	4500	Roger
Westfield MK Auger Older of Two	3000	Roger
JD 158 Loader with 8' bucket	3000	Roger
Knight Reel Auggie 2300 Mix Feeder Wagon	2750	Roger
BalzerSilage Accumulator Box	2000	Roger
JD 2320 Gas SP Swather	1750	Roger
2004 Feterl 10 x 70 Auger	1500	Roger
1/2 Ownership Grain Vac	1250	Roger
1998 Kawasaki Prairie 400 ATV	1000	Roger
Yellow Round Bale Transport	950	Roger
Mueller 1000 Gal SS Milk Bulk Tank	3500	Larry/Roger
Westfallia Surge 10 HP Vacuum Pump with Pipe and	2500	Larry/Roger
(2) Patz 20' Silage Unloaders with Motors 800 ea	1600	Larry/Roger
(2) 1000 Gal LP Tanks: 800 Each: Both on Home Place	1600	Larry/Roger
(2) portable Calf Self Feeders:	1500	Larry/Roger
Balzer 24' Silage Unloader with Electric Motor:SP	1500	Larry/Roger
Golliath 25'Silage Unloader	1500	Larry/Roger
(3) 500 Gal LP Tanks: 400 each (Go with Property)	1200	Larry/Roger
Choretime Bulk Bin: Home Place (Goes with Property)	300	Larry/Roger
6-7 Ton Older Bulk Bin: Across Road from HP(Steve)	250	Larry/Roger
Double SS Wash Vat	75	Larry/Roger

STATE OF SOUTH DAKOTA) : SS COUNTY OF MCCOOK)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
GERALD PAWELTZKI, Plaintiff, vs. ROGER PAWELTZKI and LAWRENCE PAWELTZKI, Defendants.	CIV. 12-114 **ORDER ENFORCING SETTLEMENT AGREEMENT**

The Court held a hearing on December 8, 2016, at the McCook County courthouse on Defendants' Motion to Enforce Settlement pertaining to resolution of what the parties have referred to as "the Draft Items." The Court grants Defendants' motion as follows: (1) the attached Exhibit A shall be enforced as the settlement reached between the parties regarding the subject matter of Exhibit A; and (2) the manure spreader (Item #323 on the Draft Items list) and hay rack (Items #265 on the Draft Items list), which are partnership-owned property presently located on land owned by Brian Paweltzki, shall be resolved by the Court at a later date when the Court resolves the remaining "true-up" issues related to partnership fuel, chemicals, livestock, crops, panels, gates, posts, corral fencing, and electric fencing.

Dated this 7th day of December, 2016.

BY THE COURT:

Honorable Steven R. Jensen
Circuit Court Judge

ATTEST: Cheryl J Miller
Clerk of Court
By _____ Deputy

FILED
DEC 08 2016
Cheryl J Miller
McCOOK COUNTY CLERK OF COURTS
FIRST JUDICIAL CIRCUIT COURT OF SD

EXHIBIT
10

DRAFT ITEMS SETTLEMENT AGREEMENT

Gerald Pawelzki ("Jerry"), Lawrence Pawelzki ("Larry"), and Roger Pawelzki ("Roger") (collectively "the Parties") execute this Draft Items Settlement Agreement ("this Agreement") to memorialize the compromise reached with respect to disposition of certain property owned by the Parties and the Parties' farming partnership known as Pawelzki Brothers Partnership ("the Partnership").

1. **Included Property.** Jerry is to receive all equipment, tools, attachments, accessories, tangible property, and other property in his possession as of March 30, 2016, and which is located upon land owned or leased by him and/or on land owned or leased by his son, Brian Pawelzki. Larry and Roger are to receive all equipment, tools, attachments, accessories, tangible property, and other property in their possession as of March 30, 2016, and which is located upon land owned or leased by them and/or on land owned or leased by Steven Pawelzki, including land known by the parties as "Leitheiser", Schabrel and Richard's feedlot. It is the express intent of Jerry, Larry and Roger that this Draft Items Settlement Agreement resolves any and all claims as to property owned by the Parties and/or the Partnership that remain unresolved following execution of the Quit Claim Deeds and Bill of Sale on September 9, 2015.

2. **Excluded Property.** Excluded from paragraph (1) above are the following four categories of property: (a) property previously resolved or transferred per Judge Jensen's prior court decisions or orders, which property is the subject of the Quit Claim Deeds or Bill of Sale dated September 9, 2015; (b) "true-up" items owned by the Partnership, which include, but are not limited to, fuel, chemicals, livestock, crops, and the particular items Judge Jensen determined were not affixed to real property (panels, gates, posts, corral fencing, and electric fencing); (c) Jerry's legal claims against Larry and Roger as set forth in the Complaint; and (d) Larry and Roger's legal claims against Jerry as set forth in their Counterclaim. Nothing in this Agreement is intended to change the disposition of any property or claim listed in this paragraph (2) of this Agreement. Notwithstanding anything in this Agreement, the Parties are not settling the disposition of the other claims, issues, or Partnership property identified in this paragraph (2) of this Agreement.

3. **Larry and Roger's Property.** Jerry further agrees to tender to Larry and Roger the following items which shall be owned by Larry and Roger: Roger's wire winder; the grain spreader, bale carrier, and bale spear (also called the quick tach frame) in Brian Pawelzki's possession that the Partnership purchased; and the bin fan that Jerry removed from Bin #3 at Richards' place (Item 234). Jerry specifically agrees the orbit motor, which Jerry asserted was part of the bale elevator and which Larry and Roger asserted was part of one of their augers, shall be owned by Larry and Roger. Jerry waives any claim to the items that will be owned by Larry or Roger, and further agrees to execute a bill of sale to reflect such ownership if the need arises.

4. **Jerry's Property.** Larry and Roger shall tender the red working chute and carrier to Jerry and Jerry shall own this item. Larry and Roger waive any claim to the items that will be owned by Jerry, and further agree to execute a bill of sale to reflect such ownership if the need arises.

EXHIBIT
A

5. **Payment to Jerry.** Larry and Roger shall pay to Jerry the total sum of $14,500.00 (fourteen-thousand five-hundred dollars) upon: (a) Jerry's execution of this Agreement; and (b) Jerry's completion of tendering all required items to Larry and Roger.

6. **Execution.** This Agreement may be executed in separate parts. The Parties have obtained legal advice from attorneys of their choosing regarding this Agreement and execute this Agreement knowingly and voluntarily.

Dated this 19 day of April, 2016.

Gerald "Jerry" Paweltzki, Individually and as a partner of Paweltzki Brothers Partnership

Dated this ___ day of April, 2016.

Roger Paweltzki, individually and as a partner of Paweltzki Brothers Partnership

Dated this ___ day of April, 2016.

Lawrence "Larry" Paweltzki, individually and as a partner of Paweltzki Brothers Partnership

STATE OF SOUTH DAKOTA) : SS COUNTY OF MCCOOK)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
GERALD PAWELTZKI, Plaintiff, vs. ROGER PAWELTZKI and LAWRENCE PAWELTZKI, Defendants.	FILE NO. 44CIV12-000114 ORDER DENYING DEFENDANT'S ADDITIONAL MOTION TO ENFORCE SETTLEMENT

The above entitled matter having come on before the Honorable Chris S. Giles, Circuit Court Judge, First Judicial Circuit, State of South Dakota, for a hearing on November 27, 2017, pursuant to the Defendants' Motion for Enforcement of Settlement dated September 28, 2017; and the Plaintiff not appearing in person, but by and through his attorney or record Timothy R. Whalen; and the Defendants appearing in person and with their attorney Mitchell A. Peterson; and the Court having read and considered the Defendants' motion and the Plaintiff's response to said motion; and the Court having reviewed the file in the above matter; and the Court having heard and considered the arguments of the parties; and the court having been fully advised in the premises and good cause appearing therefor, it is hereby

ORDERED that the Defendants' Motion to Enforce Settlement dated September 28, 2017, be and the same is hereby denied; and it is further

ORDERED that the parties are permitted to convene depositions for the limited purposes of engaging in discovery relative to the issue of whether or not a settlement was reached when the parties engaged in mediation; and it is further

ORDERED that nothing herein shall be construed as prohibiting the

EXHIBIT 11

Defendants from bringing the aforesaid motion at later date after further discovery and/or depositions are completed relative to the issues framed in the aforesaid motion.

BY THE COURT:
Signed: 11/28/2017 3:56:31 PM

Chris S. Giles

CHRIS S. GILES - CIRCUIT COURT JUDGE

Attest:
Miller, Cheryl J.
Clerk/Deputy

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MCCOOK)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

****

GERALD PAWELTZKI,
Plaintiff,

vs.

ROGER PAWELTZKI and LAWRENCE PAWELTZKI,
Defendants.

FILE NO. 44CIV12-000114

ORDER DENYING DEFENDANT'S RENEWED MOTION TO ENFORCE SETTLEMENT

****

The above entitled matter having come on before the Honorable Chris S. Giles, Circuit Court Judge, First Judicial Circuit, State of South Dakota, for a hearing on May 8, 2018, pursuant to the Defendants' Renewed Motion to Enforce Settlement; and the Plaintiff appearing in person and with his attorney of record Timothy R. Whalen; and the Defendants appearing in person and with their attorney of record Mitchell A. Peterson; and the Court having read and considered the Defendants' motion and briefs and the Plaintiff's response to said motion; and the Court having reviewed the file in the above matter; and the Court having heard and considered the arguments of the parties; and the court having been fully advised in the premises and good cause appearing therefor, it is hereby

ORDERED that the Defendants' Renewed Motion to Enforce Settlement, be and the same is hereby denied in its entirety.

Signed: 5/14/2018 9:18:41 AM

BY THE COURT:

Chris S. Giles

CHRIS S. GILES - CIRCUIT COURT JUDGE.

Attest:
Miller, Cheryl J.
Clerk/Deputy

EXHIBIT 12

First Judicial Circuit Court

Bruce V. Anderson
Circuit Court Judge
P.O. Box 86
Armour, SD
Phone: 605-724-2145
Fax: 605-724-2508

Melissa A. Odens
Official Court Reporter
P.O. Box 86
Armour, SD
Phone: 605-724-2145
Fax: 605-724-2508

Presiding Judge
Cheryle W. Gering
Circuit Judges
Bruce V. Anderson
Patrick T. Smith
Tami Bern
Chris Giles

Magistrate Judges
Donna Bucher
Kasey Sorensen

Circuit Administrator
Kim L. Allison
Chief Court Services Officer
Ron Freeman
Circuit Assistant
Joan Novak

January 30, 2020

RE: Paweltzki v. Paweltzki, 44CIV12-114

The Court having heard all the evidence and testimony and considered the arguments of counsel now enters the following memorandum opinion. The Court had the opportunity to view the credibility of all the witnesses and that is a significant factor in reaching this decision. Overall, the Court found the defendants' witnesses to be truthful and credible. The Court did not find the plaintiff to be a very credible witness. Almost all of the defendants' facts and evidence were properly and fully supported by the testimony of the witnesses. The Court finds that the plaintiff's testimony and positions on the issues for the Court to decide were not properly supported by the evidence. In fact, the Court found his position concerning 42 unaccounted-for, or missing heifers to be completely preposterous.

I. Items to be Distributed

a. Items in Agreement between the parties

There were some items on what has been categorized as Jerry's True-Up Damages to which the parties are in agreement. The parties agree that the feed inventory was worth $520, making the plaintiff's one-third share $167.33. The parties agree that the value of the fuel inventory is $4,658, making the plaintiff's one-third share $1,553. The parties agree that the

value of the oil inventory was $3,000, making plaintiff's one-third share $1,000. The parties agree that the value of the milk replacer would be $238.50, making the plaintiff's one-third share $79.50. The parties agree that the boxes of milk filters were valued at $99, making the plaintiff's one-third share $33. The parties agree that the prepaid expense to Potter Tire Service was $5,000 and that the plaintiff would be entitled to reimbursement for one-third of this, in the amount of $1,666.

b. Livestock

The Court finds the Wieman Livestock appraisal conducted on January 7, 2013, to be reasonable and accurate. At the time of that appraisal there were 330 head of livestock. This is consistent with the bank financial statements from March of 2012 and all of the other evidence presented. Plaintiff's theory that there are an additional 42 unaccounted-for heifers or any other unaccounted-for cattle is not credible. The Wieman appraisal may label these 330 head of livestock slightly differently from how they had been labelled or categorized before, but the overall number of 330 is accurate and consistent. Taking into account the sales of livestock made between January 7, 2013, and February 15, 2013, the Court finds the total value of the livestock as of February 15, 2013, to be $248,203. Plaintiff is entitled to 1/3 of this.

c. Milk

The plaintiff is requesting one-third of $46,478 of milk income that was listed on the partnership 1065 return. The evidence showed that this milk income was deposited into the partnership checking account. It was then used to reduce the overall partnership debt. Therefore, the plaintiff has already received his one-third benefit for this item by the reduction in the partnership debt for which he would have been responsible otherwise.

d. Beans

The Court believes the most accurate and reliable information provided concerning the bean inventory as of February 15, 2013, was presented by the defendants. The Court finds that there were 8,393.33 bushels of beans. The plaintiff believes there were 8,500 bushels of beans and the Court finds that this difference is attributable to one of the partnerships landlords being paid out their one-third share of the harvest as rent. The applicable price per bushel for February 2013 is $14.40/bushel. The total value of this inventory was $165,575.94 making plaintiff's one-third share of the inventory $55,191.98.

e. Corn

The Court finds that the grain audit conducted by Great American Insurance Company on October 19, 2012, was a comprehensive inventory of all corn on hand, owned by the partnership, as of that date. This included all harvested corn from 2012 that had not already been sold and all corn inventory that was on hand and remaining from previous years. The plaintiff's contention that the grain audit only counted what was harvested in 2012 is not credible, feasible, or logical because there is no way an inventory of that nature would be able to differentiate between what was harvested in 2012 and placed in the bins, and what was previously in the bins.

Based on these findings, there were 25,007.10 bushels of corn as of October 19, 2012. The Court finds the defendants' calculations for 2,714.29 for the number of bushels of corn being fed to the milk cows and the defendants' calculation of 3,958.33 for the number of bushels of corn being fed to the fat cattle between October 19, 2012, and February 15, 2013, to be reasonable and soundly based. Therefore, there are 18,334.48 bushels of corn that are subject to this division. The February 2013 price per bushel for corn was $6.88. Multiplying this times the number of bushels results in a value for the corn inventory of $126,141.22, making the plaintiff's one-third share $42,047.07.

f. Hay

The Court believes the testimony from the defendants that the hay to which the plaintiff was entitled has already been distributed to him. The Court makes this determination based in large part upon the credibility of the witnesses for the defendants and the lack of credibility of the plaintiff. The number of bales the plaintiff claims should be available for distribution is not consistent with the overall history of the bales produced by the partnership on an annual basis and is not consistent with the facts surrounding the 2012 growing season which involved a serious drought. Therefore, the Court does not find that the plaintiff is entitled to anything more for hay bales, alfalfa bales, or square straw bales.

g. Utility Charges

The Court does find that the plaintiff is entitled to one-third of the utility charges after the dissolution of the partnership. The Court does not believe the plaintiff would have received any reasonable benefit from this. This total expenditure was $6,759 and therefore, plaintiff would be entitled to be reimbursed for one-third of this in the amount of $2,253.

h. Prepaid Insurance on Buildings and Vehicles

The Court does not believe the plaintiff is entitled to a full one-third share of the prepaid insurance for 2012 for buildings and vehicles because the Court believes the plaintiff did receive some benefit and value from this. This total expense was listed by the plaintiff at $8,000. The Court will award the plaintiff $2,000 for his one-third share of this expense.

i. Beef Slaughtered

The plaintiff requested one-third of four beef that went to the Alexandria Locker in 2012. It appears to the Court that a portion of these went to Roger and Larry, along with other family members. It is also clear that the plaintiff received a similar allotment earlier that same month.

Any of this beef that was sold had the proceeds deposited in the partnership checking account. Therefore, the plaintiff would have received the benefit from that. Taking into account that the plaintiff had already received a similar distribution of beef and that it appears to have been the parties' practice to make a distribution of this nature to the parties and their family members, which in this case included the plaintiff's son, the Court does not find it to be appropriate to award any amounts to the plaintiff for this item.

j. Gates, Posts, Fences, Corrals, etc.

The plaintiff listed the overall value of the gates, posts, fences, and corrals, etc., for the partnership at $31,604. In light of the Court finding the plaintiff to be less than credible in his valuations and descriptions of the parties' assets, the Court has great difficulty in finding this to be an accurate and reasonable value. Therefore, the Court is going to reduce the plaintiff's estimated value by 50%. The Court will find the total value of these items to be $15,802 and plaintiff's one-third share of this would be $5,267.33.

k. Increase in Debt After Dissolution

The Court will next address the plaintiff's request for a share of the increase in the partnership debt after the dissolution. The plaintiff believes this increase in debt was $30,947. However, this includes payment for the 2012 real estate taxes that were not payable until 2013 in the approximate amount of $16,000. These real estate taxes are a legitimate expense of the partnership prior to dissolution. Subtracting out the real estate taxes that were paid would leave only approximately $15,000. Therefore, the Court will award the plaintiff $5,000 for this requested item.

