IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 31118

JEREMY MORRISS,	)
	)
Appellant,	)
	)
v.	)
	)
DANIELLE MORRISS,	)
	)
Appellee.	)

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

NOTICE OF APPEAL FILED: June 11, 2025

The Honorable Matt Brown, Circuit Court Judge, presiding

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Throughout Appellant's Brief, Plaintiff/Appellant, Jeremy Morriss, will be referred to as "Jeremy" or "Appellant" interchangeably. Appellee, Danielle Morriss will be referred to as "Appellee" or "Danielle" interchangeably. The settled record is denoted "SR." follow by the appropriate pagination. The April 4th, 2025, Court Trial will be denoted "CT." followed by the appropriate citation to the record.

JURISDICTIONAL STATEMENT

The trial court, the Honorable Judge Matthew Brown presiding, adopted Defendant's Proposed Findings of Fact and Conclusions of Law issuing the Court's Findings of Fact and Conclusions of Law (hereinafter "Findings") April 8th, 2025. SR. 75, 93. The Court entered a Judgment for Attorneys' Fees, Costs, and Compensatory Damages May 6th, 2025. SR. 121. The Court issued an Amended Judgment for Attorneys' Fees, Costs and Compensatory Damages (hereinafter "Amended Judgment") May 8th, 2025. SR. 123. Notice of Entry thereof was filed May 12th, 2025. SR. 128. Appellant timely filed his Notice of Appeal June 11th, 2025. SR. 131.

STATEMENT OF THE ISSUES

I. WHETHER THE CIRCUIT COURT ERRORED, DENYING JEREMY RELIEF ON ALL THEORIES OF RECOVERY, FINDING THE $65,000.00 DOWNPAYMENT CONSTITUED A GIFT.

The trial court erroneously found the $65,000.00 downpayment was a gift and that there was no basis for recovery under any of the theories; express contract, implied in fact contract, unjust enrichment or fraudulent misrepresentation.

Setliff v. Akins, 2000 S.D. 124, ¶ 29, 616 N.W.2d 878, 888

J. Clancy, Inc. v. Khan Comfort, LLC, 2021 S.D. 9, ¶ 20, 955 N.W.2d 382, 389

Murphey v. Pearson, 2022 S.D. 62, ¶ 27, 981 N.W.2d 410, 418

II. WHETHER THE CIRCUIT COURT ERRORED, AWARDING DANIELLE ATTORNEY FEES, COSTS, PAID AND UNPAID TAXES, AND DOUBLE ATTORNEY FEES AS COMPENSATORY DAMAGES.

The trial court erroneously awarded Danielle attorney fees, disbursements and costs, billed and unbilled sales tax, as well as double attorney fees as compensatory damages without a statutory basis.

Crisman v. Determan Chiropractic, Inc., 2004 SD 103, ¶ 26, 687 N.W.2d 507, 513

In re S. Dakota Microsoft Antitrust Litig., 2005 S.D. 113, ¶ 30, 707 N.W.2d 85, 99

Fix v. First State Bank of Roscoe, 2011 S.D. 80, ¶ 14, 807 N.W.2d 612, 617

SDCL § 15-17-38

STATEMENT OF THE CASE AND FACTS

Jeremy initiated a lawsuit against Danielle by Verified Complaint alleging: (1) Breach of Contract; (2) Breach of Implied Contract; (3) Unjust Enrichment; and (4) Fraudulent Misrepresentation resulting from him loaning Danielle a $65,000 downpayment she used to purchase 13129 Big Bend Road, Rapid City, South Dakota (hereinafter "the Property"). SR. 3. Danielle filed an Answer and Counterclaim alleging: (1) Tortious Interference with a Contract; (2) Intentional Infliction of Emotional Distress; and (3) Abuse of Process, stemming from the intense emotional whirlwind of a relationship between the parties and her medical problems that coincided with this period of time. SR. 16.

Once discovery and depositions were completed, the parties by stipulation agreed to the dismissal of Danielle's counterclaims for Tortious Interference with a Contract and Intentional Infliction of Emotional Distress. SR. 52. A one (1) day trial to the court was held at the Pennington County Courthouse, before the Honorable Judge Matthew Brown on April 4th, 2025, with a group of University of South Dakota Law students as spectators. The specific facts of the case are as follows:

Jeremy and Danielle were married for a period of twenty (20) plus years but divorced in the summer of 2020. SR. 93, ¶ 5. They had been divorced for four (4) years at the time of initiation of this lawsuit. SR. 93, ¶ 8. Jeremy and Danielle resolved their divorce by stipulation and fully divided all marital assets and debts. SR. 93, ¶ 9. No equalization payment was owed to either party. SR. 93, ¶ 11; CT. 5:21-5. After the divorce, Jeremy stayed in Iowa where they both originally lived and Danielle moved to Rapid City. SR. 93, ¶ 14; CT. 5:25-6:3.

Danielle and Jeremy, despite the recent divorce, continued to have an on-again, off-again relationship, fraught with problems due to Jeremy's improprieties and Danielle's desire to win back his affection at all costs. SR. 93, ¶ 17.[1] Danielle rented a condominium in Rapid City and there were discussions between Jeremy and Danielle about Jeremy also moving out to Rapid City. SR. 93, ¶ ¶ 15-16. Danielle wanted to save her family. SR. 93, ¶ 17.

Testimony is conflicting as to who was pushing who to buy a house. CT. 23:23-24:1. In 2021, Danielle toured the Property. SR. 93. Danielle requested downpayment funds from Jeremy. CT. 29:5-15. Jeremy's understanding regarding the purchase of the Property was that any home would be owned together. CT. 6:4-17. Jeremy never viewed the Property, any disclosures, and was not involved in the loan process. Danielle did all the work to buy the Property. CT. 8:7-14. Jeremy did not believe he would be on the mortgage because "we were not legally married." CT. 6:21-24. Jeremy did not talk to any lending institution or bank regarding the mortgage. CT. 7:3-6. Jeremy understood he would be providing the downpayment and only Danielle would be obligated to the

[1] Danielle testified: "I feel like we never stopped trying to reconcile. I feel like I was holding on for dear life and he was having fun during the affair, but I think it just all happened so fast, and I think if he hadn't been caught, like, he probably would have -- I mean, he would have just tried to keep it a secret as long as he could. I don't think he was actually ready to let go either." CT. 55:13-21.

mortgage. CT. 7:10-13. Despite not being on the loan or in any way connected legally to the property, Danielle was told Jeremy would have to pay off his $29,033.00 pick-up loan which was in his name only, prior to her ability to close on the Property; Jeremy complied. CT. 25:8-18.

On August 30th, 2021, in Danielle's Rapid City condo, Danielle presented Jeremy with the FNMA/FHLMC Gift Letter (hereinafter "Gift Letter") and a check in the amount of $65,000.00 was made out. SR. 64; 56. CT. 60:11-17. Jeremy understood the $65,000.00 downpayment check to be "considered a loan to be repaid." CT. 7:13-23. Jeremy testified he presented Danielle a "blank check" and that he only wrote his name and date on the check, leaving the remainder of the check blank to have Danielle later fill out. CT. 46:6-10. Jeremy recalls he filled in the date line; Danielle wrote the $65,000.00 amount numerically, Danielle wrote the "sixty-five-thousand-dollars-and-zero-cents" spelled out, Danielle wrote the Property address, and Jeremy just signed his name. CT. 45:18-5. Jeremy was asked if he was "stupid or the most trusting person in the world" to which he replied, "I've always trusted her." CT. 46:14-18. Jeremy testified the they discussed this downpayment being "a loan" prior to Jeremy writing the check but that discussion was never reduced to writing at that time (August of 2021). CT. 9:20-10:5.

The Gift Letter provided: "I/we certify that there's no repayment expected or implied on the gift, either in the form of cash or by future services." SR. 64. Danielle testified that she read the Gift Letter prior to presenting it to Jeremy. CT. 70:17-23. Jeremy testified Danielle presented him the Gift Letter and he did not read it, "she gave it to me to sign and I hesitated on signing, questioning what it was for[,] [a]nd she told me I had nothing to worry about." CT. 12:25-13:4. Jeremy took Danielle's "word for it" and did not read the Gift Letter nor worry about it. CT. 13:5-6. Jeremy was hesitant but assuaged by Danielle's comment to the effect "I'm not going to F'ing screw you over."

CT. 35:13-18. Danielle testified she did not explain the Gift Letter to Jeremy and "just told him I was not able – I was not able to go through with the closing on the house until I had this Gift Letter signed and given to." CT. 60:22-61:3. Danielle stated "I don't know that he read through the entire thing" when asked about Jeremy viewing the Gift Letter. CT. 71:16-20.

Jeremy testified he has since reviewed the Gift Letter and when he signed it, it was blank regarding donor name, amount of gift, relationship, name of recipient of funds, property to which funds would be applied to, donor's complete address, donor's telephone number. Jeremy only filled out the bottom part of the page (donor's signature and date). CT. 12:15-21. Danielle agreed, Jeremy only filled out the date and signature. CT. 75:3-9. Having reviewed the Gift Letter in its entirety once litigation commenced, Jeremy testified the Gift Letter is inconsistent with his understanding of why he was giving Danielle the downpayment money and their prior conversations regarding repayment. CT. 13:7-15.

From the date Jeremy wrote the check, August 30th, 2021, till the closing date in September, had a change of heart and told Danielle not to go through with closing. CT. 10:9-15. Jeremy realized it was "sketchy" giving his ex-wife a check in the amount of $65,000.00. CT. 10:13-23. Danielle testified "[w]e were nowhere ready to buy a house together . . . Love makes you do crazy things. I mean, now that I look back on the whole thing, it was all nuts. It was all emotionally driven." CT. 76:24-77:6. Danielle was delusional by her heightened emotional state to reclaim their relationship. CT. 75:23-25.

Despite mutual concerns, Danielle closed on the Property and moved in shortly thereafter. CT. 13:16-22. Jeremy expected Danielle to live there, pay the mortgage (which only she was obligated to) and also repay him the $65,000.00 down payment. CT. 14:10-

15. Jeremy testified there were conversations about repayment after Danielle moved into the Property, which she agreed to, but those conversations were never formally reduced to writing of any specific terms or timeline. CT. 14:16-22.

Danielle wrote the following notes to Jeremy on April 4, 2022, the first being as follows: "I, your ex-wife Danielle, will get you $50,000 somehow, even if I have to sell my soul. I will try to have it to you within one month. I hereby release you from my miserable presence and will fill out the annulment papers promptly. Your ex-wife, Danielle." CT. 16:1-10; SR. 58. Jeremy said it was not acceptable "by the way she worded everything, it was very immature" so the other note was reduced to writing. CT. 16:10-23. Jeremy testified annulment had nothing to do with the funds he was owed. CT. 17:4-6. Jeremy initially testified "yes" the re-payment of the downpayment was contingent upon the parties reconciling but later upon learning the meaning of the word "contingent" clarified that the parties agreed repayment was expected and understood by the parties regardless of their relationship status. CT. 10:25-11:13[2]; 43:21-44:6.

Danielle then wrote "I, Danielle Morriss, will give you $50,000 within one month. Danielle Morriss, April 4, 2022." CT. 15:2-7; SR. 57. Jeremy testified this note was penned while the parties were together, he "was not holding a gun to her head making her write" this, and it happened during a discussion between the them to give him some assurances. CT. 15:9-19. Jeremy testified the amount owing was reduced ($50,000 – instead of outstanding balance) due to the amount being paid in one (1) month time. CT.

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[2] On Redirect Examination:
Q: Jeremy, did I say a word that you didn't know what it meant? And what I mean is do you know what the word contingent means?
A: I do not.
Q: So if I say a word that you don't understand, don't answer the question. Just tell me you don't know what I'm talking about. Okay?
A: Yes.
TC. 43:5-13.

34:7-13. Danielle testified regarding these two (2) notes, "I was very emotionally distraught and I think we -- I think he knew that this was the last time that he was going to, you know, attempt to reconcile and that he was going back and he wanted to make sure that, you know, he recouped some of what he had lost." CT. 64:18-22 (emphasis added). Danielle stated, till that date, April 4, 2022, the money that Jeremy provided was never discussed in terms of a loan, "no, it was an attempt to reconcile." CT. 64:23-65:1.

Jeremy testified Danielle does not owe him the entire balance of the $65,000.00. CT. 17:20-22. Jeremy testified he is harmed, and needs money to come back to him. CT. 37:10-15. According to Jeremy, $58,331.49 is the balance remaining to be repaid. CT. 17:20-22; SR. 65. This reduced amount is due to the payments Danielle made to Jeremy which was confirmed in a written letter Jeremy's prior counsel sent to Danielle. CT. 18:5-10l; SR. 65. Danielle, through Venmo[3] paid Jeremy the following:

Date	Amount	Description
• 3/12/2022	$500.00	Stuff;
• 3/18/2022	$500.00	Stuff;
• 5/2/2022	$400.00	(house emoji);
• 6/1/2022	$400.00	(house emoji);
• 7/1/2022	$451.00	Nuya;
• 7/29/2022	$400.00	(house emoji)
• 9/16/2022	$500.00	(house emoji);
• 9/30/2022	$392.31	(house emoji);
• 10/29/2022	$425.00	Nuya Biz;
• 11/29/2022	$500.00	Nuya;
• 12/31/2022	$400.00	Nuya
• 1/27/2023	$400.00	Life;
• 4/2/2023	$400.00	(dollar emoji);
• 3/24/2023	$1,600.00	BS;
• 2/24/2023	$400.00	Private;

SR. 59.

[3] Venmo is a social payment service to make and share payments with friends, family, and businesses in the United States. It's like PayPal, but is unique in that, on Venmo, you can share and like payments through a social feed. Venmo, https://www.paypal.com/us/cshelp/article/what-is-venmo-and-how-does-it-work-help231 (last visited Sept. 7, 2025).

Jeremy testified he received these payments from Danielle as repayment for the downpayment money. CT. 19:3-4. Jeremy testified he would not have loaned Danielle the money if he thought she could not or would not repay it. CT. 20:8-14. Danielle agreed she never paid Jeremy $400 a month while they were married, she did not pay Jeremy on a consistent basis after the divorce while trying to reconcile, she only started giving Jeremy money on a consistent basis once the Property was purchased and Jeremy asked to be paid back. CT. 72:2-23. Danielle additionally agreed that the house emoji attributed to a payment to Jeremy was in fact for repayment on the Property and she was paying Jeremy on a consistent basis. CT. 78:15-20. Danielle came up with the $400 a month payment and she testified Jeremy agreed to that number. CT. 78:18-79:1. Danielle's explanation for the repayments to Jeremy was "I mean, I do things all the time without strings attached. Because it's, you know, I just have a charitable heart I guess. Money is not that important to me." CT. 67:10-14. Danielle testified:

> It was a house that was supposed to be for us. He walked away from it. I never -- it was never a loan. It was never a gift. It was supposed to be for us. He was the one that was supposed to live in it. I didn't feel like I had to pay for his bad decisions and the fact that he walked away from a home that we were supposed to live in together.

CT. 73:1-7 (emphasis added).

Jeremy did not object to the affidavit of attorney fees (SR. 111), the specific amount as certain items were missing that could have been added, but files this appeal in part due to the application of the circuit court in its award of attorney fees. *See* SR. 123. Objecting to the amount would not change the required appeal as to the Findings of the circuit court. SR. 93.

STANDARD OF REVIEW

Factual findings by the trial court are reviewed under the clear error standard of review. *State v. Christensen*, 2003 S.D. 64, ¶ 7, 663 N.W.2d 691, 693–94 (citing *State v. Lamont*, 2001 SD 92, ¶ 21, 631 N.W.2d 603, 610).

The existence of an express contract is a question of law that this Court reviews de novo. *Humble v. Wyant*, 843 N.W.2d 334, 2014 S.D. 4.

Regarding implied in fact contracts, this Court reviews the circuit court's findings of fact for clear error. *Murphey v. Pearson*, 2022 S.D. 62, ¶ 21, 981 N.W.2d 410, 416 (citing *Icehouse, Inc. v. Geissler*, 2001 S.D. 134, ¶ 21, 636 N.W.2d 459, 465).

"Unjust enrichment is an equitable concept[,]" and [this Court] review[s] a circuit court's decision to grant equitable relief for an abuse of discretion. *Murphey v. Pearson*, 2022 S.D. 62, ¶ 26, 981 N.W.2d 410, 418 (quoting *Dowling Family P'ship v. Midland Farms*, 2015 S.D. 50, ¶ 10, 865 N.W.2d 854, 860) (citation omitted). However, "[p]ursuant to an abuse of discretion standard of review, factual determinations are subject to a clearly erroneous standard." *Id.* (quoting *Gartner v. Temple*, 2014 S.D. 74, ¶ 8, 855 N.W.2d 846, 850 (citation omitted)).

When reviewing a trial court's award of attorney fees, questions of fact are reviewed under the clearly erroneous standard. *In re S. Dakota Microsoft Antitrust Litig.*, 2005 S.D. 113, ¶ 28, 707 N.W.2d 85, 98 (citing *Brooks v. Milbank Ins. Co.*, 2000 SD 16, ¶ 17, 605 N.W.2d 173, 178). Standards and procedures applied by the trial court in determining attorney fees are legal questions. *Id.* (citing *Smith v. Philadelphia Housing Auth.*, 107 F.3d 223, 225 (3rdCir.1997)). As such, the trial court's conclusions of law are given no deference and are reviewed by this Court de novo. *Id.* (citing *Sherburn v. Patterson Farms, Inc.*, 1999 SD 47, ¶ 4, 593 N.W.2d 414, 416). However, a trial court's decision based on an error of law can be by definition an abuse of discretion. *State v.*

Vento, 1999 SD 158, ¶ 5, 604 N.W.2d 468, 469 (quoting *State v. Richards*, 1998 SD 128, ¶ 9, 588 N.W.2d 594, 595).

When reviewing an attorney fee award, our determination is not "whether we would have made the same ruling, but whether 'a judicial mind, in view of the law and the circumstances of the particular case, could reasonably have reached such a conclusion.' " *In re S. Dakota Microsoft Antitrust Litig.*, 2005 S.D. 113, ¶ 85, 707 N.W.2d 85, 111 (Meierhenry dissenting) (quoting *DeVries v. DeVries*, 519 N.W.2d 73, 75 (S.D.1994) (citation omitted)).

[The South Dakota Supreme Court] review[s] the award of costs and disbursements, including the determination of who was the prevailing party, under an abuse of discretion standard. *Hewitt v. Felderman*, 2013 S.D. 91, ¶ 28, 841 N.W.2d 258, 266 (citing *Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, ¶ 19, 687 N.W.2d 507, 512) (citation omitted).

ARGUMENT

I. The Circuit Court Errored Denying Jeremy Relief on All Theories of Recovery, Finding the $65,000.00 Downpayment Constituted a Gift.

Jeremy initiated a lawsuit against Danielle alleging alternative theories of recovery: (1) Breach of Contract; (2) Breach of Implied Contract; (3) Unjust Enrichment; and (4) Fraudulent Misrepresentation over the $65,000.00 loan of downpayment funds Danielle used to purchase the Property. SR. 3. The circuit court erred in dismissing the first two theories of Jeremey and not considering unjust enrichment or fraud as alternative theories for recovery after determining no contract exists. SR. 93, ¶¶ 24-51, 52-57, 58-62.

While Jeremy always thought the $65,000.00 was a loan, Danielle at first (based on optimistic views of reconciliation) did not; however, her position, as noted by her conduct changed and an implied in fact contract for repayment formed between the

parties. The circuit court's Findings confuse Jeremy's theories of contract recovery. To clarify, there first was an implied in fact contract precipitated by Danielles two payments on March 12th and 18th of 2022 to Jeremy. SR. 59. Then in April of 2022, the payments stopped, and there was an express contract based on the April 4th note for the reduced amount of $50,000, *if* payment was made within one month time. SR. 57, 58. Once the reduced payment based on a expedited timeline failed to come to fruition, the parties ratified their initial implied in fact contract by continuing the loan repayment payments as noted by the house emojis. SR. 59.

