

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

THERESA VAN ZEE

Appellant

-VS-

CRAIG AND PAMELA VAN ZEE

Appellees

Appeal No. 30600

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
HAND COUNTY, SOUTH DAKOTA

THE HONORABLE KENT A. SHELTON
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

In this brief, the Appellant, Theresa Van Zee, will be referred to as "Theresa." The Appellees, Craig and Pamela Van Zee, will be referred to as "Craig" and "Pamela," respectively. The Hand County Clerk of Courts' record will be referred to by the initials "CR" and the corresponding page numbers. The transcript of the pretrial hearing will be referred to as "PT" followed by the corresponding page numbers. The transcript of the first day of the jury trial, conducted on December 13, 2023, will be referred to as "T" followed by the corresponding page numbers. The transcript of the second day of the jury trial, conducted on December 14, 2023, will be referred to as "T2" followed by the corresponding page numbers. The Appendix to this brief will be referred to as "Appx." followed by the corresponding page numbers.

JURISDICTIONAL STATEMENT

This appeal follows the trial court's Judgment, which was filed on December 22, 2023. (Appx. 20; CR 1837.) Notice of Entry was served that same date. (CR 1838.) Theresa filed a Notice of Appeal on January 18, 2024. (CR 1876.) This Court may exercise jurisdiction pursuant to SDCL 15-26A-3(1), because Theresa timely appealed a final judgment.

QUESTIONS PRESENTED

- I. WHETHER THE TRIAL COURT ERRED BY CONCLUDING THERE WAS NO FRAUDULENT CONCEALMENT BY CRAIG AND PAMELA WHICH TOLLED THE STATUTE OF LIMITATIONS.**

Relying upon its decision that Craig and Pamela did not owe Theresa a fiduciary duty, the trial court concluded that Theresa had to show that Craig and Pamela engaged in affirmative or deceptive acts that prevented Theresa from discovering her cause of action. The trial court granted Craig and Pamela's motion for summary judgment, barring Theresa's claims from prior to May 31, 2017.

Conway v. Conway, 487 N.W.2d 21 (S.D. 1992).

SDCL 15-2-13.

II. WHETHER THE TRIAL COURT ERRED BY CONCLUDING THAT CRAIG AND PAMELA, WHO WERE IN POSSESSION OF CO-TENANCY PROPERTY, OWED NO FIDUCIARY DUTY TO THERESA.

The trial court denied Theresa's Motion for Partial Summary Judgment, and granted Craig and Pamela's Motion for Summary Judgment, concluding Craig and Pamela did not owe a fiduciary duty to Theresa.

Conway v. Conway, 487 N.W.2d 21 (S.D. 1992).

Hafeman v. Gem Oil Co., 163 Neb. 438, 80 N.W.2d 139 (1956).

Mountcastle v. Baird, No. 33, 1988 Tenn. App. LEXIS 38 (Ct. App. Jan. 29, 1988).

III. WHETHER THE TRIAL COURT ERRED BY REFUSING TO IMPOSE A CONSTRUCTIVE TRUST.

The trial court found that a constructive trust was not created, granted Craig and Pamela's Motion for Summary Judgment, and denied Theresa's Motion for Partial Summary Judgment seeking that relief.

Briggs v. Briggs (In re Certification of a Question of Law from the United States Dist. Court, Dist. of S.D., S. Div.), 2019 S.D. 37, 931 N.W.2d 510.

Johnson v. Markve, 2022 S.D. 57, 980 N.W.2d 662.

SDCL 55-1-7.

SDCL 55-1-11.

IV. WHETHER THE TRIAL COURT ERRED BY DENYING THERESA'S MOTION FOR PARTIAL SUMMARY JUDGMENT SEEKING DAMAGES FOR CONVERSION.

Although it was undisputed that Craig and Pamela exercised control over the rental income on the real estate they co-owned with Theresa, the trial court found there was a factual dispute that precluded summary judgment in Theresa's favor.

First Am. Bank & Trust, N.A. v. Farmers State Bank of Canton, 2008 S.D. 83, 756 N.W.2d 19.

W. Consol. Coop. v. Pew, 2011 S.D. 9, 795 N.W.2d 390.

SDCL 21-3-3.

V. ALTERNATIVELY, WHETHER THE TRIAL COURT ERRED BY ALLOWING CRAIG AND PAMELA TO PRESENT EVIDENCE TO THE JURY REGARDING DESMOND VAN ZEE'S DEBT, THE ALLEGED AGREEMENT BETWEEN CRAIG AND PAMELA AND PATRICIA VAN ZEE, AND ACTIONS FROM 1999 TO THE PRESENT TO DEFEND AGAINST THERESA'S CLAIMS FOR UNPAID RENT.

The trial court denied Theresa's motions in limine and permitted Craig and Pamela to present evidence related to Craig's alleged "agreement" with Patricia Van Zee and evidence related to Desmond Van Zee's debt.

Stabler v. First Bank of Roscoe, 2015 S.D. 44, 865 N.W.2d 466.

SDCL 19-19-401.

SDCL 19-19-403.

STATEMENT OF THE CASE

On June 14, 2022, Craig and Pamela filed a Complaint seeking a partition of Hand County real estate they jointly owned with Theresa. (CR 2-

3.) On July 18, 2022, Theresa filed an Answer and Counterclaim seeking an accounting relating to the jointly owned real estate. (CR 6-8.) Craig and Pamela moved to dismiss the counterclaim seeking a partnership accounting, and their motion was granted. (CR 33.)

On May 12, 2023, Theresa filed an Amended Motion for Leave to Amend and Add Counterclaim. (CR 140.) That Motion was granted. (CR 174.) On May 31, 2023, Theresa filed a Counterclaim alleging constructive trust and accounting, breach of fiduciary duty, conversion, fraudulent concealment, and unjust enrichment. (CR 182-187.) Theresa's counterclaims centered on the rental income that Craig and Pamela retained from the jointly-owned real estate. (*Id.*) Theresa sought rental income that she had not received since Craig and Theresa became joint owners in 2010. (*Id.*)

On October 6, 2023, Craig and Pamela filed a Motion for Summary Judgment. (CR 262-263.) On October 12, 2023, Theresa filed a Motion for Partial Summary Judgment on her counterclaims for constructive trust, breach of fiduciary duty, and conversion. (CR 622.) In a letter opinion dated November 13, 2023, the Honorable Kent Shelton advised the parties that he was granting Craig and Pamela's motion, in part. (Appx. 1-15; CR 860-874.) Specifically, Judge Shelton granted summary judgment regarding the statute of limitations and barred Theresa's claims for unpaid rent from prior to May 31, 2017. (Appx. 3-5; CR 862-864.) Judge Shelton also concluded Craig and Theresa owed no fiduciary duty to Theresa, and no constructive trust should

be imposed. (Appx. 7-9; CR 866-868.) Finally, Judge Shelton advised that he was denying all parts of Theresa's motion. (Appx. 14-15; CR 873-874.)

On November 28, 2023, Theresa filed a petition for discretionary appeal, and Craig and Pamela were instructed to respond by December 1, 2023. (CR 898.) The Court denied the petition on December 7, 2023. (CR 1028.)

On November 30, 2023, Craig and Pamela filed Pretrial Motions and Motions in Limine, which included a request that the jury hear the "whole story." (CR 900-904.) Craig and Pamela requested they be allowed to present evidence relating to the history of the debt of Desmond Van Zee, the father of Craig, Theresa, and Michael. (Id.) They also sought to present evidence relating to a claimed agreement between Craig and his mother, Patricia, regarding the use of the rental income, as well as Craig and Pamela's actions dating back to 1999. (Id.) On November 30, 2023, Theresa filed Motions in Limine, which included a request that Craig and Pamela not be allowed to present evidence of Desmond's debt or Craig's agreement with Patricia. (CR 905.) At the pretrial hearing on December 5, 2023, Judge Shelton granted Craig and Pamela's Motions and denied Theresa's Motion. (Appx. 18-19; CR 921-922.)

A jury trial was held on December 13-14, 2023 regarding Theresa's counterclaims for conversion and unjust enrichment. Theresa was only allowed to pursue damages for the withheld rent in the six years preceding

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the lawsuit. (Appx. 79; CR 1031.) Consistent with Judge Shelton's pretrial rulings, Craig and Pamela were allowed to present the evidence about their actions preceding the co-tenancy, Desmond's debt, and Craig's claimed agreement with Patricia. Ultimately, after questioning whether the unjust enrichment damages could be split based on Patricia's date of death, the jury returned a verdict in Theresa's favor for only \$38,052.00. (Appx. 80-81; CR 1032-1033.) Judgment was entered on December 22, 2023. (CR 1837.)

STATEMENT OF FACTS

Although this matter proceeded to trial, Craig and Pamela do not dispute many of the critical facts. (CR 784-792.) Very simply, from the time that Craig became a cotenant with Theresa in 2010 until this lawsuit, Craig leased real estate that he and Theresa jointly owned without telling Theresa about the leases or providing her with any of the rental income.

A. Craig obtains the Homeplace.

Desmond and Patricia Van Zee were the parents of Craig, Michael, and Theresa. (T 4, 6.) Desmond and Patricia owned farm land in Hand County, South Dakota. (CR 784.) Desmond passed away in 1997. (T 51.) When Desmond died, approximately 1,500 acres farmland owned by Desmond, Patricia, or jointly by the two of them, transferred to Patricia. (T 8, 51; CR 784.) This land consisted of a "home place" of about 920 acres, and what is sometimes referred to as the "land by the lake" of approximately 480 acres. (T2 13-14, 21.)

Around 2004, Patricia and Craig consulted with attorney Jim Jones in Miller, South Dakota, to draft a deed transferring the home place from Patricia, a single person, to Patricia, Craig, and Pamela, as joint tenants with rights of survivorship. (T2 13-14; CR 785.) This deed was executed on June 30, 2004, (CR 1034.) Before she executed the 2004 warranty deed to add Craig as a joint tenant on the home place, Patricia informed Craig that she was planning similar transfers of property to herself and to Michael and Theresa as joint tenants. (CR 785.)

Patricia quitclaimed her interest in the home place to Craig and Pamela in 2013. (CR 787, 1044-1045, 1046-1047.) Craig acknowledged he had the rent from the 920 acres to service Desmond's debt. (T2 27.)

B. Craig and Theresa become co-tenants.

On September 16, 2004, Patricia signed warranty deeds conveying approximately 240 acres to herself and Michael as joint tenants, and approximately 240 acres to herself and Theresa as joint tenants. (CR 785-786, 1036, 1037.) The real estate Patricia deeded to Theresa is legally described as:

The South Half of the Southwest Quarter (S ½ SW ¼) and the Southeast Quarter (SE ¼) of Section Twenty-one (21), Township One Hundred Fourteen (114) North, Range Sixty-nine (69), West of the 5th P.M. ("Subject Property.")

(CR 786.)

Theresa did not receive a copy of this September 16, 2004 warranty deed when it was signed and recorded. (T 54.) However, Theresa visited the courthouse at some later date and learned that she was put on the real estate as an owner with her mother. (T 56.)

On June 7, 2010, Patricia conveyed to Craig her undivided one-half interest in the Subject Property. (CR 786, 1038-1039.) Consequently, as of June 7, 2010, Theresa and Craig each owned an undivided one-half interest in the Subject Property, and Patricia no longer owned any interest in the Subject Property. (CR 787.)¹ Craig knew that Patricia executed the deed in 2010, and he knew that he owned the Subject Property jointly with Theresa. (T2 17, 21, 23; CR 786.) From 2010 to 2021, Craig admits that he did not tell Theresa that he was a joint owner of the Subject Property with her. (T2 35.)

Conversely, Theresa did not appreciate that Patricia had conveyed her one-half interest to Craig, making her a tenant in common with him, until about a decade later when Patricia was about to die. (T 58-59, 84.) Neither Craig nor Pamela said anything to Theresa about the fact that they jointly owned the land together. (T 59, 66, 88; T2 35.) She did not receive tax notices from the county or Craig, as the notices were sent to Craig and Pamela's address and were not furnished to Theresa. (T 60, 63, 88; T2 23, 32, 34, 35.) She first learned that Craig was substituted for Patricia as an owner

¹ On August 25, 2015, Craig transferred his undivided one-half interest in the Subject Property to himself and Pamela. (CR 787, 1042.)

of the Subject Property when she saw Craig's name with hers when she was looking through a plat book in a grocery store. (T 58-59.)

C. Craig leases the Subject Property.

Craig signed several leases renting the homeplace, some additional parcels he owned, and the land by the lake, including the Subject property. Between 2008 and 2012, the Subject Property was leased to L&O Acres. (CR 788.) Although Craig was aware that Theresa became a cotenant with him in 2010, the lease with L&O acres was never mentioned to Theresa. (Id.)

The Subject Property was among 471.2 acres that Craig leased to Kirby Odde for a five-year term beginning in 2012. (CR 788-789; 1048-1051.) This lease called for a \$93,160.00 payment in 2012, a \$186,600.00 payment in 2013, and \$279,760.00 for the years 2014, 2015, 2016, and 2017. (CR 1049.) Theresa was neither told about this lease nor included as a signatory to the lease. (T2 23; CR 1051.) According to Craig, he did not tell Theresa or Michael about the lease because "mom told me not to tell them." (T2 23.) Theresa received no rental payments under this lease. (T 61.)

For the farming years 2018-2020, Craig again rented land, including the Subject Property, to Odde. (CR 789; 1052-1054.) Once again, Theresa was not consulted and did not sign the 2018-2020 lease. (T 62-63; CR 790, 1054.) Taking the total payment of \$323,400, divided by 1,960 acres, this lease obligated Odde to pay \$165/acre over those three years. (T2 27; CR 1052-1054.) Although Theresa owned an undivided one-half interest in the

Subject Property, which was rented to Odde, none of the rental income for those years was provided to Theresa. (T 62; T2 27, 32; CR 790.)

For 2021, Craig executed a lease with Odde Farms, which included the Subject Property. (T2 33; CR 790, 1055-1057.) The total amount remained the same as the prior three years, with a price per acre of \$165. (T2 33-34.) This lease was not discussed with Theresa and she did not sign it. (T 64; T2 34.) Theresa received no rental payments in 2021. (T 63-64.)

Finally, for the farming years from 2022 to present, Craig signed a lease with Odde Farms which included the Subject Property. (T2 35; CR 790-791; 1058-1060.) For these years, the rental rate increased to \$170/acre. (T2 36.) The lease was neither discussed with nor furnished to Theresa. (T 64-65.) Craig furnished none of the rental income to Theresa in 2022 or 2023. (T 64; T2 35.)

Considering the various rental rates that applied from 2012 to present, Craig received over \$223,000 in rental income for Theresa's undivided one-half portion of the Subject Property:

Year	Total Rent Received From All Land	Price per Acre	Rent for land by the lake (471.2 tillable acres)	Theresa's 50% share for Subject Property
2012	\$93,160	\$59.94	\$28,243	\$7,061
2013	\$186,600	\$120.06	\$56,572	\$14,143
2014	\$279,760	\$180.00	\$84,816	\$21,204

2015	\$279,760	\$180.00	\$84,816	\$21,204
2016	\$279,760	\$180.00	\$84,816	\$21,204
2017	\$279,760	\$180.00	\$84,816	\$21,204
2018	\$323,400	\$165.00	\$77,748	\$19,437
2019	\$323,400	\$165.00	\$77,748	\$19,437
2020	\$323,400	\$165.00	\$77,748	\$19,437
2021	\$323,400	\$165.00	\$77,748	\$19,437
2022	\$333,200	\$170.00	\$80,104	\$20,026
2023	\$333,200	\$170.00	\$80,104	\$20,026
TOTAL	\$3,358,800.00		\$895,279.00	\$223,820

From the time Craig became a co-tenant with Theresa in 2010 to this lawsuit, it is undisputed that Craig signed leases and collected over \$446,000 in rent off the Subject Property without telling Theresa, much less providing her with any portion of the rent.² (T2 23, 43, 64; CR 788-791, 1048-1060.)

D. Craig commingles the rental income from the Subject Property.

Craig put his handling of the rent the best: "Everything is thrown together." (T2 33.) Craig testified at trial that he deposited all the rent payments he received into the Van Zee farm account at American Bank and

² The lease with L&O Acres that was in effect when Craig became a cotenant could not be located, so it is unknown how much Craig received in 2010 and 2011. (Appx. 41; CR 788.)

Trust. (T2 36, 40.) This was Craig's only checking account. (T2 43.) While Patricia was on the account, she neither deposited money into the account nor wrote checks out of the account. (T2 36.)

Craig's position is that he had an agreement with Patricia to pay Desmond's debt with the rent proceeds. (CR2 46.) First, Craig stated he "got the home place to take care of dad's note[.]" (T2 27.) Later, Craig testified that Patricia wanted him to keep *all* the land together to pay on Desmond's debt, and "[e]verything went to that debt." (T2 46.) The annual payment on Desmond's note was approximately \$31,000-33,000, and Craig never paid more than the annual payment because he "never wanted to." (T2 38-39; CR 1731.)

Craig also claims that he had an agreement to pay Patricia rent every year that continued even after Patricia did not own the Subject Property. (CR2 58-59.) Craig and Pamela confirmed that Patricia was provided approximately \$15,000- \$17,000 per year from the total amount Craig collected each year. (T 91-92; T2 37, 41.)

Craig used the rest of the rental income for a variety of things. He bought more land for himself. He purchased five additional quarters in 2011, which were collectively referred to at trial as the "Roach" land. (T2 25.) His loan payments on the Roach land ranged from \$118,000 to \$144,000 per year. (T2 28; CR 1732.) The Roach land generated about half that amount in

annual rent, which was insufficient to cover Craig's loan payments. (T2 30-31.)

Craig and Pamela also used the Van Zee farm account to pay their personal expenses. (T 89-91; T2 41-43.) They paid for vehicles with it. (Id.) They paid the kids' student loan debt and other expenses with it. (Id.) They insured and updated the lake cabin with it. (T2 42.)

Zero dollars in rental income related to the land by the lake went to Theresa and Michael, even though they each owned an undivided one-half interest for over a decade. (T2 43.)

ARGUMENT

This appeal is primarily predicated on the trial court's errors handling the parties' summary judgment motions. The errors resulted in Craig and Pamela obtaining dismissals of Theresa's claims for breach of fiduciary duty and imposition of a constructive trust. They also resulted in Theresa's claim for damages being erroneously restrained to only the six years preceding her counterclaim. Theresa submits that the undisputed facts that she presented to the trial court established that Craig and Pamela are liable for detaining the rental income on the Subject Property, as a matter of law. Thus, no jury trial should have occurred.

When the jury trial on her two surviving claims occurred, the trial court permitted Craig and Pamela to present irrelevant and unfairly

prejudicial evidence to the jury to persuade the jurors to go outside the elements of Theresa's claims and slash the damages to which Theresa is entitled under the law.

This appeal, therefore, seeks reversal of several of the trial court's decisions.

A. Craig and Pamela concealed their receipt and retention of rental income from their co-tenant, Theresa, and summary judgment on the statute of limitations was error.

The trial court granted Craig and Pamela's motion for summary judgment, applying the six-year statute of limitations in SDCL 15-2-13 and barring Theresa's claims from prior to May 31, 2017. (CR 877.) "Because the point at which a period of limitations begins to run must be decided from the facts of each case, statute of limitations questions are normally left for a jury." Strassburg v. Citizens State Bank, 1998 S.D. 72, ¶ 7, 581 N.W.2d 510, 513.

"In response to a summary judgment motion where the defendant asserts the statute of limitations as a bar to the action and presumptively establishes the defense by showing the case was brought beyond the statutory period, the burden then shifts to the plaintiff to establish the existence of material facts in avoidance of the statute of limitations, e.g., fraud or fraudulent concealment." Strassburg, 1998 S.D. 72, ¶ 5, 581 N.W.2d at 513. Theresa established facts in avoidance of the statute of limitations, and the trial court incorrectly barred her claims via summary judgment.

The lynchpin of the trial court's error was requiring Theresa to show that Craig and Pamela took affirmative acts to prevent the discovery of her cause of action. (CR 862-863.) Under Conway v. Conway, 487 N.W.2d 21 (S.D. 1992), Craig and Pamela's undisputed silence about collecting and retaining the rental income on the Subject Property, which persisted for over a decade, was sufficient to toll the statute of limitations.

It is well established that the statute of limitations will be tolled until the cause of action is discovered or might have been discovered, if there is fraudulent concealment of the cause of action. Conway, 487 N.W.2d at 23 (citing Glad v. Gunderson, Farrar, Aldrich, 378 N.W.2d 680, 682 (S.D. 1985) (further citations omitted). "In South Dakota, if a trust or confidential relationship exists between the parties, which imposes a duty to disclose, **mere silence by the one under that duty constitutes fraudulent concealment.**" Id. (citing Glad, 378 N.W.2d at 682-683) (emphasis added)).

In Conway, this Court recognized a relationship of trust and confidence between co-tenants that requires disclosure:

Although strictly speaking a fiduciary relationship does not exist between tenants in common by reason of the mere fact that they are such, *a relationship of trust and confidence exists to the extent that each co-tenant has a duty to sustain or at least not to assail, the common interest or title, and one co-tenant will not be permitted to obtain a secret profit to the disadvantage of the other co-tenants where all must act in unison.*

Id. at 24 (quoting 86 C.J.S. Tenancy in Common § 17 (1954) (emphasis added); see also Hafeman v. Gem Oil Co., 163 Neb. 438, 473, 80 N.W.2d 139,

160 (1956) (if one co-tenant has possession of funds belonging to his co-tenant he becomes trustee thereof and stands in a fiduciary relationship to the extent of the interest of the co-tenant who may compel an accounting).

Conway is very analogous. A sister, Margaret, brought an equitable accounting action against her brother, Gerald, to recover her fair share of rent from property in which each had obtained an interest. Id. at 22. Their father owned 160 acres of farmland in Minnehaha County and died intestate. In 1959, the Final Decree of the father's estate provided that the surviving widow received three-ninths of the farm, and the three children each obtained an individual two-ninth share. Id. at 22. The mother retained a life estate, and she collected rental income until 1981. Id. In 1981, the mother conveyed her interest in the real estate to Gerald, who began leasing the farm to third-parties, collecting the rent, and depositing it into his own bank account. Gerald never notified Margaret that their mother had conveyed her interest in the farm to him. Nor did he tell Margaret that he was collecting the rental income as his own. Gerald, like Craig, claimed that he used the rental income to provide for his mother.

The trial court was faced with whether the six-year statute of limitations was tolled due to Gerald's fraudulent concealment. Id. at 23. The trial court concluded that the statute of limitation began running when Margaret discovered the warranty deed from her mother to Gerald in 1983. This Court disagreed, finding that, because Gerald had a duty to disclose his

receipt of rental income from the property and he chose to remain silent, his silence constituted fraudulent concealment and tolled the statute of limitations. Id. at 24.

The trial court cited Conway in its recitation of the “Applicable Law,” but did not analyze its holding in relation to the statute of limitations issue. (CR 862-864.) The trial court’s analysis suggests that it went down the same wrong path as the trial court in Conway in two ways.

First, the trial court failed to recognize that, when a confidential relationship exists between the parties, silence on the part of one having the duty to disclose constitutes fraudulent concealment. The trial court states in its decision: “This Court finds that the Plaintiffs (sic) act of managing the farm and farm account in accordance with the wishes of their mother does not rise to the level of an *affirmative or deceptive act* designed to prevent the Defendant’s discovery of the cause of action.” (CR 864.) (Emphasis added.) The trial court fixated on the lack of evidence of *affirmative or deceptive acts*. But Conway makes clear that the relationship between co-tenants is one that requires disclosure. “Essentially, Gerald and Margaret are tenants in common. In a relationship of this sort, a confidential relationship does exist between the parties.” Id. at 24. “Since Gerald had a duty to disclose he was receiving all rental income from the farm, but chose to remain silent, we hold that this constitutes fraudulent concealment.” Id.

The same fact pattern exists here. Craig knew he was a tenant in common with Theresa in 2010. He knew Patricia no longer held an ownership interest in the Subject Property. He knew the rental income from the land they owned together was being deposited into the Van Zee farm account. He knew that neither he nor Pamela were consulting Theresa about leasing the land, much less providing Theresa with any share of the rental income. Just like Gerald, Craig and Pamela chose to remain silent.

Second, the trial court blamed Theresa for not doing more to verify ownership of the Subject Property. (CR 864.) This Court was not persuaded by a similar argument in Conway. In Conway, Margaret's assumption was that the rental income from the farm was going to mother while she was alive. Id. at 24. Gerald did not advise Margaret otherwise when he started collecting the rent. "Trial court held that discovery in 1983 of the warranty deed put upon Margaret the duty of further inquiry and notice. We do not agree. We cannot make the inductive leap binding Margaret with knowledge of Gerald's claim to all rental income, based on her discovery of the warranty deed's existence." Id. at 24.

Similarly, Theresa assumed that while Patricia was alive, the rental income from the Subject Property and the rest of the farm was going to Patricia. (T53.) Craig and Pamela remained silent and did not share with Theresa what they were doing with the rental income from the Subject

Property, presumably so that Theresa would continue in her errant assumption.

Simply put, because they were co-tenants with Theresa, Craig and Pamela had a duty to disclose information about the receipt and handling of the rental income. It is undisputed they failed to do so. Just as in Conway, the applicable statute of limitations should have been tolled due to fraudulent concealment.

B. As co-tenants in possession of rental income for the Subject Property, Craig and Pamela were fiduciaries.

To establish a valid claim for a breach of a fiduciary duty, Theresa was first required to prove that Craig and Pamela were acting as fiduciaries. Olson v. Berggren, 2021 S.D. 58, ¶ 39, 965 N.W.2d 442, 455. The existence of a fiduciary duty and the scope of that duty are questions of law for the Court. Id.

Once again, while the trial court acknowledged the Conway decision, it quickly pivoted to this Court's recent decision in Estate of Thacker v. Timm, 2023 S.D. 2, 984 N.W.2d 679, and conventional rules governing fiduciary relationships. The trial court devoted no further discussion to the factual nuance present in this case: a co-tenant in possession of co-tenancy money. (CR 866-867.) Conway recognized that the factual setting of this case is different. When Craig and Pamela came into possession of co-tenancy money related to the Subject Property, a fiduciary relationship was created.

The trial court did not analyze whether co-tenants owe fiduciary duties to each other. Some courts have concluded that the relationship as tenants-in-common, alone, creates a fiduciary relationship. See e.g., Jolley v. Corry, 671 P.2d 139, 141 (Utah 1983); Bartz v. Heringer, 322 N.W.2d 243, 244 (N.D. 1982) (recognizing confidential relationship between co-tenants); Brown v. Brown, 263 Ark. 189, 563 S.W.2d 444, 446 (Ark. 1978) (fiduciary relationship between co-tenants). This Court does not need to establish such a categorical rule to conclude that a fiduciary duty was owed in this case. Rather, it is Craig and Pamela's receipt of rental income from the Subject Property that is recognized by most courts to create the fiduciary duty.

In Conway, the Court cited to Hafeman v. Gem Oil Co., 163 Neb. 438, 80 N.W.2d 139 (1956). Hafeman discussed various authority around the country for the proposition that the fact of co-tenancy, alone, does not create a fiduciary relationship; however, a co-tenant who acquires possession and control over property common to the co-tenancy is a trustee or fiduciary for his fellow co-tenants. Id. at 471, 80 N.W.2d at 159; see also Clayton v. Clayton, 75 So. 3d 649, 655 (Ala. Civ. App. 2011) (quoting Faust v. Faust, 251 Ala. 35, 37, 36 So. 2d 232, 233 (1948)) (" . . . [i]t has become a settled rule in this country that a cotenant who has received money from third persons for the use of the common property becomes a trustee for the amount collected for the benefit of his cotenants . . ."). As such a trustee, the co-tenant in possession is required to observe a standard of conduct, described by Justice

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Cardozo as follows: "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior," Hafeman at 473, 80 N.W.2d at 161 (quoting Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928)).

Because Craig and Pamela possessed funds which were paid for the use of the common property, they owed a fiduciary duty to protect and secure those funds for Theresa's benefit. See Mountcastle v. Baird, No. 33, 1988 Tenn. App. LEXIS 38, at *7 (Ct. App. Jan. 29, 1988) (quoting Hafeman, 163 Neb. at 473, 80 N.W.2d at 160). In Mountcastle, the defendant, Baird, undertook to manage and control mining activities under a lease that related to three separate tracts of land that were owned by different parties. Each month, Baird received royalty checks. Baird made no effort to allocate the funds between the various tracts of land that were leased. Instead, he deposited them in various locations, including in his own account and his wife's safety deposit box. "By allowing Baird so to act, plaintiffs, his co-tenants, put a special confidence, faith and trust in him to manage this property in their best interests." Id. at *6. *"In addition, because Baird possessed funds which belonged to plaintiffs, he owed a fiduciary duty to them with regard to those funds."* Id. at *7 (emphasis added). Similarly, Craig and Pamela received and deposited the rental income from the Subject Property

into the Van Zee farm account, making no attempt to allocate the portion that related to Theresa's one-half interest in the Subject Property.

The recognition of a fiduciary duty in this setting comports with Conway's acknowledgement of a confidential relationship between co-tenants, as well as the traditional rules this Court has recognized with respect to fiduciary duties. "While there is no invariable rule for determining whether a fiduciary relationship exists, there must be not only confidence of the one in the other, but there must exist a certain *inequality*, dependence, weakness of age, mental strength, business intelligence, *knowledge of the facts involved*, or other conditions giving to one advantage over the other." Estate of Thacker v. Timm, 2023 S.D. 2, ¶ 21, 984 N.W.2d at 687 (quoting Wyman v. Bruckner, 2018 S.D. 17, ¶ 28, 908 N.W.2d 170, 179) (emphasis added).

Theresa was neither on equal footing with Craig and Pamela nor shared the same knowledge as Craig and Pamela. This put Craig and Pamela at an advantage. Theresa assumed that, while her mother was alive, Patricia was renting the Subject Property to others and retaining the rental income. (T53.) See Conway, 487 N.W.2d at 24 ("The family had long operated under the belief that all rental income from the farm was to go to the support of Mother until her death."). Since the late nineties, Theresa has resided several hours away near the border of Iowa and Illinois. (T45-46.) See id. ("Margaret lived several states away from South Dakota and had no ready access to information concerning the farm."). She was not included as a

signatory to the contracts leasing her land or told anything about the leases pertaining to the Subject Property, by Craig and Pamela's own admission. (CR 788-791.)

This case presents the precise factual setting in which courts, including Conway, Mountcastle, and Hafeman, have serially recognized a relationship of trust and confidence. One co-tenant cannot obtain a secret profit to the disadvantage of the other co-tenants. Theresa was at a clear disadvantage because of her lack of knowledge relating to the use of the Subject Property. Craig and Pamela had the upper hand, and they owed a fiduciary duty with respect to the rental income they collected on the Subject Property. The trial court erred by concluding they owed no fiduciary duty.

C. Because Craig and Pamela detained the rental income from the Subject Property, a constructive trust should have been imposed.

Despite clear and convincing evidence that Craig and Pamela detained the rental income from the Subject Property, while furnishing none to Theresa, the trial court refused to impose a constructive trust. Instead, it denied Theresa's motion for summary judgment and granted summary judgment to Craig and Pamela. (Appx. 9, 14, 17; CR 868, 873, 878.) Craig and Pamela, as constructive trustees, should have been ordered to return to Theresa the money in which she has an ownership interest.

SDCL 55-1-7 provides, "[o]ne who wrongfully detains a thing is an implied trustee thereof for the benefit of the owner." "SDCL 55-1-11 broadly

permits a court to establish and declare an implied or constructive trust based on the facts and circumstances of a transaction.” Briggs v. Briggs (In re Certification of a Question of Law from the United States Dist. Court, Dist. of S.D., S. Div.), 2019 S.D. 37, ¶ 1, 931 N.W.2d 510, 510.

“An implied trust arises from the facts and circumstances of a transaction. An implied trust is generally remedial in nature and is an equitable tool used to restore the status quo and to protect assets wrongfully obtained.” Johnson v. Markve, 2022 S.D. 57, ¶ 74, 980 N.W.2d 662, 680-81. To impose a construct trust, one must show: “(1) the constructive trustee gained; (2) that gain was by fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act; (3) the constructive trustee has no superior right to the thing gained; and (4) the party seeking the constructive trust would have otherwise had the thing gained.” (Id.) (citations omitted).

Craig and Pamela gained Theresa's share of the rental income from the Subject Property. To gain this money, they concealed information from Theresa that they were co-owners of the Subject Property, were negotiating and executing leases, were receiving rental income, and were determining how to distribute the rental income without consulting Theresa. Theresa owned a one-half interest of the Subject Property, so Craig and Pamela did not have a superior right to Theresa's portion of the rental income. Finally, had Craig and Pamela not retained Theresa's portion of the rental income, it rightfully would have gone to Theresa.

A constructive trust should have been imposed. The trial court erred by refusing this relief and granting Craig and Pamela's motion for summary judgment.

D. Theresa was entitled to summary judgment on her claim that Craig and Pamela converted the rental income from the Subject Property.

The trial court denied Theresa's Motion for Summary Judgment seeking damages for Craig and Pamela's conversion of rental income earned from the Subject Property. "A grant or denial of summary judgment is reviewed de novo." Abata v. Pennington Cnty. Bd. of Comm'rs, 2019 S.D. 39, ¶ 8, 931 N.W.2d 714, 718.

"Conversion is the unauthorized exercise of control or dominion over personal property in a way that repudiates an owner's right in the property or in a manner inconsistent with such right." First Am. Bank & Trust, N.A. v. Farmers State Bank of Canton, 2008 S.D. 83, ¶ 38, 756 N.W.2d 19, 31 (quoting Chem-Age Indus., Inc. v. Glover, 2002 S.D. 122, ¶ 20, 652 N.W.2d 756, 766). To prove conversion, Theresa was required to show: "(1) [she] owned or had a possessory interest in the property; (2) [her] interest in the property was greater than [Craig and Pamela's]; (3) [Craig and Pamela] exercised dominion or control over or seriously interfered with [her] interest in the property; and (4) such conduct deprived [Theresa] of [her] interest in the property." First Am. Bank & Trust, N.A., 2008 S.D. 83, ¶ 38, 756 N.W.2d at 31.

The trial court concluded there was an issue of fact about whether Craig and Pamela's conversion was "unwarranted," suggesting there is some additional element relating to Craig and Pamela's intent that Theresa needed to prove. (CR 871.) The trial court misapplied the law. "The tort of conversion does not require the intent to deprive the true owner of [her] property rights." W. Consol. Coop. v. Pew, 2011 S.D. 9, ¶ 30, 795 N.W.2d 390, 398. "It is the act of conversion itself that is the wrong." Id. "[N]either good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action." Chem-Age Indus., 2002 S.D. 122, ¶ 20, 652 N.W.2d at 766.

In W. Consol. Coop. the trial court granted summary judgment in favor of Western Consolidated Cooperative (WestCon) on its conversion claim. WestCon's employee, Lynn Pew, had been stealing grain from WestCon and selling it to LaBolt Farmers Grain Company. WestCon sued both Pew and LaBolt for conversion. LaBolt tried to defend its actions in receiving the grain by arguing there was a genuine issue of fact about whether its interference was "unwarranted." This Court rejected the argument, concluding that the use of the word "wrongful" in SDCL 21-3-3 does not add an element to the tort, or an additional element that must be satisfied to calculate damages once the defendant has been found liable for conversion. The defendants' liability for conversion was affirmed, but the matter was

remanded so damages could be apportioned under SDCL 15-8-15.1 and 15-8-15.2.

This case is much simpler. Theresa owned a one-half interest in the Subject Property, which entitled her to a one-half interest in the rental income associated with the Subject Property. Theresa's interest in her half of the rental income was greater than Craig and Pamela's interest. Craig and Pamela exercised complete dominion and control over all rental agreements, all rental income that was collected, and all rental income distributions, including the rental income associated with Theresa's one-half interest in the Subject Property. Theresa was deprived of her interest in the rental income by their actions.

The trial court's conclusion that there is a fact dispute about whether Theresa "acquiesced to the rental income being used to support [her] mother and service the family debt," is completely untethered to any record evidence. Theresa was never told anything about the leases much less asked what she wanted done with her share of the rental income on the Subject Property. Indeed, Craig and Pamela admit that Theresa was never asked to help pay her father's debt:

21. Craig has never asked Michael or Theresa to help pay Desmond's debt. (Depo. Craig, 62:16-19).

RESPONSE: Admit.

(CR 788.)

The trial court incorrectly determined there was a factual dispute concerning Craig and Pamela's liability for converting the rental income. To the contrary, the facts about Craig and Pamela exercising control over the rental income are undisputed. Craig and Pamela's admissions establish all essential elements of conversion. From the time Craig became a co-tenant with Theresa in 2010 to this lawsuit, Craig, and later Craig and Pamela, exercised control over \$223,830 in rental income off the Subject Property that related to Theresa's undivided one-half interest. (T2 23, 43, 64; CR 788-791, 1048-1060.) Summary judgment should have been granted in Theresa's favor. Under SDCL 21-3-3(1), she was entitled to a judgment for the money converted plus interest.

E. Alternatively, the trial court's evidentiary rulings permitting Craig and Pamela to present irrelevant content to the jury unfairly prejudiced Theresa.

For the foregoing reasons, the trial court committed several errors with respect to the cross motions for summary judgment. When the matter proceeded to trial on Theresa's two remaining claims, the trial court abused its discretion by allowing Craig and Pamela to present irrelevant and unfairly prejudicial evidence to the jury, which the jury acted upon to Theresa's detriment.

This Court's review of the trial court's evidentiary rulings requires a two-step process. Stabler v. First Bank of Roscoe, 2015 S.D. 44, ¶ 36, 865 N.W.2d 466, 484. First, the Court must "determine whether the trial court {00731129.DOCX / 1}

abused its discretion in making an evidentiary ruling.” Id. (quoting Ruschenberg v. Eliason, 2014 S.D. 42, ¶ 23, 850 N.W.2d 810, 817). Second, the Court must determine whether this error was a prejudicial error that in all probability affected the jury’s conclusion.” Id. (quoting Ruschenberg, 2014 S.D. 42, ¶ 23, 850 N.W.2d at 817).

“Evidence is relevant if . . . [i]t has any tendency to make a fact more or less probable than it would be without the evidence and . . . [t]he fact is of consequence in determining the action.” SDCL 19-19-401. A court may exclude relevant evidence, however, where its probative force is substantially outweighed by a danger of unfair prejudice, among other considerations. SDCL 19-19-403.

In this case, two claims that Theresa pled in her counterclaim proceeded to trial: (1) Theresa’s claim that, from 2010 forward, Craig and Pamela converted her share of income from the Subject Property; and (2) Theresa’s claim that Craig and Pamela would be unjustly enriched by the retention of all the rental income from 2010 forward. (CR 185-186.)

Since Theresa’s motion in limine was denied, Craig and Pamela were allowed to defend against her claims with evidence about Desmond’s debt dating back to the 1990’s and a supposed agreement Craig made with Patricia about how the rental income was to be used. The trial court acknowledged that it permitted this evidence to come in *only* as to the unjust enrichment claim. (PT 10.) Theresa maintains that this evidence should

have been excluded in its entirety. The jury was invited to consider matters that had nothing to do with the elements of her undue influence claim, namely, that Pamela and Craig received a benefit, that they were aware of the benefit, and that their retention of the benefit without reimbursing Theresa would be inequitable. (CR 991.)

For example, this testimony was presented:

Q Was there ever a time when your mom signed that lease, this is after the property, that she put Michael and Theresa's name on the property, was there ever a time when she told you I want part of this rent to go to Mike and Theresa?

A The exact words come out of her mouth she said let's keep this together to pay on dad's debt. And so everything went to that debt.

Q And so even though your mom had deeded part of the land to them and she signed the lease where she knew she was getting money, did she ever say some of this money needs to go to Michael and Theresa?

A No, she just said just keep it here for dad's debt.

(T2 46.)

Likewise, Craig testified:

Q Would you tell the jury what your mother expected of you for you doing this for her all these years up to let's take the 2010 when you are signing the mortgage?

A All I remember is my mom wanted me to keep the family farm going and so I was.

Q Did she want any, did she ever tell you any of the rent was supposed to go to Michael and Theresa?

A No.

Q Some of the years, well, all of them after the deeds that were shown where your mom didn't own the land, she is still getting rent, didn't she?

A Yes, I promised her that.

(T2 57-58.)

The trial court's decision to deny Theresa's motion in limine and allow evidence about Desmond's debt and the "agreement" Craig made with Patricia was erroneous. This evidence was irrelevant and calculated only to prejudice Theresa.

First, Desmond's debt did not even pertain to the land by the lake. Craig acknowledged in his testimony that, as of 2010, the land by the lake, including the Subject Property, had no mortgage or lien against it. (T2 44.) Craig also acknowledged that he was given the home place to deal with Desmond's debt: "I got four and a half quarters to take care of the Roach ground, *I got the home place to take care of dad's note*, and then I got a couple other notes." (T2 27.) (Emphasis added.)

Second, and more importantly, *Patricia was not an owner of the Subject Property from June 7, 2010 forward*. The trial court seemed to attribute significance to Craig managing the family farm consistent with some nebulous conception of what Patricia wanted. (CR 869 ("The undisputed facts here show that Plaintiffs had an agreement with their

mother to manage the entire property, pay annual rent to support the parties' mother, and service the parties' father's debt.'). What Patricia wanted or did not want to be done with the rental income from 2010 forward is utterly irrelevant to the determination of Theresa's claims against Craig and Pamela. If Craig decided to do something Patricia requested, that was Craig's prerogative. But it has no bearing on whether Theresa, as Craig and Pamela's co-tenant who was never consulted, should have to forfeit the rental income relating to her undivided one-half interest in the Subject Property. Theresa did not make any agreements.

There is no question that Patricia conveyed her remaining interest in the Subject Property to Craig in 2010. This Court interprets a deed as it would a contract. In re Estate of Rosenbaum, 2001 S.D. 44, ¶ 6, 624 N.W.2d 821, 824 (citing SDCL 43-4-13). "When examining an instrument of conveyance, we are guided by the principle that the intention of the parties, and the grantor's intention in particular, must be ascertained by a fair consideration of the entire instrument and its language, without undue emphasis on any particular provision." Id. at ¶ 7, 624 N.W.2d at 824. "Only when construction of an instrument, as a whole, leaves doubt about the intention of the parties will we consider the circumstances surrounding the execution of a deed." Id. "We presume that a grant of real property conveys a fee simple interest in the property described unless it appears from the grant that a lesser estate was intended." Id. at ¶ 8, 624 N.W.2d at 824.

The trial court took the bait on Craig and Pamela's argument that this evidence of Desmond's unrelated debt and an agreement with Patricia pertains to "equity," and they should be allowed to point to those things to explain why they provided no rental income to Theresa. (PT 7-9.) They were given carte blanche to color their retention of the rental income as carrying out Patricia's wishes. But there was nothing ambiguous about the 2010 warranty deed by which Patricia conveyed her undivided one-half interest in the Subject Property to Craig. (CR 1038-1039.) Essentially, the trial court permitted Craig and Pamela to utilize parole evidence to convince the jury that the deed Patricia executed in 2010 did not really mean what it said. Their presentation suggested that, because of some side agreement that Theresa was no part of, Patricia still controlled the Subject Property and the income from it and decided that it should go to Desmond's debt and her.

This claimed side agreement between Craig and Patricia was irrelevant. Even if it had some tangential relevance, its probative value was substantially outweighed by the danger of unfair prejudice, confusing the issues, and misleading the jury. SDCL 19-19-403. The trial court abused its discretion by allowing Craig and Pamela to make Desmond's debt and the supposed agreement between Craig and Patricia the focal points of their defense.

And Theresa was unfairly prejudiced. The jury in this case asked two questions: (1) what was the date of Patricia's passing; and (2) can the jury

split the years by the date of Patricia's death for unnecessary enrichment? (T2 100-101.) Patricia died on March 26, 2021. (T2 101.) Theresa was seeking between \$19,800-21,600 per year for the retained rent. (CR 1031.) The jury awarded \$38,052.00 to her. (CR 1032.) It takes no significant feat of mathematics to surmise that the jury limited its award based upon the date that Patricia passed away, attributing significance to her supposed control over the Subject Property until her death. The trial court's error clearly prejudiced Theresa and reversal is warranted.

CONCLUSION

Theresa respectfully requests that the trial court's summary judgment rulings be reversed, and this case be remanded for entry of judgment in Theresa's favor for the rental income withheld from her.

Respectfully submitted this 4th day of June, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief does not exceed the number of words permitted by SDCL 15-26A-66(b)(2), said brief containing 8,150 words, Century Schoolbook, 12 point, and 40,852 characters (no spaces).