II. Unjust Enrichment

The Court has considered the defendants' claims for unjust enrichment. Based on the testimony and evidence presented, the Court believes the defense of laches applies to the defendants' unjust enrichment claim. The witnesses, especially Alyce Paweltzki, was adamant that she and the defendants were aware of the plaintiff's inappropriate activities as early as 2001 or before. Her testimony was that she and the defendants were certain of the plaintiff's misconduct during the time she and Larry were in charge of the partnership books. 2001 was the last year she was in charge of the partnership books.

The Court believes that the defendants knew and did not take appropriate action concerning the plaintiff's improper conduct. The Court finds this delay to be unreasonable. Therefore, the Court will not award anything to the defendants under the claim of unjust enrichment.

III. Prejudgment Interest

This matter has been hotly contested and disputed by these parties. This litigation took several years to get to trial. The Court does not find any improper conduct or bad behavior during the course of litigation by any of the parties. Therefore, the Court believes prejudgment interest would be appropriate and is applicable. For the plaintiff's claims to be decided by the Court, prejudgment interest commences from February 15, 2013. The Court believes 73 months of prejudgment interest would be appropriate at the statutory rate of 10% per annum.

Dated this 30th day of January, 2020.

Chris S. Giles

The Honorable Chris S. Giles
First Circuit Court Judge

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MCCOOK)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

****

GERALD PAWELTZKI,
Plaintiff,

vs.

ROGER PAWELTZKI and LAWRENCE PAWELTZKI,
Defendant.

FILE NO. 44CIV12-000114

NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

****

TO: The above named Defendants and their attorneys or record, Mitchell Peterson and Justin T. Clarke, Davenport, Evans, Hurwitz & Smith, 206 W. 14th Street, Sioux Falls, SD 57101:

NOTICE IS HEREBY GIVEN that FINDINGS OF FACT AND CONCLUSIONS OF LAW and a JUDGMENT in the above entitled action were entered by the Court on the 27th day of February, 2020, and filed with the Clerk of Courts of McCook County, South Dakota, on the 27th day of February, 2020, copies of which are attached hereto.

Dated this 2nd day of March, 2020.

TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: (605) 487-7645
Attorney for the Plaintiff
whalawtim@cme.coop

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT was served upon the attorneys for the Defendants at their last known mailing addresses as follows:

Mitchell A. Peterson/Justin T. Clarke
Davenport, Evans, Hurwitz & Smith
206 W. 14th Street
Sioux Falls, SD 57101
mpeterson@dehs.com
jclark@dehs.com

by the UJS file and serve system on the 2nd day of March, 2020.

TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: (605) 487-7645
Attorney for the Plaintiff
whalawtim@cme.coop

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MCCOOK)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

****

GERALD PAWELTZKI,
Plaintiff,

vs.

ROGER PAWELTZKI and LAWRENCE PAWELTZKI,
Defendant.

FILE NO. 44CIV12-000114

FINDINGS OF FACT

AND CONCLUSIONS OF LAW

****

The above entitled matter having come on for a jury and court trial before the Honorable Chris S. Giles, Circuit Court Judge, First Judicial Circuit, State of South Dakota, from January 24, 2020, through and including January 30, 2020; and the Plaintiff appearing in person and with his attorney of record, Timothy R. Whalen; and the Defendants appearing in person and with their attorneys of record, Mitchell A. Peterson and Justin T. Clarke; and the Court having considered the evidence, heard the testimony of the witnesses, and heard the arguments of the parties relative to the equitable claims to be decided by the court; and the Court having entered a memorandum decision; and the Court having been fully advised in the premises and good cause appearing therefor, the Court now enters the following

FINDING OF FACTS

1. It is undisputed that Gerald Paweltzki (Jerry), Roger Paweltzki (Roger) and Lawrence Paweltzki (Larry) operated a farming partnership known as Paweltzki Brothers Partnership (PBP) since at least the early 1980s.

2. The testimony showed that from the inception of PBP and during the 1980s Jerry maintained and kept the books and records for PBP and handled the financial matters with the bank for PBP.

3. The record established that during the time Jerry handled the partnership books and records, all partners had access to the records, bank account, and all other business records of PBP. Further, all partners were allowed to and did write checks on the PBP checking account and charged expenses to PBP with various vendors and suppliers.

4. Testimony showed that in the 1980s Larry and his wife, Alyce Paweltzki (Alyce), became concerned that Jerry was stealing or misappropriating funds from the PBP.

5. Larry and Alyce both testified that they consulted Roger in the 1980s about Jerry's misappropriation and alleged wrongful activities, but no action was taken by them against Jerry.

6. The record shows that as a result of Larry and Alyce's concerns they took over PBP books and records in the early 1990s and maintained said books and records until approximately 2001.

7. It is undisputed that after Larry and Alyce took over the PBP books and records, they and Roger continued to allow Jerry to write checks on PBP account, charge bills to vendors and suppliers who PBP did business with, and allowed Jerry to generally continue to do all things that he did before except keep the PBP books and records.

8. The testimony showed that after Larry and Alyce took over the PBP books and records, Jerry continued to handle the banking matters associated with financial planning for PBP as well as the preparation of the annual financial statements, balance sheets and related documents.

9. The evidence is overwhelming that at all times when Larry and

Alyce had control of the PBP books and records they, along with Roger and Jerry, had complete and unlimited access to the bank accounts, bank statements, and all financial matters associated with the operation of PBP.

10. Alyce testified that while Alyce had control of PBP books and records she worked at the same bank where PBP banked. Alyce had access to PBP banking records and, in fact, accessed said records to obtain information relative to the operation and financial matters of PBP.

11. Alyce and Larry both testified that as early as 1997 Larry and Alyce were convinced and knew for certain in their minds that Jerry was stealing or misappropriating funds from PBP.

12. As a result of Larry and Alyce's concerns about Jerry, they testified that the bank insisted on a written partnership agreement and such an agreement was signed by Larry, Roger and Jerry, on March 21, 1997. See, Exhs. #5 and #18.

13. The evidence showed that Larry and Alyce advised Roger of Jerry's alleged actions on several occasions and the three parties had numerous conversations relative to Jerry's perceived illegal actions.

14. In the mid 1990s Larry and Alyce testified that they complained to Alyce's employer that Jerry was stealing or misappropriating money from PBP and her employer, according to Alyce, advised them to take action against Jerry, but no action against Jerry was initiated by either Larry or Roger.

15. In approximately 2001, Larry and Alyce testified that they relinquished the books and records for PBP to Roger because they were

"fed up" with Jerry's actions.

16. The evidence showed that while Roger was in charge of the books from 2001 to January of 2012, no changes in the practices established by the partners were made. In short, Jerry continued to do the same things when Roger had the books as when he and Larry and Alyce had the books. Further, although Larry, Alyce and Roger complained about Jerry's actions, they did nothing to change the established practices of the business and took no action whatsoever to remedy their claimed loss or to stop Jerry from his alleged illegal activity.

17. Prior to January 6, 2012, although Larry, Alyce and Roger testified they were certain in their minds that Jerry was stealing or misappropriating funds from PBP, they did not make a complaint to law enforcement; they did not complain to or seek assistance from their tax accountant; they continued to deduct most of the expenses Jerry paid from PBP funds on the partnership tax returns, but claimed to have not deducted some of the expenditures Jerry made because they were misappropriated expenditures; they did seek advice of an attorney, but they did not pursue a civil claim or action against Jerry; they did not sue Jerry for his alleged wrongful conduct; Larry and Roger did not contact suppliers and vendors and tell them to stop charging to Jerry for PBP business; they did not contact the bank and remove Jerry from the accounts; and they took no other action of any nature or sort to stop Jerry's perceived illegal actions.

18. The evidence is uncontradicted that Jerry continued to engage in business on behalf of PBP the same as he did from the 1970s though

and including 2011. Moreover, Larry and Roger continued to rely on Jerry to handle the banking matters relative to the annual financial statements, balance sheets and related banking documents.

19. Prior to January 6, 2012, while Jerry was allegedly stealing or misappropriating funds from PBP, Larry and Roger testified that neither one of them terminated Jerry's ability to write checks on the PBP account, nor did they stop Jerry from continuing to incur expenses on behalf of PBP. Further, when the bills incurred by Jerry were sent to Larry and Alyce and Roger for payment, they paid same in the normal course of business. In fact, while Roger had control of PBP books and records the evidence showed that he and Larry wrote over 80% of the checks on PBP account to pay bills incurred by all three of the partners on behalf of PBP.

20. There is no evidence that Jerry did anything to hide his activities during the entire time he was a partner in PBP and while engaging in business on behalf of PBP from Larry and Roger. Further, there is no evidence to support a contention that Jerry engaged in concealment, misleading tactics, misrepresentation, fraud, bad faith, or other such impermissible conduct so as to conceal his actions and prevent Larry and Roger from discovering the alleged illegal actions by Jerry and thereafter pursuing a legal claim against him for any claimed damages due to Jerry's actions.

21. The record, rather, shows that all of Jerry's actions were engaged in with the full knowledge of Larry and Roger.

22. Jerry's son is Brian Paweltzki (Brian). Brian worked for PBP from the time he was in high school until 2011. Further, Brian's work

at PBP was not intermittent, but was regular and extensive.

23. The evidence showed that Brian had an agreement with PBP to trade work as compensation.

24. The evidence showed that during the time that Roger had control of PBP books and records, he frequently, paid Brian's real property taxes even though Brian was not part of PBP, but only worked for them. See, Exh. #69.

25. The evidence showed that it was a standard and customary practice for Larry, Roger, Jerry and Brian to use PBP equipment, machinery, and fuel to work not only PBP land, but their own private property as well.

26. The evidence and testimony showed that it was standard practice for PBP to pay many of the agricultural inputs for each of the individual partners as well as Brian.

27. The record is replete with evidence that the partners had a hostile relationship from the 1980s and thereafter; nevertheless, the partners continued to engage in their established practices as set forth above regarding the operation of PBP.

28. All parties admitted that Jerry was a one-third owner and partner in PBP at all times relevant to this matter.

29. The parties agreed that Jerry was entitled to one-third of PBP assets from and after February 15, 2013, when the partnership was dissolved.

30. The parties disagreed on the value of the assets and whether Jerry was entitled to certain assets he claimed were PBP assets, but were missing or otherwise disposed of by Larry and Roger without his

knowledge or consent.

31. In making the equitable division of PBP assets the Court adopted, in large part, the values and proposed distribution to Jerry that Larry and Roger suggested and recommended. The Court's equitable division of PBP assets is more fully set forth in its memorandum decision dated January 30, 2020.

32. Larry and Roger claim that, although they agree that Jerry is entitled to a one-third share of the PBP assets, his claim should be set off or barred by their claim for unjust enrichment.

33. The elements of a claim of unjust enrichment are that one person(s) confers a benefit upon another who accepts or acquiesces in that benefit which makes it inequitable to retain that benefit without paying. See, *Blue v. Blue*, 2018 S.D. 58, ¶17, – N.W.2d –.

34. If Jerry was stealing or misappropriating funds from PBP, Larry, Roger and Alyce acted in a manner which was not consistent with their claim that unjust enrichment was occurring. The findings set forth above specifically support this factual finding. Moreover, the continued payment by PBP of farm input and other expenses, not only on the partners' private land, but also on Brian's property, is inconsistent with Larry and Roger's claims. The failure to challenge Jerry's actions or contact suppliers and vendors to stop Jerry from charging to PBP accounts is inconsistent with the claim of unjust enrichment.

35. The evidence does not support the claim that Larry and Roger conferred any benefit upon Jerry that he was not entitled to by virtue of his one-third ownership interest in PBP.

36. The evidence and admissions of the parties showed that Jerry was entitled to one-third of the assets of PBP when the partnership was dissolved on February 15, 2013, and that right remained intact until this litigation concluded.

37. No evidence suggests that Jerry's actions or retention of property he obtained while actively engaged in PBP was unjust.

38. The jury in this matter rendered a verdict in favor of Jerry and on his legal claims of breach of the PBP agreement and breach of the fiduciary duty Larry and Roger owed to Jerry and awarded Jerry $25,000 in damages.

39. The jury rejected Larry and Roger's claim for damages based upon Larry and Roger's claim that Jerry misappropriated funds from PBP and ruled against Larry and Roger on their other legal claims and their defenses.

40. Jerry defended against Larry and Roger's claim of unjust enrichment on the basis of the equitable defense of laches.

41. Laches is an equitable defense which requires a showing that 1) Larry and Roger had full knowledge of the facts upon which their claim was based; 2) regardless of the knowledge, Larry and Roger engaged in unreasonable delay before seeking relief in court; and 3) it would be prejudicial to allow Larry and Roger to maintain their claim against Jerry. See, *Clarkson and Co. v. Continental Resources, Inc.*, 2011 S.D. 72, ¶12, 806 N.W.2d 615.

42. Larry and Roger clearly had full knowledge of their alleged claim against Jerry, as the evidence clearly shows that they knew or were firmly convinced of their claims against Jerry for unjust

enrichment, theft, misappropriation, conversion, or on other legal or equitable grounds at least in 2001, and as early as 1997. Furthermore, Larry had been complaining about Jerry stealing or misappropriating money since the 1980s. The facts set forth above herein clearly support the finding that Larry and Roger had knowledge of their claims numerous years ago.

43. Larry and Roger admitted that they took no remedial action to assert their claims before this lawsuit and sought no assistance from outside sources to assert their claims. Further, Larry and Roger provided no credible explanation as to why they delayed in asserting their claims until this lawsuit was commenced by Jerry. Consequently, Larry and Roger's delay in bringing their claim is unreasonable under the facts and circumstances associated with this case and the facts set forth above herein clearly support the finding that Larry and Roger's delay in bringing their claims was unreasonable.

44. Larry and Roger's delay in asserting their claims had a prejudicial effect on Jerry and his claims and defenses. Specifically, such prejudice against Jerry includes, but is not limited to, the following: 1) evidence which supported Jerry's defenses was lost and parties with knowledge of facts which would support Jerry's defenses were no longer available, died, or their memories were diminished due to the passage of time; 2) Larry and Roger paid PBP bills which had been incurred by Jerry, PBP paid farm inputs for all of the partners and for Brian on a regular basis, and PBP paid Brian's real estate taxes for years all of which gave Jerry the distinct impression that the status quo of PBP was as it had been

for the past decades; 3) Larry and Roger testified that they confronted Jerry about the claimed theft or misappropriation, but took no action relative to the claim which gave Jerry a sense that any claim of illegality was merritless and the confrontation was borne solely out of hostility toward him; 4) although allegations were levied against Jerry, he continued to write checks, have access to PBP records, handle financial matters with PBP bank, and continued to engage in actions the same as he had before, with the exception of handling the books. The facts established by the testimony at trial, the evidence produced at trial, and the facts as set above herein clearly support the finding that Jerry suffered a prejudicial effect from Larry and Roger delaying action on their claims for decades.

45. Jerry claims prejudgment interest on sums awarded to him by the Court for his share of the partnership assets.

46. This case was hotly contested for several years.

47. This case involved numerous hearings and pre-trial proceedings.

48. No delay can be attributed to Jerry for the amount of time it took for this case to be finally concluded by trial.

49. PBP was dissolved on February 15, 2013, which is the date Jerry was entitled to his one-third share of PBP.

50. Jerry is entitled to $198,992.54 as and for his one-third share of PBP assets.

51. The court determines that Jerry is entitled to 73 months of prejudgment interest at the rate of 10% per annum on the sum of $198,992.54.

52. Interest due Jerry equals $121,053.71.

53. The Court's memorandum decision dated January 30, 2020, is hereby fully incorporated herein by this reference thereto in further support of these Findings of Fact.

54. The testimony and evidence submitted at trial by the parties is hereby incorporated herein by this reference thereto in further support of these Findings of Fact.

NOW, THEREFORE, IN ACCORDANCE with the above and foregoing Findings of Fact, the Court hereby enters the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter hereof.

2. In order to prove a claim of unjust enrichment Larry and Roger must prove the following: 1) that Larry and Roger conferred a benefit upon Jerry; 2) that Jerry accepted or acquiesced in that benefit; and 3) Jerry's retention of that benefit without paying for same would be inequitable or unjust. See, *Blue v. Blue*, 2018 S.D. 58, ¶17, — N.W.2d —.

3. Larry and Roger failed to prove their unjust enrichment claim, as they failed to establish any of the elements of unjust enrichment as shown by the above and forgoing Findings of Fact.

4. Jerry defended against the claim of unjust enrichment and asserted the defense of laches.

5. Laches is an equitable defense which requires a showing that 1) Larry and Roger had full knowledge of the facts upon which their claim was based; 2) regardless of the knowledge, Larry and Roger

engaged in unreasonable delay before seeking relief in court; and 3) it would be prejudicial to allow Larry and Roger to maintain their claim against Jerry. See, *Clarkson and Co. v. Continental Resources, Inc.*, 2011 S.D. 72, ¶12, 806 N.W.2d 615.