Alternatively, Jeremy asserted for the circuit court's consideration the remedy of unjust enrichment, as he conferred upon Danielle a benefit ($65,000.00) which she requested, *i.e.* filling out the check, and it would be unjust for her to retain the Property that was obtained due to Jeremy's downpayment. SR. 93, 52-57. Lastly, under the theory of fraudulent misrepresentation, despite Danielle's assurance she was "not going to F'ing screw (Jeremy) over" she did, inducing him to pay the $65,000.00 with no intent to repay. SR. 93, ¶¶ 58-62; CT. 35:13-18.

A. *The Circuit Court Errored in Finding Jeremy's $65,000 Payment to Danielle Constituted a "gift."*

Danielle requested downpayment funds from Jeremy. CT. 29:5-15. Jeremy's understanding regarding the purchase of the Property was that any home would be owned together. CT. 6:4-17. Jeremy understood the $65,000.00 downpayment check to be "considered a loan to be repaid." CT. 7:13-23. Jeremy would not have loaned Danielle the money if he thought she could not or would not repay him. CT. 20:8-14.

The donor's intent must be shown in order to determine that a gift has been made; "[a] gift is a transfer of personal property, made voluntarily and without consideration." *Owen v. Owen*, 351 N.W.2d 139, 142 (S.D. 1984) (quoting SDCL § 43-36-1. The

essential elements of a gift inter vivos are intent, delivery and acceptance. *Id.* Here the consideration was Jeremy would either own the property or receive repayments . . . which he eventually did receive. CT. 6:4-17; 20:8-14. It does not make sense, and the evidence does not support a theory on why Jeremy would *gift* his ex-wife Danielle $65,000.00. Jeremy understood the $65,000.00 downpayment check to be "considered a loan to be repaid." CT. 7:13-23. No intent to make a gift is present here.

Additionally, in determining whether a transaction is a loan or a gift, "the trial court may take into consideration the relationship of the parties and an individual's need for the loan." *Setliff v. Akins*, 2000 S.D. 124, ¶ 29, 616 N.W.2d 878, 888 (citations omitted). The trial court can deliberate " 'whether in view of their relations a loan might be made without being evidenced by a note and any other incidents that would enable one to infer that the transaction constituted a loan[.]' " *Id.* (quotation omitted).It does not make sense, and the evidence does not support a theory why Jeremy would, out of the goodness of his heart, *gift* his ex-wife Danielle $65,000.00. Danielle knew Jeremy had $100,000 cash from the marital home sale and needed the money as a downpayment, requested it, Jeremy made it was a loan, Danielle didn't care if it was a loan or gift, she was solely focused on her ultimate goal of re-uniting the family. CT. 73:1-7.

The circuit court's Findings lack any explanation as to how Danielle's payment of $6,668.51 to Jeremy is "a gift." SR. 93, ¶¶ 13-23, 7. It is incongruent with the court's rational that Danielle's payment does not constitute an implied in fact contract, ratification, acknowledgement of a benefit received and repayment of that *unjustly* received benefit, but rather merely is a "gift." Had the circuit court in determining whether a transaction is a loan or a gift, "consider[ed] the relationship of the parties" it would have determined there was no gift, the $65,000.00 downpayment was a loan and the $6,668.51 was repayment. *See Setliff*, 2000 S.D. 124, ¶ 29, 616 N.W.2d 878, 888.

B. *The Conduct Between Jeremy and Danielle Established an Implied In Fact Contract Which was Later Ratified.*

All contracts may be oral except such as are specially required by statute to be in writing. SDCL § 53-8-1. "An implied contract is a fiction of the law adopted to achieve justice where no true contract exists." *Scotlynn Transp., LLC v. Plains Towing & Recovery, LLC*, 2024 S.D. 24, ¶ 23, 6 N.W.3d 671, 677–78 (citing *Weller v. Spring Creek Resort, Inc.*, 477 N.W.2d 839, 841 (S.D. 1991)) (quoting *Mahan v. o'*, 80 S.D. 211, 214, 121 N.W.2d 367, 369 (S.D. 1963)).

> An implied-in-fact contract is created when the intention as to the contract is not manifested by direct or explicit words by the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used, or acts done by them, or other pertinent circumstances attending the transaction. Because an implied contract must contain all the elements of an express contract, both express and implied-in-fact contracts require mutual assent. For implied contracts, however, assent occurs when, after reviewing the facts objectively, a party voluntarily indulges in conduct reasonably indicating assent.

J. Clancy, Inc. v. Khan Comfort, LLC, 2021 S.D. 9, ¶ 20, 955 N.W.2d 382, 389–90 (cleaned up).

"The existence of a contract is a question of law." *Nelson v. Est. of Campbell*, 2023 S.D. 14, ¶ 28, 987 N.W.2d 675, 685 (quoting *Harvey v. Reg'l Health Network, Inc.*, 2018 S.D. 3, ¶ 55, 906 N.W.2d 382, 398). The "[e]lements essential to existence of a contract are: (1) Parties capable of contracting; (2) Their consent; (3) A lawful object; and (4) Sufficient cause or consideration." *Id.* (quoting § 53-1-2).

Regarding the element of consent, "the creation of a contract requires an offer by one party and an acceptance by the other." *Advanced Recycling Sys., LLC v. Southeast Properties Ltd. P'ship*, 2010 S.D. 70, ¶ 16, 787 N.W.2d 778, 784. "An offer 'is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.' " *Id.* (quoting *McCoy v. McCallum as trustee of Sandra K. McCallum Living Trust*, 2022 S.D.

42, ¶ 17, 978 N.W.2d at 478 (quoting Restatement (Second) of Contracts § 24 (1981)). "Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." *Id.* (quoting Restatement (Second) of Contracts § 50 (1981)). "An acceptance must be absolute and unqualified[.]" *Id.* (quoting SDCL § 53-7-3).

In assessing the essential elements of a contract: (1) Jeremy and Danielle were over the age of majority and capable of contracting; (2) they consented to the terms of the contract *i.e.* repayment of the loan; (3) the objective was lawful;[4] and (4) sufficient consideration exists in Danielle has the Property and Jeremy receives his money back. *See* SDCL § 53-1-2. Contrary to the Findings of the trial court, both parties to the contract are identifiable – *i.e.* Danielle and Jeremy. SR. 93, ¶ 36. Consent is mutual as the parties know exactly what they agree to; repayment of $65,000.00. *See* SR. 93, ¶ 33 (SDCL § 53-1-2(2). The parties ascertained the same damages, both in nature and origin, the $65,000.00 and how it will be repaid. *See* SR. 93, ¶ 24. Consideration is equally present; Danielle has the house (no reconciliation) Jeremy gets receives his money back. CT. 34:7-13; *see* SR. 93, ¶ 37.

Danielle through her actions implied a contract by remitting funds and assented to remitting funds. SR. 93, ¶¶ 48, 49. Danielle in an exact opposite statement as the circuit court found, testified regarding writing the two (2) notes, "I think he knew that this was

[4] While Jeremy always thought the $65,000.00 was a loan, Danielle at first (based on optimistic views of reconciliation) did not at the time both parties executed the Gift Letter, which does not preclude the parties from later conduct the ability to enter into an implied in fact contract, then ratify that agreement after the immediate payment of the $50,000 was not made. The $65,000 in the minds of *both* parties by the implied conduct which was ratified by continued payment, became a loan at a later date then when the funds were first given, and as such the Gift Letter does not make that latter conduct invalid or illegal. This clarification is added although the argument of the Gift Letter making the ability to contract illegal was not raised is only raised to clarify any issues of timing and ability of the parties to contract and does not invite such argument now. Jeremy also did not know of any barrier to a loan as he only reviewed the Gift Letter in its entirety once litigation commenced, although Danielle (as to the elements of fraudulent misrepresentation did read it) Jeremy testified the Gift Letter is inconsistent with his understanding of why he was giving Danielle the downpayment money and their prior conversations regarding repayment. CT. 13:7-15.

the last time that he was going to, you know, attempt to reconcile and that he was going back and he wanted to make sure that, you know, he recouped some of what he had lost." CT. 64:18-22; *see* SR. 93, ¶ 50 (leaving the door open for reconciliation).

Although Jeremy always thought the $65,000.000 was a loan, both parties eventually mutually agreed it was a loan and Danielle started a course of conduct constituting an implied in fact contract "once it became clear (to her) the parties were not going to reconcile." CT. 64:18-22. Repayment of that loan amount started by Danielle in March of 2022 with payments on the 12th and 18th. SR. 59. The conduct of the parties, specifically the repayments through Venmo, establish an implied-in-fact contract. Danielle paid Jeremy the following:

	Date	Amount	Description
•	3/12/2022	$500.00	Stuff;
•	3/18/2022	$500.00	Stuff;
•	Break for month of April due to 4/4/2022 "$50,000.00 in one month note"		
•	5/2/2022	$400.00	(house emoji);
•	6/1/2022	$400.00	(house emoji);
•	7/1/2022	$451.00	Nuya;
•	7/29/2022	$400.00	(house emoji)
•	9/16/2022	$500.00	(house emoji);
•	9/30/2022	$392.31	(house emoji);
•	10/29/2022	$425.00	Nuya Biz;
•	11/29/2022	$500.00	Nuya;
•	12/31/2022	$400.00	Nuya
•	1/27/2023	$400.00	Life;
•	4/2/2023	$400.00	(dollar emoji);
•	3/24/2023	$1,600.00	BS;
•	2/24/2023	$400.00	Private;

SR. 59.

Jeremy testified he received these payments from Danielle repayment for the money loaned to her. CT. 19:3-4. Danielle agreed she never paid Jeremy $400 a month while they were married, she did not pay Jeremy on a consistent basis after the divorce

while trying to reconcile, she only started giving Jeremy money on a consistent basis once the Property was purchased and Jeremy asked to be paid back. CT. 72:2-23 (emphasis added). Danielle stated that the house emoji attributed to a payment to Jeremy was in fact for repayment on the Property and she made payments on a consistent basis. CT. 78:15-20 (emphasis added). Danielle came up with the $400 a month payment and she testified Jeremy agreed to that number. CT. 78:18-79:1 (emphasis added). Assent occurred when, after reviewing the facts objectively, Danielle, voluntarily indulged in conduct reasonably indicating assent—the consistent monthly loan repayments for the Property as noted by the house emoji. *See Khan Comfort, LLC*, 2021 S.D. 9, ¶ 20, 955 N.W.2d 382, 389–90.

Once the April 4, 2022, $50,000.00 note agreement (SR. 57, 58) failed to come to fruition, the parties ratified their initial implied in fact contract by the continued payments. SR. 59. 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." *Ziegler Furniture & Funeral Home, Inc. v. Cicmanec*, 2006 S.D. 6, ¶ 31, 709 N.W.2d 350, 358 (quoting 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." *First State Bank of Sinai v. Hyland*, 399 N.W.2d 894, 898 (S.D.1987) (citations omitted).

Danielle came up with the $400 a month payment and Jeremy agreed to that number. CT. 78:18-79:1. The acts of renewed repayment starting in May of 2022 on a consistent basis constitute ratification of the original implied contract. SR. 59. Contrary to the circuit court's findings, damages are clearly ascertained in the amount of $58,33.49,

the amount owing to Jeremy after crediting Danielle for the payments made against the original $65,000.00. *See* SR. 93, ¶ 34. This Court should reverse the circuit court and find that an implied contract exists (or was ratified) by the conduct of the parties.

C. *Danielle Committed a Breach of Contract as to the $50,000 Note.*

Jeremy's position is an implied contract existed for repayment of $65,000.00, demonstrated by the conduct of the parties and then ratified after the $50,000.00 note contract failed. The express contract theory regarding the $50,000.00 is an alternative basis for recovery of the same funds and does not serve as a basis for double damages. Danielle wrote the following to Jeremy, "I, Danielle Morriss, will give you $50,000 within one month. Danielle Morriss, April 4, 2022." CT. 15:2-7; SR. 57. Jeremy testified this note was wrote while the parties were together, he "was not holding a gun to her head making her write" this note and was to give Jeremy some assurances. CT. 15:9-19. Jeremy testified the amount owing was lower ($50,000 – instead of outstanding balance) due to the amount being paid in one (1) month time. CT. 34:7-13. Danielle testified regarding these two (2) notes, "I think he knew that this was the last time that he was going to, you know, attempt to reconcile and that he was going back and he wanted to make sure that, you know, he recouped some of what he had lost." CT. 64:18-22. Danielle agreed, till that date, April 4, 2022, the money that Jeremy provided was never discussed in terms of a loan, "no, it was an attempt to reconcile." CT. 64:23-65:1.

The existence of the note imports consideration, and Danielle is charged with the burden of proving lack of consideration. *Ralston Purina Co. v. Jungers*, 86 S.D. 583, 587, 199 N.W.2d 600, 603 (1972); SDCL §§ 53-6-3 and 53-6-4. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the

execution of the instrument. *Eggers v. Eggers*, 79 S.D. 233, 237, 110 N.W.2d 339, 341 (1961).

In assessing the essential elements of a contract: (1) both Jeremy and Danielle were over the age of majority and capable of contracting; (2) they consented to the terms, *i.e.* reduced payment (-$50,000.00 instead of as to at that time $64,000.00 as only two March 2022 payments were made); (3) the objective was lawful; and (4) sufficient consideration exists, -$14,000.00 less money back for the mortgage loan if it is paid expeditiously. *See* SDCL § 53-1-2. Contrary to the findings of the trial court, both parties to the contract are identifiable – Danielle and Jeremy. SR. 93, ¶ 36. Consent is mutual as the parties each know exactly what they are agreeing to; less money being owed from the original $65,000.00, if the amount is paid expeditiously. *See* SR. 93, ¶ 33 (SDCL § 53-1-2(2). The parties ascertained the same damages, both in nature and origin, the $65,000.00 and how it will be repaid. *See* SR. 93, ¶ 24. Consideration is equally present; less money owed in light of the money owed paid back expeditiously. CT. 34:7-13; *see* SR. 93, ¶ 37. Danielle in an exact opposite statement as the circuit court found, testified regarding writing the two (2) notes, "I think he knew that this was the last time that he was going to, you know, attempt to reconcile and that he was going back and he wanted to make sure that, you know, he recouped some of what he had lost." CT. 64:18-22; *see* SR. 93, ¶ 39 (leaving the door open for reconciliation). Jeremy's position is recovery is appropriate under a theory of an implied contract, which was then ratified; alternatively, Jeremy supports if this Court finds a basis for reversal on the grounds that the parties entered an express written contract requiring Danielle repay the $50,000.00 amount.

D. *In the Absence of an Express Contract, the Trial Court Failed to Adequately Consider the Remedy of Unjust Enrichment.*

[The South Dakota Supreme Court] held the equitable remedy of unjust enrichment is unwarranted when the rights of the parties are controlled by an express contract. *Johnson v. Larson*, 2010 S.D. 20, ¶ 8, 779 N.W.2d 412, 416 (citing *Burch v. Bricker*, 2006 SD 101, ¶ 18, 724 N.W.2d 604, 609–10) (quoting *Mooney's, Inc. v. South Dakota Dept. of Transp.*, 482 N.W.2d 43, 47 (S.D.1992)) (discussing quantum meruit) (additional citation omitted). The equitable remedy of restitution is imposed because the transfer lacks an adequate legal basis. *Id.* The circuit court found there was not an express contract controlling here. SR. 93.

The Restatement of Restitution declares that "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Hofeldt v. Mehling*, 2003 S.D. 25, ¶ 15, 658 N.W.2d 783, 788 (quoting Restatement of Restitution § 1 (1937)). The comment to this section explains that "[a] person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be *unjust*." *Id.* (quoting Restatement of Restitution § 1 cmt. a (1937)) (emphasis in original). Unjust enrichment occurs "when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying." *Id.* (quoting *Parker v. Western Dakota Insurors, Inc.*, 2000 SD 14, ¶ 17, 605 N.W.2d 181, 187). "Unjust enrichment occurs 'when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying.' " *Murphey v. Pearson*, 2022 S.D. 62, ¶ 27, 981 N.W.2d 410, 418 (quoting *Hofeldt*, 2003 S.D. 25, ¶ 15, 658 N.W.2d 783, 788) (citation omitted). When unjust enrichment is found, the law implies a contract obligating the beneficiary to compensate the benefactor for the value of the benefit conferred. *Hofeldt*, 2003 S.D. 25, ¶ 16, 658 N.W.2d 783, 788 (citing *Mack v. Mack*, 2000 SD 92, ¶ 27, 613 N.W.2d 64, 69).

Danielle requested downpayment funds from Jeremy in the amount of $65,000.00. CT. 29:5-15. Jeremy conferred a benefit to Danielle, which she accepted, *i.e.* the $65,000.00 downpayment used toward the downpayment of the Property. *See Murphey*, 2022 S.D. 62, ¶ 27, 981 N.W.2d 410, 418. Jeremy understood the $65,000.00 downpayment to be "considered a loan to be repaid." CT. 7:13-23. Jeremy is harmed and he needs money to come back to him but is without an express contact. CT. 37:10-15. According to Jeremy, $58,331.49 is the balance remaining to be repaid. CT. 17:20-22; SR. 65. Danielle testified regarding the two (2) notes, "(Jeremy) wanted to make sure that, you know, he recouped some of what he had lost." CT. 64:18-22 (emphasis added). It is *unjust* for Danielle to retain the Property that was purchased in connection with the $65,000.00 down payment amount conferred to her by Jeremy.

Unlike the facts in *Murphey v. Pearson*, Jeremy received no benefit such as in that case where defendant "received a considerable benefit because of the parties' living arrangement[,] [i]n exchange for his payments, Lisa provided him and their child a place to live and necessities while she assumed all of the financial risk." 2022 S.D. 62, ¶ 29, 981 N.W.2d 410, 419. Jeremy has never lived at the Property, experienced any increase in value of the property associated with ownership, resided there, received rent, nor has he even received any interest on the $65,000.00 Danielle had no legal entitlement to receive.

The circuit court erred in finding that the transfer had to lack an adequate basis or be nonconsensual. SR. 93, ¶ 53. The circuit court erred finding Jeremy did not make a mistake (he did, thinking the payment of $65,000.00 was a loan) and that Danielle requested the funds (the check was blank, she filled it out). SR. 93, ¶ 54. The circuit court erred in not considering Jeremys extensive testimony on how Danielle requested the funds (she filled out the check) and he mistakenly believed the $65,000.00 to be a loan. SR. 93, ¶ 55; CT. 7:13-23. The circuit court mistakes that Jeremy always thought was a loan, it

was Danielle, not Jeremy who only started making repayment when reconciliation failed. SR. 93, ¶ 56; CT. 72:2-23.

In the absence of an express contract this Court should find that based on the principles of unjust enrichment this matter should be reversed and remanded to the circuit court for reconsideration.

E. *The Circuit Court Errored Denying Jeremy Recovery for Danielle's Fraudulent Misrepresentations.*

A claim of fraudulent misrepresentation is established by proving:

1) A defendant made a representation as a statement of fact;
2) The representation was untrue;
3) The defendant knew the representation was untrue or he made the representation recklessly;
4) The defendant made the representation with intent to deceive the plaintiff and for the purpose of inducing the plaintiff to act upon it;
5) The plaintiff justifiably relied on the representation;
6) The plaintiff suffered damage as a result.

Est. of Johnson by & through Johnson v. Weber, 2017 S.D. 36, ¶ 27, 898 N.W.2d 718, 729; *N. Am. Truck & Trailer, Inc. v. M.C.I. Com. Serv.*, 2008 S.D. 45, ¶ 10, 751 N.W.2d 710, 714.

As to element (1) Jeremy relied on the representation he "had nothing to worry about" upon signing the Gift Letter. CT. 12:25-13:4. Jeremy took Danielle's "word for it" and did not read the Gift Letter nor worry about it. CT. 13:5-6. Jeremy was hesitant but assuaged by Danielle's comment to the effect "I'm not going to F'ing screw you over." CT. 35:13-18. As to (2) the representation Jeremy had "nothing to worry about" is untrue, Jeremy has requested repayment, which he testified he would not have funded the $65,000.00 if he did not think he would be repaid. CT. 7:13-23.