Dated this 4th day of June, 2024.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for the appellant, hereby certifies that on the 4th day of June, 2024, a true and correct copy of **APPELLANT'S BRIEF** was electronically transmitted to:

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and the original and two copies of **APPELLANT'S BRIEF** were mailed by first-class mail, postage prepaid, to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Word format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 4th day of June, 2024.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

THERESA VAN ZEE,

Appellant

-VS-

CRAIG AND PAMELA VAN ZEE,

Appellees

Appeal No. 30600

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
HAND COUNTY, SOUTH DAKOTA

THE HONORABLE KENT A. SHELTON
CIRCUIT COURT JUDGE

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NOTICE OF APPEAL FILED
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NOV 13 2023

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
 3RD CIRCUIT CLERK OF COURT

Marla Bertsch

RE: *Van Zee v. Van Zee*, 29CIV22-9 & 29CIV22-10; Plaintiffs' Motion to Consolidate Cases, Plaintiffs' Motion for Summary Judgment, and Defendants' Motion for Partial Summary Judgment

LETTER MEMORANDUM

Dear Counsel:

This matter has come before this Court by a Complaint filed on June 14, 2022. The Defendants filed a Counterclaim on May 31, 2023. The Plaintiffs filed a Motion to Consolidate cases 29CIV22-9 and 29CIV22-10, Motion to Amend and a Motion for Summary Judgment on October 6, 2023. Subsequently, Defendants each filed a Motion for Partial Summary Judgment. A Motion hearing was held on November 9, 2023. The following issues were addressed: (1) statute of limitations and fraudulent concealment, (2) laches, (3) fiduciary duty, (4) unjust enrichment (5) conversion, (6) failure to add an indispensable party, and (7) waiver and consent.

MOTION TO CONSOLIDATE: Granted in Court

MOTION TO AMEND: Granted in Court

1. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

FACTS

The land that is in dispute is family farmland that was owned by Desmond Van Zee and Patricia Van Zee, husband and wife, prior to Desmond's death in 1997. Desmond and Patricia are the parents of the parties to this suit. After Desmond's death, Craig Van Zee, the Plaintiff, took over management of the farm alongside Patricia. Theresa Van Zee and Michael Van Zee, Craig's siblings, did not help with the management of the disputed property.

In 2004, Patricia conveyed an interest in the disputed property to Theresa and Michael, the Defendant's. In 2010, Patricia conveyed her one-half interest in the disputed property to Craig, and Craig knew that the Defendant's had an interest in the property. Theresa received records from the Register of Deeds office three times in 2015 and once in 2019. Michael's son received records from the Register of Deeds office and allegedly gave those records to Michael in 2016.

Plaintiffs claim that Patricia created an estate plan that involved deeding away her land, subject to the condition that she received rental support income and that the family debts were paid. Plaintiffs further claim that they had an agreement with Patricia to manage the property, and to use the rental income from the property to support Patricia and to service the family debt. Theresa admits that she knew about her interest in the property long before 2020. She also admits that she knew that Craig had an interest in the property in early 2020, prior to Patricia's death in March 2021. Michael admits that he knew about his property when his mother told him

about it, prior to her death in 2021. Both parties admit that Patricia was using the rental income from the property to live on.

The Plaintiff's filed their Complaint on June 14, 2022, seeking to have the disputed property partitioned. Defendants filed their counterclaims against the Plaintiffs on May 31, 2023, alleging five counts regarding the disputed property. Plaintiffs now submit this Motion for Summary Judgment on the following issues.

Issue 1: Statute of limitations and Fraudulent Concealment

APPLICABLE LAW

South Dakota law provides for a six-year statute of limitations on Defendant's counterclaims. SDCL 15-2-13. For a counterclaim that seeks affirmative relief, the statute is tolled once the counterclaim is served. *Murray v. Mansheim*, 2010 S.D. 18, 779 N.W.2d 379, 383-384. "However, this statute of limitations will be tolled until the cause of action is discovered or might have been discovered, if there is fraudulent concealment of the cause of action." *Conway v. Conway*, 487 N.W.2d 21, 23(S.D. 1992). "If a trust or confidential relationship exists between the parties, which imposes a duty to disclose, mere silence by the one under the duty constitutes fraudulent concealment." *Id.*

"Fraudulent concealment applies not when an action remains merely undiscovered, but when actionable conduct or injury has been concealed by deceptive act or artifice." *Strassburg v. Citizens State Bank*, 581 N.W.2d 510 (S.D. 1998). "Without a confidential or fiduciary relationship, fraudulent concealment consists of some affirmative act or conduct on the part of the defendant designed to prevent, and which does prevent, the discovery of the cause of action." *Id.* The party claiming fraudulent concealment "must further show he nonetheless exercised

diligence to discover the cause of action.” *Id.* at ¶15. “Statute of limitations questions are usually jury questions.... [W]hen [Plaintiff] had actual or constructive knowledge of a claim, and whether he exercised diligence to discover his cause of action are issues of fact for the jury.” *Id.* at ¶ 19.

ANALYSIS

The Plaintiff argues that the six-year statute of limitations applies to Defendant’s counterclaim. Under this argument the Defendant’s counterclaim that was served on May 31, 2023, would toll the statute and all claims prior to May 31, 2017, would be time barred. The Defendant’s concede that there is a six-year statute of limitations; however, they argue that Plaintiffs fraudulently concealed relevant facts so the statute of limitations should be tolled.

When a defendant submits a counterclaim that seeks affirmative relief, South Dakota law is clear that there is a six-year statute of limitations that is tolled once the counterclaim is served. However, if there is fraudulent concealment of the cause of action, the statute will be tolled until the cause of action is discovered. Therefore, the issue here comes down to whether the Plaintiffs fraudulently concealed relevant facts. The Court finds that Plaintiffs did not owe Defendants a fiduciary duty here (see analysis under “Issue 3”). Therefore, for fraudulent concealment to exist here, the Plaintiffs must have engaged in an affirmative or deceptive act that prevented the Defendants from discovering this cause of action, and Defendant’s must show that they exercised diligence to discover the cause of action.

The Plaintiffs argue that they did not engage in affirmative or deceptive act because they had no contact with the Defendants until this litigation and the Defendants admit they had no dealings with the Plaintiffs concerning the disputed property. Conversely, Defendants argue that

the Plaintiffs were actively depositing the rental income into the farm account without Defendant's knowledge and did not provide the Defendants with any share of the income. The Plaintiffs were also managing the farm account in accordance with their agreement with their mother, rather than at the discretion of the Defendants. These facts are undisputed and therefore this issue is proper for summary judgment. This Court finds that the Plaintiffs act of managing the farm and farm account in accordance with the wishes of their mother does not rise to the level of an affirmative or deceptive act designed to prevent the Defendant's discovery of the cause of action.

Even if the Plaintiffs acts did rise to the level of an affirmative or deceptive act, to be successful on a claim of fraudulent concealment, South Dakota Law requires the Defendants to show that they exercised diligence to discover the cause of action. Defendants' ownership interests in the disputed property were a matter of public record as early as 2004. Defendants admitted that they knew about their property interests prior to their mother's death and knew that the disputed property was rented. The record shows that Theresa received several documents from the Register of Deeds office three times in 2015 and once in 2019, however, she denies that the content of those documents was regarding the disputed property. The Defendants could have, at any point, checked the public records for ownership information of the disputed property. At the very least, they could have reached out to their mother or the Plaintiffs and simply asked how the disputed property was being managed. The Court finds that the Defendants did not exercise diligence in discovering the cause of action.

Plaintiff's motion for summary judgment on the issue of statute of limitations and fraudulent concealment is GRANTED.

Issue 2: Laches

APPLICABLE LAW

To support a determination that laches bars an action, the following factors must be found: (1) the moving party had full knowledge of the facts upon which their action was based, (2) regardless of this knowledge, the moving party engaged in unreasonable delay before serving the counterclaim, and (3) allowing the moving party to maintain their counterclaim would prejudice the other parties. *Conway v. Conway*, 487 N.W. 2d, 21, 24 (S.D. 1992). "Laches does not depend upon the passage of time alone; plaintiff must be chargeable with lack of diligence in failing to proceed more promptly." *Id.* at 25. "In a case where at least part of the delay is attributable to defendant, or when defendant has engaged in concealment, misleading tactics and misrepresentation, laches is not available as a defense." *Id.*

ANALYSIS

Plaintiffs argue that the following factors prove the doctrine of laches bars the Defendants claims: (1) Defendants had full knowledge of the facts upon which their action was based, (2) regardless of this knowledge, Defendants engaged in unreasonable delay before serving the counterclaim, and (3) allowing Defendants to maintain their counterclaim would prejudice the Plaintiffs. Defendants contend that Plaintiffs are misstating the facts, and the record allegedly reveals that Defendants clearly did not have full knowledge of the facts until 2020.

Based on the facts, the Court finds that there is a genuine issue as to when the Defendants became fully aware of all the relevant facts in this case. There are conflicting statements in the depositions, statements of undisputed material facts, and affidavits of the parties. The receipts submitted with the affidavit of Suzy Wernsmann indicate Theresa received several pages of records from the Register of Deeds office in 2015 and 2019, however, the receipts do not affirm

what records Theresa was given. Michael's son allegedly received records from the Register of Deeds office and gave them to his dad, however, the Court cannot know for certain whether Michael ever received the property records for the disputed property. Full knowledge of the facts is a factor that must be proven for a claim of laches to be successful, and full knowledge has not been proven.

Further, the South Dakota Supreme Court has ruled that laches is not an available defense for a party who is part of the delay and who has engaged in concealment of the facts. The Plaintiffs have admitted that they never volunteered information regarding the disputed property to either of the Defendant's, despite having knowledge that they had an interest in the property dating back to 2010. Plaintiffs managed the land and were aware that Patricia planned to add the Defendant's name to the property. The Plaintiffs actions may not amount to concealment, but they were certainly part of the delay. The Court finds that summary judgment would not be appropriate on the issue of Laches.

Plaintiff's motion for summary judgment on the issue of laches is DENIED.

Issue 3: Fiduciary Duty

APPLICABLE LAW

"Although strictly speaking a fiduciary relationship does not exist between tenants in common by reason of the mere fact that they are such, a relationship of trust and confidence exists to the extent that each co-tenant has a duty to sustain or at least not to assail, the common interest or title, and one co-tenant will not be permitted to obtain a secret profit to the disadvantage of the other co-tenants where all must act in unison." *Id.* at 24. However, the Supreme Court held most recently, "[f]iduciary duties arise only when one undertakes to act

primarily for another's benefit. The law will imply such duties only where one party to a relationship is unable to fully protect its interests and the unprotected party has placed its trust and confidence in the other." *Estate of Thacker v. Timm*, 2023 S.D. 2, 984 N.W.2d 679, 686 (citing *Ward v. Lange*, 1996 S.D. 113, ¶12, 553 N.W.2d 246, 250).

"While there is no invariable rule for determining whether a fiduciary relationship exists, there must be not only confidence of the one in the other, but there must exist a certain inequality, dependence, weakness of age, mental strength, business intelligence, knowledge of the facts involved, or other conditions giving to one advantage over the other." *Id.* at 687. "The existence and scope of a fiduciary duty are questions of law. Whether a breach of fiduciary duty occurred, however, is a question of fact."

"An implied trust is generally remedial in nature and is an equitable tool used to restore the status quo and to protect assets wrongfully obtained." *Johnson v. Markve*, 2022 S.D. 57, ¶ 74, 980 N.W.2d 662, 680-81. "To impose a constructive trust, the wrongful act must be proven by clear and convincing evidence, and must show: (1) the constructive trustee gained; (2) that gain was by fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act; (3) the constructive trustee has no superior right to the thing gained; and (4) the party seeking the constructive trust would have otherwise had the thing gained." *Id.*

ANALYSIS

The Plaintiffs argue that they did not owe a fiduciary duty to the Defendants because the Defendants are fully able to protect their own interests, and they did not place their trust and confidence in the Plaintiffs. The Defendants contend that the Plaintiffs are the trustees of a

constructive trust that was created when they withheld income that was owed to the Defendants, and therefore owe a fiduciary duty to Defendants.

This Court first considers whether a constructive trust exists. As stated by the South Dakota Supreme Court, the necessary factors to determine that a constructive trust exists are as follows: Plaintiffs have "gained;" that gain was by fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act; the Plaintiffs have no superior right to the gain; and the Defendants would have otherwise had the thing gain. The Plaintiffs were given an interest in the property by a proper transfer of ownership, they managed the property, they paid the real estate taxes, they paid the family debt with the income from the property, and they paid Patricia's living expenses with the rental income. These facts do not prove by clear and convincing evidence that the Plaintiffs gained anything by wrongful act. The Court finds that a constructive trust has not been created based on the facts.

The issue then becomes whether Plaintiffs owed Defendants a fiduciary duty. The Supreme Court has ruled that a fiduciary duty is only implied where one party is unable to protect themselves and the unprotected party placed its trust and confidence in the other. The facts here show that the Defendants were both aware of their interests in the disputed property prior to Patricia's death in 2021. Theresa admitted to being aware of the Plaintiffs ownership in the property in early 2020. The Defendants were fully capable of protecting their interest in the property. The record shows that the parties did not communicate prior to this action, therefore the Defendants did not place their trust and confidence in the Plaintiff. The Court finds that the Plaintiffs did not owe a fiduciary duty to the Defendants.

Plaintiff's motion for summary judgment on the issue of fiduciary duty is GRANTED.

Issue 4: Unjust Enrichment

APPLICABLE LAW

"To prevail on a claim for unjust enrichment, [Plaintiff] was required to prove the [Defendant] received a benefit, [Defendant] was aware he was receiving a benefit, and it would be inequitable to allow [Defendant] to retain the benefit without paying for it." *Johnson v. Larson*, 210 S.D. 20, 779 N.W.2d 412.

ANALYSIS

The Plaintiffs argue that they did not receive a benefit or an unjust benefit from the agreement with their mother concerning the disputed property. The Defendants argue that because the Plaintiffs were depositing all rental income received from the disputed property into a family farm account and Defendants were not receiving any of the rental income, the Plaintiffs were receiving a benefit to the detriment of the Defendants.

The undisputed facts here show that Plaintiffs had an agreement with their mother to manage the entire property, pay annual rent to support the parties' mother, and service the parties' father's debt. It is also undisputed that the Plaintiffs controlled how the rental income was distributed, the Defendants did not receive any portion of the income, and the Defendants did not assist with the management of the property or the servicing of debt.

To be successful on a claim for unjust enrichment, all three elements above must be proven. The Court recognizes that all of the rental income from the disputed property was deposited into the family farm account and Plaintiffs used the rental income to support their mother and service their father's debt; however, without more information regarding how the leftover funds were spent, the Court cannot determine whether the Plaintiffs received a benefit.

The parties are in dispute as to whether the Defendants knew and acquiesced to the Plaintiffs management of the property and whether the Defendants consented to the rental income being used for supporting their mother and servicing the family debt. Additionally, the parties' mother died in 2021 and therefore the Plaintiffs presumably have no longer been paying for her support since her death. There are material facts here that are in dispute, and therefore this issue is not proper for summary judgment.

Plaintiff's motion for summary judgment on the issue of unjust enrichment is DENIED.

Issue 5: Conversion

APPLICABLE LAW

"Conversion is the unauthorized exercise of control or dominion over personal property in a way that repudiates an owner's right in the property or is in some manner inconsistent with such right." *Western Consolidate Co-op v. Pew*, 2011 S.D. 9, 795 N.W.2d 390, 396. To be successful on a claim of conversion, there must be "an unwarranted interference by Defendant with the dominion over the property over the Plaintiff." *Id.* In order to prove conversion, the plaintiff must show: "(1) [plaintiff] owned or had a possessory interest in the property; (2) [plaintiff's] interest in the property was greater than the [defendant's]; (3) [defendant] exercised dominion or control over or seriously interfered with [plaintiff's] interest in the property; and (4) such conduct deprived [plaintiff] of its interest in the property. *Id.* (citing *First Am. Bank & Trust, N.A.*, 2008 S.D. 83, ¶ 38, 756 N.W.2d at 31.)

ANALYSIS

The Plaintiffs argue that summary judgment on the issue of conversion should be granted in their favor because their use of the rental income was not an unwarranted interference, based

upon the knowledge and conduct by the Defendants. The Defendants argue that they had no knowledge regarding the Plaintiffs management of the property, and the Plaintiffs argument regarding the family debt and providing their mother income are irrelevant issues.

This issue is not suitable for summary judgment, because there is dispute as to whether the Defendants knew about and acquiesced to the rental income being used to support their mother and service the family debt. The Court finds that the rental income being used to service the debt and provide their mother income is relevant. If the Defendants knew and allowed the rental income to be distributed to their mother and service the debt, then a claim of conversion will be unsuccessful as there would be no unwarranted interference by Defendant.

Plaintiffs motion for summary judgment on the issue of conversion is DENIED.

Issue 6: Failure to Add an Indispensable Party

APPLICABLE LAW

The factors that a court should consider in determining whether a party is indispensable include: "first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

ANALYSIS

Here, joining the parties' mother would have certainly helped clear up some of the disputed facts, however that is not possible in this case. First, the party exposed to potential prejudice from a judgment in absence of their mother are the Plaintiffs. The Plaintiffs have stated that their mother would have been able to provide the Court with facts regarding when the Defendants knew about their interest in the disputed property and the details of the agreement between the Plaintiffs and herself. However, the Court believes that any prejudice that the Plaintiffs would suffer can be lessened or avoided by shaping relief or other measures around the undisputed facts. Additionally, the Court believes that it has the ability to reach an adequate remedy in the absence of the mother.

Plaintiff's motion for summary judgment on the issue of an Indispensable party is DENIED.

Issue 7: Waiver and Consent*APPLICABLE LAW*

"The requirements to show waiver are that a person in possession of a right, with full knowledge of the material facts, does or forebears the doing of something that is inconsistent with the existence of the right and their intention to rely upon it." *Wehrkamp v. Wehrkamp*, 2009 S.D. 84, 773 N.W. 2d 212, 215. Additionally, the waiver must be a clear, unequivocal, and decisive act. *Oxton v. Rudland*, 2017 S.D. 35, 897 N.W.2d 356.

ANALYSIS

The Plaintiffs argue that the Defendants consented and/or waived their right to obtain the rent while the Plaintiff was supporting their mother and servicing the debt that their father had accumulated. The Defendants argue that they were unaware of many material facts and therefore did not consent or waive their rights to the rental income.

It is undisputed that the Defendants had a right to the disputed property. It is also undisputed that at some point, the Defendants became aware that they had a property interest in the disputed property. However, there is dispute as to whether the Defendants knew that they were joint owners of the property with the Plaintiffs, rather than their mother. The Plaintiffs also argue that they did not know that the Plaintiffs were collecting rental income, depositing it into the family farm account, and were in charge of how it was distributed. To succeed on a defense of waiver, the Plaintiffs must prove that the Defendants waiver was clear, unequivocal, and decisive. None of the facts indicate that the Plaintiffs received a clear, unequivocal, or decisive wavier from the Defendants. In fact, both parties admitted that they didn't speak until this litigation.

Plaintiff's motion for summary judgment on the issue of waiver and consent is DENIED.

2. DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Issue 1: Statute of Limitations

Based upon the above analysis in issue 1, Defendant's motion for partial summary judgment on the issue of statute of limitations is DENIED.

Issue 2: Constructive Trust

Based upon the above analysis in issue 3, Defendant's motion for partial summary judgment on the issue of a constructive trust is DENIED.

Issue 3: Fiduciary Duty

Based upon the above analysis in issue 3, Defendant's motion for partial summary judgment on the issue of fiduciary duty is DENIED.

Issue 4: Conversion

Based upon the above analysis in issue 5, Defendant's motion for partial summary judgment on the issue of conversion is DENIED.

BY THE COURT:

____ Kent A Shelton ____
Hon. Kent A. Shelton
Circuit Judge, Third Judicial Circuit

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:ss	
COUNTY OF HAND	)	THIRD JUDICIAL CIRCUIT

CRAIG AND PAMELA VAN ZEE,

Plaintiffs,

v.

THERESA VAN ZEE and
MICHAEL D. VAN ZEE,

Defendants.

29CIV. 22-9

ORDER ON MOTIONS FOR
SUMMARY JUDGMENT

The Plaintiffs and the Defendants having filed cross Motions for Summary Judgment on various issues, and those Motions having come for hearing before the Honorable Kent A. Shelton on the 7th day of November, 2023 at 10:30 a.m., and the parties having appeared and argued those motions before the Court, it is hereby

ORDERED, ADJUDGED, and DECREED that the Plaintiffs' Motion for Summary Judgment with respect to the statute of limitations is granted and all claims asserted by the Defendants from prior to May 31, 2017, are hereby barred; it is further

ORDERED, ADJUDGED, and DECREED that there is no fraudulent concealment; it is further

ORDERED, ADJUDGED, and DECREED that the Plaintiffs' Motion for Summary Judgment on the defense of laches is denied; it is further

ORDERED, ADJUDGED, and DECREED that the Court finds that the Plaintiffs owed no fiduciary duty to the Defendants; it is further

ORDERED, ADJUDGED, and DECREED that the Plaintiffs' Motion for Summary Judgment on the claim of unjust enrichment is denied; it is further

ORDERED, ADJUDGED, and DECREED that the Plaintiffs' Motion for Summary Judgment on conversion, failure to add an indispensable party, waiver, and consent are denied; it is further

ORDERED, ADJUDGED, and DECREED that the Defendants' Motion that the statute of limitations is tolled based upon fraudulent concealment is denied; it is further

ORDERED, ADJUDGED, and DECREED that no constructive trust was created, and the claim for summary judgment based upon the constructive trust is denied; it is further

ORDERED, ADJUDGED, and DECREED that the Defendants' Motion for Summary Judgment based upon fiduciary duty and conversion are denied; it is further

ORDERED, ADJUDGED, and DECREED that the Court's Letter of Memorandum dated November 13, 2023, is incorporated herein by this reference.

11/14/2023 1:51:31 PM

BY THE COURT:

Attest:
Bertsch, Marla
Clerk/Deputy





Honorable Kent A. Shelton
Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:ss	
COUNTY OF HAND	)	THIRD JUDICIAL CIRCUIT

CRAIG AND PAMELA VAN ZEE,	)	29CIV. 22-9
)	
Plaintiffs,)	
)	
v.	)	ORDER ON PRETRIAL MOTIONS
	)	AND MOTIONS IN LIMINE
THERESA VAN ZEE and)	
MICHAEL D. VAN ZEE,)	
)	
Defendants.)	

The Plaintiffs and the Defendants having filed cross Pretrial Motions and Motions in Limine on various issues, and those Motions having come for hearing before the Honorable Kent A. Shelton on the 5th day of December, 2023 at 3:00 p.m., and the parties having appeared and argued those motions before the Court, it is hereby

ORDERED, ADJUDGED, and DECREED that the Plaintiffs' Motion excluding the testimony regarding rental income from property Craig and Pamela Van Ze did not receive from his mother, Patricia Van Zee is granted; it is further

ORDERED, ADJUDGED, and DECREED that the whole story regarding Desmond Van Zee's debt, the agreement between Craig Van Zee and Patricia Van Zee and all Craig and Pamela Van Zee's actions from 1999 forward being presented to the jury is granted; it is further

ORDERED, ADJUDGED, and DECREED that the Plaintiffs' Motion for no double recovery is granted; it is further

ORDERED, ADJUDGED, and DECREED that the Plaintiffs' Motion for a Special Verdict Form is denied and a general verdict form will be used; it is further

ORDERED, ADJUDGED, and DECREED that the Plaintiffs' and Defendants' Motions for Sequestration is granted; it is further

ORDERED, ADJUDGED, and DECREED that the Plaintiffs' and Defendants' Motions to exclude any testimony regarding settlement negotiations, communications, discussions or offers is granted; it is further

ORDERED, ADJUDGED, and DECREED that the Plaintiffs' Motion to prohibit any exhibits in opening statements is granted; it is further

ORDERED, ADJUDGED, and DECREED that the Defendants' Motion enjoining any undisclosed witnesses or documents to support their defenses is granted with the exception of rebuttal witnesses or exhibits is granted; it is further

ORDERED, ADJUDGED, and DECREED that the Defendants' Motion enjoining the jurors to put themselves in the place of Craig Van Zee is granted; it is further

ORDERED, ADJUDGED, and DECREED that the Defendants' Motion enjoining the testimony or evidence related to Craig Van Zee's agreement with Patricia Van Zee is denied; it is further

ORDERED, ADJUDGED and DECREED that the Defendants' Motion enjoining the testimony or evidence related to Desmon Van Zee's debt is denied.

12/7/2023 8:32:46 AM

BY THE COURT:

Attest:
Bertsch, Marla
Clerk/Deputy




Honorable Kent A. Shelton
Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:86	
COUNTY OF HAND	)	THIRD JUDICIAL CIRCUIT

CRAIG AND PAMELA VAN ZEE,	)	29CIV. 22-9
)	
Plaintiffs,)	
)	
v.	)	JUDGMENT
)	
THERESA VAN ZEE and)	
MICHAEL D. VAN ZEE,)	
)	
Defendants.)	

The above entitled matter having come before a jury in Hand County, South Dakota on the 14th day of December, 2023 and the jury having returned a verdict on December 15, 2023, and the Plaintiffs, Craig and Pamela Van Zee having been represented by Lee Schoenbeck, and the Defendants, Michael Van Zee and Theresa Van Zee having been represented by Ryan Vogel and the jury having returned a verdict to the Honorable Kent A. Shelton, the Court does now hereby

ORDERED, ADJUDGED, AND DECREED that based upon the jury verdict, that judgment be entered for Michael Van Zee in the amount of \$38,052, with interest accruing at ten percent per annum from December 14, 2023; it is further

ORDERED, ADJUDGED, AND DECREED that a judgment be entered for Theresa Van Zee in the amount of \$38,052 with interest accruing at ten percent per annum from December 14, 2023.

12/22/2023 8:25:17 AM

BY THE COURT:

Attest:
Bertsch, Maria
Clerk/Deputy



Hon. Kent A. Shelton
Circuit Court Judge

STATE OF SOUTH DAKOTA)
 :SS
 COUNTY OF HAND)

IN CIRCUIT COURT
 THIRD JUDICIAL CIRCUIT

CRAIG AND PAMELA VAN ZEE,

Plaintiffs,

v.

THERESA VAN ZEE,

Defendant.

29CIV. 22-9

PLAINTIFFS' STATEMENT OF
 UNDISPUTED MATERIAL FACTS

Plaintiffs Craig Van Zee and Pamela Van Zee respectfully submit this *Plaintiffs' Statement of Undisputed Material Facts* in support of *Plaintiffs' Motion for Summary Judgment*. Exhibits referenced herein are attached to the *Affidavit of Lee Schoenbeck* filed in support of *Plaintiffs' Motion for Summary Judgment*.

1. Desmond Van Zee, the father of the parties of the Van Zee children in this litigation, died on January 27, 1997. (Affidavit of Craig Van Zee.)
2. At the time of Desmond Van Zee's death, he had a divorce pending with his wife, Patricia Van Zee, in which Desmond alleged that during the parties' marriage they had incurred "substantial liabilities." (Divorce *Answer and Counterclaim*, REDIGER 93-95.)
3. According to Attorney Rediger's handwritten notes, Desmond had debts of \$198,220 and liquid assets of \$16,454. (Atty. Rediger's Notes, PL 93.)
4. Desmond was being foreclosed on. (Craig's Depo. p. 36.)
5. After Desmond died, Craig took on all of the farm work, pledged his property for his parents' debt, and signed mortgages that included his property. (Mortgage 6/17/2002 PL 320-324.)

6. Patricia wanted all the land kept together to help pay Desmond's debt.
(Craig's Depo. p. 34.)
7. On June 3, 2010, Patricia, Craig, and Pam signed a mortgage for Frontier Bank, formally known as Pender State Bank. (Mortgage 06/03/2010 PL 344-356.)
8. On June 9, 2010, the original loan amount for Desmond's debt was down to \$375,000 and owed by Patricia, and now Craig and Pam. (Loan Status, Depo. Ex. 9; Craig's Depo. p. 47.)
9. The original lender after Desmond died wanted Patricia and Craig to sell some of the quarters. (Craig's Depo. p. 48.)
10. On June 30, 2004, Patricia Van Zee conveyed the home place to Patricia, Craig, and Craig's wife, Pam. (Warranty Deed, Depo. Ex. 5.)
11. On September 16, 2004, Patricia conveyed a quarter and an 80 in Section 21 into joint tenancy with herself and her son, Michael. (Warranty Deed, Depo. Ex. 6A.)
12. On September 16, 2004, Patricia conveyed a quarter and an 80 in Section 21 into joint tenancy with herself and her daughter, Theresa. (Warranty Deed, Depo. Ex. 6B.)
13. In October 2004, Northstar Farms leased the Section 21 property at issue in this litigation, and the lease was signed by Patricia and her son, Craig.
(Northstar Lease, PL 1-3)
14. June 7, 2010, Patricia conveyed her undivided one-half interest in the quarter and 80, the subject of this litigation with Michael, to Craig. (Warranty Deed, Depo. Exs. 6E & 6F.)

15. June 7, 2010, Patricia conveyed her undivided one-half interest in the quarter and 80, the subject of this litigation with Theresa, to Craig. (Warranty Deed, Depo. Exs. 6C & 6D.)
16. In October 2012, Kirby Odde leased all the Van Zee property, including the property subject to this litigation, and the lease was for five years. The lease was executed by Patricia Van Zee and Craig Van Zee. (Odde Lease, Depo. Ex. 11.)
17. At the time Odde Lease, Depo. Ex. 11, was executed, Patricia Van Zee had no interest in the property that is subject to this litigation. (Odde Lease, Depo. Ex. 11.)
18. On May 22, 2013, Patricia quit claimed her interest in real property in Sections 1, 13, and 14 to Craig and his wife, Pam. (Quit Claim Deed, Depo. Ex. 7.)
19. On July 10, 2013, Patricia quit claimed her interest in real property in Section 13 Craig and his wife, Pam Van Zee. (Quit Claim Deed, Depo. Ex. 8.)
20. On December 31, 2013, Patricia listed \$14,000 of rent on her tax return. (2013 Tax Return, PL 21-26.)
21. On December 31, 2014, Patricia listed \$16,000 of rent on her tax return. (2014 Tax Return, PL 27-32.)
22. In March and April 2015, Theresa called the Register of Deeds and had five pages sent to her in Iowa. (Theresa Depo. pp. 17-18.) (See Affidavit of Suzy Wernsmann.)

23. On August 25, 2015, Craig conveyed his one-half interest in the property that he owned that is subject to this litigation, into joint tenancy with his wife, Pam. (Quit Claim Deed, Depo. Exs. 6G & 6H.)
24. On December 31, 2015, Patricia listed \$16,000 of rent on her tax return. (2015 Tax Return, PL 33-38.)
25. On October 18, 2016, Brady Van Zee, Michael's son, had the Hand County Register of Deeds find all the real property with Michael's name on it and provide him copies of the deeds. (Receipt, Depo. Ex. 2.) (Affidavit of Suzy Wernsmann¹.)
26. When Brady got copies of deeds with his dad's name on them, he testified that he probably gave them to his dad, Michael. (Brady Depo. p.10.)
27. On December 31, 2016, Patricia listed \$16,000.00 of rent on her tax return. (2016 Tax Return, PL 39-44.)
28. On December 31, 2017, Patricia listed \$16,000 of rent on her tax return. (2017 Tax Return, PL 45-50.)
29. Sometime in 2018, Theresa said that she talked to Michael about the deeds at some time two years before Patricia died. (Theresa's Depo. pp. 20-21.)
30. On December 31, 2018, Patricia listed \$17,000 of rent on her tax return. (2018 Tax Return, PL 51-56.)
31. On July 18, 2019, Theresa got seven pages of records from the Hand County Register of Deeds Office. (See Affidavit of Suzy Wernsmann.)

¹ "Affidavit of Suzy Wernsmann" is a reference to the Affidavit filed in the corresponding case: *Craig and Pamela Van Zee v. Michael Van Zee*, 29CIV22-10

32. On December 31, 2019, Patricia listed \$15,899 of rent on her tax return. (2019 Tax Return, PL 57-63.)
33. By 2020, Theresa admitted that she knew that her name was on the land. (Theresa's Depo. pp. 15, 18.)
34. Theresa admitted that she had seen the Warranty Deed that put her name on the land, Depo. Ex. 1, "a long time ago" before 2020. (Theresa's Depo. pp. 15, 18.)
35. Theresa knew that Desmond had debt when he died and had seen a bankruptcy attorney. She doesn't know how it was sorted out, she didn't help, and she doesn't know what Craig did about the debt. (Theresa's Depo. p. 19.)
36. Theresa put a copy of the deed, where Michael got the land that is subject to litigation, in Michael's pickup. (Theresa's Depo. p. 20.)
37. Theresa didn't do anything about paying real estate taxes or managing the farm once she knew her name was on the deed. (Theresa's Depo. p. 24.)
38. December 31, 2020, Patricia listed \$16,000 of rent on her tax return. (2020 Tax Return, PL 64-73.)
39. March 20, 2021, Michael signed a divorce settlement with his wife and doesn't list an interest in ag land as an asset in his divorce. (*Divorce Property and Martial Settlement Agreement*, PL 425-430.)
40. On March 26, 2021, Patricia died. (Affidavit of Craig Van Zee.)
41. Michael admitted that he knew while his mom was alive what land she put his name on. (Michael's Depo. pp. 7-9.)

42. Rent Patricia received, which was reported on her tax returns, was rent paid by Craig, even though Patricia had no land to rent after July 10, 2013. (See Affidavit of Craig Van Zee.)
43. Michael assumed Craig was taking care of the farm debt. (Michael's Depo. p. 12.)
44. Michael brought up rent with his mom while she was alive. (Michael's Depo. p. 16.)
45. Michael didn't do anything to assist with the land. (Michael's Depo. p. 9.)
46. Michael learned from his sister that his name was on the land. (Michael's Depo. p. 11.)
47. Theresa talked to a lawyer after she saw the deeds but chose not to follow up with it. (Theresa's Depo. pp. 21-23.)
48. Theresa knew her mom was renting out the farm ground. (Theresa's Depo. pp. 29, 33.)
49. Craig and Theresa didn't talk. (Theresa's Depo. pp. 32-33.)
50. Craig and Michael didn't talk (Michael's Depo. pp. 13, 17-18.)
51. Theresa talked to her mom about why Theresa was not on the land. (Theresa's Depo. p. 18.)
52. Theresa was told by her mom that Craig's name was on the land because their dad had debt (Theresa's Depo. p. 18.)
53. Theresa did not ask her mom for Theresa's share of the rent money. (Theresa's Depo. p. 32.)
54. Michael was told by his mom that his name was on the land. (Michael's Depo. p. 7.)

55. Michael didn't ask for rent because he knew his mom needed the money to make payments on the debts. (Michael's Depo. pp. 8-9.)
56. The current balance on Desmond Van Zee's debt that Craig is paying is \$186,409.72. (Loan Status, Depo. Ex. 9.)
57. Patricia cried to Pam about Theresa and Michael confronting Patricia concerning land that Theresa and Michael received. (Plaintiffs' First Supplemental Answers to Defendant's Interrogatories, No. 12.)

DATED: This 6th day of October, 2023.

SCHOENBECK & ERICKSON, P.C.

By: /s/ Lee Schoenbeck
LEE SCHOENBECK
JOE ERICKSON
Attorneys for Plaintiffs
1200 Mickelson Dr., STE. 310
Watertown, SD 57201
(605) 886-0010

STATE OF SOUTH DAKOTA)
 : SS.
 COUNTY OF HAND)

IN CIRCUIT COURT
 THIRD JUDICIAL CIRCUIT

CRAIG VAN ZEE AND PAMELA
 VAN ZEE,

Plaintiffs,

-VS-

THERESA VAN ZEE,

Defendant.

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29CIV22-009

**DEFENDANT'S STATEMENT OF
 UNDISPUTED MATERIAL FACTS**

Pursuant to SDCL 15-6-56(c), Defendant Theresa Van Zee, submits the following Statement of Undisputed Material Facts in support of his motion for partial summary judgment.

1. Desmond Van Zee ("Desmond") and Patricia Van Zee ("Patricia"), husband and wife, owned farm land in Hand County, South Dakota. (Depo. Craig Van Zee, 24:6-8).
2. Desmond passed away in 1997, and all the farmland owned by Desmond, Patricia, or jointly, was transferred to Patricia. (Depo. Craig, 24:3-19; 22:7-8).
3. Around 2004, Patricia and her son Craig consulted with attorney Jim Jones in Miller, South Dakota, to draft a deed ("Deed 1") transferring approximately 920 acres of land from Patricia to Patricia, Craig, and Craig's wife Pamela Van Zee ("Pamela") as joint tenants with rights of survivorship. (Depo. Craig, 24:15-25; 25:1-10). The legal descriptions of the transferred parcels are as follows:

The North Half of the Northwest Quarter (N ½ NW ¼) of Section One, the West ½ of the East Half of the Northwest Quarter (W ½ E ½ N ¼), and the Southwest Quarter (SW ¼) of Section Thirteen (13); the Northeast Quarter (NE ¼) and the South Half (S ½) of Section Fourteen (14); and the Northwest Quarter (NW ¼) of Section Twenty-nine (29); all located in Township One Hundred Fifteen (115) North, Range Sixty-seven (67), West of the 5th P.M.

(the "Homeplace") (Vogel Aff. ¶2, Ex. A).

4. Deed 1 was executed on June 30, 2004. (Id.)
5. Before Deed 1 was executed, Patricia indicated to Craig that she was going to transfer some real property to herself and Michael and Theresa. (Depo. Craig, 27:13-23).
6. The property subject to this litigation consists of approximately 240 acres and is described as follows:

The South Half of the Southwest Quarter (S ½ SW ¼) of the Southeast Quarter (SE ¼) of Section Twenty-one (21), Township One Hundred Fourteen (114) North, Range Sixty-nine (69), West of the 5th P.M.

("Subject Property") (Vogel Aff. ¶2, Ex. C).

7. On September 16, 2004, Patricia transferred the Subject Property to herself and Theresa as joint tenants with rights of survivorship ("Deed 3"). (Id.)
8. That same day, September 16, 2004, Patricia transferred approximately 240 acres from herself, to herself and Michael as joint tenants with rights of survivorship ("Deed 2"), with a legal description as follows:

The Northwest Quarter (NW ¼) and the North Half of the Southwest Quarter (N ½ SW ¼) of Section Twenty-one (21), Township One Hundred Fourteen (114) North, Range Sixty-nine (69), West of the 5th P.M.

("Michael Property") (Vogel Aff. ¶2, Ex. B).

9. Since at least 2004, Craig has been aware that Patricia planned to transfer land to herself and Michael and to herself and Theresa. (Depo. Craig, 29:20-25; 30:1-10; 30:19-23).
10. On June 7, 2010, Patricia transferred her undivided one-half interest in the Subject Property ("Deed 4") to Craig. (Vogel Aff. ¶2, Ex. D).
11. On June 7, 2010, Patricia transferred her undivided one-half interest in the Michael Property ("Deed 5") to Craig. (Vogel Aff. ¶2, Ex. E).
12. By virtue of Deeds 3 and 4, Theresa and Craig each owned an undivided one-half interest in the Subject Property. (Vogel Aff. ¶2, Exs. C and D).

13. By virtue of Deeds 2 and 5, Michael and Craig each owned an undivided one-half interest in the Michael Property. (Depo. Craig, 31:4-11) (Vogel Aff. ¶2, Exs. B and E).
14. When Deed 4 and 5 were executed, Craig was aware that he now owned the Subject Property with Theresa and the Michael Property with Michael respectively. (Depo. Craig, 31:24-25; 32:1-3; 33:13-15).
15. On August 25, 2015, Craig transferred his undivided one-half interest in the Michael Property and the Subject Property to himself and Pamela ("Deed 6"). (Depo. Craig, 37:14-25; 38:1-24) (Vogel Aff. ¶2, Ex. F).
16. On May 22, 2013, Patricia, via quitclaim deed ("Deed 7"), deeded all of her interest in the Homeplace to Craig and Pamela. (Depo. Craig, 39: 13-25; 40: 1-25). (Vogel Aff. ¶2, Ex. G).
17. On July 10, 2013, Patricia, having previously overlooked a parcel of the Homeplace, transferred via quitclaim deed ("Deed 8") to Craig and Pamela:

**The West Half of the northwest Quarter (W ½ NW ¼) of
Section Thirteen (13) in Township One Hundred Fifteen
(115) North, Range Sixty-seven (67), West of the 5th P.M.**

(considered as a part of the "Homeplace") (Depo. Craig, 43:5-10, 11-24)
(Vogel Aff. ¶2, Ex. H).

18. After Patricia executed Deed 8, she no longer owned any interest in the Homeplace, the Subject Property, or The Michael Property. (See all deeds)
19. During his life, Desmond acquired debt. (Depo. Craig, 50:16-21).
20. Desmond's debt is not and was not associated with the Subject Property. (Depo. Craig, 60: 10-18).
21. Craig has never asked Michael or Theresa to help pay Desmond's debt. (Depo. Craig, 62:16-19).
22. The Subject Property is not subject to any liens or mortgages, only the Homeplace is. (Depo. Craig, 35:7-21).
23. The Subject Property was never at risk for foreclosure. (Depo. Craig, 35:7-21).

24. For farming years 2008-2012, Craig cannot locate a copy of the lease with L&O Acres. (Depo. Craig, 70:11-14).
25. The rental income for the 2008-2012 lease was deposited into the Van Zee farm account. (Depo. Craig, 71: 12-14).
26. The 2008-2012 lease was never discussed with Michael or Theresa. (Depo. Craig, 71:15-20).
27. For farming years 2012-2017, Craig and Patricia leased property, including the Michael Property, to Kirby Odde. (Depo. Craig, 72:5-10) (Vogel Aff. ¶2, Ex. D).
28. The 2012-2017 lease contains a signature line for Craig, Patricia, Kirby Odde, and two witnesses. (Depo. Craig, 72:11-15) (Vogel Aff. ¶2, Ex. D).
29. The 2012-2017 lease does not have a signature line for Michael or Theresa. (Depo. Craig, 72:16-17) (Vogel Aff. ¶2, Ex. D).
30. Craig was a part of the negotiations for the 2012-2017 lease (Depo. Craig, 73:12-18).
31. The rental income for the 2012-2017 lease was deposited in the Van Zee farm account. (Depo. Craig, 73:12-18).
32. Craig never told Michael or Theresa about the lease, the rental income, nor did he provide them with their portion. (Depo. Craig, 73:19-25).
33. For farming years 2018-2020, Craig rented the Michael Property to Kirby Odde. (Depo. Craig, 74:7-13; 22-23) (Vogel Aff. ¶2, Ex. J).
34. The rental amount for farming years 2018-2020 was deposited into the Van Zee farm account, none of which was provided to Michael or Theresa. (Depo. Craig, 74: 19-21; 76:3-5) (Vogel Aff. ¶2, Ex. J).
35. Patricia never signed the 2018-2020 lease. (Depo. Craig, 75: 8-16) (Vogel Aff. ¶2, Ex. J).
36. Neither Michael nor Theresa signed the 2018-2020 lease. (Depo. Craig, 75: 20-24) (Vogel Aff. ¶2, Ex. J).
37. For farm season of 2021, Craig executed a lease with Odde Farms. (Depo. Craig, 15-18) (Vogel Aff. ¶2, Ex. K).

38. Craig negotiated the lease, signed the lease, received the rental income, and deposited the same into the Van Zee farm account. (Depo, Craig, 78:2-25; 79:1-3) (Vogel Aff. ¶2, Ex. K).
39. Patricia did not sign the 2021 lease. (Vogel Aff. ¶2, Ex. K).
40. Craig did not inform Michael or Theresa of the 2021 lease or provide either of them their share of the income (Depo. Craig, 79:20-24; 80:3-5).
41. The current lease spans from 2020-2024 and was executed by Craig and Odde Farms. (Vogel Aff. ¶2, Ex. L).
42. Craig did not inform Michael or Theresa of the 2022-2024 lease. (Depo. Craig, 81:19-25; 82:1-6).
43. Craig has not provided Michael or Theresa any income from the 2022-2024 lease. (Depo. Craig, 81:19-25; 82:1-6).
44. All of the previously discussed leases included the Subject Property, the Michael Property, and other land owned by Craig and Pamela. (See all leases and deeds)
45. The total principal amount of rental income owed to Theresa for years 2012-2023 is \$223,821.48. (Vogel Aff. ¶2, Exs. I-M).
46. Craig has never asked Michael or Theresa to pay the taxes associated with the Subject Property or the Michael Property. (Depo. Craig, 67:5-7, 11-13).
47. Craig has never asked Michael or Theresa to assist with repairs or landscaping on the Subject Property or the Michael Property. (Depo. Craig, 65:4-25; 66:1-25; 67:1-4).
48. Craig assuming his father's debt was an "agreement" only between Craig and Patricia. (Depo. Craig, 86: 20-24).
49. Craig is unsure of the exact terms of the agreement between him and Patricia. (Depo. Craig, 87:10-14).
50. Instead of providing Michael and Theresa with their share, Craig kept the money in the account as "backup." (Depo. Craig, 87:17-21).
51. Even though Patricia's name is on the Van Zee farm account, she never wrote any checks from the account or deposited any funds into the account. (Depo. Craig, 79:4-19).