6. Jerry proved all elements of laches which is a complete bar to Larry and Roger's claim of unjust enrichment as shown by the above and forgoing Findings of Fact.

7. Prejudgment interest is authorized by law and is mandatory. SDCL 21-1-13.1; *Casper Lodging v. Akers*, 2015 S.D. 80, ¶74, – N.W.2d –.

8. Calculation of interest on a sum certain due a party is the duty of the court. SDCL 21-1-13.1.

9. The Court's award to Jerry for his one-third share of PBP is $198,992.54.

10. Jerry is entitled to 73 months of interest on $198,992.54.

10. Interest due Jerry on the Court's award is $121,053.71.

11. The Court's memorandum decision dated January 30, 2020, is hereby fully incorporated herein by this reference thereto in further support of these Conclusions of Law.

12. The testimony and evidence submitted at trial by the parties is hereby incorporated herein by this reference thereto in further support of these Conclusions of Law.

LET THE JUDGMENT BE ENTERED ACCORDINGLY.

Signed: 2/27/2020 3:58:55 PM

BY THE COURT:

Chris S. Giles

CHRIS S. GILES – CIRCUIT COURT JUDGE

Attest:
Miller, Cheryl J.
Clerk/Deputy

JUDGMENT

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MCCOOK)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

****

GERALD PAWELTZKI,
Plaintiff,

vs.

ROGER PAWELTZKI and LAWRENCE PAWELTZKI,
Defendant.

FILE NO. 44CIV12-000114

JUDGMENT

****

The above entitled matter having come on for a jury and court trial before the Honorable Chris S. Giles, Circuit Court Judge, First Judicial Circuit, State of South Dakota, from January 24, 2020, through and including January 30, 2020; and the Plaintiff appearing in person and with his attorney of record, Timothy R. Whalen; and the Defendants appearing in person and with their attorneys of record, Mitchell A. Peterson and Justin T. Clarke; and the jury having returned a verdict in favor of the Plaintiff and against the Defendants on the parties' legal claims; and the Court having considered the evidence, heard the testimony of the witnesses, and heard the arguments of the parties relative to the equitable claims to be decided by the court; and the Court having entered a memorandum decision; and the Court having entered its Findings of Fact and Conclusions of Law; and the Court having been fully advised in the premises and good cause appearing therefor, it is hereby

ORDERED that pursuant to the verdict returned by the jury in favor of the Plaintiff on his claims of breach of contract and breach of fiduciary duty, a money judgment is entered in favor of the Plaintiff and against the Defendants for the sum of $25,000.00; and it is further

ORDERED that pursuant to the Court's decision on the equitable claims of the parties, the Plaintiff is hereby awarded a money judgment against the Defendants for the sum of $198,992.54 as and for compensation to the Plaintiff for his one-third share of the assets and property of the partnership known as Paweltzki Brothers Partnership; and it is further

ORDERED that the Plaintiff is awarded the sum of $121,053.71 in interest on the amount due and owing him from the Defendants for his share of the Paweltzki Brothers Partnership assets; and it is further

ORDERED that the total money judgment amount with interest included awarded to the Plaintiff and against the Defendants is $345,046.25; and it is further

ORDERED that the Plaintiff is hereby awarded his costs, expenses and disbursements incurred in this action in the amount of $ 0 against the Defendants.

BY THE COURT/2020 4:00:54 PM

Chris S. Giles

CHRIS S. GILES - CIRCUIT COURT JUDGE

STATE OF SOUTH DAKOTA) : SS COUNTY OF MCCOOK)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
GERALD PAWELTZKI, Plaintiff, vs. ROGER PAWELTZKI and LAWRENCE PAWELTZKI, Defendants.	44CIV12-000114 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT**

A joint bench and jury trial was held at the McCook County Courthouse from January 24, 2020, through January 30, 2020. On January 30, 2020, the jury returned a verdict in favor of Plaintiff in the amount of $25,000.00, with no award of prejudgment interest. On January 30, 2020, the Court issued its Memorandum Decision, which was read in open court following dismissal of the jury, which Memorandum Decision is incorporated by reference.

The Court enters the following Findings of Fact, Conclusions of Law, and Judgment incorporating the Court's judgment and the jury's verdict. If any Finding of Fact is determined to be a Conclusion of Law, it shall be deemed a Conclusion of Law; likewise, if any Conclusion of Law is determined to be a Finding of Fact, it shall be deemed a Finding of Fact.

FINDINGS OF FACT

A. Credibility

1. The Court had the opportunity to view the credibility of all the witnesses.
2. Defendants' witnesses were truthful and credible.
3. Plaintiff was not a very credible witness.

4. Almost all of defendants' facts and evidence were properly and fully supported by the testimony of the witnesses.

5. Plaintiff's testimony and positions on the issues for the Court to decide were not properly supported by the evidence.

6. In particular, plaintiff's position concerning 42 unaccounted-for, or missing, heifers is completely preposterous.

7. Credibility of the witnesses is a significant factor in reaching the Court's decision.

B. Partnership Property Valuation and Plaintiff's One-third Value

8. Unless otherwise noted, all values found by the Court are as of the date of the property distribution that occurred effective February 15, 2013.

a. Items in Agreement between the parties

9. The parties agree that the feed inventory is worth $520.00, making plaintiff's one-third share $167.33.

10. The parties agree that the value of the fuel inventory is $4,658.00, making plaintiff's one-third share $1,553.00.

11. The parties agree that the value of the oil inventory is $3,000.00, making plaintiff's one-third share $1,000.00.

12. The parties agree that the value of the milk replacer is $238.50, making plaintiff's one-third share $79.50.

13. The parties agree that the boxes of milk filters are valued at $99.00, making plaintiff's one-third share $33.00.

14. The parties agree that the prepaid expense to Potter Tire Service is $5,000.00 and that plaintiff is entitled to reimbursement for one-third of this in the amount of $1,666.00.

Filed: 2/14/2020 4:51 PM CST McCook County, South Dakota 44CIV12000114

15. The total value of plaintiff's one-third value of the items in agreement between the parties is $4,498.83.

b. Livestock

16. The Court finds the Wieman Livestock appraisal ("the appraisal") conducted on January 7, 2013, to be reasonable and accurate.

17. At the time of the appraisal, there were 330 head of livestock, which is consistent with the bank financial statements from March of 2012 and all of the other evidence presented.

18. Plaintiff's theory that there are an additional 42 unaccounted-for heifers or any other unaccounted-for cattle is not credible.

19. The Wieman appraisal may label these 330 head of livestock slightly differently from how they had been labelled or categorized before, but the overall number of 330 is accurate and consistent.

20. Taking into account the sales of livestock made between January 7, 2013, and February 15, 2013, the Court finds the total value of the livestock as of February 15, 2013, to be $248,203. Plaintiff is entitled to one-third of this amount, which is $82,734.33.

c. Milk Income

21. Plaintiff is requesting one-third of $46,478 of milk income that was listed on the partnership 1065 return for tax year 2013.

22. The evidence showed that this milk income was deposited into the partnership checking account, after which point it was the used to reduce the overall partnership debt.

23. Therefore, plaintiff has already received his one-third benefit for this item by the reduction in the partnership debt for which he would have been responsible otherwise.

d. Beans

24. The Court believes the most accurate and reliable information provided concerning the bean inventory as of February 15, 2013, was presented by the defendants.

25. The Court finds that there were 8,393.33 bushels of beans harvested in 2012, making the total partnership inventory11,498.33 bushels as of February 15, 2013.

26. Plaintiff believes there were 8,500 bushels of beans harvested in 2012, but the Court finds that this difference is attributable to one of the partnership's landlords being paid out her one-third share of the harvest as rent.

27. The applicable price per bushel for February 15, 2013, is $ 14.40 per bushel.

28. The total value of the bean inventory is $165,575.94, making plaintiff's one-third share of bean inventory $55,191.98.

e. Corn

29. The Court finds that the grain audit conducted by Great American Insurance Company on October 19, 2012, was a comprehensive inventory of all corn on hand owned by the partnership as of that date.

30. The Great American Insurance audit included all harvested corn from 2012 that had not already been sold and all corn inventory that was on hand and remaining from previous years.

31. Plaintiff's contention that the grain audit only counted what was harvested in 2012 is not credible, feasible, or logical, because there is no way an inventory of that nature would be able to differentiate between what was harvested in 2012 and placed in the bins, and what was previously in the bins.

32. Based on these findings, there were 25,007.10 bushels of corn as of October 19, 2012.

33. The Court finds defendants' calculations for 2,714.29 for the number of bushels of corn being fed to the milk cows and defendants' calculation of 3,958.33 for the number of bushels of corn being fed to the fat cattle between October 19, 2012, and February 15, 2013, to be reasonable and soundly based.

34. Therefore, there are 18,334.48 bushels of corn that are subject to the partnership property division as of February 15, 2013.

35. The February 15, 2013, price per bushel for corn was $6.88, which when multiplied by the number of bushels of corn inventory results in a corn inventory value of $126,141.22

36. Plaintiff's one-third share of this corn inventory is $42,047.07.

f. Hay

37. The Court believes the testimony from defendants that the hay to which plaintiff was entitled has already been distributed to him.

38. The Court makes this determination based in large part upon the credibility of the witnesses for defendants and the lack of credibility of plaintiff.

39. The number of bales plaintiff claims should be available for distribution is not consistent with the overall history of the bales produced by the partnership on an annual basis and is not consistent with the facts surrounding the 2012 growing season which involved a serious drought.

40. Therefore, the Court does not find that plaintiff is entitled to anything more for hay bales, alfalfa bales, or square straw bales.

g. Utility Charges

41. The Court finds that plaintiff is entitled to one-third of the utility charges after the dissolution of the partnership.

42. The Court does not believe plaintiff would have received any reasonable benefit from this.

43. This total expenditure was $6,759.00 and therefore, plaintiff would be entitled to be reimbursed for one-third of this in the amount of $2,253.00.

h. Prepaid Insurance on Buildings and Vehicles

44. The Court does not believe plaintiff is entitled to a full one-third share of the prepaid insurance for 2012 for buildings and vehicles, because the Court believes the plaintiff did receive some benefit and value from this.

45. This total expense was listed by the plaintiff at $8,000.

46. The Court will award plaintiff $2,000 for his one-third share of this expense.

i. Beef Slaughtered

47. Plaintiff requested one-third of four beef that went to the Alexandria Locker in 2012.

48. It appears to the Court that a portion of these went to defendants, along with other family members.

49. Any of this slaughtered beef that was sold had the proceeds deposited in the partnership checking account; therefore, plaintiff received the benefit from that.

50. It is also clear that plaintiff received a similar allotment on a separate date prior to distribution of the livestock on February 15, 2013.

51. Taking into account that plaintiff received a similar distribution of beef and that it appears to have been the parties' practice to make a distribution of this nature to the parties and their family members, which in this case included plaintiff's son, the Court does not find it to be appropriate to award any amounts to plaintiff for this item.

j. Gates, Posts, Fences, Corrals, etc.

52. Plaintiff listed the overall value of the gates, posts, fences, and corrals, etc., for the partnership at $31,604.

53. In light of the Court finding plaintiff to be less than credible in his valuations and descriptions of the parties' assets, the Court has great difficulty in finding this to be an accurate and reasonable value.

54. Therefore, the Court is going to reduce plaintiff's estimated value by 50%.

55. The Court will find the total value of these items to be $15,802 and plaintiff's one-third share of this would be $5,267.33.

k. Increase in Debt After Dissolution

56. The Court will next address plaintiff's request for a share of the increase in the partnership debt after the dissolution.

57. The plaintiff believes this increase in debt was $30,947.

58. However, this includes payment for the 2012 real estate taxes that were not payable until 2013 in the approximate amount of $16,000. These real estate taxes are a legitimate expense of the partnership prior to dissolution. Subtracting out the real estate taxes that were paid would leave only approximately $15,000.

59. Therefore, the Court will award the plaintiff $5,000 for this requested item.

I. Total Value of Plaintiff's One-third Share of Partnership Assets

60. The Court finds the chart below summarizes the total value of partnership assets to which plaintiff is entitled to payment:

Item	1/3 Amount
a. Agreed-upon items	$4,498.83
b. Livestock	$82,734.33
c. Milk income	$0.00
d. Beans	$55,191.98
e. Corn	$42,047.07
f. Hay	$0.00
g. Utility charges	$2,253.00
h. Prepaid insurance	$2,000.00
i. Beef slaughtered	$0.00
j. Gates, fences, posts, etc.	$5,267.33
k. Increase in debt	$5,000.00
Grand Total	**$198,992.54**

61. Based on prior distributions through mediation, settlement, or court order, many of the partnership's assets have been distributed to plaintiff and defendants.

62. The total amount defendants owe to plaintiff for his unpaid one-third share of partnership assets is $198,992.54.

63. Based on all factors and factual findings, Plaintiff is entitled to 73 months of prejudgment interest at the rate of 10% per annum.

64. Prejudgment interest is calculated as follows: $198,992.54 (principal) x .10 (annual interest rate) ÷ 12 (to convert annual rate to monthly rate) x 73 (number of months).

65. 10% prejudgment interest on $198,992.54 for 73 months equals $121,053.80.

C. Unjust Enrichment

66. The Court has considered the defendants' claims for unjust enrichment.

67. Based on the testimony and evidence presented, the Court believes the defense of laches applies to the defendants' unjust enrichment claim.

68. The witnesses, especially Alyce Paweltzki, was adamant that she and defendants were aware of plaintiff's inappropriate activities as early as 2001 or before.

69. Her testimony was that she and defendants were certain of plaintiff's misconduct during the time she and Larry were in charge of the partnership books.

70. 2001 was the last year she was in charge of the partnership books.

71. The Court believes that defendants knew and did not take appropriate action concerning plaintiff's improper conduct.

72. The Court finds this delay to be unreasonable.

CONCLUSIONS OF LAW

Issues to Be Decided by the Court

1. The issues to be decided by the Court are set forth in the final jury instructions.

2. In short, the Court decided: (a) plaintiff's one-third value of partnership assets for which defendants owe plaintiff compensation (and related prejudgment interest); and (b) defendants' unjust enrichment claim against plaintiff and applicable affirmative defenses.

3. The valuation of partnership assets and the related one-third value defendants owe to plaintiff equals $198,992.54.

4. Defendants owe plaintiff $121,053.80 for 73 months of prejudgment interest on the principal sum of $198,992.54.

5. Based on the jury's verdict, defendants owe plaintiff the total of $25,000.00, with no prejudgment interest.

6. The total principal amount defendants owe to plaintiff is $223,992.54.

7. Including the principal amount ($223,992.54) plus prejudgment interest ($121,053.80), the total amount defendants owe to plaintiff is $345,046.34.

8. Defendants' unjust enrichment claim is barred by the affirmative defense of laches.

JUDGMENT

Based on the foregoing Findings of Fact and Conclusions of Law, and the jury's verdict dated January 30, 2020, the Court enters the following Judgment:

1. Judgment is entered in favor of plaintiff and against defendants in the principal amount of $223,992.54.

2. Plaintiff is entitled to prejudgment interest in the amount of $121,053.80.

3. Defendants shall have until March 20, 2020, to pay the total sum of $345,046.34 to plaintiff to fully satisfy this judgment.

Dated this ___ day of February, 2020.

BY THE COURT:
Signed: 2/27/2020 4:01:47 PM

Chris S. Giles

Honorable Chris S. Giles
Circuit Court Judge

ATTEST:
Clerk of Court

Attest:
Miiller, Cheryl J.
Clerk/Deputy

By _____
Deputy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPELLEE'S BRIEF

GERALD PAWELTZKI,
Plaintiff/Appellee,

vs.

ROGER PAWELTZKI AND LAWRENCE PAWELTZKI,
Defendants/Appellants.

DOCKET #29298

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
MCCOOK COUNTY, SOUTH DAKOTA

HONORABLE CHRIS S. GILES
Presiding Circuit Judge

Timothy R. Whalen, Esq.
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: (605)487-7645
Attorney for Plaintiff and Appellee

Mitchell A. Peterson
Justin T. Clarke
Michael L. Snyder
Davenport, Evans, Hurwitz & Smith, L.L.P.
206 West 14th Street, P.O. Box 1030
Sioux Falls, SD 57101-1030
Attorneys for Defendants and Appellants

NOTICE OF APPEAL FILED APRIL 1, 2020

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATE STATUTES:

PRELIMINARY STATEMENT

The Appellants shall be referred to herein as "Roger" and "Lawrence." The Appellee shall be referred to herein as "Gerald." References to motion hearings shall be by "MH" followed by the date of the hearing and page and, if necessary, line numbers. Reference to the jury trial transcript shall be by "TT" followed by the page number and, if necessary, the line number. References to the settled record shall be by "SR" followed by the page number for the beginning of the document, or other relevant pages of the document if necessary, as reflected in the McCook County Clerk of Court's indices. References to the exhibits, if any, shall be by "Exh." followed by the exhibit number or the exhibit letter.