As to (3) Danielle knew Jeremy did not review the Gift Letter and either knew she would not pay him back or made the representation of what he was agreeing to recklessly.

Danielle testified that she read the Gift Letter prior to presenting it to Jeremy. CT. 70:17-23 (emphasis added). Jeremy testified Danielle presented him the Gift Letter and he did not read it, "she gave it to me to sign and I hesitated on signing, questioning what it was for[.] [a]nd she told me I had nothing to worry about." CT. 12:25-13:4. Danielle did not explain the Gift Letter to Jeremy and "just told him I was not able – I was not able to go through with the closing on the house until I had this Gift Letter signed and given to." CT. 60:22-61:3.

As to (4) Danielle made the representations of nothing to worry about to deceive Jeremy out of the $65,000.00 then acted on those intentions when she wrote the $65,000.00 amount numerically, the "sixty-five-thousand-dollars-and-zero-cents" spelled out, the Property address, and Jeremy just signed his name. CT. 45:18-5 As to (5) Jeremy relied on the representations he would be paid back. CT. 7:13-23. As to (6) Jeremy testified he is harmed. CT. 37:10-15.

Jeremy met this burden and the circuit court's denial of this alternative theory of recovery should be reversed for reconsideration.

II. The Circuit Court Errored, Awarding Danielle Attorney Fees, Costs, Paid and Unpaid Taxes, and Double Attorney Fees as Compensatory Damages.

The Amended Judgment includes an award of attorney fees to Danielle of $17,272.50 plus $1,070.00; costs pursuant to SDCL § 15-6-54(d) in the amount of $2,167.21; an award of two times the reasonable attorneys' fees in the amount of $34,545.00; and the total judgment awarded to Defendant is $55,054.71. SR. 123. The breakdown of the awards to reach $55,054.71 is as follows:

$17,272.50	total attorney fees;
$34,545.00	original attorney fees multiplied by two;
$1,070.00	taxes on billed and unbilled time; and
$2,167.21	costs.
$55,054.71	Total.

A. *The Circuit Court Erroneously Awarded Danielle Attorney Fees as well as Billed and Unbilled Sales Tax in its Amended Judgment.*

The circuit courts Findings as well as the Amended Judgment lack a statutory or contractual basis to award attorney fees and the $17,272.50 and $1,070.00 to Danielle should be reversed. The circuit court's Findings relating to attorney fees cite the 'American Rule' and provide no statutory support for an award of attorney fees. SR. 93, ¶¶ 80-83.

"An award of attorney's fees is not the norm. The party requesting ... fees has the burden to show, by a preponderance of the evidence, the basis for such an award." *Credit Collection Servs., Inc. v. Pesicka*, 2006 S.D. 81, ¶ 6, 721 N.W.2d 474, 476 (quoting *Jacobson v. Gulbransen*, 2001 SD 33, ¶ 31, 623 N.W.2d 84, 91). In this jurisdiction the recovery of attorney's fees is governed by the American rule, which provides:

> each party bears the party's own attorney fees. However, attorney fees are allowed *when there is a contractual agreement* that the prevailing party is entitled to attorney fees *or* there is statutory authority authorizing an award of attorney fees.

Id. at 477; *Crisman v. Determan Chiropractic, Inc.*, 2004 SD 103, ¶ 26, 687 N.W.2d 507, 513. (citations omitted) (emphasis in *Pesicka*). In determining whether attorney fees are authorized by statute, "[t]his Court has rigorously followed the rule that authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power." *Endres v. Endres*, 2022 S.D. 80, ¶ 36, 984 N.W.2d 139, 150; *Long v. State*, 2017 S.D. 78, ¶ 10, 904 N.W.2d at 362 (alteration in original) (quoting *Rupert v City of Rapid City*, 2013 S.D. 13, ¶ 32, 827 N.W.2d at 67). "The party requesting an award of attorneys' fees has the burden to show its basis by a preponderance of the evidence." *Stern Oil Co., Inc. v. Brown*, 2018 S.D. 15, ¶ 44, 908 N.W.2d 144, 157 (quoting *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 2011 S.D. 38, ¶ 25, 800 N.W.2d 730, 737).

There is no contractual agreement for attorney fees between Danielle and Jeremy, the circuit court only cites SDCL § 15-17-38 as authority within its Findings. SR. 93. Neither SDCL §§ 15-17-37 or 15-17-38 permit the recovering party to recoup "sales tax on billed and unbilled time." SR. 123. The Amended Judgment lacks any contractual or statutory basis to support the award of attorney fees, let alone double attorney fees. SR. 123.

There is no agreement or statute supporting attorney fees and this case is civil, not of divorce, annulment, determination of paternity, custody, visitation, separate maintenance, support, or alimony. *See* SDCL § 15-17-38. Under the 'American Rule' which the long line of precedent establishes South Dakota follows there is no statutory or contractual basis for an award of attorney fees in this case. *In re S. Dakota Microsoft Antitrust Litig.*, 2005 S.D. 113, ¶ 30, 707 N.W.2d 85, 99. The circuit courts Findings as well as the Amended Judgment are without a statutory or contractual basis to award attorney fees or billed and unbilled sales tax, and as such the $17,272.50 and $1,070.00 awards should be reversed.

B. *The Circuit Court Failed to Make Specific Findings for Attorney Fees.*

"[The South Dakota Supreme] Court has consistently required a trial court to enter findings of fact and conclusions of law when ruling on a request for attorney's fees." *Bruggeman by Black Hills Advoc., LLC v. Ramos*, 2022 S.D. 16, ¶ 60, 972 N.W.2d 492, 512 (quoting *Hoffman v. Olsen*, 2003 S.D. 26, ¶ 10, 658 N.W.2d 790, 793). In particular, courts are to make specific findings based on the relevant factors. *Id.* (citing *Duffy v. Seventh Jud. Cir.*, 2004 S.D. 19, ¶ 18, 676 N.W.2d 126, 134). The Findings reference the factors a court is to consider in an award of attorney fees but does not make any findings as to the application of those factors as to the award of attorney fees. SR. 93, ¶ 82. The Amended Judgment is equally absent any application or finding regarding the factors

required in awarding attorney fees. SR. 123. The affidavit of attorney fees does not provide any analysis either. *See Bruggeman*, 2022 S.D. 16, ¶ 60, 972 N.W.2d 492, 512; SR. 111. As such, an award of attorney fees, and subsequent award of two times attorney fees is unsupportable and should be reversed.

C. *There is no Basis for Attorney Fees, Let Alone Awarding Double Attorney Fees.*

There is no basis to support an award of attorney fees, let alone two times reasonable attorney fees as "compensatory damages for emotional distress" especially when no claim before the circuit court related to emotional distress. SR. 93, ¶ 6. The Court found "[Danielle] is awarded compensatory damages for emotional distress in an amount equal to two times her reasonable attorneys' fees expended in this matter." SR. 93, ¶ 6.

Danielle's claims for emotional distress, *i.e.* her causes of action for tortious interference with a contract and intentional inflection of emotional distress dismissed by mutual stipulation. SR. 52. Within the circuit court's findings two paragraphs relate to the basis of awarding attorney fees as compensatory damages. SR. 93, ¶¶ 78-79. Those paragraphs include reference to *Fix* for the proposition "[s]ince an abuse of process claim is an intentional tort, a [party] can seek damages in the form of emotional distress without proving the independent tort of intentional inflection of emotional distress and without proving the heightened standard of 'extreme and disabling' emotional distress." SR. 93, ¶ 79 (citing *Fix v. First State Bank of Roscoe*, 2011 S.D. 80, ¶ 14, 807 N.W.2d 612, 617).

The circuit court made the following findings and conclusions regarding Danielle's emotional state: "Danielle was truthful in stating her actions were primarily driven by her emotions and the desire to bring her family back together" "Danielle wrote the notes while in a heightened emotional state as she recognized the reconciliation with Jeremy was not going to be successful." SR. 93, ¶¶ 39, 12. There are no findings Danielle

was "feeling angered, betrayed, devastated" or experienced "mental distress known as humiliation, that is a feeling of degradation or inferiority" as included in cases cited within *Fix*. 2011 S.D. 80, ¶ 14, 807 N.W.2d 612, 617 (citing *Roth v. Farner–Bocken Co.*, 2003 S.D. 80, ¶ 70, 667 N.W.2d 651, 670; *Bean v. Best*, 77 S.D. 433, 441–42, 93 N.W.2d 403, 408 (1958); *Davis v. Holy Terror Mining Co.*, 20 S.D. 399, 107 N.W. 374, 379 (1906).

The Court in *Fix* notes, in South Dakota, tort damages are governed by SDCL § 21-3-1, which provides: "[f]or the breach of an obligation *not arising from contract*, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for *all* the detriment proximately caused thereby, whether it could have been anticipated or not." 2011 S.D. 80, ¶ 14, 807 N.W.2d 612, 617 (emphasis in original). [The South Dakota Supreme] Court explained that while SDCL § 44-9-42 (not direct statute at issue) permits an award of attorney fees, such an award is not "punitive or . . . based on a conclusion that punishment is warranted." *Smith v. WIPI Grp., USA, Inc.*, 2025 S.D. 26, ¶ 35, 23 N.W.3d 168, 180 (citing *Wald, Inc. v. Stanley*, 2005 S.D. 112, ¶ 14, 706 N.W.2d at 630) (quoting *Duffield Const., Inc. v. Baldwin*, 2004 S.D. 51, ¶ 19, 679 N.W.2d 477, 483).

Here an award of attorney fees was unsupported by contract or statute. *Supra.* There are no findings by the circuit court as to humiliation, emotional damage, mental distress as a result of Jeremy, only that Danielle was of a heightened emotion state to due try to salvage her family/relationship with Jeremy. SR. 93, ¶¶ 39, 12. The award of doubling attorney fees is unsupportable as noted within *Fix*, in South Dakota, tort damages are governed by SDCL § 21-3-1, which provides damages to *compensate* for the detriment proximately caused (which could include) attorney fees, but this is only compensatory, not punitive or designed to punish. 2011 S.D. 80, ¶ 14, 807 N.W.2d 612,

617. This is against public policy to utilize attorney fees as an award of punitive measure and in light of the entirety of the case; a man giving his ex-wife $65,000.00 then having to pay another $55,054.71 while she keeps the $65,000.00 offends a sense of justice.

This Court should reverse the circuit courts award of two times attorney fees in the amount of $34,545.00 as the record is absent any findings of humiliation or emotional distress, the amount exceeds any compensatory amount, is punitive, and is at best loosely supported by precedent.

D. *The Circuit Court Erroneously Awarded Danielle Costs & Disbursements pursuant to SDCL § 15-6-54(d).*

The Amended Judgment included costs pursuant to SDCL § 15-6-54(d) in the amount of $2,167.21. SR. 123. The "prevailing party" in a civil action may recover specific costs and disbursements "necessarily incurred in gathering and procuring evidence or bringing the matter to trial." *Id.* (quoting SDCL § 15-17-37). The prevailing party is "the party in whose favor the decision or verdict is or should be rendered and judgment entered." *Id.* (quoting *Picardi v. Zimmiond*, 2005 S.D. 24, ¶ 16, 693 N.W.2d 656, 661) (citation omitted).

"It is well settled that costs and disbursements are creatures of statute and cannot be allowed in the absence of statutory authority." *DeHaven v. Hall*, 2008 S.D. 57, ¶ 41, 753 N.W.2d 429, 441 (citing *Elfring v. New Birdsall Co.*, 17 S.D. 350, 351, 96 N.W. 703, 704 (1903).

> [T]he taxation of costs was unknown to the common law, and ... courts are without the inherent power to tax costs. The authority to tax such costs should not be implied, but must rest upon a clear legislative grant of power to do so.

Id. at 442 (citing *Matter of Estate of O'Keefe*, 1998 SD 92, ¶ 18, 583 N.W.2d 138, 142) (quoting *Salem Sales, Inc. v. Brown*, 443 N.W.2d 14, 15 (S.D.1989)).

A party who wishes to recover disbursements must file an application that includes a "statement in detail" of the disbursements claimed, which "shall be verified by affidavit." *DeHaven v. Hall*, 2008 S.D. 57, ¶ 47, 753 N.W.2d 429, 443 (quoting SDCL § 15-6-54(d)) (emphasis added). Furthermore, under other provisions "[t]he court may limit the taxation of disbursements in the interests of justice," SDCL § 15-17-52, and "[t]he court may reduce or disallow a taxation of disbursements that would be oppressive or work a hardship." *Id.*

The record is absent of Danielle filing an application for taxation of costs—which shall include a detail of the costs and disbursements claimed and verified by affidavit—and a certificate of service, with the clerk of court. *See* SDCL § 15-6-54(d). SDCL § 15-6-54(d) is non-discretionary, "[i]f a party wishes to have disbursements and costs of the action assessed, that party *must* file an application for taxation of costs. . . and certificate of service." *Id.* Point blank, there is no "application of costs" or certificate of service of the same within the index—none were ever filed and this disbursement would cause a hardship and be oppressive in light of the $65,000.00 *gift* the circuit court decided. *See* SDCL § 15-17-52

Danielle filed an Affidavit of Attorneys' fees and costs which includes "costs billed through April 4, 2025, of $2,1657.21" and "Sales Tax on Billed and Unbilled Time of $1,070.90." SR. 111. An award of costs and disbursements through an application for taxation of *cost should be supported by affidavit*, but affidavit alone is insufficient. *See* SDCL § 15-6-54(d). There is no specific breakdown of what "costs and disbursements" are delineated within the affidavit as well. SR. 111. The affidavit of fees and costs (SR. 111) is statutorily insufficient as a basis for the circuit court pursuant to SDCL § 15-6-54(d) to award $2,167.21 in "costs" and should be reversed. *See* SR. 123.

CONCLUSION

Jeremey respectfully, for the aforementioned reasons asks this Court to REVERSE the circuit court, as Jeremy did not intend the $65,000.00 downpayment to constitute a gift and the parties subsequently entered into an implied in fact contract and the circuits award of fees and damages to Danielle is unsupported by contract or statute.

Dated September 8, 2025

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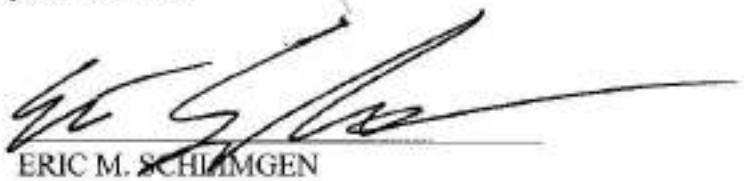
ORAL ARGUMENT IS HEREBY RESPECTFULLY REQUESTED

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66, Eric M. Schlimgen, counsel for the Appellant, does hereby submit the following:

The foregoing brief is 32 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The footnotes are Times New Roman 10 point. The word processor used to prepare this brief indicates that there are a total of **32 pages, 9,740** words, and 46,589 characters (no spaces) in the body of the Brief.



ERIC M. SCHLIMGEN

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 8, 2025, he electronically filed the foregoing documents with the Clerk of the Supreme Court via email at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also emailed to:

Ms. Emily Maurice
Halbach Szware Law Firm
108 S. Grange Ave.
Sioux Falls, SD 57104
(605) 910-7645

The undersigned further certifies that the original and two (2) copies of the Brief of Appellant in the above-entitled action were mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class postage thereon prepaid, on the date written above.

ERIC M. SCHLIMGEN

APPENDIX A
TABLE OF CONTENTS

STATE OF SOUTH DAKOTA) :SS COUNTY OF PENNINGTON)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
JEREMYMORRISS, Plaintiff, v. DANIELLE MORRISS, Defendant.	51CIV24-000023 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The above matter having come on for hearing before this Court at the Pennington County Courthouse, on March 3, 2025, the Honorable Matt Brown, Circuit Court Judge for the Seventh Judicial Circuit, presiding; and the Plaintiff appearing personally and through his attorney, Eric Schlimgen of Schlimgen Law Firm, L.L.C., Rapid City, South Dakota; Defendant appearing personally and through her attorney, Emily Maurice of Halbach | Szwarc Law Firm, Sioux Falls, South Dakota; and the Court having considered the pleadings on file herein, having heard the evidence presented, and having considered the arguments of counsel and all of the files and records, herein; and the Court having rendered its decision and order and now makes and enters the following:

FINDINGS OF FACT

1. All Findings of Fact and Conclusions of Law stated on the record are incorporated herein by reference. Findings of Fact are based on the evidence in the record as of March 3, 2025.

2. Plaintiff, Jeremy Morris ("Jeremy"), is a resident of the State of Iowa.

3. Defendant, Danielle Morriss ("Danielle") is a resident of the State of South Dakota.

4. The property or funds at issue were exchanged in the State of South Dakota.

5. The parties were married for over twenty (20) years.

6. During their marriage, the parties kept their finances separate.

7. Danielle testified that she would not ask Jeremy for funds during their marriage, and vice versa.

8. Jeremy filed for divorce in early 2020 and the parties divorced in the summer of 2020.

9. All terms of the divorce were settled through a stipulation of the parties.

10. As a part of the property division, Jeremy was awarded the marital residence.

11. No property equalization payment was given to either party.

12. Following the divorce, Danielle worked as a traveling nurse. Jeremy continued to live and work in Iowa.

13. The parties continued a relationship off and on following their divorce.

14. Danielle, having family in Rapid City, South Dakota, decided to relocate.

15. Danielle had a rental condominium in Rapid City.

16. Prior to Danielle relocating to Rapid City, Jeremy discussed moving out to Rapid City, as well.

17. Danielle wanted to save her family and was open to Jeremy moving out to Rapid City.

18. Jeremy wanted to purchase a house while Danielle wanted to purchase a camper or stay in her condominium.

19. Jeremy would regularly send Danielle homes to look at and Danielle would tour those homes.

20. One of the homes Danielle toured was 13129 Big Bend Road in Rapid City, South Dakota ("the Property").

21. Danielle had already begun the process of determining her pre-approval amount to purchase a house and the Property fell within that range with a proper down payment.

22. Jeremy had approximately $100,000 from the sale of the marital residence that he was awarded sole possession of in the divorce from Danielle.

23. Prior to closing, a truck loan in the amount of $29,033 was disclosed on Danielle's financial records, and Danielle stated that for months prior to closing, the bank required that amount to be paid off.

24. The truck loan was for Jeremy's truck, which he was awarded sole possession of in the divorce. Neither Danielle nor Jeremy could recall how Danielle's name was associated with the truck such that it was reflected on the closing documents for the Property.

25. Jeremy used proceeds from the sale of the marital residence to pay off the truck loan.

26. Jeremy wrote a check on August 30, 2021 from an account he also used for his business, JD's Tree Service, to cover the down payment that he believed he could afford on the Property. The check amount was for $65,000. Plaintiff's Trial Exhibit 1.

27. The check was written to Pennington Title Company and was held in escrow until closing.

28. Jeremy recalled a verbal agreement for Danielle to repay the $65,000. Danielle recalled a verbal agreement to repay the $65,000 only if closing did not go through.

29. Danielle had hesitation leading up to the closing date of September 8, 2021, and because of that also lined up the purchase of a camper in case the house did not work out.

30. Danielle purchased and returned a camper on September 8, 2021, because she believed Jeremy would move to Rapid City and they would make their family work.

31. The relationship between Danielle and Jeremy continued to be on and off through April of 2022.

32. Jeremy had moved items from Iowa to the Property. Danielle assisted in paying for U-Haul trucks to assist in Jeremy's move.

33. Between September 2021 and April 2022, Jeremy did not demand any payment from Danielle as a result of the alleged loan.

34. The parties' relationship fell apart for the final time in April 2022.

35. On April 4, 2022, as Jeremy was leaving to return to Iowa, Danielle made multiple writings and signed her name on at least two of them. Jeremy only kept two of the writings. The notes stated:

> I Danielle Morriss will give you $50,000 dollars within 1 month.
> Danielle Morriss
> Apil [sic] 4, 2002 [sic]

Trial Exhibit 2.

> I your ex-wife, Danielle will get your $50,000 somehow even if I have to sell my soul. I will try to have it to you within 1 month. I hereby release you from my miserable presence and will fill out the annulment papers promptly.
> Your Ex-Wife,
> Danielle

Trial Exhibit 3.