Dated this 12th day of October, 2023.

RICHARDSON, WYLY, WISE, SAUCK
& HIEB, LLP

By /s/ Ryan S. Vogel
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STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	ss:	
COUNTY OF HAND)	THIRD JUDICIAL CIRCUIT

CRAIG AND PAMELA VAN ZEE,)	
)	
Plaintiff,	)	29CIV22-9
)	
vs.	)	PLAINTIFFS'
	)	ADDITIONAL UNDISPUTED
	)	MATERIAL FACTS AND
THERESA VAN ZEE,	)	PLAINTIFFS' RESPONSE TO
	)	DEFENDANT'S STATEMENT OF
Defendant.	)	UNDISPUTED MATERIAL FACTS
)	

COMES NOW Plaintiffs, by and through their attorneys, Joe Erickson and Lee Schoenbeck, and submit this response and submit these Additional Statements of Undisputed Material Facts to *Defendant's Statement of Undisputed Material Facts in Support of Motion for Partial Summary Judgment*.

ADDITIONAL UNDISPUTED MATERIAL FACTS¹

- 48. Theresa knew her mother was renting out the farm ground (Theresa's depo pp. 29 & 33.)
- 53. Theresa did not ask her mom for Theresa's share of the rent money (Theresa's depo pp. 32.)
- 52. Theresa was told by her mom that Craig's name was on the land because their dad had debt (Theresa's Depo. p. 18.)

¹ These Additional Material Facts and the documents cited for each are from the Plaintiffs' Statement of Undisputed Material Facts filed in support of Plaintiffs' Motion for Summary Judgment currently pending before this Court.

3. According to Attorney Rediger's handwritten notes, Desmond had debts of \$198,220 and liquid assets of \$16,454. (Atty. Rediger's Notes, PL 93.)
4. Desmond was being foreclosed on. (Craig's Depo. p. 36.)
5. After Desmond died, Craig took on all of the farm work, pledged his property for his parents' debt, and signed mortgages that included his property. (Mortgage 6/17/2002 PL 320-324.)
6. Patricia wanted all the land kept together to help pay Desmond's debt. (Craig's Depo. p. 34.)
7. On June 3, 2010, Patricia, Craig, and Pam signed a mortgage for Frontier Bank, formally known as Pender State Bank. (Mortgage 06/03/2010 PL 344-356.)
8. On June 9, 2010, the original loan amount for Desmond's debt was down to \$375,000 and owed by Patricia, and now Craig and Pam. (Loan Status, Depo. Ex. 9; Craig's Depo. p. 47.)
9. The original lender after Desmond died wanted Patricia and Craig to sell some of the quarters. (Craig's Depo. p. 48.)
20. On December 31, 2013, Patricia listed \$14,000 of rent on her tax return. (2013 Tax Return, PL 21-26.)
21. On December 31, 2014, Patricia listed \$16,000 of rent on her tax return. (2014 Tax Return, PL 27-32.)
22. In March and April 2015, Theresa called the Register of Deeds and had five pages sent to her in Iowa. (Theresa Depo. pp. 17-18.) (See Affidavit of Suzy Wernsmann.)
24. On December 31, 2015, Patricia listed \$16,000 of rent on her tax return. (2015 Tax Return, PL 33-38.)

27. On December 31, 2016, Patricia listed \$16,000.00 of rent on her tax return. (2016 Tax Return, PL 39-44.)
28. On December 31, 2017, Patricia listed \$16,000 of rent on her tax return. (2017 Tax Return, PL 45-50.)
30. On December 31, 2018, Patricia listed \$17,000 of rent on her tax return. (2018 Tax Return, PL 51-56.)
31. On July 18, 2019, Theresa got seven pages of records from the Hand County Register of Deeds Office. (See Affidavit of Suzy Wernsmann.)
32. On December 31, 2019, Patricia listed \$15,899 of rent on her tax return. (2019 Tax Return, PL 57-63.)
33. By 2020, Theresa admitted that she knew that her name was on the land. (Theresa's Depo. pp. 15, 18.)
34. Theresa admitted that she had seen the Warranty Deed that put her name on the land, Depo. Ex. 1, "a long time ago" before 2020. (Theresa's Depo. pp. 15, 18.)
35. Theresa knew that Desmond had debt when he died and had seen a bankruptcy attorney. She doesn't know how it was sorted out, she didn't help, and she doesn't know what Craig did about the debt. (Theresa's Depo. p. 19.)
37. Theresa didn't do anything about paying real estate taxes or managing the farm once she knew her name was on the deed. (Theresa's Depo. p. 24.)
38. December 31, 2020, Patricia listed \$16,000 of rent on her tax return. (2020 Tax Return, PL 64-73.)
40. On March 26, 2021, Patricia died. (Affidavit of Craig Van Zee.)

42. Rent Patricia received, which was reported on her tax returns, was rent paid by Craig, even though Patricia had no land to rent after July 10, 2013. (See Affidavit of Craig Van Zee.)
47. Theresa talked to a lawyer after she saw the deeds but chose not to follow up with it. (Theresa's Depo. pp. 21-23.)
56. The current balance on Desmond Van Zee's debt that Craig is paying is \$186,409.72. (Loan Status, Depo. Ex. 9.)
57. Patricia cried to Pam about Theresa and Michael confronting Patricia concerning land that Theresa and Michael received. (Plaintiffs' First Supplemental Answers to Defendant's Interrogatories, No. 12.)

RESPONSE TO DEFENDANT'S UNDISPUTED MATERIAL FACTS

1. Desmond Van Zee ("Desmond") and Patricia Van Zee ("Patricia"), husband and wife, owned farm land in Hand County, South Dakota. (Depo. Craig Van Zee, 24:6-8).

RESPONSE: Admit.

2. Desmond passed away in 1997, and all the farmland owned by Desmond, Patricia, or jointly, was transferred to Patricia. (Depo. Craig, 24:3-19; 22:7-8).

RESPONSE: Admit.

3. Around 2004, Patricia and her son Craig consulted with attorney Jim Jones in Miller, South Dakota, to draft a deed ("Deed 1") transferring approximately 920 acres of land from Patricia to Patricia, Craig, and Craig's wife Pamela Van Zee ("Pamela") as joint tenants with rights of survivorship. (Depo. Craig, 24:15-25; 25:1-10). The legal descriptions of the transferred parcels are as follows:

The North Half of the Northwest Quarter (N $\frac{1}{2}$ NW $\frac{1}{4}$) of Section One, the West $\frac{1}{2}$ of the East Half of the Northwest Quarter (W $\frac{1}{2}$ E $\frac{1}{2}$ N $\frac{1}{4}$), and the Southwest Quarter (SW $\frac{1}{4}$) of Section Thirteen (13); the Northeast Quarter (NE $\frac{1}{4}$) and the South Half (S $\frac{1}{2}$) of Section Fourteen (14); and the Northwest Quarter (NW $\frac{1}{4}$) of Section Twenty-nine (29); all

located in Township One Hundred Fifteen (115) North,
Range Sixty-seven (67), West of the 5th P.M.

(the "Homeplace") (Vogel Aff. ¶2, Ex. A).

RESPONSE: Admit.

4. Deed 1 was executed on June 30, 2004. (Id.).

RESPONSE: Admit.

5. Before Deed 1 was executed, Patricia indicated to Craig that she was going to transfer some property to herself and Michael and Theresa. (Depo. Craig, 27:13-23).

RESPONSE: Admit.

6. The property subject to this litigation consists of approximately 240 acres and is described as follows:

The South Half of the Southwest Quarter (S ½ SW ¼) of
the Southeast Quarter (SE ¼) of Section Twenty-one (21),
Township One Hundred Fourteen (114) North, Range
Sixty-nine (69), West of the 5th P.M.

("Subject Property") (Vogel Aff. ¶2, Ex. C).

RESPONSE: Admit.

7. On September 16, 2004, Patricia deeded the Subject Property to herself and Michael as joint tenants with rights of survivorship ("Deed 3"). (Id.)

RESPONSE: Admit.

8. That same day, September 16, 2004, Patricia deeded approximately 240 acres from herself to herself and Theresa as joint tenants with rights of survivorship ("Deed 2"), with a legal description as follows:

The South Half of the Southwest Quarter (S ½ SW ¼) of the
Southeast Quarter (SE ¼) of Section Twenty-one (21),
Township One Hundred Fourteen (114) North, Range
Sixty-nine (69), West of the 5th P.M.

("Michael Property") (Vogel Aff. ¶2, Ex. B).

RESPONSE: Admit.

9. Since at least 2004, Craig has been aware that Patricia planned to transfer land to herself and Michael and to herself and Theresa. (Depo. Craig, 29:20-25; 30:1-10; 30:19-23).

RESPONSE: Admit.

10. On June 7, 2010, Patricia transferred her undivided one-half interest in the Subject Property ("Deed 4") to Craig. (Vogel Aff. ¶2, Ex. D).

RESPONSE: Admit.

11. On June 7, 2010, Patricia transferred her undivided one-half interest in the Michael Property ("Deed 5") to Craig. (Vogel Aff. ¶2, Ex. E).

RESPONSE: Admit.

12. By virtue of Deeds 3 and 4, Theresa and Craig each owned an undivided onehalf interest in the Subject Property. (Vogel Aff. ¶2, Exs. C and D).

RESPONSE: Admit.

13. By virtue of Deeds 2 and 5, Michael and Craig each owned an undivided onehalf interest in the Michael Property. (Depo. Craig, 31:4-11) (Vogel Aff. ¶2, Exs. B and E).

RESPONSE: Admit.

14. When Deed 4 and 5 were executed, Craig was aware that he now owned the Subject Property with Theresa and the Michael Property with Michael, respectively. (Depo. Craig, 31:24-25; 32:1-3; 33:13-15).

RESPONSE: Admit.

15. On August 25, 2015, Craig transferred his undivided one-half interest in the Michael Property and the Subject Property to himself and Pamela ("Deed 6"). (Depo. Craig, 37:14-25; 38:1-24) (Vogel Aff. ¶12, Ex. F).

RESPONSE: Admit.

16. On May 22, 2013, Patricia, via quitclaim deed ("Deed 7"), transferred all her interest in the Homeplace to Craig and Pamela. (Depo. Craig, 39: 13-25; 40: 1-25). (Vogel Aff. ¶12, Ex. G).

RESPONSE: Admit.

17. On July 10, 2013, Patricia, having previously overlooked a parcel of the Homeplace, transferred via quitclaim deed ("Deed 8") to Craig and Pamela:

The West Half of the northwest Quarter (W ½ NW ¼) of
Section Thirteen (13) in Township One Hundred Fifteen
(115) North, Range Sixty-seven (67), West of the 5th P.M.

(considered as a part of the "Homeplace")(Depo. Craig, 43:5-10, 11-24) (Vogel Aff. ¶12, Ex. H).

RESPONSE: Admit.

18. After Patricia executed Deed 8, she no longer owned any interest in the Homeplace, the Subject Property, or the Michael Property. (See all deeds)

RESPONSE: Admit.

19. During his life, Desmond acquired debt. (Depo. Craig, 50:16-21).

RESPONSE: Admit.

20. Desmond's debt is not and was not associated with the Subject Property. (Depo. Craig, 60: 10-18).

RESPONSE: Deny. The deposition cite misstates the record. In the deposition cite, Craig is saying that the other three loans have nothing to do with his father's debt. In fact, the Defendant miscites the deposition. On the previous page of the deposition, page 59, Desmond's debt is described as currently being \$186,000.00. (Craig's Depo, p. 59:12-15.)

21. Craig has never asked Michael or Theresa to help pay Desmond's debt. (Depo. Craig, 62:16-19).

RESPONSE: Admit.

22. The Subject Property is not subject to any liens or mortgages, only the Homeplace is. (Depo. Craig, 35:7-21).

RESPONSE: Admit.

23. The Subject Property was never at risk for foreclosure. (Depo. Craig, 35:7-21).

RESPONSE: Denied to the extent the statement misstates the law. As set forth in the Additional Undisputed Material Facts above, Desmond had substantial debt. There is no dispute that there wasn't a mortgage on the subject property, but Desmond had been in bankruptcy and had substantial financial problems. All of his real property would be subject to paying his creditors—even real property that did not have a mortgage on it.

24. For farming years 2008-2012, Craig cannot locate a copy of the lease with L&O Acres. (Depo. Craig, 70:11-14).

RESPONSE: Admit.

25. The rental income for the 2008-2012 lease was deposited into the Van Zee farm account. (Depo. Craig, 71: 12-14).

RESPONSE: Admit.

26. The 2008-2012 lease was never discussed with Michael or Theresa. (Depo. Craig, 71:15-20).

RESPONSE: Admit.

27. For farming years 2012-2017, Craig and Patricia leased property, including the Michael Property, to Kirby Odde. (Depo. Craig, 72:5-10) (Vogel Aff. ¶2, Ex. I).

RESPONSE: Admit.

28. The 2012-2017 lease contains a signature line for Craig, Patricia, Kirby Odde, and two witnesses. (Depo. Craig, 72:11-15) (Vogel Aff. ¶2, Ex. I).

RESPONSE: Admit.

29. The 2012-2017 lease does not have a signature line for Michael or Theresa.
(Depo. Craig, 72:16-17) (Vogel Aff. ¶2, Ex. I).

RESPONSE: Admit.

30. Craig was a part of the negotiations for the 2012-2017 lease (Depo. Craig, 73:12-18).

RESPONSE: Deny as represented. In fact, the negotiations were conducted by Craig and his mother, who is also the Defendant's mother. (Craig's Depo. p. 73: 12-13.)

31. The rental income for the 2012-2017 lease was deposited in the Van Zee farm account. (Depo. Craig, 73:12-18).

RESPONSE: Deny as represented. The funds were deposited in the bank account owned by the parties' mother, Patricia Van Zee, and Craig and Pamela Van Zee. (Craig's Depo. p. 79.)

32. Craig never told Michael or Theresa about the lease, the rental income, nor did he provide them with their portion. (Depo. Craig, 73:19-25).

RESPONSE: Deny as represented. While Craig didn't tell Michael or Theresa about their rental income, Michael and Theresa knew about the rent and testified accordingly. There was no portion owing to Theresa because she allowed her mother to have the rent. (See Additional Undisputed Material Facts Nos. 48 and 53.)

33. For farming years 2018-2020, Craig rented the Michael Property to Kirby Odde. (Depo. Craig, 74:7-13; 22-23) (Vogel Aff. ¶2, Ex. J).

RESPONSE: Admit.

34. The rental amount for farming years 2018-2020 was deposited into the Van Zee farm account, none of which was provided to Michael or Theresa. (Depo. Craig, 74: 19-21; 76:3-5) (Vogel Aff. ¶2, Ex. J).

RESPONSE: Admit.

35. Patricia never signed the 2018-2020 lease. (Depo. Craig, 75: 8-16) (Vogel Aff. ¶2, Ex. J).

RESPONSE: Admit.

36. Neither Michael nor Theresa signed the 2018-2020 lease. (Depo. Craig, 75: 20-24) (Vogel Aff. ¶2, Ex. J).

RESPONSE: Admit.

37. For farm season of 2021, Craig executed a lease with Odde Farms. (Depo. Craig, 15-18) (Vogel Aff. ¶2, Ex. K).

RESPONSE: Admit.

38. Craig negotiated the lease, signed the lease, received the rental income, and deposited the same into the Van Zee farm account. (Depo, Craig, 78:2-25; 79:1-3) (Vogel Aff. ¶2, Ex. K).

RESPONSE: Deny as represented. The statement is incomplete in that it ignores that part of the rental income went to pay the balance owing on Desmond Van Zee's debt. (Additional Undisputed Material Facts Nos. 8, 52, 55, 56.)

39. Patricia did not sign the 2021 lease. (Vogel Aff. ¶2, Ex. K).

RESPONSE: Admit.

40. Craig did not inform Michael or Theresa of the 2021 lease or provide either of them their share of the income (Depo. Craig, 79:20-24; 80:3-5).

RESPONSE: Deny. As set forth in the Additional Undisputed Material Facts above, provided by the Plaintiffs, as well as the responses above, both Michael and Theresa knew the land was rented and, while their mother was alive, chose not to have the rent. They knew there was debt that was being serviced and that income was being provided to their mother. There was no such thing as "their share" that was not provided to them.

41. The current lease spans from 2022-2024 and was executed by Craig and Odde Farms. (Vogel Aff. ¶2, Ex. L).

RESPONSE: Admit.

42. Craig did not inform Michael or Theresa of the 2022-2024 lease. (Depo. Craig, 81:19-25; 82:1-6).

RESPONSE: Admit.

43. Craig has not provided Michael or Theresa any income from the 2022-2024 lease. (Depo. Craig, 81:19-25; 82:1-6).

RESPONSE: Admit.

44. All the previously discussed leases included the Subject Property, the Michael Property, and other land owned by Craig and Pamela. (See all leases and deeds)

RESPONSE: Admit.

45. The total principal amount of rental income owed to Theresa for years 2012-2023 is \$223,821.48. (Vogel Aff. ¶2, Exs. I-M).

RESPONSE: Deny. As set forth in the responses above and in the Plaintiffs' separate Motion for Summary Judgment, there is no amount owing to Theresa. Theresa knew her name was on the land. Theresa knew the land was being rented out for the benefit of her mother. Theresa knew that her father had substantial debt that was continuing to be serviced. Theresa did not ask for any share of the rent money.

46. Craig has never asked Michael or Theresa to pay the taxes associated with the Subject Property or the Michael Property. (Depo. Craig, 67:5-7, 11-13).

RESPONSE: Admit.

47. Craig has never asked Michael or Theresa to assist with repairs or landscaping on the Subject Property or the Michael Property. (Depo. Craig, 65:4-25; 66:1-25; 67:1-4).

RESPONSE: Admit.

48. Craig assuming his father's debt was an "agreement" only between Craig and Patricia. (Depo. Craig, 86: 20-24).

RESPONSE: Admit in part and deny in part. There is no dispute that the agreement was reached between Craig and his mother when Craig undertook paying the debt.

There is also no dispute, as set forth in the Additional Undisputed Material Facts, that Michael and Theresa knew about the debt and knew that it was being serviced.

49. Craig is unsure of the exact terms of the agreement between him and Patricia.
(Depo. Craig, 87:10-14).

RESPONSE: Deny. In the deposition, Craig describes the agreement on pages 86 and 87. Additionally, previously Craig Van Zee has submitted an Affidavit that again sets forth the very simple agreement he and his mother entered into, in order to preserve the very land that is the subject matter of this litigation.

50. Instead of providing Michael and Theresa with their share, Craig kept the money in the account as "backup." (Depo. Craig, 87:17-21).

RESPONSE: Deny. The issue of whether or not Michael and Theresa had "shares" left after the payments to their mother and the payments on the debt is not supported by the conclusory questions referenced in support of Statement No. 50.

51. Even though Patricia's name is on the Van Zee farm account, she never wrote any checks from the account or deposited any funds into the account. (Depo. Craig, 79:4-19).

RESPONSE: Deny. Even set forth above in the Additional Undisputed Material Facts, it represents that Patricia Van Zee signed leases, and that the rental receipts from those leases went into this account. It would be inaccurate to say that she didn't deposit any funds into the account. Also in the Statement of Undisputed Material Facts are facts that she received the rental payments, so it would be incorrect to say she did not receive any funds out of the account.

Dated this 26th day of October, 2023.

SCHOENBECK & ERICKSON, PC

By: /s/ Lee Schoenbeck
Lee Schoenbeck
Joe Erickson
Attorneys for Plaintiffs
1200 Mickelson Dr, STE. 310
Watertown, SD 57201
605-886-0010

RESPONSE: It is undisputed that PL 93 contains someone's handwritten notes indicating various "debts" and "assets"; however, this fact is immaterial. See the additional facts set forth in ¶2.

4. Desmond was being foreclosed on. (Craig's Depo. p. 36.)

RESPONSE: Disputed and immaterial. The only evidence presented of this alleged foreclosure is Craig's testimony. No foreclosure documents or evidence from any third-party has been produced. (Vogel Second Aff¹. ¶2). Further, Craig testified there was "talk of foreclosure." (Craig Depo. 36:17-19). See the additional facts set forth in ¶2.

5. After Desmond died, Craig took on all of the farm work, pledged his property for his parents' debt, and signed mortgages that included his property. (Mortgage 6/17/2002 PL 320-324.)

RESPONSE: Disputed but immaterial. The only land pledged as collateral by Craig was land purchased for Craig by Desmond. (Craig Depo. 10:15-25; 11:1-9). See the additional facts set forth in ¶2.

6. Patricia wanted all the land kept together to help pay Desmond's debt. (Craig's Depo. p. 34.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶2. As of June 7, 2010, Patricia did not have any ownership interest in the property subject to this litigation. (Vogel Aff². ¶2, Ex. A, B, C, and D.)

7. On June 3, 2010, Patricia, Craig, and Pam signed a mortgage for Frontier Bank, formally known as Pender State Bank. (Mortgage 06/03/2010 PL 344-356.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶¶2 and 6.

8. On June 9, 2010, the original loan amount for Desmond's debt was down to \$375,000 and owed by Patricia, and now Craig and Pam. (Loan Status, Depo. Ex. 9; Craig's Depo. p. 47.)

RESPONSE: Disputed but immaterial. See the additional facts set forth in ¶¶2 and 6. The plaintiffs have not produced any evidence indicating how this debt

¹ The abbreviation "Vogel Second Aff." refers to the Affidavit of Ryan S. Vogel in Resistance to Plaintiff's Motion for Summary Judgment.

² The abbreviation "Vogel Aff." refers to the Affidavit of Ryan S. Vogel in Support of Defendant's Motion for Partial Summary Judgment, which was previously filed.

was incurred. (Vogel Second Aff. ¶3). This debt amount is more substantial than the amount referenced in the handwritten notes of PL 93.

9. The original lender after Desmond died wanted Patricia and Craig to sell some of the quarters. (Craig's Depo. p. 48.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶2.

10. On June 30, 2004, Patricia Van Zee conveyed the home place to Patricia, Craig, and Craig's wife, Pam. (Warranty Deed, Depo. Ex. 5.)

RESPONSE: Undisputed.

11. On September 16, 2004, Patricia conveyed a quarter and an 80 in Section 21 into joint tenancy with herself and her son, Michael. (Warranty Deed, Depo. Ex. 6A.)

RESPONSE: Undisputed.

12. On September 16, 2004, Patricia conveyed a quarter and an 80 in Section 21 into joint tenancy with herself and her daughter, Theresa. (Warranty Deed, Depo. Ex. 6B.)

RESPONSE: Undisputed.

13. In October 2004, Northstar Farms leased the Section 21 property at issue in this litigation, and the lease was signed by Patricia and her son, Craig. (Northstar Lease, PL 1-3)

RESPONSE: Undisputed.

14. June 7, 2010, Patricia conveyed her undivided one-half interest in the quarter and 80, the subject of this litigation with Michael, to Craig. (Warranty Deed, Depo. Exs. 6E & 6F.)

RESPONSE: Undisputed.

15. June 7, 2010, Patricia conveyed her undivided one-half interest in the quarter and 80, the subject of this litigation with Theresa, to Craig. (Warranty Deed, Depo. Exs. 6C & 6D.)

RESPONSE: Undisputed.

16. In October 2012, Kirby Odde leased all the Van Zee property, including the property subject to this litigation, and the lease was for five years. The lease was executed by Patricia Van Zee and Craig Van Zee. (Odde Lease, Depo. Ex. 11.)

RESPONSE: Undisputed. See the additional facts set forth in ¶6.

17. At the time Odde Lease, Depo. Ex. 11, was executed, Patricia Van Zee had no interest in the property that is subject to this litigation. (Odde Lease, Depo. Ex. 11.)

RESPONSE: Undisputed.

18. On May 22, 2013, Patricia quit claimed her interest in real property in Sections 1, 13, and 14 to Craig and his wife, Pam. (Quit Claim Deed, Depo. Ex. 7.)

RESPONSE: Undisputed.

19. On July 10, 2013, Patricia quit claimed her interest in real property in Section 13 Craig and his wife, Pam Van Zee. (Quit Claim Deed, Depo. Ex. 8.)

RESPONSE: Undisputed.

20. On December 31, 2013, Patricia listed \$14,000 of rent on her tax return. (2013 Tax Return, PL 21-26.)

RESPONSE: Undisputed but immaterial. As of July 10, 2013, Patricia did not have any ownership interest in any real property; therefore, categorizing any income as rental income on her tax return is a mischaracterization. (Vogel Aff. ¶2, Ex. A, B, C, D, E, and F).

21. On December 31, 2014, Patricia listed \$16,000 of rent on her tax return. (2014 Tax Return, PL 27-32.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶20.

22. In March and April 2015, Theresa called the Register of Deeds and had five pages sent to her in Iowa. (Theresa Depo. pp. 17-18.) (Affidavit of Suzy Wernsmann.)

RESPONSE: Disputed. The Affidavit of Suzy Wernsmann and attached records only indicate a "customer" and number of pages. They do not indicate how contact was made, who made contact, what records were requested, or where

records were sent. Further, the Affidavit of Suzy Wernsman only states that "business records" show Theresa received copies. From this statement, it can be inferred that Ms. Wernsmann has no independent knowledge. (See Wernsmann Aff. ¶2).

23. On August 25, 2015, Craig conveyed his one-half interest in the property that he owned that is subject to this litigation, into joint tenancy with his wife, Pam. (Quit Claim Deed, Depo. Exs. 6G & 6H.)

RESPONSE: Undisputed.

24. On December 31, 2015, Patricia listed \$16,000 of rent on her tax return. (2015 Tax Return, PL 33-38.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶20.

25. On October 18, 2016, Brady Van Zee, Michael's son, had the Hand County Register of Deeds find all the real property with Michael's name on it and provide him copies of the deeds. (Receipt, Depo. Ex. 2.) (See Affidavit of Suzy Wernsmann.)

RESPONSE: Disputed. Brady testified that he went to the Hand County Register of Deeds looking for a parcel of property Michael owned, which is not subject to this litigation. (Brady Depo. 7:10-23). Brady testified that he never spoke with Michael about any real property Michael may be receiving from Patricia. (Brady Depo. 6:17-20). The Affidavit of Suzy Wernsmann and the attachments do not indicate what documents were potentially received by Brady. (See Wernsmann Aff. ¶3). Michael was not aware he was the owner of the property subject to this litigation. At some point, Patricia had informed Michael she was going to give the property to him at some time. (Michael Depo. 10:18-25). Michael did not know he owned the property subject to this litigation until after Patricia died. (Michael Depo. 11:8-12).

26. When Brady got copies of deeds with his dad's name on them, he testified that he probably gave them to his dad, Michael. (Brady Depo. p.10.)

RESPONSE: Disputed. See the additional facts set forth in ¶25. During Brady's deposition, the following exchange took place:

SCHOENBECK: So if the employees at the Hand County Register of Deeds office testified that that's what you came and requested (referring to copies of deeds with Michael's name on them) and that's what they gave you, they'd be lying?

BRADY: I could have. I don't – I don't recall. (Brady Depo. 10:6-9)

From the Affidavit of Suzy Wernsmann, there is no information that Brady received copies of deeds with Michael's name on them, as Attorney Schoenbeck indicated during Brady's deposition. (See Wernsmann Aff.).

27. On December 31, 2016, Patricia listed \$16,000.00 of rent on her tax return. (2016 Tax Return, PL 39-44.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶20.

28. On December 31, 2017, Patricia listed \$16,000 of rent on her tax return. (2017 Tax Return, PL 45-50.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶20.

29. Sometime in 2018, Theresa said that she talked to Michael about the deeds at some time two years before Patricia died. (Theresa's Depo. pp. 20-21.)

RESPONSE: Disputed. Theresa stated that she put a copy of a deed, not deeds, in Michael's pickup at some time. (Theresa Depo. 20:22-24). Michael did not see any deed in his pickup. (Michael Depo. 20:8-13). Michael was not aware he was the owner of the property subject to this litigation. (Michael Depo. 10:18-25). Michael did not know he owned the property subject to this litigation until after Patricia died. (Michael Depo. 11:8-12). The conversation between Theresa and Michael took place sometime after Patricia's death. (Michael Depo. 11:8-21).

30. On December 31, 2018, Patricia listed \$17,000 of rent on her tax return. (2018 Tax Return, PL 51-56.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶20.

31. On July 18, 2019, Theresa got seven pages of records from the Hand County Register of Deeds Office. (Affidavit of Suzy Wernsmann.)

RESPONSE: Disputed. See the additional facts set forth in ¶22.

32. On December 31, 2019, Patricia listed \$15,899 of rent on her tax return. (2019 Tax Return, PL 57-63.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶20.

33. By 2020, Theresa admitted that she knew that her name was on the land. (Theresa's Depo. pp. 15, 18.)

RESPONSE: Undisputed. However, Theresa was not aware that Craig was a co-owner of the land subject to this litigation, that Craig was renting the land, that Craig was depositing all rental income into an account he controlled, that Craig was determining how to distribute rental income, or that Craig was retaining a majority of the rental income because Craig never informed Theresa of any of these facts. (Craig Depo. 71:15-20; 73:19-25).

34. Theresa admitted that she had seen the Warranty Deed that put her name on the land, Depo. Ex. 1, "a long time ago" before 2020. (Theresa's Depo. pp. 15, 18.)

RESPONSE: Undisputed. Theresa was not aware that Craig was co-owner of the property subject to this litigation until 2020. Theresa was not aware that Patricia did not own the property until early 2020. Theresa was not aware that Craig was leasing the property, collecting the rental income, determining how rental income would be distributed, and retaining most of the rental income. (Theresa Aff. ¶¶2-4). See the additional facts set forth in ¶33.

35. Theresa knew that Desmond had debt when he died and had seen a bankruptcy attorney. She doesn't know how it was sorted out, she didn't help, and she doesn't know what Craig did about the debt. (Theresa's Depo. p. 19.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶2.

36. Theresa put a copy of the deed, where Michael got the land that is subject to litigation, in Michael's pickup. (Theresa's Depo. p. 20.)

RESPONSE: Disputed. Theresa testified she put a copy of a deed in Michael's pickup, but it is not clear which deed she put in Michael's pickup. (Theresa Depo. 20:22-24). See the additional facts set forth in ¶29.

37. Theresa didn't do anything about paying real estate taxes or managing the farm once she knew her name was on the deed. (Theresa's Depo. p. 24.).

RESPONSE: Undisputed. The real estate tax notices were being sent to Craig, and he did not ask Michael or Theresa to pay the taxes associated with the property subject to this litigation. (Craig Depo. 67:5-7 and 11-13). See the additional facts set forth in ¶34.

38. December 31, 2020, Patricia listed \$16,000 of rent on her tax return. (2020 Tax Return, PL 64-73.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶20.

39. March 20, 2021, Michael signed a divorce settlement with his wife and doesn't list an interest in ag land as an asset in his divorce. (Divorce Property and Martial Settlement Agreement, PL 425-430.)

RESPONSE: Undisputed. This is consistent with Michael's lack of knowledge of ownership of the property. See the additional facts set forth in ¶29.

40. On March 26, 2021, Patricia died. (Affidavit of Craig Van Zee.)

RESPONSE: Undisputed.

41. Michael admitted that he knew while his mom was alive what land she put his name on. (Michael's Depo. pp. 7-9.)

RESPONSE: Disputed. See the additional facts set forth in ¶¶25 and 29.

42. Rent Patricia received, which was reported on her tax returns, was rent paid by Craig, even though Patricia had no land to rent after July 10, 2013. (See Affidavit of Craig Van Zee.)

RESPONSE: Disputed insofar as the money being received by Patricia is characterized as rent. See the additional facts set forth in ¶20.

43. Michael assumed Craig was taking care of the farm debt. (Michael's Depo. p. 12.)

RESPONSE: Disputed but immaterial. Michael was not aware of the farm's financial situation. (Michael Depo. 11:22-25; 12:1). Michael guessed that Craig was helping take care of the farm finances. (Michael Depo. 12:21-24). See the additional facts set forth in ¶2.

44. Michael brought up rent with his mom while she was alive. (Michael's Depo. p. 16.)

RESPONSE: Disputed. There is nothing on page 16 of Michael's deposition that supports the assertion that Michael spoke with Patricia regarding rent. (See Michael Depo. 16).

45. Michael didn't do anything to assist with the land. (Michael's Depo. p. 9.)

RESPONSE: Undisputed. See the additional facts set forth in ¶29.

46. Michael learned from his sister that his name was on the land. (Michael's Depo. p. 11.)

RESPONSE: Undisputed. See the additional facts set forth in ¶29.

47. Theresa talked to a lawyer after she saw the deeds but chose not to follow up with it. (Theresa's Depo. pp. 21-23.)

RESPONSE: Disputed. Theresa was not aware Craig was co-owner of the property subject to this litigation until speaking with an attorney in early 2020, and then began pursuing this matter. (Theresa Aff. ¶2).

48. Theresa knew her mom was renting out the farm ground. (Theresa's Depo. pp. 29, 33.)

RESPONSE: Disputed in that this statement is vague. Theresa was aware Patricia had rented some farm land out to the highest bidder. (Theresa Depo. 29:19-25). See the additional facts set forth in ¶34.

49. Craig and Theresa didn't talk. (Theresa's Depo. pp. 32-33.)

RESPONSE: Undisputed. See the additional facts set forth in ¶34.

50. Craig and Michael didn't talk (Michael's Depo. pp. 13, 17-18.)

RESPONSE: Undisputed. See the additional facts set forth in ¶¶29 and 34.

51. Theresa talked to her mom about why Theresa was not on the land. (Theresa's Depo. p. 18.)

RESPONSE: It is undisputed that at some point Theresa spoke with Patricia regarding ownership of the farm land. See the additional facts set forth in ¶¶33-34.

52. Theresa was told by her mom that Craig's name was on the land because their dad had debt (Theresa's Depo. p. 18.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶¶2 and 34.

53. Theresa did not ask her mom for Theresa's share of the rent money.
(Theresa's Depo. p. 32.)

RESPONSE: Undisputed. Patricia told Theresa she barely had enough money to live on. (Theresa Depo. 5-6). See the additional facts set forth in ¶34.

54. Michael was told by his mom that his name was on the land. (Michael's Depo. p. 7.)

RESPONSE: Disputed. This is a misstatement of Michael's testimony. Michael was told that at some point his name would be put on the land. (Michael Depo. 7:15-18). Michael was never shown a copy of the deed. (Michael Depo. 7:8-10). See the additional facts set forth in ¶29.

55. Michael didn't ask for rent because he knew his mom needed the money to make payments on the debts. (Michael's Depo. pp. 8-9.)

RESPONSE: Disputed. See the additional facts set forth in ¶¶29 and 54. Based on these facts, Michael had no reason to request any rent.

56. The current balance on Desmond Van Zee's debt that Craig is paying is \$186,409.72. (Loan Status, Depo. Ex. 9.)

RESPONSE: Undisputed insofar as the balance remaining on at loan at Frontier Bank is 186,409.72 but immaterial. See additional facts set forth in ¶¶2 and 8.

57. Patricia cried to Pam about Theresa and Michael confronting Patricia concerning land that Theresa and Michael received. (Plaintiffs' First Supplemental Answers to Defendant's Interrogatories, No. 12.)

RESPONSE: Disputed. During Pam's deposition the following exchanges took place:

VOGEL: Did you and Craig ever have conversations about Michael and Theresa receiving some of this land (referring to Van Zee land)?

PAM: No.

VOGEL: Did you and Pat?

PAM: No.
(Pam Depo. 9:17-21).

VOGEL: You didn't – when you have conversations with Pat, it wasn't about Dad's debt or rental income or who owned what land?

PAM: We had never talked about that. No. Pat and I never did that.

VOGEL: Is that something Pat liked to talk about?

PAM: No.

(Pam Depo. 19:6-12) (emphasis added).

Dated this 26th day of October, 2023.

RICHARDSON, WYLY, WISE, SAUCK
& HIEB, LLP

By /s/ Ryan S. Vogel
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STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	:ss	
COUNTY OF HAND)	THIRD JUDICIAL CIRCUIT

CRAIG AND PAMELA VAN ZEE,	)	29CIV. 22-9
)	
Plaintiffs,	)	REPLY TO
	)	DEFENDANT'S RESPONSES TO
v.	)	PLAINTIFFS' STATEMENT OF
	)	UNDISPUTED MATERIAL FACTS
THERESA VAN ZEE,)	
)	
Defendant.)	

Comes now the Plaintiffs, Craig and Pamela Van Zee, and make the following reply with respect to the *Defendant's Responses to Plaintiffs' Statement of Undisputed Material Facts*. Only those responses that required a reply are addressed below:

2. At the time of Desmond Van Zee's death, he had a divorce pending with his wife, Patricia Van Zee, in which Desmond alleged that during the parties' marriage they had incurred "substantial liabilities." (Divorce *Answer* and *Counterclaim*, REDIGER 93-95.)

RESPONSE: It is undisputed that the divorce Answer and Counterclaim indicates "substantial liabilities" had been incurred; however, this fact is immaterial. The property subject to this lawsuit is not and was not encumbered by any liens or mortgages. (Craig Depo. 35:7-21). The property subject to this litigation was never at risk for foreclosure. (*Id.*). Desmond's debt was not associated with the property subject to this litigation. (Craig Depo. 60:10-18).

REPLY: The last two sentences of the response are inaccurate. One sentence ignores that if a debtor owes money, while it is true that the foreclosure would be on the property that is collateral, ultimately all the judgment debtor's property is at risk until all of their debts are paid. The fact that the mortgage wasn't on some part of the Van Zee property doesn't mean that the unmortgaged property is not at risk with respect to the family debts.

Additionally, the response miscites and misquotes the deposition testimony of Craig Van Zee. The citation is to Craig Van Zee talking about the other notes at the bank. On the previous page, in reference to the amount of Craig's father's debt remaining, he affirmatively answers counsel's question that the principle on the father's loan was just over \$186,000 as of March 24, 2023. (Craig's Depo. p. 59:12-15.)

Even though there was no mortgage on the property subject to the litigation, even Michael testified that his mother described the situation as the debt being against the land. (Michael's Depo. p. 8:7-8.)

Even though there was not a mortgage on the land, Patricia Van Zee clearly viewed all her land being at risk for the debt that the family owed.

4. Desmond was being foreclosed on. (Craig's Depo. p. 36.)

RESPONSE: Disputed and immaterial. The only evidence presented of this alleged foreclosure is Craig's testimony. No foreclosure documents or evidence from any third-party has been produced. (Vogel Second Aff¹. ¶12). Further, Craig testified there was "talk of foreclosure." (Craig Depo. 36:17-19). See the additional facts set forth in ¶12.

REPLY: Craig explained in his deposition that his father was in financial trouble and he and his mother stopped a forced sale and lined up financing to salvage the farm. (Craig's Depo. pp. 36:2-19; 48:16-49:11)

5. After Desmond died, Craig took on all of the farm work, pledged his property for his parents' debt, and signed mortgages that included his property. (Mortgage 6/17/2002 PL 320-324.)

RESPONSE: Disputed but immaterial. The only land pledged as collateral by Craig was land purchased for Craig by Desmond. (Craig Depo. 10:15-25; 11:1-9). See the additional facts set forth in ¶12.

REPLY: The response is misleading. The truth is that Craig was helping his dad run the farm and the land was put in Craig's name, and Craig and his father made the payments. (Craig's Depo. pp. 10:21-11:5.)

6. Patricia wanted all the land kept together to help pay Desmond's debt. (Craig's Depo. p. 34.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶12. As of June 7, 2010, Patricia did not have any ownership interest in the property subject to this litigation. (Vogel Aff². ¶12, Ex. A, B, C, and D.)

REPLY: It is true that part of Patricia's estate plan involved her deeding away her land, subject to the conditions that she received rental support income and that the family debts were paid, and because of that, she did not have any ownership interest in the land. It is material that it was Patricia's plan for this to happen this way and it is particularly material why waiting until Patricia had passed away to file the lawsuit deprives the Court and the jury of the important testimony that is supported by the objective facts.

7. On June 3, 2010, Patricia, Craig, and Pam signed a mortgage for Frontier Bank, formally known as Pender State Bank. (Mortgage 06/03/2010 PL 344-356.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶¶2 and 6.

REPLY: See Reply to Nos. 2 and 6 above.

8. On June 9, 2010, the original loan amount for Desmond's debt was down to \$375,000 and owed by Patricia, and now Craig and Pam. (Loan Status, Depo. Ex. 9; Craig's Depo. p. 47.)

RESPONSE: Disputed but immaterial. See the additional facts set forth in ¶¶2 and 6. The plaintiffs have not produced any evidence indicating how this debt was incurred. (Vogel Second Aff. ¶3). This debt amount is more substantial than the amount referenced in the handwritten notes of PL 93.

REPLY: See Reply to Nos. 2 and 6 above. Additionally, the best evidence available of the remaining Desmond Van Zee debt is the note that has been continuously in existence since his survivors consolidated his debt and arranged a bank loan to pay it. It is inaccurate to say that the Plaintiffs have not produced any evidence as to how this debt was incurred, as they have presented evidence that Desmond Van Zee incurred debt. Better evidence about the amount of debt the Van Zee family had would have been available if the Defendants had brought their lawsuit while Patricia Van Zee was alive.

9. The original lender after Desmond died wanted Patricia and Craig to sell some of the quarters. (Craig's Depo. p. 48.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶2.

REPLY: See Reply to No. 2 above.

20. On December 31, 2013, Patricia listed \$14,000 of rent on her tax return. (2013 Tax Return, PL 21-26.)

RESPONSE: Undisputed but immaterial. As of July 10, 2013, Patricia did not have any ownership interest in any real property; therefore, categorizing any income as rental income on her tax return is a mischaracterization. (Vogel Aff. ¶2, Ex. A, B, C, D, E, and F).

REPLY: Patricia's tax returns characterize the money received by her as rent. The response uses the word "mischaracterization," which is misleading. Patricia believed she was receiving rent because that was a condition she placed on the transfer of the property. There is no "mischaracterization." Furthermore, Theresa testified that she knew her mom was receiving rent (Theresa's

Depo. pp. 31:24-32:16) and Michael knew that his mother was getting income from the land and he didn't ask her for any of it (Michael's Depo. pp. 7:15-9:7).

22. In March and April 2015, Theresa called the Register of Deeds and had five pages sent to her in Iowa. (Theresa Depo. pp. 17-18.) (Affidavit of Suzy Wernsmann.)

RESPONSE: Disputed. The Affidavit of Suzy Wernsmann and attached records only indicate a "customer" and number of pages. They do not indicate how contact was made, who made contact, what records were requested, or where records were sent. Further, the Affidavit of Suzy Wernsman only states that "business records" show Theresa received copies. From this statement, it can be inferred that Ms. Wernsmann has no independent knowledge. (See Wernsmann Aff. ¶12).

REPLY: Response misstates the Affidavit. Suzy Wernsmann testified that the records were delivered to Theresa Van Zee, the response doesn't dispute that Theresa Zan Zee got these records from the Register of Deeds office.

24. On December 31, 2015, Patricia listed \$16,000 of rent on her tax return. (2015 Tax Return, PL 33-38.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶20.

REPLY: See Reply to No. 20 above.

25. On October 18, 2016, Brady Van Zee, Michael's son, had the Hand County Register of Deeds find all the real property with Michael's name on it and provide him copies of the deeds. (Receipt, Depo. Ex. 2.) (See Affidavit of Suzy Wernsmann.)

RESPONSE: Disputed. Brady testified that he went to the Hand County Register of Deeds looking for a parcel of property Michael owned, which is not subject to this litigation. (Brady Depo. 7:10-23). Brady testified that he never spoke with Michael about any real property Michael may be receiving from Patricia. (Brady Depo. 6:17-20). The Affidavit of Suzy Wernsmann and the attachments do not indicate what documents were potentially received by Brady. (See Wernsmann Aff. ¶13). Michael was not aware he was the owner of the property subject to this litigation. At some point, Patricia had informed Michael she was going to give the property to him at some time. (Michael Depo. 10:18-25). Michael did not know he owned the property subject to this litigation until after Patricia died. (Michael Depo. 11:8-12).

REPLY: Defendant's response misstates the record in several ways. First, Suzy Wernsmann's Affidavit does specifically tell what Brady asked for:

Brady wanted to know information on the land that was in his father's name. I took him to our Deed Books and showed him the deeds. From the receipts for the photocopies, which are attached, I know that the first time was in 2016 and the second time was in 2021.

Affidavit of Suzy Wernsmann.