JURISDICTIONAL STATEMENT

The claims and defenses in this case were both legal and equitable so a single trial was held January 24, 2020, through January 30, 2020, in McCook County, South Dakota, before the Honorable Chris S. Giles, Circuit Court Judge, First Judicial Circuit, State of South Dakota. The jury decided the legal claims and defenses and the Court decided the equitable claims and defenses. The Court and the jury found in favor of Gerald. The Court entered findings of fact and conclusions of law accordingly. The Court's decision and the jury verdict were entered by virtue of a Judgment on February 27, 2020. *SR, p. 1426*. Roger and Lawrence do not appeal from the entire judgment of the trial court, but only the trial court's rulings on motions to enforce settlement and the unjust enrichment claim and the application of the laches remedy. Notice of Appeal was filed and served on April 1, 2020. *SR, p. 1563*. This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF THE LEGAL ISSUES

ISSUE 1: WHETHER THE PAWELTZKIS' MOTION TO ENFORCE SETTLEMENT AGREEMENT AND TO COMPEL ARBITRATION SHOULD BE GRANTED IN LIGHT OF THE PARTIES' MEDIATION SETTLEMENT AND THEIR AGREEMENT TO ARBITRATE ANY REMAINING DISPUTES BETWEEN THEM?

Trial court holding: No.

Relevant court cases:

1. *Humble v. Wyant*, 2014 S.D. 4, 843 N.W.2d. 334
2. *Lewis v. Benjamin Moore & Co*., 1998 S.D. 14, 574 N.W.2d. 887
3. *Vander Heide v. Boke Ranch, Inc*., 2007 S.D. 69, 736 N.W.2d. 824
4. *Winegeart v. Winegeart*, 2018 S.D. 32, 910 N.W.2d. 906

Relevant statutes or authority:

1. SDCL 19-13A-1

ISSUE 2: WHETHER THE AFFIRMATIVE DEFENSE OF LACHES BARRED ENTIRELY THE PAWELTZKIS' CLAIM FOR UNJUST ENRICHMENT?

Trial court holding: No.

Relevant court cases:

1. *Mealy v. Prins*, 2019 S.D. 57, 934 N.W.2d. 891
2. *Moser v. Moser*, 422 N.W.2d. 594 (SD 1988)
3. *Howlett v. Stellingwerf*, 2018 S.D. 19, 908 N.W.2d. 775
4. *In re C.H. Young Revocable Living Trust*, 2008 S.D. 43, 751 N.W.2d. 715

Relevant statutes or authority:

1. SDCL 15-6-52(a)

STATEMENT OF THE CASE

Gerald commenced this lawsuit against his two brothers by filing a Summons and

Complaint asserting several claims as a result of the brothers' operating the Paweltzki Brothers Partnership (PBP). *SR, pp. 1, 2.* Gerald's claims were for damages and equitable relief. *Id.* Roger and Lawrence answered Gerald's Complaint and denied his claims, asserted affirmative defenses, and counterclaimed for over $1 million in damages. *SR, p. 17.* Gerald denied all liability to his brothers for any damages, and asserted affirmative legal and equitable defenses and remedies. *SR, p. 28.* A single trial was held January 24, 2020, through and including January 30, 2020. *SR, pp. 2352-2464*. At trial, the Court decided the equitable claims, defenses, and remedies and the jury decided the legal claims and defenses. *SR, pp. 2453-2458, 2459.* The Court and jury both held in favor of Gerald and against Roger and Lawrence. *SR., p. 1426*. The Court entered its Findings of Fact and Conclusions of Law on the equitable issues and entered its Judgment on the verdict and Court decision on February 27, 2020. *SR, pp. 1414, 1426, 1428.* Notice of Appeal was filed on April, 1, 2020. *SR, p. 1563*. Roger and Lawrence appeal only the portion of the trial court rulings on the motions regarding settlement and the unjust enrichment claim and the remedy of laches.

STATEMENT OF THE FACTS

Gerald and Lawrence began PBP in the early 1970s as a farming partnership. *TT, pp. 215, 314, 606-608, 611-612; Exh. #5*. Roger joined PBP in the 1970s. *TT, p. 607.* After Roger joined PBP, the interest in the partnership was divided up one-third each. *TT, pp. 216, 229, 607-608; Exh. #5.* When PBP was first started it operated on an oral agreement basis. *TT, p. 608*. The farming chores were divided up among the brothers except during harvest when all brothers pitched in and helped. *TT, pp. 217, 319, 611-612*. Gerald handled the partnership books at the beginning of the partnership and for 22 years thereafter. *TT, pp. 216, 315, 608.* Gerald was the partner who was responsible for

the financial aspects of the partnership and the partner who primarily handled the banking business during most of the existence of PBP. *Id.* During PBP's existence, it was operated in a very informal and relaxed fashion with little controls in place. *TT, pp. 217, 238, 335, 610-611, 652, 1300-1302*.

In the 1980s Lawrence and his wife, Alyce, became suspicious that Gerald was misappropriating property from PBP. *TT, pp. 219, 316, 326, 613-615*. Lawrence and Alyce discussed their concerns regarding Gerald with Roger. *TT, p. 322, 337, 1115-1116*. As a result of Lawrence's concerns, he requested and Gerald consented to Lawrence and Alyce handling the books and records for the partnership beginning in the early part of 1990. *TT, pp. 221, 318, 615*. Lawrence and Alyce handled the partnership books and records for approximately 14 years. *TT, p. 617*. When Lawrence took care of the partnership books and records, the PBP bank statements and financial records were sent to Lawrence's address, as were bills for the partnership business. *TT, pp. 328-330*. When confronted by Lawrence, Gerald would attempt to explain the questioned matters, but Lawrence would not listen. *TT, pp. 617-620*. Gerald denied misappropriating property from PBP or doing anything else inappropriate with partnership property. *Id.* Even though Lawrence accused Gerald of misappropriation, neither he nor Roger changed any of the PBP past practices when they were in charge of the books and records. *TT, pp. 221, 323-324, 327, 330-334, 615-617*. After Lawrence made the accusations against Gerald and took over the bookkeeping and management chores, neither Lawrence, Alyce, nor Roger took any action against Gerald to remedy his perceived illegal activities. *TT, pp. 239, 244, 317-318, 327, 330-337, 1116-1117*. Regardless of their suspicions, Lawrence, Alyce, or Roger did not contact law enforcement, never had an internal audit of PBP books, did not advise their accountant of

the alleged theft, did contact an attorney about Gerald, but did not hire the attorney to sue him. *Id*. In addition, at all times that Lawrence, Alyce, and Roger suspected illicit conduct on the part of Gerald, they still allowed Gerald full and complete access to the checking account. *TT, pp. 221-223, 318, 327, 330-338, 615-616, 630*. Gerald also continued to handle most of the financial affairs for the partnership with the bank until January of 2012. *Id.; Exh. #6.* Regardless of Lawrence, Alyce, and Roger's concerns about Gerald, they continued to allow him to charge materials, products, supplies, and services to vendors on behalf of PBP, and when bills were sent to Lawrence, Alyce, or Roger for PBP for expenses that had been charged by Gerald, they paid them along with all the other bills of the PBP. *Id.; TT, pp. 238-247*. Prior to 2012, Lawrence, Alyce, or Roger never contacted any vendors and told them to stop allowing Gerald to charge materials, products, and supplies to PBP accounts. *TT, pp. 221-223, 238-247, 244, 318, 327, 336-337, 615-616.* The bank statements were sent to Lawrence and Alyce while they were keeping the partnership books, and they never once took any steps to remedy what they claimed was a misappropriation of PBP assets, property, or money by Gerald. *Id.; TT, pp. 328-330*.

On March 21, 1997, the brothers signed a written Partnership Agreement (Agreement). *Exh. #5*. After the Agreement was signed, the partnership continued to operate as it had in the past with the chores being divided up as before and each party handling the same responsibilities of the PBP business as they had before. *TT, p. 229, 643*.

In 2002 Lawrence turned the PBP books over to Roger. *TT, pp. 238, 334.* Roger handled the books in the same fashion as Gerald and Lawrence, and nothing changed as to the operation of PBP. *TT, pp. 238, 643*. When Roger handled the partnership books,

Gerald's activities were the same as before. *TT, pp. 238, 643*. When bills that Gerald had charged were sent to Roger for payment by PBP, Roger paid the bills and never questioned their legitimacy. *TT, pp. 238-244*. The bank statements were also sent to Roger, and he never challenged Gerald regarding any financial improprieties. *Id.* Roger kept PBP books and records until the end of the partnership. *TT, p. 243*. Gerald's expert witness, Larry Harden (Harden), reviewed the partnership records from 2006 through 2011. *TT, pp 1296-1297; Exh. #62*. During the this time frame Harden noted that Lawrence and Roger wrote over 80% of the checks on PBP account to pay for items they accused Gerald of stealing. *TT, pp. 1300-1303*.

Lawrence claims he knew that Gerald was misappropriating PBP property when the bank suggested that a written partnership agreement be put in place. *TT, pp. 321-323*. The PBP bank first suggested a written partnership agreement on July 5, 1985. *Exh. #18, July 5, 1985 entry*. The bank made further suggestions to the partners that they create and sign a written partnership agreement on February 10, 1993, November 22, 1993, March 20, 1996, and on March 28, 1996. *Exh. #18*. The agreement was signed by the partners on March 21, 1997. *Exh. #5*. The bank notes show that the bankers were of the opinion that the partners were "… doing a good job of production and financial management." *Exh. #18, March 27, 1997 entry*. Similar notations are found in the bank records for other years prior to 1997. *Exh. #18, October 5, 1995 entry*. Alyce was convinced that Gerald was misappropriating PBP property in 1995, but was suspicious of Gerald as early as the 1980s. *TT, pp. 1114-1116, 1119-1121*.

Gerald lived on the home place which was the center of the PBP operations. *TT, pp. 246-247, 620*. Gerald's son, Brian Paweltzki (Brian), lived with him and also worked on the PBP farm from the time he was in high school until shortly before the partnership

ended. *TT, pp. 381-386*. The partners relied on Brian to carry a certain work load for PBP even though he was not a partner and received no share of the partnership profits or losses. *Id.; TT, p. 666*. When Brian worked for PBP, he in turn was allowed to use PBP equipment on his home place and PBP paid for some of his farming inputs. *TT, pp. 391-393*. No appreciable records were kept of Brian's work, but the arrangement was engaged in for years. *Id.* Gerald moved from the home place in 2011. *TT, p. 605*.

The brothers each had their own farms and during the existence of PBP it paid for input costs and other farming expenses for the partners' private businesses. *TT, pp. 248, 253-255, 347, 387-390, 624, 993-995*. Likewise, the brothers used the PBP assets and property for their own personal use on their private farms. *TT, pp. 248, 254, 347, 387-390, 624, 662-663*. The financial evidence associated with PBP showed that the partners' input costs for their personal farms were substantially lower than the average input costs for crop production in comparable agricultural regions. *TT, pp. 1298-1300*. The payment of farm inputs also extended to Brian's land and farming operation. *TT, pp. 650-651, 993-995*. PBP routinely paid real property taxes for all the PBP property, all of the partners' property, and Brian's property at the same time. *TT, pp. 1065-1068; Exhs. 69, 207*. The partners frequently paid their personal income taxes from the PBP bank account. *TT, pp. 255-259; Exhs. 3 and 3A*. PBP also paid expenses for Lawrence's son, Steve's, farming operation and let Steve use PBP buildings, equipment, and supplies for his own personal farming needs. *TT, pp. 667-668*. The partners and Brian also used their own machinery and equipment for PBP business. *TT, pp. 249-250, 669-670, 993-995*. PBP did not own any light vehicles so the partners' personal vehicles were used for PBP farm work. *TT, pp. 344-345, 393-394*. Payment for expenses associated with Gerald's vehicles was a common practice because the partners and PBP hired hands used Gerald's

personal vehicles in the partnership business. *TT, pp. 393-395, 646-649.*

Over the years that the PBP was operated, the partners took a monthly draw. *TT, pp. 233-235.* This was to be compensation for each partner's daily chores and was in addition to the division of partnership profits and losses. *Id.* The partners agreed upon the monthly draw amounts, but from time to time each partner would take cash or other property for their own personal use. *TT, pp. 691-695; Exh. 10.*

One of Gerald's daily chores was to run the PBP dairy which he did for decades. *TT, pp. 217, 611, 679, 688.* In the fall of 2011, Gerald advised his brothers that he was getting too old to do the dairy work and that they would need to get someone to help him or take over the dairy work altogether. *TT, p. 688-690.* Neither Roger nor Lawrence took any action in response to Gerald's advisement, and Gerald reminded them of his situation from time to time. *Id.* In January of 2012, Gerald stopped his dairy chores. *Id.* When Roger and Lawrence caught wind of Gerald's actions, they terminated Gerald's access to PBP accounts, cut off his monthly draw, opened a new account for PBP with only their names on the account, and in all respects disassociated Gerald from the partnership. *TT, pp. 271-276, 281-282, 365, 690-691, 694; Exh. #6.* After being cut off from PBP, Gerald was not able to charge any bills to PBP, but was still doing his share of the work for PBP, except the dairy work. *TT, pp. 757-759.* However, since PBP would not pay for Gerald's charges, he had to pay for fuel and other farming expenses he incurred for PBP from his own pocket. *Id.* Gerald learned through the course of discovery in the lawsuit that on August 15, 2011, Roger and Lawrence each took a $25,000 draw against the PBP line of credit loan and refused to allow a similar draw for him. *TT, pp. 263-265, 362-363, 691-695, 1057; Exh. #9.* At the time of Roger and Lawrence's wrongful draw, Gerald was still a one-third owner of the PBP. *Id.* Even

though Roger and Lawrence engaged in the above prohibited conduct, Gerald still fulfilled his daily farm chores for PBP and assisted with the 2012 harvest for PBP like he had in the past years. *TT, pp. 757-759.*

Gerald commenced this action by filing the Summons and Complaint on October 5, 2012. *SR, pp. 1,2.* Before any discovery by either party, the parties sought to mediate their claims. *SR, Affidavit of Gerald Paweltzki January 3, 2014, p. 120, ¶¶7-16.* The first mediation was held with mediating attorney Lon Kouri (Kouri) on February 15, 2013. *Id., at ¶9.* This mediation appeared to resolve certain aspects, but not all, of the dispute between the parties. *Id., at ¶17-23.* A second mediation occurred on April 23, 2013, because of extensive inaccuracies regarding PBP business and assets and because Gerald was concerned about Lawrence and Roger's disclosures. *Id., at ¶27.* The second mediation did not resolve the parties' disputes, but a written memorandum was submitted to the parties by Kouri, although it was never signed by the parties. *Id., at ¶27.* After the mediations, it became apparent that the parties were not on the same page with regard to many of the matters associated with the settlement. *Id. at ¶¶35-47.* The parties continued to attempt to negotiate a settlement and, finally, arrived at a written partial settlement agreement for certain disputes in the lawsuit. Gerald signed the agreement on April 19, 2016. *SR, p. 832-834.* The trial court later enforced the written partial settlement agreement signed by Gerald. *Id.*

Lawrence and Roger brought on five motions to enforce settlements. On December 9, 2013, Lawrence and Roger moved to enforce a settlement agreement between the parties and to compel arbitration. *SR, pp. 75.* The Court heard and considered the evidence and arguments of the parties, rendered a memorandum opinion, entered its findings of fact and conclusions of law, and its order denying the motion in its

entirety. *SR, pp. 75, 195, 226, 237.*

On December 30, 2014, Lawrence and Roger filed a second motion to enforce settlement. *SR, p. 264.* This motion was heard by the Court, and the Court modified its decision on the previous motion to enforce settlement because the parties had effectively implemented the division of real property, including Roger's place, and the division of certain items of equipment. *SR, p. 530 (p. 9) 548 (pp. 4, 5, and 7).* The Court entered its findings of fact and conclusions of law and order partially granting the motion to enforce settlement. *SR, p. 548.*

On September 12, 2016, Lawrence and Roger moved to enforce the original settlement agreement from the mediations in 2013. *SR, p. 752.* Gerald resisted the motion. *SR, pp. 807, 813.* At the motion hearing, the Court considered a written settlement proposal which had been ostensibly agreed upon by the parties. *SR, Affidavit of Mitchell Peterson in Support of Motion to Enforce Settlement Agreement on Draft Items, pp. 754, 782.* The settlement agreement was entitled "Draft Items Settlement Agreement" (Settlement Agreement). *Id.* After receipt of the Settlement Agreement, Gerald rejected same because it was not consistent with the settlement he believed the parties had reached. *SR, Affidavit of Gerald Paweltzki, p. 807.* Gerald then revised the agreement, signed it, and sent it back to Lawrence and Roger for their execution. *Id., at p. 808, ¶8.* Lawrence and Roger did not execute the written Settlement Agreement, but sought enforcement thereof as an alternative relief in their motion. *SR, p. 752; MH, December 8, 2016, pp. 24-27.* Based upon Lawrence and Roger's motion and the comments of their counsel, the Court adopted the Settlement Agreement which had been signed by Gerald and granted the motion to enforce settlement. *MH, December 8, 2016,*

pp.24-27; SR, p. 832. The December 8, 2016, order incorporated by reference the Settlement Agreement, which clearly reserved litigation rights to the parties as to the following issues:

> ... (b) "true-up" items owned by the Partnership, which include, but are not limited to, fuel, chemicals, livestock, crops, and the particular items Judge Jensen determined were not affixed to real property (panels, gates, posts, corral fencing, and electric fencing; (c) Jerry's legal claims against Larry and Roger as set forth in the Complaint; and (d) Larry and Roger's legal claims against Jerry as set forth in their Counterclaim, ...