36. Neither note was countersigned.

37. No party other than Danielle was identified in the two writings.

38. Danielle did not receive anything in return for drafting either writing.

39. Danielle wrote the notes while in a heightened emotional state as she recognized the reconciliation with Jeremy was not going to be successful.

40. Danielle could not articulate why she began to pay Jeremy a monthly amount but had various electronic transfers that had a house emoticon next to the amount. Danielle's monthly amount varied in time paid and amount paid. Danielle testified she simply gave Jeremy what she could when she could. Plaintiff's Trial Exhibit 4.

41. Danielle testified that she believed if she would continue to give money to Jeremy that it might bring her family back together.

42. Jeremy returned to Iowa in April 2022.

43. Danielle ceased remitting money to Jeremy in April of 2023. Plaintiff's Trial Exhibit 4.

44. Jeremy hired an attorney after Danielle's last payment and sent a demand letter on October 12, 2023, for $58,331.49. Defendant's Trial Exhibit B.

45. At trial, Jeremy confirmed that he is seeking reimbursement of $58,331.49.

46. The findings made by the Court are not final findings in this matter, and the Court reserves the ability to change the determinations based upon additional argument and evidence.

CONCLUSIONS OF LAW

1. To the extent that any of the above-made findings of fact are determined to be conclusions of law or mixed findings of fact and conclusions of law, the same are incorporated herein by this reference as a conclusion as if set forth in full.

2. The Court has jurisdiction of the subject matter of the action.

3. The Court has personal jurisdiction of all the parties hereto.

CREDIBILITY OF WITNESSES

4. "'Determining the credibility of the witnesses is the role of the factfinder.'" *Schneider v. S.D. Dept. of Transp.*, 2001 SD 70, ¶ 14, 628 N.W.2d 725, 730 (quoting *Mash v. Cutler*, 488 N.W.2d 642, 653-54 (S.D. 1992)).

5. Jeremy and Danielle were the only witnesses to testify at trial.

6. Jeremy was not credible in his testimony. He stated that he had not read the Gift Letter (Defendant's Trial Exhibit A) yet also stated that he had "glanced over it." He further stated that he asked Danielle what the document was for and then, relying on what Danielle told him, that the bank needed the document, he signed it. However, Jeremy also testified that he believed the document was to memorialize the alleged loan. Due to the inconsistent statements, this Court is not required to believe any part of Jeremy's testimony.

7. Jeremy trusted Danielle enough to give her a blank check to insert the appropriate amount for closing on the Property. However, Jeremy is also suing Danielle under two theories that require a showing of Danielle deceiving him and committing fraud upon him.

8. Jeremy brought claims that required him to show there was detriment done to him but also stated that expending the $65,000 did not harm him financially.

9. Jeremy testified that he initially asked for the entire $65,000 to be repaid to him, then requested that it be minus the amounts Danielle remitted to him yet asks this Court to enforce two written contracts for an amount even less than that.

10. Danielle was credible in her testimony. She testified that she never believed the $65,000 was intended as a loan or a gift as she believed Jeremy was going to share in the benefit, or the purchase of the Property. The funds had never been discussed in terms of a loan until April 2022, and then it was only Jeremy that referred to it as a loan.

11. Danielle believed the money was to reconcile the relationship between herself and Jeremy – to bring their family back together. Danielle believed Jeremy was going to move to Rapid City and live at the Property with her.

12. This Court finds that Danielle was truthful in stating her actions were primarily driven by her emotions and the desire to bring her family back together.

GIFT

13. "A gift is a transfer of personal property, made voluntarily and without consideration." SDCL § 43-36-1.

14. "A gift, other than a gift in view of death, cannot be revoked by the giver." SDCL § 43-36-3.

15. "The essential terms of a gift inter vivos are intent, delivery and acceptance." *Owen v. Owen*, 351 N.W.2d 139, 142 (S.D. 1984).

16. "In determining whether a transaction is a loan or a gift, 'the trial court may take into consideration the relationship of the parties and an individual's need for the loan.'" *Setliff v. Akins*, 2000 S.D. 124, ¶ 29, 616 N.W.2d 878, 888 (quoting *Saum v. Moenter*, 101 Ohio App.3d 48, 654 N.E.2d 1333, 1335 (1995)).

17. Jeremy testified that he signed the Gift Letter (Defendant's Trial Exhibit A) and that he signed the check for the Pennington Title Company without knowing the exact amount he would be paying.

18. Jeremy gave the check to Danielle knowing the money would go into escrow and would not be withdrawn unless and until closing on the Property occurred.

19. Danielle took the check and gave it to the Pennington Title Company.

20. The check was cashed on or around September 8, 2021, which was the date of closing on the Property.

21. For the following seven (7) months, Jeremy and Danielle continued to treat the $65,000 as a gift and something mutually beneficial as the parties continued to reconcile their relationship.

22. Had reconciliation of the parties' relationship been successful, the Court doubts this matter would be before it.

23. This Court finds the $65,000 was intended as a gift pursuant to the terms of the Gift Letter and the subsequent actions of the parties in the months following the delivery and acceptance of the gift. The gift was delivered and accepted upon closing on the Property.

BREACH OF CONTRACT

24. "A contract is an agreement to do or not do a certain thing." SDCL § 53-1-1.

25. A contract is either express or implied. S.D. Civil Pattern Jury Instruction 30-10-10.

26. An express contract is an actual agreement of the parties which is created by distinct and explicit language at the time of making the contract. An express contract may be created orally or in writing. Whether a contract exists is a question of law to be determined by the court, not a factfinder. S.D. Civil Pattern Jury Instruction 30-10-20.

27. "All contracts may be oral except such as are specially required by statute to be in writing." SDCL § 53-8-1.

28. The execution of a written contract supersedes all previous or contemporaneous oral negotiations or stipulations concerning its matter. S.D. Civil Pattern Jury Instruction 30-10-100.

29. An agreement for a loan of money must be in writing and subscribed by the party to be charged to be enforceable. SDCL § 53-8-2(4).

30. The essential elements of a contract include: (i) parties capable of contracting (b) their consent; (c) a lawful object; and (d) sufficient cause or consideration. SDCL § 53-1-2.

31. If the parties to the contract cannot be identified, a contract is invalid. SDCL § 53-2-3.

32. Every oral and written contract requires that all parties to the contract consent to the making of that contract. The consent must be free, mutual, and communicated to each other. S.D. Civil Pattern Jury Instruction 30-10-70.

33. Consent is not mutual unless the parties all agree upon the same thing in the same sense. SDCL § 53-3-3. *See also* SDCL § 53–1–2(2); *Braunger v. Snow*, 405 N.W.2d 643, 646 (S.D.1987).

34. "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and their origin." SDCL § 21-2-1.

35. Jeremy based his breach of contract claim on the two notes attached to his Verified Complaint as Exhibits 2 and 3, and introduced at trial as Plaintiff's Trial Exhibit 2 and 3, which identify an alleged repayment due and owing to Jeremy of $50,000.

36. Danielle is the only identifiable party in the two notes. There is no countersignature, and no other party identified other than "you."

37. No consideration is identifiable in either note.

38. Whether there was a verbal agreement for repayment of $65,000 is irrelevant as Jeremy seeks to enforce one or both of the written notes for repayment of $50,000, which were executed after the alleged verbal agreement.

39. Danielle wrote the two notes for an alleged obligation to repay $50,000 while in an emotionally distraught state. She testified that she believed writing the notes would leave the door open to possible reconciliation with Jeremy in the future.

40. Danielle testified that she never believed any of the money from Jeremy was intended as a loan.

41. This Court does not find a valid written contract exists that can be enforced against Danielle as the parties are not identifiable through the four corners of the alleged contract and there was not a meeting of the minds such that they were agreeing "upon the same thing in the same sense." SDCL § 53-3-3.

42. Furthermore, Jeremy is requesting an amount of $58,331.49, which is $8,331.49 over the amount that Jeremy alleges was contracted for.

BREACH OF IMPLIED CONTRACT

43. In an implied contract, the existence and terms are shown by conduct. SD Civil Pattern Jury Instruction 30-10-10; SDCL 53-1-3.

44. A contract may be implied in fact. A contract is implied in fact where the parties do not directly or expressly in words set forth an intention to enter a contract, but where their conduct, language, or other acts causes you to conclude they did, in fact, intend to enter a contract. (SD Civil Pattern Jury Instruction 30-10-30; SDCL 53-1-3).

45. "An implied contract is a fiction of the law adopted to achieve justice where no true contract exists." *Weller v. Spring Creek Resort, Inc.*, 477 N.W.2d 839, 841 (S.D. 1991) (quoting *Mahan v. Mahan*, 80 S.D. 211, 214, 121 N.W.2d 367, 369 (S.D. 1963)).

46. It is under this claim that Jeremy is requesting $58,331.49, as that represents the $65,000 minus amounts Danielle has already paid.

47. This cannot be as Jeremy presented two written notes from Danielle indicating a repayment of only $50,000. The execution of a written contract supersedes all previous or contemporaneous oral negotiations or stipulations concerning its matter. S.D. Civil Pattern Jury Instruction 30-10-100.

48. Jeremy contends Danielle has breached an implied contract through her actions of remitting funds.

49. Jeremy cannot point to, and Danielle did not testify to, her assent to remit funds to Jeremy as repayment of a loan.

50. Danielle remitted funds to Jeremy in hopes that money might bring back attempts at reconciling their relationship.

51. This Court finds Danielle regifted money to Jeremy through her actions, and is not entitled to recover those funds, but no implied contract exists that mandates Danielle to repay any amount of money to Jeremy.

UNJUST ENRICHMENT

52. Unjust enrichment occurs when a party confers a benefit upon another party who accepts or acquiesces in that benefit and it is inequitable to receive that benefit without paying. To recover under a claim of unjust enrichment, the plaintiff must show that the defendant: (1) has received a benefit; (2) is aware of the benefit; and (3) if allowed to retain the benefit without reimbursing the plaintiff would result in an inequitable outcome. S.D. Civil Pattern Jury Instruction 30-10-60.

53. "Unjust enrichment contemplates an involuntary or nonconsensual transfer, unjustly enriching one party. The equitable remedy of restitution is imposed because the transfer lacks an adequate basis." *Johnson v. Larson*, 2010 S.D. 20, ¶ 8, 779 N.W.2d 412, 416.

54. "'[A] person who without mistake, coercion, or request has unconditionally conferred a benefit upon another is not entitled to restitution.'" *Blue v. Blue*, 2018 S.D. 58, ¶ 20, 916 N.W.2d 131, 137–38 (quoting *Dowling Family P'ship v. Midland Farms*, 2015 S.D. 50, ¶ 24, 865 N.W.2d 854, 864).

55. Jeremy has not established that he made the payment of $65,000 due to a mistake, coercion, or request.

56. In fact, it wasn't until the parties' relationship was officially past reconciliation in April of 2022 that Jeremy began requesting Danielle repay any amount of money.

57. Jeremy has not established that Danielle is unjustly enriched by keeping the money that was gifted to her, that he also received the benefit of, and Jeremy is not entitled to any restitution under this theory.

FRAUDULENT MISREPRESENTATION

58. Fraudulent misrepresentation requires a plaintiff to show: (1) the defendant made a representation as a statement of fact; (2) the representation was untrue; (3) the defendant knew the representation was untrue or made the representation recklessly; (4) the defendant made the representation with intent to deceive the plaintiff and for the purpose of inducing the plaintiff to act upon it; (5) the plaintiff justifiably relied on the representation; and the plaintiff suffered damage as a result. SDCL §§ 20-10-1, 20-10-2(1); S.D. Civil Pattern Jury Instruction 20-110-20.

59. Deceit within the meaning of SDCL § 20-10-1 is either: (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) the assertion, as a fact, of that which is not true by one who has no reasonable ground for believing it to be true; (3) the suppression of a fact by one who is bound to disclose it, or who gives information of

other facts which are likely to mislead for want of communication of that fact; or (4) a promise made without any intention of performing. SDCL § 20-10-2.

60. "More than a finding of knowledge of falsity is required to warrant a conclusion of liability based on intentional misrepresentation. Intentional misrepresentation is defined by SDCL 20–10–1 as a wilful deception made with the intention of inducing a person to alter his position to his injury or risk. **[The South Dakota Supreme Court has] held that an action for deceit requires proof that the misrepresentations were material to the formation of the contract and that the plaintiff relied on the misrepresentations to his detriment.**" (emphasis added). *Littau v. Midwest Commodities, Inc.*, 316 N.W.2d 639, 643 (S.D. 1982) (citing *Aschoff v. Mobil Oil Corp.*, 261 N.W.2d 120 (S.D.1977); *Schmidt v. Wildcat Cave, Inc.*, 261 N.W.2d 114 (S.D.1977); *Viajes Iberia, S. A. v. Dougherty*, 87 S.D. 591, 212 N.W.2d 656 (S.D.1973)).

61. Jeremy has not established his burden of proof that Danielle committed deceit.

62. Jeremy did not articulate what statement Danielle made that he relied upon, that Danielle knew not to be true, and that Jeremy suffered detriment from. Jeremy is not entitled to recover under this theory.

ABUSE OF PROCESS

63. "One who uses a legal process whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." Restatement (Second) of Torts § 682 (1977).

64. "The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some action or refrain from it." Restatement (Second) of Torts § 682, cmt b (1977).

65. Extortion is "[t]he practice or an instance of obtaining something or compelling some action by illegal means, as by force or coercion." EXTORTION, BLACK'S LAW DICTIONARY (12th ed. 2024).

66. "If a party is content to use the particular machinery of the law for the immediate purpose for which it was intended, he is not ordinarily liable, notwithstanding a vicious or vindictive motive. However, the moment he attempts to attain some collateral objective, outside the scope of the operation of the process employed, a tort has been consummated." 33 Causes of Action 2d 465 (citing *Phillips v. Ingham County*, 371 F.Supp.2d 918 (W.D.Mich. 2005).

67. The party claiming abuse of process "must plead facts that show that the [opposing party] instituted proceedings against him for an improper purpose; such as extortion, intimidation, or embarrassment." 33 Causes of Action 2d 465 (citing *Kumar v. Bornstein*, 354 Ill. App. 3d 159, 290 Ill. Dec. 100, 820 N.E.2d 1167 (2d Dist. 2004), appeal denied, 215 Ill. 2d 598, 295 Ill. Dec. 521, 833 N.E.2d 3 (2005).

68. "[L]iability should result only when the sense of awareness [that initiating an action will necessarily subject the opposing party to additional legal expenses] progresses to a sense of purpose, and, in addition the utilization of the procedure for the purposes for which it was designed becomes so lacking in justification as to lose it legitimate function as a reasonably justifiable litigation procedure." 33 Causes of Action 2d 465 (citing *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 92 P.3d 882 (Ct. App. Div. 2 2004), review denied, (Mar. 22, 2005).

69. "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." SDCL § 53-8-5.

70. Jeremy failed to acknowledge the Gift Letter (Defendant's Trial Exhibit A) in his Verified Complaint.

71. In his Reply to Answer and Counterclaim, Defendant admitted to signing Defendant's Trial Exhibit A. Jeremy testified to the same at trial.

72. Jeremy also acknowledged that Danielle wrote and signed two documents (Trial Exhibits 2 and 3) that identified an alleged amount Danielle would pay to Jeremy was limited to $50,000.

73. However, Jeremy testified at trial that he is seeking $58,331.49 from Danielle, which is based on the alleged oral contract Jeremy believes was made for $65,000. This means Jeremy is now asking for $8,331.49 more than what Jeremy states was in the alleged written contracts he is now trying to enforce.

74. Jeremy's request is in violation of SDCL § 53-8-5 as he also seeks to enforce alleged written contracts for the repayment of $50,000.

75. Jeremy continued this matter to a trial without clarifying which documents he sought to rely upon and without specification of how much he believes Danielle owes; he is simply hoping this Court finds that Danielle owes him some money.

76. Jeremy testified to wanting to settle with Danielle; Danielle testified that Jeremy would have anticipated Danielle settling as she rarely stood up to him in the past.

77. After acknowledging that he signed a gift letter, Jeremy knew he was not entitled to any money from Danielle. He continued the lawsuit for to extort money from Danielle, as shown by his request for an inappropriate and unsupported amount, which is an improper purpose for the justice system.

Damages

78. "Since an abuse of process claim is an intentional tort, a [party] can seek damages in the form of emotional distress without proving the independent tort of intentional infliction of emotional distress and without proving the heightened standard of 'extreme and disabling' emotional distress." *Fix v. First State Bank of Roscoe*, 2011 S.D. 80, ¶ 14, 807 N.W.2d 612, 617.

79. "[I]n reviewing damages awarded by a jury in an abuse of process action, . . . 'a jury ay properly consider wounded feelings, mental suffering, humiliation, degradation, and disgrace in fixing compensatory damages.'" *Id.* (quoting *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 753 (N.D. 1989)). "The 'tort of abuse of process, unlike the tort of negligent infliction of emotional distress, does not require specific proof of intangible damages such as mental injury as a prerequisite to an award if it is clear that such damages would accrue to a normal person." *Id.* (cleaned up).

ATTORNEYS' FEES

80. "South Dakota follows the American rule of attorneys' fees, which provides that each party is responsible for their own fees." *Stern Oil Company, Inc. v. Brown*, 2017 SD 15, ¶ 44, 908 N.W.2d 144, 157 (citing *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 2011 SD 38, ¶ 25, 800 N.W.2d 730, 737). A court may allow attorneys' fees if provided for by a contract or specific statute. SDCL § 15-17-38.

81. "The court, if appropriate, in the interests of justice, may award payment of attorneys' fees in all causes of ... determination of paternity, custody, [and] visitation...." *Id.*

82. In deciding what is a reasonable attorney fee, the trial court should consider several parameters which affect the value of legal services, such as:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

City of Sioux Falls v. Kelley, 513 N.W.2d 97, 111 (S.D. 1994) (quoting Model Rules of Professional Conduct, Rule 1.5).

83. Prevailing parties may also request disbursements under SDCL § 15-17-37, which states:

> [t]he prevailing party in a civil action or special proceeding may recover expenditures necessarily incurred in gathering and procuring evidence or bringing the matter to trial. Such expenditures include costs of telephonic hearings, costs of telephoto or fax charges, fees of witnesses, interpreter or translator expenditures not otherwise covered pursuant to § 15-17-37.1, officers, printers, service of process, filing, expenses from telephone calls, copying, costs of original and copies of transcripts and reporter's attendance fees, and court appointed experts. These expenditures are termed "disbursements" and are taxed pursuant to § 15-6-54(d).

SDCL § 15-17-37.

ORDER

Consistent with the above findings and conclusions of law, the Court orders the following:

1. Plaintiff Cause of Action I, Breach of Contract, is found in favor of Defendant;

2. Plaintiff's Cause of Action II, Breach of Implied Contract, is found in favor of Defendant;

3. Plaintiff's Cause of Action III, Unjust Enrichment, is found in favor of Defendant;

4. Plaintiff's Cause of Action IV, Fraudulent Misrepresentation, is found in favor of Defendant;

5. Defendant's Cause of Action I, Abuse of Process, is found in favor of Defendant;

6. Defendant is awarded compensatory damages for emotional distress in an amount equal to two times her reasonable attorneys' fees expended in this matter;

7. Plaintiff is entitled to keep the $6,668.51 that was regifted to him by Defendant between April 2022 and April 2023;

8. Neither party is awarded punitive damages;

9. Plaintiff's request for attorneys' fees in this matter is denied;

10. Defendant's request for attorneys' fees and disbursements is granted, such fees shall be submitted by counsel for Defendant via affidavit within fourteen (14) days following submission of this Judgment for the Court's consideration pursuant to the aforementioned factors;

11. Plaintiff shall have ten (10) days following Defendant's counsel's submission to file any objections to the requested attorneys' fees.

IT IS SO ORDERED.