It is true that Brady initially lied in his deposition about going to the Register of Deeds office. (Brady's Depo. p. 7:2-4.) When confronted about them, he made up an initial story, which is what the Defendant is representing to the Court in his Response. When confronted with all the documents, Brady again told a different story, but in the end, the following took place, which is not the one the Defendant chose to disclose to the Court in his response:

Q If you would have been getting copies of the deeds with your father's name on it, would you have then taken them to your father?

A Well, yeah, I probably would have.

(Brady's Depo. p. 10:12-15.)

26. When Brady got copies of deeds with his dad's name on them, he testified that he probably gave them to his dad, Michael. (Brady Depo. p.10.)

RESPONSE: Disputed. See the additional facts set forth in ¶25. During Brady's deposition, the following exchange took place:

SCHOENBECK: So if the employees at the Hand County Register of Deeds office testified that that's what you came and requested (referring to copies of deeds with Michael's name on them) and that's what they gave you, they'd be lying?

BRADY: I could have. I don't – I don't recall. (Brady Depo. 10:6-9)

From the Affidavit of Suzy Wernsmann, there is no information that Brady received copies of deeds with Michael's name on them, as Attorney Schoenbeck indicated during Brady's deposition. (See Wernsmann Aff.).

REPLY: See Reply to No. 25. The excerpt extracted by the Defendant and set before the Court in the Response on No. 26 intentionally excludes the actual answer to the question from the transcript, which is set forth immediately above in the Reply to No. 25.

27. On December 31, 2016, Patricia listed \$16,000.00 of rent on her tax return. (2016 Tax Return, PL 39-44.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶20.

REPLY: See Reply to No. 20 above.

28. On December 31, 2017, Patricia listed \$16,000 of rent on her tax return.
(2017 Tax Return, PL 45-50.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶20.

REPLY: See Reply to No. 20 above.

29. Sometime in 2018, Theresa said that she talked to Michael about the deeds at
some time two years before Patricia died. (Theresa's Depo. pp. 20-21.)

RESPONSE: Disputed. Theresa stated that she put a copy of a deed, not deeds, in
Michael's pickup at some time. (Theresa Depo. 20:22-24). Michael did not see
any deed in his pickup. (Michael Depo. 20:8-13). Michael was not aware he
was the owner of the property subject to this litigation. (Michael Depo. 10:18-
25). Michael did not know he owned the property subject to this litigation until
after Patricia died. (Michael Depo. 11:8-12). The conversation between Theresa
and Michael took place sometime after Patricia's death. (Michael Depo. 11:8-
21).

REPLY: It is true that Michael and Theresa have told different stories. In fact, the
excerpt from Michael's deposition cited to the Court excludes this exchange:

Q So had your mother told you she would put your name
on some land or is that -- she told you that while she
was alive?

A Yes.

Q And then when did you actually find out -- find out
which land it was?

A I knew which land it was when she told me.

Q And did you know how much land it was?

A Yes.

Q And then did you talk to her about when you were
going to get the income from that land that was in
your name?

A No.

Q Okay. Why didn't you have that conversation with her?

A Why would I have a conversation with her over that when I was under the assumption that she needed the ground to make the payments on the debt?

(Michael's Depo. pp. 7:15-8:6.)

30. On December 31, 2018, Patricia listed \$17,000 of rent on her tax return. (2018 Tax Return, PL 51-56.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶20.

REPLY: See Reply to No. 20 above.

31. On July 18, 2019, Theresa got seven pages of records from the Hand County Register of Deeds Office. (Affidavit of Suzy Wernsmann.)

RESPONSE: Disputed. See the additional facts set forth in ¶22.

REPLY: See Reply to No. 22 above.

32. On December 31, 2019, Patricia listed \$15,899 of rent on her tax return. (2019 Tax Return, PL 57-63.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶20.

REPLY: See Reply to No. 20 above.

33. By 2020, Theresa admitted that she knew that her name was on the land. (Theresa's Depo. pp. 15, 18.)

RESPONSE: Undisputed. However, Theresa was not aware that Craig was a co-owner of the land subject to this litigation, that Craig was renting the land, that Craig was depositing all rental income into an account he controlled, that Craig was determining how to distribute rental income, or that Craig was retaining a majority of the rental income because Craig never informed Theresa of any of these facts. (Craig Depo. 71:15-20; 73:19-25).

REPLY: It is undisputed that Theresa knew the land was rented out and her mother was receiving income from the land, which are the material facts. (Theresa's Depo. pp. 31:24-32:16.)

34. Theresa admitted that she had seen the Warranty Deed that put her name on the land, Depo. Ex. 1, "a long time ago" before 2020. (Theresa's Depo. pp. 15, 18.)

RESPONSE: Undisputed. Theresa was not aware that Craig was co-owner of the property subject to this litigation until 2020. Theresa was not aware that Patricia did not own the property until early 2020. Theresa was not aware that Craig was leasing the property, collecting the rental income, determining how rental income would be distributed, and retaining most of the rental income. (Theresa Aff. ¶¶2-4). See the additional facts set forth in ¶33.

REPLY: When Theresa received the deeds in 2015, Craig Van Zee's name was already on the property. The undisputed facts are contrary to the allegations in the response.

35. Theresa knew that Desmond had debt when he died and had seen a bankruptcy attorney. She doesn't know how it was sorted out, she didn't help, and she doesn't know what Craig did about the debt. (Theresa's Depo. p. 19.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶2.

REPLY: See Reply to No. 2 above.

36. Theresa put a copy of the deed, where Michael got the land that is subject to litigation, in Michael's pickup. (Theresa's Depo. p. 20.)

RESPONSE: Disputed. Theresa testified she put a copy of a deed in Michael's pickup, but it is not clear which deed she put in Michael's pickup. (Theresa Depo. 20:22-24). See the additional facts set forth in ¶29.

REPLY: See Reply to No. 29 above. Additionally, context of Theresa's discussion on the deposition pages 19-21 make it clear she gave Michael a copy of the deed to his property.

37. Theresa didn't do anything about paying real estate taxes or managing the farm once she knew her name was on the deed. (Theresa's Depo. p. 24.)

RESPONSE: Undisputed. The real estate tax notices were being sent to Craig, and he did not ask Michael or Theresa to pay the taxes associated with the property subject to this litigation. (Craig Depo. 67:5-7 and 11-13). See the additional facts set forth in ¶34.

REPLY: See Reply to No. 34 above.

38. December 31, 2020, Patricia listed \$16,000 of rent on her tax return. (2020 Tax Return, PL 64-73.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶20.

REPLY: See Reply to No. 20 above.

39. March 20, 2021, Michael signed a divorce settlement with his wife and doesn't list an interest in ag land as an asset in his divorce. (Divorce Property and Martial Settlement Agreement, PL 425-430.)

RESPONSE: Undisputed. This is consistent with Michael's lack of knowledge of ownership of the property. See the additional facts set forth in ¶29.

REPLY: See the Reply to No. 29 above.

41. Michael admitted that he knew while his mom was alive what land she put his name on. (Michael's Depo. pp. 7-9.)

RESPONSE: Disputed. See the additional facts set forth in ¶¶25 and 29.

REPLY: See Reply to Nos. 25 and 29 above.

42. Rent Patricia received, which was reported on her tax returns, was rent paid by Craig, even though Patricia had no land to rent after July 10, 2013. (See Affidavit of Craig Van Zee.)

RESPONSE: Disputed insofar as the money being received by Patricia is characterized as rent. See the additional facts set forth in ¶20.

REPLY: See Reply to No. 20 above.

43. Michael assumed Craig was taking care of the farm debt. (Michael's Depo. p. 12.)

RESPONSE: Disputed but immaterial. Michael was not aware of the farm's financial situation. (Michael Depo. 11:22-25; 12:1). Michael guessed that Craig was helping take care of the farm finances. (Michael Depo. 12:21-24). See the additional facts set forth in ¶2.

REPLY: See Reply to No. 2 above. Also, Michael testified that he knew there was debt that had to be serviced. (Michael's Depo. pp. 7:24-8:6.)

44. Michael brought up rent with his mom while she was alive. (Michael's Depo. p. 16.)

RESPONSE: Disputed. There is nothing on page 16 of Michael's deposition that supports the assertion that Michael spoke with Patricia regarding rent. (See Michael Depo. 16).

REPLY: The better deposition cite to Michael's testimony are pages 7:19-8:8.

45. Michael didn't do anything to assist with the land. (Michael's Depo. p. 9.)

RESPONSE: Undisputed. See the additional facts set forth in ¶29.

REPLY: See Reply to No. 29 above.

46. Michael learned from his sister that his name was on the land. (Michael's Depo. p. 11.)

RESPONSE: Undisputed. See the additional facts set forth in ¶29.

REPLY: See Reply to No. 29 above.

47. Theresa talked to a lawyer after she saw the deeds but chose not to follow up with it. (Theresa's Depo. pp. 21-23.)

RESPONSE: Disputed. Theresa was not aware Craig was co-owner of the property subject to this litigation until speaking with an attorney in early 2020, and then began pursuing this matter. (Theresa Aff. ¶2).

REPLY: Theresa's Affidavit and the argument contained in the response are inconsistent with the undisputed facts that Theresa testified that she knew the land was being rented but she chose to not raise the issue with her mother before her death. (Theresa's Depo. pp. 31:24-32:16.) Additionally, when Theresa obtained the deeds on the property from the Hand County Register of Deeds in 2015, Craig Van Zee's name was already on the real property. See Reply to No. 34 above.

48. Theresa knew her mom was renting out the farm ground. (Theresa's Depo. pp. 29, 33.)

RESPONSE: Disputed in that this statement is vague. Theresa was aware Patricia had rented some farm land out to the highest bidder. (Theresa Depo. 29:19-25). See the additional facts set forth in ¶34.

REPLY: See Reply to No. 34. Additionally, Theresa's response here is directly contradicted by her testimony with respect to the disputed land, Deposition Exhibit 1, reflected in her deposition on pages 31:24-32:6.

49. Craig and Theresa didn't talk. (Theresa's Depo. pp. 32-33.)

RESPONSE: Undisputed. See the additional facts set forth in ¶34.

REPLY: See Reply to No. 34.

50. Craig and Michael didn't talk (Michael's Depo. pp. 13, 17-18.)

RESPONSE: Undisputed. See the additional facts set forth in ¶¶29 and 34.

REPLY: See Reply to Nos. 29 and 34.

51. Theresa talked to her mom about why Theresa was not on the land.
(Theresa's Depo. p. 18.)

RESPONSE: It is undisputed that at some point Theresa spoke with Patricia regarding ownership of the farm land. See the additional facts set forth in ¶¶33-34.

REPLY: See Reply to Nos. 33 and 34.

52. Theresa was told by her mom that Craig's name was on the land because their dad had debt (Theresa's Depo. p. 18.)

RESPONSE: Undisputed but immaterial. See the additional facts set forth in ¶¶2 and 34.

REPLY: See Reply to Nos. 2 and 34.

53. Theresa did not ask her mom for Theresa's share of the rent money. (Theresa's Depo. p. 32.)

RESPONSE: Undisputed. Patricia told Theresa she barely had enough money to live on. (Theresa Depo. 5-6). See the additional facts set forth in ¶34.

REPLY: See Reply to No. 34.

54. Michael was told by his mom that his name was on the land. (Michael's Depo. p. 7.)

RESPONSE: Disputed. This is a misstatement of Michael's testimony. Michael was told that at some point his name would be put on the land. (Michael Depo. 7:15-18). Michael was never shown a copy of the deed. (Michael Depo. 7:8-10). See the additional facts set forth in ¶29.

REPLY: See Reply to No. 29.

55. Michael didn't ask for rent because he knew his mom needed the money to make payments on the debts. (Michael's Depo. pp. 8-9.)

RESPONSE: Disputed. See the additional facts set forth in ¶¶29 and 54. Based on these facts, Michael had no reason to request any rent.

REPLY: See Reply to Nos. 29 and 54.

56. The current balance on Desmond Van Zee's debt that Craig is paying is \$186,409.72. (Loan Status, Depo. Ex. 9.)

RESPONSE: Undisputed insofar as the balance remaining on at loan at Frontier Bank is 186,409.72 but immaterial. See additional facts set forth in ¶¶2 and 8.

REPLY: See Reply to Nos. 2 and 8.

57. Patricia cried to Pam about Theresa and Michael confronting Patricia concerning land that Theresa and Michael received. (Plaintiffs' First Supplemental Answers to Defendant's Interrogatories, No. 12.)

RESPONSE: Disputed. During Pam's deposition the following exchanges took place:

VOGEL: Did you and Craig ever have conversations about Michael and Theresa receiving some of this land (referring to Van Zee land)?

PAM: No.

VOGEL: Did you and Pat?

PAM: No.

(Pam Depo. 9:17-21).

VOGEL: You didn't – when you have conversations with Pat, it wasn't about Dad's debt or rental income or who owned what land?

PAM: We had **never** talked about that. No. Pat and I **never** did that.

VOGEL: Is that something Pat liked to talk about?

PAM: No.

(Pam Depo. 19:6-12) (emphasis added).

REPLY: It is true that Pam did not talk to her mother-in-law about any of the details concerning the father's debt or the rental income. The Statement of Fact and the supporting Answers to Interrogatories are about her mother-in-law crying to her when being confronted by Theresa and Michael concerning the land they received. Other than Patricia crying about this, Pam was not involved in any discussions with Patricia about the details.

Dated this 2nd day of November, 2023.

SCHOENBECK & ERICKSON, PC

/s/ Lee Schoenbeck

Lee Schoenbeck

Joe Erickson

Attorneys for Plaintiffs

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605-886-0010

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	:ss	
COUNTY OF HAND)	THIRD JUDICIAL CIRCUIT

CRAIG AND PAMELA VAN ZEE,

29CIV. 22-9

Plaintiffs,

v.

PLAINTIFFS' REPLY TO
DEFENDANT'S ADDITIONAL FACTS

THERESA VAN ZEE,

Defendant.

Comes now, the Plaintiffs, Craig and Pamela Van Zee, by and through their attorney, Lee Schoenbeck, and makes this reply to the Defendant's Additional Facts:

1. No foreclosure documents or evidence from any third-party has been produced. (Vogel Second Affi. ¶12). Further, Craig testified there was "talk of foreclosure." (Craig Depo. 36:17-19).

REPLY: Craig explained in his deposition that his father was in financial trouble and he and his mother stopped a forced sale and lined up financing to salvage the farm. (Craig's Depo. p. 36:2-19; 48:16-49:11)

2. The only land pledged as collateral by Craig was land purchased for Craig by Desmond. (Craig Depo. 10:15-25; 11:1-9).

REPLY: The statement is misleading. The actual deposition cite says that Craig was working with his father on the farm, and they worked together to make the payments.

3. As of June 7, 2010, Patricia did not have any ownership interest in the property subject to this litigation. (Vogel Aff2. ¶12, Ex. A, B, C, and D.)

REPLY: It is true that part of Patricia's estate plan involved her deeding away her land, subject to the conditions that she received rental support income and that the family debts were paid, and because of that, she did not have any ownership interest in the land. It is material that it was Patricia's plan for this to happen this way and it is particularly material why waiting until Patricia had passed away to file the lawsuit deprives the Court and the jury of the important testimony that is supported by the objective facts.

4. The plaintiffs have not produced any evidence indicating how this debt was

incurred. (Vogel Second Aff. ¶13). This debt amount is more substantial than the amount referenced in the handwritten notes of PL 93.

REPLY: See the Reply to Nos. 1 and 3 above. Additionally, the best evidence available of the remaining Desmond Van Zee debt is the note that has been continuously in existence since his survivors consolidated his debt and arranged a bank loan to pay it. It is inaccurate to say that the Plaintiffs have not produced any evidence as to how this debt was incurred, as they have presented evidence that Desmond Van Zee incurred debt. Better evidence about the amount of debt the Van Zee family had would have been available if the Defendants had brought their lawsuit while Patricia Van Zee was alive.

5. As of July 10, 2013, Patricia did not have any ownership interest in any real property; therefore, categorizing any income as rental income on her tax return is a mischaracterization. (Vogel Aff. ¶12, Ex. A, B, C, D, E, and F).

REPLY: Patricia's tax returns characterize the money received by her as rent. The response uses the word "mischaracterization," which is misleading. Patricia believed she was receiving rent because that was a condition she placed on the transfer of the property. There is no "mischaracterization." Furthermore, Theresa testified that she knew her mom was receiving rent (Theresa's Depo. pp. 31:24-32:16) and Michael knew that his mother was getting income from the land and he didn't ask her for any of it. (Michael's Depo. pp. 7:15-9:7).

6. The Affidavit of Suzy Wernsmann and attached records only indicate a "customer" and number of pages. They do not indicate how contact was made, who made contact, what records were requested, or where records were sent. Further, the Affidavit of Suzy Wernsmann only states that "business records" show Theresa received copies. From this statement, it can be inferred that Ms. Wernsmann has no independent knowledge. (See Wernsmann Aff. ¶12).

REPLY: Response misstates the Affidavit. Suzy Wernsmann testified that the records were delivered to Theresa Van Zee, the response doesn't dispute that Theresa Van Zee got these records from the Register of Deeds office.

7. Brady testified that he went to the Hand County Register of Deeds looking for a parcel of property Michael owned, which is not subject to this litigation. (Brady Depo. 7:10-23). Brady testified that he never spoke with Michael about any real property Michael may be receiving from Patricia. (Brady Depo. 6:17-20). The Affidavit of Suzy Wernsmann and the attachments do not indicate what documents were potentially received by Brady. (See Wernsmann Aff. ¶13).

REPLY: Defendant's response misstates the record in several ways. First, Suzy Wernsmann's Affidavit does specifically tell what Brady asked for:

Brady wanted to know information on the land that was in his

father's name. I took him to our Deed Books and showed him the deeds. From the receipts for the photocopies, which are attached, I know that the first time was in 2016 and the second time was in 2021.

Affidavit of Suzy Wernsmann.

It is true that Brady initially lied in his deposition about going to the Register of Deeds office. (Brady's Depo. p. 7:2-4.) When confronted about them, he made up an initial story, which is what the Defendant is representing to the Court in his Response. When confronted with all the documents, Brady again told a different story, but in the end, the following took place, which is not the one the Defendant chose to disclose to the Court in his response:

Q If you would have been getting copies of the deeds with your father's name on it, would you have then taken them to your father?

A Well, yeah, I probably would have.

(Brady's Depo. p. 10:12-15.)

8. Michael was not aware he was the owner of the property subject to this litigation. At some point, Patricia had informed Michael she was going to give the property to him at some time. (Michael Depo. 10:18-25).

REPLY: It is true that Michael and Theresa have told different stories. In fact, the excerpt from Michael's deposition cited to the Court excludes this exchange:

Q So had your mother told you she would put your name on some land or is that -- she told you that while she was alive?

A Yes.

Q And then when did you actually find out -- find out which land it was?

A I knew which land it was when she told me.

Q And did you know how much land it was?

A Yes.

Q And then did you talk to her about when you were going to get the income from that land that was in your name?

A **No.**

Q Okay. Why didn't you have that conversation with her?

A **Why would I have a conversation with her over that when I was under the assumption that she needed the ground to make the payments on the debt?**

(Michael's Depo. pp. 7:15-8:6.)

9. Michael did not know he owned the property subject to this litigation until after Patricia died. (Michael Depo. 11:8-12).

REPLY: See Reply to No. 8 above.

10. During Brady's deposition, the following exchange took place:

SCHOENBECK: So if the employees at the Hand County Register of Deeds office testified that that's what you came and requested (referring to copies of deeds with Michael's name on them) and that's what they gave you, they'd be lying?

BRADY: I could have. I don't – I don't recall. (Brady Depo. 10:6-9)

REPLY: See Reply to No. 7 above. The excerpt extracted by the Defendant and set before the Court in No. 7 intentionally excludes the actual answer to the question from the transcript, which is set forth above in the Reply to No. 7.

11. From the Affidavit of Suzy Wernsmann, there is no information that Brady received copies of deeds with Michael's name on them, as Attorney Schoenbeck indicated during Brady's deposition. (See Wernsmann Aff.).

REPLY: See Reply to No. 7 above. The excerpt extracted by the Defendant and set before the Court in No. 7 intentionally excludes the actual answer to the question from the transcript, which is set forth above in the Reply to No. 7.

12. Theresa stated that she put a copy of a deed, not deeds, in Michael's pickup at some time. (Theresa Depo. 20:22-24).

REPLY: See Reply to No. 8 above. Additionally, context of Theresa's discussion on the deposition pages 19-21 make it clear she gave Michael a copy of the deed to his property.

13. Michael did not see any deed in his pickup. (Michael Depo. 20:8-13).

REPLY: See Reply to No. 8 above. Additionally, context of Theresa's discussion on the deposition pages 19-21 make it clear she gave Michael a copy of the deed to his property.

14. The conversation between Theresa and Michael took place sometime after Patricia's death. (Michael Depo. 11:8-21).

REPLY: See Reply to No. 8 above.

15. Theresa was not aware that Craig was a co-owner of the land subject to this litigation, that Craig was renting the land, that Craig was depositing all rental income into an account he controlled, that Craig was determining how to distribute rental income, or that Craig was retaining a majority of the rental income because Craig never informed Theresa of any of these facts. (Craig Depo. 71:15-20; 73:19-25).

REPLY: It is undisputed that Theresa knew the land was rented out and her mother was receiving income from the land, which are the material facts. (Theresa's Depo. pp. 31:24-32:16.)

16. Theresa was not aware that Craig was co-owner of the property subject to this litigation until 2020. Theresa was not aware that Patricia did not own the property until early 2020. Theresa was not aware that Craig was leasing the property, collecting the rental income, determining how rental income would be distributed, and retaining most of the rental income. (Theresa Aff. ¶¶2-4).

REPLY: When Theresa received the deeds in 2015, Craig Van Zee's name was already on the property. The undisputed facts are contrary to the allegations in No. 16.

17. The real estate tax notices were being sent to Craig, and he did not ask Michael or Theresa to pay the taxes associated with the property subject to this litigation. (Craig Depo. 67:5-7 and 11-13).

REPLY: See Reply to No. 16 above.

18. Michael was told that at some point his name would be put on the land. (Michael Depo. 7:15-18).

REPLY: See Reply to No. 8 above.

19. Michael was never shown a copy of the deed. (Michael Depo. 7:8-10).

REPLY: See Reply to No. 8 above.

20. During Pam's deposition the following exchanges took place:

VOGEL: Did you and Craig ever have conversations about Michael and Theresa receiving some of this land (referring to Van Zee land)?

PAM: No.

VOGEL: Did you and Pat?

PAM: No.

(Pam Depo. 9:17-21).

VOGEL: You didn't – when you have conversations with Pat, it wasn't about Dad's debt or rental income or who owned what land?

PAM: We had never talked about that. No. Pat and I never did that.

VOGEL: Is that something Pat liked to talk about?

PAM: No.

(Pam Depo. 19:6-12)(emphasis added).

REPLY: It is true that Pam did not talk to her mother-in-law about any of the details concerning the father's debt or the rental income. The Statement of Fact and the supporting Answers to Interrogatories are about her mother-in-law crying to her when being confronted by Theresa and Michael concerning the land they received. Other than Patricia crying about this, Pam was not involved in any discussions with Patricia about the details.

Dated this 2nd day of November, 2023.

SCHOENBECK & ERICKSON, PC

/s/ Lee Schoenbeck

Lee Schoenbeck

Joe Erickson

Attorneys for Plaintiffs

1200 Mickelson Dr., STE. 310

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605-886-0010

21-3-3. Presumed damages for wrongful conversion of personal property—Presumptions conclusive when possession wrongful from beginning.

The detriment caused by the wrongful conversion of personal property is presumed to be:

- (1) The value of the property at the time of the conversion, with the interest from that time;
- (2) Where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party;
- (3) A fair compensation for the time and money properly expended in pursuit of the property.

Such presumptions cannot be repelled in favor of one whose possession was wrongful from the beginning by his subsequent application of the property to the benefit of the owner, without his consent.

Source: CivC 1877, §§ 1970, 1971; SL 1885, ch 42, § 1; CL 1887, §§ 4603, 4604; RCivC 1903, §§ 2315, 2316; RC 1919, §§ 1987, 1988; SDC 1939 & Supp 1960, § 37.1910.

55-1-7. Wrongful detention creates implied trust.

One who wrongfully detains a thing is an implied trustee thereof for the benefit of the owner.

Source: SDC 1939, § 59.0102 (1).

55-1-11. Implied trust--Declaration by court of equity.

The enumeration in §§ 55-1-7 to 55-1-10, inclusive, of cases wherein an implied trust arises does not exclude or prevent the arising of an implied trust in other cases nor prevent a court of equity from establishing and declaring an implied, resulting, or constructive trust in other cases and instances pursuant to the custom and practice of such courts.

Source: SDC 1939, § 59.0102.

Rent amounts - Theresa's portion

2016 - \$21,600

2017 - \$21,600

2018 - \$19,800

2019 - \$19,800

2020 - \$19,800

2021 - \$19,800

2022 - \$21,000

2023 - \$21,000

Total - \$164,400

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Appendix 79

STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

COUNTY OF HAND)

:SS

THIRD JUDICIAL CIRCUIT

CRAIG AND PAMELA VAN ZEE,

Plaintiffs,

v.

THERESA VAN ZEE AND MICHAEL D.
VAN ZEE,

Defendants

29CIV. 22-9

VERDICT FORM

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues, find as follows with respect to the issues we are to address.

Question 1

We find for Pamela and Craig Van Zee on all counts brought by both Defendants:

 Yes X No

If "No," go to Question 2.

Question 2

We find that Michael Van Zee is entitled to damages against Pamela and Craig Van Zee in the amount of \$ 38,052.00 (assessed damages, if any, in the sum of).

We further find that Michael Van Zee is entitled to prejudgment interest, beginning 12-14-23 (fill in date) on the amount of 38,052.00 (fill in dollar amount of damages the plaintiff is entitled to recover interest on).

If you have put an amount in this Question, then go to Question 3.


Question 3

We find that Theresa Van Zee is entitled to damages against Pamela and Craig Van Zee in the amount of \$ 38,052.00 (assessed damages, if any, in the sum of).

We further find that Theresa Van Zee is entitled to prejudgment interest, beginning 12-14-23 (fill in date) on the amount of 38,052.00 (fill in dollar amount of damages the plaintiff is entitled to recover interest on).

The Foreperson should now sign the Verdict Form and notify the Bailiff.

Dated this 14th day of December, 2023.


Foreperson

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 30600

THERESA VAN ZEE,
Plaintiff and Appellant,

vs.

CRAIG AND PAMELA VAN ZEE,
Defendants and Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Hand County, South Dakota

HONORABLE KENT A. SHELTON
Presiding Judge

APPELLEES' BRIEF

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Notice of Appeal was filed January 18, 2024.

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<u>Jolley v. Corry</u> 671 P.2d 139 (Utah 1983).....	16.
<u>Matter of Estate of Tank</u> 2023 S.D. 59, 998 N.W.2d 109.....	17.
<u>Meinhard v. Salmon</u> 249 N.Y. 458, 164 N.E. 545 (1928).....	16.
<u>Rancho Viejo Cattle Company, Ltd. v. ANB Cattle Company, Ltd.</u> 642 S.W.3d 850 (Tex. App. 2021).....	15, 17.
<u>Ries v. JM Custom Homes, LLC</u> 2022 S.D. 52, 980 N.W.2d 217.....	14.
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<u>Strassburg v. Citizens State Bank</u> 581 N.W.2d 510 (S.D. 1998).....	20.
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STATUTES

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PRELIMINARY STATEMENT

The Honorable Judge Shelton and the Hand County jury, based upon the undisputed evidence before Judge Shelton and the witnesses that testified before the jury, got it right. The Hand County jury did not believe Theresa Van Zee's story as to why she had not pursued rent on land that she knew that she owned. Theresa's case is entirely based upon misapplication of the law concerning tenants in common.

Appellees, Craig and Pamela Van Zee, will use the same designations in the Appellees' Brief that the Appellant, Theresa Van Zee, has indicated in the Preliminary Statement to her Appellant's Brief. Craig and Pamela's Statement of Undisputed Material Facts will be included in our Appendix and additionally referred to as "SUMF" with its respective paragraph number in the pleading. The Hand County Clerk of Courts record for the companion case of Michael Van Zee (hereinafter "Michael") prior to the consolidation of the matters, will be referred to as "CR Michael" followed by the corresponding page numbers.

JURISDICTIONAL STATEMENT

Craig and Pamela agree with Appellant's Jurisdictional Statement.

STATEMENT OF LEGAL ISSUES

- 1. WHETHER THE TRIAL COURT WAS CORRECT IN CONCLUDING THAT CRAIG AND PAMELA OWED NO FIDUCIARY DUTY TO THEIR CO-TENANT.**

The trial court denied Theresa's Motion for Partial Summary Judgment, and granted Craig and Pamela's Motion for Summary Judgment, concluding Craig and Pamela did not owe a fiduciary duty to Theresa.

Est. of Thacker v. Timm, 2023 S.D. 2, 984 N.W.2d 679, 686.
Conway v. Conway, 487 N.W.2d 21 (S.D. 1992).
Smith v. Smith, 846 S.E.2d 819 (N.C. Ct. App. 2020).
Hoven v. Banner Assocs., Inc., 2023 S.D. 33, 993 N.W.2d 562.

SDCL 48-7A-202(c)(1).

2. WHETHER THE TRIAL COURT WAS CORRECT IN CONCLUDING THERE WAS NO FRAUDULENT CONCEALMENT BY CRAIG AND PAMELA, WHICH WOULD HAVE TOLLED THE STATUTE OF LIMITATIONS.

The trial court concluded that Theresa had no evidence that showed Craig and Pamela engaged in affirmative or deceptive acts that prevented Theresa from discovering her cause of action. The trial court granted Craig and Pamela's Motion for Summary Judgment, barring Theresa's claims from prior to May 31, 2017.

Strassburg v. Citizens State Bank, 581 N.W.2d 510, 515 (S.D. 1998).

3. WHETHER THE TRIAL COURT WAS CORRECT IN REFUSING TO IMPOSE A CONSTRUCTIVE TRUST.

The trial court found that a constructive trust was not created, granted Craig and Pamela's Motion for Summary Judgment, and denied Theresa's Motion for Partial Summary Judgment seeking that relief.

Johnson v. Markve, 2022 S.D. 57, 980 N.W.2d 662.

4. WHETHER THE TRIAL COURT WAS CORRECT IN DENYING THERESA'S MOTION FOR PARTIAL SUMMARY JUDGMENT SEEKING DAMAGES FOR CONVERSION.

The trial court concluded that there was a factual dispute that precluded summary judgment in Theresa's favor.

W. Consol. Coop. v. Pew, 2011 S.D. 9, 795 N.W.2d 390.
Est. of Thacker v. Timm, 2023 S.D. 2, 984 N.W.2d 679, 686.

5. WHETHER THE TRIAL COURT WAS CORRECT IN ALLOWING CRAIG AND PAMELA TO PRESENT EVIDENCE TO THE JURY CONCERNING THE AGREEMENT FOR THE PAYMENT OF THE FAMILY DEBT AND SUPPORTING MOTHER AS A CONDITION OF RECEIVING THE REAL PROPERTY.

The trial court denied Theresa's Motions in Limine to exclude evidence of the mother's requirement that she be supported and that the debt be paid as a condition of receiving the property.

Hofeldt v. Mehling, 2003 S.D. 25, 658 N.W.2d 783, 788.

STATEMENT OF THE CASE

Craig and Pamela agree with most of Theresa's Statement of the Case, supplemented as set forth herein.

Craig and Pamela commenced two partition actions to divide the property. One of the actions was to make Theresa take her half interest. (CR 2-3.) In the companion action, Michael was forced to take his share of an adjoining piece of property. (CR Michael 2-3.) Both matters were tried together before the jury. The two Complaints were consolidated for trial and Michael also received a verdict of \$38,052. He has not appealed from his Judgment, and that Judgment has been satisfied. (App. 161.)

Theresa's initial Counterclaim alleged a partnership and sought an accounting. (CR 6-10.) Pursuant to a Motion to Dismiss, the partnership claim was dismissed by the court (CR 33) and Theresa has not appealed that ruling.

The parties stipulated to trying all of the equitable issues to a jury. (App. 159-160.)

On page 5 of the Appellant's Brief, Theresa refers to the Agreement that the siblings entered into with their mother as a "claimed agreement." As Theresa admits on page 34 of the Appellant's Brief, the jury found this to be an actual agreement. Craig and Pamela would dispute the use of the adjective "claimed" by Theresa. The same reference appears on page 6 of the Appellant's Brief.

STATEMENT OF THE FACTS

Because Theresa's appeal is about both the facts that were presented before the court at the motion for summary judgment hearing, and the facts that were presented to a jury at the jury trial, Craig and Pamela's Statement of Facts set forth below makes the temporal distinction about information before the judge and the jury.

A. Summary Judgment Undisputed Facts¹.

1. Van Zee parents' land and dad's debt.

- Desmond Van Zee, the father of the parties of the Van Zee children in this litigation, died on January 27, 1997. (SUMF #1, App. 1; Aff. of Craig, CR 290-291.)
- At the time of Desmond Van Zee's death, he had a divorce pending with his wife, Patricia Van Zee, in which Desmond alleged that during the parties' marriage they had incurred "substantial liabilities." (SUMF #2, App. 1; *Divorce Answer and Counterclaim*, CR 305-307.)
- According to Attorney Rediger's handwritten notes, Desmond had debts of \$198,220 and liquid assets of \$16,454. (SUMF #3, App. 1; CR 308.)
- Desmond was being foreclosed on. (SUMF #4, App. 1; Craig's Depo., App. 43.)
- After Desmond died, Craig took on all of the farm work, pledged his property for his parents' debt, and signed mortgages that

¹ SUMF refers to Craig and Pamela's Statement of Undisputed Material Facts (App. 1-7.) as referenced above in the Preliminary Statement. The number of the statement is given in the citation along with the document that was cited for the statement in the Statement of Undisputed Material Facts.

included his property. (SUMF #5, App. 1; Mortgage 6/17/2002, CR 409-413.)

- Patricia wanted all the land kept together to help pay Desmond's debt. (SUMF #6, App. 2; Craig's Depo., App. 41.)
- On June 3, 2010, Patricia, Craig, and Pam signed a mortgage for Frontier Bank, formally known as Pender State Bank. (SUMF #7, App. 2; Mortgage 06/03/2010, CR 414-426.)
- On June 9, 2010, the original loan amount for Desmond's debt was down to \$375,000 and owed by Patricia, and now Craig and Pam. (SUMF #8, App. 2; Loan Status, CR 427.)
- The original lender after Desmond died wanted Patricia and Craig to sell some of the quarters. (SUMF #9, App. 2; Craig's Depo., App. 55.)
- On June 30, 2004, Patricia Van Zee conveyed the home place to Patricia, Craig, and Craig's wife, Pam. (SUMF #10, App. 2; Warranty Deed, CR 428-429.)
- The current balance on Desmond Van Zee's debt that Craig is paying is \$186,409.72. (SUMF #10, App. 2; Loan Status, CR 427.)

2. History of the farmland at issue.

- On September 16, 2004, Patricia conveyed a quarter and an 80 in Section 21 into joint tenancy with herself and her son, Michael. (SUMF #11, App. 2; Warranty Deed, CR 430.)
- On September 16, 2004, Patricia conveyed a quarter and an 80 in Section 21 into joint tenancy with herself and her daughter, Theresa. (SUMF #12, App. 2; Warranty Deed, CR 431.)
- In October 2004, Northstar Farms leased the Section 21 property at issue in this litigation, and the lease was signed by Patricia and her

son, Craig. (SUMF #13, App. 2; Northstar Lease, CR 432-434.)

- June 7, 2010, Patricia conveyed her undivided one-half interest in the quarter and 80, the subject of this litigation with Michael, to Craig. (SUMF #14, App. 2; Warranty Deed, CR 435-436.)
- June 7, 2010, Patricia conveyed her undivided one-half interest in the quarter and 80, the subject of this litigation with Theresa, to Craig. (SUMF #15, App. 3; Warranty Deed, CR 437-438.)
- In October 2012, Kirby Odde leased all the Van Zee property, including the property subject to this litigation, and the lease was for five years. The lease was executed by Patricia Van Zee and Craig Van Zee. (SUMF #16, App. 3; Odde Lease, CR 439-442.)
- On May 22, 2013, Patricia quit claimed her interest in real property in Sections 1, 13, and 14 to Craig and his wife, Pam. (SUMF #18, App. 3; Quit Claim Deed, CR 443-444.)
- On July 10, 2013, Patricia quit claimed her interest in real property in Section 13 Craig and his wife, Pam Van Zee. (SUMF #19, App. 3; Quit Claim Deed, CR 445-446.)
- On August 25, 2015, Craig conveyed his one-half interest in the property that he owned that is subject to this litigation, into joint tenancy with his wife, Pam. (SUMF #23, App. 4; Quit Claim Deed, CR 508-509.)

3. Mom continued to get the benefit of the land after her name was off the property.

- At the time Odde Lease, Depo. Ex. 11, was executed, Patricia Van Zee had no interest in the property that is subject to this litigation. (SUMF #17, App. 3; Odde Lease, CR 439-442.)

- On December 31, 2013, Patricia listed \$14,000 of rent on her tax return. (SUMF #20, App. 3; 2013 Tax Return, CR 447-452.)
- On December 31, 2014, Patricia listed \$16,000 of rent on her tax return. (SUMF #21, App. 3; 2014 Tax Return, CR 453-458.)
- On December 31, 2015, Patricia listed \$16,000 of rent on her tax return. (SUMF #24, App. 4; 2015 Tax Return, CR 510-515.)
- On December 31, 2016, Patricia listed \$16,000.00 of rent on her tax return. (SUMF #27, App. 4; 2016 Tax Return, CR 531-536.)
- On December 31, 2017, Patricia listed \$16,000 of rent on her tax return. (SUMF #28, App. 4; 2017 Tax Return, CR 537-542.)
- On December 31, 2018, Patricia listed \$17,000 of rent on her tax return. (SUMF #30, App. 4; 2018 Tax Return, CR 543-548.)
- On December 31, 2019, Patricia listed \$15,899 of rent on her tax return. (SUMF #32, App. 5; 2019 Tax Return, CR 549-555.)
- December 31, 2020, Patricia listed \$16,000 of rent on her tax return. (SUMF #38, App. 5; 2020 Tax Return, CR 556-565.)
- Rent Patricia received, which was reported on her tax returns, was rent paid by Craig, even though Patricia had no land to rent after July 10, 2013. (SUMF #42, App. 6; Aff. of Craig, CR 290-291.)

4. Theresa knew she was an owner of the property long before the partition action.

- In March and April 2015, Theresa called the Register of Deeds and had five pages sent to

her in Iowa. (SUMF #22, App. 3; See Aff. of Suzy Wernsmann, CR 285-289.)

- Theresa admitted that she had seen the Warranty Deed that put her name on the land, Depo. Ex. 1, "a long time ago" before 2020. (SUMF #34, App. 5; Theresa's Depo., App. 123, 126.)
- On October 18, 2016, Brady Van Zee, Michael's son, had the Hand County Register of Deeds find all the real property with Michael's name on it and provide him copies of the deeds. (SUMF #25, App. 4; Receipt, CR 516.)
- When Brady got copies of deeds with his dad's name on them, he testified that he probably gave them to his dad, Michael. (SUMF #26, App. 4; Brady Depo., CR 526.)
- Sometime in 2018, Theresa said that she talked to Michael about the deeds at some time two years before Patricia died. (SUMF #29, App. 4; Theresa's Depo., App. 128-129.)
- On July 18, 2019, Theresa got seven pages of records from the Hand County Register of Deeds Office. (SUMF #31, App. 4; See Aff. of Suzy Wernsmann, CR 285-289.)
- By 2020, Theresa admitted that she knew that her name was on the land. (SUMF #33, App. 5; Theresa's Depo., App. 123, 126.)
- Theresa knew that Desmond had debt when he died and had seen a bankruptcy attorney. She doesn't know how it was sorted out, she didn't help, and she doesn't know what Craig did about the debt. (SUMF #35, App. 5; Theresa's Depo., App. 127.)
- Theresa put a copy of the deed, where Michael got the land that is subject to litigation, in Michael's pickup. (SUMF #36, App. 5; Theresa's Depo., App. 128.)

- Theresa didn't do anything about paying real estate taxes or managing the farm once she knew her name was on the deed. (SUMF #37, App. 5; Theresa's Depo., App. 132.)
- March 20, 2021, Michael signed a divorce settlement with his wife and doesn't list an interest in ag land as an asset in his divorce. (SUMF #39, App. 5; *Divorce Property and Marital Settlement Agreement*, CR 566-571.)
- Michael admitted that he knew while his mom was alive what land she put his name on. (SUMF #41, App. 5; Michael's Depo., CR 579-581.)
- Michael assumed Craig was taking care of the farm debt. (SUMF #43, App. 6; Michael's Depo., CR 584.)
- Michael brought up rent with his mom while she was alive. (SUMF #44, App. 6; Michael's Depo., CR 588.)
- Michael didn't do anything to assist with the land. (SUMF #45, App. 6; Michael's Depo., CR 581.)
- Michael learned from his sister that his name was on the land. (SUMF #46, App. 6; Michael's Depo., CR 583.)
- Theresa talked to a lawyer after she saw the deeds but chose not to follow up with it. (SUMF #47, App. 6; Theresa's Depo., App. 129-131.)
- Theresa knew her mom was renting out the farm ground. (SUMF #48, App. 6; Theresa's Depo., App. 137, 141.)
- Theresa talked to her mom about why Theresa was not on the land. (SUMF #51, App. 6; Theresa's Depo., App. 126.)

- Theresa was told by her mom that Craig's name was on the land because their dad had debt (SUMF #52, App. 6; Theresa's Depo., App. 126.)
- Theresa did not ask her mom for Theresa's share of the rent money. (SUMF #53, App. 6; Theresa's Depo., App. 140.)
- Michael was told by his mom that his name was on the land. (SUMF #54, App. 6; Michael's Depo., CR 579.)
- Michael didn't ask for rent because he knew his mom needed the money to make payments on the debts. (SUMF #55, App. 7; Michael's Depo., CR 580-581.)

5. Craig had no involvement with Theresa.

- Craig and Theresa didn't talk. (SUMF #49, App. 6; Theresa's Depo., App. 140-141.)
- Craig and Michael didn't talk (SUMF #50, App. 6; Michael's Depo., CR 585, 589-590.)

6. Mom died in 2021.

- On March 26, 2021, Patricia died. (SUMF #40, App. 5; Aff. of Craig, CR 290-291.)

B. Trial Facts.

Below are additional facts the jury heard while having the opportunity to see and weigh the witness credibility:

1. Weighing Theresa's story.

In 2015, Theresa had the Hand County Register of Deeds send Theresa copies of all of the deeds that had Theresa's name on them. (T 78-81; App. 164-167.) The jury heard evidence that showed Theresa knew her name was on the

real property in 2015. (T 82.) From that time on, Theresa never complained to her mother about not receiving rent. (T 82.)

Theresa knew that her name was on the property while her mother was still alive, and Theresa chose not to talk to her mom about why Theresa wasn't receiving rent. (T 56-56.) Theresa said that around 2020 she knew that she and Craig owned the land together. (T 58.)

Theresa was evasive in front of the jury, and they were able to judge her demeanor. (T 71-72.)

Theresa admitted that she talked with her brother Michael about the deed at least two years before her mother died. (T 72.)

Theresa knew that her father's bankruptcy showed secured debt of \$364,480.61 and unsecured debt of \$29,862.56. She doesn't know who was working on the farm after her father's death to get the bills taken care of. (T 77.) She didn't do anything to help her mother financially even though she knew her mother had to go to a banker to get some help with her finances. (T 77-78.)

Near the end of Theresa's mother's life, Theresa did confront her mom about why Craig was one of the owners of the property, but she didn't confront her mother about the rent. (T 84.)

Theresa asked the jury for eight years of one-half of the rental income on the land she received from her mother, for a total of \$164,000 and the jury awarded Theresa \$38,052 which is approximately the amount of the rent from the time Theresa's mother died until the jury trial. (T2 104; Appellant's Brief p. 34.)

2. Theresa's Mother's wants and needs.

Theresa was okay with her mom having control of the funds. (T 83-84.) Theresa's mom's name was on the farm checking account where the rent went. (T 83.)

Theresa's mother was sick with cancer and bad health from 2017 on, but she continued to live independently because she was cared for by Craig and Pamela. (T 94-98.)

Patricia wanted the income from the land to go towards paying the debt her husband had accumulated, instead of paying rent to Michael and Theresa. (T2 45-46.) When Desmond Van Zee died, the land taxes hadn't been paid, and he was behind on land payments. (T2 48.) The mother had a hospital bill that was in collection and back taxes were owed. (*Id.*)

Through all of this, Patricia never told Craig to make any rent payments to Michael or Theresa. (T2 56-57.) Through it all, Craig and Pamela agreed with their mother to keep paying her rent every year, even when she wasn't the owner of the property. (T2 58.) During much of this time, Theresa and Michael "kept haunting her" about the land. (T2 57-58.) Craig and Pamela agreed to take care of Craig's mother as part of the deal his mother made. (T2 59-61; 63-64.)