SR, p. 833.

On September 28, 2017, Lawrence and Roger made a fourth motion to enforce settlement. *SR, p. 835*. Gerald resisted the motion, and the Court held a hearing on the motion on November 27, 2017. *MH, November 27, 2017.* At the motion hearing counsel for Lawrence and Roger admitted that the Settlement Agreement was negotiated and agreed upon by counsel and the parties. *MH, November 27, 2017, pp. 19-20*. The Court denied Lawrence and Roger's motion to enforce settlement, but allowed further discovery on the settlement issues if either party so desired. *SR, p. 1265; MH, November 27, 2017, pp. 23-26*.

Limited depositions of Roger and Gerald were taken and Lawrence and Roger renewed their motion to enforce settlement filed on September 28, 2017. *SR, p. 1273*. Lawrence and Roger filed the complete deposition transcripts for Gerald and Roger and copies of the deposition exhibits in support of their renewed motion. *SR, pp. 1289-1573*. The Court reviewed the motion and response, the supporting affidavits, the deposition transcripts of Gerald and Roger, the deposition exhibits, and reviewed the court file, and denied Lawrence and Roger's renewed motion to enforce settlement in its entirety. *MH, May 8, 2018, p. 17; SR, p. 1768*.

ARGUMENT

A. Standard of Review.

The trial court's findings of fact are reviewed under the "… clear error …" standard and will be reversed on appeal "… only when a complete review of the evidence leaves … [the Supreme Court] … with a definite and firm conviction that a mistake has been made." *Howlett v. Stellingwerf*, 2018 S.D. 19, ¶12, 908 N.W.2d. 775; SDCL 15-6-52(a). The Supreme Court has further directed that when reviewing the trial court's findings of fact:

> … [a]ll conflicts in the evidence must be resolved in favor of the trial court's determinations. … The credibility of the witnesses, the import to be accorded their testimony, and the weight of the evidence must be determined by the trial court, and we give due regard to the trial court's opportunity to observe the witnesses and examine the evidence. (Citations omitted). That we may have found the facts differently had we heard the testimony is no warrant for us to substitute our judgment for the trial court's findings. …

Estate of Schnell, 2004 S.D. 80, ¶8, 683 N.W.2d 415. Furthermore, on appellate review the successful party is entitled to the benefit of his version of the evidence and of all favorable inferences fairly deductible therefrom." *Lindblom v. Sun Aviation,* 2015 S.D. 20, ¶9, 862 N.W.2d. 549. Moreover, "… [t]he trial court's findings of fact are presumptively correct and the burden is upon appellant to show error." *Taylor v. Taylor*, 2019 S.D. 27, ¶15, 928 N.W.2d. 458. The trial court's "… conclusions of law are given no deference and are reviewed de novo …" by the Supreme Court. *Andersen v. Andersen*, 2019 S.D. 7, ¶10, 922 N.W.2d. 801.

Equitable actions are reviewed pursuant to the abuse of discretion standard on appeal. *Moeckly v. Hanson*, 2020 S.D. 45, ¶13, --- N.W.2d. ---. An abuse of discretion is defined as "…a fundamental error of judgment, a choice outside the range of permissible

choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Gartner v. Temple*, 2014 S.D. 74, ¶7, 855 N.W.2d 846. On review, this Court does not "… determine whether we would have made the same decision as the circuit court. … [r]ather, "[o]ur function in reviewing matters which rest in the discretion of the trial court is to protect litigants from conclusions which exceed the bounds of reason." *Id.*, at ¶7. In addition, however, under the abuse of discretion standard "… factual determinations are subject to a clearly erroneous standard." *Id.*, at ¶7.

Issue 1 addresses whether or not a settlement contract was created by the parties. The existence of a contract is "… a question of law and is to be judged on the objective facts of the particular case." *Lamore Restaurant Group, LLC v. Akers*, 2008 S.D. 32, ¶15, 748 N.W.2d. 756. Issue 2 involves the equitable claim of unjust enrichment and the equitable remedy of laches. *Huston v. Vance Martin & the Estate of Jarman*, 2018 S.D. 73, ¶30, 919 N.W.2d. 356 (unjust enrichment); *Clarkson and Co. v. Continental Resources, Inc.*, 2011 S.D. 72, ¶12, 806 N.W.2d 615 (laches).

ISSUE 1: WHETHER THE PAWELTZKIS' MOTION TO ENFORCE SETTLEMENT AGREEMENT AND TO COMPEL ARBITRATION SHOULD BE GRANTED IN LIGHT OF THE PARTIES' MEDIATION SETTLEMENT AND THEIR AGREEMENT TO ARBITRATE ANY REMAINING DISPUTES BETWEEN THEM?

Lawrence and Roger argue that an enforceable contract was created by virtue of the parties' mediations, actions, conduct, e-mails, and oral statements over the course of several years of this litigation. Practically everything Lawrence and Roger assert supports their argument on this issue stems primarily from the two mediations that occurred in 2013.

1. Uniform Mediation Act.

Recently, the Supreme Court decided a case which is remarkably instructive on

this issue. *See, Winegeart v. Winegeart*, 2018 S.D. 32, 910 N.W.2d 906. In *Winegeart* the proponent of the issue on appeal asserted that she should be allowed to enforce an apparent oral agreement from mediation. The Supreme Court considered the issue in the context of the Uniform Mediation Act (UMA) which was enacted in South Dakota in 2008. *SDCL 19-13A-1, et seq.* The Supreme Court rejected the argument that oral agreements from mediation should be enforced based, in part, upon decisions from other jurisdictions that had enacted the UMA. *Winegeart*, 2018 S.D. at 32, ¶11. The other jurisdictions refused to enforce oral mediation agreements. *Id*., at ¶11. In *Winegeart* this Court held that oral agreements from mediation are subject to the statutory privilege of the UMA and are not enforceable. *Id*., at ¶14. This Court's reasoning was based on the principle that the purpose of the UMA is to "… encourage participants to be candid by shielding their negotiations from later disclosure." *Id*., at ¶14. This is so because "… nearly everything said during a mediation session could bear on either whether the parties came to an agreement or the content of the agreement." *Id*., at ¶14. Consequently, "… permitting a mediator to disclose the terms of a purported oral settlement also has the potential to swallow the rule of privilege." *Id*., at ¶14. Lawrence and Roger are asserting the very same argument here as the proponent in *Winegeart*. A review of Lawrence and Roger's brief shows that they are relying on certain statements made in or as part of the mediations, or the follow-up to mediations, to support their position on this issue. They are asserting unsigned mediation memorandums as evidence of a settlement, are parsing words, piecing together statements from emails, and comparing statements from mediations to later emails or comments by Gerald or his counsel. The potential problems expressed in *Winegeart* are realized here. Moreover, mediator Kouri provided testimony as to the issue of whether or not a settlement

agreement was reached in direct contravention of the UMA. *See, MH, January 10, 2014, pp. 25-29; MH, February 12, 2014.* In light of the above, Kouri's evidence should be disregarded in its entirety, and Lawrence and Roger's argument that an enforceable global settlement agreement was reached should be rejected.

2. Settlement Agreement.

Even if this Court elects to go beyond the UMA and consider the issue of whether the parties reached a global settlement agreement, Lawrence and Roger's argument on this issue still does not carry the day.

Settlement agreements are contracts, and the law governing the creation and enforcement of a contract applies to same. *Standard Fire Ins. Co. v. Cont'l Res., Inc*., 2017 S.D. 41, ¶13, 898 N.W.2d. 734. Courts are permitted to enforce settlement agreements, but they are not permitted to settle cases for parties or to enforce settlement agreements that are questionable as to their certainty and existence. *Lewis v. Benjamin Moore & Co.*, 1998 S.D. 14, ¶8, 574 N.W.2d 887. The "... [t]rial courts have, 'the inherent power to summarily enforce a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous." *Id*., at ¶8. However, "… [w]hile an attorney 'may negotiate for and advise settlement of controversy,' the decision to settle belongs to the client." *Melstad v. Kovac*, 2006 S.D. 92, ¶12, 723 N.W.2d 699. Furthermore, the "… client must expressly give … [his] … attorney the authority to settle …" *Id.*, at ¶12.

Whether or not an agreement to settle exists is a question of law. *Lamore*, 2008 S.D. at 32, ¶15. In order to form an agreement to settle, the essential elements of a contract must exist. *Winegeart*, 2018 S.D. at 32, ¶16. The essential elements of a contract are "… (1) [p]arties capable of contracting; (2) [t]heir consent; (3) [a] lawful

object; and (4) [s]ufficient cause or consideration." *Id.*, at ¶16; SDCL 53-1-2. Moreover, the law is well settled that "… [a] contract can either be express or implied, but not both." *Humble v. Wyant*, 2014 S.D. 4, ¶39, 843 N.W.2d 334; SDCL 53-1-3. This Court has held that "… [a]n express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct." *Id.*, at ¶39. If, however, either an express or an implied contract "… leaves open essential terms and calls for the parties to agree to agree and negotiate in the future on essential terms, then a contract is not established." *Lamore*, 2008 S.D. at 32, ¶16. Lawrence and Roger argue that they have both an express and implied contract, but this is clearly inconsistent with the governing law and facts.

Key to the resolution of this issue is whether or not Gerald consented to a global settlement. The law governing mutual consent provides as follows:

> An agreement is the result of a mutual assent of two parties to certain terms, and, if it be clear that there is no consensus, what may have been written or said becomes immaterial. ... There must be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract. ... Whether there is mutual assent is a fact question determined by the words and actions of the parties. ... Consent is an essential element of a contract. ... Consent must be free, mutual and communicated. ... Consent is not mutual unless the parties all agree upon the same thing in the same sense. ... The existence of mutual consent is determined by considering the parties' words and actions. (Citations omitted).

Vander Heide v. Boke Ranch, Inc., 2007 S.D. 69, ¶¶20-21, 736 N.W.2d 824. Lawrence and Roger must prove that they and Gerald consented to a global settlement and that there was a meeting of the minds to the degree that the brothers agreed upon the same thing in the same sense. There has been no credible evidence of Gerald's consent to a global settlement agreement. Lawrence and Roger assert numerous emails and other assorted documents and actions in support of their argument, but these items merely show

that there were ongoing settlement negotiations and that a settlement had not been consummated. The affidavit filed by attorney Mitchell Peterson (Peterson) in support of the September 12, 2016, motion to enforce settlement has numerous exhibits attached to it, but the exhibit show settlement negotiations rather than an actual settlement agreement. For example, Peterson and Gerald's counsel at the time, Michael Tobin (Tobin), were communicating in January of 2016 about a potential sale of assets vs. a draft and division of same and Tobin indicated that settlement did not appear possible. *SR, Affidavit of Mitchell Peterson in Support of Motion to Enforce Settlement Agreement on Draft Items, p. 754, Exh. #1, #4, and #5.* In addition, Tobin used language in a number of the e-mails referencing his attempts at selling a settlement to his client and identifying what he believed were certain issues in the settlement negotiations. *Id., at Exhs. #4 and #5*. Moreover, Tobin identified Gerald's reluctance to accept a certain settlement offer from Lawrence and Roger in a March 29, 2016, e-mail. *Id., at Ex. #10*. In May of 2016, settlement negotiations were still active and there is clearly no global settlement. *See, Id., at Exh. #22 and #23*. The e-mails and exhibits referenced by Lawrence and Roger show that the parties endeavored to settle certain aspects of this case, but in the end they simply were not able to do so because they could not reach a final written global agreement. Clearly, there was no mutual consent to a global agreement, and there is simply no enforceable global settlement agreement here. At best, Lawrence and Roger's assertions equate to an agreement to agree, possibly, at some future time as to the terms of a global settlement. Unfortunately, the global settlement never materialized.

In addition, one of the general rules of construction of contracts is that "... an acceptance must not change, add to, or qualify the terms of the offer" if there is to be a

contract. *Adv. Recycling Sys., LLC v. Southeast Prop. Ltd. Partnership*, 2010 S.D. 70, ¶16, 787 N.W.2d 778. Furthermore, "... [a]n acceptance must be absolute and unqualified[.]" *Id.*, at ¶16; see also, SDCL 53-7-3. Here the offers and proposals were changed and added to and the acceptance of same was certainly not unqualified. While the parties may have come close to a settlement agreement, in the end they simply failed to consummate a global deal by an agreed upon writing.

The record also shows that Lawrence and Roger brought five motions to enforce a perceived global settlement from the mediations and subsequent acts by the parties. All of the motions to enforce settlement were, for all practical purposes, based upon the same set of facts and circumstances. Lawrence and Roger's motions were largely denied, but on December 8, 2016, presiding Judge Steven Jensen did grant relief to Lawrence and Roger as to a written settlement agreement negotiated by the parties and signed by Gerald. *See, SR, p. 832*. The enforcement of this signed Settlement Agreement was alternatively prayed for by Lawrence and Roger in their pleading. The Court's ruling on this motion was consistent with the relief Lawrence and Roger sought. *SR, p. 832*. The Order Enforcing Settlement Agreement entered pursuant to the December 8, 2016, hearing had a copy of the Settlement Agreement signed by Gerald attached to it. *SR, p. 833*. The enforced Settlement Agreement excluded specific issues and reserved those issues for litigation. *SR, p. 833*. Clearly, Lawrence and Roger did not believe that a global settlement had been reached, regardless of their argument, because they offered the Settlement Agreement adopted by Judge Jensen as an alternative to their motion to enforce settlement. In short, Lawrence and Roger got exactly what they asked for in the December 8, 2016, hearing. In addition, on the fourth motion to enforce settlement, Judge Giles allowed Lawrence and Roger to take depositions on the limited issue of

whether or not a settlement was reached. *MH, November 27, 2017, pp. 23-26*. After the depositions were concluded, the motion to enforce settlement was renewed, the trial court reviewed the depositions and deposition exhibits in detail, and concluded that the motion to enforce settlement was meritless and denied same in its entirety. *SR, p. 1265*.

Clearly, the trial court's rejection of the global settlement motions was not made in a vacuum, but the trial court heard testimony, considered affidavits, reviewed the depositions of Roger and Gerald, reviewed the deposition exhibits, entered findings of fact and conclusions of law, and reviewed the court files and records. See, *SR, pp. 75, 77, 120, 226, 264, 278, 285, 752, 754, 807, 813, 823, 835, 854, 963, 1273, 1275, 1289, 1575, 1677, 1763; MH, January 10, 2014; MH, January 16, 2015; MH, March 20, 2015; MH, December 8, 2016; November 27, 2017*. The trial court found, after a considered and extensive review of the records, that the parties did not consent to a global settlement and such decision was supported by credible evidence and the law. It is very apparent that the trial court's decision was not the product of clear error, and there is no evidence that a mistake was made by the trial court on this issue.

Lawrence and Roger further argue that Gerald impliedly agreed to a global settlement by his actions and conduct, but the record does not support such a finding. The evidence presented to the trial court clearly shows that Gerald did not consent nor agree to a global settlement and Lawrence and Roger mislead him as to facts associated with the mediation and subsequent negotiations. *SR, p. 1289 and Depositions of Gerald Paweltzki and Roger Paweltzki attached; SR, p. 1575, Response and Resistance to Defendants' Renewed Motion to Enforce Settlement, Exhibit E, pp. 2, 4, 8, 9-12, and 15-17.* If Lawrence and Roger thought they had a binding settlement agreement with Gerald, why did the parties continue to negotiate through 2016? The answer is simple – because

they did not have a global settlement.