BY THE COURT:

Matt Brown 4/7/2024

Hon. Matt Brown

Clerk

By Heather Shaw Deputy

FILED
Pennington County, SD
IN CIRCUIT COURT

APR - 8 2025

Amber Watkins, Clerk of Courts
By HS Deputy

STATE OF SOUTH DAKOTA) :SS COUNTY OF PENNINGTON)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
JEREMY MORRISS, Plaintiff, v. DANIELLE MORRISS, Defendant.	51CIV24-000023 **AMENDED JUDGMENT FOR ATTORNEYS' FEES, COSTS, AND COMPENSATORY DAMAGES**

Pursuant to the Order entered on April 8, 2025, Defendant submitted to the Court an Affidavit of Attorneys' Fees and Costs, filed on April 16, 2025. Pursuant to the Court's Findings of Fact and Conclusions of Law, filed April 8, 2025, Plaintiff had ten (10) days to object to the Affidavit of Attorneys' Fees and Costs. Plaintiff did not submit objections until May 2, 2025, 2 days after Plaintiff's objections were due. As the objections were untimely, the Court will not consider Plaintiff's objections. Based on Defendant's Affidavit and all other filings in this matter, it is:

ORDERED, ADJUDGED AND DECREED that Defendant is hereby granted an award of attorney fees in the amount of Seventeen-Thousand Two-Hundred Seventy-Two Dollars and Fifty Cents ($17,272.50), plus sales tax of One-Thousand Seventy Dollars ($1,070.00) and Judgment shall be entered for Defendant against Plaintiff for said amount. It is further

ORDERED, ADJUDGED AND DECREED that Defendant is hereby granted an award of costs pursuant to SDCL 15-6-54(d) in the amount of Two-Thousand One-Hundred Sixty-Seven Dollars and Twenty-One Cents ($2,167.21), and Judgment shall be entered for Defendant against Plaintiff for said amount. It is further

ORDERED, ADJUDGED AND DECREED that Defendant is hereby granted an award of two times the reasonable attorneys' fees in the amount of Thirty-Four Thousand Five-Hundred Forty-Five Dollars ($34,545.00), and Judgment shall be entered for Defendant against Plaintiff for said amount.

ORDERED, ADJUDGED AND DECREED that total Judgment awarded to Defendant against Plaintiff is Fifty-Five Thousand Fifty-Four Dollars and Seventy-One Cents ($55,054.71).

IT IS SO ORDERED.

5/8/2025 4:38:52 PM

BY THE COURT:

Hon. Matt Brown

Attest:
Shaw, Heather
Clerk/Deputy

STATE OF SOUTH DAKOTA) :SS COUNTY OF PENNINGTON)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
JEREMY MORRISS, Plaintiff, v. DANIELLE MORRISS, Defendant.	51CIV24-23 **NOTICE OF ENTRY OF AMENDED JUDGMENT FOR ATTORNEYS' FEES, COSTS, AND COMPENSATORY DAMAGES**

YOU WILL HEREBY TAKE NOTICE that on May 8, 2025, the Court entered the *Amended Judgment of Attorneys' Fees, Costs, and Compensatory Damages* in the above-captioned matter, which was filed with the Pennington County Clerk of Court on May 8, 2025. A copy of said Judgment is attached and made a part of this Notice of Entry of Amended Judgment of Attorneys' Fees, Costs, and Compensatory Damages, the same as if fully and completely set forth herein.

Dated May 12, 2025.

HALBACH | SZWARC LAW FIRM

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Filed: 5/12/2025 4:35 PM CST Pennington County, South Dakota 51CIV24-000023

STATE OF SOUTH DAKOTA) :SS COUNTY OF PENNINGTON)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
JEREMY MORRISS, Plaintiff, v. DANIELLE MORRISS, Defendant.	51CIV24-000023 **AMENDED JUDGMENT FOR ATTORNEYS' FEES, COSTS, AND COMPENSATORY DAMAGES**

Pursuant to the Order entered on April 8, 2025, Defendant submitted to the Court an Affidavit of Attorneys' Fees and Costs, filed on April 16, 2025. Pursuant to the Court's Findings of Fact and Conclusions of Law, filed April 8, 2025, Plaintiff had ten (10) days to object to the Affidavit of Attorneys' Fees and Costs. Plaintiff did not submit objections until May 2, 2025, 2 days after Plaintiff's objections were due. As the objections were untimely, the Court will not consider Plaintiff's objections. Based on Defendant's Affidavit and all other filings in this matter, it is:

ORDERED, ADJUDGED AND DECREED that Defendant is hereby granted an award of attorney fees in the amount of Seventeen-Thousand Two-Hundred Seventy-Two Dollars and Fifty Cents ($17,272.50), plus sales tax of One-Thousand Seventy Dollars ($1,070.00) and Judgment shall be entered for Defendant against Plaintiff for said amount. It is further

ORDERED, ADJUDGED AND DECREED that Defendant is hereby granted an award of costs pursuant to SDCL 15-6-54(d) in the amount of Two-Thousand One-Hundred Sixty-Seven Dollars and Twenty-One Cents ($2,167.21), and Judgment shall be entered for Defendant against Plaintiff for said amount. It is further

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ORDERED, ADJUDGED AND DECREED that Defendant is hereby granted an award of two times the reasonable attorneys' fees in the amount of Thirty-Four Thousand Five-Hundred Forty-Five Dollars ($34,545.00), and Judgment shall be entered for Defendant against Plaintiff for said amount.

ORDERED, ADJUDGED AND DECREED that total Judgment awarded to Defendant against Plaintiff is Fifty-Five Thousand Fifty-Four Dollars and Seventy-One Cents ($55,054.71).

IT IS SO ORDERED.

5/8/2025 4:38:52 PM

BY THE COURT:

Hon. Matt Brown

Attest:
Shaw, Heather
Clerk/Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 31118

JEREMY MORRISS V. DANIELLE MORRISS

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

THE HONORABLE MATT BROWN
Circuit Court Judge

BRIEF OF APPELLEE

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NOTICE OF APPEAL FILED JUNE 11, 2025

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PRELIMINARY STATEMENT

Appellant Jeremy Morriss will be referred to as "Jeremy". Appellee Danielle Morriss will be referred to as "Danielle". Any joint reference to Jeremy and Danielle will be as "the Parties". Reference to the real property located at 13129 Big Bend Road in Rapid City, South Dakota will be as "the Rapid City Property." Reference to the settled record will be by the designation "R." followed by the page number(s). Reference to the March 3, 2025, court trial transcript will be by the designation "TT." followed by the page/line number(s). Reference to Appendix materials will be by the designation "APP." followed by the page number(s).

JURISDICTIONAL STATEMENT

Jeremy appeals the Circuit Court's April 8, 2025, Findings of Fact and Conclusions of Law, APP. 1-18, and May 8, 2025, Amended Judgment, APP. 19-20. Notice of entry was served on May 12, 2025. R. 128-130. Per SDCL § 15-26A-3, it is a final order subject to appeal. Jeremy timely filed and served his Notice of Appeal on June 11, 2025. SDCL § 15-26A-6; R. 131.

REQUEST FOR ORAL ARGUMENT

Danielle respectfully requests the privilege of appearing before this Court for Oral Argument.

STATEMENT OF LEGAL ISSUES

I. **Did the Circuit Court's Findings of Fact Support its Conclusions of Law?**

Yes. The Circuit Court, relying on Jeremy's contemporaneous sworn statements, found that the $65,000.00 that he gave Danielle constituted a valid gift with no expectation of reciprocal consideration. The Circuit Court further appropriately determined that Jeremy's breach of express and implied contracts claims lacked any factual or legal viability, and that his unjust enrichment and fraud-based claims lacked merit.

- SDCL § 43-36-1
- SDCL § 53-1-1
- *Grode v. Grode*, 1996 S.D. 15, 543 N.W.2d 795

II. **Did the Circuit Court Err in Awarding Danielle Damages for Abuse of Process?**

No. Abuse of process claims are different from other torts in that attorneys' fees are an inherent part of the tort's underlying damages. As such, an award of attorneys' fees is little more than part of the overall compensatory damages for abuse of process claims. Likewise, Danielle's emotional distress damages were rooted in a reasonable, non-speculative, rationale that had roots in the underlying tort.

- § 8:12. False arrest, malicious prosecution and abuse of process, 1 Attorneys' Fees § 8:12 (3d ed.)
- *Yankton Cnty. v. McAllister*, 2022 S.D. 37, 977 N.W.2d 327
- *Fix v. First State Bank of Roscoe*, 2011 S.D. 80, 807 N.W.2d 612

III. Did Jeremy Preserve his Objections of Danielle's Taxation of Costs

No. Jeremy failed to timely object to Danielle's taxation of costs. He may not appeal that award, now.

- SDCL § 15-6-54(d)

INTRODUCTION

Jeremy and Danielle were married for over twenty years. After they divorced, they repeatedly attempted to reconcile. Those reconciliation efforts included the purchase of a home in Rapid City, South Dakota. Jeremy offered to give Danielle $65,000.00 as a down payment towards that home. He had received their marital home in the divorce settlement and did not have to make any cash equalization payments to Danielle as part of that settlement.

Leading up to closing, Jeremy signed a document swearing under oath that the $65,000.00 was a gift. Jeremy and Danielle's relationship eventually crumbed permanently, and Jeremy started to try and coerce Danielle to return the $65,000.00 that he previously had gifted to her. Those efforts culminated in this lawsuit.

The Circuit Court asked for findings of fact and conclusions of law after a court trial. Danielle timely provided proposed findings and conclusions. Jeremy, on the other hand, provided neither proposed findings nor did he object to Danielle's. The Circuit Court adopted Danielle's proposed findings and found that Jeremy abused the court process to try and extort money from Danielle. The Circuit Court imposed attorneys' fees and emotional distress damages against Jeremy, as a result.

Jeremy now seeks to undo his own failures. He disavows the sworn statements that he previously made and ignores the implications of his own

neglect at not preparing his own findings or objecting to Danielle's. The Circuit Court appropriately weighed the evidence and made legal determinations consistent with that evidence. The amended judgment signed by the Circuit Court should be affirmed.

STATEMENT OF THE CASE

Jeremy initiated suit through a verified complaint, filed January 4, 2024. R. 3-13. Danielle answered on March 5, 2024 and asserted counterclaims of tortious interference with a contract, intentional infliction of emotional distress, and abuse of process. R. 16-27. Jeremy replied to Danielle's counterclaims on April 8, 2024. R. 28-30.

On February 2, 2025, the Parties stipulated to a dismissal of Danielle's tortious interference and intentional infliction of emotional distress counterclaims. R. 52-53. The Circuit Court filed a judgment of dismissal the next day. R. 54.

The Circuit Court held a court trial on March 3, 2025. TT 1-93. After both Parties rested, the Circuit Court inquired whether they wanted to make argument or post-trial submissions. TT 91:1-4. Both Jeremy's and Danielle's counsel indicated that they would be fine with either contemporaneous argument or post-trial submissions. TT 91. The Circuit Court indicated that it "wouldn't mind proposed findings and conclusions if the [P]arties wanted to do that." TT 91:9-10.

Danielle's counsel submitted proposed findings of fact and conclusions of law on March 17, 2025. R. 75-92. The Parties' respective counsel conferred with the Court via email regarding findings of fact and conclusions of law. R. 126-27. Danielle's counsel began that correspondence by providing her proposed findings. R 75-92, 126-27. Jeremy's counsel later responded indicating that he would not be submitting any proposed findings of his own. *Id.*

The Circuit Court signed findings of fact and conclusions of law on April 8, 2025. APP. 1-18. In those findings, the Circuit Court directed Danielle to prepare and submit an affidavit for attorneys' fees, costs, and disbursements. APP. 18. The Circuit Court also directed Jeremy's counsel to provide his objections no later than ten (10) days following Danielle's submissions. APP. 18. Danielle submitted her affidavit off attorneys' fees and costs on April 16, 2025. R. 111-18. Jeremy neglected to respond within the deadline and filed his objections to fees and costs on May 2, 2025. R. 119-120. The Circuit Court entered an amended judgment for attorneys' fees, costs, and compensatory damages on May 8, 2025. APP. 19-20. Notice of entry of that amended order was filed on May 12, 2025. R. 128-130. Jeremy filed his notice of appeal on June 11, 2025. R. 131.

STATEMENT OF THE FACTS

Danielle and Jeremy "were married for over twenty (20) years." APP. 2; TT 5:11-12. They "kept their finances separate" for the duration of their marriage. APP. 2; TT 22:18-24. Danielle "paid for her stuff" and Jeremy "paid for [his] stuff." TT 22:23-24. *See also* APP. 2, TT 62:20-63:1 ("Danielle testified that she would not ask Jeremy for funds during their marriage, and vice versa.").

"Jeremy filed for divorce in early 2020 and the [P]arties divorced in the summer of 2020." APP. 2; TT 22:4-11. "All terms of the divorce were settled through a stipulation of the [P]arties." APP. 2; TT 5:21-24. Jeremy received the Parties' marital residence, and there was no equalization payment to Danielle in the stipulation. APP. 2; TT 5:21-24, 67:19-23.

"Following the divorce, Danielle worked as a traveling nurse. Jeremy continued to live and work in Iowa." APP. 2; TT: 5:25-6:1, 19-13-15. Danielle moved to Rapid City, following the divorce, to be closer to family. APP. 2; TT 5:25-6:3.

"The [P]arties continued a relationship off and on following the divorce." APP. 2; TT 22:12-17. Jeremy, as part of those attempts at reconciliation, planned on moving to Rapid City to be with Danielle. APP. 2; TT 60:8-10. "Danielle wanted to save her family and was open to Jeremy moving out to Rapid City." APP. 2; TT 62:11-14. "Jeremy wanted to

purchase a house [in Rapid City] while Danielle wanted to purchase a camper or stay in her condominium." APP. 2; TT 56:9-23. "Jeremy would regularly send Danielle homes to look at and Danielle would tour those homes." APP. 2; TT 56:13-23, 58:18-25.

One of the homes that Danielle toured was the Rapid City Property. APP. 3; TT 58:18-25. "Danielle had already begun the process of determining her pre-approval amount to purchase a house and the [Rapid City] Property fell within that range with a proper down payment." APP. 3; TT 59:6-60:3. Jeremy received "approximately $100,000 from the sale of the marital residence that he was awarded" in the divorce. APP. 3; TT:86:2-4.

"Prior to closing [on the Rapid City Property], a truck loan in the amount of $29,033 was disclosed on Danielle's financial records...." APP. 3; R. 72. "The truck loan was for Jeremy's truck" and "[n]either Danielle nor Jeremy could recall how Danielle's name was associated with the truck such that it was reflected on the closing documents for the [Rapid City] Property." APP. 3; TT 65:10-20. Jeremy acknowledged that he should have been responsible for paying off the truck. TT 26:14-16. As a result, "Jeremy used proceeds from the sale of the marital residence to pay off the truck loan." APP. 3; TT 86:8-10.

Jeremy also made the down payment of $65,000.00 for the purchase of the Rapid City Property. APP. 3; R. 56; TT 9:3-13. That check was

accompanied by an FNMA/FHLMC Gift Letter confirming that the $65,000 was a gift from Jeremy to Danielle. R. 64. The letter contained the following warning:

> **WARNING: Section 1010 of Title 18, United States Code, Department of Housing and Urban Development Transactions provides that, "Whoever, for the purpose of influencing in any way the action of such department, makes, passes, utters, or publishes any statement knowing the same to be false shall be fined not more than $5,000 or imprisoned not more than two (2) years, or both".**

R. 64 (bold in original). Directly below the warning was Jeremy and Danielle's signature block, and both of them executed the gift letter on August 30, 2021. R. 64. The letter also contained the following sworn certification:

> I/We certify that *there is no repayment expected or implied* on the Gift, either in the form of cash or by future services.

R. 64 (emphasis added). Danielle, with some hesitation, closed on September 8, 2021. APP. 3-4; TT 27:24-28:3.

"The relationship between Danielle and Jeremy continued to be on and off through April of 2022." APP. 4; TT 63:23-64:3. It then fell apart for the final time in April of 2022. APP. 4; TT 63:23-64:3

Jeremy later claimed that there was "a verbal agreement for Danielle to repay the $65,000". APP. 3; TT 9:20-10:5, 33:9-20. Danielle, in a heightened emotional state, had signed two notes indicating that she would give Jeremy $50,000. APP. 4; R. 57-58. Neither of those notes, however, were signed by both Parties. APP. 4; R. 57-58. Likewise, Danielle did not receive any

consideration in exchange for either note. APP. 4; R. 57-58. Danielle had given Jeremy some money after April of 2022, but she testified that she did so because Jeremy had been badgering her for money and her hopes that they would eventually reconcile. APP. 5; TT 80:15-81:1.

Jeremy later hired an attorney demanding payment of $58,331.49 from Danielle. APP. 5; TT 17:13-22. Jeremy confirmed at trial that he was seeking $58,331.49 as claimed breach of verbal contract damages. APP. 5; TT 20:15-22.

STANDARD OF REVIEW

Ordinarily, findings of fact are evaluated under the clearly erroneous standard with legal conclusions reviewed *de novo*. *Sturzenbecher v. Sioux Cnty. Ranch, LLC*, 2025 S.D. 24, ¶ 17, 20 N.W.3d 419, 426 (citations omitted). If, however, an appellant has "failed to object to the findings and conclusions proposed" by the appellee, this Court's "review is significantly limited 'to the question of whether the findings support the conclusions of law and judgment.'" *Selway Homeowners Ass'n v. Cummings*, 2003 S.D. 11, ¶ 14, 657 N.W.2d 307, 312 (quoting *Huth v. Hoffman*, 464 N.W.2d 637, 638 (S.D.1991)). *See also Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.*, 2005 S.D. 82, ¶ 11, 700 N.W.2d 729, 733 (quoting *Premier Bank, N.A. v. Mahoney*, 520 N.W.2d 894, 895 (S.D.1994)) (other citations omitted) ("[t]he failure of an appellant to object to findings of fact and conclusions of law and to propose his or her own

findings, limits review to the question of whether the findings support the conclusions of law and judgment.") (alteration in original).

Jeremy did not object to Danielle's proposed findings. He, likewise, did not propose his own findings. When asked by the Circuit Court whether he intended to propose any findings, Jeremy's counsel indicated that he would not be submitting any:

> Judge Brown,
>
> To confirm, I will not be submitting a FOF/COL, unless the Court requests one.
>
> Eric

R. 126. *See also* R. 125 ("My client [Jeremy] did not authorize me [his counsel] to submit findings."). R. 125.

As a result, this Court may not review the Circuit Court's factual findings for error. *Selway*, 2003 S.D. 11, ¶ 14, 657 N.W.2d at 312. Rather, this Court accepts those findings as true and limits its review to "whether the findings support the [Circuit Court's] conclusions of law and judgment." *Id.*[1]

This omission has implication beyond accepting the Circuit Court's factual determinations in its findings of fact as true. "Determinations of lay and expert witness credibility are factual questions." *Wiedmann v. Merillat Indus.*, 2001 S.D. 23, ¶ 10, 623 N.W.2d 43, 47. Jeremy's failure to object to

[1] For whatever reason, Jeremy neglects to acknowledge this rule.

Danielle's proposed findings or submit any of his own removes those determinations from this Court's review, as well. *Canyon Lake*, 2005 S.D. 82, ¶ 11, 700 N.W.2d at 733; *Selway*, 2003 S.D. 11, ¶ 14, 657 N.W.2d at 312; *Huth*, 464 N.W.2d at 638.

"Generally, '[t]he 'existence of a valid contract is a question of law[,]' which is reviewed de novo.'" *Erickson v. Erickson*, 2023 S.D. 70, ¶ 28, 1 N.W.3d 632, 641 (quoting *Koopman v. City of Edgemont*, 2020 S.D. 37, ¶ 14, 945 N.W.2d 923, 927–28 (quoting *Behrens v. Wedmore*, 2005 S.D. 79, ¶ 20, 698 N.W.2d 555, 566)) (alterations in original). "If in dispute, however, the existence and terms of a contract are questions for the fact finder." *Id.*, ¶ 29 (quoting *Koopman*, 2020 S.D. 37, ¶ 14, 945 N.W.2d at 927–28 (quoting *Behrens*, 2005 S.D. 79, ¶ 20, 698 N.W.2d at 566)). Because both the existence and terms of the alleged contracts were in dispute, the Circuit Court's rulings on the existence and terms of the alleged contracts were factual determinations not subject to further review. *Canyon Lake*, 2005 S.D. 82, ¶ 11, 700 N.W.2d at 733; *Selway*, 2003 S.D. 11, ¶ 14, 657 N.W.2d at 312; *Huth*, 464 N.W.2d at 638.