3. Craig and Pamela.

In the Appellant's Brief, they misstate Craig and Pamela's purchase of the Roach place. (Appellant's Brief p. 12.) Land acquired from their mother was not used to finance the purchase of the Roach place. (T2 25-27.)

When their father died, Craig signed notes and mortgages for the family debt. (T2 49-51; CR. 1783-1793, 1800-1834.) Craig and Pamela signed a note for

\$250,000 of his father's debt in 1999. (T2 51.) The same process of signing notes for the family debt was repeated in 2022, putting Pam and Craig on \$350,000 of family debt. (T2 52-53; CR 1789-1793.) Craig and Pamela were not able to get ahead in paying off the family debt by 2003. (T2 54.) Michael and Theresa were not helping pay the debt. (T2 55-56.)

Craig and Pamela and their sons converted the pastureland to crop ground to make it more profitable. (T 98-99; T2 46-47.) They picked rocks by hand, cleaned it up, broke up and tilled the ground, and then repeated the process the following year because the rocks kept coming up. (*Id.*) The improvement from pastureland to crop ground made the rental income rise from approximately \$65 an acre up to \$170 an acre. (*Id.*)

STANDARD OF REVIEW

1. Jury Verdict.

The challenge to a jury verdict, the evidence is examined in the light "most favorable" to upholding the verdict and the verdict is given the "benefit of all reasonable inferences." Bridge v. Karl's, Inc., 538 N.W.2d 521, 523 (S.D. 1995). "This court does not weigh the evidence and substitute its judgment for that of the jury." (*Id.*)

2. Evidentiary Rulings.

Evidentiary rulings are reviewed under an abuse of discretion standard. Thompson v. Mehlhaff, 2005 S.D. 69, ¶32, 698 N.W.2d 512, 522. If there is error in an evidentiary ruling, it must be prejudicial in nature before this Court will

overturn the jury verdict. In re Est. of Duebendorfer, 2006 S.D. 79, ¶ 16, 721 N.W.2d 438, 443.

3. Summary Judgment.

A summary judgment decision is reviewed de novo. Ries v. JM Custom Homes, LLC, 2022 S.D. 52, ¶ 14, 980 N.W.2d 217, 222. The Court determines whether a genuine issue of material fact exists and if a legal question has been correctly decided. (*Id.*)

ARGUMENT

A. The Trial Court correctly concluded that Craig and Pamela owed no fiduciary duty to their co-tenant.

1. There was no fiduciary relationship as a matter of law.

This last year this Court clearly defined a fiduciary duty:

Fiduciary duties “arise only when one undertakes to act primarily for another’s benefit. The law will imply such duties only where one party to a relationship is unable to fully protect its interests and the unprotected party has placed its trust and confidence in the other.”

Est. of Thacker v. Timm, 2023 S.D. 2, ¶ 21, 984 N.W.2d 679, 686.

The key facts with respect to fiduciary duty are not in dispute. Craig and Pamela had no relationship with Theresa of any type. Theresa knew that she owned a one-half interest in the property since 2015. (T 78-82.) Theresa knew the property was rented and that she wasn’t getting any rent. (T 82.) On appeal, Theresa now takes the position that she agreed to rental income going to support her mother. (Appellant’s Brief p. 22.)

There are no facts that support the imposition of a fiduciary duty relationship in this setting. Theresa's bare argument is that Craig and Pamela are her fiduciaries because their mother put them all on the title to the real property at some point in time.

Judge Shelton got the legal question right in the motion for summary judgment, and the jury also didn't buy Theresa's story at the trial.

2. There is no fiduciary relationship for tenants in common, absent special circumstances.

Conway v. Conway, 487 N.W.2d 21 (S.D. 1992) uses language from a Nebraska decision, Hafeman v. Gem Oil Co., 163 Neb. 438, 80 N.W.2d 139 (1956), a decision unique to oil and gas property circumstances. Transporting that language into Conway misdirects the standards for tenants in common.

The basic rule in American jurisprudence is that "a fiduciary relationship ordinarily does not arise between tenants in common." Smith v. Smith, 846 S.E.2d 819 (N.C. Ct. App. 2020); Rancho Viejo Cattle Co., Ltd. v. ANB Cattle Co., Ltd., 642 S.W.3d 850, 865 (Tex. App. 2021). The Conway decision cites similar language from Hafeman. Conway, at 24.

To have a fiduciary relationship between tenants in common, there has to be a "special confidence reposed," Smith, 846 S.E. at 23, or "an agreement or contract." Rancho Viejo, 642 S.W. at 26. Our Court has expounded on the nature of a fiduciary relationship. Hoven v. Banner Assocs., Inc., 2023 S.D. 33, 993 N.W.2d 562. A fiduciary relationship is a "peculiar confidence placed by one individual in another." *Id.* at 573. One party has "superior power." *Id.* One party has been placed "in charge of" the other. *Id.* None of these facts are present here.

In fact, it is undisputed that Theresa, Craig, and Pamela had no special relationship, no discussion, no agreement, in any respect concerning this transaction.

In Theresa's Appellant's Brief, she attempts to stretch the tenants in common relationship into a fiduciary one on page 20. But, other than the Arkansas decision, the other states required special relationships between the co-tenants. In the North Dakota decision, there were option rights the co-tenants shared pursuant to a last will and testament. Bartz v. Heringer, 322 N.W.2d 243, 244 (N.D. 1982). In the Utah decision, there was a debt that a co-tenant unilaterally defaulted on to put the property into foreclosure so as to acquire it. Jolley v. Corry, 671 P.2d 139, 141 (Utah 1983). Even more interesting is the reference in Appellant's Brief to Justice Cardozo's decision in Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928). Justice Cardozo was writing about "joint adventures, like co-partners." Ironically, Theresa initially filed a counterclaim alleging a partnership, like the situation in Meinhard v. Salmon, and that counterclaim was dismissed in September of 2022 as joint ownership alone does not create a partnership. SDCL 48-7A-202(c)(1). The dismissal of the counterclaim alleging a partnership was not appealed.

3. Conway Key Facts: life estate and family understanding.

In Conway, mother had a life estate. Conway v. Conway, 487 N.W.2d 21 (S.D. 1992). That entitled her to all the income during her lifetime. The life estate was deeded away to her son/defendant, and he didn't disclose the removal of the mother's life estate. Our Court noted the critical fact "the family had long operated under the belief that all rental income from the farm was to go to

support the mother until her death." *Id.* Conversely, the 2010 deed of one-half interest to Theresa did not reserve a life estate to mother. According to Theresa's own testimony, in 2015, she knew every fact that entitled her to assert present ownership and entitlement to rent. (T 80-82.) The jury heard the testimony. The logical explanation for Theresa's conscious decision to not seek rent while her mother was alive was because she knew her mother conditioned the gift on mother being cared for and the family debt being paid. The jury is expected to weigh conflicting evidence and decide upon the credibility of the witnesses.

Matter of Est. of Tank, 2023 S.D. 59, 998 N.W.2d 109, 122.

In Theresa's new interpretation of the facts on page 22 of her Appellant's Brief, she is now saying that she was okay with her mother being supported by the rental income from the farm.

4. There was no relationship of trust or confidence.

As set forth in the facts, Craig and Pamela had no relationship with Theresa. There was no trust or confidence of any type between them. Under Theresa's theory, her mother owed Theresa rent from September 2004, when Theresa became a co-owner with her mother of the parcel of property at issue!

In Theresa's Brief on page 22, she creates a new story, different from the one she argued at the trial below. On page 22 of the Appellant's Brief, Theresa now says that she assumed that her mother was getting the rent and that was okay while her mother owned the property. If the Court looks at the trial transcript cite, it is a reference to something that happened just a couple of years after Theresa's father died in 1997. Theresa is now, on appeal, attempting to transport that story into the events after Theresa's mother made Theresa one-half

owner of the property in 2004. On appeal, Theresa also then transports her story one step further to be that the permission for her mother to have the rent from the property ended when Craig and Pamela became half owners of the property. If Theresa's new story on page 22 of her Appellant's Brief is true, and she agreed with rental income going for the support of her mother, the undisputed evidence is that her mother continued to receive rent all the way until her mother died, what is the basis for Theresa's complaint on appeal? Summary judgment was appropriate as a matter of law because there was no special relationship. Additionally, the jury heard Theresa's evolving story. The Court should not weigh the evidence and should not substitute its judgment for that of that jury.

Westover v. E. River Elec. Power Co-op., Inc., 488 N.W.2d 892 (S.D. 1992).

5. Oil and gas pool decision.

The Conway decision relied upon Hafeman v. Gem Oil Co., 163 Neb. 438, 80 N.W.2d 139 (1956) for its language about "a relationship of trust in confidence exists" and about "a secret profit." Hafeman is an oil and gas case involving oil extracted from under two non-contiguous quarters of real property. *Id.* at 40. It is a laborious case to read, but it is about the agreement that the co-tenants entered for the sharing of the proceeds from the pool of oil from which there were extractions. In Hafeman, two of the co-tenants controlled the extraction and distribution of the proceeds pursuant to an agreement. *Id.* at 470. The agreement was violated, and a lawsuit resulted from the party that didn't receive their share of the oil proceeds. In Hafeman, there actually was a contract and there were secret profits. The owner of the property couldn't know the amount of oil being extracted and whether or not they were getting their share.

Theresa conversely knew in 2015 she had received a one-half interest in the real property and, under her theory, it came unencumbered, so she knew immediately that she was entitled to half the rent. If her claim before this Court is false, the same claim rejected by the jury, it may well be because Theresa knew that the proceeds from the land had to go towards paying off the debt and supporting her mother. Upon her mother's death, Theresa received the benefits of the real property that her mother had gifted to her as part of an estate plan.

6. The facts don't support Theresa's theory.

Theresa came into the property relationship with her mother in 2004. Under Theresa's theory, her mother created a fiduciary responsibility to Theresa to provide half of the rent to Theresa from the day the mother made the gift! The course of conduct between the parties is undisputed. Theresa did not receive any rent from her mother at any time prior to her mother's death.

At trial, the jury heard that in 2015 Theresa received the deed that showed her name on the property as a joint tenant. Under Theresa's theory, at that point in time, she had no special relationship of any type with Craig and Pamela. Theresa doesn't contend she had any contract or agreement with Craig or Pamela. Theresa made a conscious decision to not pursue one-half of the rent for the property. The only plausible explanation for that is the one offered by Craig, that the parties all knew the rent from the property was to stay together until the debt was paid and to provide for mom in her lifetime.

Theresa asked the jury to return a verdict of \$164,400. Instead, the jury returned an amount of \$38,052, which is approximately the rental income from

the time mother died until the time Craig was able to get the property partitioned in 2023. (T 104.)

B. There was no fraudulent concealment by Craig and Pamela to toll the statute of limitations.

1. Relevant Undisputed Material Facts.

It is undisputed that rent was being paid to Patricia right up until her death and was reported accordingly on her income tax returns, even though she didn't own the land from which she received "rent." (SUMF #42, App. 6.) In her Appellant's Brief, Theresa now contends that she was okay with her mother receiving rental income. (Appellant's Brief p. 22.) Theresa's name was put on the property in 2004, as a joint tenant with her mother. Her mother did not pay rent to Theresa ever. In 2010, Patricia transferred her half interest to Craig and Pamela. In 2015, Theresa obtained the deeds from Hand County Register of Deeds Office, so she knew who the owners of the property were. (T 79-82.) Theresa knew the land was being rented. (T 82.) Theresa now contends that she was a victim of fraudulent concealment.

2. Law of Fraudulent Concealment.

Judge Shelton correctly issued this summary judgment decision. For fraudulent concealment to apply absent a "confidential or fiduciary relationship," there has to have been "actionable conduct or injury [that] has been concealed by a deceptive act or artifice." Strassburg v. Citizens State Bank, 581 N.W.2d 510, 515 (S.D. 1998).

Craig did not talk to his sister, Theresa. (SUMF #49, App. 6.) Theresa knew the land was rented. (T 82.) Theresa knew she was an owner of the property

since 2015. (T 79-82.) Theresa doesn't allege that Craig or Pamela did anything to hide from her that she was (a) an owner of the property; and (b) that the property was rented; or (c) that Theresa was not receiving any of the rent from the property. Fraudulent concealment did not exist.

3. Conway distinguished.

Appellant relies upon the Conway decision for their fraudulent concealment argument. Conway is discussed and distinguished in the preceding issue. Conway v. Conway, 487 N.W.2d 21 (S.D. 1992).

C. There was no basis for a constructive trust.

The trial court correctly found on summary judgment there was no basis for a constructive trust. Theresa notes in her brief that the assets have to have been "wrongfully obtained." Johnson v. Markye, 2022 S.D. 57, 980 N.W.2d 662. Two of the elements of a constructive trust are a problem for Theresa. First, she must show that Craig and Pamela "gained," and then she has to show that the gain was "by fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act." *Id.*

With respect to whether Craig and Pamela gained from the rent on this property, Theresa ignored that Craig and Pamela signed their names to large debts of Theresa's parents and paid on those large debts for many years. Additionally, as the jury heard, Craig and Pamela agreed to care for Patricia, and that included more than paying rent. Craig and Pamela and their sons worked the land, picked the rocks, and helped convert the subject property from pasture to more valuable crop ground. (T 98-99; T2 46-47.) Craig and Pamela were physically caring for a lady who at the time was very sick and who needed care as

a result of cancer. (T 94-98; T2 59-61.) If Craig and Pamela had “gained” so much, one might wonder why Theresa didn’t sign for the family debt, work the family farm, and care for her mother.

The even bigger problem that Theresa has with her argument is that there is no evidence that Craig and Pamela engaged in “fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act.” They didn’t do anything with respect to Theresa. But here is what Theresa has admitted:

- She knew she owned the land since 2015.
- She knew the land was rented.
- She knew she wasn’t getting the rent.
- She knew there was family debt that had to be paid.
- She knew that her mother was being cared for and provided for.

On the undisputed facts, how is Theresa the victim of “fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act” given what she has admitted she knew?

D. The trial court was correct in denying Theresa’s motion for partial summary judgment seeking damages for conversion.

Theresa knew and acquiesced in not receiving the rent. There was no conversion. There were questions of fact.

Theresa did not object to Jury Instruction #15, the South Dakota Civil Pattern Jury Instruction 20-170-10, which provides in its first sentence:

Conversion is the *unauthorized* exercise of control or dominion over personal property in a manner that is *unwarranted* and *seriously interferes* with an

owner's right in the property or in a manner
inconsistent with the owner's right.

S.D. Civil Pattern Jury Instruction 20-170-10 (*emphasis added*); W. Consol. Coop. v. Pew, 2011 S.D. 9, 795 N.W.2d 390, 396. Consent defeats conversion. Est. of Thacker v. Timm, 2023 S.D. 2, ¶ 41, 984 N.W.2d 679, 692.

The jury heard the testimony that Theresa knew she owned a one-half interest in the property, she knew the property was being rented, and she knew she wasn't receiving any of the rent. On appeal, now Theresa contends on page 22 of her Appellant's Brief that she was agreeable to money being used for her mother's care. The jury also heard testimony about Theresa's arguments with her mother concerning the property and heard testimony that their mother wanted all of the money to be used to pay the family debt and for mother's care. There was sufficient evidence to support the jury conclusion that the use of the rent was not unauthorized or unwarranted or seriously interfered with or was inconsistent with Theresa's wishes through this time period.

In Theresa's appeal, she is not contesting the affirmative defenses that were included in the jury instructions of laches, waiver, estoppel, and consent.

There is an interesting question of reconciling the two civil pattern jury instructions on conversion: 20-170-10 and 20-170-20. Both are statements of the law repeated by the court on multiple occasions. It would appear that the reconciliation is that you cannot begin to claim conversion if you authorized the use, or if the use is not unwarranted or doesn't interfere with what you intended. In other words, you have to get over the threshold in 20-170-10, which is a

verbatim quote from W. Consol. Coop. v. Pew, 2011 S.D. 9, 795 N.W.2d 390, 396, before you look at the elements set forth in 20-170-20.

An alternative reconciliation of the two statements of law would be that the “seriously interfered with” condition in the third element of conversion is defined by the language contained in South Dakota Pattern Jury Instruction 20-170-10.

In either event, the jury had the ability to hear the testimony and Theresa’s evolving explanations, which supported a reasonable belief that Theresa knew where the income was supposed to go, she knew she wasn’t getting it, and she had no complaints about its use during her mother’s lifetime.

Interestingly, Theresa has this statement in support of this issue:

Trial court’s conclusion that there is a fact dispute about whether Theresa “acquiesced to the rental income being used to support [her] mother and service the family debt” is completely untethered to any record evidence.

Appellant’s Brief p. 27.

Compare that allegation under conversion to the representation on page 22 of Appellant’s Brief that she assumed and acquiesced in rental income being used for the support of her mother. The jury had reasonable evidence on which it concluded that Theresa acquiesced in her mother’s wishes of the family debt being serviced and her mother being supported. The inconsistencies in Theresa’s Brief in page 22 and page 27 support that there was a question of fact for the jury to decide—and they did. There was a factual issue for the jury, and they rejected Theresa’s story.

E. The trial court correctly allowed Craig and Pamela to present evidence to the jury to show they were not unjustly enriched.

The gravamen of an unjust enrichment claim is whether or not the retention of a benefit would be “unjust.” Hofeldt v. Mehling, 2003 S.D. 25, 658 N.W.2d 783, 788. Theresa doesn’t dispute that the issue of what is “just,” or in the words of the instruction “inequitable,” is a factual dispute. Instead, Theresa seeks to limit the evidence the jury heard on the issue on what would be inequitable. There is a certain irony in Theresa’s argument and a clear inconsistency. On page 22 of her Appellant’s Brief, she says she acquiesced in the rent being used to support her mother—she admits at least that much of what she agreed to. When Theresa received the deeds in 2015, her mother was no longer on the property, and Theresa admits that on page 32 of her Appellant’s Brief on this issue. Theresa now wants to put a hard stop on the concept of “justice” with respect to the rental income going to pay the family debts and support her mother, and Theresa is blunt in describing her new position:

What Patricia (mother) wanted or did not want to be done with the rental income from 2010 forward is utterly irrelevant to the determination of Theresa’s claim against Craig and Pamela.

Appellant’s Brief pg. 32.

There is no legal basis for reversing the trial court’s determination that the jury should hear all the evidence on whether or not it would be unjust for Craig and Pamela to use the rent for support of Theresa’s mother and for the payment of Theresa’s mother’s family debt.

CONCLUSION

According to Theresa's own testimony, from 2015 on, she knew she owned a one-half interest in the real property at issue. Now on appeal, she argues that she was agreeable with the money going to support her mother until such time that her mother was no longer a half-owner of the property. Her mother was no longer a half-owner of the property by the time Theresa received the deeds in 2015!

The jury heard the evidence. As Theresa summarizes on page 34 of her brief, the jury based its decision on the evidence it heard about what Theresa and Michael and Craig and Pamela and Patricia all had intended and acquiesced in—that while mother was alive, that the funds would go for mother's care and to service the family debt. The jury's decision should be upheld.

DATED this 5th day of August, 2024.

Respectfully submitted,

SCHOENBECK & ERICKSON, PC

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in SDCL 15-26A-66(b)(4). This brief was prepared using Microsoft Word 2013, with 12 point Georgia font. This brief contains 6,269 words, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificate of counsel. I relied on the word count feature in Microsoft Word 2013 to prepare this certificate.

DATED this 5th day of August, 2024.

SCHOENBECK & ERICKSON, PC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on August 5th, 2024, I served a true and correct copy of the foregoing *Appellees' Brief* via electronic means on the following:

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**APPENDIX
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1.	Plaintiff's Statement of Undisputed Material Facts (10/6/2023)	APP. 1-7	CR. 264-270
2.	Deposition of Craig Van Zee (08/30/2023)	APP. 8-107	CR. 309-408
3.	Deposition of Theresa M. Van Zee (08/25/2022)	APP. 108-152	CR. 459-503
4.	Defendant's Answer to Plaintiff's Complaint and Counterclaim (07/18/2022)	APP. 153-157	CR. 6-10
5.	Judgment of Dismissal of Counterclaim (09/14/2022)	APP. 158	CR. 33
6.	Stipulation and Order for Jury Trial of Equitable Issues (11/28/2023)	APP. 159-160	CR. 896-897
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STATE OF SOUTH DAKOTA)
 :SS
 COUNTY OF HAND)

IN CIRCUIT COURT
 THIRD JUDICIAL CIRCUIT

CRAIG AND PAMELA VAN ZEE,

Plaintiffs,

v.

THERESA VAN ZEE,

Defendant.

29CIV. 22-9

PLAINTIFFS' STATEMENT OF
 UNDISPUTED MATERIAL FACTS

Plaintiffs Craig Van Zee and Pamela Van Zee respectfully submit this *Plaintiffs' Statement of Undisputed Material Facts* in support of *Plaintiffs' Motion for Summary Judgment*. Exhibits referenced herein are attached to the *Affidavit of Lee Schoenbeck* filed in support of *Plaintiffs' Motion for Summary Judgment*.

1. Desmond Van Zee, the father of the parties of the Van Zee children in this litigation, died on January 27, 1997. (Affidavit of Craig Van Zee.)
2. At the time of Desmond Van Zee's death, he had a divorce pending with his wife, Patricia Van Zee, in which Desmond alleged that during the parties' marriage they had incurred "substantial liabilities." (Divorce *Answer and Counterclaim*, REDIGER 93-95.)
3. According to Attorney Rediger's handwritten notes, Desmond had debts of \$198,220 and liquid assets of \$16,454. (Atty. Rediger's Notes, PL 93.)
4. Desmond was being foreclosed on. (Craig's Depo. p. 36.)
5. After Desmond died, Craig took on all of the farm work, pledged his property for his parents' debt, and signed mortgages that included his property. (Mortgage 6/17/2002 PL 320-324.)

6. Patricia wanted all the land kept together to help pay Desmond's debt.
(Craig's Depo. p. 34.)
7. On June 3, 2010, Patricia, Craig, and Pam signed a mortgage for Frontier Bank, formally known as Pender State Bank. (Mortgage 06/03/2010 PL 344-356.)
8. On June 9, 2010, the original loan amount for Desmond's debt was down to \$375,000 and owed by Patricia, and now Craig and Pam. (Loan Status, Depo. Ex. 9; Craig's Depo. p. 47.)
9. The original lender after Desmond died wanted Patricia and Craig to sell some of the quarters. (Craig's Depo. p. 48.)
10. On June 30, 2004, Patricia Van Zee conveyed the home place to Patricia, Craig, and Craig's wife, Pam. (Warranty Deed, Depo. Ex. 5.)
11. On September 16, 2004, Patricia conveyed a quarter and an 80 in Section 21 into joint tenancy with herself and her son, Michael. (Warranty Deed, Depo. Ex. 6A.)
12. On September 16, 2004, Patricia conveyed a quarter and an 80 in Section 21 into joint tenancy with herself and her daughter, Theresa. (Warranty Deed, Depo. Ex. 6B.)
13. In October 2004, Northstar Farms leased the Section 21 property at issue in this litigation, and the lease was signed by Patricia and her son, Craig.
(Northstar Lease, PL 1-3)
14. June 7, 2010, Patricia conveyed her undivided one-half interest in the quarter and 80, the subject of this litigation with Michael, to Craig. (Warranty Deed, Depo. Exs. 6E & 6F.)

15. June 7, 2010, Patricia conveyed her undivided one-half interest in the quarter and 80, the subject of this litigation with Theresa, to Craig. (Warranty Deed, Depo. Exs. 6C & 6D.)
16. In October 2012, Kirby Odde leased all the Van Zee property, including the property subject to this litigation, and the lease was for five years. The lease was executed by Patricia Van Zee and Craig Van Zee. (Odde Lease, Depo. Ex. 11.)
17. At the time Odde Lease, Depo. Ex. 11, was executed, Patricia Van Zee had no interest in the property that is subject to this litigation. (Odde Lease, Depo. Ex. 11.)
18. On May 22, 2013, Patricia quit claimed her interest in real property in Sections 1, 13, and 14 to Craig and his wife, Pam. (Quit Claim Deed, Depo. Ex. 7.)
19. On July 10, 2013, Patricia quit claimed her interest in real property in Section 13 Craig and his wife, Pam Van Zee. (Quit Claim Deed, Depo. Ex. 8.)
20. On December 31, 2013, Patricia listed \$14,000 of rent on her tax return. (2013 Tax Return, PL 21-26.)
21. On December 31, 2014, Patricia listed \$16,000 of rent on her tax return. (2014 Tax Return, PL 27-32.)
22. In March and April 2015, Theresa called the Register of Deeds and had five pages sent to her in Iowa. (Theresa Depo. pp. 17-18.) (See Affidavit of Suzy Wernsmann.)

23. On August 25, 2015, Craig conveyed his one-half interest in the property that he owned that is subject to this litigation, into joint tenancy with his wife, Pam. (Quit Claim Deed, Depo. Exs. 6G & 6H.)
24. On December 31, 2015, Patricia listed \$16,000 of rent on her tax return. (2015 Tax Return, PL 33-38.)
25. On October 18, 2016, Brady Van Zee, Michael's son, had the Hand County Register of Deeds find all the real property with Michael's name on it and provide him copies of the deeds. (Receipt, Depo. Ex. 2.) (Affidavit of Suzy Wernsmann¹.)
26. When Brady got copies of deeds with his dad's name on them, he testified that he probably gave them to his dad, Michael. (Brady Depo. p.10.)
27. On December 31, 2016, Patricia listed \$16,000.00 of rent on her tax return. (2016 Tax Return, PL 39-44.)
28. On December 31, 2017, Patricia listed \$16,000 of rent on her tax return. (2017 Tax Return, PL 45-50.)
29. Sometime in 2018, Theresa said that she talked to Michael about the deeds at some time two years before Patricia died. (Theresa's Depo. pp. 20-21.)
30. On December 31, 2018, Patricia listed \$17,000 of rent on her tax return. (2018 Tax Return, PL 51-56.)
31. On July 18, 2019, Theresa got seven pages of records from the Hand County Register of Deeds Office. (See Affidavit of Suzy Wernsmann.)

¹ "Affidavit of Suzy Wernsmann" is a reference to the Affidavit filed in the corresponding case: *Craig and Pamela Van Zee v. Michael Van Zee*, 29CIV22-10

32. On December 31, 2019, Patricia listed \$15,899 of rent on her tax return. (2019 Tax Return, PL 57-63.)
33. By 2020, Theresa admitted that she knew that her name was on the land. (Theresa's Depo. pp. 15, 18.)
34. Theresa admitted that she had seen the Warranty Deed that put her name on the land, Depo. Ex. 1, "a long time ago" before 2020. (Theresa's Depo. pp. 15, 18.)
35. Theresa knew that Desmond had debt when he died and had seen a bankruptcy attorney. She doesn't know how it was sorted out, she didn't help, and she doesn't know what Craig did about the debt. (Theresa's Depo. p. 19.)
36. Theresa put a copy of the deed, where Michael got the land that is subject to litigation, in Michael's pickup. (Theresa's Depo. p. 20.)
37. Theresa didn't do anything about paying real estate taxes or managing the farm once she knew her name was on the deed. (Theresa's Depo. p. 24.)
38. December 31, 2020, Patricia listed \$16,000 of rent on her tax return. (2020 Tax Return, PL 64-73.)
39. March 20, 2021, Michael signed a divorce settlement with his wife and doesn't list an interest in ag land as an asset in his divorce. (*Divorce Property and Martial Settlement Agreement*, PL 425-430.)
40. On March 26, 2021, Patricia died. (Affidavit of Craig Van Zee.)
41. Michael admitted that he knew while his mom was alive what land she put his name on. (Michael's Depo. pp. 7-9.)

- 42. Rent Patricia received, which was reported on her tax returns, was rent paid by Craig, even though Patricia had no land to rent after July 10, 2013. (See Affidavit of Craig Van Zee.)
- 43. Michael assumed Craig was taking care of the farm debt. (Michael's Depo. p. 12.)
- 44. Michael brought up rent with his mom while she was alive. (Michael's Depo. p. 16.)
- 45. Michael didn't do anything to assist with the land. (Michael's Depo. p. 9.)
- 46. Michael learned from his sister that his name was on the land. (Michael's Depo. p. 11.)
- 47. Theresa talked to a lawyer after she saw the deeds but chose not to follow up with it. (Theresa's Depo. pp. 21-23.)
- 48. Theresa knew her mom was renting out the farm ground. (Theresa's Depo. pp. 29, 33.)
- 49. Craig and Theresa didn't talk. (Theresa's Depo. pp. 32-33.)
- 50. Craig and Michael didn't talk (Michael's Depo. pp. 13, 17-18.)
- 51. Theresa talked to her mom about why Theresa was not on the land. (Theresa's Depo. p. 18.)
- 52. Theresa was told by her mom that Craig's name was on the land because their dad had debt (Theresa's Depo. p. 18.)
- 53. Theresa did not ask her mom for Theresa's share of the rent money. (Theresa's Depo. p. 32.)
- 54. Michael was told by his mom that his name was on the land. (Michael's Depo. p. 7.)

55. Michael didn't ask for rent because he knew his mom needed the money to make payments on the debts. (Michael's Depo. pp. 8-9.)
56. The current balance on Desmond Van Zee's debt that Craig is paying is \$186,409.72. (Loan Status, Depo. Ex. 9.)
57. Patricia cried to Pam about Theresa and Michael confronting Patricia concerning land that Theresa and Michael received. (Plaintiffs' First Supplemental Answers to Defendant's Interrogatories, No. 12.)

DATED: This 6th day of October, 2023.

SCHOENBECK & ERICKSON, P.C.

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1 STATE OF SOUTH DAKOTA IN CIRCUIT COURT
 2 COUNTY OF HAND THIRD JUDICIAL CIRCUIT
 3 * * * * *
 4 Craig and Pamela Van Zee *
 5 Plaintiffs, *
 6 vs. *
 7 Michael D. Van Zee, *
 8 Defendant. *
 9 * * * * *
 10
 11
 12 DEPOSITION OF
 13 CRAIG VAN ZEE
 14
 15 August 30, 2023
 16 10:54 a.m.
 17
 18
 19
 20
 21
 22
 23
 24
 25 REPORTED BY: Kelli Lardy, RPR

Deposition of CRAIG VAN ZEE, taken before
Kelli Lardy, a Notary Public in and for the County of Day,
State of South Dakota, at Watertown, South Dakota.

A P P E A R A N C E S

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Theresa Van Zee
Pamela Van Zee
Taylor Hageman, Paralegal - Schoenbeck & Erickson, P.C.

I N D E X

PAGE

Examination by Mr. Vogel

4

* * * *

E X H I B I T S

NUMBER DESCRIPTION

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5 Warranty Deed PL 295-296 21

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8 Quit Claim Deed PL 289-290 42

9 Frontier Bank 46

10 Lease Agreement 10/2004 67

11 Lease Agreement 10/2012 71

12 Lease 12/2017 73

13 Lease 1/2021 76

14 Lease 10/2021 80

1 (WHEREUPON, the following proceedings were duly had:)

2 CRAIG VAN ZEE,

3 was called as a witness and, being first duly

4 sworn, was examined and testified as follows:

5 EXAMINATION

6 BY MR. VOGEL

7 Q Craig, would you just state your name?

8 A My name is Craig Van Zee.

9 Q Where do you live, Craig?

10 A Miller.

11 Q Is it okay if I call you Craig?

12 A Yeah.

13 Q What's your address in Miller?

14 A 718 East Second Avenue.

15 Q How long have you lived there.

16 A I cannot tell you.

17 Q Ten years? Twenty years?

18 A I am sure it's a good fifteen.

19 Q And before we get anymore in depth, have you had your
20 deposition taken before?

21 A No, sir.

22 Q I am sure you met with Lee and he probably explained some
23 of the rules of a deposition. But just briefly, you're
24 doing a good job so far, make sure you let me finish the
25 question before you answer. If it's a yes or no answer,

1 answer a yes or a no, rather than a head shake or a mm-hmm
2 or a hmm-mm.

3 A Yes, sir.

4 Q Okay. Another, not really a rule, but something I like to
5 ask is if I ask you a question and you don't understand
6 it, will you let me know?

7 A Yes, sir.

8 Q So if I ask you a question and you answer it, I am going
9 to assume that you understood that question; is that fair?

10 A Yes, sir.

11 Q Are you on any medications or anything that's going to
12 make it difficult for you to understand what the
13 questions --

14 A No.

15 Q -- are about today?

16 A No.

17 Q And you understand why we're here today taking this --

18 A Yes.

19 Q -- deposition?

20 A Yes, I do.

21 MR. SCHOENBECK: Make sure he finishes.

22 THE WITNESS: Okay. Sorry. Sorry.

23 BY MR. VOGEL

24 Q And I will make sure, Craig, that I let you finish before
25 I talk so that I'm not talking over you. To prepare for

1 your deposition today, what did you do? Look at any
2 documents?

3 A Yesterday, I did.

4 Q What did you look at?

5 A All the paperwork that I'm getting thrown against me.

6 Q Can you explain a little bit more what that means? Were
7 they your answers to interrogatories? Were they document
8 production?

9 A Excuse me, but what does that mean?

10 Q Were they the questions I sent your attorney for you to
11 answer? Were they some of the documents that your
12 attorney provided to me? What -- what documents would you
13 say?

14 A Questions and answers.

15 Q Any of the bank records?

16 A You got all that I could have or find.

17 Q I am asking if you reviewed any of them before today?

18 A No.

19 Q Any of the -- your father's probate file from Attorney
20 Kludt?

21 A No.

22 Q Did you look at any of the bankruptcy file from Attorney
23 Carlson?

24 A No.

25 Q How about any of the file -- and I don't know if I'm

1 pronouncing his name right -- Attorney Rediger?

2 A Right.

3 Q Is that how you pronounce it?

4 A Yes, sir.

5 Q Did you look at any of his file?

6 A No, sir.

7 Q Any of your mother's medical records?

8 A When I was taking her to the doctor, I got to see them
9 all.

10 Q Did you look at them, any of them, in preparation for
11 today?

12 A No.

13 Q Okay. So I want to get a little bit into your background,
14 Craig. You mentioned you're not sure how long you lived
15 at your address, but I want to go back a little bit
16 farther than that.

17 Where did you graduate from high school?

18 A Miller.

19 Q What year was that?

20 A 1976.

21 Q Did you go to any schooling after high school?

22 A No.

23 Q After high school, did you work somewhere?

24 A I worked on the farm until it was dry that year and then -
25 went to work on the road construction.

1 Q Do you know what year that would have been approximately?

2 A '76.

3 Q Okay. So -- okay. So after high school, you worked on
4 the farm during that year until it got dry and then you
5 worked road construction?

6 A Right.

7 Q Did you work on the farm other years?

8 A Yes.

9 Q Can you tell me -- let's take it that -- so as far as
10 working on the farm, what years did you work on the farm?

11 A Ever since I was small.

12 Q After high school, what years did you work on the farm?

13 A Every day.

14 Q Did you eventually stop?

15 A I might have stopped and worked at a tire store, but then
16 I always went out to the farm.

17 Q Are you still actively farming?

18 A No.

19 Q All the farm ground, is it currently rented?

20 A Yes.

21 Q Do you put up hay on any of it, anything like that?

22 A The ground that I own, I do put up hay.

23 Q Which ground would that be?

24 A It's called the Roach ground.

25 Q And that -- is that ground that you purchased separately

1 from land that your parents had, the Roach land?

2 A Explain better.

3 Q Yeah, I will try that again. The Roach land, that's not

4 land that you received from your mother, is it?

5 A No.

6 Q Is that land that you purchased?

7 A Yes.

8 Q Do you know about what year that was?

9 A No.

10 Q Are we talking 10 years ago?

11 A I cannot give you a straight answer.

12 Q Why is that?

13 A Because I don't know.

14 Q Okay. So you mentioned you worked on the farm every day,
15 and it's my understanding your father passed away in 1997?

16 A Right.

17 Q So --

18 A Yes.

19 Q I'm sorry. I cut you off. Finish what you were going to
20 say.

21 A I said yes.

22 Q So from 1976 until 1977 [sic], you farmed with your
23 father?

24 A I was farming with my dad before '76.

25 Q Sure. I am just talking about from '76 until '97, you

1 farmed with your dad?

2 A My dad didn't farm five years before he died.

3 Q Okay.

4 A I took care of it.

5 Q What was the farming operation? Crops? Cattle?

6 A Mostly just crops late -- later.

7 Q What type of crops?

8 A Cash crop, I call them, corn, beans.

9 Q And at that time -- you didn't have the Roach land at that
10 time?

11 A No.

12 Q It was just -- at that time it was just your father's
13 land?

14 A Yes.

15 Q So from '97 -- from '76 until '97, did you own any land?

16 A Say that again.

17 Q You bet. From 1976 until 1997, did you own any land?

18 A Yes.

19 Q Which land would that have been?

20 A We call it the Hardee quarter. That's the name of it.

21 Q Did you buy that?

22 A I don't know how to say this. I worked for dad and we
23 made the payments on it, but he put it in my name.

24 Q Who -- when you say "we made the payments," were you
25 paying for it? Was it coming out of your dad's farm

1 account? Explain that to me.

2 A Me -- me and my dad was paying it together out of the
3 farm.

4 Q Was there one account?

5 A Yes.

6 Q Okay. And money from the farm went into that account?

7 A I assume it's Dad's account.

8 Q Did you put any money into that account?

9 A No.

10 Q And the Hardes land, do you know who you purchased it
11 from?

12 A Hardes.

13 Q Hardes? There was a deed I found somewhere from some land
14 that was -- you received from a Deborah Johnson. It would
15 be the Southeast Quarter of Section 13.

16 A That's the same ground.

17 Q So that's the Hardes land?

18 A (Witness nods head.)

19 Q Oh, okay. At some point someone named Hardes owned it?

20 A That's her dad.

21 Q That makes sense then. Okay. Okay. So as you're --
22 you're farming with your dad, you said, about five years
23 before he passed away he wasn't very actively involved in
24 farming; is that accurate?

25 A No.

1 Q It's not accurate?

2 A Yes. It -- I'm sorry. No, he did not farm.

3 Q And how about how many acres, other than this Harde's land,
4 how many acres were you and your dad farming during that
5 farm period?

6 A I don't know.

7 Q Would it -- is it -- other than the Roach land that you
8 have now, would it have been the acres that you currently
9 own other than the Harde's and Roach land?

10 A Say that again.

11 Q You bet. So the lands that you and your dad were farming
12 from 1976 until whenever he stopped, is it the land that
13 you currently own minus the Roach and Harde's land?

14 A I'm sorry, but you're going to have to repeat that again.
15 It ain't coming out right.

16 Q You bet. I have deeds from land that your mother got
17 after your father passed away, deeded some to Michael and
18 Theresa, some to you. You know about all of that land?

19 A Yes.

20 Q Is there any -- was all of that land that you currently
21 have the land that you were farming with your dad?

22 A You mean now?

23 Q The land that you currently have, was that the land that
24 you were farming with your dad from 1976 until when he
25 stopped?

1 A Yes.

2 Q Okay. Okay. It's not like after your dad passed away,
3 your mom didn't purchase any new land, did she?

4 A No.

5 Q Okay. That was the question there. So you're -- you --
6 it's safe to say you're pretty familiar with the farming
7 operation?

8 A Yes.

9 Q Okay. And you're pretty familiar with the land that your
10 mom and dad owned?

11 A Yes.

12 Q Okay. And you mentioned, as part of your work history,
13 you worked at a tire shop?

14 A Yes.

15 Q What was the name of that shop?

16 A OK Tire.

17 Q Do you know approximately how many years you worked there?

18 A No.

19 Q Do you know approximately when you worked there?

20 A Oh, six or seven years ago I quit. I had to.

21 Q Why is that?

22 A I lost my knees.

23 Q Okay. Did you have knee surgery?

24 A Five times.

25 Q Okay. So until about -- did you say five or six years

1 ago --

2 A Right.

3 Q -- you worked at OK Tire?

4 A Right.

5 Q And you don't --

6 A Yes.

7 Q Sorry. I --

8 A Sorry.

9 Q And you don't know how long you'd worked there before you
10 quit?

11 A No.

12 Q Okay. So five or six years ago, we're talking about 2017,
13 2018, is around when you stopped working at OK Tire?

14 A Yes.

15 Q While you were working at OK Tire, were you farming or
16 renting out the land?

17 A I was farming. I was farming most of it. I didn't rent
18 nothing out until after Dad died.

19 Q Okay. Were you working at OK Tire when your dad died?

20 A Yes.

21 Q So you worked at OK Tire for a while?

22 A Yes.

23 Q Full-time?

24 A No.

25 Q Were you ever full-time there?

1 A No.

2 Q So it was just a part-time?

3 A I took off when I wanted to.

4 Q Explain what you mean by that.

5 A When I had stuff to do at the farm, I didn't have to show
6 up for work.

7 Q Okay. Maybe this is a better way to ask it. When did you
8 start leasing the farm ground out?

9 A 2004.

10 Q So from -- and was that -- did you -- did you own the
11 Roadn land at that point?

12 A No.

13 Q So in 2004, there was your parents' land and the Hardes
14 land; is that accurate?

15 A Right.

16 Q Was all of that land rented out in 2004?

17 A I don't know. I am going to say yes, but all of Dad's
18 farm ground now was not farmed. It was sod.

19 Q In 2004 it was?

20 A Right.

21 Q So all the land that your parents owned in 2004 was sod?

22 A No.

23 Q Explain it to me then.

24 A Part of it was farmed and part was sod.

25 Q Do you know approximately the split, as far as acres? I

1 don't need parcels right now, but acres. How much was
2 sod? How much was farmed?

3 A I don't know.

4 Q But you believe in 2004 it was all rented out?

5 A I don't know for sure.

6 Q Well, were you -- if you were actively farming it, what
7 would you have been doing? Raising cattle? Putting up
8 hay? Cash crops?

9 A I rented the pasture out to other people.

10 Q Okay.

11 A And I took care of the farm ground.

12 Q When you say "took care," what do you mean by that?

13 A Farmed it.

14 Q Okay. So in two thousand -- and the land that's at issue
15 here that involves Michael and Theresa, you're familiar
16 with it's in Section 21?

17 A Right, yes.

18 Q In 2004 was that pasture?

19 A I don't know for sure.

20 Q At some point it was pasture, correct?

21 A Was pasture when Dad died.

22 Q Okay.

23 A He had it rented out to another person.

24 Q The pasture?

25 A Right.

1 Q Eventually, someone broke it up?

2 A Yes.

3 Q Do you recall who that was?

4 A L&C Acres.

5 Q So it wasn't you?

6 A No.

7 Q Do you know about when, what year you would have stopped
8 actively farming raising crops.

9 A No.

10 Q Ten years ago?

11 A I don't know the years.

12 Q Okay. You have no recollection of when you stopped
13 farming?

14 A I haven't stopped yet.

15 Q What do you still do?

16 A Put up hay.

17 Q Okay. What land do you put up hay on?

18 A The Roach ground.

19 Q Okay. Anything else?

20 A Just the farm's ditches.

21 Q Okay. Okay. Do you -- what -- the Roach ground, do you
22 know what section that's in?

23 A No.

24 Q If you saw a deed or a lease, would you know which land
25 the Roach land is?

1 A No.

2 Q So you don't know any of the legal descriptions to your
3 land?

4 A I gotta look at a book, and I could pick it out.

5 Q What kind of book?

6 A It's a book of Hand County.

7 Q Like a plat map, plat book?

8 A Yeah, that shows the landowners.

9 Q Okay. Okay. Getting back to the farming that you did --
10 well, actually back to your work. You said you worked at
11 OK Tire part-time when you needed time off to do stuff on
12 the farm and just didn't have to go into work, correct?

13 A Right, yes.

14 Q Did you work anywhere else or have you?

15 A Oh, I worked for the farmer I work for now.

16 Q Who is that?

17 A Wagners.

18 Q Do you know about when you started working for them?

19 A I worked with them when Dad was alive.

20 Q So you've worked for them, would you say, on and off since
21 before your dad died?

22 A Yes.

23 Q What kind of work do you do for them?

24 A Run combine, drive truck. They're grain farmers.

25 Q So is it seasonal?

1 A Yes.

2 Q Do you help them plant any of the crops?

3 A Now I do.

4 Q When did you start that?

5 A I can guess. Five, seven -- year, five or seven years
6 ago, full-time now.

7 Q You're full-time with them?

8 A Right.

9 Q So -- and you said they -- do they have any livestock?

10 A No.

11 Q So they're just a grain farm --

12 A Yes.

13 Q -- cash crops? Okay. And you're full-time with them now?

14 A Yes.

15 Q Before that it was seasonal?

16 A Yes.

17 Q Mainly during harvest?

18 A Yes.

19 Q Okay. Any other employment you've had?

20 A I can't think of much more.

21 Q So, so far we've got you worked at OK Tire part-time, you
22 seasonally worked for Wagners, and you helped out on the
23 farm?

24 A Right, yes.

25 Q And you're not sure, as far as the farm, your parents'

1 farm, when you stopped farming actual crops; is that
2 accurate?

3 A No, I can't.

4 Q Okay. Here's -- here's what I am going to do is I have
5 some deeds here. I want to go through them with you. We
6 will have them marked as exhibits.

7 (Exhibit 4 marked for identification by the court
8 reporter.)

9 BY MR. VOGEL

10 Q All right. Craig, I am handing you what's been marked as
11 Exhibit 4. What I want you to do is there's a top and a
12 bottom half, there's kind of a line dividing it. The
13 bottom half, it appears to be a deed from Deborah Johnson
14 to -- let me find it here -- Craig Van Zee.

15 Do you see that?

16 A Yes.

17 Q And it is for the Southeast Quarter of Section 13. Do you
18 see that?

19 A Yes.

20 Q And it's from February of 1993. Do you see that as well?

21 A (No response.)

22 Q About halfway down on the bottom section, there's a dated
23 this blank day of February 1993.

24 A Oh, yes, I do.

25 Q This would be for the Hardes land?

1 A Yes.

2 Q Are you --

3 A Excuse me.

4 Q And you're familiar with -- are you familiar with this
5 deed?

6 A No.

7 Q You're familiar with this land?

8 A Yes.

9 Q Okay. And this --

10 A I did -- excuse me. I did see this one time when I was
11 taking care of Dad's paperwork.

12 Q Okay. Okay.

13 (Exhibit 5 marked for identification by the court
14 reporter.)

15 BY MR. VOGEL

16 Q All right. You can set 4 aside, Craig. Here's Exhibit 5.
17 It's two pages marked PL 295 through 296. Just take a
18 minute to look at this, Craig, and just let me know when
19 you've had a chance to look at it.

20 A I looked at it.

21 Q Okay. And this says it's a warranty deed and it's from
22 Patricia Van Zee to Craig and Pamela Van Zee. Excuse me.
23 It's from -- let me back up. It's from Patricia Van Zee
24 to Patricia and Craig and Pamela Van Zee.

25 Do you see that?

1 A Yes.

2 Q And it lists several pieces of land down in the section
3 where it describes the land. Do you see that?

4 A Yes.

5 Q And it's dated June 30, 2004. Do you see that?

6 A Yes.

7 Q And in 2004, your father had passed away, correct?

8 A He died in '97.

9 Q Right. And so have you seen this deed before?

10 A I am sure I have, but I don't recall it.

11 Q So you think you've seen it, but you don't know when?

12 A Right.

13 Q Okay. So in 2004, as I look at that, this deed, it
14 appears that your mother Patricia is deeding land to
15 herself, you, and your wife. Do you see that?

16 A Right. Yes.

17 Q And there's several listed there and I went through it.

18 It appears that it's approximately 920 acres of land, give
19 or take, if -- does that sound right to you?

20 A Yes.

21 Q Okay. Do you remember in 2004 conversations that you
22 would have had with your mom about her deeded land to you
23 and your wife?

24 A No.

25 Q So you don't remember your mom talking with you about why

1 she was deeding land to you?

2 A All I can remember one time me and my mom talked about is
3 getting the land out of her name if something happens to
4 see her where she goes into a nursing home.

5 Q Do you know when that conversation happened?

6 A Before this.

7 Q So before 2004?

8 A Yes.

9 Q And then you understand that this deed, the land is still
10 in your mom's name?

11 A It is? Now?

12 Q Under this deed, it is.

13 A Oh. This is when me and Mom took over. I don't know for
14 sure. All three of our names were on it at one time.

15 Q Okay. Yes. That's -- that's what this deed is from my
16 reading of it.

17 A Right.

18 Q It appears to me, and you can correct me if I'm wrong,
19 Craig, after your father passed away, all the land, the
20 Van Zee farmland, was in your mother's name only.

21 Does that sound right?

22 A Right. Not all. The Hardes quarter.

23 Q That was yours?

24 A Right.

25 Q That was always just in your name according to that deed,

1 correct?

2 A Right, yes.

3 Q Yes. Yep. That's right. But the rest of the land was --
4 after your father passed away was just in your mother's
5 name for a period of time?

6 A I had to -- Dad had land in his name only --

7 Q Okay.

8 A -- and Mom's name and his.

9 Q Yep.

10 A So I switched it all over to Mom's when Dad died. So
11 everything was in Mom's name. And then me and Mon came up
12 with this deal.

13 Q In about 2004?

14 A I -- must be, yes.

15 Q Okay. So you said you and Mon came up with this deal.

16 Tell me about what -- what was the purpose of doing this,
17 what we see in this deed marked Exhibit 5.

18 A Like I said, it -- to get it out of her name and somebody
19 else's name if something happens to her.

20 Q Okay. And it appears that Jin Jones an attorney in Miller
21 drafted this up, in the top left corner?

22 A Yeah, that's his name.

23 Q Did you ever meet with Jin Jones?

24 A Me and my mom did.

25 Q Okay. And you had conversations with him about deeding

1 land out of just your mom's name into your name?

2 A Me and mom did.

3 Q You and Mom had conversations with him?

4 A Yes.

5 Q And the purpose of deeding it out of her name was in case
6 something happened to her?

7 A Yes.

8 Q Okay. And you understand that with this Exhibit 5, the
9 land is still in your mom's name?

10 A Yes.

11 Q Okay.

12 A She just wanted another name on there if something happens
13 it don't go to the State.

14 Q Okay. Okay. I see what you're saying. Okay. So you are
15 familiar with the deed in Exhibit 5 then?

16 A Yes.

17 Q Okay. I am going to go back to that deed, Exhibit 5. As
18 I look at this, and you can correct me if I'm wrong,
19 Craig, all the land deeded, your mom deeded to you and
20 your wife and her, none of it was in Section 21, correct?

21 A Is that the ground that we're arguing with?

22 Q Correct.

23 A No.

24 Q So your -- in 2004, that land wasn't deeded to you yet?

25 A No.

1 Q That was a bad question, so your answer is bad and that's
2 my fault. That land hadn't been deeded to you yet, had
3 it?

4 A No.

5 Q That's better. Do you know --

6 A Her --

7 Q Go ahead.

8 A Her part --

9 Q Go ahead. I'm sorry. I interrupted you.

10 A It's undivided.

11 Q Okay.

12 A So she deeded her part to me later.

13 Q Okay. And she deeded -- so in from the time your dad died
14 until 2034, your mom was the only owner of the land at
15 issue here?

16 A The homestead.

17 Q Is that what you refer to it as?

18 A The homestead, yes.

19 Q If I call it that, you will know what I'm talking about?

20 A Right.

21 Q Perfect. I appreciate that. So from '97 --

22 MR. SCHOENBECK: Can we be off the record a second?

23 MR. VOGEL: Yeah.

24 (A brief discussion was held off the record.)

25 BY MR. VOGEL

1 Q Okay. So the land by the lake is the land that there's
2 the dispute about now?

3 A Yes.

4 Q That's what you call it?

5 A Yes.

6 Q The land that's in Exhibit 5 is the homeplace?

7 A Yes.

8 Q Okay. So I'm going to talk about the land by the lake
9 now. From '97 until your dad died until approximately
10 2004, your mom was the only owner of that property,
11 correct?

12 A Yes.

13 Q And then eventually, she deeded the property to -- some of
14 the property to herself and to Michael and Theresa,
15 correct?

16 A She told me she was.

17 Q So you were familiar with that?

18 A Yes.

19 Q Do you know when she told you that?

20 A No.

21 Q Was it around the same time of the deed in Exhibit 5 or
22 before that?

23 A Before.

24 Q Okay. So your mom had told you the land by the lake she
25 was going to deed it and put Michael and Theresa on it as

1 well?

2 A Right.

3 Q And then you mentioned eventually your mom --

4 A She -- excuse me.

5 Q Eventually your mom took her interest in the land by the
6 lake and deeded it you?

7 A Yeah, yes.

8 Q Do you know around when that was?

9 A No.

10 Q Okay.

11 (Exhibit 6 marked for identification by the court
12 reporter.)

13 BY MR. VOGEL

14 Q So before you look at it, Craig, I'll just let you know
15 that there's several pages stapled together here as
16 Exhibit 6, several deeds. They are not Bates stamped.
17 They are deeds that we received from -- from Lee. So I'll
18 just have you take a minute, look through all of them, and
19 then I'm just going to ask some questions about these
20 deeds.

21 Have you had a chance to look at all those, Craig?

22 A Yes.

23 MR. VOGEL: And off the record for a second.

24 (A brief discussion was held off the record.)

25 BY MR. VOGEL

1 Q All right. Craig, so Exhibit 6, I've went through and put
2 letters A through H on the page. And when I refer to a
3 page, I will refer to as 6A, 6B, whatever the letter is on
4 the bottom.

5 A Yes.

6 Q So you've had a chance to look at these?

7 A Yes.

8 Q Are you familiar with these deeds?

9 A I seen them before.

10 Q Okay. We'll just start at the beginning, so 6A is from
11 September 16, 2004, and this is a deed that appears where
12 Patricia your mother deeds the Northwest Quarter and the
13 North Half of the Southwest Quarter of Section 21 to
14 herself and Michael.

15 Do you see that?

16 A Yes.

17 Q And this is around the same time as the deed in Exhibit 5,
18 correct?

19 A Yes.

20 Q So this land that's deeded to Patricia and Michael is a
21 portion of the lake land, the land by the lake?

22 A Yes.

23 Q And you testified earlier your mom had talked with you
24 that she was going to do this, to deed this land like
25 she's doing in Exhibit 6A?

1 A But keep her name on it.

2 Q Correct. And her name is still on it, you can see?

3 A Right.

4 Q Okay. So you were aware of that?

5 A Yes.

6 Q And you were aware that she was going to deed some of it
7 to Michael?

8 A Yes.

9 Q And she was going to deed some of it to Theresa?

10 A Yes.

11 Q Okay. I will have you turn to 63. It's another warranty
12 deed. And this is for the South Half of the Southwest
13 Quarter and the Southeast Quarter of Section 21.

14 Again, this is part of the land by the lake?

15 A Yes.

16 Q Is that what you call it, land by the lake, or the lake
17 land?

18 A Land by the lake.

19 Q Okay. And this deed, it appears that your mom is deeding
20 the land to herself and to Theresa?

21 A Yes.

22 Q Okay. And you were aware this was going to take place?

23 A Yes.

24 Q And like you mentioned, your mom kept her name on the
25 land?

1 A Yes.

2 Q Okay. And this was September 16th of 2004, is what the --

3 A Yeah, I see that now there.

4 Q I will have you turn to Exhibit 6C. So Exhibit 6C is
5 another deed that's for the South Half of the Southwest
6 Quarter and the South Quarter of Section 21.

7 Do you see that?

8 A Yes.

9 Q And your mother is -- is deeding her undivided one-half
10 interest in that real estate to you?

11 A Yes.

12 Q And this was on June 7, 2010, correct?

13 A I couldn't tell you -- I see that, but I don't know for
14 sure. It must be.

15 Q Okay. And this land that's described in Exhibit 6C is the
16 land that your mother had previously deeded to herself and
17 Theresa, correct?

18 A Yes.

19 Q Okay. So as of the date of this deed in 2010, your mom
20 had deeded all her interest in that land away, correct?

21 A That portion, yes.

22 Q That portion, yes.

23 A Right, yes.

24 Q So at that point, you and Theresa each had an undivided
25 one-half interest in the land described in Exhibit 6C?

1 A Yes.

2 Q And you knew that?

3 A Yes.

4 Q I will have you turn -- and it's two pages, so Exhibit 6D
5 is the notary block, so I'm going to have you turn to
6 Exhibit 6E. And, again, this is another warranty deed.
7 This is for the Northwest Quarter and the North Half of
8 the Southwest Quarter of Section 21.

9 Do you see that?

10 A Yes.

11 Q This is the other portion of the land by the lake,
12 correct?

13 A Yes.

14 Q And in this deed, your mother Patricia is deeding an
15 undivided one-half interest in that real estate to you,
16 Craig?

17 A Yes.

18 Q And from the date of this, this was on June 7, 2010?

19 A Yes.

20 Q The land described in Exhibit 6E is the land your mom had
21 previously deeded to herself and Michael, correct?

22 A Yes.

23 Q And you knew that?

24 A Yes.

25 Q Okay. So as of June of 2010, the land that's described in

1 6E, your mom no longer had an interest in that land,
2 correct?

3 MR. SCHOENBECK: I will object to the form of the
4 question. Witness can go ahead and answer.

5 THE WITNESS: Say that again now, please.

6 BY MR. VOGEL

7 Q Yeah, sure. Your mom had deeded all her interest in the
8 land described in 6E to Michael and to you as of June 7,
9 2010?

10 A Yes.

11 Q And you were aware of that?

12 A Yes.

13 Q And you knew Michael owned that land described in 6E with
14 you?

15 A Yes.

16 Q Okay. Can you tell me, Craig, when the deeds in 6C and 6E
17 were signed by your mom in 2010, what conversations you
18 had with her about why she was now relinquishing all of
19 her interest in that land?

20 A It wasn't for the same reason, but if something happened
21 to her it wouldn't go fully to them where they could sell
22 it free of nothing, you know, free of Dad's debt. That's
23 why we left two names on it.

24 Q Explain that to me, you mean sell it free of Dad's debt.

25 A Well, if they had their names on it only --

1 Q Right.

2 A -- they could sell it and it just be free. This way they
3 got extra name on it, they can't sell it until all three
4 of us agree. And Mom wanted this land to stay in the
5 group to help pay Dad's debt. So that's what we did it
6 for.

7 Q Okay. So that's why -- why did she put it in your name
8 and not just keep her name on it? Did she talk to you
9 about that?

10 A She just wanted everything out of her name. If something
11 happens to her, there wouldn't be a big brawl.

12 Q A big what?

13 A A fight.

14 Q Okay. Any other conversations you had with your mom
15 around the time of the deeds in Exhibit 6C and 6E?

16 A I'm sure there was, but I don't remember.

17 Q Any conversations about her deeding land to you?

18 A We agreed on this. She brought it up.

19 Q Okay.

20 A I didn't.

21 Q So your mom brought up deeding the land to you?

22 A Right.

23 Q Okay. You mentioned -- and we'll get to Dad's debt. But
24 you mentioned part of the rationale was so that Michael
25 and Theresa couldn't sell this land, correct?

1 A Yes.

2 Q Why didn't she want them to have control of the land?

3 A Because of Dad's debt.

4 Q How much debt did your Dad -- was there of your dad's as
5 of 2010?

6 A I cannot tell you.

7 Q Okay. As of 2013 -- and I'm referring to all of the land
8 by the lake now, Michael's, Theresa's, yours -- were there
9 any mortgages tied to that land?

10 A No.

11 Q Any liens on that land?

12 A No.

13 Q Were there any liens or mortgages on the homelace --

14 A Yes.

15 Q -- as of --

16 A Yes. When I took it over, yes.

17 Q Because in 2004, you took over -- you and your mom -- your
18 mom deeded the homelace land to you and her, correct?

19 A Right, yes.

20 Q And there were mortgages or liens on it at that point?

21 A Yes.

22 Q What was that associated with?

23 A I couldn't really tell you for sure, but Dad had one hell
24 of a debt against it.

25 Q Did it have to do with your dad purchasing that land, the

1 homeland?

2 A No. He just -- God, what year was that? You probably
3 know he had to file bankruptcy.

4 Q I do know that, yep.

5 A '76 was a dry year. Then he was behind. When I took it
6 over, he was getting foreclosed on.

7 Q When you took what over?

8 A Me and Mom took the land over.

9 Q What year would that have been?

10 A Well, it wasn't me and Mom. It was me. It was still
11 Mom's land when I started helping her out. And we got it
12 going where they couldn't sell it. I went and got a
13 banker, got it going, and that's when later on Mom decided
14 to put the land in my name.

15 Q This was after your dad died?

16 A Yes.

17 Q So after your dad died, there was talk of foreclosure on
18 the homeland?

19 A A lot of it, yes.

20 Q But not on the lake -- land by the lake?

21 A No.

22 Q Because that never had any liens or mortgages on it?

23 A No.

24 Q That was a bad question. For as long as you know, has the
25 land by the lake had any liens or mortgages on it?

1 A No.

2 Q It was only the homeplace land?

3 A Yes.

4 Q And the homeplace land when you're talking about Dad's
5 debt, his debt was tied to the homeplace land through a
6 mortgage or some sort of lien?

7 A Yes.

8 Q And all of the homeplace land, your mom deeded to you and
9 her and then eventually just to you, correct?

10 A Yes.

11 Q Okay. And all the debt was tied to that land through a
12 lien or mortgage?

13 A Yes.

14 Q Okay. I will have you take a look at 6G. And, Craig,
15 this is a quit claim deed that -- for the Northwest
16 Quarter and the South Half of Section 21.

17 Do you see that?

18 A Yes.

19 Q And it it's a deed from you to yourself and your wife
20 Pamela, correct?

21 A Yes.

22 Q And it's from August 25th of 2015. Do you see that?

23 A Yes.

24 Q So -- and this pertains -- this deed is for all of the
25 land by the lake, correct?

1 A I couldn't tell you.

2 Q Why can't you tell me?

3 A I don't know the description of all of that land by the
4 lake.

5 Q Was all the land by the lake in Section 21?

6 A I couldn't tell you.

7 Q How many acres are up there?

8 A Three quarters.

9 Q Okay. So approximately 480 acres?

10 A Yes.

11 Q And if you look at this, we have the Northwest Quarter
12 which would be approximately 160 acres, right?

13 A Right.

14 Q And then we have the South Half which would be
15 approximately 320 acres, correct?

16 A Right.

17 Q So that's 480 acres in Section 21, correct?

18 A Yes.

19 Q So does that appear to be the land by the lake?

20 A Yes.

21 Q And what was the purpose of deeding it from yourself to
22 yourself and your wife -- or at least your interest in it
23 from yourself to yourself and your wife?

24 A Just in case something happens to me.

25 Q Okay. That's what I figured. I just wanted to ask you.

1 A Yeah.

2 Q So -- and as of 2014, you were still aware that Michael
3 and Theresa had an interest in portions of this land,
4 correct?

5 A Yes.

6 (Exhibit 7 marked for identification by the court
7 reporter.)

8 BY MR. VOGEL

9 Q I'll have you take a look at Exhibit 7, Craig.

10 A Okay.

11 Q Have you had a chance to look at it?

12 A Yes.

13 Q Okay. And Exhibit 7 is a quit claim deed. Do you see
14 that?

15 A Yes.

16 Q And in the portion where it describes land being deeded,
17 there's a few different parcels there. Do you see that?

18 A (No response.)

19 Q It starts with the North Half of the Northwest Quarter of
20 Section 1?

21 A Yes.

22 Q So this deed appears to be a deed from your mother to you
23 and your wife Pamela. Do you see that?

24 A Yes.

25 Q And it's from May 22nd of 2013. That's on the second page

1 of this.

2 A Yes.

3 Q Okay. And you can look if you want, but as I look at
4 Exhibit 5, which was the warranty deed where your mom
5 deeded land from her to herself and you, and then I look
6 at Exhibit 7 where she's deeding land from -- her interest
7 in land from herself to you and your wife, it appears that
8 it's the same legal descriptions in both of those deeds,
9 Exhibits 5 and 7. They are laid out a little bit
10 differently in format.

11 Exhibit 5. I think you're looking at 6, there,
12 Craig. Yeah, right there.

13 A I did not draw these up.

14 Q No, I understand that.

15 A So I don't know what --

16 Q Just the first page of Exhibit 5.

17 A Oh, right here.

18 Q As I review the legal descriptions in Exhibit 5 and
19 Exhibit 7, they appear to be the same legal descriptions,
20 all of them?

21 A Yes.

22 Q Okay. So it looks like in 2013 your mom deeded all of her
23 interest in the homeplace out of her name to you and your
24 wife. Does that sound accurate?

25 A Yes.

1 Q Do you remember conversations you had with your mom around
2 2013 about why she was doing that?

3 A The reason was if something happened to her, if she goes
4 in a home, they wouldn't come and get it.

5 Q Okay. So she wanted the land all out of her name?

6 A Yep.

7 Q So as I've looked at -- as we've looked at all the deeds
8 through these exhibits here, it appears as of May 2013
9 your mom no longer has any of the land in her name?

10 A Yes.

11 Q That's accurate?

12 A Yes.

13 Q It's all in your name and your wife's or your wife's name
14 and either Michael and Theresa?

15 A Yes.

16 Q And you were aware of all that?

17 A Yes.

18 Q What was your mom's health like in 2013, if you remember?

19 A I don't think it was that bad yet.

20 Q Okay. And I haven't asked this yet, but your mom passed
21 away in 2021, correct?

22 A That would be, what, three years?

23 Q About two and a half years ago, I think.

24 A Yes.

25 Q How old was she? I'm going to put you on the spot, Craig.

1 A Well, she was born in '33.

2 Q What month was she born?

3 A November.

4 Q Okay. I don't -- I am not good at math, Craig. So she
5 was born in 1933 and died in 2021?

6 A Right, yes.

7 Q Okay. So if my math is right, she wasn't quite 90 yet,
8 she would be 88? You don't know for sure?

9 A No.

10 Q Okay.

11 (Exhibit 8 marked for identification by the court
12 reporter.)

13 BY MR. VOGEL

14 Q One more here, this is Exhibit 8, Craig, it's a quit claim
15 deed. It's two pages. Just take a minute to look at
16 that, please.

17 A Okay.

18 Q You've had a chance to look at Exhibit 8?

19 A Yes.

20 Q And this is another deed, it's a quit claim deed, and the
21 legal description in this is the West Half of the
22 Northwest Quarter of Section 13, Township 115, Range 67.

23 Do you see that?

24 A Yes.

25 Q And it's dated July 10, 2013. Do you see that?

1 A Yes.

2 Q And it's a quit claim deed from your mother to you and
3 your wife Pamela. Do you see that?

4 A Yes.

5 Q Was this some land that your mom missed in deeding over to
6 you or what -- do you know why there's a separate deed for
7 this compared to Exhibit 7?

8 A How many acres is this? Do you know?

9 Q Half of a quarter, I believe, is 80, thereabouts.

10 A Yeah, she missed it.

11 Q Okay. Was this part of the homelace?

12 A It's three miles from it.

13 Q Okay. When we're talking about the homelace and the land
14 by the lake, how far are they apart, the land?

15 A I don't know. Eight to ten miles.

16 Q Okay. So the land described in Exhibit 3 is about three
17 miles from the homelace?

18 A Yes.

19 Q Okay. Do you still consider it part of the homelace land
20 or was this something separate?

21 A No. It's the homelace, Dad's.

22 Q Okay. So the land in Exhibit 7 and the land in Exhibit 8
23 are what you refer to as the homelace?

24 A Yes.

25 Q All right. And if my math is right, it's about a thousand

1 acres, give or take?

2 A Yes.

3 Q Does that sound about right from your knowledge of the
4 farm?

5 A Yes.

6 Q Okay. And then the land by the lake is approximately
7 480 acres --

8 A Yes.

9 Q -- give or take? So we're talking the land that was your
10 family's land is not quite 1500 acres?

11 A Yes.

12 Q And then the Harde's land was separate land of yours?

13 A Yes.

14 Q And now the Roach land is separate land of yours as well?

15 A Yes.

16 Q Okay. Any other land that you own?

17 A No.

18 Q What about your wife, any other land that she owns?

19 A That's all hers.

20 Q Okay. Is there any other?

21 A My wife owns some.

22 Q Okay. Do you know about how many acres?

23 A I think it's 160.

24 Q Okay. Would she know better than you?

25 A Yeah, I'd say, because I don't ask her. That's hers.

1 Q Okay. Fair enough. I am just asking what you know,
2 Craig.

3 A That's not involved in the farm, mine.

4 Q Okay. And the land in Exhibit 8, the reason for your mom
5 transferring that land to you, is that the same reason she
6 transferred the land?

7 A Yes.

8 Q And I asked you a question earlier, it probably wasn't
9 totally right. So now as of July 10, 2013, from my review
10 of all these deeds, it appears your mom has now deeded any
11 interest she has in any of the Van Zee land to you, your
12 wife, and Michael and Theresa?

13 A Yes.

14 Q So as of that date, she no longer had any ownership
15 interest in any real estate that we've talked about here
16 today; is that correct?

17 A Yes.

18 Q And you were aware of that?

19 A Yes.

20 Q And I didn't mention this earlier, Craig. If you need a
21 break at some point, let me know. I will just try to
22 finish the questions I am asking. I'm not --

23 A That's fine. I'm fine.

24 Q You're good for now?

25 A Yes.

1 Q Okay. I want to talk to you about what you've been
2 referring to as Dad's debt and the payments you've been
3 making on it.

4 (Exhibit 9 marked for identification by the court
5 reporter.)

6 BY MR. VOGEL

7 Q Craig, I've handed you Exhibit 9. In the bottom left
8 corner you will see a PL 301, that's what we call a Bates
9 stamp. This is a document I received from your attorney
10 Lee through discovery. I will have you take a look at
11 that.

12 A Yeah, I looked at it.

13 Q Okay. Are you familiar with this --

14 A Yes.

15 Q -- document? It says it's from Frontier Bank?

16 A Yes.

17 Q Where is Frontier Bank located?

18 A Nebraska.

19 Q Where at in Nebraska do you deal with?

20 A (No response.)

21 Q Is there a town or a city?

22 A Pender.

23 Q Pender, Nebraska? Is there a person that you deal with at
24 that bank?

25 A Troy.

1 Q Do you know Troy's last name?

2 A No.

3 Q Okay. So Troy at Frontier Bank in Pender, Nebraska?

4 A Yes.

5 Q As I look at this document, it has your name, Pamela's
6 name, and your mother Patricia's name on it under the
7 mailing label. Do you see that?

8 A Yes.

9 Q We look down at the loan to date, it looks like on June 9,
10 2010, there was a principal advance on the loan of
11 \$375,000?

12 A What day?

13 Q June 9, 2010.

14 A Right.

15 Q So the original amount of this loan was \$375,000. Does
16 that sound right?

17 A Yes.

18 Q Is this the loan that is associated with what you refer to
19 as Dad's debt?

20 A Yes.

21 Q Did you have a loan at a different bank for Dad's debt
22 before this one?

23 A Yes.

24 Q Where was that at?

25 A Miller. It's called the Quoin Bank.

1 Q Is that the one that's spelled, like, Q-J-C-I-N?

2 A Yeah, yes.

3 Q That's pronounced Quoin like a coin?

4 A Yes.

5 Q Okay. I just didn't know exactly how to pronounce it.

6 So before 2010, this --

7 A I went to another bank after that too.

8 Q After Quoin?

9 A Yes.

10 Q Well, I will back up -- maybe we'll back up a little bit.

11 So Dad's debt, just walk me through your understanding of
12 how Dad's debt came about and how you and your mom repaid
13 it, where you got loans through. Just, I am looking for a
14 timeline as best you can give me, Craig.

15 A Well, when Dad died, I got everything together from Dad's
16 paperwork, his debts, his bills. And then, see, me and
17 Mom sat down and figured out where -- what we could do.
18 So I started looking for a bank to hold onto the farm
19 because we was gonna -- the bank -- one bank told us to
20 start selling.

21 Q Do you know which bank that was?

22 A It was the Quoin Bank. They wanted us to sell a couple
23 quarters.

24 Q And this was around the time your dad died?

25 A No. After.

1 Q Okay.

2 A Me and Mom didn't take over the farm until after Dad died.

3 Q Right. That's what I am talking about.

4 A Right. So me and Mom sat down, we put something together,
5 and I had to throw my quarter of land in that was clear.

6 Q Is that the Hardes?

7 A Right. And it would make it work to take a loan out to
8 keep the farm going.

9 Q And I'm going to stop you. When you say "keep the farm
10 going," is that because --

11 A We could make the payments.

12 Q Because some of this debt was tied to land, meaning land
13 was mortgaged and they were threatening to foreclose on
14 that land?

15 A Yes.

16 Q But the land by the lake was not -- they never threatened
17 foreclosure on that, did they?

18 A No.

19 Q That was a bad question. Did the ever threaten
20 foreclosure on that land?

21 A No.

22 Q Okay. Keep going then. I want to stop you for a second,
23 though, because you mentioned Quoin Bank and you said that
24 was a while after your dad had passed. So in '97 after
25 your dad passes away, there's some debt, some of his debt

1 is still outstanding?

2 A Yes.

3 Q And you didn't go to Quoin Bank until several years after
4 that -- after your dad's death? I am just trying to get a
5 timeline of how this debt came about. Was it through
6 purchasing land? Was it through purchasing equipment?
7 How your dad accumulated this debt, if you know?

8 MR. SCHOENBECK: I am going to object to the form of those
9 multiple questions. And ask that you ask the witness one
10 question. There was about five in a row there.

11 MR. VOGEL: Well, I just want him to answer my last one.

12 MR. SCHOENBECK: Okay. What's that one?

13 MR. VOGEL: Would you read it back, Kelli?

14 (The requested portion was read back by the court
15 reporter.)

16 THE WITNESS: I assume, I'm not sure, land that he
17 purchased. And then he had like three years' back taxes
18 on it.

19 BY MR. VOGEL

20 Q Is that land taxes?

21 A Right.

22 MR. SCHOENBECK: You cut him off. Are you done answering
23 it?

24 THE WITNESS: Sorry. Sorry .

25 MR. VOGEL: Sometimes it's hard to tell, Lee.

1 MR. SCHOENBECK: Okay. Well, I'll just help him here.
2 You cut him off.

3 THE WITNESS: Okay.

4 MR. VOGEL: Okay. You can finish your answer.

5 THE WITNESS: Ask me again, please. You said --

6 MR. VOGEL: The question he was answering that I thought
7 he was done with.

8 (The requested portion was read back by the court
9 reporter.)

10 MR. VOGEL: And would you read back what he had for an
11 answer so far?

12 (The requested portion was read back by the court
13 reporter.)

14 BY MR. VOGEL

15 Q So finish your answer if you need to.

16 A I'd say which one? On the taxes?

17 Q The one on how your dad accumulated the debt.

18 A Oh, I -- I don't know because that was back in '97. All I
19 know, me and my mom put something together to make it
20 work.

21 Q You did mention something about three years' back taxes,
22 right?

23 A Yes.

24 Q Was that back real estate taxes?

25 A Yes.

1 Q Did he owe any back taxes, as far as like income taxes
2 that you're aware of?

3 A No.

4 Q Do you know how much the back taxes were?

5 A No.

6 Q Do you know if these back taxes were associated with all
7 of the land that he owned or just portions of it?

8 A I am going to say all.

9 Q Do you know for sure?

10 A No.

11 Q Okay. Do you know when you -- when you say you and your
12 mom put something together, do you know about what year
13 that was?

14 A No.

15 Q Are we talking around the time of your father's death or
16 several years after?

17 A Real close to when Dad died because the banks were going
18 to come and get it.

19 Q Do you know which banks?

20 A I don't know. I don't remember which ones he was involved
21 with.

22 Q Okay. Do you know if there was more than one bank he was
23 involved with?

24 A I cannot answer that.

25 Q Okay.

1 A I don't know.

2 Q Were -- do you know if there were -- if your mom or you
3 were receiving notices from the County about these back
4 taxes?

5 A They were showing up at my dad's house.

6 Q Who was?

7 A The letters.

8 Q From -- from whom?

9 A Hand County Courthouse.

10 Q Okay. Saying you owe taxes?

11 A Yes.

12 Q And if you don't pay them, did they say what they were
13 going to do?

14 A I don't remember.

15 Q They were showing up at whose house?

16 A My dad's house.

17 Q And did your mom live there?

18 A No.

19 Q And was this before your dad died these letters were
20 showing up there?

21 A I'm sure they were, because he was three years behind.

22 Q Okay. So was anyone living at your dad's house after he
23 died?

24 A I had my mom move back.

25 Q So they lived separate for a while?

1 A Yes.

2 Q Okay. And then after your dad died, your mom moved back
3 into your dad's house?

4 A I told her to do it.

5 Q Was that house in Miller or --

6 A Yes.

7 Q And so letters from Hand County were showing up at that
8 house?

9 A Yes.

10 Q What's the address of that house, you said, "Dad's house"?

11 A 509 East Fifth Street.

12 Q Is that the house that your mom lived in until she passed
13 away?

14 A Yes.

15 Q Okay. So when you and your mom put something together
16 regarding the back taxes, was there a certain bank you
17 went to first?

18 A I'm not sure, but I'm thinking it was Quoin.

19 Q And that's in Miller?

20 A Yes.

21 Q So you think -- you think the first bank you went to after
22 your dad passed was the Quoin Bank?

23 A Yes.

24 Q And when you went there, did you and your mom, I guess for
25 lack of a better term, refinance all of your dad's debt

1 into one loan?

2 A Yes.

3 Q Through the Quoin Bank?

4 A Yes.

5 Q Do you know approximately how much that debt was?

6 A No.

7 Q Are we talking a million dollars?

8 A No.

9 Q 500,000?

10 A No.

11 Q Less?

12 A Yes.

13 Q 300,000?

14 A Well, here it says three-something here, doesn't it?

15 Q No, I get what it says on that one. I am just asking if
16 you know back when you went to Quoin Bank what it was?

17 A No.

18 Q Okay. Fair enough. So when you refinanced at Quoin Bank,
19 do you recall what you used as collateral for that loan at
20 Quoin Bank?

21 A It was the main farm.

22 Q The home farm -- the homelace?

23 A Yep, and then that -- my quarter, the Harde's quarter.

24 Q And you don't know what year this was?

25 A No.

1 Q Okay. After Quoin Bank, did you go to a different bank?

2 A Yes.

3 Q Which bank was that?

4 A Dacotah.

5 Q Dacotah Bank?

6 A Yeah, Faulkton.

7 Q Okay. So you went from -- your recollection is from Quoin
8 Bank to Dacotah Bank?

9 A Yes.

10 Q In Faulkton. What was the reason for that transition?

11 A I didn't like the Quoin Bank because they wanted to sell
12 some land. So I found another bank that would take me on,
13 me and Mom, where we didn't have to sell any.

14 Q So with your loan at Quoin Bank, were you making the
15 regular payments?

16 A I don't remember.

17 Q Who was -- who was making those payments?

18 A Me and my mom.

19 Q Well, do you know, when you say you and your mom, did you
20 have a joint account or?

21 A Yes.

22 Q Okay. Is that what you would refer to as the farm
23 account?

24 A Van Zee Farms.

25 Q And do you know where that account was at that time when

1 your loan was at Quoin Bank?

2 A It was at the Quoin Bank.

3 Q Okay. So the loan and the bank account were both there?

4 A Yes.

5 Q And then you transition -- I will stop myself there.

6 Your conversations with the people at Quoin Bank, why
7 did they want you to sell some land?

8 A To reduce my dad's debt.

9 Q Is it something they told you you had to do or they were
10 going to default the loan, or what was happening?

11 A I got the hint they were. They didn't come out and
12 threaten me.

13 Q So based on those conversations, you looked for a
14 different bank?

15 A Yes.

16 Q And you ended up at Dacotah Bank in Faulkton?

17 A Yes.

18 Q And you refinanced the loan from Quoin Bank at Dacotah
19 Bank in Faulkton?

20 A Yes.

21 Q Did you use the same collateral at that bank?

22 A Yes.

23 Q Do you know about what year that would have been?

24 A No.

25 Q Okay. And your loan at Dacotah Bank for Dad's debt, do

1 you know about how much it was?

2 A No.

3 Q Less than half a million?

4 A Yes.

5 Q Okay. Do you know about how long your loan was at Dacotah
6 Bank, how long you had the loan there before you switched?

7 A No.

8 Q Okay. Because from the document in front of you,
9 Exhibit 9, it appears that in 2010 you switched to
10 Frontier Bank in Pender, Nebraska, correct?

11 A Yes.

12 Q So is Dacotah Bank in Faulkton the bank you were at right
13 before Frontier Bank?

14 A Yes.

15 Q Okay. What prompted you to switch to Frontier Bank?

16 A They dropped my payments if I went through them.

17 Q So your payments were less through Frontier Bank?

18 A Yes.

19 Q Did you have other accounts or loans at Frontier Bank that
20 you knew the payments were going to be lower?

21 A No.

22 Q I guess what I am trying to get at, Craig, is what
23 prompted you to start searching for other banks other than
24 Dacotah Bank?

25 A At Dacotah Bank my payments were pretty high. And I asked

1 to drop them down where I could make something go at it.
2 And they said they couldn't. So, meanwhile, I talked to a
3 friend and he was banking at this bank in Nebraska. So I
4 called them and they come and looked at the place and they
5 did what I wanted them to do.

6 Q And the payments were lower than at --

7 A Yes.

8 Q Do you recall what your payments were at Dacotah Bank?

9 A No.

10 Q They were higher than \$33,167.16 a year?

11 A They had to be.

12 Q So -- and it looks like just from this printout, as of
13 March 24, 2023, the remaining principal on this loan is
14 just over \$136,000; is that correct?

15 A Yes.

16 Q And I am trying to see here, but I don't -- I don't see
17 anything from this document what the maturity date of this
18 loan is or how long of a loan this is.

19 Do you know?

20 A No.

21 Q Do you have any document that shows that?

22 A I don't know.

23 Q Okay. You have other loans associated with Frontier Bank?

24 A No.

25 Q You don't have any other loans at Frontier Bank?

1 A No, just land.

2 Q Okay. That's what I meant. So it's a loan for land you
3 purchased?

4 A Yes.

5 Q Okay. Okay.

6 A And Dad's debt.

7 Q So Exhibit 8 -- Exhibit 9, I'm sorry, is the loan that you
8 are saying is associated with Dad's debt?

9 A Yes.

10 Q Okay. And Lee's office provided me three other loans
11 through Frontier Bank that are in your name and your
12 wife's name. Those have nothing to do with the land by
13 the lake?

14 A No.

15 Q They have nothing to do with Dad's debt, correct?

16 A No.

17 Q Is that correct, they don't?

18 A Yes. Sorry.

19 Q No, that's okay. It's not a great question.

20 Do you know what those other loans are related to?

21 A The land that I purchased.

22 Q The --

23 A Roach.

24 Q Roach land?

25 A Yes.

1 Q So all three of them are for that?

2 A Two of them.

3 Q Okay. I am not going to mark these unless you want to
4 look at them, but we have one from 2013 that's
5 1.8 million, one from 2012 that's 265,000, and one from, I
6 guess, 2019 that looks like more of a line of credit than
7 a loan.

8 Do you have a line of credit through Frontier Bank?

9 A I don't know.

10 Q Okay. But you have two loans for the land, the Roach
11 land, through Frontier Bank?

12 A We call it the Roach ground. Yes.

13 Q Okay. Do you think that maybe the first one was for a
14 down payment? The first one is from November 30, 2012.
15 It's for \$265,000.

16 A No. It ain't a down payment on the Roach ground.

17 Q Do you know what that loan would have been for then?

18 A I am thinking that was another quarter of ground right
19 across the road from Roach ground.

20 Q Okay.

21 A But we call it the Roach ground.

22 Q So you call all of it the Roach ground?

23 A Right, the -- what I purchased.

24 Q Okay. So you purchased a quarter across the road from the
25 Roach ground?

1 A Yes.

2 Q But you call it the Roach ground?

3 A Yes.

4 Q Who did you purchase that from?

5 A I think they called it the Nilson quarter.

6 Q Nilson?

7 A Yeah.

8 Q Okay. And the larger loan for 1.8 million in November of
9 2013 was for the Roach ground from Roach's?

10 A Yes.

11 MR. VOGEL: I need to use the restroom. Is it okay if we
12 take a little break here?

13 MR. SCHOENBECK: You bet.

14 (A brief recess was taken.)

15 BY MR. VOGEL

16 Q So, Craig, just back to this debt of your dad's, did you
17 ever approach Michael or Theresa and ask them to help pay
18 this debt?

19 A No.

20 Q And I know you have a farm account at American Bank and
21 Trust. Do you know about what year you opened that?

22 A No.

23 Q Okay. And the reason I ask is, you know, I've got the
24 records, about seven years back is all the banks keep
25 records. So I am just curious how long that account has

1 been open. You're not aware?

2 A No.

3 Q What do you -- as far as checking accounts go, there's a
4 farm account at American Bank and Trust. Do you have,
5 yourself, have any other checking accounts?

6 A No.

7 Q Do you know if your wife does?

8 A I assume she's got her own.

9 Q Okay. All I'm asking is if you know. If you don't,
10 that's --

11 A Yeah, she's got her own.

12 Q Okay. And we're talking about the payments made on Dad's
13 debt on Exhibit 9. The payments that have been made on
14 that loan since 2010, as far as you know, have they come
15 out of the Van Zee farm account?

16 A Yes.

17 Q And the money that goes into the Van Zee farm account,
18 would be a rental payment from the honeplace land and the
19 land by the lake?

20 A All the land.

21 Q Because -- so all of the land you get out of --

22 A Now, all the land I got, me and Mom, we fell in one big
23 group, Roach ground, Dad's ground, and the land by the
24 lake is one big group. And then we take out the payments
25 on it, but I got them other loans, too, hooked together,

1 too, all in one big group.

2 Q And they are at Frontier Bank?

3 A Right, yes.

4 Q So you get one lease payment that would go into the farm
5 account?

6 A Yes.

7 Q You would make one payment to Frontier Bank for all of
8 your loans?

9 A Yes.

10 Q Okay. And you would pay the real estate taxes on all of
11 the ground out of that bank account?

12 A Yes.

13 Q Okay. Any other expenses tied to -- are there any -- so
14 let me back up.

15 Expenses that are directly tied to the land by the
16 lake, what we've established is you've told me there's no
17 lease or -- or excuse me -- there's no mortgage or lien on
18 that property, correct?

19 A Yes -- no. There is no -- no lease.

20 Q Okay. There's real estate taxes that need to be paid on
21 it, correct?

22 A Yes.

23 Q And you pay those twice a year?

24 A Yes.

25 Q And Lee provided me with a supplemental letter outlining

1 the taxes that have been paid on that going back several
2 years. Are you familiar with that?

3 A Yes.

4 Q Okay. Any other money that's been spent on the land by
5 the lake out of the farm account?

6 A Not lately.

7 Q When was there?

8 A I can't recall.

9 Q Okay. Do you know if there ever was?

10 A Yes.

11 Q What -- what was it for?

12 A Putting up fence.

13 Q Okay. Is that back when it was pasture?

14 A No.

15 Q What was fence put up for?

16 A The other person's cattle.

17 Q To keep them off?

18 A Yeah, make a long story short, farmers divide the fence
19 up. They take care of their half. We take care of our
20 half, each line around. And then it's our -- well,
21 them -- lake -- the lake ground half was bad, so I had to
22 fix it.

23 Q Did you hire somebody?

24 A No.

25 Q You did it yourself?

1 A Yes.

2 Q When you say "fix it," did you mean is this barbwire
3 fence?

4 A Yes.

5 Q Did you have to put new posts or wire on it or just
6 stretch it and splice it --

7 A There was an area that we had to put new posts up.

8 Q The wire was still good?

9 A Nope. It flooded and it bent over from the snow.

10 Q Do you know about what year this was?

11 A No.

12 Q Are we talking 10 years ago?

13 A I don't know.

14 Q Okay. But other than the fence that you fixed and the
15 taxes, any other land that's been spent on the -- any
16 other money that's been spent on the land by the lake?

17 A Not now.

18 Q Okay. When else was there?

19 A To get it ready to break, we spent money on it, cleaning
20 it up, picking rock.

21 Q Okay. Did you hire someone to do that?

22 A No.

23 Q Who did that?

24 A Me and my boys.

25 Q Do you know about what year this was?

1 A No.

2 Q Did you ever ask Michael or Theresa if they'd be willing
3 to help do that?

4 A No.

5 Q The taxes with the land by the lake, from my review it
6 appears that you receive those tax notices?

7 A Yes.

8 Q Okay. And you receive the tax notices for the land by the
9 lake as well as the homeplace land?

10 A Yes.

11 Q Okay. Did you ever -- you never reached out to Theresa or
12 Mike and asked them to help pay those, did you?

13 A No.

14 Q I just want to go through the leases that I have here with
15 you and just talk a little bit about them.

16 (Exhibit 10 marked for identification by the court
17 reporter.)

18 BY MR. VOGEL

19 Q Craig, I am handing you Exhibit 10. And I will just give
20 you a minute to look at that, please.

21 A I've seen these before.

22 Q Okay. So Exhibit 10, as I look at it, it looks like it's
23 a lease agreement from 2004 until 2037. Does that sound
24 right?

25 A I got 2035 to '7.

1 Q I'm sorry. You're right. You're right. It is for 2005
2 through -- the farming years 2005 through 2007. Does that
3 sound right?

4 A Yeah, yes.

5 Q And it's between Patricia and Craig Van Zee and Northstar
6 Farms?

7 A Yes.

8 Q When I look, it's about the third paragraph down where it
9 lists the land to be rented. As I look at that, it looks
10 like that's just the land by the lake. Do you see that
11 two paragraphs from the top -- or three?

12 A Yes.

13 Q So this lease here is just for the land by the lake,
14 correct?

15 A Yes.

16 Q So from 2005 to 2007, what was happening with the
17 homeplace land?

18 A These guys would rent it.

19 Q Just on a separate lease?

20 A Yes.

21 Q And at the bottom or by the legal description it says,
22 "Grassland to be broke"?

23 A Yes.

24 Q Was it all grass at that point?

25 A Yes.

1 Q Okay. So as of the farming season of 2005, it was -- the
2 land by the lake was all grass; is that right?

3 A Yes.

4 Q Okay. And Northstar Farms is who leases it for those four
5 years?

6 A Yes.

7 Q Okay. And you -- okay. And when we look at -- the pages
8 aren't numbered, but it's the last page of this exhibit.
9 You will see signature lines for Patricia and Craig
10 Van Zee and a witness as well as Northstar Farms and some
11 individuals from Northstar Farms. You'll see that,
12 correct?

13 A Yes.

14 Q There's no signature line for Mike or Theresa, is there?

15 A No.

16 Q This lease, are you the one who talked with Northstar
17 Farms about entering into this lease?

18 A Me and my mom together talked to them.

19 Q So you both talked to them?

20 A Yes.

21 Q On the phone or how?

22 A They showed up at the house.

23 Q Okay. And you guys discussed like a rental rate?

24 A Yes.

25 Q Okay. So the money that was received under this lease,

1 would that all have went into your farm account?

2 A Yes.

3 Q Okay. Was any of that money provided to Michael or
4 Theresa?

5 A No.

6 Q Did you ever tell them about this lease agreement?

7 A No.

8 Q Okay. And your understanding is that Northstar Farms is
9 the same as L&G Acres?

10 A Yes.

11 Q Okay. So I've got -- I've been in contact with Lee about
12 a lease from 2008 through 2012, and it sounds like you
13 weren't able to locate a lease. Does that sound right?

14 A Yes.

15 Q From your recollection for 2008 through 2011, were you
16 leasing the land by the lake to L&G Acres?

17 A Yes.

18 Q Do you have any idea what the rental rate was?

19 A No.

20 Q Was there a written lease?

21 A Same as this.

22 Q So you were pointing to Exhibit 10?

23 A Well, they write up the contract, just like these, this
24 paperwork. Every time they lease ground from me, that's
25 what me and Mom signs.

1 Q Who would draft the lease? Was it you or was it L&O
2 Acres?

3 A What's that?

4 Q The lease.

5 A Drew it up?

6 Q Yeah, who drew it up?

7 A They did.

8 Q Okay. So your understanding or recollection for the
9 timeframe of 2008 to 2011 is it was a lease similar to
10 Exhibit 10 with L&O Acres?

11 A Right. For them, but I don't know the price.

12 Q Okay. The rental payments for those years would have been
13 deposited in the farm account?

14 A Yes.

15 Q And with that lease, did you ever talk with Mike or
16 Theresa about it?

17 A No.

18 Q Did you ever talk to them about the rents that you
19 received from that land?

20 A No.

21 (Exhibit 11 marked for identification by the court
22 reporter.)

23 BY MR. VOGEL

24 Q Craig, I will have you take a look at Exhibit 11.

25 A Okay.

1 Q So Exhibit 11, and correct me if I'm wrong, Craig, appears
2 to be a lease with Kirby Odde who also can be called L&O
3 Acres, as he operates L&O Acres. Does that sound right?

4 A Yes.

5 Q And as I review it, it's for the farming seasons 2013
6 through 2017? That would be on the second page -- or I'm
7 sorry. The end part of 2012 through 2017.

8 A Yes, I see that.

9 Q Does that sound accurate?

10 A I don't know. It must be because it's written down.

11 Q I will have you look at the last page. It's page 4, it
12 says at the top. Do you see there's a signature line for
13 your mom Patricia and for you as well as for Kirby Odde
14 and two witnesses?

15 A Yes.

16 Q There's no signature line for Michael or Theresa?

17 A No.

18 Q Just back on the first page of this, when I look at
19 Exhibit 11 versus Exhibit 10, it appears that there's more
20 land listed in Exhibit 11.

21 Does that look accurate?

22 A Yes.

23 Q Is this -- the bottom description for 471.2 acres in
24 Section 21, would that be the land by the lake?

25 A I -- I'm not that good on descriptions of land.

1 Q But it's approximately 480 acres?

2 A Yes.

3 Q Okay. The rest of the land listed above it, just tell me
4 this: What land were you leasing to Kirby Odde in 2012
5 through 2017 just from your knowledge, was it Hardes, the
6 homeplace, and the land by the lake?

7 A I don't know.

8 Q Who would know?

9 A Probably the guys who rent my ground or that ground.

10 Q Okay.

11 A Kirby Odde.

12 Q So with this lease from 2012 to 2017, were you part of
13 negotiating this lease with Odde's?

14 A Me and Mom.

15 Q Okay. And the money received from rent for these years
16 listed, 2012 through 2017, that was deposited in the farm
17 account?

18 A Yes.

19 Q For those years, was any of that rental income provided to
20 Mike or Theresa?

21 A No.

22 Q Did you tell them about the lease that's Exhibit 11?

23 A No.

24 Q Did you tell them about the rental income?

25 A No.

1 (Exhibit 12 marked for identification by the court
2 reporter.)

3 BY MR. VOGEL

4 Q I am Handing you Exhibit 12, Craig. I will have you take
5 a look at that.

6 A Okay.

7 Q So Exhibit 12 appears to be a lease between Kirby Odde,
8 yourself, and your mother for just say of 2,000 acres of
9 land. Does that sound accurate?

10 A Yes.

11 Q Page 2 lists the years of leases for -- it's 2018, 2019,
12 and 2020 at the very top?

13 A Yes.

14 Q And it lists the rental amount of \$323,400 per year. Do
15 you see that?

16 A Yes.

17 Q Does that all seem accurate?

18 A Yes.

19 Q So the rental income for this lease, each year you
20 received, that was deposited into the farm account?

21 A Yes.

22 Q And this lease would include the land by the lake?

23 A Yes.

24 Q When you look at the final page of the lease, they are not
25 numbered. There's a signature line for Patricia Van Zee

1 and Craig Van Zee and Kirby Odde, plus two witnesses.

2 Do you see that?

3 A Yep, yes.

4 Q It appears that you signed this, correct?

5 A Yes.

6 Q And it appears that Kirby Odde signed this?

7 A Yes.

8 Q But Patricia Van Zee did not sign this, did she?

9 A What year is this?

10 Q It would be 2018 through 2020.

11 A The land was already switched over in my name.

12 Q So why did you put her --

13 A They left it on there.

14 Q They left it on there?

15 A Yes. Every time I get a different paperwork, her name is
16 always on there.

17 Q Okay. So because she didn't own any of the land anymore,
18 you didn't have her sign it, correct?

19 A Well, yeah, yes.

20 Q There's no signature line for Michael or Theresa, is
21 there?

22 A No.

23 Q And they owned some of that land, didn't they?

24 A Yes.

25 Q This lease Exhibit 12, you never talked with Mike or

1 Theresa about this, did you?

2 A No.

3 Q And you never provided them any of the rental income from
4 this lease, did you?

5 A No.

6 Q Since your mother didn't own the land during these -- this
7 timeframe, was she involved in negotiating this lease?

8 A Yes.

9 Q Okay. Why was that?

10 A Because I talked to her every time I did anything with her
11 old ground.

12 Q Just to let her know what was going on?

13 A Yes.

14 Q Okay. But you didn't have to, did you?

15 A No.

16 Q Okay. And you knew that?

17 A Yes.

18 Q Okay. I think I asked this, yeah. I'll ask it again.

19 But all the rent was deposited in that farm account?

20 A Yes.

21 Q At American Bank and Trust?

22 A Yes.

23 (Exhibit 13 marked for identification by the court
24 reporter.)

25 BY MR. VOGEL

1 Q Craig, I am handing you Exhibit 13.

2 A I've looked at it.

3 Q Okay. Are you familiar with this lease?

4 A I don't see the years on the lease.

5 Q If you look at the bottom, the second from the bottom
6 paragraph on page 1, it says "Term of Lease."

7 Do you see that?

8 A Yes. One year.

9 Q Correct. So it appears that this is for the 2021 farming
10 season?

11 A Yes.

12 Q Okay. Do you know why in 2021 you just had a one-year
13 lease with Oddes?

14 A I don't know right now.

15 Q Okay. And this lease, is it between Patricia Van Zee,
16 Craig Van Zee, and Odde Farms, correct? It's at the very
17 top it says it under "Lease"?

18 A Yes.

19 Q This lease would include the land by the lake, correct?

20 A My mom's name is always going to be on these because they
21 didn't take it off.

22 Q Okay.

23 A Yes, there's -- it's everything on the land, the total
24 acres.

25 Q It includes the land by the lake?

1 A Yes.

2 Q And you mentioned your -- so when you look at the final
3 page, there's a signature line for your mom, but she
4 didn't sign it, correct? She didn't sign this?

5 A Yeah, no, she didn't sign it, but she looked at it. Like
6 I told you, I'd take everything over there so she can see
7 it.

8 Q You signed this lease?

9 A What's that?

10 Q You signed this lease?

11 A Yes, I did.

12 Q Are you the one that spoke with Odde Farms about this
13 lease?

14 A Yes.

15 Q Okay. The rent checks that were sent for all the leases
16 that we talked about, were they sent to you?

17 A Yes.

18 Q Okay. They weren't sent to your mother, were they?

19 A They started off with my name and Mom's name on them. Two
20 names, they started off when they first rented it. Now
21 it's just me.

22 Q When did they start putting just your name on it?

23 A I don't know.

24 Q But the checks were always sent to you?

25 A Yes.

1 Q And you're the one that deposited them in the farm
2 account?

3 A Yes.

4 Q And any checks that were written out of that farm account
5 for loans or to your mother were written by you or your
6 wife?

7 A Yes.

8 Q I've reviewed those bank accounts and it doesn't appear
9 that your mother Patricia wrote, at least starting in
10 2015, wrote any checks out of that account, did she?

11 A She had it where she could have if she wanted to. I don't
12 know if she never did. I don't know.

13 Q Well, if the records show that she never did, do you --

14 A Right.

15 Q Do you agree with that?

16 A Yes.

17 Q Okay. Do you recall her ever depositing any money into
18 that farm account, your mother?

19 A No, she didn't. No.

20 Q Getting back to Exhibit 13, there's no signature line for
21 Michael or Theresa, is there?

22 A No.

23 Q You didn't -- did you provide them a copy of this lease?

24 A No.

25 Q The rental income that was paid was deposited in the farm

1 account?

2 A Yes.

3 Q You didn't provide any of that rental income to Mike or
4 Theresa?

5 A No.

6 Q And when I look at this lease versus Exhibit 11, there's
7 approximately 400 more acres on Exhibit 13 than
8 exhibit 11. Does that have to do with the Roach land?

9 A I do not know.

10 Q Were you ever renting the Roach land out separately from
11 the land by the lake and the homeplace?

12 A No.

13 Q Okay.

14 (Exhibit 14 marked for identification by the court
15 reporter.)

16 BY MR. VOGEL

17 Q I will give you Exhibit 14 there, Craig, just take a look
18 at that and let me know when you're done.

19 A Okay.

20 Q This appears to be a lease between Patricia Van Zee, Craig
21 Van Zee, and Odde Farms, correct?

22 A Mom's not on this. Her name is on here.

23 Q Correct. Her name is on it, correct?

24 A Right.

25 Q Okay. And when you look at the second page, it appears

1 that this is a three-year lease from 2022 through 2024 at
2 the very top?

3 A Correct.

4 Q This lease would include the land by the lake?

5 A Yes.

6 Q And this is the lease that is currently in place?

7 A Yes.

8 Q When we look at the final page, you mention there's a
9 signature line for your mother, but she didn't sign it,
10 correct?

11 A Yes.

12 Q You signed it and Greg Odde signed it?

13 A Yes.

14 Q And it appears that it looks like Dexter Van Zee signed as
15 a witness?

16 A Yes.

17 Q Is that your son?

18 A Yes.

19 Q Mike and Theresa never signed this?

20 A No.

21 Q And you never provided them a copy of this, did you?

22 A No.

23 Q The rental income for the -- I suppose two -- you've
24 received rental income from 2022 and 2023 under this
25 lease?

1 A Yes.

2 Q Again, that was deposited into the farm account?

3 A Yes.

4 Q You never provided any of that income to Mike or Theresa,
5 did you?

6 A No.

7 Q And I meant to ask you this earlier. I see Dexter Van Zee
8 signed this. How many kids do you have?

9 A Three.

10 Q What are their names?

11 A Dexter, Derick, Desirae.

12 Q How old are they?

13 A I don't know.

14 Q Out of high school?

15 A Yes.

16 Q Okay. What does Dexter do?

17 A He works for a farmer south of town.

18 Q Which farmer is that?

19 A Fultons.

20 Q And you said Derick is another son?

21 A Yes.

22 Q What does Derick do?

23 A He's in the Air Force for six years and now he's going to
24 Brookings to school.

25 Q So he goes to SDSU?

1 A Yeah, that's --

2 Q Does he -- I'm sorry. I cut you off.

3 A I'm sorry.

4 Q No. It was my fault. Go ahead, Craig.

5 A Yes, he does.

6 Q Does he live in Brookings then?

7 A Yes.

8 Q And Desirae, what does she do?

9 A She's a nurse in Huron.

10 Q Does she live in Huron?

11 A Yes.

12 Q And I will back up a little bit too. You currently live
13 at -- what was your address again?

14 A 718 East Second Avenue.

15 Q Before living there, where did you live?

16 A I don't remember.

17 Q Let's do it this way. Growing up and going to school, you
18 lived with your parents?

19 A Yes.

20 Q Was that on the farm or in town?

21 A Both.

22 Q Okay. Do you know about what year you moved into town?

23 A '69.

24 Q Is that -- do you know the address of that house?

25 A That's where my mom's address is.

1 Q What was that again?

2 A 509 East Fifth Street.

3 Q How long did you -- did you live there after high school?

4 A Yes.

5 Q How long?

6 A I do not know.

7 Q Before moving to where you live now, did you live anywhere
8 between your parents' house and your current house?

9 A Yes.

10 Q Where did you live?

11 A I can't tell you the address there.

12 Q Was it in Miller?

13 A Yes.

14 Q Anywhere else in between living at your parents' house to
15 where you currently live?

16 A Just that one little place.

17 Q Who did you live there with?

18 A My wife.

19 Q Were you guys married at that time?

20 A Yes.

21 Q Okay. So you -- do you know about how long you lived at
22 this little place in Miller?

23 A No.

24 Q Okay. You don't -- so after high school, you think you
25 lived in your parents' house for 10 years?

1 A I don't know.

2 Q No idea of how old you think you were?

3 A No.

4 Q Were -- did you live there, was it just you and your
5 parents?

6 A Until she moved in.

7 Q Okay. Do you know -- "she" being Pamela?

8 A Yes.

9 Q So you both lived at your parents' house for a while?

10 A Yes.

11 Q Was this after your dad died.

12 A No. We was already married and moved out.

13 Q So you were married and moved out before your dad died?

14 A Yes.

15 Q So you moved out of that house before '97?

16 A Yes.

17 Q Okay. Okay. Did you pay any rent when you lived at
18 your --

19 A No.

20 Q Okay. I think I talked with you a little bit, Craig,
21 about the tax -- the tax records for all the land were
22 sent to you?

23 A Yes.

24 Q Do you know about when that started?

25 A No.

1 Q Okay. Just -- just in reference to the land by the lake
2 that involves both Theresa and Michael, the Hand County
3 Treasurer tax receipt history shows that as of 2011 the
4 tax receipt or request from 2011 going forward for the
5 land by the lake was sent to Craig Van Zee at 718 East
6 Second Avenue, Miller.

7 Does that sound right?

8 A I don't know.

9 Q You've been paying the taxes since that time?

10 A Before.

11 Q Okay.

12 MR. VOGEL: Lee, I am just about finished. I just want to
13 take a little break and look at a couple things.

14 MR. SCHOENBECK: Sure.

15 (A brief recess was taken.)

16 BY MR. VOGEL

17 Q So earlier you had mentioned some agreement you had with
18 your mom about your dad's debt, correct?

19 A Like what?

20 Q I am not sure. It's been mentioned in some of the
21 discovery responses I received that you had some agreement
22 with your mom about paying your dad's debt and collecting
23 income. Can you expand on that at all?

24 A We agreed on a deal how to make it work.

25 Q Okay. What do you mean by that?

1 A To keep the land.

2 Q You and your mom had some agreement?

3 A We did before we took all this over.

4 Q What was that agreement?

5 A How to keep Dad's land all in one group.

6 Q I get that, but what -- what was the agreement between you
7 and Mom? Who was supposed to do what?

8 A You're going to have to explain better. What -- what do
9 you mean?

10 Q Well, something that you provided to me saying you had an
11 agreement with Mom to pay Dad's debt, and what did that
12 agreement entail?

13 A Probably the agreement that the income off the land goes
14 towards Dad's debt.

15 Q Okay.

16 A To keep it.

17 Q What about the excess income off the land? Is that part
18 of the agreement?

19 A Well, we just kind of kept it in the account for backup.

20 Q Backup for what?

21 A Taxes.

22 Q Okay. What about the excess after taxes?

23 A Well, there's my living expenses and I paid Mom.

24 Q Okay. When you say you paid Mom, you're talking about
25 that yearly check you paid her?

1 A Right.

2 Q How did you determine how much you were going to pay your
3 mom?

4 A That was her doing.

5 Q Was it a gift to her or was it --

6 A That's what she asked for.

7 Q Okay. And your mother's living expenses, I understand she
8 had her own account, bank account?

9 A Yes.

10 Q And she had income from retirement?

11 A Yes.

12 Q And possibly Social Security?

13 A Yes.

14 Q So is it fair to say that your mom paid most of her living
15 expenses out of her own account after that check came to
16 her from the farm account?

17 A I don't know.

18 Q Who would know that?

19 A Probably my mom.

20 Q Okay. But it's not like you were regularly -- I can't
21 talk -- regularly making payments for your mom for her
22 sewer bill or electric bill?

23 A No, no.

24 Q Okay. So any of the excess money after you paid your
25 dad's debt, paid the taxes, and paid Mom, you kept to pay

1 your own living expenses?

2 A Yes.

3 MR. VOGEL: I don't have anything more.

4 MR. SCHOENBECK: You're entitled to read and sign the
5 deposition, but I would encourage you to waive the reading
6 and signing. You just have to say on the record that
7 you're willing to waive it.

8 THE WITNESS: Tell her that?

9 MR. SCHOENBECK: Yeah.

10 THE WITNESS: I will just waive it.

11 (WHEREUPON, the foregoing deposition concluded at
12 1:17 p.m.)
13
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23
24
25

1 STATE OF SOUTH DAKOTA

2 COUNTY OF DAY

3
4
5 Be it known that the foregoing proceedings were taken by
6 Kelli Lardy, RPR, on the 30th day of August, 2023, at
Watertown, South Dakota.

7
8
9 That I was then and there a Notary Public in and for the
10 County of Day, State of South Dakota, and that by virtue
thereof, I was duly authorized to administer an oath;

11
12
13 That the proceedings were recorded in stenotype by myself
14 and transcribed into writing by computer-aided transcription,
and that the transcript is a true record of the testimony
15 given to the best of my ability;

16
17 Dated and signed the 11th day of September, 2023.

18
19
20
21 /s/ Kelli Lardy
22 Kelli Lardy, RPR
13060 439th Ave
23 Roslyn, South Dakota 57261
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(10) will... - Zee
App. 107

In the Matter Of:
CRAIG & PAMELA VAN ZEE
VS
MICHAEL D. VAN ZEE
THERESA M. VAN ZEE
August 25, 2022



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1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2 COUNTY OF HAND) :SS
3) THIRD JUDICIAL CIRCUIT
4 CRAIG AND PAMELA VAN ZEE 29CIV22-9
5 Plaintiffs
6 -vs-
7 THERESA M. VAN ZEE
8 Defendant
9
10 * * * * *
11 ZOOM DEPOSITION OF
12 THERESA M. VAN ZEE
13 AUGUST 25, 2022
14 * * * * *
15 APPEARANCES:
16 SCHOENBECK & ERICKSON
17 Watertown, South Dakota
18 BY: LEE SCHOENBECK, ESQ. (by Zoom)
19 Counsel on behalf of the Plaintiffs
20 MORGAN THEELER
21 Mitchell, South Dakota
22 BY: JACOB W. TIEDE, ESQ. (by Zoom)
23 Counsel on behalf of the Defendant
24 ALSO PRESENT: Craig Van Zee (by Zoom)
25

I N D E X

WITNESS	EXAMINATION BY	PAGE
Ms. Van Zee	Mr. Schoenbeck	3

E X H I B I T S

NUMBER	DESCRIPTION	PAGE
1	Warranty Deed	3

* * * * *

The Zoom deposition of THERESA M. VAN ZEE was taken on the 25th day of August, 2022, commencing at 1:52 p.m.; said deposition taken before Stacy L. Wiebesiek, RPR, CSR, a Notary Public with and for the State of South Dakota.

THERESA M. VAN ZEE

called as a witness, being first duly sworn, deposed and said as follows:

1 (Exhibit 1 was marked for identification.)

2 EXAMINATION

3 BY MR. SCHOENBECK:

4 Q Would you state your name for the record?

5 A Theresa M. Van Zee.

6 Q And, Theresa, where do you currently live?

7 A Moline, Illinois.

8 Q How long have you lived in Moline?

9 A A little over three years. Almost four, I guess.

10 Q And where did you live before that?

11 A Blue Grass, Iowa.

12 Q Where is Blue Grass, Iowa at?

13 A West of the Quad Cities.

14 Q And how long were you in Blue Grass, Iowa?

15 A 21 years.

16 Q And then where did you live before that?

17 A Pierre, South Dakota.

18 Q And how long were you in Pierre?

19 A Eight, nine years maybe.

20 Q What's your education history?

21 A 12th grade.

22 Q And you graduated from Miller High School?

23 A Yes, that's correct.

24 Q Okay. And then after graduation, what did you do
25 for work?

1 A The railroad.

2 Q Which railroad did you work for?

3 A Burlington Northern.

4 Q What year did you start with the BN?

5 A 1978.

6 Q What year did you graduate from high school?

7 A '78.

8 Q And then how long were you with the Burlington
9 Northern?

10 A A couple years.

11 Q And then what did you do after that?

12 A Oh, I drove heavy equipment for Publisher Paper
13 Mill.

14 Q And where is -- where did you do that for -- what
15 city, for Publisher Paper?

16 A Oregon City, Oregon.

17 Q And how long were you there?

18 A You know, I don't know. I can't remember. A year
19 or two.

20 Q Approximately how long were you there?

21 A I can't remember.

22 Q Was it more than ten years?

23 A No.

24 Q More than five years?

25 A No.

1 Q And then what was your next job after the paper
2 mill?

3 A I waitressed in between jobs before I went back to
4 work for the railroad.

5 Q And when you went back to work for the railroad, is
6 that the BN?

7 A No.

8 Q Which railroad?

9 A DM&E.

10 Q And were you based out of Pierre then?

11 A Yes. Huron -- Huron and Pierre.

12 Q Is that that eight to nine-year period that you
13 ascribed to living in Pierre?

14 A No. I don't remember what year I went back to work
15 for the railroad. There was a space in there.

16 Q So you worked for the DM&E in Pierre and Huron, and
17 then what was your next job?

18 A That's it. Where I'm at now.

19 Q Okay. So when you were at Blue Grass, Iowa, were
20 you working for the DM&E?

21 A CP -- not CP. They've changed their name five
22 times, but the same place in Davenport and, yeah, they --

23 Q And so you've been out of South Dakota for about 25
24 years?

25 A About, yes.

1 Q And did you -- did you grow up living on the farm
2 near Miller?

3 A Yes, Rockham.

4 Q And when did you last live on the farm?

5 A '69.

6 Q So you -- so you moved off the farm before you
7 graduated from high school?

8 A In the fall, yes.

9 Q And when you weren't living on the farm after 1969,
10 where were you living?

11 A Miller.

12 Q Did the family move into Miller?

13 A Yes.

14 Q After you graduated in 1978, when was your last
15 involvement with the farm?

16 A I came back and lived with my dad for a while
17 when -- maybe in 1980 something and went out on the farm with
18 dad and worked.

19 Q And how long were you living there with your father?

20 A Oh, I can't remember now.

21 Q When you were giving me the kind of progression of
22 where you had worked and where you lived, you didn't have
23 living in Miller or working on the farm on that progression.
24 So could you tell me about how long you would have worked on
25 the farm and lived with your father?

1 A I'm going to say between '86 and '88. I'm just not
2 sure.

3 Q And would you have been living somewhere else as
4 well during that time or were you exclusively living with your
5 father and working on the farm?

6 A I was staying at my dad's.

7 Q And working full time on the farm?

8 A Not full time. I had gotten a couple part-time
9 waitress jobs and -- I just stayed there until I got hired on
10 on the railroad again in '88, I believe it was.

11 Q So is that when you went with the DM&E?

12 A Yeah.

13 Q And so you had other jobs. You were living with
14 your father and you were doing something on the farm. Tell me
15 what kind of work you were doing on the farm.

16 A Cultivating, I guess.

17 Q Did you have any livestock on the farm?

18 A Not that I worked with other than watching a gate.

19 Q Did you help with the harvest?

20 A I can't remember.

21 Q And when you say cultivating so how many growing
22 seasons were you there helping with cultivating?

23 A My whole life or just that year?

24 Q Well, in that -- in the period after high school
25 when you came back?

1 A Yeah, I can't remember.

2 Q You'd said '86 to '88?

3 A Yeah.

4 Q Do you know what time of the year you came in '86?

5 A I don't recall.

6 Q Do you remember what time of the year --

7 A It --

8 Q I'm sorry. Go ahead.

9 A I'm just trying to think of how old my son was at
10 the time to -- you know, I think he was about four so that
11 would have put it at '87. I'm just not sure. You know, I can
12 remember raking hay and remember dad putting me in the field
13 and leaving over by the Hardes place and -- I worked in
14 another field that was the 80 acres, but I just don't
15 remember.

16 Q You remember working in two different fields though?

17 A Yeah.

18 Q Do you have any interest in farmland in Hand County
19 today?

20 A I don't understand the question.

21 Q Do you own any property in Hand County?

22 A Well, I'm not sure.

23 Q Did you ever become aware that your mother had put
24 your name on some property?

25 A Yes.

1 Q When did you find that out?

2 A I'm not sure when it was. Sometime after dad died.

3 Q And your dad died in what year?

4 A '97.

5 Q Do you remember how long after '97 you found out
6 that your name was on some property?

7 A No.

8 Q How did you find out your name was on some property?

9 A Well, dad had told me he left me land on the home
10 place. He did tell me that on several occasions so I went up
11 to the courthouse to see. And all my -- my name wasn't on
12 there. It was over by my grandma's.

13 Q Well, after your dad died, how long was it when you
14 went up to the courthouse to look and see if your name was on
15 property?

16 A I don't recall.

17 Q Was it two years, five years?

18 A Because I had moved and my kids were toddlers. I
19 don't remember.

20 Q Where had you moved to?

21 A Blue Grass, Iowa.

22 Q So during the period you were in Blue Grass, Iowa,
23 you came back and looked at the Hand County courthouse?

24 A Yes.

25 Q And at that point in time, you found your name on

1 some land?

2 A Yes.

3 Q And then when you found your name on some land, what
4 did you do about it?

5 A I called a lady in Miller to ask her about how my
6 name got off the home place.

7 Q Who is the lady in Miller?

8 A I can't think of her last name right now.

9 Q What is her first name?

10 A I don't know. It's been so long ago.

11 Q What kind of a job did you --

12 A I wanted to see the records, you know, so --

13 Q And why would you call this particular lady you
14 called?

15 A To see how my name got off and Craig and -- got put
16 on everything.

17 Q So why did you call this particular lady that you
18 called? Why would she be somebody that could answer that for
19 you?

20 A She would know how to check the records.

21 Q Was she somebody in the courthouse?

22 A I don't know if she was in the courthouse, but an
23 office person, yeah. I can't think. Luellen maybe. I can't
24 think of her last name. It's been too long ago.

25 Q How did you know her to call her and ask her to do

1 that for you?

2 A I don't remember.

3 Q Did this lady check the records for you?

4 A No, it was going to cost a lot of money at the time.

5 Q And you made the comment how your name was taken off
6 the home place. Do you know that your name was ever on the
7 ownership of the home place?

8 A I saw old blueprints of the farm. My dad told me,
9 and I saw old blueprints.

10 Q And these old blueprints you saw, they had your name
11 on them?

12 A Yeah.

13 Q And tell me, what did the blueprints look like?

14 A Like if you were going to build a building and they
15 were the blueprints, kind of like an X-ray type.

16 Q And in what year approximately did you see these
17 blueprints?

18 A The last time I seen them was in like '97 when dad
19 died.

20 Q And when was the first time you saw them?

21 A I don't remember.

22 Q When you saw them the last time, where were they at?

23 A Mom's. Dad's house.

24 Q Do you have a copy of them?

25 A No.

1 Q How did you happen to see them at your mom's house
2 after your dad died?

3 A I don't know. It was with dad's stuff, I guess.

4 Q You were looking through -- was it in a book?

5 A Yeah.

6 Q What kind of a book?

7 A Pardon me?

8 Q What kind of a book was it in?

9 A Just a folder like book.

10 Q And it was in your mom's house?

11 A Yeah.

12 Q Where did she keep it in the house?

13 A I believe that day it was in her -- it was out with
14 dad's -- some of dad's stuff in what room she called the
15 nursery.

16 Q Now, back to -- you saw your name on some land at
17 some point after your father died, right?

18 A Yes.

19 Q And that was when you were living at Blue Grass,
20 Iowa, correct?

21 A Yeah. Well, '97 -- I would have to think about this
22 when I came back. I was in the process of moving when my dad
23 died, and I had worked on the railroad a short time in Oregon.
24 When dad died, I drove back from Oregon. I was on the
25 railroad there waiting to get on this other railroad in Iowa,

1 Illinois.

2 Q Are you still thinking or can I ask another
3 question?

4 A Go ahead.

5 Q So earlier I believe what you said was it was
6 sometime after your dad died that you found out your name was
7 on some property. It sounded like you meant a couple --
8 several years after your father died.

9 A No, it was when I came back for the funeral.

10 Q So when you came back for the funeral, you found out
11 your name was on some property?

12 A Well, dad had told me earlier. I mean, he had told
13 me growing up, but I didn't ever question it or see it on
14 anything, you know.

15 Q But you have testified under oath that there was a
16 point where you did see your name on some property, I think
17 you said by grandma's.

18 A Yeah, that was at the courthouse, yeah.

19 Q And was that when your dad died?

20 A No, it was after that.

21 Q Which is kind of where I left off at. So how long
22 after your father died was it that you saw this deed at the
23 courthouse that had your name on some land?

24 A I can't remember.

25 Q And was it -- was it in the first couple years after

1 your dad died or longer than that?

2 A I don't know.

3 Q Okay. And the -- the land you saw your name on at
4 the courthouse, how much land was it?

5 A To the best I can recollect, a quarter and a half.
6 You know, I just saw Michael's name and my name and I was
7 looking more at the home place, you know, trying to see over
8 there than grandma's.

9 Q But over at your grandma's, there you saw your name
10 on a -- on a deed?

11 A It was in a book.

12 Q At the courthouse, right?

13 A Uh-huh.

14 Q You have to say yes or no.

15 A Yes.

16 Q I would like you to look at **Exhibit 1** that your
17 attorney has there, if you could put that in front of you.

18 MR. TIEDE: It's sitting right here on the
19 table by her, Lee.

20 BY MR. SCHOENBECK:

21 Q Okay. So I would like you to look at **Exhibit 1**. Is
22 that the deed you're talking about that you saw at the
23 courthouse, or a copy of it?

24 A It may have been. I'm just not sure.

25 Q And do you see that deed is dated 2004? Do you see

1 that?

2 A Yes.

3 Q How long after 2004 do you think you would have seen
4 the deed with your name on it?

5 A I don't know.

6 Q Well, today it's 2022. Let's go back to 2020. By
7 then, had you seen the deed?

8 A Yeah, I knew about it then.

9 Q So now let's go back ten more years from then, 2010.
10 Would you have seen the deed by then?

11 A I'm not sure. I would have to think about the kids
12 and the dates and the moving and -- I don't know when I saw
13 it.

14 Q What about the moving would help you remember when
15 you saw the deed?

16 A I was up at the courthouse a couple different times.
17 My mother was still alive, I know that.

18 Q Okay. And am I right that I understand you were
19 living in Blue Grass, Iowa when you saw the deed?

20 A I don't recall when I came back. I don't remember
21 when it was.

22 Q Okay. I'm not asking you for dates, but I would
23 like to know within a couple of years so I'm going to keep
24 asking you some questions to help jog your memory. So the
25 first question is, were you living in Blue Grass, Iowa when

1 you went to the courthouse and saw the deed?

2 A I was up there a few different times so it's
3 possible that one of the times. I'm trying to think. I don't
4 know when I was back.

5 Q Okay. When you say you were up there a couple
6 different times, why would you have been up there a couple
7 different times?

8 A I don't know. I bought one of those little books
9 that showed all the land all over.

10 Q Did you buy that at the courthouse?

11 A Yeah.

12 Q Okay. At the Register of Deeds office?

13 A Probably. I'm not sure.

14 Q And when you bought that book, is that when you were
15 looking at the deed where you saw your name?

16 A No. It was a long time ago. The very first time I
17 saw this was a long time ago.

18 Q And you're referencing **Exhibit 1**, aren't you?

19 A Yes.

20 Q You're saying the first time you saw that was a long
21 time ago?

22 A Uh-huh.

23 Q You have to say yes or no. I think you're nodding.

24 A Yes.

25 Q All right. So we know that deed has been in

1 existence for 18 years. And you said you saw it -- the first
2 time you saw it was a long time ago. Would that be more than
3 ten years ago?

4 A I don't know. I don't know.

5 Q Do you -- I mean --

6 A I don't recall.

7 Q Is there any way -- anything you could look at that
8 would help you remember when you first learned of this deed?

9 A No, not at this time.

10 Q I don't mean at this time. Is there -- is there
11 anything we could have you go look or check on that would help
12 you remember when you first saw this deed?

13 A No, not right now.

14 Q Well, and so you added not right now. That's why
15 I've got to keep asking.

16 A Yeah, I don't know. I could ask my oldest son when
17 I was back, but I don't know if he would recall either.

18 Q Was your oldest son with you when you went --

19 A No.

20 Q -- at the time you saw the deed?

21 A Huh-uh.

22 Q Okay. How would -- how would your oldest son be
23 helpful to you finding out when you first saw the deed?

24 A Because I would have talked to him.

25 Q How old is your oldest son?

1 A 39.

2 Q So at this point in time, the best of your
3 recollection is the first time you saw **Exhibit 1** was, I think
4 your words were, a long time ago, right?

5 A Yes.

6 Q Did you talk to any of your family members about
7 **Exhibit 1** when you first learned of it?

8 A My oldest son.

9 Q Okay. Did you talk to your mother?

10 A I don't remember when it was I talked to my mother
11 about it.

12 Q So eventually you did talk to your mother about it?

13 A Yeah.

14 Q Tell me about that conversation.

15 A She didn't really want to talk too much about it.

16 Q Okay. But what did you ask her?

17 A I asked her why Craig's name was put on it, beings
18 he got the home place given to him and there was a time
19 Michael or -- I'm not sure how it went but -- so if Craig had
20 the home place and Michael and I had over by grandma's, why
21 would have Craig's name been put on it at all

22 Q Okay. What did your mother tell you?

23 A Just something to the effect that dad had debt, and
24 she just went on about -- she just really didn't want to talk
25 about it.

1 Q But she told you that your father had some debt when
2 he died, didn't she?

3 A Yes.

4 Q Did you know that your father had financial problems
5 when he died?

6 A Well, I knew that he was seeing a lawyer in Pierre,
7 a bankruptcy lawyer, yes.

8 Q And then after he died, do you know how the
9 financial problems got sorted out?

10 A No.

11 Q Did you help with it?

12 A No.

13 Q Do you know if Craig helped with it?

14 A I don't know if the adjective helped would be what I
15 would use.

16 Q What did Craig do with respect to the farm debt?

17 A I don't know.

18 Q Do you know if he did anything to get it cleaned up
19 or organized?

20 A No.

21 Q Did you ever talk to Craig about this deed, **Exhibit**
22 **1**, after you saw it?

23 A No, I never saw him.

24 Q But you know how to get ahold of him, didn't you?

25 A No.

1 Q You knew where he lived, didn't you?

2 A No, I don't.

3 Q Did you make any effort to try and talk to him about
4 Exhibit 1 after you saw it?

5 A I made an effort to talk to him one time. I went up
6 to Goodyear at 7:30 in the morning before they opened, and
7 when he seen me, he walked the other way. He didn't want to
8 talk to me.

9 Q And what year was that?

10 A I don't remember.

11 Q Was it after your mother had died?

12 A No.

13 Q Did you ever try and talk to Jim Jones about Exhibit
14 1?

15 A No.

16 Q Did you ever talk to your brother Michael about
17 Exhibit 1?

18 A Ever? Yeah.

19 Q Okay. Did you talk to him about it within the first
20 couple years after you found out about it?

21 A I didn't talk to him. I didn't see him.

22 Q Did you reach out to Michael to ask him about
23 Exhibit 1 and that real estate transaction?

24 A I put a copy of it in his pickup.

25 Q Were you living around Miller at the time?

1 A I don't remember when it was.

2 Q Why would you put a copy in his pickup?

3 A So that he would be aware.

4 Q And then after you put the copy in his pickup, did
5 you talk to him about it?

6 A No, no, not -- not then, no.

7 Q When did you first talk to him about **Exhibit 1**?

8 A I don't recall how long ago it was.

9 Q Was it after your mom died?

10 A No, it was before.

11 Q Within two years before your mom died?

12 A I think it was before that.

13 Q And when you talked to Michael about it, what did
14 you and he decide to do about your interest in the property
15 that's in **Exhibit 1**?

16 A He didn't suggest -- there wasn't anything said
17 really. I don't remember. I just wanted to make him aware of
18 it. There was no comment that I recall.

19 Q Okay. You said that a long time ago you found out
20 about **Exhibit 1**. After you found out about it, what did you
21 do to take control of your property interest?

22 A I talked to a lawyer in Pierre.

23 Q And then --

24 MR. TIEDE: Lee, I'm just going to -- sorry,
25 I just want to state that at any point if we're

1 getting into conversation that she had with me or
2 Mike, that I would make an objection on the basis of
3 attorney-client privilege. You haven't got there
4 yet, but I just want to point that out.

5 MR. SCHOENBECK: Thank you.

6 BY MR. SCHOENBECK:

7 Q Who was the lawyer in Pierre?

8 A I can't remember her name. It was a woman at May,
9 Adam, Gerdes that I actually hired, but I had spoke to a
10 lawyer before that just to -- just to talk to a lawyer to see
11 why Craig was not informing me.

12 Q Who was the first lawyer you talked to?

13 A That I hired or that I just talked to on the phone?

14 Q Let's take the one you talked to on the phone.

15 A I don't remember. I just had some questions about,
16 you know, the land, and I didn't actually hire a lawyer until
17 a few years ago.

18 Q Okay. So the first one you talked to on the phone,
19 where was that lawyer based out of?

20 A I think it was Pierre.

21 Q Then the second lawyer you actually -- who is the
22 one you actually hired was a woman at May, Adam?

23 A Yeah.

24 Q How long ago was that?

25 A I don't remember when.

1 Q Did that attorney take any steps on your behalf to
2 reach out to Craig?

3 A Yeah.

4 Q And what did they do?

5 A She just clarified. She gave me a booklet she
6 printed out just kind of clarified some things to give to a
7 lawyer here.

8 Q Okay. The lawyer in Pierre, I asked you if she
9 reached out to Craig. First you said yes, and then you said
10 she just gave you a booklet. Did she reach out to Craig?

11 A I don't know. I don't think so. I don't know if
12 she did or not. I mean, she knew what was going on, you know,
13 so she --

14 Q And was that more than five years ago?

15 A I don't remember when it was. I have the letter and
16 the date of the research on that that she wrote up. I have a
17 copy of it somewhere.

18 MR. SCHOENBECK: Jake, I don't want to see
19 the letter, but I want to know the date if you're
20 willing to furnish -- you can block out of the rest
21 of it. That's fine with me.

22 MR. TIEDE: I'll make a note of it, Lee.

23 BY MR. SCHOENBECK:

24 Q Thank you. How long after the Pierre attorney
25 before you went to the Mitchell lawyers?

1 A I don't know. I would have to check the dates.

2 Q Was it more than five years?

3 A No.

4 Q From when you learned about **Exhibit 1** a long time
5 ago, did you ever pay any property taxes on that real
6 property?

7 A No.

8 Q When you learned about **Exhibit 1** a long time ago,
9 did you ever do anything to see that the land -- the farmland
10 was worked?

11 A No.

12 Q When you learned about **Exhibit 1** a long time ago,
13 did you ever do anything to see that the land would get
14 rented?

15 A I did try to speak to mother, but she didn't want to
16 talk about it.

17 Q And did you feel your mother was involved in the
18 rental income from the property?

19 A I didn't know.

20 Q Well, why would you ask your mother about **Exhibit 1**
21 getting farmed?

22 A I just asked her about the farm in general.
23 Sometimes on a -- I didn't specifically ask her this piece of
24 property, is it rented out, how much money are you making. I
25 didn't ask her, no.

1 Q Why not?

2 A It's just not something the family discussed or
3 talked about. It was just tacky. It's not something I would
4 do.

5 Q You understood your mother was involved still in
6 that farming income, didn't you?

7 A She made the comment one time that Craig barely gave
8 her enough to live on so --

9 Q So Craig was providing income for her to live off
10 of; is that --

11 A I don't know. That's what she insinuated -- she
12 insinuated she got a small amount. You know, I knew she, you
13 know, was a retired school teacher and probably got Social
14 Security. I don't know. I don't know what.

15 Q After you learned about **Exhibit 1** a long time ago,
16 what did you do to see that there was liability insurance in
17 place on that farmland?

18 A I don't understand the question.

19 Q Did you do anything to see that there was insurance
20 coverage on your farmland in case somebody got hurt out there?

21 A No.

22 Q What did you do to help your mother handle the farm
23 after your father died?

24 A After my father died, my mother was coming out of a
25 drunk stupor.

1 Q So she really needed help you're saying, right?

2 A She was fog-headed for a while. She'd been sick --
3 she had been sick. She had been in the hospital.

4 Q So back to my question to ask you what did you do to
5 help your mother handle the farm after your father died,
6 particularly in light of your knowledge that she had problems
7 with handling her own life?

8 A Yeah, I gave her some money to get her tooth -- her
9 teeth fixed one time.

10 Q How much money did you give her?

11 A \$600.

12 Q When did you do that?

13 A I don't know when it was. She came out and visited
14 me in Pierre. She stayed there for a while. Then I left. I
15 went to Oregon to work and she stayed at my place and --

16 Q This was when you were in Pierre before you were in
17 Oregon?

18 A Yeah, this would have been in '97 maybe when she got
19 sick.

20 Q Was that the year that your dad died?

21 A Maybe '96 or '97. It might have been in the fall of
22 '96, I think that she got sick.

23 Q So sometime around '96 or '97, you gave your mother
24 \$600?

25 A Yeah.

1 Q Other than that, what did you do with the farm to
2 help your mother after your father died in '97?

3 A Nothing.

4 Q What did you do to help with the farm debts that
5 your mother had after your father died in '97?

6 A I didn't know that there was farm debt. I didn't
7 know what exactly the financial situation was between her and
8 Craig. He never would say.

9 Q A little while --

10 A She never said.

11 Q A little while ago under oath you testified that you
12 knew your dad had financial problems when he died. Do you
13 remember that testimony?

14 A Well, he had told me in November he had everything
15 taken care of before he died. In November, so three months
16 before he died, he told me that he was done with his
17 bankruptcy and that he -- you know, he felt good about getting
18 it over with, and there was an agreement with the lawyer and
19 the bankruptcy and that everything was settled. Everything
20 was taken care of.

21 Q So he told you in November before he died that he
22 had a bankruptcy plan in place then?

23 A It was over with. It had been going on for a few
24 years.

25 Q Did you understand that to mean his debts were paid

1 or just that he had a plan in place so that he could pay his
2 debts?

3 MR. TIEDE: I mean, I don't know that she's
4 qualified to answer that, Lee. I mean, I would make
5 an objection to the extent that it calls for a legal
6 conclusion, but you can go ahead and answer to the
7 best of your abilities.

8 THE WITNESS: I just, you know, feel like
9 what -- that he had everything taken care of.

10 BY MR. SCHOENBECK:

11 Q Did you know if that meant that the debts were all
12 paid off or not?

13 A I don't know about the debts all paid off, but like,
14 you know, he was all -- he was comfortable with having it over
15 with, the bankruptcy. He thought that he was good.
16 Everything was in the good, left mother sitting okay, you
17 know.

18 Q And at that point in time, was Craig working on the
19 farm?

20 A I don't believe so.

21 Q Who did you expect to assist your mother in
22 getting -- handling the farm finances after your father died?

23 A The banker.

24 Q So you thought the banker was the one that would
25 help your mother organize the farm finances after your dad

1 die?

2 A She did tell me she went up there and reorganized
3 some things and that he was helping her, yes.

4 Q Which banker are you talking about?

5 A I think Peterka, I believe.

6 Q Did you know your brother was involved in helping
7 your mother get the farm finances organized after your dad
8 died?

9 A No.

10 Q Do you have any complaints about any of the work --
11 maybe you don't know if there was any but of the work your
12 brother did to get the farm debts taken care of after your
13 father died?

14 A I don't know what all went on. I wasn't there.

15 Q Do you have any complaints about the rent that was
16 charged on the land that is Exhibit 1?

17 A I don't know what rent was charged.

18 Q You've known about your interest in the land for a
19 long time. Did you ever inquire to see what the terms were
20 under which the land was being rented?

21 A No, other than the whole farm. You know, mother had
22 explained that -- I don't know if she said she went to the
23 sale barn, but she rented the ground out and rented it out to
24 the highest bidder so there wasn't any hard feelings to the
25 locals.

1 Q Are you making a claim for any money from your
2 brother for any time period before your mom died?

3 MR. TIEDE: Well, I'll make an objection on
4 that to the extent that you're asking for a legal
5 conclusion if any money is owed before then from a
6 legal basis, but subject to that objection, you can
7 go ahead and answer, Theresa.

8 THE WITNESS: I would have to see what went
9 on, if he owes money or what -- you know, I don't
10 know what the circumstances were.

11 BY MR. SCHOENBECK:

12 Q Theresa, I'm trying to understand what you're
13 claiming in your lawsuit, okay, so that's why I'm asking you.
14 First off, do you want money from your brother Craig?

15 A Yes, if he owes me money, yes.

16 Q And why do you think he might owe you money?

17 A I would have to see.

18 Q Okay. As you sit here today, can you tell me any
19 reason that comes to your mind about why you think he might
20 owe you money?

21 MR. TIEDE: I'll restate the objection on any
22 basis that you're calling for a -- or on any -- to
23 the extent that the question calls for any type of
24 legal conclusion as to whether or not she's owed any
25 money by Craig, I would object, but subject to that

1 objection, she can answer.

2 BY MR. SCHOENBECK:

3 Q Go ahead, Theresa.

4 A Can you restate the question again, please?

5 Q I'm going to have the court reporter read it back.

6 (The court reporter read back.)

7 THE WITNESS: Someone was farming the ground.

8 BY MR. SCHOENBECK:

9 Q Is that all? Any other reason that you can think of
10 about why you think he might owe you money?

11 A If he was renting my ground out and keeping the
12 money, yeah, he would owe me.

13 Q And you've known someone has been farming the ground
14 since, in your words, a long time ago, right?

15 A I don't know when I found out. My mother was still
16 alive.

17 Q So --

18 A I just drove by there and, you know, it used to be
19 pasture, and now it's plowed up.

20 Q And if it was pasture, it would be rented out as
21 pasture ground, right?

22 A I don't know if he rented it out when it was pasture
23 ground or not.

24 Q Did you ever inquire -- when you learned a long time
25 ago that you had an interest in the property that is **Exhibit**

1 **Q** did you ever inquire to see who was renting it?

2 A Mother just said she rented the ground out. That's
3 all she said.

4 Q And then what did you do about that?

5 A I didn't do anything after she told me she barely
6 had enough to live on.

7 Q Did you ask her for your share of the rent?

8 A No.

9 Q Why not?

10 A Pardon me?

11 Q Why not?

12 A I just wouldn't do that.

13 Q Because you understood that rent money was being
14 used by Craig to help support your mother?

15 A I don't know. I don't know what was going on. I
16 didn't ask him. I didn't ever talk to him in 20 years.

17 Q But you did talk to your mother?

18 A Yeah, I tried to.

19 Q Did you say you haven't talked to your brother in 20
20 years?

21 A Well, not -- not too much, a couple comments here
22 and there.

23 Q How many different times did you have these couple
24 comment times?

25 A I seen him at the hospital in Omaha, and then I

1 don't know. When he come over to mother's when I was there,
2 he just ignored me.

3 Q So you saw him at the --

4 A I tried to ask him one time when mother was still
5 alive, do you know why wasn't I considered in the land or, you
6 know, talked to or what, you know. I tried to talk to him
7 about it once.

8 Q Where did that conversation take place?

9 A In the kitchen at my mother's.

10 Q Okay. And who was present?

11 A My mother and Craig.

12 Q And how long before your mother died was that?

13 A Well, she was getting treatments in Mitchell at the
14 time, I believe, so I don't know.

15 Q I'm waiting if you're still thinking. I don't want
16 to interrupt you.

17 A I don't know how long before she died.

18 Q What kind of an agreement did you have with your
19 brother to share the income from the property that's **Exhibit**
20 **1**?

21 A Which brother, Craig?

22 Q Craig.

23 A I didn't have any agreement.

24 Q What kind of conversations did you have with your
25 brother about how to manage the property that's in **Exhibit 1**?

1 A I didn't have any conversations with Craig since my
2 dad died. I wouldn't call them conversations.

3 Q Tell me what kind of management agreement you had in
4 place with your brother concerning the property that's **Exhibit**
5 **1**.

6 A I didn't have any agreement with Craig.

7 Q Are you claiming you're a partner with your brother
8 on this farming operation on that land that's **Exhibit 1**?

9 MR. TIEDE: Objection to the extent that it
10 calls for a legal conclusion. Subject to the
11 objection, you can answer.

12 THE WITNESS: Could you repeat the question,
13 please.

14 BY MR. SCHOENBECK:

15 Q Are you claiming you're a partner with your brother
16 on the farming operation that is the land in **Exhibit 1**?

17 MR. TIEDE: The same objection. You can
18 answer.

19 THE WITNESS: Yeah, I don't feel like we're
20 partners at all.

21 BY MR. SCHOENBECK:

22 Q And why don't you feel like you're partners?

23 A I was never asked anything about it. Like when he,
24 you know, rented it out, or -- you know, I feel like he tried
25 to steal it from me.

1 MR. SCHOENBECK: Give me just one minute.
2 I'll just step out in the hall with Craig. I'm
3 probably done. I just want to talk to him first.

4 (A recess was taken.)

5 BY MR. SCHOENBECK:

6 Q I just have a few questions. So, Theresa, is it
7 your testimony that at the time your father was sick and dying
8 that Craig was not working on the farm? Did you say that?

9 A Yeah, I thought he worked at Goodyear.

10 Q But you also -- besides working at Goodyear, you
11 don't believe he was the one working on the farm?

12 A No.

13 Q That's a bad question. We had a double negative in
14 there. Do you believe Craig was working on the farm during
15 the period of time when your father was sick and died?

16 A Well, he was sick for a long time, my dad was.

17 Q When your dad died, do you believe Craig was working
18 on the farm in the months around that time period?

19 A I don't know.

20 Q Because the reason I asked is because you said that
21 he wasn't working on the farm, and I just wanted to make sure
22 what you were basing that on.

23 A Because dad told me he just wanted him fired. He
24 just was stealing from him, and he didn't want him around. I
25 thought Craig worked -- I thought Craig worked at Goodyear.

1 Q And then you cultivated for one or two years, did
2 you say?

3 A Not that long. I was just back staying, waiting for
4 another job, and I went out there with dad whenever he needed
5 help like in between jobs. You know, I had my son then so --

6 Q But you did say you helped with cultivating, right?

7 A Yep.

8 Q What kind of crops were you cultivating?

9 A Corn, I think.

10 Q And what kind of tractor were you driving?

11 A I don't remember. The only one he had, an old
12 International, I believe. It's been a long time ago.

13 Q Tell me about the cultivator. What kind of
14 cultivator was it?

15 A What brand name it was or how many rows did it do?

16 Q Let's do both. Anything you can tell me about the
17 cultivator.

18 A Yeah, I don't remember.

19 Q You don't remember how many rows?

20 A Huh-uh.

21 Q I'm sorry. You have to say yes or no.

22 A No.

23 Q Do you remember what kind of brand it was?

24 A No.

25 Q Tell me about what work you actually do when you're

1 cultivating. How does that work?

2 A You just go down the field and get the weeds out.

3 Q How do you get the weeds out?

4 A I guess I don't understand the question.

5 Q What are you doing to cultivate a field?

6 A Driving the tractor.

7 Q And how many quarters of land did you cultivate?

8 A It was over by the Hardes place. Craig would know
9 more of that than that.

10 Q Did you cultivate one quarter or two quarters, how
11 many, ballpark?

12 A I don't know how many acres.

13 Q I wasn't asking acres, because that can be a little
14 tricky, but quarters are -- describe the piece of ground that
15 you drove around on.

16 A What do I want to know about it?

17 Q I want to know what you know about it. How big of a
18 piece of ground were you cultivating?

19 A I don't remember how many acres exactly. It was --

20 Q Was it more than one -- go ahead.

21 A It was the Hardes place.

22 MR. TIEDE: I think it's been asked and
23 answered, Lee. She doesn't know it was by the,
24 quote, Hardes place is what she said. And, I mean,
25 I don't know what you're getting at, but I think

1 she's answered your question.

2 BY MR. SCHOENBECK:

3 Q Spell that last name, would you? The place you said
4 you were cultivating at. That isn't meant to be a trick. The
5 court reporter needs it for the record.

6 A Yeah, I'm not sure how to spell the last part of it.
7 If it's A-S or E-S. The Hardes place. I don't know.

8 MR. SCHOENBECK: I don't have any other
9 questions of this witness. It's a little bit before
10 3:00. Do you want to start at 3:00 on the next one?

11 MR. TIEDE: That sounds good to me.

12 THE COURT REPORTER: Does she want to read
13 and sign or waive?

14 MR. TIEDE: Waive, please. She's going to
15 waive. We talked about this prior to going on the
16 record.

17 (2:52 p.m.)
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C E R T I F I C A T E

STATE OF SOUTH DAKOTA)

:SS

COUNTY OF MINNEHAHA)

I, STACY L. WIEBESIEK, RPR, CSR, in the State of Iowa, Notary Public in and for the State of South Dakota, do hereby certify that the deposition of THERESA M. VAN ZEE was by me reduced to machine shorthand in the presence of the witness, afterwards transcribed by me by means of computer, and that to the best of my ability the foregoing is a true and correct transcript of the deposition by the witness as aforesaid.

I further certify that this deposition was taken at the time and place specified in the foregoing caption.

I further certify that I am not a relative, counsel or attorney for any party, or otherwise interested in the outcome of this action.

IN WITNESS WHEREOF, I have hereunto set my hand at Sioux Falls, South Dakota, on the 1st day of September, 2022.



STACY L. WIEBESIEK, RPR, CSR
NOTARY PUBLIC

My Commission expires December 21, 2025.

<p>Exhibits</p> <p>Exhibit 1 3:1 14:16,21 16:18 18:3,7 19:21,22 20:4,13,14,17,23 21:7,15, 20 24 4,8,12,20 25 15 29:16 31:25 32:1 33:19, 20,25 34:4,5,8,16</p> <p>\$</p> <p>\$600 26:11,24</p> <p>1</p> <p>1 2:8 3:1 14:16,21 16:18 18:3,7 19:22 20:4,14,17, 23 21 7,15,20 24:4,8,12, 20 25 15 29:16 32:1 33:20 25 34:5,8,16</p> <p>12th 3:21</p> <p>18 17:1</p> <p>1969 6:9</p> <p>1978 4:5 6:14</p> <p>1980 6:17</p> <p>1:52 2:14</p> <p>2</p> <p>20 32:16,19</p> <p>2004 14:25 15:3</p> <p>2010 15:9</p> <p>2020 15:6</p> <p>2022 2:14 15:6</p> <p>21 3:15</p> <p>25 5:23</p> <p>25th 2:14</p> <p>2:52 38:17</p> <p>3</p> <p>3 2:3,8</p>	<p>39 18:1</p> <p>3:00 36:10</p> <p>6</p> <p>69 6:5</p> <p>7</p> <p>78 4:7</p> <p>7:30 20:6</p> <p>8</p> <p>80 6:14</p> <p>86 7:1 8:2,4</p> <p>87 8:11</p> <p>88 7:1,10 6:2</p> <p>9</p> <p>96 26:21,22,23</p> <p>97 9:4,5 11:18 12:21 26:18,21,23 27:2,5</p> <p>A</p> <p>A-S 36:7</p> <p>abilities 28:7</p> <p>acres 8:14 37:12,13,19</p> <p>Adam 22:9,22</p> <p>added 17:14</p> <p>adjective 19:14</p> <p>agreement 27:18 33:18, 23 34:3,8</p> <p>ahead 8:8 13:4 28:6 30:7 31:3 37:20</p> <p>ahold 19:24</p> <p>alive 15:17 31:16 33:5</p> <p>amount 25:12</p> <p>approximately 4:20 11:16</p>	<p>ascribed 5:13</p> <p>assist 28:21</p> <p>attorney 14:17 23:1,24</p> <p>attorney-client 22:3</p> <p>August 2:14</p> <p>aware 8:23 21:3,17</p> <p>B</p> <p>back 5:3,5,14 6:16 7:25 9:23 12:16,22,24 13:9,10 15 6,9,20 16:4 17:17 26:4 31 5,6 36:3</p> <p>bad 35:13</p> <p>ballpark 37:11</p> <p>banker 28:23,24 29:4</p> <p>bankruptcy 19:7 27:17, 19,22 28:15</p> <p>barely 25:7 32:5</p> <p>barn 29:23</p> <p>based 5:10 22:19</p> <p>basing 35:22</p> <p>basis 22:2 30:6,22</p> <p>behalf 23:1</p> <p>beings 18:17</p> <p>bidder 29:24</p> <p>big 37:17</p> <p>bit 36:9</p> <p>block 23:20</p> <p>Blue 3:11 12:14 5:19 9:21,22 12:19 15:19,26</p> <p>blueprints 11:8,9,10,13, 15,17</p> <p>BN 4:4 5:6</p> <p>book 12:4,6,8,9 14:11 16:14</p> <p>booklet 23:5,10</p> <p>books 16:8</p> <p>bought 16 6,14</p>	<p>brand 36:15,23</p> <p>brother 20:16 29:6,12 30:2,14 32:19 33:19,21,25 34:4,7,15</p> <p>build 11:14</p> <p>building 11:14</p> <p>Burlington 4:3,8</p> <p>buy 16:10</p> <p>C</p> <p>call 10:13,17,25 34:2</p> <p>called 2:19 10:5,14,18 12:14</p> <p>calling 30:22</p> <p>calls 28:5 30:23 34:10</p> <p>care 27:15,20 28:9 29:12</p> <p>case 25:20</p> <p>changed 5:21</p> <p>charged 29:16,17</p> <p>check 10:20 11:3 17:11 24:1</p> <p>circumstances 30:10</p> <p>Cities 3:13</p> <p>city 4:15,16</p> <p>claim 30:1</p> <p>claiming 30:13 34:7,15</p> <p>clarified 23:5,6</p> <p>cleaned 19:18</p> <p>comfortable 28:14</p> <p>commencing 2:14</p> <p>comment 11:5 21:18 25:7 32:24</p> <p>comments 32:21</p> <p>complaints 29:10,15</p> <p>conclusion 28:6 30:5,24 34:10</p> <p>considered 33:5</p> <p>control 21:21</p>
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Craig and Pamela Van Zee v. Theresa M. Van Zee
Hand County; 29CIV22-000009

- (g) Defendant is without sufficient knowledge to admit or deny the allegations set forth in paragraph 7 of Plaintiffs' Complaint and therefore puts Plaintiff to their strict proof thereof.
- (h) Defendant is without sufficient knowledge to admit or deny the allegations set forth in paragraph 8 of Plaintiffs' Complaint and therefore puts Plaintiff to their strict proof thereof.
- (i) Defendant denies the allegations as contained in paragraph 9 of Plaintiffs' Complaint and puts Plaintiffs to their strict proof thereof.

3. Defendant reserves the right to raise any affirmative defenses that may be determined by further investigation or discovery.

COUNTERCLAIM

COMES NOW Defendant Theresa M. Van Zee, and for her Counterclaim against the Plaintiffs, states and alleges as follows:

GENERAL ALLEGATIONS

1. Craig Van Zee and Pamela Van Zee (hereinafter "Plaintiffs") are residents of Miller, Hand County, South Dakota.

2. Defendant Theresa M. Van Zee (hereinafter "Defendant") is a resident of Moline, Illinois.

3. Jurisdiction and Venue are properly situated in Hand County, South Dakota.

4. That Plaintiffs and Defendant each own an undivided one-half (1/2) interest in the following described real property, to wit:

The South Half of the Southwest Quarter (S1/2SW1/4) and the Southeast Quarter (SE1/4) of Section Twenty-One (21), Township One Hundred Fourteen (114) North, Range Sixty-Nine (69), West of the 5th P.M.

(hereinafter "Subject Property")

5. As joint owners, Plaintiff and Defendant are partners in the Subject Property.

6. For the past several years Plaintiffs have unilaterally rented out the Subject Property to various tenants.

Craig and Pamela Van Zee v. Theresa M. Van Zee
Hand County; 29CIV22-000009

7. Upon information and belief, the rental income for the Subject Property has been deposited into accounts in which Plaintiffs have access and/or control.

8. Upon information and belief, said rental payments have not been divided appropriately between the partners.

9. Defendant has made multiple demands to Plaintiffs to provide a full and accurate partnership accounting, including supporting documentation. Plaintiffs have failed to do so.

COUNT ONE: ACCOUNTING

10. Defendant incorporates and alleges Paragraphs 1 through 9, inclusive, as though fully set forth herein and further state and allege:

11. Plaintiffs have, without communication, been unilaterally managing, operating, and disposing of certain Partnership assets, to include rents and lease payments. Plaintiffs have failed, despite demand, to provide information related to such activities, which is required by Plaintiffs for the proper exercise of their rights and duties as partners. Plaintiffs are required to supply this information, without demand, pursuant to SDCL § 48-7A-405(b).

12. Defendant is entitled to an accounting of all the business and financial affairs of the Partnership from Defendant pursuant to SDCL § 48-7A-405(b).

WHEREFORE, Defendant prays as follows:

1. That Plaintiffs' Complaint be dismissed against Defendant and that Defendant recover judgment against the Plaintiff in an amount determined at trial;
2. For a full accounting and all documentation of rents commencing from the time in which Plaintiffs obtained control over the Subject Property.
3. That Defendant recover her costs, disbursements, and attorneys fee herein;
4. That Plaintiff receive no relief or judgment against Defendant; and
5. That Defendant be awarded such other and further relief as the Court may deem just and proper.

Dated this 18th day of July, 2022.

/s/ Jacob W. Tiede
Jacob W. Tiede, Esq.
Of MORGANTHEELER LLP
PO Box 1025, 1718 N. Sanburn Blvd.
Mitchell, SD 57301-7025
Phone: (605) 996-5588
ATTORNEYS FOR DEFENDANT

Craig and Pamela Van Zee v. Theresa M. Van Zee
Hand County; 29CIV22-000009

DEMAND FOR JURY TRIAL

Defendant hereby demands a trial by jury of any issue triable of right by a jury.

Dated this 18th day of July, 2022.

/s/ Jacob W. Tiede
Jacob W. Tiede, Esq.
Of MORGANTHEELER LLP
PO Box 1025, 1718 N. Sanborn Blvd.
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Phone: (605) 996-5588
ATTORNEYS FOR DEFENDANT

Craig and Pamela Van Zee v. Theresa M. Van Zee
Hand County; 29CIV22-000009

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Defendant's Answer to Plaintiffs' Complaint and Counterclaim and this Certificate of Service in the above-entitled matter were, on the 18th day of July, 2022, sent by regular U.S. Mail with postage prepaid to the following named individual at their last known post office address, to-wit:

/s/ Jacob W. Tiede

Jacob W. Tiede, Esq.
OF MORGAN THEELER LLP
PO Box 1025, 1718 N. Sanborn Blvd.
Mitchell, SD 57301-7025
Phone: (605) 996-5588
ATTORNEYS FOR DEFENDANT

STATE OF SOUTH DAKOTA)
 :SS
 COUNTY OF HAND)

IN CIRCUIT COURT
 THIRD JUDICIAL CIRCUIT

CRAIG AND PAMELA VAN ZEE,

Plaintiffs,

v.

THERESA M. VAN ZEE,

Defendant.

29CIV. 22-9

JUDGMENT OF DISMISSAL
 OF COUNTERCLAIM

The Plaintiffs' Motion for Judgment on Pleadings having come on for hearing before the Court in the Beadle County Courtroom in Huron, South Dakota, and the Plaintiffs having appeared through counsel of record, Lee Schoenbeck and Joe Erickson, the Defendant having through counsel of record, Jacob Tiede, and the Court having reviewed the filings of the parties, and the Defendant not having filed a resistance to the Motion, and the Court having reviewed the relevant statutes, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Defendant's Counterclaim seeking a partnership accounting is dismissed, pursuant to both SDCL 15-6-12(b)(5) and SDCL 15-6-12(c).

DATED this _____ day of September, 2022.

BY THE COURT

9/14/2022 8:05:27 AM

Attest:
 Bertsch, Maria
 Clerk/Deputy




 Hon. Kent Shelton
 Circuit Court Judge

STATE OF SOUTH DAKOTA)
COUNTY OF HAND)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

CRAIG AND PAMELA VAN ZEE,

Plaintiffs,

v.

THERESA VAN ZEE and
MICHAEL D. VAN ZEE,

Defendants.

29CIV. 22-9


STIPULATION AND ORDER FOR
JURY TRIAL OF EQUITABLE
ISSUES

STIPULATION

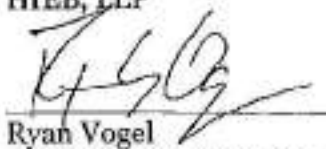
The parties hereby stipulate that the equitable issues in this proceeding will be tried to a jury whose verdict should have the same effect as is a trial by jury had been a matter of right. SDCL 15-6-39(c).

Dated this 27th day of November, 2023.

SCHOENBECK & ERICKSON, PC


Lee Schoenbeck
Joe Erickson
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Watertown, SD 57201

RICHARDSON, WYLY, WISE, SAUCK &
HIEB, LLP


Ryan Vogel
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Aberdeen, SD 57402-1030

ORDER

Based on the above Stipulation, it is hereby ORDERED, ADJUDGED AND DECREED that the equitable issues in this proceeding will be tried to a jury who's verdict shall have the same effect as if a trial by jury had been a matter of right.

BY THE COURT:
11/28/2023 11:57:33 AM

Attest:
Bertsch, Marla
Clerk/Deputy




Honorable Kent A. Shelton
Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:86	
COUNTY OF HAND	)	THIRD JUDICIAL CIRCUIT

CRAIG AND PAMELA VAN ZEE,	)	29CIV. 22-9
)	
Plaintiffs,)	
)	
v.	)	JUDGMENT
)	
THERESA VAN ZEE and)	
MICHAEL D. VAN ZEE,)	
)	
Defendants.)	

The above entitled matter having come before a jury in Hand County, South Dakota on the 14th day of December, 2023 and the jury having returned a verdict on December 15, 2023, and the Plaintiffs, Craig and Pamela Van Zee having been represented by Lee Schoenbeck, and the Defendants, Michael Van Zee and Theresa Van Zee having been represented by Ryan Vogel and the jury having returned a verdict to the Honorable Kent A. Shelton, the Court does now hereby

ORDERED, ADJUDGED, AND DECREED that based upon the jury verdict, that judgment be entered for Michael Van Zee in the amount of \$38,052, with interest accruing at ten percent per annum from December 14, 2023; it is further

ORDERED, ADJUDGED, AND DECREED that a judgment be entered for Theresa Van Zee in the amount of \$38,052 with interest accruing at ten percent per annum from December 14, 2023.

12/22/2023 8:25:17 AM

BY THE COURT:

Attest:
Bertsch, Maria
Clerk/Deputy



Hon. Kent A. Shelton
Circuit Court Judge

STATE OF SOUTH DAKOTA)
: SS.
COUNTY OF HAND)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

CRAIG AND PAMELA VAN ZEE,

Plaintiffs,

-vs-

THERESA VAN ZEE and
MICHAEL D. VAN ZEE,

Defendants.

29CIV22-09

**SATISFACTION OF
JUDGMENT AND COSTS**

Defendant Michael Van Zee, by and through his attorney of record, hereby acknowledges full and complete satisfaction of the Judgment filed December 22, 2023, in the amount of \$38,052.00, costs in the amount of \$1,514.84, and interest in the amount of \$612.08. A total of \$40,178.92 has been satisfied in connection with this matter.

Dated this 9th day of February, 2024.

RICHARDSON, WYLY, WISE, SAUCK
& HIEB, LLP

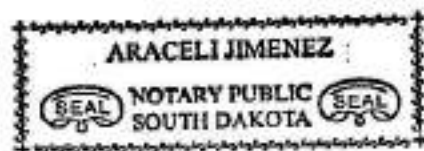
By 
Attorneys for Theresa Van Zee
and Michael Van Zee

Ryan S. Vogel
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Post Office Box 1030
Aberdeen, SD 57402-1030
Telephone No. 605-225-6310
Email: RVogel@rwwsh.com

STATE OF SOUTH DAKOTA)
COUNTY OF BROWN) : SS.

On this the 9th day of February, 2024, before me, the undersigned officer, personally appeared Ryan S. Vogel, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.



Paul J. J.
Notary Public, South Dakota

My Commission Expires: 7/22/27

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendants, hereby certifies that on the 9th day of February, 2024, a true and correct copy of **SATISFACTION OF JUDGMENT AND COSTS** was served through the Odyssey File & Serve system on:

Mr. Joseph Erickson
Mr. Lee Schoenbeck
Schoenbeck & Erickson, P.C.
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Dated this 9th day of February, 2024.

RICHARDSON, WYLY, WISE, SAUCK
& HIEB, LLP

By /s/ Ryan S. Vogel
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12/18/2023 12:31 PM FILED IN HAND COUNTY SD BY MARLA BERTSCH, CLERK OF COURTS

Receipt #112964

03/20/2015 8:38 AM

Hand County Register of Deeds

415 W. 1st Ave

Miller, SD 57362

Customer: THERESA VANZEE
PO BOX 123
BLUE GRASS, IA 52725

User: DeAnn
Drawer: General

Fees:

COPY

5 pages

\$5.00

Total Fees: \$5.00**Amount Received:** \$5.00**Change:** \$0.00**Payments & Refunds:**

Cash

\$5.00

Receipt #112983

03/23/2015 3:17 PM

Hind County Register of Deeds

415 W. 1st Ave

Miller, SD 57362

Customer: THERESA VANZEE
PO BOX 123
BLUE GRASS, IA 52726

User: DeAnn
Drawer: General

Fees:

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10 pages

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Total Fees: \$10.00
Amount Received: \$10.00
Change: \$0.00

Payments & Refunds:

Cash

\$10.00

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04/09/2015 1:55 PM

Hand County Register of Deeds

415 W. 1st Ave

Miller, SD 57362

Customer: THERESA VANZEE
PO BOX 123
BLUE GRASS, IA 52726

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Drawer: General

Fees:

COPY	10 pages	\$10.00
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Total Fees:	\$10.00
Amount Received:	\$10.00
Change:	\$0.00

Payments & Refunds:

Cash	\$10.00
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Receipt #120406

07/08/2019 9:00 AM

Hand County Register of Deeds

415 W. 1st Ave

Miller, SD 57362

Customer: THERESA VANZEE

, MO

User: Suzy**Drawer:** General**Fees:**

COPY

7 pages

\$7.00

Total Fees: \$7.00**Amount Received:** \$7.00**Change:** \$0.00**Payments & Refunds:**

Cash

\$7.00

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

THERESA VAN ZEE

Appellant

vs.

CRAIG AND PAMELA VAN ZEE

Appellees

Appeal No. 30600

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
HAND COUNTY, SOUTH DAKOTA

THE HONORABLE KENT A. SHELTON
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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NOTICE OF APPEAL FILED
JANUARY 18, 2024

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PRELIMINARY STATEMENT

Recognizing the obvious problem they have with this Court's decision in Conway v. Conway, 487 N.W.2d 21 (S.D. 1992), Craig and Pamela resort to misstating Theresa's testimony and mischaracterizing her argument, to try to convert the appellate argument into a game of "gotcha." Craig and Pamela have no legally viable excuse for their silent retention of rental income from Theresa's undivided one-half share in the Subject Property for over a decade. The Circuit Court's summary judgment decisions were erroneous and should be reversed.

REPLY TO APPELLEES' ARGUMENT

A. Craig and Pamela's factual recitation takes liberties with the record regarding Theresa's supposed knowledge.

A claimed "fact" which pervades Craig and Pamela's brief makes its first appearance on pages 7-8, and is repeated on page 10: "In 2015, Theresa had the Hand County Register of Deeds send Theresa copies of all the deeds that had Theresa's name on them." Cited for this are Theresa's testimony and receipts. The content cited does not give any indication of what documents Theresa received in 2015. Nor does she remember. Craig and Pamela argue that "Theresa knew her name was on the real property in 2015," citing page 82 of the transcript. (Appellees' Br., at 10-11.) Here is how Theresa testified on page 82:

Q So way back in 2015, you know that your name is on property in Hand County, right?

A I didn't really read through the papers. I don't remember.

Q Didn't you, in fact, confront your mother about it?

A *When my mom was dying, I knew* – I found out Craig's name was over by grandma and I went home and asked her about it.

(T82.) (Emphasis added.)

Patricia was sick and dying around 2020, and that is when Theresa testified that she learned that Theresa and Craig were co-tenants on the Subject Property. (T 58-59.) Yet, from the evidence set forth above, Craig and Pamela repeatedly leap to the assertion that Theresa knew she was a co-tenant with Craig in 2015, even going so far as to argue that “[a]t trial, the jury heard that in 2015 Theresa received the deed that showed her name on the property as a joint tenant.” (Appellee’s Br., at 19.) Repeatedly saying it does not make it an undisputed fact. Craig and Pamela’s suppositions about what Theresa knew in 2015 are not supported by what they cite.

B. Theresa’s claims have not changed.

Craig and Pamela have contrived a “gotcha” type argument about Theresa changing her position in this appeal. Theresa’s position has not changed. It remains focused on Craig and Pamela’s silent retention of rental income derived from real estate Theresa owned as a co-tenant with Craig and Pamela.

Theresa’s position that Craig and Pamela retained money earned from her real estate is borne out by Craig and Pamela’s own factual recitation.

They list information regarding Patricia's tax returns from 2013-2020 to show that Patricia received income even after she deeded the real estate to Craig. (Appellees' Brief, at 7.) While it is true that Patricia was furnished with \$15,000-\$17,000 each year, that was a small price to pay for Craig. Between 2013 and 2020, he was depositing rent checks that ranged from \$186,600 to \$323,400 for renting out all the land. (CR 788-791, 1048-1051, 1052-1054, 1055-1057, 1058-1060.) All the rent payments he received from the tenants were deposited into the Van Zee farm account at American Bank and Trust - Craig's only checking account, which was never utilized by Patricia. (T2 36, 40, 43.) Commingled in these amounts were the payments he received from the Subject Property acres.

Craig also paid \$31,000-33,000 toward the annual payment on Desmond's note. (T2 38-39; CR 1731.) However, Craig testified at trial that he "got the home place to take care of dad's note[.]" so the Subject Property did not have anything to do with that payment. (T2 27.) Later, Craig testified that Patricia wanted him to keep all the land together to pay on Desmond's debt, and "[e]verything went to that debt." (T2 46.) "Everything" certainly did not go to that debt; rather, Craig paid the annual payment and nothing more, ensuring that more stayed with him. (T2 38-39; CR 1731.)

Craig and Pamela do not dispute that they received all the rental income. They just chalk it up to a supposed agreement that they were supposed to keep the land together and use the income to support Patricia

and pay debt. Their misguided insistence that the rental income from the Subject Property was used exclusively for Patricia's support and to pay down debt explains why Theresa references the "claimed agreement." (Appellees' Brief, at 3.) It is a "claimed agreement," because it is simply what Craig and Pamela say it is to suit their position. Theresa was obviously never told anything about it, because as Craig and Pamela succinctly acknowledge: "Craig and Theresa didn't talk." (Appellees' Brief, at 10.) Since Craig was cashing the rent checks and keeping the remaining balance after the payments referenced above, that is a problem for Craig under Conway.

Despite the obvious disparity between the payments to Patricia and the bank, versus the amounts Craig and Pamela collected and retained, Craig and Pamela repeatedly suggest that Theresa has changed her position and simply acquiesced in receiving no rental income. (Appellees' Br., at 14, 17, 18.) Theresa can only assume that Craig and Pamela are being purposely obtuse. Theresa knew nothing about Craig and Pamela retaining hundreds of thousands of dollars, while furnishing Patricia a small fraction of what they collected annually. They argue: "If Theresa's new story on page 22 of her Appellant's Brief is true, and she agreed with rental income going for the support of her mother, the undisputed evidence is that her mother continued to receive rent all the way until her mother died, what is the basis for Theresa's complaint on appeal." (Appellees' Br., at 18.)

While this question was presumably rhetorical, Theresa will answer it: Theresa's complaint is that, unbeknownst to her, hundreds of thousands of dollars in rent related to property she owned were being secretly converted by Craig and Pamela. It is undisputed that Theresa received nothing from Craig. (T2 43.) The fact that Theresa did not know what was happening with the rental income only further underscores the breaches of duty committed by Craig and Pamela as her co-tenants, and the errors made by the trial court in dismissing or diminishing her claims before they ever got to trial.

C. As in Conway, it was Craig and Pamela's receipt of co-tenancy money that created a duty of trust and confidence and a duty to disclose.

Craig and Pamela state: "Theresa's bare argument is that Craig and Pamela are her fiduciaries because their mother put them all on the title to the real property at some point in time." (Appellees' Br., at 15.) That is not Theresa's argument at all. In fact, in her Appellant's Brief, Theresa expressly advised the Court that it need not reach a categorical rule that a fiduciary duty exists between co-tenants. (Appellant's Br., at 20.)

Rather, Theresa's argument is that co-tenants who acquire possession and control over property common to the co-tenancy are trustees or fiduciaries for fellow co-tenants. Conway at 471, 80 N.W.2d at 159; Clayton v. Clayton, 75 So. 3d 649, 655 (Ala. Civ. App. 2011) (quoting Faust v. Faust, 251 Ala. 35, 37, 36 So. 2d 232, 233 (1948)) (" . . . [i]t has become a settled rule

in this country that a cotenant who has received money from third persons for the use of the common property becomes a trustee for the amount collected for the benefit of his cotenants . . .”). On page 15 of the Appellees’ Brief, Craig and Pamela head their argument: “There is no fiduciary relationship for tenants in common, *absent special circumstances*.” (Emphasis added.) The “special circumstance” is that Craig and Pamela received money from third persons for the use of the Subject Property. Craig and Pamela’s receipt and retention of those funds, and their failure to protect and secure those funds for Theresa’s benefit, or even disclose any details to Theresa, tolls the statute of limitations and gives rise to their liability for breach of fiduciary duty in this case.

Craig and Pamela argue repeatedly that they had no special relationship with Theresa that obligated them to tell her anything. But to reach that conclusion, they must flatly ignore the Conway decision, as well as the body of case law that has developed around the country. “[A] relationship of trust and confidence exists to the extent that each co-tenant has a duty to sustain or at least not to assail, the common interest or title, and one co-tenant will not be permitted to obtain a secret profit to the disadvantage of the other co-tenants where all must act in unison.” Conway, 487 N.W.2d at 24 (quoting 86 C.J.S. Tenancy in Common § 17 (1954)). In South Dakota, if a trust or confidential relationship exists between the parties, which imposes a duty to disclose, mere silence by the one under that

duty constitutes fraudulent concealment. Id. Therefore, this Court concluded in Conway that “a confidential relationship existed between Margaret and Gerald and Gerald had a duty to disclose that he was receiving all rental income from the farm.” Id.

Craig and Pamela assert that there was a life estate reserved for the mother in Conway. (Appellees’ Br., at 16-17.) That changes nothing about the Court’s analysis in that case, and it changes nothing about this case. Conway is concerned with the duties owed between co-tenants when one co-tenant is receiving the rent from the jointly-owned property. Craig and Pamela were the co-tenants receiving the rent. They owed a duty of disclosure to Theresa that they did not meet. The trial court’s willingness to overlook those facts and grant their motion for summary judgment was error.

Craig and Pamela also devote much of their brief incorrectly repeating that Theresa was aware of her ownership interest as a co-tenant as early as 2015. They again miss the point. Knowledge relating to the title was immaterial to the Court’s ruling in Conway:

Trial court held that discovery in 1983 of the warranty deed put upon Margaret the duty of further inquiry and notice. We do not agree. We cannot make the inductive leap binding Margaret with knowledge of Gerald’s claim to all rental income, based on her discovery of the warranty deed’s existence.

Id. at 24.

Here, too, the facts are clear that Craig and Pamela were retaining rental income that went leagues beyond the modest support provided to

Patricia and the annual loan payment tied to the home place. Their arguments for distinguishing Conway are unconvincing.

Craig and Pamela owed the same duty to disclose their receipt of the rental income on the Subject Property as Gerald did in Conway. They make no claim that they disclosed *any* details regarding their retention of the rental income from the Subject Property to Theresa. In fact, it is undisputed that they kept as quiet as Gerald about their retention of all the rental income from the Subject Property. Under these circumstances, the Circuit Court committed error by granting Craig and Pamela's motion for summary judgment on the fiduciary duty and statute of limitations issues.

D. Craig and Pamela's wrongful gains from retaining the Subject Property rent are obvious, and summary judgment was improper on the constructive trust claim.

Craig and Pamela ask "how is Theresa the victim of 'fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act,' given what she admitted she knew?" (Appellees' Br., at 22.) Continuing in the spirit of answering their questions, Theresa would respond in three parts.

First, as discussed previously in Section A., the argument that Theresa knew she owned the land with Craig as a co-tenant in 2015 is oft repeated, but not supported. The extent of Theresa's knowledge was not an undisputed fact that supported summary judgment on the constructive trust claim.

Second, Craig and Pamela's assertion seems to be that they did not gain anything. They once again mention the family debt and their support of

Patricia, but conveniently omit the math. Section B., above, explains why the argument that they were simply acting out of benevolence does not fit. Craig testified he was given the home place to service his father's debt. Even if Craig's own testimony is ignored, the annual loan payment plus the \$15,000-17,000 paid per year to Patricia comes in at just under \$50,000 per year. Craig and Pamela kept the balance for 10 years, including hundreds of thousands of dollars generated from the Subject Property acres. They clearly gained from Theresa's real estate.

Third, Craig and Pamela finish with "there is no evidence that Craig and Pamela engaged in "fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act." (Appellees' Br., at 22.) In addition to perfectly matching Conway's discussion of fraudulent concealment, Craig and Pamela's actions constitute deceit, which is defined in South Dakota to include "[t]he suppression of a fact by one who is bound to disclose it." SDCL 20-10-2. As established in the preceding sections, Craig and Pamela were bound to disclose to Theresa that they were receiving the rental income from the Subject Property. Conway, 487 N.W.2d at 24 ("a confidential relationship existed between Margaret and Gerald and Gerald had a duty to disclose that he was receiving all rental income from the farm"). Fraudulent concealment, deceit, and breach of fiduciary duty, as argued above, undoubtedly qualify as "wrongful acts."

Also, Theresa's counterclaim states "[p]laintiffs assumed control of the property without Theresa's knowledge." (CR 184.) SDCL 55-1-7 provides that "[o]ne who detains a thing is an implied trustee thereof for the benefit of the owner." Here, it is undisputed that Craig and Pamela detained all the rental income from the Subject Property. SDCL 55-1-7 also supported the imposition of the constructive trust in this case.

The trial court committed error in its analysis of the fiduciary duty and fraudulent concealment issues, which carried over to its consideration of the constructive trust claim.

E. Theresa did not consent to Craig and Pamela retaining hundreds of thousands of dollars in rent earned from her undivided one-half interest in the Subject Property.

Craig and Pamela rely on this undisputed fact in their factual recitation: "Craig and Theresa didn't talk." (Appellees' Brief, at 10.) Yet, by pages 22-24 of their brief, they shift to arguing that Theresa consented to their retention of all rent relating to the Subject Property. They also equate Theresa being alright with rent proceeds being used to support her mother when her mother owned the real estate, to consenting to Craig and Pamela retaining the rent proceeds from the Subject Property from 2010 until close to Theresa's death. But at no point do they point to Theresa's testimony, or their own testimony, to establish Theresa *consented to anything*.

They point to Estate of Thacker v. Timm, 2023 S.D. 2, 984 N.W.2d 679, for the proposition that "[c]onsent defeats conversion." (Appellees' Br., at 23.)

That was an uncontroversial proposition in that case. “The circuit court found that Thacker knew of and consented to Timm’s subsequent disposition of the funds from those CDs. This finding is supported by evidence in the record and is not clearly erroneous.” Id. at ¶ 43, 984 N.W.2d at 692. Indeed, the trial court’s recitation reflected that the Estate’s claim was dubious. The decedent, Owen Thacker, agreed with the money in his accounts being used to take care of himself and his significant other, Vicky Timm, whose “actions were conducted with [Thacker’s] knowledge and correspond with his wishes.” Id. at ¶ 42, 984 N.W.2d at 692.

Estate of Thacker gives a sense of the type of consent that defeats a conversion claim. Craig and Pamela established no similar facts here, which is why summary judgment should have been granted to Theresa on her conversion claim. Neither Craig nor Pamela said anything to Theresa about the fact that they jointly owned the land together. (T 59, 66, 88; T2 35.) Likewise, Craig and Pamela did not advise Theresa of the leases that were in place, much less have her sign as a landowner. (T 62-65; T2 23-36; CR 788-791, 1050-1060.) How could Theresa have consented when it is undisputed that she was not consulted by her co-tenants about anything?

From the time Craig became a co-tenant with Theresa in 2010 to this lawsuit, Craig, and later Craig and Pamela, exercised control over \$223,830 in rental income off the Subject Property that related to Theresa’s undivided one-half interest. (T2 23, 43, 64; CR 788-791, 1048-1060.) Summary

judgment should have been granted in Theresa's favor. Under SDCL 21-3-3(1), she was entitled to a judgment for the money converted plus interest.

F. The trial court abused its discretion by permitting irrelevant and unfairly prejudicial evidence.

Craig and Pamela offer no explanation or authority to explain why Patricia's wishes with respect to the Subject Property from 2010 to her death have any legal relevance to whether they, as Theresa's co-tenants, were unjustly enriched when they retained all rent proceeds relating to the Subject Property. They were permitted to make an "agreement" with Patricia the focal point of their defense, essentially allowing Patricia, Craig, and Pamela to dictate Theresa's legal rights. The trial court's evidentiary rulings have nothing to do with "justice," and everything to do with permitting an improper diversion from the real issues of Theresa's unjust enrichment claim. The trial court abused its discretion, and Theresa was unfairly prejudiced.

CONCLUSION

Theresa respectfully requests that the trial court's summary judgment rulings be reversed, and this case be remanded for entry of judgment in Theresa's favor for the \$223,830 in rental income withheld from her plus interest.

Respectfully submitted this 4th day of September, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief does not exceed the number of words permitted by SDCL 15-26A-66(b)(2), said brief containing 2,973 words Century Schoolbook, 12-point, and 15,101 characters (no spaces).

Dated this 4th day of September, 2024.

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CERTIFICATE OF SERVICE

The undersigned one of the attorneys for the appellant, hereby certifies that on the 4th day of September, 2024 a true and correct copy of APPELLANT'S REPLY BRIEF was electronically transmitted to:

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Mr. Lee Schoenbeck
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and the original and one copy of APPELLANT'S REPLY BRIEF were mailed by first-class mail, postage prepaid to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Reply Brief was also electronically transmitted in Word format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 4th day of September, 2024.

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