There is ample evidence in the record that proves that Lawrence and Roger were deceitful, manipulative, and certainly less than forthcoming as to the type and nature of the property and assets subject of the alleged settlement. *SR, p. 1575, Response and Resistance to Defendants' Renewed Motion to Enforce Settlement, Exhibit E, pp. 2, 4, 8, 9-12, and 15-17.* Moreover, the deposition testimony regarding the settlement clearly supports Gerald's position on the settlement. It is undisputed that Lawrence and Roger ousted Gerald from the partnership and opened a new checking account in their names only on January 13, 2012. *Exh. #6; SR, p. 1289 and Deposition of Roger Paweltzki, pp. 7-9.* Further, Exhibit #6 shows the owners of the account are "Larry Paweltzki and Roger Paweltzki" and the tax identification number for the account was Roger and Larry's social security numbers. Gerald had no access to the new account or any records for the new partnership between Roger and Lawrence. *SR, p. 1289 and Deposition of Gerald Paweltzki p. 32; Deposition of Roger Paweltzki, pp. 10-11.* In fact, the signature card for the new account for Roger and Lawrence was not disclosed by them until after the settlement depositions had occurred. *SR, p. 1289 and Deposition of Roger Paweltzki, pp. 59-60.* Under these circumstances Gerald could not know what assets remained with PBP or had been sold. The only thing Gerald could rely upon was his memory and the ongoing discovery process in the litigation. Clearly, Gerald could not agree, either expressly or impliedly, to a global settlement when he was not privy to all of the facts and circumstances associated with the subject matter of the claimed agreement.

After the new bank account was opened, Lawrence and Roger deposited funds from the sales of old partnership property into the new account, but did not use all of the sale proceeds to pay the old partnership debt as they had represented at mediation and

thereafter. *SR, p. 1289 and Deposition of Roger Paweltzki, p. 26.* Specifically, Lawrence and Roger repeatedly represented to Gerald that all of the sales proceeds from fat cattle and crops were applied to the old partnership line of credit loan. *SR, p. 1289 and Deposition of Roger Paweltzki, p. 26.* The record shows that there were numerous instances where Lawrence and Roger sold livestock or crops and did not apply the full sale amount to the PBP line of credit as represented to Gerald. *SR, p. 1575, Response and Resistance to Defendants' Renewed Motion to Enforce Settlement, Exhibit E, pp. 2, 4, 8, 9-12, and 15-17.* These sales also occurred within a few months of the commencement of mediation and after Lawrence and Roger had taken over the partnership and excluded Gerald from all operations. Also, Gerald was unaware of these transactions, and it was represented to him that all proceeds from the sales of cattle and crops were being applied to the old line of credit loan. *SR, p. 1289 and Deposition of Gerald Paweltzki, pp. 28-32, 41-42.* Furthermore, on October 1, 2012, Roger and Lawrence, unbeknownst to Gerald, delivered 8,393 bushels of harvested beans worth $122,013.23 (8,393 x $14.5375) to Cargill, Inc., in Emery, South Dakota, on a contract with a deferred payment agreement to May of 2013. *SR, p. 1289 and Deposition of Gerald Paweltzki, pp. 76-89.* Lawrence and Roger's deceit caused Gerald further concern regarding the nature and extent of the assets of the PBP and the fairness of the settlement negotiations.

At the time of settlement negotiations, the hay count was inaccurate and misrepresented by Lawrence and Roger. The bale count was a moving target throughout the history of this case. The number of bales changed repeatedly. *SR, p. 1289 and Deposition of Gerald Paweltzki, pp. 52-54, 65, 71-72, 97-99.* Roger represented that he counted the hay bales before mediation, but his testimony at deposition demonstrated his

confusion on this issue. *SR, p. 1289 and Deposition of Roger Paweltzki, pp. 77-79.* Roger further testified that he did not count certain hay bales because they were not present on property the partnership was using when he counted. *Id., at pp. 81-82.* The trial court finally ruled on the hay issue, but that was after a five day trial which occurred years after the settlement negotiations.

The partnership was officially dissolved after the first mediation on February 15, 2013, and no expenses or debts for the old partnership were to be incurred nor paid if they were after the aforesaid date. *SR, p. 1289 and Deposition of Roger Paweltzki, pp. 39-40.* Lawrence and Roger, however, continued to utilize the old partnership line of credit after the dissolution of the partnership and incurred an additional $30,947.00 in debt which meant that Gerald's share of the old partnership debt was inappropriately increasing after the first mediation. *SR, p. 1289 and Deposition of Roger Paweltzki, pp. 41-43, 45-46, Exhibits 5, 6A and 7A.* Gerald did not learn of the additional debt until after mediation when the discovery process began to unfold. Furthermore, Lawrence and Roger, unbeknownst to Gerald, only a few days before the February 15, 2013, mediation, prepaid $5,000.00 in anticipated expenses to Potter Tire and Service (PTS). *SR, p. 1575, Response and Resistance to Defendants' Renewed Motion to Enforce Settlement, Exhibit E, p. 2.* Prepayment of expenses typically occurs during the latter part of the year when the tax year is about to close and income for the year is relatively certain, not during the beginning of the tax year when the financial status of the business is unknown. Consequently, the only logical reason for the prepayment to PTS was to reduce the cash in the partnership account before the mediation.

At the first mediation, it was Gerald's understanding that the parties only intended to dissolve the partnership and resolve the land issues. *SR, p. 1289 and Deposition of*

Gerald Paweltzki, pp. 22-23. The equipment and livestock appraisal conducted by Wieman Land & Auction Co., Inc., was not relevant to the intended purposes of the first mediation, but became a part of the mediation quite inadvertently. Consequently, the values Wieman assigned to the livestock were in contention, but given the representations made by Lawrence and Roger as to the disposition of the cattle, Gerald did not challenge the appraisal at that time. *SR, p. 1575, Response and Resistance to Defendants' Renewed Motion to Enforce Settlement, Exhibit E, p. 8-12.* Moreover, Gerald's belief at mediation was that there would be an in-kind division of property and not so much a monetary division of partnership assets. *SR, p. 1289 and Deposition of Gerald Paweltzki, pp. 25-26*. Further, Gerald was not aware of the cattle sales before mediation, or the price Lawrence and Roger had received for the cattle, because he had been excluded from the partnership operation and no discovery had occurred. Consequently, Gerald was not in a position to contest the values of the Wieman appraisal with any degree of accuracy until discovery had been completed and he obtained the sales reports from the sale barns. *SR, p. 1289 and Deposition of Gerald Paweltzki, pp. 41-42.* Once Gerald's suspicions were aroused, he engaged in further research regarding the representations of his brothers. *Id., at pp. 34, 41-42*. After Gerald had the opportunity to investigate his brothers' actions, it became apparent that they were not dealing openly or fairly with him.

Lawrence and Roger argue that the trial court's finding that Gerald was not credible when it made its decision at the conclusion of the trial in this matter supports their position herein. The trial court's decision is not a complete determination of Gerald's testimony and it was also made after a trial. At the time of the motions to enforce settlement, neither Judge Jensen nor Judge Giles had made a credibility

determination as to Gerald regarding the settlement facts. Consequently, the trial facts and the later determination by Judge Giles have no bearing or relevance to the settlement issue.

In light of the above, it is abundantly clear that the trial court's findings on this issue are not clearly erroneous; the parties had not reached a global settlement agreement; negotiations were ongoing; and the trial court did not make any mistake or error by not enforcing Lawrence and Roger's motions for settlement.

ISSUE 2: WHETHER THE AFFIRMATIVE DEFENSE OF LACHES BARRED ENTIRELY THE PAWELTZKIS' CLAIM FOR UNJUST ENRICHMENT?

The review of this issue is pursuant to the abuse of discretion standard. *Moeckly*, 2020 S.D. at 45, ¶13. Consequently, Lawrence and Roger must show that the error on the part the trial court was "…a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Gartner*, 2014 S.D. at 74, ¶7. However, this Court does not determine whether it "… would have made the same decision as the circuit court …", but "… [r]ather, this Court's "… function in reviewing matters which rest in the discretion of the trial court is to protect litigants from conclusions which exceed the bounds of reason." *Id.*, at ¶7. Under the abuse of discretion standard, however, "… factual determinations are subject to a clearly erroneous standard." *Id.*, at ¶7.

1. Conflict of claims.

Lawrence and Roger asserted the legal claims of breach of contract, civil theft, conversion, and breach of fiduciary duty and these claims were submitted to the jury for their determination. *SR, pp. 2386, 2428, 2453, Inst. No. 13, 14, and 15*. Gerald's legal defenses, particularly waiver and statute of limitations, were also submitted to the jury for

their determination. *SR, pp. 2386, 2428, Inst. No. 15, 25, and 50.* In a pretrial ruling, the trial court determined that the claims of Lawrence and Roger were not a continuing tort and that the statute of limitations had expired on all damage claims accruing prior to November 6, 2006. *TT, pp. 1396-1397.* The jury was appropriately instructed on the statute of limitations. *SR, p. 2386, Inst. No. 15*. The jury deliberated, considered the proofs of the parties, the defenses to the claims, and returned a verdict in favor of Gerald and against Lawrence and Roger on all of their claims. *SR, p. 2457*. Moreover, the statute of limitations only precluded recovery for Lawrence and Roger for claims prior to November 6, 2006. Consequently, Lawrence and Roger's legal claims for damages were fair game when sent to the jury, but died a quick and painless death when the jury deliberated and returned a verdict against them.

Once the jury ruled on Lawrence and Roger's legal claims, the law prohibits them from presenting the identical claims in the form of the equitable remedy of unjust enrichment to the trial court. This is so because a party is limited in remedies based upon the availability of legal claims. More precisely, when there is a breach of contract claim pursuant to a "… valid and enforceable contract … liability for compensation or other resolution of the breach is fixed exclusively by the contract." *Mealy v. Prins*, 2019 S.D. 57, ¶43, 934 N.W.2d. 891. Furthermore, "… [a]bsent fraud, bad faith, or similar theories, unjust enrichment claims are generally unavailable when a claimant has a 'full, adequate, and complete' remedy available at law." *Id*., at ¶43; see also, *Holzworth v. Rother*, 78 S.D. 287, 291-92, 101 N.W.2d 393, 394-96 (S.D. 1960). Lawrence and Roger did not sue in fraud or bad faith or other similar theories. *SR, p. 17.* Since the jury decided Lawrence and Roger's legal claims for damages and applied Gerald's defenses to same and ruled against a recovery for them, they cannot seek a second bite of the apple by

presenting the equitable theory of unjust enrichment to the trial court so as to recover the exact same damages the jury refused to award them. This is particularly so here because Lawrence and Roger claim the facts which support their legal claim also support their unjust enrichment claim.

2. Findings of fact and conclusions of law.

a) Two sets of findings of fact and conclusions of law.

In addition, Lawrence and Roger assign error to the trial court because two sets of findings of fact and conclusions of law were entered. Moreover, Lawrence and Roger argue that the trial court's memorandum opinion is the controlling document in the decision of the trial court. The Supreme Court has clearly held that a memorandum opinion "… is merely an expression of the trial court's opinion of the facts and the law. It has no binding effect. The findings of fact and conclusions of law and judgment, as signed by the judge, are the binding statement of adjudication." *Moser v. Moser*, 422 N.W.2d. 594, 596 (SD 1988). Furthermore, the written findings of fact and conclusions of law supersede not only a memorandum opinion, but also the trial court's oral pronouncement from the bench. *Bradeen v. Bradeen*, 430 N.W.2d. 87, 89 (SD 1988). Consequently, Lawrence and Roger's assignment of error in this regard is meritless.

Similarly, it is standard practice for a trial court judge to assign to the prevailing party's counsel the duty to prepare written findings of fact and conclusions of law. *SDCL 15-6-52(a); Mackaben v. Mackaben*, 2015 S.D. 86, ¶12 871 N.W.2d. 617. SDCL 15-6-52(a) gives the trial court the authority to direct counsel for the prevailing party to prepare findings of fact and conclusions of law. The trial court read its decision into the record and at the conclusion thereof directed Lawrence and Roger to prepare findings of fact and conclusions of law on what the Court referred to as "true-up issues" and directed

Gerald to prepare findings of fact and conclusions of law on the unjust enrichment claim, laches remedy, and the award of interest. *TT, p. 1550*. Obviously, since the trial court used most of Lawrence and Roger's values and description evidence to divide the partnership assets, the trial court viewed Lawrence and Roger as the prevailing party on the division of partnership assets. This position is bolstered by the fact that Lawrence and Roger admitted at trial that they owed Gerald his one-third share of the partnership. It is equally clear that the trial court viewed Gerald as the prevailing party on the unjust enrichment and interest claims, as the trial court directed him to prepare the appropriate findings and conclusions on these issues. This certainly does not constitute reversible error. Moreover, the entry of two separate sets of findings of fact and conclusions of law on separate issues will not automatically render one or both clearly erroneous. The trial court found different facts were probative of different issues when it decided the division of assets issue and when it decided the unjust enrichment and laches issues. This is entirely consistent with the trial court's duties under the law because at a "… bench trial, the circuit court is the finder of fact and sole judge of credibility …" of the witnesses. *Lindblom*, 2015 S.D. 20, ¶9. Furthermore, on appeal, this Court is to "… give due regard to the opportunity of the circuit court to judge the credibility of witnesses and to weigh their testimony properly." *State v. Troy Twp.*, 2017 S.D. 50, ¶36, 900 N.W.2d 840. Moreover, it is abundantly clear from the trial court's decision that its comments about Gerald's credibility were limited to issues associated with identification, valuation, and description of PBP assets as same related to the division of said assets. *Appellant Appx. P. 120*. This, however, was not the only issue for the trial court to decide. The trial court also considered and decided the unjust enrichment claim, the laches remedy, and the issue of interest. On the unjust enrichment claim and laches remedy the trial court clearly

relied upon not only Gerald's testimony, but the testimony of Lawrence, Roger, and Alyce regarding the events associated with the misappropriation claim and matters related thereto or omitted therefrom.

b**) Erroneous findings of fact.**

Lawrence and Roger claim that there are several instances where the trial court's findings of fact are clearly erroneous. They rely upon the trial court's opinion rather than the actual facts presented at trial which the judge recognized and adopted as credible in his findings of fact on the unjust enrichment and laches issues. Lawrence and Roger argue that if the trial court applied the remedy of laches to the unjust enrichment claim, then Lawrence and Roger must have proven their claim. This reasoning is hollow and neglects to recognize the rest of the findings made by the trial court. Further, Lawrence and Roger contend that the trial court inappropriately applied the remedy of laches because the elements were not substantiated by the record. Lawrence and Roger cherry pick facts in their analysis of the trial court's findings of fact on the unjust enrichment claim and the remedy of laches which is in direct contradiction to the governing law. The law is very clear and unequivocal that the Supreme Court on appeal reviews the trial court's findings under the clearly erroneous standard and only reverse the trial court when "… a **complete review of the evidence** leaves …" it with a "… definite and firm conviction that a mistake has been made. (Emphasis added). *Howlett,* 2018 S.D. at 19, ¶12. The trial court examined in detail the facts on this issue and set forth its findings on the history of the PBP and the circumstances associated with the claimed misappropriation of money, assets, or property by Gerald. The trial court found, consistent with the testimony and evidence that no misappropriation occurred as the

actions of Lawrence, Roger, and Alyce were clearly inconsistent with and contrary to their claim.

The uncontradicted evidence of what Lawrence, Roger, and Alyce did not do in the face of a claimed misappropriation by Gerald was more telling and probative than the evidence they produced in support of the supposed misappropriation. The fact that Lawrence and Roger took no steps to protect the PBP assets, property, or money from Gerald and continued to allow him complete access to the bank accounts, checks, property, money, and continue to operate the same way over decades clearly defeated any claim of unjust enrichment. Moreover, the fact that the three accusers continued to rely on Gerald to handle banking business for the PBP and basically run unchecked with vendors, suppliers, and other service providers to the PBP also supports the trial court's findings in this regard.

In addition, even though Lawrence and Roger's unjust enrichment claims are barred by the governing case law, it is important to note that the trial court's findings on the unjust enrichment claim were accurate and supported by the evidence and the law. See, *Mealy*, 2019 S.D. at 57, ¶43. In this respect Lawrence and Roger misconstrue the trial court's findings and the application of the laches remedy to this case. Gerald's laches defense applies if he can show that Lawrence and Roger (1) had full knowledge of the facts which gave rise to their cause of action; (2) regardless of their knowledge, they engaged in an unreasonable delay before seeking relief in court; and (3) that it would be prejudicial to Gerald to allow them to maintain their action. *Clarkson*, 2011 S.D. at 72, ¶12. Laches does not depend upon simply a passage of time, but the offending party "… must be chargeable with lack of diligence in failing to proceed more promptly." *Id.*, at ¶12. The record is replete with evidence that proves that Lawrence and Roger knew of

their cause of action against Gerald since the mid 1980s and believed that Gerald's conduct had occurred for decades. The trial court's findings are detailed in this regard as well. In spite of their knowledge, Lawrence and Roger took no action whatsoever against Gerald for the misappropriation they believed occurred until Gerald sued them in 2012. This is true even though Lawrence and Alyce sought the advice of an attorney in the 1990s, but never followed through with any sort of lawsuit or other action against Gerald. In fact, the record clearly shows that it was business as usual with Gerald until January of 2012.