"The existence of an implied contract, as well as its terms, are questions of fact." *Setliff v. Akins*, 2000 S.D. 124, ¶ 27, 616 N.W.2d 878, 888. Such factual determinations are, likewise, not ripe for this Court's consideration. *Canyon Lake*, 2005 S.D. 82, ¶ 11, 700 N.W.2d at 733; *Selway*, 2003 S.D. 11, ¶ 14, 657 N.W.2d at 312; *Huth*, 464 N.W.2d at 638.

Unjust enrichment claims are evaluated under the abuse of discretion standard. *Murphey v. Pearson*, 2022 S.D. 62, ¶ 26, 981 N.W.2d 410, 418 (citations omitted).

"A trial court's ruling on the award of attorney's fees and costs is reviewed for an abuse of discretion." *Hewitt v. Felderman*, 2013 S.D. 91, ¶ 23, 841 N.W.2d 258, 264 (citing *Eagle Ridge Estates Homeowners Ass'n, Inc. v. Anderson*, 2013 S.D. 21, ¶ 13, 827 N.W.2d 859, 865). A trial court is afforded "'broad discretion with regard to sanctions imposed'", including attorneys' fees, if permitted. *Id.* (quoting *Novak v. Novak*, 2007 S.D. 108, ¶ 16, 741 N.W.2d 222, 228 (citing *Stull v. Sparrow*, 92 Cal.App.4th 860, 864–66, 112 Cal.Rptr.2d 239 (2001))). Due to Jeremy's omission over findings, as outlined above, the Circuit Court's factual findings underpinning the attorneys' fees award is not subject to review here. *Canyon Lake*, 2005 S.D. 82, ¶ 11, 700 N.W.2d at 733; *Selway*, 2003 S.D. 11, ¶ 14, 657 N.W.2d at 312; *Huth*, 464 N.W.2d at 638. The only questions for review are the application of law concerning the facts outlined in the Circuit Court's findings. *Id.*

The availability and amount of damages are fact questions. *First Nat. Bank of Minneapolis v. Kehn Ranch, Inc.*, 394 N.W.2d 709, 720 (S.D. 1986) (citing *Kent v. Allied Oil & Supply, Inc.*, 264 N.W.2d 512 (S.D.1978); *Kamp Dakota, Inc. v. Salem Lumber Co. Inc.*, 89 S.D. 696, 237 N.W.2d 180 (1975)

("The question of damages is strictly for the trier of fact."). For the reasons outlined above, they are not subject for review in this appeal.

Even if they were, a damages verdict "will not be set aside except in extreme cases" where the factfinder "has palpably mistaken the rules of law by which damages in a particular case are to be measured." *Id.* (citing *Stoltz v. Stonecypher*, 336 N.W.2d 654, 657 (S.D.1983)). For the sake of argument, if the Court were inclined to review the Circuit Court's damages award, the review would be limited to whether the Circuit Court "ha[d] palpably mistaken the rules of law by which damages in a particular case [were] to be measured." *Id.*

ARGUMENT

I. The Circuit Court's Findings of Fact Supported its Conclusions of Law and Should be Affirmed

Jeremy devotes most of his brief to factual arguments that he should have made when the Circuit Court was considering proposals for findings of fact and conclusions of law. *Canyon Lake*, 2005 S.D. 82, ¶ 11, 700 N.W.2d at 733; *Selway*, 2003 S.D. 11, ¶ 14, 657 N.W.2d at 312; *Huth*, 464 N.W.2d at 638. Jeremy's legal arguments, however, are based on a different set or reading of facts than those present in the Circuit Court's findings of fact. Those arguments are misplaced because this Court's review is limited to the application of the Circuit Court's findings of fact to its conclusions of law. *Id.*

The Circuit Court did not err in its application of law to the facts. It should be affirmed.

A. The Circuit Court Correctly Determined that the $65,000.00 was a Gift

As noted by the Circuit Court, APP. 7, "[a] gift is a transfer of personal property, made voluntarily and without consideration." SDCL § 43-36-1. Once made, a gift "cannot be revoked by the giver." SDCL § 43-36-3. "The essential terms of a gift inter vivos are intent, delivery and acceptance." *Owen v. Owen*, 351 N.W.2d 139, 142 (S.D. 1984). "In determining whether a transaction is a loan or a gift, 'the trial court may take into consideration the relationship of the parties and an individual's need for the loan.'" *Setliff*, 2000 S.D. 124, ¶ 29, 616 N.W.2d at 888 (quoting *Saum v. Moenter*, 101 Ohio App.3d 48, 654 N.E.2d 1333, 1335 (1995)).

There is no dispute that Jeremy signed Trial Exhibit A. APP. 7. *See also* TT 12:9-21. Trial Exhibit A explicitly identifies itself as a gift letter. R. 64. It also unequivocally states that the $65,000.00 that Jeremy gave to Danielle was an irrevocable gift with no expectation of reciprocal consideration. *Id.* ("I/we, Jeremy Morriss do hereby certify that I/We Am/Are making a gift of $65,000.00 to my/Our Ex-wife, Danielle Morriss.... I/We certify that there is *no repayment expected or implied on the Gift*, either in the form of cash or by future services") (emphasis added).

That demonstrates intent and delivery. *Owen*, 351 N.W.2d at 142. Danielle's signature and use of those funds signals acceptance, under the law. *Id.* As a result, the Circuit Court correctly applied the factual findings to the law and determined that the $65,000.00 was a gift.

B. The Circuit Court Correctly Rejected Jeremy's Breach of Contract Claim

"A contract is an agreement to do or not do a certain thing." SDCL § 53-1-1. An agreement for a loan of money must be in writing and subscribed by the party to be charged to be enforceable. SDCL § 53-8-2(4). The essential elements of a contract include: (i) parties capable of contracting (b) their consent; (c) a lawful object; and (d) sufficient cause or consideration. SDCL § 53-1-2. If the parties to the contract cannot be identified, a contract is invalid. SDCL § 53-2-3.

A contract must also have mutual covenants. *Kindley v. Williams*, 76 S.D. 225, 228, 76 N.W.2d 227, 229 (1956). Consent is not mutual unless the parties all agree upon the same thing in the same sense. SDCL § 53-3-3. *See also* SDCL § 53–1–2(2); *Braunger v. Snow*, 405 N.W.2d 643, 646 (S.D.1987).

Per the Circuit Court's factual findings, which are not subject to dispute in this appeal, "Jeremy based his breach of contract claim on the two notes attached to his Verified Complaint as Exhibits 2 and 3, and introduced at trial as Plaintiff's Trial Exhibit 2 and 3, which identify an alleged repayment due and owing to Jeremy of $50,000." APP. 9. "Danielle is the only identifiable

party in the two notes. There is no countersignature, and no other party identified other than 'you.'" *Id.*

Because the parties to the contract cannot be identified on the notes themselves, the contract itself is facially invalid. SDCL § 53-2-3; APP. 10. Furthermore, Danielle testified – and the Circuit Court found her testimony more credible – "that she never believed [that] any of the money from Jeremy was intended as a loan." APP. 10. Because there was not credible evidence that there was a sufficient meeting of the minds, there cannot be a viable contract, as a matter of law. *Read v. McKennan Hosp.*, 2000 S.D. 66, ¶ 23, 610 N.W.2d 782, 786 (quoting 17A Am.Jur.2d Contracts § 26 at 54 (1991)) ("'There must be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract.'") (other citations omitted).

Finally, a transfer of assets or money cannot be both a gift and a loan. *Grode v. Grode*, 1996 S.D. 15, ¶¶12-21, 543 N.W.2d 795, 800-801. They can only be one or the other. *Id.* Gifts, unlike loans, are irrevocable and without any expectation of repayment.

Here, Jeremy explicitly gifted Danielle the money that he now claims was part of some loan. *See* R. 64. Contradicting his current arguments are the sworn statements he made at the time of the gift. *Id.* ("I… certify that *there is no repayment expected or implied* on the Gift, either in the form of cash or by

future services.") (emphasis added). Jeremy, by signing the Gift Letter, waived his ability to seek reimbursement for the $65,000.00 that he gave Danielle. It was a gift, not a loan.

Additionally, Jeremy's claimed agreements only state a dollar value of $50,000.00. Jeremy, however, claims breach of contract damages of $58,331.49, which is based on the $65,000.00 that he voluntarily donated, and in contradiction of the $50,000.00 alleged written agreements. The Circuit Court properly weighed the evidence, made credibility decisions, and determined that there was no credible evidence that there was a valid express agreement. Jeremy's attempt to relitigate the facts are not ripe, at this stage, due to his failure to timely dispute them. He cannot relitigate them now.

C. The Circuit Court Correctly Rejected Jeremy's Breach of Implied Contract Claim

As a preliminary matter, and contrary to Jeremy's claims, implied contracts are questions of fact;[2] and, as a result of Jeremy's failure to propose findings or object to Danielle's, the implied contract claim is not subject to further judicial review. Even if this Court did have the ability to review the

[2] The existence and governing terms of any implied contract present questions of fact to be decided by a jury. *Jurrens v. Lorenz Mfg. Co. of Benson, Minn.*, 1998 S.D. 49, ¶ 9, 578 N.W.2d 151, 154 ("The existence and governing terms of any implied contract present questions of fact to be decided by a jury") (citations omitted).

Circuit Court's decisions regarding Jeremy's implied contract claim, they would fail, as a matter of law.

Unlike an express contract, "[a]n implied contract is one, the existence and terms of which are manifested by conduct.'" *J. Clancy, Inc. v. Khan Comfort, LLC*, 2021 S.D. 9, ¶ 19, 955 N.W.2d 382, 389 (quoting SDCL § 53-1-3). "An implied-in-fact contract is created when 'the intention as to [the contract] is not manifested by direct or explicit words by the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used, or acts done by them, or other pertinent circumstances attending the transaction.'" *Id.*, ¶ 20 (quoting *Setliff*, 2000 S.D. 124, ¶ 63, 616 N.W.2d at 895).

Implied in fact contracts are not available where there is an alleged written agreement. *Jurrens*, 1998 S.D. 49, ¶ 6, 578 N.W.2d at 153 (multiple citations omitted) ("If a valid express contract exists, no implied contract need be inferred."). *See also id.* (quoting 66 Am.Jur.2d Restitution and Implied Contracts § 6, at 948–49 (1973) ("It is only when parties do not expressly agree that the law interposes and raises a promise. No agreement can be implied where there is an express one existing. Thus, an express contract precludes the existence of a contract implied by law or a quasi-contract"). That is because "'the execution of a contract in writing ... supersedes all the oral negotiations or stipulations *concerning its matter which preceded or accompanied the execution of*

the instrument.'" *Genevieve J. Parnely Revocable Tr. v. Magness*, 2023 S.D. 49, ¶ 15, 996 N.W.2d 362, 367 (quoting *Hofeldt v. Mehling*, 2003 S.D. 25, ¶ 11, 658 N.W.2d 783, 787) (other citations omitted) (emphasis in original).

Jeremy claims here that there was an express contract between himself and Danielle. That, as a matter of law, precludes the existence of an implied contract. Furthermore, per the Circuit Court's factual findings, "Jeremy cannot point to, and Danielle did not testify to, her assent to remit funds to Jeremy as repayment of a loan." APP. 11. There was credible testimony, however, that the funds Danielle gave to Jeremy were less about an implied contract than they were gifts in the hope that they might rekindle their relationship. APP. 11. Such subsequent gifts are not evidence of ratification. Rather, they demonstrate an ongoing willingness by *both Parties* to exchange monetary benefits on one another in the hopes that they could rekindle their relationship.

Ultimately, gifts are not subject to implied contract claims. *Mack v. Mack*, 2000 S.D. 92, ¶ 30, 613 N.W.2d 64, 69 (citing *Meehan v. Cheltenham Township*, 410 Pa. 446, 189 A.2d 593, 596 (1963)). The Circuit Court's determination that the $65,000.00 was a gift invalidates, as a matter of law, Jeremy's implied contract claim. *Id.*

D. The Circuit Court Correctly Rejected Jeremy's Unjust Enrichment Claim

"Unjust enrichment is an equitable doctrine. It occurs 'when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying.'" *Mack*, 2000 S.D. 92, ¶ 27, 613 N.W.2d at 69 (quoting *Parker v. Western Dakota Insurors, Inc.*, 2000 SD 14, ¶ 17, 605 N.W.2d 181, 187) (other citations omitted). There are three elements to an unjust enrichment claim: "(1) a benefit was received; (2) the recipient was cognizant of that benefit; and (3) the retention of the benefit without reimbursement would unjustly enrich the recipient." *Id.* "Unjust enrichment contemplates an involuntary or nonconsensual transfer, unjustly enriching one party. The equitable remedy of restitution is imposed because the transfer lacks an adequate basis." *Johnson v. Larson*, 2010 S.D. 20, ¶ 8, 779 N.W.2d 412, 416.

Under the Circuit Court's factual findings, there is no evidence of unjust enrichment. Jeremy was unable to support with credible testimony his claim "that he made the payment of $65,000 due to a mistake, coercion, or request." APP. 12. He swore, under oath, that he voluntarily – and without any expectation of repayment – gave Danielle the $65,000.00. *See* R. 64 ("I... certify that *there is no repayment expected or implied* on the Gift, either in the form of cash or by future services.").

A party's later regret at conferring a benefit on another party cannot serve as a valid basis for unjust enrichment. That is because "[u]njust enrichment applies only when the defendant receives a payment by mistake" and regret does not make the original payment a mistake. *Kendle v. Whig Enters.*, LLC, 760 F. App'x 371, 378 (6th Cir. 2019). There is no question that, at the time that Jeremy gave Danielle the $65,000.00, he intended to give it to her with no expectation of repayment. R. 64. Although he later changed his tune, that does not change the fact that at the time he donated the money, he gave the banks a sworn statement that it was a voluntary transfer with no expectation of repayment. Jeremy's later regret does not make Danielle's enrichment unjust.

E. The Circuit Court Correctly Rejected Jeremy's Fraudulent Misrepresentation Claim

There are six elements to a fraudulent misrepresentation claim:

1) A defendant made a representation as a statement of fact;

2) The representation was untrue;

3) The defendant knew the representation was untrue or he made the representation recklessly;

4) The defendant made the representation with intent to deceive the plaintiff and for the purpose of inducing the plaintiff to act upon it;

5) The plaintiff justifiably relied on the representation;

6) The plaintiff suffered damage as a result.

Est. of Johnson by & through Johnson v. Weber, 2017 S.D. 36, ¶ 27, 898 N.W.2d 718, 729. Deceit within the meaning of SDCL § 20-10-1 is either: (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) the assertion, as a fact, of that which is not true by one who has no reasonable ground for believing it to be true; (3) the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or (4) a promise made without any intention of performing. SDCL § 20-10-2.

Jeremy, as he does for all of his asserted errors, tries to argue the facts of the case. The facts of this case, however, are not at issue because he failed to provide writing findings or object to Danielle's. *Canyon Lake*, 2005 S.D. 82, ¶ 11, 700 N.W.2d at 733; *Selway*, 2003 S.D. 11, ¶ 14, 657 N.W.2d at 312; *Huth*, 464 N.W.2d at 638. He cannot second guess the Circuit Court's factual findings now.

Even under Jeremy's alternative facts, he is not entitled to relief. Jeremy cites to the fact that "Danielle knew [that] Jeremy did not review the Gift Letter..." as evidence of fraud. That, however, is not a valid basis to claim lack of knowledge. It is a longstanding rule in South Dakota that a person reads he or she is signing and understands it contents. *Farlow v. Chambers*, 21 S.D. 128, 110 N.W. 94, 95 (1907). *See also cf. Alexander v. State*, 74 S.D. 593, 600, 57 N.W.2d 121, 125 (1953) ("Parties to a written contract

are presumed to understand the import of its terms and to have entered into the contract with knowledge of their respective rights and obligations.").

Furthermore, Jeremy's asserted basis for fraud is not credible. It makes no sense that he would sign a document swearing, under penalty of incarceration, that the $65,000.00 as a gift without reading or understanding it first. Such credibility decisions are reserved for the factfinder, *News Am. Mktg. v. Schoon*, 2022 S.D. 79, ¶ 32, 984 N.W.2d 127, 137, and the Circuit Court explicitly found that Jeremy's testimony was not credible. *See* APP. 6 ("Jeremy was not credible in his testimony."). The Circuit Court's decision should be affirmed.

F. Jeremy Does not Appeal the Circuit Court's Finding that he Committed the Tort of Abuse of Process

"'Abuse of process consists of the malicious misuse or misapplication of legal process after its issuance to accomplish some collateral purpose not warranted or properly attainable thereby.'" *Yankton Cnty. v. McAllister*, 2022 S.D. 37, ¶ 32, 977 N.W.2d 327, 339 (quoting *Specialty Mills, Inc. v. Citizens State Bank*, 1997 S.D. 7, ¶ 20, 558 N.W.2d 617, 623). It is a form of "extortion, using the process to put pressure upon the other to compel him [or her] to pay a different debt or to take some action or refrain from it." Restatement (Second) of Torts § 682, cmt b (1977). Extortion is "[t]he practice or an instance of obtaining something or compelling some action by illegal means,

as by force or coercion." EXTORTION, BLACK'S LAW DICTIONARY (12th ed. 2024).

"If a party is content to use the particular machinery of the law for the immediate purpose for which it was intended, he is not ordinarily liable, notwithstanding a vicious or vindictive motive. However, the moment he attempts to attain some collateral objective, outside the scope of the operation of the process employed, a tort has been consummated." 33 Causes of Action 2d 465 (citing *Phillips v. Ingham County*, 371 F.Supp.2d 918 (W.D.Mich. 2005).

Jeremy, notably, does not appeal the Circuit Court's finding that he committed the tort of abuse of process. As such, this Court must presume that Jeremy initiated suit to extort Danielle or improperly influence her to give him money that he did not deserve. That, alone, undermines all of his other arguments and bolsters the Circuit Court's factual finding that his testimony was not credible.

II. The Circuit Court Awarded Danielle Appropriate Damages for her Abuse of Process Claim

A. This Court Should Recognize Attorneys' Fees as a Measure of Compensatory Damages for Abuse of Process Claims

Although this Court has yet to explicitly rule on the issue, attorneys' fees, traditionally, have been a measure of damages for abuse of process claims:

> It has generally been held or recognized that in an action for false imprisonment or arrest, or in an action for malicious prosecution

> or abuse of process, the plaintiff may recover as an element of damages attorneys' fees incurred by him as a result of the unlawful imprisonment or arrest, malicious prosecution, or abuse of process in question.

§ 8:12. False arrest, malicious prosecution and abuse of process, 1 Attorneys' Fees § 8:12 (3d ed.). *See also N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., a Div. of Keller Sys.*, 158 N.J. 561, 576, 730 A.2d 843, 852 (1999) ("attorneys' fees is a traditional element of damages in the specific cause of action such as occurs in a civil malicious prosecution or abuse of process case."); *Svistina v. Elbadramany*, No. 22-CV-20525, 2023 WL 34642, at *7 (S.D. Fla. Jan. 4, 2023) (quoting *Ratunaman v. Sanchez*, No. 09-cv-22937, 2010 WL 11602270, at *8 (S.D. Fla. May 5, 2010)) (there is "abundant authority establishing that '[a]ttorneys' fees can ... be recoverable as an element of damages with respect to certain intentional malicious torts such as malicious prosecution ... and abuse of process.'") (alterations in original) (other citations omitted).

Jeremy cites no law indicating that attorneys' fees are unavailable for abuse of process claims. Instead, he merely cites to the general rule that attorneys' fees are not available under the American Rule. Abuse of process, however, is a unique tort, like barratry, focusing on improper use of the court system to damage victims, primarily through the needless imposition of attorneys' fees on the victim.

"[B]arratry and abuse of process are similar causes of action and may have similar underlying injuries...." *McAllister*, 2022 S.D. 37, ¶ 32, 977

N.W.2d at 339. Both rely on the misuse of the court system to reach improper ends. The damage resulting from such misuse is, inherently, the attorneys' fees incurred by the victim of such misconduct. The court system and costs of doing battle there is the nexus of the tortfeasors' improper conduct. It is reasonable that attorneys' fees would be the primary damage resulting from the abuse of process tort. This Court should declare that attorneys' fees are a measure of damages in abuse of process claims and affirm the Circuit Court's decision to award attorneys' fees as a measure of damages in this case. Furthermore, because attorneys' fees are subject to sales tax, such sales tax should be included as part of Danielle's damages.

B. Danielle's Emotional Distress Damages for her Abuse of Process Claims were Well Founded

Emotional distress damages are available for abuse of process claims. *Fix v. First State Bank of Roscoe*, 2011 S.D. 80, ¶ 11, 807 N.W.2d 612, 616. They need not be extreme or disabling. *Id.* They include the wide variety of feelings that accompany other torts, including, but not limited to "anger, betrayal, and devastation", *Id.*, ¶ 14, 807 N.W.2d at 617 (citing *Roth v. Farner–Bocken Co.*, 2003 S.D. 80, ¶ 70, 667 N.W.2d 651, 670), mental anguish, *Id.* (citing *Carey v. Jack Rabbit Lines, Inc.*, 309 N.W.2d 824, 827 (S.D.1981)), or "humiliation, that is, a feeling of degradation or inferiority." *Id.* (citing *Bean v. Best*, 77 S.D. 433, 441–42, 93 N.W.2d 403, 408 (1958)). In other words, emotional distress damages for abuse of process claims "include[] all highly

unpleasant mental reactions, such as fright, humiliation, embarrassment, anger, worry, and nausea." *Christians v. Christians*, 2001 S.D. 142, ¶ 42, 637 N.W.2d 377, 386

In awarding emotional distress damages, a fact finder should consider "the age and condition in life of the plaintiff, the physical injury inflicted, the bodily pain *and mental anguish endured*." *Fix*, 2011 S.D. 80, ¶ 11, 807 N.W.2d 612, 616.. (citations omitted) (emphasis in original).

There is no heightened standard to establish the amount of emotional distress damages. There must only be "a reasonable relationship between the method used to calculate damages and the amount claimed." *McKie v. Huntley*, 2000 S.D. 160, ¶ 18, 620 N.W.2d 599, 603 (citing *Swenson v. Chevron Chemical Co.*, 89 S.D. 497, 234 N.W.2d 38, 43 (1975)). In fact, there is no "specific formula for calculating damages." *Id.* (citations omitted). Instead, Courts utilize a "rational basis for measuring loss, without allowing a [factfinder] to speculate." *Id.* (citations omitted).

Here, since attorneys' fees are the primary damage suffered by victims of abuse of process torts, it is only reasonable that the Circuit Court used those fees as the anchor to determine the extent of Danielle's emotional distress. Danielle testified regarding how Jeremy's unfounded claims caused her to feel sad and other negative emotions consistent with an abuse of process claim. *See, e.g.*, TT 68. The Circuit Court's reliance on her attorneys' fees was an

appropriate way to measure how badly this case injured her. It was not speculative. And, it certainly was not an abuse of discretion. It should be affirmed.

Jeremy claims that the Circuit Court made no specific findings regarding the award of attorneys' fees. In reaching that conclusion, Jeremy ignores that the Circuit Court made specific findings about the appropriateness of attorneys' fees in this case. *See, e.g.*, APP. 16-18. Additionally, Jeremy ignores that his untimely objections resulted in waiver. *See* APP. 19. *See also cf.* SDCL § 15-6-54(d) (untimely objections to costs waives the objections).

Furthermore, even if the Circuit Court should have considered Jeremy's objections, he only provided general objections. Such general objections are insufficient to overcome an itemized statement of attorneys' fees provided to a court unless the fees are "exorbitant" or wholly disproportionate to the services performed. *In re Est. of Catron*, 2001 S.D. 57, ¶ 24, 627 N.W.2d 175, 180 (citations omitted). Jeremy, in his brief, never argues that Danielle's claimed attorneys fees were either exorbitant or wholly disproportionate to the services her attorney performed. As such, he fails to satisfy his burden of demonstrating that the compensation was excessive. *Id.* (citing *In re Estate of Wagner*, 253 Neb. 498, 571 N.W.2d 76, 78 (1987)).

III. Jeremy Failed to Timely Object to Danielle's Taxation of Costs

Jeremy claims that the Court's application of costs was inappropriate and inconsistent with the relevant statutory provisions. Jeremy, however, ignores that he waived his ability to object by not submitting his objections within the timeframe required by statute:

> A party who objects to any part of the application shall serve and file his objections with the clerk of court in writing within ten days of the service of the application on him or he will be deemed to have agreed to the taxation of the costs and disbursements proposed. The written objections must be accompanied by a notice of hearing thereon and shall set forth in concise language the reasons why the costs should not be allowed.

SDCL § 15-6-54(d). Jeremy failed to timely submit his objections *and* he neglected to include a notice of hearing. His noncompliance waives whatever objections he may have had. Furthermore, Ms. Maurice's attorneys' fee affidavit broke down those costs and itemized the date, the description, the cost, and the appropriate expense category. The Circuit Court's award of costs should be affirmed.

CONCLUSION

Jeremy has no valid basis to oppose the Circuit Court's amended judgment. He failed to follow the proper procedure throughout this matter, and he compounds those errors by failing to appropriately follow the right standards. The Circuit Court correctly weighed the Parties' credibility, made factual determinations consistent with the evidence presented before it, and

appropriately applied the facts to the law. The Circuit Court's amended judgment should be affirmed.

Dated October 23, 2025.

HALBACH | SZWARC LAW FIRM

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellee's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 6,444 words, exclusive of the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

/s/ Robert D. Trzynka
One of the attorneys for Appellee

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the below documents were electronically filed with the Clerk of the Supreme Court via Odyssey:

- Appellee's Brief;
- Certificate of Compliance; and
- Certificate of Service

Notification of filing and service of such documents completed upon the following person, by placing the same in the service indicated, addressed as follows:

Eric M. Schlimgen	[ ] Federal Express
SCHLIMGEN LAW FIRM, LLC	[ ] Hand Delivery
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Attorneys for Appellant Jeremy Morriss	

The undersigned further certifies that a copy of Appellee's Brief was mailed by First Class U.S. Mail, postage prepaid to:

Ms. Shirley A. Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

Dated October 23, 2025.

/s/ Robert D. Trzynka
One of the attorneys for Appellee

INDEX TO APPELLEE'S APPENDIX

STATE OF SOUTH DAKOTA) :SS COUNTY OF PENNINGTON)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
JEREMYMORRISS, Plaintiff, v. DANIELLE MORRISS, Defendant.	51CIV24-000023 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The above matter having come on for hearing before this Court at the Pennington County Courthouse, on March 3, 2025, the Honorable Matt Brown, Circuit Court Judge for the Seventh Judicial Circuit, presiding; and the Plaintiff appearing personally and through his attorney, Eric Schlimgen of Schlimgen Law Firm, L.L.C., Rapid City, South Dakota; Defendant appearing personally and through her attorney, Emily Maurice of Halbach | Szwarc Law Firm, Sioux Falls, South Dakota; and the Court having considered the pleadings on file herein, having heard the evidence presented, and having considered the arguments of counsel and all of the files and records, herein; and the Court having rendered its decision and order and now makes and enters the following:

FINDINGS OF FACT

1. All Findings of Fact and Conclusions of Law stated on the record are incorporated herein by reference. Findings of Fact are based on the evidence in the record as of March 3, 2025.

2. Plaintiff, Jeremy Morris ("Jeremy"), is a resident of the State of Iowa.

3. Defendant, Danielle Morriss ("Danielle") is a resident of the State of South Dakota.

4. The property or funds at issue were exchanged in the State of South Dakota.

5. The parties were married for over twenty (20) years.

6. During their marriage, the parties kept their finances separate.

7. Danielle testified that she would not ask Jeremy for funds during their marriage, and vice versa.

8. Jeremy filed for divorce in early 2020 and the parties divorced in the summer of 2020.

9. All terms of the divorce were settled through a stipulation of the parties.

10. As a part of the property division, Jeremy was awarded the marital residence.

11. No property equalization payment was given to either party.

12. Following the divorce, Danielle worked as a traveling nurse. Jeremy continued to live and work in Iowa.

13. The parties continued a relationship off and on following their divorce.

14. Danielle, having family in Rapid City, South Dakota, decided to relocate.

15. Danielle had a rental condominium in Rapid City.

16. Prior to Danielle relocating to Rapid City, Jeremy discussed moving out to Rapid City, as well.

17. Danielle wanted to save her family and was open to Jeremy moving out to Rapid City.

18. Jeremy wanted to purchase a house while Danielle wanted to purchase a camper or stay in her condominium.

19. Jeremy would regularly send Danielle homes to look at and Danielle would tour those homes.

20. One of the homes Danielle toured was 13129 Big Bend Road in Rapid City, South Dakota ("the Property").

21. Danielle had already begun the process of determining her pre-approval amount to purchase a house and the Property fell within that range with a proper down payment.

22. Jeremy had approximately $100,000 from the sale of the marital residence that he was awarded sole possession of in the divorce from Danielle.

23. Prior to closing, a truck loan in the amount of $29,033 was disclosed on Danielle's financial records, and Danielle stated that for months prior to closing, the bank required that amount to be paid off.

24. The truck loan was for Jeremy's truck, which he was awarded sole possession of in the divorce. Neither Danielle nor Jeremy could recall how Danielle's name was associated with the truck such that it was reflected on the closing documents for the Property.

25. Jeremy used proceeds from the sale of the marital residence to pay off the truck loan.

26. Jeremy wrote a check on August 30, 2021 from an account he also used for his business, JD's Tree Service, to cover the down payment that he believed he could afford on the Property. The check amount was for $65,000. Plaintiff's Trial Exhibit 1.

27. The check was written to Pennington Title Company and was held in escrow until closing.

28. Jeremy recalled a verbal agreement for Danielle to repay the $65,000. Danielle recalled a verbal agreement to repay the $65,000 only if closing did not go through.

29. Danielle had hesitation leading up to the closing date of September 8, 2021, and because of that also lined up the purchase of a camper in case the house did not work out.

30. Danielle purchased and returned a camper on September 8, 2021, because she believed Jeremy would move to Rapid City and they would make their family work.

31. The relationship between Danielle and Jeremy continued to be on and off through April of 2022.

32. Jeremy had moved items from Iowa to the Property. Danielle assisted in paying for U-Haul trucks to assist in Jeremy's move.

33. Between September 2021 and April 2022, Jeremy did not demand any payment from Danielle as a result of the alleged loan.

34. The parties' relationship fell apart for the final time in April 2022.

35. On April 4, 2022, as Jeremy was leaving to return to Iowa, Danielle made multiple writings and signed her name on at least two of them. Jeremy only kept two of the writings. The notes stated:

> I Danielle Morriss will give you $50,000 dollars within 1 month.
> Danielle Morriss
> Apil [sic] 4, 2002 [sic]

Trial Exhibit 2.

> I your ex-wife, Danielle will get your $50,000 somehow even if I have to sell my soul. I will try to have it to you within 1 month. I hereby release you from my miserable presence and will fill out the annulment papers promptly.
> Your Ex-Wife,
> Danielle

Trial Exhibit 3.

36. Neither note was countersigned.

37. No party other than Danielle was identified in the two writings.

38. Danielle did not receive anything in return for drafting either writing.

39. Danielle wrote the notes while in a heightened emotional state as she recognized the reconciliation with Jeremy was not going to be successful.

40. Danielle could not articulate why she began to pay Jeremy a monthly amount but had various electronic transfers that had a house emoticon next to the amount. Danielle's monthly amount varied in time paid and amount paid. Danielle testified she simply gave Jeremy what she could when she could. Plaintiff's Trial Exhibit 4.

41. Danielle testified that she believed if she would continue to give money to Jeremy that it might bring her family back together.

42. Jeremy returned to Iowa in April 2022.

43. Danielle ceased remitting money to Jeremy in April of 2023. Plaintiff's Trial Exhibit 4.

44. Jeremy hired an attorney after Danielle's last payment and sent a demand letter on October 12, 2023, for $58,331.49. Defendant's Trial Exhibit B.

45. At trial, Jeremy confirmed that he is seeking reimbursement of $58,331.49.

46. The findings made by the Court are not final findings in this matter, and the Court reserves the ability to change the determinations based upon additional argument and evidence.

CONCLUSIONS OF LAW

1. To the extent that any of the above-made findings of fact are determined to be conclusions of law or mixed findings of fact and conclusions of law, the same are incorporated herein by this reference as a conclusion as if set forth in full.

2. The Court has jurisdiction of the subject matter of the action.

3. The Court has personal jurisdiction of all the parties hereto.

CREDIBILITY OF WITNESSES

4. "'Determining the credibility of the witnesses is the role of the factfinder.'" *Schneider v. S.D. Dept. of Transp.*, 2001 SD 70, ¶ 14, 628 N.W.2d 725, 730 (quoting *Mash v. Cutler*, 488 N.W.2d 642, 653-54 (S.D. 1992)).

5. Jeremy and Danielle were the only witnesses to testify at trial.

6. Jeremy was not credible in his testimony. He stated that he had not read the Gift Letter (Defendant's Trial Exhibit A) yet also stated that he had "glanced over it." He further stated that he asked Danielle what the document was for and then, relying on what Danielle told him, that the bank needed the document, he signed it. However, Jeremy also testified that he believed the document was to memorialize the alleged loan. Due to the inconsistent statements, this Court is not required to believe any part of Jeremy's testimony.

7. Jeremy trusted Danielle enough to give her a blank check to insert the appropriate amount for closing on the Property. However, Jeremy is also suing Danielle under two theories that require a showing of Danielle deceiving him and committing fraud upon him.

8. Jeremy brought claims that required him to show there was detriment done to him but also stated that expending the $65,000 did not harm him financially.

9. Jeremy testified that he initially asked for the entire $65,000 to be repaid to him, then requested that it be minus the amounts Danielle remitted to him yet asks this Court to enforce two written contracts for an amount even less than that.

10. Danielle was credible in her testimony. She testified that she never believed the $65,000 was intended as a loan or a gift as she believed Jeremy was going to share in the benefit, or the purchase of the Property. The funds had never been discussed in terms of a loan until April 2022, and then it was only Jeremy that referred to it as a loan.

11. Danielle believed the money was to reconcile the relationship between herself and Jeremy – to bring their family back together. Danielle believed Jeremy was going to move to Rapid City and live at the Property with her.

12. This Court finds that Danielle was truthful in stating her actions were primarily driven by her emotions and the desire to bring her family back together.

GIFT

13. "A gift is a transfer of personal property, made voluntarily and without consideration." SDCL § 43-36-1.

14. "A gift, other than a gift in view of death, cannot be revoked by the giver." SDCL § 43-36-3.

15. "The essential terms of a gift inter vivos are intent, delivery and acceptance." *Owen v. Owen*, 351 N.W.2d 139, 142 (S.D. 1984).

16. "In determining whether a transaction is a loan or a gift, 'the trial court may take into consideration the relationship of the parties and an individual's need for the loan.'" *Setliff v. Akins*, 2000 S.D. 124, ¶ 29, 616 N.W.2d 878, 888 (quoting *Saum v. Moenter*, 101 Ohio App.3d 48, 654 N.E.2d 1333, 1335 (1995)).

17. Jeremy testified that he signed the Gift Letter (Defendant's Trial Exhibit A) and that he signed the check for the Pennington Title Company without knowing the exact amount he would be paying.

18. Jeremy gave the check to Danielle knowing the money would go into escrow and would not be withdrawn unless and until closing on the Property occurred.

19. Danielle took the check and gave it to the Pennington Title Company.

20. The check was cashed on or around September 8, 2021, which was the date of closing on the Property.

21. For the following seven (7) months, Jeremy and Danielle continued to treat the $65,000 as a gift and something mutually beneficial as the parties continued to reconcile their relationship.

22. Had reconciliation of the parties' relationship been successful, the Court doubts this matter would be before it.

23. This Court finds the $65,000 was intended as a gift pursuant to the terms of the Gift Letter and the subsequent actions of the parties in the months following the delivery and acceptance of the gift. The gift was delivered and accepted upon closing on the Property.

BREACH OF CONTRACT

24. "A contract is an agreement to do or not do a certain thing." SDCL § 53-1-1.

25. A contract is either express or implied. S.D. Civil Pattern Jury Instruction 30-10-10.

26. An express contract is an actual agreement of the parties which is created by distinct and explicit language at the time of making the contract. An express contract may be created orally or in writing. Whether a contract exists is a question of law to be determined by the court, not a factfinder. S.D. Civil Pattern Jury Instruction 30-10-20.

27. "All contracts may be oral except such as are specially required by statute to be in writing." SDCL § 53-8-1.

28. The execution of a written contract supersedes all previous or contemporaneous oral negotiations or stipulations concerning its matter. S.D. Civil Pattern Jury Instruction 30-10-100.

29. An agreement for a loan of money must be in writing and subscribed by the party to be charged to be enforceable. SDCL § 53-8-2(4).

30. The essential elements of a contract include: (i) parties capable of contracting (b) their consent; (c) a lawful object; and (d) sufficient cause or consideration. SDCL § 53-1-2.

31. If the parties to the contract cannot be identified, a contract is invalid. SDCL § 53-2-3.

32. Every oral and written contract requires that all parties to the contract consent to the making of that contract. The consent must be free, mutual, and communicated to each other. S.D. Civil Pattern Jury Instruction 30-10-70.

33. Consent is not mutual unless the parties all agree upon the same thing in the same sense. SDCL § 53-3-3. *See also* SDCL § 53–1–2(2); *Braunger v. Snow,* 405 N.W.2d 643, 646 (S.D.1987).

34. "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and their origin." SDCL § 21-2-1.

35. Jeremy based his breach of contract claim on the two notes attached to his Verified Complaint as Exhibits 2 and 3, and introduced at trial as Plaintiff's Trial Exhibit 2 and 3, which identify an alleged repayment due and owing to Jeremy of $50,000.

36. Danielle is the only identifiable party in the two notes. There is no countersignature, and no other party identified other than "you."

37. No consideration is identifiable in either note.

38. Whether there was a verbal agreement for repayment of $65,000 is irrelevant as Jeremy seeks to enforce one or both of the written notes for repayment of $50,000, which were executed after the alleged verbal agreement.

39. Danielle wrote the two notes for an alleged obligation to repay $50,000 while in an emotionally distraught state. She testified that she believed writing the notes would leave the door open to possible reconciliation with Jeremy in the future.

40. Danielle testified that she never believed any of the money from Jeremy was intended as a loan.

41. This Court does not find a valid written contract exists that can be enforced against Danielle as the parties are not identifiable through the four corners of the alleged contract and there was not a meeting of the minds such that they were agreeing "upon the same thing in the same sense." SDCL § 53-3-3.

42. Furthermore, Jeremy is requesting an amount of $58,331.49, which is $8,331.49 over the amount that Jeremy alleges was contracted for.

BREACH OF IMPLIED CONTRACT

43. In an implied contract, the existence and terms are shown by conduct. SD Civil Pattern Jury Instruction 30-10-10; SDCL 53-1-3.

44. A contract may be implied in fact. A contract is implied in fact where the parties do not directly or expressly in words set forth an intention to enter a contract, but where their conduct, language, or other acts causes you to conclude they did, in fact, intend to enter a contract. (SD Civil Pattern Jury Instruction 30-10-30; SDCL 53-1-3).

45. "An implied contract is a fiction of the law adopted to achieve justice where no true contract exists." *Weller v. Spring Creek Resort, Inc.*, 477 N.W.2d 839, 841 (S.D. 1991) (quoting *Mahan v. Mahan*, 80 S.D. 211, 214, 121 N.W.2d 367, 369 (S.D. 1963)).

46. It is under this claim that Jeremy is requesting $58,331.49, as that represents the $65,000 minus amounts Danielle has already paid.

47. This cannot be as Jeremy presented two written notes from Danielle indicating a repayment of only $50,000. The execution of a written contract supersedes all previous or contemporaneous oral negotiations or stipulations concerning its matter. S.D. Civil Pattern Jury Instruction 30-10-100.

48. Jeremy contends Danielle has breached an implied contract through her actions of remitting funds.

49. Jeremy cannot point to, and Danielle did not testify to, her assent to remit funds to Jeremy as repayment of a loan.

50. Danielle remitted funds to Jeremy in hopes that money might bring back attempts at reconciling their relationship.

51. This Court finds Danielle regifted money to Jeremy through her actions, and is not entitled to recover those funds, but no implied contract exists that mandates Danielle to repay any amount of money to Jeremy.

UNJUST ENRICHMENT

52. Unjust enrichment occurs when a party confers a benefit upon another party who accepts or acquiesces in that benefit and it is inequitable to receive that benefit without paying. To recover under a claim of unjust enrichment, the plaintiff must show that the defendant: (1) has received a benefit; (2) is aware of the benefit; and (3) if allowed to retain the benefit without reimbursing the plaintiff would result in an inequitable outcome. S.D. Civil Pattern Jury Instruction 30-10-60.

53. "Unjust enrichment contemplates an involuntary or nonconsensual transfer, unjustly enriching one party. The equitable remedy of restitution is imposed because the transfer lacks an adequate basis." *Johnson v. Larson*, 2010 S.D. 20, ¶ 8, 779 N.W.2d 412, 416.

54. "'[A] person who without mistake, coercion, or request has unconditionally conferred a benefit upon another is not entitled to restitution.'" *Blue v. Blue*, 2018 S.D. 58, ¶ 20, 916 N.W.2d 131, 137–38 (quoting *Dowling Family P'ship v. Midland Farms*, 2015 S.D. 50, ¶ 24, 865 N.W.2d 854, 864).

55. Jeremy has not established that he made the payment of $65,000 due to a mistake, coercion, or request.

56. In fact, it wasn't until the parties' relationship was officially past reconciliation in April of 2022 that Jeremy began requesting Danielle repay any amount of money.

57. Jeremy has not established that Danielle is unjustly enriched by keeping the money that was gifted to her, that he also received the benefit of, and Jeremy is not entitled to any restitution under this theory.

FRAUDULENT MISREPRESENTATION

58. Fraudulent misrepresentation requires a plaintiff to show: (1) the defendant made a representation as a statement of fact; (2) the representation was untrue; (3) the defendant knew the representation was untrue or made the representation recklessly; (4) the defendant made the representation with intent to deceive the plaintiff and for the purpose of inducing the plaintiff to act upon it; (5) the plaintiff justifiably relied on the representation; and the plaintiff suffered damage as a result. SDCL §§ 20-10-1, 20-10-2(1); S.D. Civil Pattern Jury Instruction 20-110-20.

59. Deceit within the meaning of SDCL § 20-10-1 is either: (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) the assertion, as a fact, of that which is not true by one who has no reasonable ground for believing it to be true; (3) the suppression of a fact by one who is bound to disclose it, or who gives information of

other facts which are likely to mislead for want of communication of that fact; or (4) a promise made without any intention of performing. SDCL § 20-10-2.

60. "More than a finding of knowledge of falsity is required to warrant a conclusion of liability based on intentional misrepresentation. Intentional misrepresentation is defined by SDCL 20–10–1 as a wilful deception made with the intention of inducing a person to alter his position to his injury or risk. **[The South Dakota Supreme Court has] held that an action for deceit requires proof that the misrepresentations were material to the formation of the contract and that the plaintiff relied on the misrepresentations to his detriment.**" (emphasis added). *Littau v. Midwest Commodities, Inc.*, 316 N.W.2d 639, 643 (S.D. 1982) (citing *Aschoff v. Mobil Oil Corp.*, 261 N.W.2d 120 (S.D.1977); *Schmidt v. Wildcat Cave, Inc.*, 261 N.W.2d 114 (S.D.1977); *Viajes Iberia, S. A. v. Dougherty*, 87 S.D. 591, 212 N.W.2d 656 (S.D.1973)).

61. Jeremy has not established his burden of proof that Danielle committed deceit.

62. Jeremy did not articulate what statement Danielle made that he relied upon, that Danielle knew not to be true, and that Jeremy suffered detriment from. Jeremy is not entitled to recover under this theory.

ABUSE OF PROCESS

63. "One who uses a legal process whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." Restatement (Second) of Torts § 682 (1977).

64. "The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some action or refrain from it." Restatement (Second) of Torts § 682, cmt b (1977).

65. Extortion is "[t]he practice or an instance of obtaining something or compelling some action by illegal means, as by force or coercion." EXTORTION, BLACK'S LAW DICTIONARY (12th ed. 2024).

66. "If a party is content to use the particular machinery of the law for the immediate purpose for which it was intended, he is not ordinarily liable, notwithstanding a vicious or vindictive motive. However, the moment he attempts to attain some collateral objective, outside the scope of the operation of the process employed, a tort has been consummated." 33 Causes of Action 2d 465 (citing *Phillips v. Ingham County*, 371 F.Supp.2d 918 (W.D.Mich. 2005).

67. The party claiming abuse of process "must plead facts that show that the [opposing party] instituted proceedings against him for an improper purpose; such as extortion, intimidation, or embarrassment." 33 Causes of Action 2d 465 (citing *Kumar v. Bornstein*, 354 Ill. App. 3d 159, 290 Ill. Dec. 100, 820 N.E.2d 1167 (2d Dist. 2004), appeal denied, 215 Ill. 2d 598, 295 Ill. Dec. 521, 833 N.E.2d 3 (2005).

68. "[L]iability should result only when the sense of awareness [that initiating an action will necessarily subject the opposing party to additional legal expenses] progresses to a sense of purpose, and, in addition the utilization of the procedure for the purposes for which it was designed becomes so lacking in justification as to lose it legitimate function as a reasonably justifiable litigation procedure." 33 Causes of Action 2d 465 (citing *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 92 P.3d 882 (Ct. App. Div. 2 2004), review denied, (Mar. 22, 2005).

69. "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." SDCL § 53-8-5.

70. Jeremy failed to acknowledge the Gift Letter (Defendant's Trial Exhibit A) in his Verified Complaint.

71. In his Reply to Answer and Counterclaim, Defendant admitted to signing Defendant's Trial Exhibit A. Jeremy testified to the same at trial.

72. Jeremy also acknowledged that Danielle wrote and signed two documents (Trial Exhibits 2 and 3) that identified an alleged amount Danielle would pay to Jeremy was limited to $50,000.

73. However, Jeremy testified at trial that he is seeking $58,331.49 from Danielle, which is based on the alleged oral contract Jeremy believes was made for $65,000. This means Jeremy is now asking for $8,331.49 more than what Jeremy states was in the alleged written contracts he is now trying to enforce.

74. Jeremy's request is in violation of SDCL § 53-8-5 as he also seeks to enforce alleged written contracts for the repayment of $50,000.

75. Jeremy continued this matter to a trial without clarifying which documents he sought to rely upon and without specification of how much he believes Danielle owes; he is simply hoping this Court finds that Danielle owes him some money.

76. Jeremy testified to wanting to settle with Danielle; Danielle testified that Jeremy would have anticipated Danielle settling as she rarely stood up to him in the past.

77. After acknowledging that he signed a gift letter, Jeremy knew he was not entitled to any money from Danielle. He continued the lawsuit for to extort money from Danielle, as shown by his request for an inappropriate and unsupported amount, which is an improper purpose for the justice system.

Damages

78. "Since an abuse of process claim is an intentional tort, a [party] can seek damages in the form of emotional distress without proving the independent tort of intentional infliction of emotional distress and without proving the heightened standard of 'extreme and disabling' emotional distress." *Fix v. First State Bank of Roscoe*, 2011 S.D. 80, ¶ 14, 807 N.W.2d 612, 617.

79. "[I]n reviewing damages awarded by a jury in an abuse of process action, . . . 'a jury ay properly consider wounded feelings, mental suffering, humiliation, degradation, and disgrace in fixing compensatory damages.'" *Id.* (quoting *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 753 (N.D. 1989)). "The 'tort of abuse of process, unlike the tort of negligent infliction of emotional distress, does not require specific proof of intangible damages such as mental injury as a prerequisite to an award if it is clear that such damages would accrue to a normal person." *Id.* (cleaned up).

ATTORNEYS' FEES

80. "South Dakota follows the American rule of attorneys' fees, which provides that each party is responsible for their own fees." *Stern Oil Company, Inc. v. Brown*, 2017 SD 15, ¶ 44, 908 N.W.2d 144, 157 (citing *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 2011 SD 38, ¶ 25, 800 N.W.2d 730, 737). A court may allow attorneys' fees if provided for by a contract or specific statute. SDCL § 15-17-38.

81. "The court, if appropriate, in the interests of justice, may award payment of attorneys' fees in all causes of ... determination of paternity, custody, [and] visitation...." *Id.*

82. In deciding what is a reasonable attorney fee, the trial court should consider several parameters which affect the value of legal services, such as:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

City of Sioux Falls v. Kelley, 513 N.W.2d 97, 111 (S.D. 1994) (quoting Model Rules of Professional Conduct, Rule 1.5).

83. Prevailing parties may also request disbursements under SDCL § 15-17-37, which states:

> [t]he prevailing party in a civil action or special proceeding may recover expenditures necessarily incurred in gathering and procuring evidence or bringing the matter to trial. Such expenditures include costs of telephonic hearings, costs of telephoto or fax charges, fees of witnesses, interpreter or translator expenditures not otherwise covered pursuant to § 15-17-37.1, officers, printers, service of process, filing, expenses from telephone calls, copying, costs of original and copies of transcripts and reporter's attendance fees, and court appointed experts. These expenditures are termed "disbursements" and are taxed pursuant to § 15-6-54(d).

SDCL § 15-17-37.

ORDER

Consistent with the above findings and conclusions of law, the Court orders the following:

1. Plaintiff Cause of Action I, Breach of Contract, is found in favor of Defendant;

2. Plaintiff's Cause of Action II, Breach of Implied Contract, is found in favor of Defendant;

3. Plaintiff's Cause of Action III, Unjust Enrichment, is found in favor of Defendant;

4. Plaintiff's Cause of Action IV, Fraudulent Misrepresentation, is found in favor of Defendant;

5. Defendant's Cause of Action I, Abuse of Process, is found in favor of Defendant;

6. Defendant is awarded compensatory damages for emotional distress in an amount equal to two times her reasonable attorneys' fees expended in this matter;

7. Plaintiff is entitled to keep the $6,668.51 that was regifted to him by Defendant between April 2022 and April 2023;

8. Neither party is awarded punitive damages;

9. Plaintiff's request for attorneys' fees in this matter is denied;

10. Defendant's request for attorneys' fees and disbursements is granted, such fees shall be submitted by counsel for Defendant via affidavit within fourteen (14) days following submission of this Judgment for the Court's consideration pursuant to the aforementioned factors;

11. Plaintiff shall have ten (10) days following Defendant's counsel's submission to file any objections to the requested attorneys' fees.

IT IS SO ORDERED.

BY THE COURT:

Matt Brown 4/7/2025

Hon. Matt Brown

Clerk

by Heather Shaw

Deputy

FILED
Pennington County, SD
IN CIRCUIT COURT

APR - 8 2025

Amber Watkins, Clerk of Courts

By HS Deputy

STATE OF SOUTH DAKOTA) :SS	IN CIRCUIT COURT
COUNTY OF PENNINGTON)	SEVENTH JUDICIAL CIRCUIT

JEREMY MORRISS, Plaintiff, v. DANIELLE MORRISS, Defendant.	51CIV24-000023 **AMENDED JUDGMENT FOR ATTORNEYS' FEES, COSTS, AND COMPENSATORY DAMAGES**

Pursuant to the Order entered on April 8, 2025, Defendant submitted to the Court an Affidavit of Attorneys' Fees and Costs, filed on April 16, 2025. Pursuant to the Court's Findings of Fact and Conclusions of Law, filed April 8, 2025, Plaintiff had ten (10) days to object to the Affidavit of Attorneys' Fees and Costs. Plaintiff did not submit objections until May 2, 2025, 2 days after Plaintiff's objections were due. As the objections were untimely, the Court will not consider Plaintiff's objections. Based on Defendant's Affidavit and all other filings in this matter, it is:

ORDERED, ADJUDGED AND DECREED that Defendant is hereby granted an award of attorney fees in the amount of Seventeen-Thousand Two-Hundred Seventy-Two Dollars and Fifty Cents ($17,272.50), plus sales tax of One-Thousand Seventy Dollars ($1,070.00) and Judgment shall be entered for Defendant against Plaintiff for said amount. It is further

ORDERED, ADJUDGED AND DECREED that Defendant is hereby granted an award of costs pursuant to SDCL 15-6-54(d) in the amount of Two-Thousand One-Hundred Sixty-Seven Dollars and Twenty-One Cents ($2,167.21), and Judgment shall be entered for Defendant against Plaintiff for said amount. It is further

AMENDED JUDGMENT FOR ATTORNEYS' FEES, COSTS AND COMPENSATORY DAMAGES

ORDERED, ADJUDGED AND DECREED that Defendant is hereby granted an award of two times the reasonable attorneys' fees in the amount of Thirty-Four Thousand Five-Hundred Forty-Five Dollars ($34,545.00), and Judgment shall be entered for Defendant against Plaintiff for said amount.

ORDERED, ADJUDGED AND DECREED that total Judgment awarded to Defendant against Plaintiff is Fifty-Five Thousand Fifty-Four Dollars and Seventy-One Cents ($55,054.71).

IT IS SO ORDERED.

5/8/2025 4:38:52 PM

BY THE COURT:

Matt Brown

Hon. Matt Brown

Attest:
Shaw, Heather
Clerk/Deputy

State of South Dakota } Seventh Judicial
County of Pennington } Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this

JUN 11 2025

Amber Watkins
Clerk of Courts, Pennington County

By HR Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

JEREMY MORRISS, Plaintiff/Appellant, v. DANIELLE MORRISS, Defendant/Appellee.	31118 **MOTION FOR APPELLATE ATTORNEYS' FEES**

COMES NOW, Danielle Morriss, Defendant/Appellee in the above-captioned case, and respectfully moves this Court pursuant to SDCL § 15-26A-87.3 for an Order granting her attorneys' fees for this appellate action.

Dated November 5, 2025.

HALBACH | SZWARC LAW FIRM

By: */s/ Emily Maurice*

Emily Maurice
Robert D. Trzynka
108 S. Grange Ave.
Sioux Falls, SD 57104
P: (605) 910-7634
EmilyM@HalbachLawFirm.com
BobT@HalbachLawFirm.com
Attorneys for Defendant/Appellee

Filed: 11/5/2025 2:54 PM CST Supreme Court, State of South Dakota #31118

CERTIFICATE OF SERVICE

I, Emily Maurice, hereby certify that on November 5, 2025, the forgoing was filed with the South Dakota Supreme Court using the Odyssey File & Serve system, which served the same on the following as Counsel of Record for Plaintiff/Appellant:

SCHLIMGEN LAW FIRM, LLC
Eric M. Schlimgen
611 Dahl Rd., Suite 1
Spearfish, SD 57783
605.340.1340
eric@schlimgenlawfirm.com
Attorneys for Appellant Jeremy Morriss

By: */s/ Emily Maurice*
Emily Maurice

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

JEREMY MORRISS, Plaintiff/Appellant, v. DANIELLE MORRISS, Defendant/Appellee.	31118 **AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION FOR APPELLATE ATTORNEYS' FEES**

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

Emily Maurice, being first duly sworn upon her oath, deposes and states as follows:

1. I am one of the attorneys for Defendant/Appellee Danielle Morriss in the above-captioned matter.

2. This Court may award appellate attorney fees in situations where attorneys' fees are permitted at the trial level. *Matter of Fred Petersen Land Trust*, 2023 S.D. 44, ¶ 41, 995 N.W.2d 84, 93 (quoting *Farmer v. Farmer*, 2020 S.D. 46, ¶ 58, 948 N.W.2d 29, 45).

3. My legal serves are currently billed at an hourly rate of $325.00, with sales tax added at 6.2%.

4. Attorney Robert D. Trzynka's legal services are currently billed at an hourly rate of $325.00, with sales tax added at 6.2%.

5. Our firm's paralegals' services are currently billed at an hourly rate of $150.00, with sales tax added at 6.2%.

6. The amounts charged are fair and reasonable and total the sum of Nine-Thousand Six-Hundred and Two Dollars and Fifty Cents ($9,602.50), plus tax thereon in the

Filed: 11/5/2025 2:54 PM CST Supreme Court, State of South Dakota #31118

amount of Five-Hundred Ninety-Five Dollars and Thirty-Six Cents ($595.36), for a total of Ten-Thousand One-Hundred Ninety-Seven Dollars and Eighty-Six Cents ($10,197.86). A total of 31 hours have been expended on this appeal to date, which included time spent in discussing the matter with Defendant/Appellee, researching complex and first impression aspects of the case, drafting the Brief of Appellee, reviewing the Appellant's Brief, and preparing for service and filing of Appellee's brief.

7. A description of the time spent on this matter and the attorneys' fees requested is attached hereto as **Exhibit A**.

8. The total amount in attorneys' fees is reasonable in this action.

I declare under penalty of perjury under the law of South Dakota that the foregoing is true and correct.

Dated November 5, 2025, at Sioux Falls, South Dakota.

HALBACH | SZWARC LAW FIRM

By: Emily Maurice

Emily Maurice
108 S. Grange Ave.
Sioux Falls, SD 57104
P: (605) 910-7635
emilym@halbachlawfirm.com
Attorneys for Defendant / Appellee

CERTIFICATE OF SERVICE

I, Emily Maurice, hereby certify that on November 5, 2025, the forgoing was filed with the South Dakota Supreme Court using the Odyssey File & Serve system, which served the same on the following as Counsel of Record for Plaintiff/Appellant:

SCHLIMGEN LAW FIRM, LLC
Eric M. Schlimgen
611 Dahl Rd., Suite 1
Spearfish, SD 57783
605.340.1340
eric@schlimgenlawfirm.com
Attorneys for Appellant Jeremy Morriss

By: */s/ Emily Maurice*
Emily Maurice

EXHIBIT A

Type	Date	Hours	Description	Rate ($)	Billable ($)	User
TimeEntry	9/11/2025	0.5	Review appeal documents; emails with client requesting phone call to discuss	$325.00	$162.50	Emily Maurice
TimeEntry	9/12/2025	0.6	Phone call with client to discuss appeal	$325.00	$195.00	Emily Maurice
TimeEntry	10/15/2025	2.0	Review settled record for appeal	$325.00	$650.00	Robert Trzyska
TimeEntry	10/16/2025	2.0	Continued review of settled record for appeal	$325.00	$650.00	Robert Trzyska
TimeEntry	10/21/2025	6.0	Draft appellee brief	$325.00	$2,025.00	Robert Trzyska
TimeEntry	10/22/2025	10.0	Draft appellee brief; research various issues relevant to brief	$325.00	$3,250.00	Robert Trzyska
TimeEntry	10/22/2025	0.7	Analyze and revise appellee brief	$325.00	$227.50	Emily Maurice
TimeEntry	10/22/2025	3.0	Finalize appellee brief	$325.00	$975.00	Robert Trzyska
TimeEntry	10/23/2025	2.2	Proof and finalize Brief; attach appendix and filing of Brief; preparation of correspondence to clerk enclosing Brief; binding and handling of Brief to Clerk	$150.00	$330.00	Jennifer Bell
TimeEntry	11/5/2025	0.6	Preparation of Motion for Attorney Fees and Affidavit in Support	$150.00	$75.00	Jennifer Bell
TimeEntry	11/5/2025	0.5	Finalize Motion for Appellate Attorneys' Fees and Affidavit in Support	$325.00	$162.50	Emily Maurice
		31.0			$9,802.50	
				6.2% Tax	$695.35	
					$10,197.85	