Additionally, while the trial court found that the legal claims of Lawrence and Roger were not a continuing tort, the unjust enrichment claim, nonetheless, was dependent upon the claimed history of Gerald as perceived by Lawrence and Roger. Moreover, the trial court allowed evidence of the supposed history of Gerald as to the long running misappropriation of PBP money, assets, or property. Consequently, the unjust enrichment claim was not limited to the last few years as suggested by Lawrence and Roger, but was intended to cover the decades of the supposed theft. Clearly, then, if the trial court viewed the equitable claim as one which was based on decades of misappropriation, then the measuring stick for the unjust enrichment delay element is the decades of the claimed misappropriation. Consequently, it is without question that Lawrence and Roger did not exercise due diligence in pursuing their unjust enrichment claim. The trial court was more than justified in concluding that the delay was decades long and not simply a few years as suggested by Lawrence and Roger.

Finally, Gerald was clearly prejudiced by the failure of Lawrence and Roger to take any action against him on the unjust enrichment claim. Over the span of the decades delay evidence was lost, witnesses aged to the point of having severe memory loss,

documents became irretrievable, and witnesses died. PBP paid bills that were incurred by Gerald and allowed him to continue to act on behalf of PBP. There was no adequate record of what Gerald was supposed to have misappropriated, as all calculations were made decades later in hind sight and in contemplation of trial and none of the records were examined in a timely fashion when the events were transpiring. Moreover, the prejudice element is supported by the fact that Lawrence and Roger's actions over the decades delay were completely inconsistent with a valid unjust enrichment claim. Lawrence and Roger did nothing regarding the alleged misappropriation by Gerald and it was business as usual until January of 2012. At the very least, if one is subject to a claim for wrongful conduct, there should be a standard which the claimant must adhere to before the alleged wrong can be rectified. That is the exact point of the laches defense – to keep a party from using a claim as a potential savings account and cash in on same when they get the urge to do so decades later. This position is also consistent with precedent. In the case of *In re C. H. Young Revocable Living Trust* this Court held the laches defense was good on the similar factual basis as here. *In re C. H. Young Revocable Living Trust*, 2008 S.D. 43, ¶¶9-11, 751 N.W.2d 715. In *Young* the party against whom laches was valid knew of his rights, was aware of what he needed to do to preserve those rights, but sat on his rights for years and key witnesses were lost or unable to be produced for court. *Id.*, at ¶11. The trial court made no error here. The findings on the unjust enrichment claim and laches defense are not clearly erroneous, nor do they constitute "…a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Gartner*, 2014 S.D. at 74, ¶7.

CONCLUSION

The decision of the trial court should be affirmed in all respects.

REQUEST FOR ORAL ARGUMENT: Gerald hereby requests oral argument.

Dated this 30th day of September, 2020.

/S/TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
whalawtim@cme.coop
Attorney for the Appellee

CERTIFICATE OF COMPLIANCE

Timothy R. Whalen, the attorney for the Appellee, hereby certifies that the Appellee's Brief complies with the type volume limitations provided for in SDCL 15-26A-66(b)(4). The Appellee's Brief contains 49,844 characters and 9,993 words. Further, the undersigned relied upon the word count of the word processing system used to prepare the Appellee's Brief.

Dated this 30th day of September, 2020.

/S/ TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
whalawtim@cme.coop
Attorney for the Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two true and correct copies of the Appellee's Brief on the attorneys for the Appellants at their address as follows: Mitchell A. Peterson, Justin T. Clarke, Michael L. Snyder, Davenport, Evans, Hurwitz & Smith,

LLP, 206 West 14th Street, P.O. Box 1030, Sioux Falls, SD 57101-1030 mpeterson@dehs.com, msnyder@dehs.com, jclarke@dehs.com by e-mail and by depositing same in the United States first class mail, postage prepaid, on the 30th day of September, 2020, at Lake Andes, South Dakota. Further, the undersigned hereby certifies that the original and two copies of the above and foregoing Appellee's Brief were mailed to Shirley Jameson-Fergel, Clerk of the Supreme Court, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070 by depositing same in the United States first class mail, postage prepaid, on the 30th day of September, 2020. Further, one copy of the Appellee's Brief was e-mailed to the aforesaid Clerk of the Supreme Court on the 30th day of September, 2020, at her e-mail address as follows: SCClerkBriefs@ujs.state.sd.us.

/S/TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
whalawtim@cme.coop

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29298

GERALD PAWELTZKI,

Plaintiff/Appellee,

vs.

ROGER PAWELTZKI and LAWRENCE PAWELTZKI,

Defendants/Appellants.

Appeal from the Circuit Court
First Judicial Circuit
McCook County, South Dakota
The Honorable Chris S. Giles, Presiding Judge

REPLY BRIEF OF APPELLANTS

Timothy R. Whalen
Whalen Law Office, P.C.
PO Box 127
Lake Andes, SD 57356
Telephone: (605) 487-7645

Attorneys for Plaintiff/Appellee

Mitchell A. Peterson
Justin T. Clarke
Michael L. Snyder
Davenport, Evans, Hurwitz & Smith, L.L.P.
206 West 14th Street, PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880

Attorneys for Defendants/Appellants

Notice of Appeal Filed April 1, 2020

Oral Argument Requested

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I. The Circuit Court Erred When it Denied the Paweltzkis' Motion to Enforce Settlement Agreement and to Compel Arbitration

A. The Material Terms of the Agreement

The first mediation held on February 15, 2013, resolved the following issues for the Paweltzki Brothers' Partnership's (the "Partnership") and the three partners, Defendants-Appellants, Roger and Lawrence Paweltzki (together, "the Paweltzkis"), and Plaintiff-Appellee, Gerald Pawletzki ("Jerry"): dividing real property; agreeing to a "draft" process to distribute equipment; splitting debt; apportioning crops, crop receivables, and crop insurance; and distributing livestock. The parties also agreed to release each other from their respective claims and to dismiss this lawsuit. The settlement had the effect of apportioning more than 99% of Partnership assets and settling the lawsuit. Thus, these are the material terms of the agreement. *See LaMore Rest. Grp., LLC v. Akers*, 2008 S.D. 32, ¶ 17, 748 N.W.2d 756, 762 (defining "material terms" as those "dealing with significant issues" between the parties).

The material terms were not revisited during the second mediation on April 23, 2013, where the parties reaffirmed those terms and addressed which list to use for the equipment "draft" and a handful of ancillary issues. Jerry never expressed any genuine disagreement the parties reached an agreement to divide the Partnership's crops and livestock, in addition to its real property, along with the parties mutually exchanging a release and dismissal of each other's claims. Instead, Jerry's later alleged "misunderstandings" involved about one-half of 1% of the total value of Partnership

assets. (SR. 283-303); (SR. 439-480) (Hrg. Exs. 21, 22, and 23) (appraisals of assets).) Thus, Jerry's claimed "misunderstandings," even if credible, are immaterial.

This clarity is warranted because Jerry repeatedly refers to the settlement as a "global" one, implying it must resolve every point of contention between the parties, or else there could be no agreement at all. (*See, e.g.*, Appellee's Brief at 15, 16, 17, 18, 19, 20, 24). But that description is misleading. The parties knew and agreed other, smaller issues regarding relatively minor Partnership assets might arise, but the 99% of resolved matters were never contingent upon resolving those minor issues. Rather, the parties agreed to submit any such disagreements to arbitration with Lon Kouri acting as arbitrator. Even in the absence of agreeing to arbitrate, those unresolved, immaterial issues do not affect the settlement of materially all (99% of) Partnership property. In comparison to what was resolved by the parties as of April 23, 2013, those minor issues would all be immaterial.

B. The Parties' Agreement is Enforceable

Jerry argues the Court's consideration of the settlement agreement is barred by the Uniform Mediation Act (the "UMA"), SDCL Ch. 19-13A, as analyzed by the Court in *Winegeart v. Winegeart*, 2018 S.D. 32, 910 N.W.2d 906. Jerry is incorrect.

The UMA creates a statutory, evidentiary privilege against the disclosure of communications made during mediation. *See* SDCL 19-13A-4; *see also Winegeart*, 2018 S.D. 32, at ¶ 14 (observing the purpose of the privilege "is to encourage participants to be candid by shielding their negotiations from later disclosure."). Like any evidentiary privilege, it may be waived. SDCL 19-13A-5. And here, there is no dispute the parties

waived the UMA's privilege. In fact, Jerry waived the UMA's privilege for at least three reasons, any one of which suffices to dismiss his argument.

First, Jerry waived the UMA's privilege through his litigation conduct. While the UMA has been in force during the lifetime of this lawsuit, Jerry never attempted to rely on its privilege at any prior stage in these proceedings. Indeed, Jerry never objected to Mr. Kouri's hearing testimony concerning the parties' mediation communications (in fact, Jerry's counsel solicited testimony from Mr. Kouri about what was said during the two mediations), and both parties introduced evidence of their mediation communications into the record. (*See generally* Appellant-Appx) (appending various motion papers, exhibits, and correspondence exchanged between the parties pertaining to those efforts); (*see also* SR. 120-186) (1/3/14 affidavit of Jerry); (SR. 278-284) (12/30/14 affidavit of Roger); (SR. 285-307) (12/30/14 affidavit of Larry).

Second, Jerry failed to raise the UMA's privilege at the Circuit Court level, which waives the issues for this appeal. *See State v. Gard*, 2007 S.D. 117, ¶ 15, 742 N.W.2d 257, 261 ("Ordinarily an issue not raised before the trial court will not be reviewed at the appellate level") (quotation omitted).

Third, Jerry failed to notice for review the Circuit Court's consideration of Mr. Kouri's testimony and partial enforcement of the mediated agreements in alleged violation of the UMA's privilege, which constitutes waiver. *See Schuck v. John Morrell & Co*., 529 N.W.2d 894, 897 (S.D. 1995) ("issue is not properly preserved for appeal when a party fails to file a notice of review…therefore, the issue is waived") (citation ommitted); *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (S.D. 1992).

In addition, the Paweltzkis have introduced evidence in support of the settlement that would not fall within the definition of "mediation communications" for purposes of the UMA's privilege. SDCL 19-13A-2(2). For example, on June 26, 2013, counsel for Jerry wrote counsel for the Paweltzkis confirming several terms of the settlement and acknowledging the parties had taken steps toward carrying out the agreement. (Appellant-Appx. 30) ("I'm not sure I agree the milking operation continued to be a partnership endeavor after February 15 as the livestock all went to Roger/Larry. . . . Although you state fuel and equipment was used for partnership business, given that the dairy operation became Larry/Roger's operation following our February 15 mediation, their use of the fuel, etc., does not constitute partnership business.").

The same correspondence concluded by suggesting the parties submit any lingering disputes they may have to arbitration which, again, is entirely consistent with the terms of agreement the Paweltzkis asked the Circuit Court to enforce. (Appellant-Appx. 31) ("Perhaps we should simply schedule a couple of days to arbitrate these issues with Lon Kouri . . ."). The parties also began the equipment draft after the April 23, 2013, mediation, with each party, including Jerry, choosing and taking possession of the property chosen in the draft. (Appellant-Appx. 2) (December 6, 2013, Affidavit of Mitchell A. Peterson, at ¶ 10); (s*ee also* Appellant-Appx. 30-31) (February 10, 2014, Supplemental Affidavit of Mitchell A. Peterson, Ex. 8.). Thus, while the issue of the UMA's privilege has been waived, none of the parties' communications subsequent to the mediations, and certainly none of their conduct outside of the mediations, would be affected by the UMA's privilege against disclosure of "mediation communications."

C. The Circuit Court Erred, and Jerry's Arguments to the Contrary are Not Persuasive or Supported by the Evidence

For context, the Paweltzkis filed their motion to enforce the parties' settlement agreement and to compel arbitration on December 9, 2013, which the Circuit Court denied on August 5, 2014. (SR. 75-76); (Appellant-Appx. 56-66). It is this decision the Paweltzkis' have challenged on appeal. In support of their position the parties reached an enforceable settlement agreement as of April 23, 2013, as detailed *supra*, or that they ratified the agreement by their conduct, the Paweltzkis' produced evidence establishing the following:

(1) Mr. Kouri's April 23, 2013, settlement memorandum clearly and unambiguously set forth the terms of the parties' agreement, which was never objected to by Jerry;

(2) While Mr. Kouri's settlement memorandum was not signed, its terms plainly contemplated the parties agreed to be bound by it, and under South Dakota law "a contract is formed even though [the parties] intend to adopt a formal document with additional terms at a later date." *Setliff v. Akins*, 2000 S.D. 124, ¶ 14, 616 N.W.2d 878, 885; *see also In re Estate of Neiswender*, 2003 S.D. 50, at ¶¶ 6-7, 660 N.W.2d 249 (accepting agreements evidenced by the exchange of correspondence between counsel, even when there are variances in minor details);

(3) Mr. Kouri, the only disinterested witness, testified at the evidentiary hearing that: (a) the parties reached "concrete agreements" to resolve the lawsuit and a disposition of the major affairs affecting the Partnership dissolution; (b) whatever issues remained would be wrapped up between the parties as needed; and (c) if the parties were unable to resolve those ancillary issues, they agreed to submit them to Mr. Kouri for resolution through arbitration; and

(4) The parties' conduct and the words of their counsel following the second mediation demonstrate they understood they reached a settlement agreement. *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 2011 S.D. 38, ¶ 11, 800 N.W.2d 730, 734; *Neiswender*, 2003 S.D. 50, at ¶ 16. Alternatively, even if the agreement was initially ineffective, the parties' conduct signified they had ratified the agreement. *Ziegler Furniture & Funeral Home, Inc. v. Cicmanec*, 2006 S.D. 6, ¶ 31, 709 N.W.2d 350.

All of this evidence was contemporary with the Paweltzkis' motion to enforce the parties' settlement agreement, and provided to the Circuit Court.

Critically, Jerry ignores the evidence produced by the Paweltzkis' entirely. Instead, Jerry offers a selective interpretation of evidence obtained long after the fact. For example, virtually every piece of evidence offered by Jerry in an attempt to show the parties failed to reach an enforceable agreement *in 2013* did not come into existence *until 2016 or 2018*. (*See* Appellee's Brief at 17, 19-24). Clearly, when the Circuit Court ruled on the Paweltzkis' motion in 2014, the soundness of that decision cannot be tested by evidence that either did not exist or was never presented to the Circuit Court at that time. Thus, the evidence relied on by Jerry should be disregarded.

Jerry's non-evidence-based contentions are easily answerable. First, to the extent Jerry's argument could be interpreted as a re-hash of his alleged "misunderstandings" in spite of the agreement, Jerry failed to address the fact these claimed "misunderstandings" involved about one-half of 1% of the total value of Partnership assets. (SR. 283-303); (SR. 439-480) (Hrg. Exs. 21, 22, and 23) (appraisals of assets).) Thus, they were not material. Second, Jerry suggests the Paweltzkis' subsequent attempts to enforce the settlement agreement in piecemeal fashion means even they did not believe a settlement agreement was reached. (Appellee's Brief at 18). Jerry is incorrect. After the Circuit Court denied the Paweltzkis' initial motion, they had no other option but to proceed with the lawsuit and/or attempt to enforce what they could. Third, Jerry claims the total number some of the crops involved in the settlement–the hay count–was a moving target. (*Id.* at 21). The opposite is true. The Circuit Court ultimately concluded the Paweltzkis' accounting of the amount of hay at issue was correct, and that Jerry was wrong.

(Appellant-Appx. 119). The same was true for virtually all of the Partnership's assets and liabilities, despite Jerry's protestations. (*See id.* at 116-120). Thus, Jerry's alleged points of uncertainty or confusion are illusory, and indicative of his attempts to change his mind in order to back out of the agreement, which the law does not permit him to do. *Setliff* , 2000 S.D. 124, at ¶ 14.

Finally, with respect to the documentary evidence cited by the Paweltzkis, it consists simply of that–documents. The Court can review precisely what those documents say and do not say. Upon doing so, the Court should conclude the parties reached a binding, enforceable settlement agreement following the April 23, 2013, mediation, and the Circuit Court's findings and conclusions to the contrary are clearly erroneous and contrary to law. *Eagle Ridge Estates Homeowners Ass'n, Inc. v. Anderson*, 2013 S.D. 21, ¶ 12, 827 N.W.2d 859, 864; *Leonhardt v. Leonhardt*, 2014 S.D. 86, ¶ 15, 857 N.W.2d 396, 400. In addition, the Circuit Court erred when it did not consider whether the parties ratified the agreement, even if the agreement was initially unenforceable. *Ziegler*, 2006 S.D. 6, at ¶ 31. For each and all of these reasons, this Court should conclude the parties' April 23, 2013, settlement agreement is enforceable, and reverse the Circuit Court.

II. Alternatively, the Circuit Court Erred When it Held the Defense of Laches Completely Barred the Paweltzkis' Unjust Enrichment Claim

A. Jerry's Asserted Standard of Review is Incorrect

Jerry argues the "abuse of discretion" standard governs the Court's review of issue. In support, Jerry cites *Moeckly v. Hanson*, 2020 S.D. 45, ¶ 13, 947 N.W.2d 630, 635, which held "[p]artition actions are equitable actions reviewed for abuse of discretion." However, this generic standard of review for partition actions does not apply.

Instead, the first question is whether the Circuit Court used the correct legal standard in applying the defense of laches, which is a legal question reviewed *de novo*. *Clarkson & Co. v. Cont'l Res., Inc.*, 2011 S.D. 72, ¶ 10, 806 N.W.2d 615, 618. Second, if the Circuit Court's application of the defense was correct, then the clearly erroneous standard applies to the Circuit Court's factual findings. *Id.* And third, the Circuit Court's ultimate legal conclusion of whether the defense applies is reviewed *de novo*. *Webb v. Webb*, 2012 S.D. 41, ¶ 10, 814 N.W.2d 818, 822 ("We review de novo a court's ruling on the applicability of the doctrine of laches").

B. The Paweltzkis Properly Pursued Their Claims

The Paweltzkis asserted claims for both legal and equitable relief, including their claim for unjust enrichment. Jerry argues the law prohibited them from pursuing both legal and equitable claims, particularly after the jury ruled against the Paweltzkis on their legal claims. Jerry is incorrect for several reasons.

First, the Court should reject Jerry's contention entirely because it is waived. Jerry never raised an objection with the Circuit Court to the Paweltzkis pursuing their unjust enrichment claim (or any equitable claim) along with their legal claims. Thus, this issue has been forfeited on appeal. *State v. Janklow*, 2005 S.D. 25, ¶ 47, 693 N.W.2d 685, 701 ("Having failed to give the trial court the opportunity to rule on this issue by objecting at the time, Defendant has waived this argument on appeal"); *see also Gard*, 2007 S.D. 117, at ¶ 15 ("Ordinarily an issue not raised before the trial court will not be reviewed at the appellate level") (quotation omitted).

Second, Jerry's argument is contrary to our Rules of Civil Procedure and the election of remedies doctrine. The Rules of Civil Procedure specifically permit a party to

"state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both." SDCL 15-6-8(e)(2). And the election of remedies doctrine enables a party to maintain their request for inconsistent, alternative, or cumulative relief up until a final judgment is entered. *Stabler v. First State Bank of Roscoe*, 2015 S.D. 44, ¶ 13, 865 N.W.2d 466, 475 ("The rule does not prohibit assertion of multiple causes of action, nor does it preclude pursuit of consistent remedies, even to final adjudication, so long as the plaintiff receives but one satisfaction") (quoting *Pa. Nat'l Mut. Cas. Ins. Co. v. City of Pine Bluff*, 354 F.3d 945, 950-51 (8th Cir. 2004)). Instead, the doctrine only requires a party to choose between or among its several remedies so as to avoid a double recovery. *Id.* at ¶ 13.

On this latter point, Jerry's argument turns the election of remedies doctrine on its head. Ordinarily, an election of remedies does not occur at trial until a verdict is reached; otherwise, the party choosing its remedy will be doing so in the blind. Here, and while ignoring that the Paweltzkis' legal and equitable claims are not identical as Jerry suggests, *see infra,* after the jury returned its verdict in favor of Jerry on the legal claims, the Paweltzkis elected their remedy. *See id.* at ¶ 15 (explaining the election of remedies rule was triggered when the trial court granted the plaintiffs partial summary judgment on their claim for damages; from that point forward they could no longer pursue their claim for equitable relief). But according to Jerry, the Paweltzkis were required to guess how the jury would return its verdict and to elect their remedy beforehand. Jerry has cited no authority for this position, as there is none. Thus, the Court should conclude the Paweltzkis were not prohibited from pursuing their claims for equitable relief.

Third, and although of lesser importance, the Paweltzkis' equitable claims are not "identical" to their legal claims, as Jerry suggests. (*See* Appellee's Brief at 25). The Paweltzkis asserted for their legal claims that Jerry breached the parties' partnership agreement; that he breached his fiduciary duties; and that he committed civil theft and/or conversion. (*See* SR. 2398) (Final Jury Instruction No. 13). While there may be some factual overlap between conduct that would give rise to both a legal claim for damages (*i.e.*, breach of the partnership agreement) and an unjust enrichment claim, the latter claim involves factual uniqueness the former claim does not. For example, liability for a breach of contract claim is not predicated on the fairness or justness of the actor's conduct. The Paweltzkis' unjust enrichment claim is not "identical" to their legal claims.

Finally, the Court should be aware Jerry's description of the Circuit Court's ruling on the continuing tort rule and a statute of limitations defense is misleading. Jerry asserts: "In a pretrial ruling, the trial court determined that the claims of [the Paweltzkis] were not a continuing tort and that the statute of limitations had expired on all damage claims accruing prior to November 6, 2006." (Appellee's Brief at 25). This statement is partly true and partly untrue. The Court did rule the Paweltzkis' legal claims were not continuing torts. (Tr. 1396:22-23). The Court did not, however, rule the statute of limitations barred their legal claims that accrued prior to 2006. Rather, the Court permitted the parties to argue the applicability of the statute of limitations to the jury, (Tr. 1396:23-1397:12), although the verdict forms do not refer to a statute of limitations defense or whether it applied to any of the Paweltzkis' claims. Thus, while a minor point, the Court should be aware Jerry's statute of limitations argument had no effect on the Paweltzkis' unjust enrichment claim.

In sum, the Court should reject Jerry's argument the Paweltzkis could not pursue both legal and equitable theories, as Jerry never raised the objection with the Circuit Court and so it is waived. However, to the extent the Court does consider the matter further, the Court should conclude the Paweltzkis properly pursued claims for legal and equitable relief, and that Jerry's contentions to the contrary are meritless.

C. The Circuit Court's Inconsistent Findings and Conclusions

There is no dispute the Circuit Court entered two significantly inconsistent sets of findings of fact and conclusions of law. To be sure, this is not the scenario where each party drafts a set of findings and conclusions, which the Circuit Court then harmonizes into a single set. (*Contra* Appellee's Brief at 27). Rather, both parties submitted sets of findings of fact and conclusions of law for the Circuit Court to consider, and each of the parties submitted objections to the set of findings and conclusions proposed by the other. However, the Circuit Court neither resolved the parties' objections nor did it reconcile the competing sets of findings and conclusions. Instead, the Circuit Court simply executed and filed both sets as-is, entering the Paweltzkis' set last.

The competing sets of findings and conclusion differ materially, particularly with respect to the Circuit Court's credibility findings and the Paweltzkis' unjust enrichment claim. This point illustrates why the Circuit Court's memorandum decision is instructive. It is not because the Paweltzkis contend the memorandum decision is controlling, as Jerry suggests, but because it is the only evidence in the record (aside from the Court reading it verbatim, Tr. 1542:5-1550:6), of what the Circuit Court actually did, and did not, decide. The Circuit Court was clear it found the Paweltzkis' "witnesses to be truthful and credible" and "[a]lmost all of [their] facts and evidence were properly and fully supported

by the testimony of the witnesses," whereas the Circuit Court "did not find [Jerry] to be a very credible witness" and his "testimony and positions on the issues for the Court to decide were not properly supported by the evidence. In fact, the Court found his position concerning 42 unaccounted-for or missing heifers to be completely preposterous." (Appellant-Appx. 116). The Paweltzkis' set of proposed findings and conclusions align with the Circuit Court's pronouncements, whereas Jerry omitted these credibility findings entirely. (*Compare* Appellant-Appx. 122-139) (Jerry's proposed findings and conclusions) (*with* Appellant-Appx. 140-49) (the Paweltzkis' proposed findings and conclusions).

More substantively, the Circuit Court was also clear the Paweltzkis' unjust enrichment claim did not fail due to a lack of proof, as Jerry's proposed findings and conclusions erroneously state. (*See, e.g.*, Appellant-Appx. 132) (Jerry's Finding of Fact, ¶ 37) (claiming "No evidence suggests that Jerry's actions or retention of property he obtained while actively engaged in [the Partnership] was unjust."). Instead, as noted above, the Circuit Court found the Paweltzkis' witnesses to be credible and their facts and evidence supported by the testimony of the witnesses. And thus the claim did not fail for a lack of proof, but because "the defense of laches applies to [the Paweltzkis'] unjust enrichment claim." (Appellant-Appx. 121).

The only logical inference to draw here is that the Paweltzkis' ***did*** otherwise prove their unjust enrichment claim but the Circuit Court concluded it was barred by laches. Stated another way, if the Circuit Court had concluded the claim had not been proven in the first instance, then the Circuit Court never would have needed to consider whether laches (or any affirmative defense) applied. Again, whereas the Paweltzkis'

proposed findings and conclusions align with the Circuit Court's pronouncements, the set filed by Jerry contains numerous claimed facts the Circuit Court never found. (*Compare* Appellant-Appx. 122-139) (*with* Appellant-Appx. 140-49).

Thus, the two sets of findings and conclusions entered by the Circuit Court are materially incompatible. It cannot be, as Jerry's set claims, that the Paweltzkis' unjust enrichment claim failed for a lack of proof and, at the same time, as both the Circuit Court's memorandum decision and the Paweltzkis' set state, that the Paweltzkis proved their claim but it was, nonetheless, barred by laches.

The Circuit Court's entry of both sets of findings and conclusions would ordinarily warrant a remand because the inconsistencies between the two sets make meaningful appellate review of what the Circuit Court actually decided impossible. *Wiswell v. Wiswell*, 2010 S.D. 32, ¶ 10, 781 N.W.2d 479, 482. However, the Paweltzkis submit that because their proposed set of findings and conclusions is both consist with the Circuit Court's memorandum decision and also entered by the Circuit Court subsequent to those submitted by Jerry, that the Circuit Court intended for the Paweltzkis' submission to be controlling as amendments or modifications to Jerry's set, which was entered first. This view is consistent with Rule 52(a), which permits the Circuit Court to modify its findings and conclusions. However, if this Court disagrees, then the matter must be remanded for the Circuit Court to enter a new, singular set of findings of fact and conclusions of law.

D. The Circuit Court's Adjudication of the Unjust Enrichment Claim

The Circuit Court erred when it held the Paweltzkis' unjust enrichment claim was entirely barred by laches. To be entitled to a laches defense, Jerry was required to prove

three elements: (1) the Paweltzkis had full knowledge of the facts upon which their claims are based; (2) regardless of that knowledge, the Paweltzkis engaged in an unreasonable delay before commencing suit; and (3) that allowing the Paweltzkis to maintain the suit would prejudice Jerry. *Webb*, 2012 S.D. 41, at ¶ 10.

There is no dispute the Circuit Court failed to address the prejudice element. For his part, Jerry insists that he was prejudiced because, according to him, "[o]ver the span of the decades [of] delay evidence was lost, witnesses aged to the point of having severe memory loss, documents became irretrievable, and witnesses died." (Appellee's Brief at 30-31). Of course, the Circuit Court never made such findings, unless this Court ignores the two irreconcilable sets of findings and conclusions and focuses only on the set submitted by Jerry which includes this, among other, gratuitous conclusions the Circuit Court never made. The same is true for the numerous other times Jerry refers to "the findings made by the trial court." (*See* Appellee's Brief at 28-31). It is simply impossible to follow "the facts" as claimed by Jerry in his brief otherwise.

Jerry's allegations of prejudice also make little sense in light of his conduct immediately prior to the commencement of this lawsuit (*i.e.*, in 2011, 2010, 2009, etc.). That is, according to Jerry, somehow valuable evidence pertinent to these recent transgressions was suddenly lost, and key witnesses to these new events abruptly became unavailable. Yet Jerry makes no attempt to explain how that could be. Instead, this is again the type of claim where Jerry's proffered "testimony and positions on the issues for the Court to decide were not properly supported by the evidence." (Appellant-Appx. 116). Thus, this Court should conclude the Circuit Court did not apply the correct legal

standard when it adjudicated the Paweltzkis' unjust enrichment claim. *See Clarkson & Co.*, 2011 S.D. 72, at ¶ 10.

Jerry's only substantive contention is that the Paweltzkis essentially sat on their rights while he misappropriated funds year after year, and that their claim should fail for allowing him to continue to operate "business as usual" in this fashion. However, this is not an argument premised on laches but on a waiver/estoppel-type theory. *Compare Webb*, 2012 S.D. 41, at ¶ 10 (elements of laches) *with Wilcox v. Vermeulen*, 2010 S.D. 29, ¶ 9, 781 N.W.2d 464, 468 (elements of estoppel); *and Wehrkamp v. Wehrkamp*, 2009 S.D. 84, ¶ 8, 773 N.W.2d 212, 215 (elements of waiver). But laches requires a different analysis, and in particular it necessitates showing prejudice which "will not be inferred from the mere passage of time." *Webb*, 2012 S.D. 41, at ¶ 10. "Thus, mere delay, short of the statute of limitations, will not estop a party from asserting his right . . . unless he has been guilty of some act, declaration, or statement that has, in some manner, misled the other party to his prejudice." *Burch v. Bricker*, 2006 S.D. 101, ¶ 15, 724 N.W.2d 604, 609 (quotation omitted) (alteration in original). But Jerry cannot seriously claim he has been prejudiced in any meaningful sense of the word because his recidivism means he will have to return more ill-gotten gains now than if he had been sued earlier.

Jerry also makes little attempt to defend the Circuit Court's conclusion that laches <u>*completely*</u> barred the Paweltzkis' unjust enrichment claim. This lawsuit was commenced in 2012, and the Paweltzkis introduced largely unrebutted evidence at trial showing Jerry had unjustly enriched himself by misappropriating over $1,000,000.00 in Partnership assets during the last decade of the Partnership's operation (*i.e.*, from 2000 – 2011). Although the Paweltzkis disagree laches applies at all, this Court should conclude the

defense cannot apply *at least* during the last years of the Partnership's operation (*i.e.*, in 2011, 2010, 2009, etc.), because each act of theft or embezzlement committed by Jerry during these years would give rise to an actionable unjust enrichment claim, and the Paweltzkis could not "unreasonabl[y] delay before commencing suit" with respect to those claims. *Webb*, 2012 S.D. 41, at ¶ 10; *Conway v. Conway*, 487 N.W.2d 21, 25 (S.D. 1992) (holding laches did not bar a lawsuit commenced roughly one year after the plaintiff became aware of her cause of action); *see also* 30A Corpus Juris Secundum, Equity § 151 ("There can be no 'delay' for purposes of laches until a claim was ripe such that a court could entertain it.").

The only case cited by Jerry in support of the Circuit Court's ruling–*In re Admin. of C.H. Young Revocable Living Tr.*, 2008 S.D. 43, 751 N.W.2d 715–involved not only a showing of significant prejudice which is missing here, but it involved a trustee who knew the trust document he administered contained an omission, but he waited *over ten years* before attempting to reform it. Thus, the case is simply not analogous, at least in so far as Jerry's more recent acts of theft or embezzlement are concerned.

On this latter point, to allow laches to apply to all claims based on Jerry's bad behavior from years or decades earlier would cloak Jerry's theft with immunity before he even misappropriated Partnership assets. Under the Circuit Court's ruling, even if the Paweltzkis sued Jerry the day after he embezzled money in 2011, the claim would be immediately barred based on Jerry's theft from a decade prior. Such a rule is inequitable, and it cannot be the law. *Cf.* 30A Corpus Juris Secundum, Equity § 3 ("The object of equity is to do right and justice with some degree of flexibility, and the essence of equity jurisdiction is its flexibility rather than rigidity"). Accordingly, while the Paweltzkis do

not believe laches applies at all, to the extent it does, the Circuit Court should not have applied it in an all-or-nothing fashion. Thus, the Court should reverse the Circuit Court's conclusion that laches bars entirely the Paweltzkis' unjust enrichment claim.

CONCLUSION

The Circuit Court erred when it denied the Paweltzkis' motion to enforce settlement and compel arbitration. This Court should conclude the parties reached a binding settlement agreement following the April 23, 2013, mediation, or that the parties subsequently ratified that agreement, and that the same should be enforced. Alternatively, this Court should conclude the Circuit Court erred when it held the defense of laches wholly barred the Paweltzkis' unjust enrichment claim. Thus, under either outcome, the Circuit Court should be reversed.

Dated at Sioux Falls, South Dakota, this 13th day of November, 2020.

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

_____

Mitchell A. Peterson
Justin T. Clarke
Michael L. Snyder
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellants complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 4,983 words and 26,467 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 13th day of November, 2020.

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

_____

Mitchell A. Peterson
Justin T. Clarke
Michael L. Snyder
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Reply Brief of Appellants" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on the 13th of November, 2020.

The undersigned further certifies that an electronic copy of "Reply Brief of Appellants" was emailed to the attorneys set forth below, on 13th November, 2020:

Timothy R. Whalen
Whalen Law Office, P.C.
Attorneys for Plaintiff/Appellee

Pamela Reiter
Anthony Sutton
Johnson, Janklow, Abdallah, & Reiter, LLP
pamela@janklowabdallah.com
anthony@janklowabdallah.com
Attorneys for interest party Brian Paweltzki

Steve Huff
Marlow, Woodward, & Huff, Prof. LLC
steve@mwhlawyers.com
Attorneys for (former) Intervenor First State Bank

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

_____

Mitchell A. Peterson
Justin T. Clarke
Michael L. Snyder
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellants