IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27114

DOWLING FAMILY PARTNERSHIP;
DOWLING BROTHERS PARTNERSHIP,

Appellees,

v.

MIDLAND FARMS, LLC,

Appellant,

LANNY DEMOTT,

Defendant.

Appeal from the Circuit Court
Sixth Judicial Circuit
Haakon County, South Dakota

THE HONORABLE PATRICIA DEVANEY
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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Jurisdictional Statement

The parties are landlord and tenant under a farm lease. Whether the tenant renewed the lease for three years created the initial dispute, but the issues in this appeal also include the landlord's counterclaim for unjust enrichment and damages. The landlord, Midland Farms, LLC, appeals from a judgment dated May 19, 2014, entered after a split decision in a court trial in which the circuit court entered judgment in favor of the tenant, Dowling Family Partnership and Dowling Brothers Partnership ("Dowling"), on Midland Farms' counterclaim for unjust enrichment. (SR 1231.) Midland Farms also appeals from an order dated May 19, 2014, on Midland Farms' second motion for summary judgment. (SR 1233.) Midland Farms appeals from that part of the order denying Midland Farms' renewed motion for summary judgment on Dowling's claim that an expiring lease had been extended for three years. The court had earlier entered a partial judgment on March 19, 2013, declaring that Dowling lawfully exercised an option to lease the farm for three years beginning in the fall of 2013. (SR 787.) After entry of final judgment on May 19, Midland Farms filed a notice of appeal on June 13, 2014. (SR 1275.) Dowling filed a notice of review on July 1, 2014, seeking review of that part of the judgment entered in favor of Midland Farms on his claim for damages.

Statement of the Issues

1. The circuit court held that Midland Farms was barred by unclean hands from recovering on its counterclaim for unjust enrichment not because it acted in bad faith, but because it had breached a lease between the parties. A party seeking

equity must act in good faith. Absent a finding of bad faith, was Midland Farms legally barred from seeking unjust enrichment?

The circuit court did not hold that Midland Farms acted in bad faith, but relied on this Court's decision in *Talley v. Talley* to hold that a breach of contract barred Midland Farms from seeking equity.

Talley v. Talley, 1997 S.D. 88, 566 N.W.2d 846
Buffalo Ridge Corp. v. Lamar Adver. of S. D., Inc., 2011 S.D. 4, 793 N.W.2d 809
Adrian v. McKinnie, 2002 S.D. 10, 639 N.W.2d 529

2. To recover for unjust enrichment, Midland Farms had to prove that Dowling received a benefit, that he was aware of the benefit, and that it would be inequitable for him to retain the benefit without paying for it. Dowling regained possession of the Midland Farms property after it had been planted at Midland Farms' expense with 12,000 acres of winter wheat at a cost in excess of $1 million, and he received income of $2,691,944 from the crop that he did not plant and would not have received had the crop not been planted. Did Midland Farms prove that Dowling received a benefit of which he was aware?

   The circuit court held that Dowling received a benefit, but that he was not aware of the benefit because, based on his position that Midland Farms had breached the 2011 lease, he objected to the crop being planted.

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

3. Had Dowling remained in possession of the Midland Farms property, he would have incurred expense to plant the winter wheat crop, and it is undisputed that he received over $2.6 million in income from the crop, which he did not plant. Dowling pursued his legal remedy, a claim for breach of contract, related to the 2011 lease. Does the fact that he went through litigation related to the 2011 lease make it fair that he retain the benefit that he received from Midland Farms paying for the expense of planting a crop that he harvested?

   The circuit court held that it was not inequitable for Dowling to retain the benefit of the crop that he did not plant because Midland Farms breached the 2011 lease, and Dowling had to endure litigation as a result.

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

Stoleson v. United States, 708 F.2d 1217 (7th Cir. 1983)

4. The 2011 lease provided that Midland Farms would give Dowling an option to rent the property for three more years, "terms and conditions to be agreed to by Landlord and Tenant." This Court has held that an option is an irrevocable offer to sell on specific terms and creates a power of acceptance in the optionee. Was the lease provision a binding option contract?

   The circuit court held that the lease provision was ambiguous and therefore looked to parole and extrinsic evidence to determine that it was a binding option contract.

   Advanced Recycling Sys., LLC v. Se. Prop. Ltd. P'ship, 2010 S.D. 70, 787 N.W.2d 778

5. Because one of the principals of Midland Farms testified that the lease provision was a right of first refusal, the circuit court held that it was ambiguous, and looked to parole and extrinsic evidence. Extrinsic evidence cannot be considered, however, in determining whether a contract is ambiguous. Was the lease provision ambiguous?

   The circuit court held that Scott DeMott's characterization of the lease provision as a right of first refusal, combined with Dowling's agreement to pay rent of $70/acre, created a binding obligation to extend the lease for three more years.

   Advanced Recycling Sys., LLC v. Se. Prop. Ltd. P'ship, 2010 S.D. 70, 787 N.W.2d 778

6. Scott DeMott told Dowling that the price of a new lease was $70/acre for the next three crop years, and Dowling agreed to that amount in a conversation on August 1. The parties did not agree to security for the rent, and a new multi-year lease was not reduced to writing before Midland Farms told Dowling that it was going to lease the land to another tenant. Did the parties reach an agreement sufficient to satisfy the statute of frauds?

   The circuit court held that the conversations and e-mails between DeMott and Dowling addressed all the material terms of an extended lease and were sufficient to satisfy the statute of frauds.

   LaMore Rest. Grp., LLC v. Akers, 2008 S.D. 32, 748 N.W.2d 756

Statement of the Case and the Facts

1. Procedural history

This appeal involves a claim for breach of a provision in a farm lease, and an equitable claim for unjust enrichment. The case arises out of two filings that were later consolidated. In the first filing, Midland Farms, LLC, the landlord and one of the Defendants, served a three-day notice to quit and vacate dated August 17, 2012, on Dowling Family Partnership and Dowling Brothers Partnership, the tenant ("Dowling"). (Civ. 12-27.) A four-day summons and complaint for forcible entry and detainer soon followed. (SR 1-15.) Midland Farms alleged that a one-year cash lease for 29,000 acres of farmland between the parties had ended by its terms, and that Dowling had wrongfully refused to surrender possession of the property.

In the second filing, Dowling filed a complaint for declaratory relief, money damages, and equitable relief, dated September 7, 2012. (Civ. 12-26.) Dowling alleged that Midland Farms had breached a provision in the 2011 lease, which he understood to be an option, by not extending the lease after he and Scott DeMott, one of the principals of Midland Farms, agreed on August 1, 2012, to rent of $70 per acre going forward. The lease provided that Midland Farms would give Dowling an "option to rent leased premises for the 2013, 2014 and 2015 crop year. Terms and conditions to be agreed to by Landlord and Tenant." (Ex. D ¶ 3.) Midland Farms answered the complaint and denied that the parties had agreed on terms to extend the lease beyond the 2012 crop year. (SR

18.) After August 1, Midland Farms entered into a new lease with a different tenant, Clement Farms, who planted winter wheat on some of the property in the fall of 2012.

The cases were consolidated by order dated October 26, 2012. (SR 65.) Both sides moved for summary judgment. (SR 105, 315.) The circuit court held a hearing on the motions on February 20, 2013, and decided that there were questions of fact whether the parties had agreed to all material terms necessary to renew the 2011 lease, and the amount of Dowling's damages if the lease had been breached. (SR 785.) The parties then supplemented the summary judgment record with a stipulation of facts. (SR 763.) The court then entered findings of fact and conclusions of law dated March 1, 2013, finding that Dowling had an option to renew the farm lease, that the parties agreed on all material terms of the lease for 2013-2015, and that Midland Farms breached the lease in August, 2012. (SR 765 (App. 7-24).) The court entered judgment on March 19, 2013, "that an enforceable contract exists between the parties in this matter, and Dowling has lawfully exercised the right to lease the Midland Farms property described in the 2011 Lease for the 2013, 2014, and 2015 crop years at the rate of $70 per acre." (SR 787 (App. 5-6).) Dowling's claim for damages and Midland Farms' counterclaim for unjust enrichment remained for trial.

Before the court's decision, Midland Farms and Dowling had entered into an agreement dated February 28, 2013, providing that if the court ruled in Dowling's favor on the lease, then Dowling would have five days to pay the rent and would be restored to

immediate possession of the premises upon payment of the rent. (Ex. 9 (App. 93).) After the decision, Dowling paid the rent on March 18, 2013, and was restored to possession of the property, including the acres that Clement Farms had planted to winter wheat. After Dowling regained possession, Midland Farms served an amended answer and a counterclaim for unjust enrichment dated April 2, 2013. (SR 790.)

Dowling later filed an amended complaint on November 8, 2013, asserting seven claims: for failure to repair certain grain bins pursuant to the agreement dated February 28, 2013; for breach of the lease; for tortious interference with contract; for civil conspiracy; for unjust enrichment; and for intentional misrepresentation. Midland Farms filed a motion for summary judgment on the new claims pleaded in the amended complaint, and reasserted its argument that there had been no breach based on the "option" as a matter of law. In response, Dowling resisted summary judgment on his claims for breach of contract, but agreed to dismissal of one claim as not ripe and to summary judgment on all other claims. (SR 847, 984, 1146, 1156.) The circuit court again denied Midland Farms' motion for breach of the lease, but granted judgment dismissing the rest of Dowling's claims. (SR 1235 (App. 3-4).)

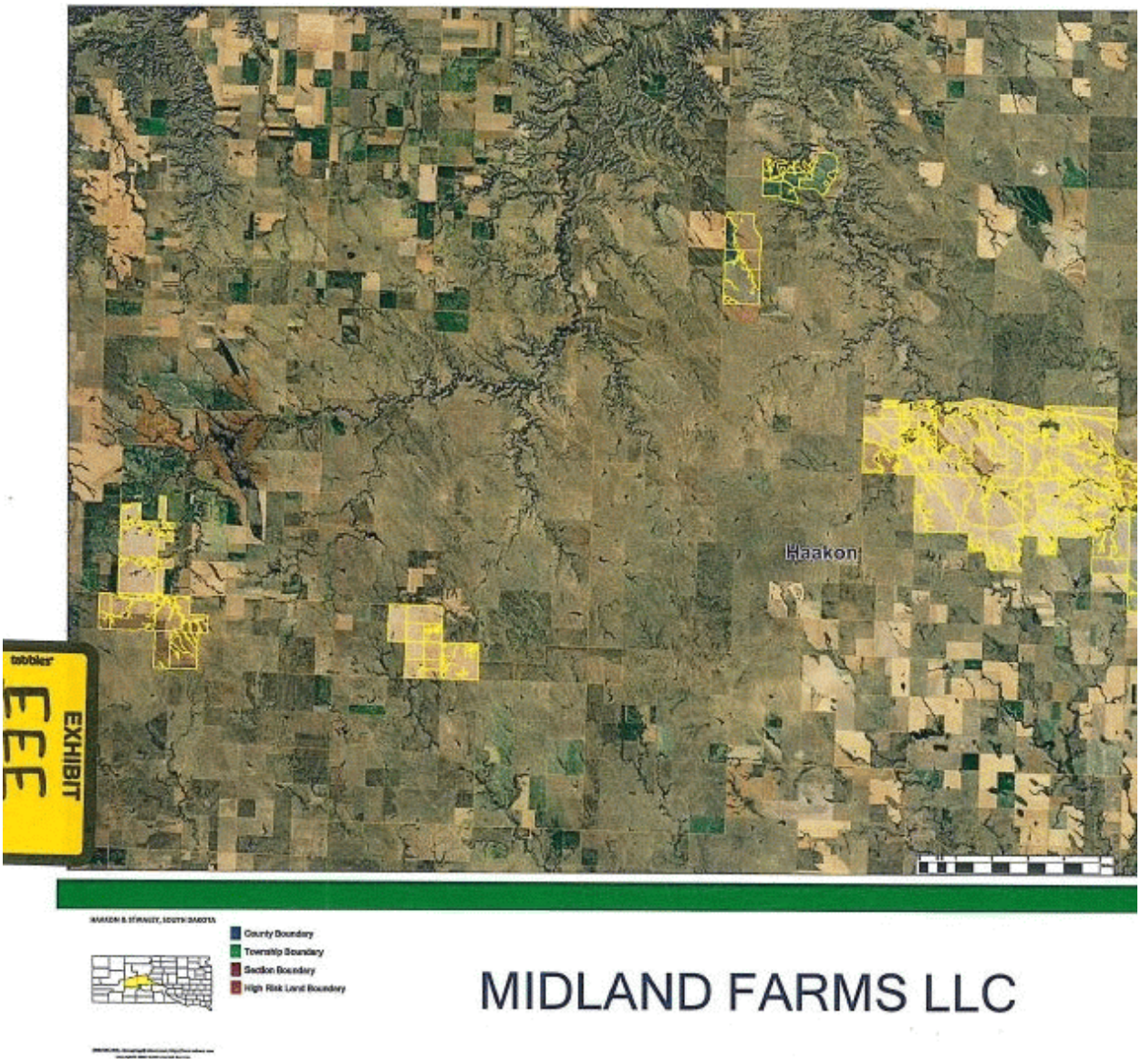
The remaining claims were Dowling's claims for damages due to breach of the lease, and Midland Farms' counterclaim for unjust enrichment. The case was tried to the court on February 19-21, and March 12, 2014. The court issued a memorandum decision dated April 16, 2014, finding that Dowling had not proved any damages, and that

Midland Farms was not entitled to recover on its equitable claim for unjust enrichment. (SR 1166 (App. 25-58).) The court entered judgment on May 19, 2014, on the claims that were tried. (SR 1235 (App. 1-2).) This appeal followed.

2. Factual background

a. The parties and the 2011 lease

Midland Farms is a South Dakota limited liability company that owns approximately 33,000 acres of farmland in central South Dakota. (Tr. at 553-54.) Midland Farms bought the property in 2008. (Tr. at 528-29.) It is located in Haakon and Stanley Counties as shown on Ex. EEE, depicted below. (Tr. at 554-55.)



The largest contiguous acreage, which includes the farm headquarters, is approximately 23,000 acres. (Ex. 45.) The acres to the west, near Philip, are referred to as "Philip East" and "Philip West." (Tr. at 135-36.) The acres to the north are referred to as Plum Creek. (Tr. at 136, 553.) In 2011, Dowling leased everything except for Plum Creek. (Tr. at

136.) The 2011 Dowling lease covered approximately 29,012 gross acres, as shown in Exhibit 45. (Ex. 1 (App. 59); Ex. 45.)

Lanny and Scott DeMott, who are father and son, are both managing members of Midland Farms, LLC, which was formed in 2008 solely to purchase farmland in South Dakota. (Tr. at 528-29, 556.) Lanny, a farmer and real estate agent, lives in Iowa. Scott, a farmer and insurance agent, lives in Little Rock, Arkansas. (Tr. at 523-24.) Lanny and Scott also own about 5,500 acres of farmland in Tripp County, which Scott farms, and where they have a commercial hunting lodge. (Tr. at 527-28.) The other members of Midland Farms are Bob Robbins, who lives in Fort Pierre; Jim Begley of Manhattan, Illinois; and Tim Kreifels of Atlantic, Iowa. (Tr. at 552-54.) The DeMotts together own 26% of Midland Farms. (Tr. at 553-54.)

Scott Dowling is a life-long farmer and the managing partner of the various Dowling entities that leased property from Midland Farms from 2009 through today. (Tr. at 8-9, 241.) Dowling's farm headquarters is located near Draper. (Tr. at 241.) He owns 20,000 acres. (Tr. at 8-11,16.) He owns or leases a total of 65,000 acres, 50,000 of which is tillable. (Tr. at 240-41.)

Midland Farms first leased property to Dowling in 2009. (Ex. D.) The lease was for 10,276 acres, and was between Midland Farms, LLC, and Dowling Farms. (Tr. at 529.) In 2010, Midland Farms and Dowling Family Partnership entered into a crop-share lease for 13,384 acres, and a cash farm lease for 15,725 acres. (Ex. E.) Both the 2009

and 2010 leases included language that Midland Farms would give Dowling "a first opportunity" to rent the property for the next crop year, referred to the opportunity as an "option," and stated that Midland Farms was not obligated to rent to Dowling unless the terms were acceptable. (Exs. D, E; Findings, April 2, 2013, ¶¶ 3-4 (App. 8).) In 2011, Midland Farms entered into a one-year lease for 29,012 acres with Dowling Family Partnership and Dowling Brothers Partnership. (Ex. 1 (App. 59).) The lease provides for termination "after the 2012 crop harvest, unless otherwise extended," and further states that "Landlord will give Tenant option to rent leased premises for the 2013, 2014 and 2015 crop year. Terms and conditions to be agreed to by Landlord and Tenant." (*Id.* ¶ 3 (App. 59).) The rent in the 2011 lease was $55 per acre. (*Id.* ¶ 4 (App. 60).) The lease required an irrevocable letter of credit by February 1, 2012, to secure the rent due on March 1, 2012 and required that Dowling pay $10/acre on winter wheat planted in the fall of 2011 as a credit to the rent due March 1, 2012. (*Id*.)

b. Negotiations to renew the 2011 lease

In April, 2012, before the lease's termination later in 2012, Scott DeMott asked Dowling if he were interested in renting the property in the future, and Dowling said that he would be at the same price. (Findings, ¶ 6 (App. 9).) DeMott told Dowling that he was going to market the property because Midland Farms had other options. (*Id.*) In an e-mail dated July 23, 2012, DeMott told Dowling that the current rent of $55 per acre was not acceptable, that there were other qualified parties interested in the property, and that if

Dowling had any interest in renting all or part of Midland Farms, he should advise by August 1, 2012. (*Id.* ¶ 8 (App. 9).) On July 25, DeMott and Dowling met at the 1880 Town to discuss a lease for the 2013, 2014, and 2015 crop years. (*Id.* ¶ 9 (App. 10).) Dowling asked what the terms were going forward. DeMott said that the rent would be $70 per acre, and Midland Farms needed an irrevocable letter of credit to secure the rent. (*Id.* ¶¶ 10-11 (App. 10).) Dowling told DeMott that he was buying out the interests of his brother and his brother's family from the Dowling partnerships. (*Id.* ¶ 12 (App. 10).) On August 1, 2012, Dowling and DeMott spoke by telephone, and agreed on the rent of $70 per acre. (*Id.* ¶ 15 (App. 11).) On August 6, 2012, DeMott sent an e-mail to Dowling in which he asked, "What name do I use for you on our farm lease?" (*Id.* ¶ 17 (App. 11).) The parties discussed, but did not agree on the terms of, a letter of credit to secure the rent. (Tr. at 540-41.)

c. Midland Farms entered into a new lease with Clement Farms

On August 6, 2012, DeMott met with Conrad Clement, a farmer and businessman from Cresco, Iowa, who was interested in the Midland Farms property. (Tr. at 537.) Clement said that because a deal to purchase the property probably could not be negotiated before the planting deadlines for a winter wheat crop, he would also be interested in leasing the property. (Clement depo. at 12.)[1] Before talking further with

[1] Conrad Clement was unavailable for trial, so his deposition was taken in advance and filed with the clerk.

either Clement or Dowling, DeMott talked to Curt Jensen, a lawyer who had done other work for Midland Farms, about whether his conversations with Dowling had created a binding lease. (Tr. at 538-39.) DeMott understood from his conversation with Jensen that a farm lease had to be in writing to be binding for more than one year. (*Id*.) He therefore told Dowling on August 8, 2012, that Midland Farms intended to sell the property to Clement. (Tr. at 539-40.) DeMott preferred Clement because the Dowling partnerships were dissolving, Dowling had resisted providing a letter of credit, had been slow in paying the rent previously, and the DeMotts and Dowling did not communicate effectively as landlord and tenant. (*Id*. at 531-32, 535-37.) Dowling followed up the conversation with two e-mails on August 9, in which he did not acknowledge the conversation on August 8, but provided names that should be used on a new lease. (Findings, ¶ 19 (App. 11-12).)

Through counsel, Midland Farms and Dowling continued to negotiate through the end of August over the terms of a lease. (Tr. at 540-41.) Midland Farms was willing to enter into a new lease with Dowling for one year if Dowling would provide a letter of credit to secure the rent. (*Id*.) While negotiations continued, Dowling "put Clement on hold," and discontinued conversations about leasing or selling the property to Clement. (*Id*.) Midland Farms started a declaratory judgment action on August 14 (Ex. LLL), and served a three-day notice to quit on Dowling on August 17. (Ex. MMM.) On August 28, counsel for Midland Farms served a four-day summons and a complaint for forcible entry

and detainer. (Ex. NNN.) Because the parties could not agree on security for the rent and because Dowling insisted that he had exercised the "option" in the 2011 lease, negotiations concluded at the end of August. (Tr. at 541, 544-45.)

d. Clement Farms planted 12,231 acres of winter wheat

Midland Farms entered into a cash farm lease with Clement Farms on September 21, 2012, for 33,297 acres at an annual cash rent of $70 per acre. (Ex. 2 (App. 77).) Clement's lease included the Plum Creek acres that Dowling had not leased. The Clement lease states that the lease term would begin upon delivery of an irrevocable letter of credit to secure the next year's rent. (*Id.* ¶ 3 (App. 77).) Clement "had to put an irrevocable letter of credit in immediately." (Clement depo. at 13.) The lease also provided that if Dowling prevailed in his claim based on a renewal of the 2011 lease, then the Clement lease would terminate and Midland Farms would reimburse Clement for all crop inputs and other direct expense incurred in planting the 2013 crop, plus indirect expenses of $11.40 per acre, not to exceed $100,000. (Ex. 2, ¶ 4 (App. 78).) About the same time, on September 27, 2012, Midland Farms and Clement entered into a purchase agreement for the property. (Ex. 4 (App. 139).) The purchase agreement provided that if Dowling prevailed in the litigation against Midland Farms, then the purchase would be subject to Dowling's lease. (Ex. 4, ¶ 2.4c (App. 140).) The purchase was subject to financing; Clement had until November 15, 2012, to provide an irrevocable financing commitment for the purchase price. (Ex. 4, ¶ 3.3 (App. 141).)

Except for storage and 9,000 acres that Dowling had planted to sunflowers, which were still in the ground and not yet harvested, Clement took possession of the Midland Farms property in late September, 2012. (Clement depo. at 132.) He started planting winter wheat on October 1, and had planted 12,231 acres by October 14, just before the crop-insurance planting deadline. (*Id*. at 16, 19, 25.) Clement planted Clearfield wheat, the same variety that Dowling would have planted. (*Id*. at 17, 22-23.) Clement's planting expenses included drilling expense, seed cost, transportation, tendering, and fertilizer. (*Id*. at 24-25; Ex. KK (App. 97).) Because Clement bought seed late in the season, he purchased much of the seed from Montana and incurred transportation expense. (Clement depo. at 16, 23-24, 29, 30.) Clement's planting expense, which was actually incurred, totaled $1,048,356.08. (Ex. KK (App. 97).) Clement insured the winter wheat. (Clement depo. at 32-33.) Even though there were drought conditions in central South Dakota in the fall of 2012, Clement expected to get a wheat crop on the acres that he planted. (*Id*. at 28-29, 33-34.)

As of November 15, 2012, Clement Farms had not obtained a financing commitment for the purchase of the Midland Farms property, so the sale of Midland Farms to Clement Farms was not completed. (*Id*. at 39-40.) Clement continued as a tenant under his lease, including the Plum Creek acres. (Tr. at 553.)

e. Dowling regained possession and collected on the winter wheat crop

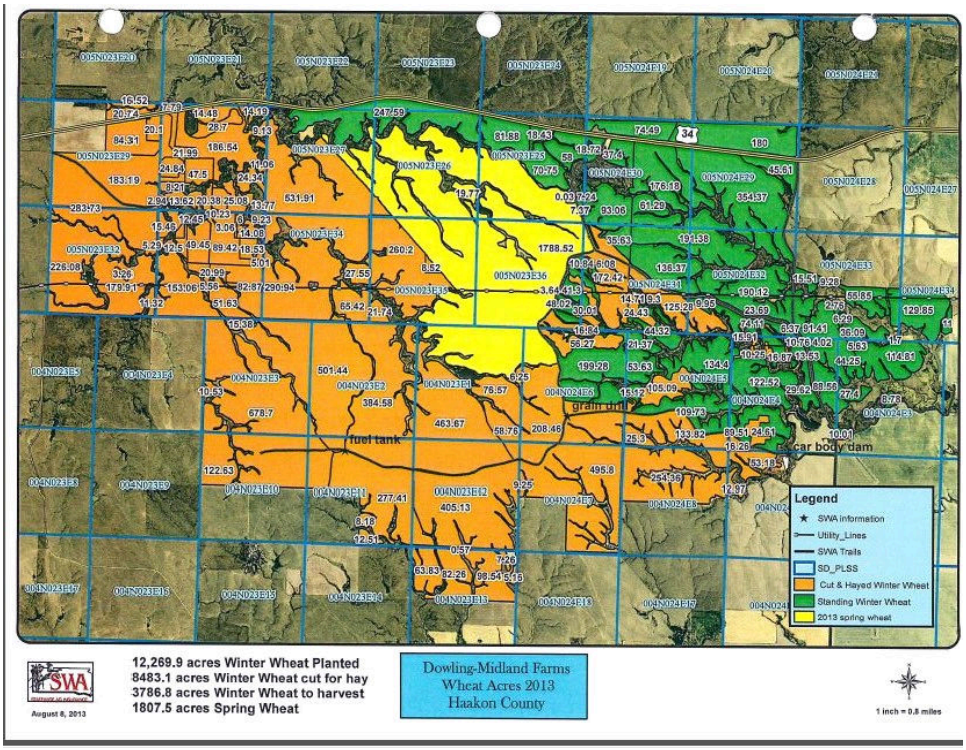
The circuit court issued findings and conclusions dated March 12, 2013, that Midland Farms had breached the 2011 lease by not extending the lease for three more years based on the conversation between Dowling and Scott DeMott on August 1. (SR 765 (App. 7).) Based on the agreement negotiated during the litigation dated February 28, 2013 (Ex. 9 (App. 93)), Dowling paid the rent for 2013 on March 18, 2013, and was immediately entitled and restored to possession of the Midland Farms property. (Tr. at 557.)

The winter wheat crop that Clement planted was still dormant, but Dowling applied spring fertilizer to the crop beginning on March 27, 2013. (Tr. at 207-08.) By late April, however, the stand did not look good because of the drought, so Dowling reported a possible crop loss to his crop-insurance agent, Tom Kauer, on April 29, 2013. (Tr. at 161; Ex. AAA.) An area crop adjuster, Butch Best, was assigned to the claim, and he first visited the Midland Farms property sometime within one or two weeks after April 29, but before May 10, 2013. (Tr. at 684-85.) He spent a day inspecting the acres that had been planted to winter wheat. (*Id*. at 685-87.) No heads were out yet, so Best determined that it was too early to do an appraisal on the field. (*Id*. at 687.) He told Dowling that he would come back when the crop was more mature. (*Id*.) Best testified that the condition of the crop was better than in neighboring Jones County, where he was able to appraise Dowling's wheat crop on his own land because conditions were "[a] lot

worse." (*Id*. at 688-89.) As of his first visit to Midland Farms, however, Best determined that some of the acres would go to harvest. (*Id*. at 690-91.)

Before Best returned, Dowling entered into an agreement with Josh Schmidt to cut hay, volunteer rye, cheet grass, weeds, thistles, and buck wheat from some of the acres that Clement had planted. (Ex. 49.) By agreement dated June 20, 2013, Schmidt agreed to pay $35 per ton for all baled materials. (*Id.*) He cut hay on 8,483.1 acres, and paid Dowling $500,812. (Ex. 43.) Because of the pending crop-insurance claim, Dowling required that Schmidt leave strips of the winter wheat for later adjustment by Butch Best. (Tr. at 697.)

Best returned to the Midland Farms property from July 7-9, 2013, and appraised the winter wheat that Clement had planted. (Tr. at 694.) The adjustment records were marked as Ex. AAA. The area that was adjusted is depicted in Ex. 44, which is shown below and which is included in the appendix.



The area shown in yellow was not planted to winter wheat. (Tr. at 39-40, 686, 690.) The orange acres were cut for hay, and appraised based on the strips that were left. (*Id*. at 697.) The acres in green ultimately went to harvest and so were not appraised. (*Id*. at 696.) Instead, Best figured the actual harvested production from those acres by measuring the bins in which the harvested wheat was stored. (*Id*. at 723-25.)

Best's adjustment records show that Dowling received two crop-insurance payments on the crop that Clement planted: one for $1,519,390, and the second for $39,429. (Ex. AAA.) Dowling submitted evidence that the acres he harvested yielded

production worth $632,313. (Ex. 27 at p. 3; Tr. at 118.) Thus, Dowling's total income from the crop that Clement planted was $2,691,944.

f. Midland Farms reimbursed Clement Farms $1,187,527

After the court's decision and Dowling was restored to possession, Midland Farms negotiated with Clement over the reimbursement due under the lease, and Clement Farms was briefly named as a third-party defendant to this lawsuit. (SR 790, 813; Tr. at 545-46, 547, 551.) Ultimately, Midland Farms paid Clement Farms $1,187,527, and they entered into a settlement agreement on July 3, 2013, pursuant to which the third-party claim against Clement Farms was dismissed. (Ex. 6.) DeMott testified that he thought that Clement's input costs for planting the winter wheat were reasonable. (Tr. at 547.) In addition to the direct expenses of $1,048,356, Midland Farms paid $35,671 in interest, $3,500 for the expense of the irrevocable letter of credit that Clement provided, and $100,000 in indirect expenses. (Ex. KK (App. 97).)

Midland Farms requested that Dowling pay for these costs since Dowling benefitted from the crop that Clement planted, but Dowling refused. Thus, Midland Farms sought reimbursement through its counterclaim for unjust enrichment. (SR 973.)

Argument

1. Dowling was unjustly enriched

a. Standard of review

Unjust enrichment is an equitable claim, so a decision in equity granting or denying relief is reviewed for abuse of discretion. *Hofeldt v. Mehling*, 2003 S.D. 25, ¶¶ 9, 14, 658 N.W.2d 783, 786-87, 788. The circuit court's findings of fact can be reversed only if clearly erroneous, while its conclusions of law are reviewed de novo. *Id.*

b. Midland Farms did not have unclean hands

Unjust enrichment occurs "when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying." *Parker v. W. Dakota Insurors, Inc.*, 2000 S.D. 14, ¶ 17, 605 N.W.2d 181, 187. Because unjust enrichment is an equitable claim, Dowling defended on the basis that, having breached the 2011 lease, Midland Farms had unclean hands and was precluded from seeking equity. Dowling cited no South Dakota cases, and the circuit court relied on none, in which a claimant seeking recovery based on unjust enrichment was barred from recovery by unclean hands.

1. The doctrine of unclean hands requires bad faith

Some courts have held that a breach of contract, by itself, does not constitute unclean hands. *SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442, 449 (Del. 2000) (affirming decision that a breach of contract alone does not require application of the unclean-hands doctrine); *Dollar Sys., Inc. v. Avcar Leasing Sys. Inc.*, 890 F.2d 165, 173 (9th Cir. 1989) (holding that bad intent, not a simple breach of contract, was the essence of the defense of unclean hands). Rather, as this Court's cases

establish, bad faith of some sort is the mark of unclean hands. *See Action Mech. v. Deadwood Historic Pres. Comm'n*, 2002 S.D. 121, ¶ 26, 652 N.W.2d 742, 751 ("A party seeking equity must act fairly and in good faith."); *Halls v. White*, 2006 S.D. 47, ¶ 18, 715 N.W.2d 577, 585 (same); *Miller v. Cnty. of Davison*, 452 N.W.2d 119, 121 (S.D. 1990) (same).

Substantial evidence in the record establishes that Midland Farms did not act in bad faith, and the circuit court did not find bad faith. DeMott had reason to want to deal with Clement Farms when it expressed interest in the property: Dowling and Midland Farms did not communicate well, DeMott knew that the Dowling entities were being dissolved and Dowling would be farming without help from his family going forward, and Dowling did not want to provide security for the multi-million-dollar rent due each year of a multi-year lease. (Tr. at 532, 535.) Before telling Dowling that Midland Farms intended to negotiate a sale to Clement Farms, Scott DeMott consulted with counsel and understood from that consultation that a multi-year farm lease had to be in writing to be valid. (Tr. at 538-39.) Based on his conversation with Dowling, DeMott therefore continued to negotiate with Dowling for most of a month, until the end of August 2012, in an effort to agree on the terms of a one-year extension. (*Id*. at 540-41.) Midland Farms advised Clement Farms of its dispute with Dowling over the lease, and included provisions in both the Clement lease and the purchase agreement addressing what would

happen if the court held that Dowling were entitled to possession. (*Id*. at 544-46; Ex. 2, ¶ 4 (App. 77).) All of these facts establish that Midland Farms acted in good faith.

2. Any breach of the lease was unrelated to Midland Farms' claim for unjust enrichment

Instead of focusing on bad faith, the court concluded that under *Talley v. Talley*, a party who breaches a material term of a contract does not have clean hands. 1997 S.D. 88, ¶ 30, 566 N.W.2d 846, 852. It was not sufficient that Midland Farms acted in good faith. "Although Midland cited out of state authorities for the proposition that not all breaches of contract require the application of the 'unclean hands' doctrine, the South Dakota Supreme Court did in fact conclude in *Talley* that the party who had breached several material terms of the contract 'has not entered the court with clean hands.'" (App. 46 (quoting *Talley*, 1997 S.D. 88, ¶ 14, 566 N.W.2d at 852).) The court went on to say that "even if the breach of contract was not based upon fraud, deception, or bad faith," the fact of breach was a circumstance in balancing the equities to determine whether it would be unjust for Dowling to retain the benefit. (*Id.*)

Although the circuit court's decision equivocated on the application of *Talley*, the decision in *Talley* is not controlling here. First, *Talley* did not involve unjust enrichment, but rather a party seeking to specifically enforce a contract that the party seeking enforcement materially breached. 1997 S.D. 88, ¶ 30, 566 N.W.2d at 852. "Anthony materially breached several substantial terms of the contract. He cannot now seek enforcement of those contractual provisions which benefit him when he has failed to

comply with express terms as well as the intent of the parties' contracts." *Id.* By contrast, Midland Farms did not seek specific performance of the 2011 lease; it sought reimbursement of a benefit that Dowling received based on a transaction–Clement's planting of 12,000 acres–that was outside the scope of the 2011 lease. Although both are equitable claims, they are legally and factually different for purposes of applying the doctrine of unclean hands. *See* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 63 cmt. a ("The implications of the 'unclean hands' maxim for equitable remedies outside the law of unjust enrichment--such as the availability of injunction or specific performance--are outside the scope of this Restatement.").

Second, the inequitable conduct must occur in the same transaction that is the basis of the unjust enrichment claim. "Recovery in restitution to which an innocent claimant would be entitled may be limited or denied because of the claimant's inequitable conduct in the transaction that is the source of the asserted liability." RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 63. Stated differently, any breach of the Dowling lease by Midland Farms was immaterial for purposes of analyzing the equitable claim for unjust enrichment based on conduct outside the lease, and Midland Farms could be denied equitable relief only if it acted "improperly or unethically in relation to the relief" it sought. *Adrian v. McKinnie*, 2002 S.D. 10, ¶ 17, 639 N.W.2d 529, 535. "'What is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts.'" *Id.* (quoting *Republic Molding Corp. v. B.W. Photo Util.*, 319

F.2d 347, 349 (9th Cir. 1963)). To be barred from recovery by unclean hands, Midland Farms must have acted wrongfully in paying for the crop that was planted.

Dowling's claim for breach of a contractual obligation to continue the farm lease does not assert that Midland Farms acted wrongfully in paying for the crop to be planted. In *Buffalo Ridge Corp. v. Lamar Adver. of S. D.* , *Inc.*, 2011 S.D. 4, 793 N.W.2d 809, this Court considered an argument that the party seeking restitution, Buffalo Ridge, should not recover because it acted with unclean hands. Like the circuit court's holding here, Lamar argued that Buffalo Ridge "created the situation in which it found itself" by refusing to cash Lamar's rent checks and refusing to permit Lamar to take down the billboards. *Id.* ¶¶ 21, 23, 793 N.W.2d at 815. Despite that contention, this Court held that the circuit court erred in failing to award restitution to Buffalo Ridge. *Id.* ¶ 23, 793 N.W.2d at 815. Here, absent wrongful conduct in reimbursing Clement for the crop that was planted, the Court should not confuse Dowling's legal claim for breach of contract with Midland Farms' equitable claim. That Dowling failed to prove damages on his legal claim is not a basis to deny relief based on unjust enrichment.

Thus, the facts of *Talley* are not analogous; Midland Farms did not act wrongfully in paying Clement Farms its planting costs; the decision in *Buffalo Ridge* supports Midland Farms' claim; and the circuit court did not find that Midland Farms acted in bad faith. For all of these reasons, this Court should hold instead: (1) that a good-faith breach of contract does not alone constitute unclean hands; and (2) that Midland Farms'

counterclaim must therefore be decided based on the factors required to establish unjust enrichment.

c. Midland Farms proved the elements of unjust enrichment

To prevail on its counterclaim, Midland Farms had to prove: (1) that Dowling received a benefit; (2) that Dowling was aware of the benefit; and (3) that it would be inequitable for Dowling to retain the benefit without paying for it. *Hofeldt*, 2003 S.D. 25, ¶ 16, 658 N.W.2d at 788.

1. Dowling received a benefit

It is undisputed that Dowling received a benefit by assuming possession of property on which Clement Farms had planted 12,000-plus acres of winter wheat at no cost to Dowling. The benefit was economic. Dowling received income of $2,691,944 from a crop that he did not plant. Whether the value of the benefit is the amount of Clement's planting expense, or the amount it would have cost Dowling to plant the crop, it is clear that having earned income from the crop, Dowling was benefitted by receiving the income without having incurred any input costs to plant the crop.

In *Aetna Life Insurance Co. v. Satterlee*, 475 N.W.2d 569, 572 (S.D. 1991), this Court held that a party who claimed an interest in property in foreclosure would have been unjustly enriched if allowed to have the proceeds of a crop planted by the mortgagee during the redemption period. "To allow Kirby to claim the crop after Aetna had planted and harvested would be unjust enrichment and contrary to the agreement between the

parties," which provided that Aetna could use the property during the redemption period. *Id*. *See also Kistler v. Stoddard*, 688 S.W.2d 746, 747 (Ark. Ct. App. 1985) (buyer of property planted by previous tenant would be unjustly enriched if allowed to harvest the crop even though buyer owned the crop and previous tenant had no legal or equitable claim to the crop). Here, the circuit court agreed that Dowling received a benefit, but concluded that the amount of the benefit should be measured by what Dowling's inputs would have been, not Clement's. (App. 46.) That issue, however, is separate from whether Dowling received a benefit, and is addressed below.

2. Dowling was aware of the benefit

Dowling was aware of the benefit. He was ignorant neither that he was receiving income from a crop that was planted at someone else's expense, nor that Midland Farms demanded reimbursement for the planting expenses. The circuit court, however, used a different standard in considering this element, and concluded that because Dowling objected to Clement's possession and therefore to Clement planting the winter wheat in the fall of 2012, the benefit was without Dowling's consent. (App. 47.) Not only is that not the standard, but it fundamentally confuses the issue. Dowling had a choice when he was restored to possession in March, 2012: he could accept or reject the crop that had been planted. He could have immediately sprayed it with chemicals to burn it down, he could have demanded that Midland Farms remove the crop, or he could have refused to seek a crop insurance indemnity payment. Instead, he accepted the benefit of the crop.

The court's opinion concludes that Midland Farms wrongly focused on the revenue that Dowling received from the winter wheat because it was income that he would have been entitled to had there been no breach of contract. (*Id.*) But Midland Farms did not seek recovery of Dowling's income from the crop, it sought recovery of the expense of planting the crop. Moreover, it is simply wrong to say that, as in *Hofeldt*, Dowling "only received what he would have received had [Midland Farms] acted diligently in the beginning." *Hofeldt*, ¶ 18, 658 N.W.2d at 789. Had there been no breach of contract, Dowling would have realized revenue from the planted acres, but he also would have incurred the expense of planting the winter wheat. Thus, the result of the circuit court's decision denying recovery based on unjust enrichment is to place Dowling in a better position than if there had been no breach of contract. Equity does not require, and should not sanction, that result.

3. It would be inequitable for Dowling to retain the benefit

Not recognizing that denying relief placed Dowling in a better position than if there had been no breach of contract, the circuit court concluded that Dowling was not *unjustly* enriched and that it would be inequitable to allow recovery to Midland Farms after it breached the 2011 lease. (App. 47.) As support for this conclusion, the court concluded that Dowling "had to endure protracted litigation with accompanying legal fees to regain lawful full possession of the property, not to mention the emotional toll and stress associated with multiple depositions and a court trial." (*Id.*) The court's opinion

cites no authority for the proposition that "these intangibles" (*id.*) are relevant factors in balancing the equities.

To the contrary, the costs and emotional toll of litigation are not compensable. Both the state and federal cases reflect the view that because anxiety is an unavoidable consequence of the litigation process, it does not form a separate basis for recovery against one's opponent. *See Stoleson v. United States*, 708 F.2d 1217, 1223 (7th Cir. 1983). Attorney fees are not recoverable under South Dakota law unless provided by contract or statute. SDCL § 15-17-38. Not only does no authority support the circuit court's reliance on the costs and emotional toll of litigation as a basis for denying equitable relief, but there was no evidence presented at trial on this issue. Dowling did not testify to litigation-induced anxiety, and there was no evidence of his fee arrangement with his lawyers.

In balancing the equities, the circuit court should have considered that the denial of equitable relief places Dowling in a better position than if there had been no breach of contract. The decision in *Hofeldt* does not require a different result. There, the party denied unjust enrichment "only received what he would have received had Hofeldt acted diligently in the beginning. The only arguable unjust enrichment is the benefit of having Hofeldt pay the taxes over the years." 2003 S.D. 25, ¶ 18, 658 N.W.2d at 789. Here, Dowling received much more than he would have had there been no breach of the 2011

lease, and there is no question that he was enriched to the extent of the cost of planting the crop from which he derived over $2.6 million in income.

d. Amount of recovery

The measure of unjust enrichment is the value of the benefit to the person receiving it rather than the cost to the person providing it. *Johnson v. Larson*, 2010 S.D. 20, ¶ 15, 779 N.W.2d 412, 418. The reasonable cost of the services provided may, however, be evidence of the value of the benefit conferred. *Id.*

While the cost of planting the winter wheat is a fair measure of the benefit conferred on Dowling, he testified at trial that his cost to plant would have been less than Clement's because he had obtained seed at a lower price; he did not have the same transportation expense; he fertilized differently; he could plant it cheaper; and he did not have tendering expense. (Tr. at 122-25.) The circuit court asked Dowling to submit evidence of his own costs to plant 12,226 acres of winter wheat, and he claimed a cost of $586,627. (Ex. 51 (App. 138).) Dowling's expense, however, did not include any management expense, which Dowling's own testimony established was 10% of total revenue, or $265,181 for 12,226 acres. (Tr. at 308-09; Ex. PP (App. 137).) Thus, the reasonable cost for Dowling to have planted 12,226 acres of winter wheat, based on his own testimony, was $851,808. This amount is consistent with Clement's actual expense, adjusted to reflect Dowling's own seed cost, of $843,538.73. (Ex. KK (App. 97).)

If the Court concludes that Midland Farms was entitled to recover on its claim for unjust enrichment, the Court could remand for determination of the amount, or, given the clear record, it could direct entry of judgment based on Dowling's own testimony, for $851,808. An award should also include prejudgment interest from July 5, 2013, which is the date that Midland Farms reimbursed Clement Farms for the expense of planting the winter wheat.

2. Midland Farms did not breach the 2011 lease

a. Standard of review

The "[e]xistence of a contract is a question of law." *LaMore Rest. Grp., LLC v. Akers*, 2008 S.D. 32, ¶ 12, 748 N.W.2d 756, 761. Contract interpretation presents a question of law. *Roseth v. Roseth*, 2013 S.D. 27, ¶ 13, 829 N.W.2d 136, 142. Whether a contract is ambiguous is a question of law. *Id.* Whether an oral agreement is barred by the statute of frauds is also a question of law. *See*, *e.g.*, *Rupert v. City of Rapid City*, 2013 S.D. 13, ¶ 32, 827 N.W.2d 55, 67 (construction and application of statute to facts present questions of law).

b. The 2011 lease provision was not an option

The 2011 lease included the following provision in paragraph 3, relating to the term of the lease: "Landlord will give Tenant option to rent leased premises for the 2013, 2014 and 2015 crop years. Terms and conditions to be agreed to by Landlord and Tenant." (Ex. 1, ¶ 3 (App. 59).) Despite use of the word "option," this provision does

not create an option agreement. "An option contract is an irrevocable offer by the owner to sell on specified terms and creates a power of acceptance in the optionee." *Advanced Recycling Sys., LLC v. Se. Prop. Ltd. P'ship*, 2010 S.D. 70, ¶ 12, 787 N.W.2d 778, 783. An option is by definition "a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer." RESTATEMENT (SECOND) OF CONTRACTS § 25. To meet the requirements of a contract, a manifestation of intent "cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain." *Id.* § 33(1). The 2011 lease does not contain reasonably certain terms of a multi-year lease going forward. It states that the terms and conditions of a future lease must be agreed to by the parties, which precludes the provision from constituting an enforceable option contract. In the words of the Restatement, "[w]here the parties manifest an intention not to be bound unless the amount of money to be paid by one of them is fixed or agreed and it is not fixed or agreed there is no contract." *Id.* § 33 cmt. e. In the words of this Court, "[i]f an agreement leaves open essential terms and calls for the parties to agree to agree and negotiate in the future on essential terms, then a contract is not established." *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 23, 714 N.W.2d 884, 892. The provision here does not include *any terms* for a lease covering the 2013, 2014, and 2015 crop years. It is therefore not an enforceable option contract.

The circuit court's findings and conclusions dated March 12, 2013, recite this Court's definition of an option contract (Findings & Conclusions, ¶ 8 (App. 15)), but state

that "[t]he fact that the parties intended that the terms of their agreement be formalized in a new written lease does not mean that they had not reached an agreement as to the essential terms." (*Id.* ¶ 7 (citing *Amdahl v. Lowe*, 471 N.W.2d 770, 775 (S.D. 1991)).) That is a fair statement of the law, but it cannot be applied to the facts of this case. In other words, the statement with reference to *Amdahl* makes sense in the context of that case, but it makes no sense here.

In *Amdahl*, the parties negotiated for the sale of farmland and signed a document stating that the seller would sell 880 acres for $210,000, with final payment due on November 1, 1989: "Terms of Agreement have been mutually agreed to by both parties. Contract drawn up as soon as possible." *Id.* at 772. Referring to the first quoted sentence, this Court noted that "[t]hese words are indicative of a completed agreement, and do not establish that there are material details upon which the parties have not yet reached agreement." *Id.* at 775. Referring to the second quoted sentence, this Court stated that it "merely indicates that the terms of the agreement will be formalized in a written contract." *Id.* The lease here, by contrast, expressly states that the parties had not agreed on essential terms of a new lease, and would have to agree in the future. The circuit court's reliance on *Amdahl* could not be more inapposite.

c. The lease provision was not ambiguous

The circuit court also concluded that the provision was ambiguous. (Findings & Conclusions, ¶¶ 10-13 (App. 16).) The court's decision states that a contract is

ambiguous if it is capable of more than one meaning, and that ambiguity must be construed against the drafter, but it does not explain why the agreement is ambiguous. (*Id.*) "The court concludes that the option clause as written in paragraph 3 of the 2011 Lease is ambiguous." (*Id.* ¶ 13 (App. 16).) This mere conclusion is not supported by the evidence.

Contractual language is ambiguous if it can be understood in more than one way "when viewed objectively by a reasonably intelligent person who has examined the context" of the entire agreement. *Estate of Fisher v. Fisher*, 2002 S.D. 62, ¶ 12, 645 N.W.2d 841, 845. The language "[t]erms and conditions to be agreed to by Landlord and Tenant" is not ambiguous. It is a clear statement that the parties would have to agree in the future to terms of the lease. The language "Landlord will give Tenant option to rent leased premises for the 2013, 2014 and 2015 crop year" is not ambiguous. It is a statement that Midland Farms would discuss with Dowling leasing the property for an additional three years when the lease terminated. The term "option" cannot mean a legally enforceable option contract, as explained above, so it must be understood in the vernacular–Midland Farms would ask Dowling whether he wanted to lease the property for three additional years. If so, then the parties would have to negotiate the terms of the lease. DeMott did ask Dowling if he wanted to lease the property and the parties negotiated. That satisfied the contract, but it did not result in a binding agreement.

Whether the language is ambiguous must be determined from the agreement itself, not from parole or extrinsic evidence, and not based on the subjective intent of the parties. "A contract is not rendered ambiguous simply because the parties do not agree on its proper construction or their intent upon executing the contract." *Id*. Unless the agreement is ambiguous on its face, parole or extrinsic evidence cannot be considered. "It is a long standing principle that '[p]arole or extrinsic evidence may not be admitted to vary the terms of a written instrument or to add to or detract from the writing.'" *LaMore*, 2008 S.D. 32, ¶ 30, 748 N.W.2d at 764. Extrinsic evidence can be considered only to explain an ambiguous agreement. Thus, the Court erred in considering extrinsic evidence to determine that the lease provision was an enforceable option. (SR 776, ¶ 20 ("The court concludes that the essential elements of an enforceable option contract are present in the 2011 Lease, as further interpreted by the parole or extrinsic evidence in the record as set forth above.").)

Midland Farms told Dowling that he would be asked whether he wanted to enter into a new multi-year lease at the conclusion of the 2011 lease, and, if he did, then the parties would have to negotiate terms. The second sentence of the provision is nothing more than an agreement to negotiate. It is indefinite and therefore unenforceable, *Estate of Fisher*, 2002 S.D. 62, ¶ 18, 645 N.W.2d at 847, but that does not make it ambiguous.

d. The lease provision was not a right of first refusal

It is unclear whether, by relying on ambiguity and extrinsic evidence, the circuit court concluded that the lease provision was a right of first refusal, but it is clear from the findings and conclusions that the court considered Scott DeMott's testimony in which he characterized the lease provision as a right of first refusal. (Findings & Conclusions, ¶ 16 (App. 17).) Even if construed as a right of first refusal, however, the lease provision would still not be legally enforceable.

"A right of first refusal is a conditional and presumptive right." *Advanced Recycling Sys.*, 2010 S.D. 70, ¶ 13, 787 N.W.2d at 783. "It requires the owner, when he receives a third-party offer to purchase the premises subject to the right of first refusal and manifests an intention or desire to sell on those terms, to offer the property first to the holder of the right *on the same terms as the third-party offer*." *Id.* "[A] right of first refusal ripens into an option contract when the owner receives the third-party offer and manifests an intention to sell on those terms." *Id.* "If the owner does not offer the property to the holder of the right of first refusal on the same terms as the third-party offer, he breaches an enforceable option contract." *Id.*, 787 N.W.2d at 784.

In *Advanced Recycling Systems*, the lease provided a tenant with the right of first refusal to purchase the leased premises in the event the landlord chose to sell. 2010 S.D. 70, ¶ 4, 787 N.W.2d at 781. However, the leased premises comprised only a portion of the landlord's development property. *Id.* It was undisputed that the right of first refusal applied only to the leased premises and not to the development as a whole. *Id.* The

landlord contracted to sell the development property, including the leased premises, to a third party. *Id.* ¶ 6, 787 N.W.2d at 782. The tenant sued, arguing that the landlord violated the right of first refusal by selling the development without first offering to sell the leased premises to the tenant. *Id.*¶ 8, 787 N.W.2d at 782.

The landlord argued that the majority of courts facing similar facts had held that "the owner of property does not violate a right of first refusal by selling a development, including leased premises subject to a right of first refusal, without first offering the leased premises to the holder of the right." *Id.*¶ 14, 787 N.W.2d at 784. This Court agreed, holding that the majority rule was consistent with the legal distinction between options and a right of first refusal. *Id.*¶ 15, 787 N.W.2d at 784. The Court's analysis was guided by general principles of contract law, including the rule that "'an acceptance must not change, add to, or qualify the terms of an offer' if there is to be a contract.'" *Id.* ¶ 16, 787 N.W.2d at 784 (quotation omitted). "A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance, but is a counteroffer." *Id.* (quotation omitted).

The tenant's right of first refusal could not ripen into an option contract because the tenant's right only extended to the leased premises. "The offer by [the third party] to purchase the development did not enlarge [the tenant's] right of first refusal." *Id.*¶ 18, 787 N.W.2d at 785. "Because [the tenant] could only accept an offer to purchase the leased premises, its acceptance necessarily would have changed, added to, or qualified the

terms of the offer to purchase the development." *Id.* Thus, the scope of the tenant's right of first refusal was too narrow to ripen into a valid option to purchase the development.

Like the tenant in *Advanced Recycling Systems*, Dowling's purported right of first refusal was too narrow to ripen into a valid option based on Midland Farms' subsequent transaction with Clement Farms. The 2011 lease was for approximately 29,012.36 gross acres, more or less. (Ex. 1 (App. 59).) The 2012 Lease between Midland Farms and Clement Farms is not identical to the 2011 Dowling Lease. (Ex. 2 (App. 77).) The rent is different, and the 2012 Clement Farms lease specifies security to secure payment of rent that the Dowling Lease did not provide and that Dowling never agreed to. Dowling agreed to nothing more than rent of $70/acre. Therefore, Dowling's "acceptance necessarily would have changed, added to, or qualified the terms of the offer" to lease the premises. *Advanced Recycling Systems*, 2010 S.D. 70, ¶ 18, 787 N.W.2d at 785.

3. The parties did not reach an enforceable oral agreement

Because the lease provision was not an enforceable option or a right of first refusal, it could not have been breached unless DeMott and Dowling had not even discussed a future lease. Thus, Dowling could not recover damages for breach of the 2011 lease, but only for breach of an alleged oral agreement to lease the property for the crop years 2013, 2014, and 2015. The problems with this position, however, are that Midland Farms and Dowling did not agree on all of the material terms of a multi-year lease, and they did not produce a written agreement to satisfy the statute of frauds.

To form an oral agreement, Midland Farms and Dowling had to agree on all material terms of an extended multi-year lease. *LaMore*, 2008 S.D. 32, ¶ 16, 748 N.W.2d at 761. The circuit court concluded that the parties agreed on "the material terms of this option contract, those being the contracting parties, the property at issue, the term of the new lease, and the rental price per acre." (Findings & Conclusions, ¶ 21 (App. 18).) The parties agreed on August 1 to rent of $70/acre, but Midland Farms also insisted upon an irrevocable letter of credit to secure the rent due each year on February 1, and they did not come to terms on this issue. DeMott told Dowling on July 25 that he needed a letter of credit to secure the 2012 rent "ASAP." (DeMott depo., Dec. 18, 2012, at 40 (SR 249).)[2] The annual rent was approximately $2,030,000, and if Dowling failed to pay the rent on February 1, it could be too late to secure a new tenant for the coming year. DeMott was concerned about timely future payments based on his conversations and dealings with Dowling, and his experience with the previous tenant. (Tr. at 532-33, 535-36.) Dowling and DeMott both testified to the fact that Midland Farms had an issue with its previous tenant, so it was an important issue to Midland Farms. (Dowling depo., Dec. 18, 2012, at 76 (SR 182); Tr. at 532-33.) Security for the rent was part of the previous Dowling leases and the Clement Farms lease. (Exs. 1, D, E, and 2.) DeMott also testified that Dowling had trouble making the lease payment due in the fall of 2011 based on the winter wheat

[2] Because the contract issue was resolved on summary judgment, the testimony at the court trial did not directly address the contract issues. Some of the record cites are therefore to deposition testimony.

he had planted, and that Dowling said he "had to pull a rabbit out of a hat" to make the payment. (DeMott depo., Dec. 18, 2012, at 40-41 (SR 248).) On these facts, the failure of the parties to agree on a provision to secure the rent with an irrevocable letter of credit establishes that they did not intend to be bound. *See* RESTATEMENT (SECOND) CONTRACTS § 33 (manifestation of intention understood as an offer cannot be accepted to form a contract unless the terms are reasonably certain); *LaMore*, 2008 S.D. 32, ¶ 17, 748 N.W.2d at 762 (defining a "material term" as a contractual term dealing with significant issues, such as "payment terms").

It is undisputed that the parties did not agree on this term. The circuit court made no finding citing to Dowling's testimony that he agreed to provide a letter of credit as of August 1 or anytime thereafter. In fact, Dowling testified at his deposition that he had not agreed to provide a letter of credit by any certain date because "it wasn't demanded of me," and "I have no lease that demands it of me." (Dowling depo., Dec. 18, 2012, at 102 (SR 188).) Ironically, Dowling hid behind the absence of a written agreement. The record does not contain evidence that the parties agreed on the amount of a letter of credit, when it had to be presented each year of the lease, or any other conditions for the letter of credit. Thus, the record is clear that there was no meeting of the minds.[3]

[3] The parties also failed to reach agreement on other material lease terms. When and how, for instance, does the current three-year lease end and how long can Dowling

Moreover, Scott DeMott testified at trial that after he told Dowling about Clement, the parties continued to negotiate over the terms of a one-year extension of the lease until the end of August, but negotiations ultimately failed because Dowling would not agree to provide an irrevocable letter of credit to secure the rent. (Tr. at 540-51.) The circuit court found only that there was no dispute that Dowling "had agreed to provide a guaranteed form of payment for the 2013 rent[.]" (Findings & Conclusions, ¶ 24 (App. 19).) This finding confirms that the parties had not agreed on the form of security for 2013, and that Dowling had not agreed to provide an irrevocable letter of credit for the rent due in 2014 or 2015. As the court's finding suggests, Dowling wanted to avoid the expense of a letter of credit, while Midland Farms insisted on a certain form of security.

The circuit court found that DeMott did not specify a date by which the letter of credit had to be provided, and the lease with Clement Farms dated September 21 provided that the letter of credit did not need to be provided until five days after the lease was executed (Findings & Conclusions, ¶ 23 (App. 19)), but this analysis ignores the fact that Dowling never agreed to provide a letter of credit for all three years of a future lease. The timing was secondary to an agreement that it would be provided. The circuit court also found that Dowling's banker testified after the fact that Dowling had the means to provide a letter of credit through his bank (Findings & Conclusions, ¶ 24 (App. 19)), but this testimony was contrary to Dowling's failure to agree contemporaneously to provide security for the rent on terms acceptable to Midland Farms. The circuit court's statement

that "there is no dispute over the fact that Dowling had agreed to provide a guaranteed form of payment for the 2013 rent" is clearly erroneous. (*Id.*) It is also insufficient, since Midland Farms demanded an irrevocable letter of credit for all three years of an extended lease. Notably, Clement Farms agreed to provide an irrevocable letter of credit, and the Clement Farms lease provided for a letter of credit for all three years of the lease. (Ex. 2, ¶ 6 (App. 78).) Clement Farms paid $3,500 for the letter of credit for the 2013 rent, and Midland Farms reimbursed that amount as part of the settlement with Clement Farms. (Ex. KK (App. 97).)

Absent agreement on the letter of credit, there was no oral agreement to extend the lease for three years.

4. There was no writing sufficient to satisfy the statute of frauds

"No agreement for the leasing of real property or an interest therein for a longer period than one year is valid unless the same, or some note or memorandum thereof, be in writing, signed by the lessor or his agent thereunto in writing." SDCL § 43-32-5. Similarly, SDCL § 53-8-2 provides that an "[a]greement for sale of real estate or an interest therein, or lease of the same, for a period longer than one year" is unenforceable "unless the contract or some memorandum thereof is in writing and subscribed by the party to be charged or his agent, as authorized in writing." To satisfy the statute of frauds, "the writing must contain all the material terms and conditions" of the agreement. *LaMore*, 2008 S.D. 32, ¶ 15, 748 N.W.2d at 761.

Dowling's own deposition testimony proves that there was no writing containing all the material terms and conditions of an extended lease. Dowling testified that he had not agreed to provide a letter of credit by a date certain because there was no writing requiring it. When asked when he intended to provide a letter of credit, Dowling answered: "I don't have any–I have no lease that demands it of me." (Dowling depo., Dec. 18, 2012, at 102 (SR 188).) When asked whether it was his "testimony that you were never told that you had to provide" a letter of credit, Dowling answered: "I have nothing that tells me I have to provide that." (*Id.* at 103.)

The circuit court concluded that a writing sufficient to satisfy the statute of frauds could be made up of more than one document, and ultimately relied on e-mails dated July 23, 2012, and August 6, 2012, to conclude that the statute of frauds was satisfied. (SR 778, 779-80, ¶¶ 28, 31-33.) The e-mail dated August 6, in which DeMott asked Dowling "what name do I use for you on our farm lease," is evidence that the process of entering into an agreement was ongoing, but it is not a writing evidencing price, the term of the lease, or the conditions necessary to secure the annual rent payment. Dowling's own testimony that he was not bound to provide a letter of credit because there was no writing requiring it proves that the statute of frauds was not satisfied.

Because there was no breach of the 2011 lease and no enforceable oral contract, the court's judgment dated March 19, 2013, should be reversed and Dowling's claims for breach of contract dismissed.

Conclusion

If the Court concludes that there was no breach of the 2011 lease and no binding oral agreement constituting a multi-year farm lease beginning in 2013, then Dowling's claims must be dismissed. Midland Farms' counterclaim for unjust enrichment is independent and would still have to be decided. Because Dowling was placed in a better position by Clement Farms planting the crop than if there had been no breach, he was unjustly enriched by retaining the benefit provided by Midland Farms. Midland Farms respectfully requests that the judgments be reversed.

Dated this 25th day of September, 2014.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

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Certificate of Compliance

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using WordPerfect X6, Times New Roman, Font 13, and contains 9,707 words, excluding

the table of contents, table of cases, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 25th day of September, 2014.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore
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Certificate of Service

I hereby certify that on the 25th day of September, 2014, I sent by United States first-class mail, postage prepaid, two true and correct copies of the foregoing Appellants' Brief, to the following:

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Appendix

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27114

DOWLING FAMILY PARTNERSHIP;
DOWLING BROTHERS PARTNERSHIP,

Appellees,

v.

MIDLAND FARMS, LLC,

Appellant,

LANNY DEMOTT,

Defendant.

Appeal from the Circuit Court
Sixth Judicial Circuit
Haakon County, South Dakota

THE HONORABLE PATRICIA DEVANEY
CIRCUIT COURT JUDGE

APPELLEES' BRIEF

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Notice of Appeal filed June 19, 2014

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JURISDICTIONAL STATEMENT

This case involves a dispute between a tenant and a landlord. Initially there was an issue of whether the tenant exercised his option for a three year extension of the lease. The landlord, Midland Farms, appeals from an Order dated May 19, 2014, in favor of the tenant (Dowling Family Partnership and Dowling Brothers Partnership) (Dowling) in exercising his option to lease a farm. (SR 787). Landlord Midland Farms also appeals from a Judgment dated May 19, 2013 in which the Court entered a judgment against Midland Farms on its counterclaim for unjust enrichment. (SR 1231).

Midland filed a Notice of Appeal on June 13, 2014. Dowling withdrew his Notice of Appeal dated July 1, 2014.

STATEMENT OF THE ISSUES

1. Did Midland Farms breach a contract with Dowling to farm the Midland property for 2013, 2014 and the 2015 crop years.

SDCL §53-1-2
Jacobson v. Gulbransen, 2001 S.D. 33 ¶ 22, 623 N.W. 2d 84, 90
Amdahl v. Lowe, 471 N.W. 2d 770, 775 (S.D. 1991)
Advanced Recycling Systems, LLC v. Southeast Properties Limited Partnership, 2010 S.D. 70, ¶ 12, 787 N.W.2d 778, 783
LaMore Restaurant Group, LLC v. Akers, 2008 S.D. 32 ¶ 30, 748 N.W. 2d 756, 764
Roseth v. Roseth, 2013 S.D. 27 ¶ 13, 829 N.W. 2d 136, 142
All Star Construction Company, Inc., v. Koehn, 2007 S.D. 111, ¶ 38, 741 N.W. 2d, 736, 744
Spiska Engineering, Inc., v. SPM Therm-Shield, Inc., 2007 S.D. 31, ¶ 24, 730 N.W. 2d 638, 645
Tolle v. Lev, 2011 S.D. 65, ¶ 17, 804 N.W. 2d 440, 446
Drake v. Sample, 279 N.W. 2d 685, 689 (S.D. 1979)
Wiggens v. Shewmake, 374 N.W. 2d 111, 115-116 (S.D. 1985)
SDCL§43-32-5
SDCL§53-8-2

Northstream Investments, Inc., v. 1804 Country Store Company, 2007 S.D. 93, ¶¶ 13-14, 739 N.W. 2d 44, 48-49
Jacobson v. Gulbransen, 2001 S.D. 33, 623 N.W. 2d 83
Shaw v. George, 141 N.W. 2d 405 (S.D. 1966)
Deadwood Lodge No. 508 v. Albert, 319 N.W. 2d 823 (S.D. 1982)
Vander Heide v. Boke Ranch, Inc., 207 S.D. 69, ¶ 28, 736 N.W. 2d 824, 834

2. Did the trial court err in concluding that Midland Farms did not sustain its burden of showing that Dowling was unjustly enriched.

Hofeldt v. Mehling, 2003 S.D. 25, ¶¶ 9, 14, 658 N.W. 2d 783, 786-87, 788.
Parker v. Western Dakota Insurers, 200 S.D. 14, ¶ 17, 605 N.W.2d 181, 187
Restatement of Restitution
Talley v. Talley, 1997 S.D. 88, 566 N.W.2d
Kane v. Schnitzler, 376 N.W.2d 337, 341 (S.D. 1985)
Aetna Life Insurance Company v. Satterle, et al, 475 N.W.2d 563 (S.D. 1991)

STATEMENT OF THE CASE AND FACTS

This action arose in the Sixth Judicial Circuit, State of South Dakota, Haakon County, before the Honorable Judge Patricia J. DeVaney. This appeal involves a claim for a breach of an option provision in a farm lease and an equitable claim for unjust enrichment. Midland Farms was the landlord and Scott Dowling was the tenant farmer. Midland brought an action for forcible entry and detainer (SR 1-15). Dowling filed a Complaint alleging breach of contract and requesting money damages and equitable relief. (Civ. 12-26). The two actions were consolidated (SR 65). Dowling claimed he had exercised an option to rent the Midland farm for the 2013, 2014 and 2015 crop years. Midland denied there was an extension of the lease and had Dowling removed from the property.

Both sides made motions for summary judgment. One issue was not ripe for adjudication and was reserved. The parties supplemented the summary judgment record

with a stipulation of facts including all of the deposition discovery (SR 763). The Court entered Findings of Fact and Conclusions of Law dated March 14, 2013 wherein the Court found that Dowling had an option to renew the farm lease and that Midland Farms had breached the lease in August of 2012. (Appellees' Brief dated November 10, 2014, Appellee App 7-24) (hereinafter Appellee App ___). The Court entered Judgment on March 19, 2013 "that an enforceable contract exists between the parties in this matter and that Dowling has lawfully exercised the right to lease the Midland Farm's property described in the 2011 lease for the 2013, 2014 and 2015 crop years at the rate of $70 per aces." (Appellee App 5-6).

The remaining claims were Dowling's claim for damages due to breach of the lease and Midland's counterclaim for unjust enrichment. The case was tried on February 19-21, and March 12, 2014. The Court issued a Memorandum Decision dated April 16, 2014 finding that Dowling had not proven damages under the breach of contract and that Midland Farms was not entitled to recover on its equitable claim for unjust enrichment. (Appellee App 25-58). The Court entered Judgment on May 19, 2014 on the claims that were tried. (Appellee App 1-2). This appeal followed.

FACTUAL BACKGROUND

a. The Parties

The Dowling Family Partnership and Dowling Brothers Partnership, hereinafter (Dowling Partnerships or Dowling), originally leased farm ground in Haakon and Stanley County from Midland Farms (hereinafter Midland) for the crop years of 2009 and 2010. Scott DeMott (hereinafter DeMott) was at all relevant times a managing member of an

investment group called Midland Farms. (Scott DeMott 12/18/12 Depo. 14:17-21, Appellee App 120). Scott Dowling was at all relevant times the managing partner in the Dowling Partnerships. (Scott Dowling 12/18/12 Depo. p. 16, Appellee App 108).

Scott Dowling grew up in the Draper, South Dakota area. He has farmed all of his life. Over the years Dowling's brother, Tracy, and he formed Dowling Family Partnership and Dowling Brothers Partnership to continue their farming and cattle operation. In 2013 the two brothers dissolved their partnerships with Scott and his wife staying involved in the farming side and Tracy and his wife continuing with livestock and to a lesser extent farming.

Midland was a limited liability company formed in 2008 to invest in the purchase of a 33,000 acres farm located in Haakon and Stanley Counties. Scott DeMott was a managing partner in Midland Farms. (Scott DeMott 12/18/12 Depo. p. 17, Appellee App 121). DeMott is an insurance agent and farm owner who lives in Little Rock, Arkansas. The other members of Midland live in Iowa, Illinois and South Dakota. They are passive investors.

b. **Farming Relationship**

The parties executed two leases for the year 2010. One lease was a Crop Share Farm Lease for approximately 13,384 gross acres. The other was a Cash Farm Lease for approximately 15,725.5 gross acres. (FOF 4, Appellee App 8).

The following year, on January 19, 2011, Midland and Dowling entered into a Cash Farm Lease (hereinafter Lease) for approximately 29,012.36 gross acres, more or less. Under paragraph 3 of that lease it states:

> Landlord will give tenant *option to rent* leased premises for the 2013, 2014 and 2015 crop year. *Terms and conditions to be agreed by the landlord and tenant.* (FOF 5, Appellee App 9, 59).

(Trial Exhibit 1, Appellee App 59).

The cash rent was $55 per acre. Dowling paid his rent and farmed the property for the 2011 and 2012 crop years without incident.

Dowling had intended to plant the entire 29,000 acres into winter wheat for the 2013 crop year. That planting would have to be accomplished in the fall of 2012.

c. **Lease Option for 2013, 2014 and 2014 Crop Years**

In April of 2012, Dowling and DeMott discussed whether Dowling was going to lease the property beyond the 2012 crop year. DeMott called Dowling and stated "you have the first right of refusal to rent. Do you want to rent it in the future?" (FOF 6, Appellee App 9). After Dowling indicated that he would at the same price ($55 per acre), DeMott said "we gave you the first right of refusal for the lease. We are going to market this because we think we have other – because we have other options to look at." (FOF 6, Appellee App 9).

The rental payment of $55 per acre was not acceptable to Midland, which was conveyed by Scott DeMott to Scott Dowling in an email dated July 23, 2012. (FOF 7, Appellee App 9; Scott DeMott 12/18/12 Depo. 38-39:4, Appellee App 122-123; and Depo. Ex. 3, Appellee App 97). DeMott sent an email to Dowling on July 23, 2012 which stated:

> "Also per paragraph 3 Midland Farms has given you the option to lease our farm for 2013, 2014 and 2015 crop years per phone conversations with me at the end of April 2012. You indicated you would rent the farm with the same expiring cash

> rent of $55 per acre. Midland Farms is not accepting this offer. We have other qualified interested parties willing to lease our farm, if you have any serious interest in renting all or part of Midland Farms, contact us by August 1, 2012. I will be at the farm Headquarters this Wednesday afternoon, July 25 if you want to discuss in person." (FOF 8, Appellee App 9; Scott DeMott 12/1812 Depo. Ex. 3, Appellee App 97).

At the 1880 Town on July 25th, Dowling asked DeMott, "what do I got to do to match the rent?" DeMott responded, "$70 an acre and an irrevocable letter of credit for the full amount ASAP. Plus we will not need to bill you the $10 an acre payment of the winter wheat you plant this fall." (Scott DeMott 12/18/12 Depo. 40, Appellee App 124). Dowling agreed that the price was set at $70 per acre and that an irrevocable letter of credit was discussed, but did not recall a deadline for providing an irrevocable letter of credit. (Scott Dowling 12/18/12 Depo. 94-95, 105, Appellee App 109, 110 &111; FOF 10, Appellee App 10).

On August 1, 2012, Scott Dowling called Scott DeMott and told him he would accept the offer and pay the $70 per acre for the 2013, 2014 and 2015 crop years. (Scott Dowling 12/18/12 Depo. 94-95, Appellee App 109-110; Scott DeMott 12/18/12 Depo. 45-46, Appellee App 125-126). DeMott agreed. Scott DeMott stating that "I offered $70. He took it." Dowling said "I'll do the deal." (FOF 15, Appellee App 11).

The Court found by a preponderance of the evidence that when Scott Dowling communicated his consent to the proposed terms of August 1, 2012, the parties reached a meeting of the minds on all essential terms of the contract. (FOF 16, Appellee App 11).

On August 6, 2012, DeMott confirmed the existence of the contract when he sent an email to Dowling stating "what name do I use for you on our farm lease?" (FOF 17,

Appellee App 11; Scott DeMott 12/18/12 Depo. Ex. 5, Appellee App 98).

On the evening of August 8, 2012, DeMott called Dowling and told him that Midland had sold the farm to Clement Farms, (hereinafter Clement). (FOF 18, Appellee App 11; Scott DeMott 12/18/12 Depo. 47:18 - 48:7, Appellee App 127-128). This was the first that Dowling had heard of Clement Farms.

On the following morning of August 9, 2012, Dowling sent an email to DeMott advising him that after meeting with his banker, the tenant name on the Midland Lease for 2013, 2014 and 2015 should be Dowling Farms Partnership – Scott and Janet Dowling. (FOF 19, Appellee App 11; Scott DeMott 12/18/12 Depo. Ex. 7, Appellee App 99). Later that same day Dowling sent another email to DeMott stating that the prior email was incorrect and that the correct name for the lease is "Dowling Family Partnership and Dowling Brothers Partnership of 23547 281st Avenue, Draper, South Dakota 57531, also known as tenant for 2013, 2014 and 2015 lease term with Midland Farms, LLC of 14809 Seasalt Drive, Little Rock, Arkansas 72223 on the extension we agreed to in our prior emails, telephone calls, and personal meeting at $70 per acre times the total acres." (FOF 19, Appellee App 11; Scott DeMott 12/18/12 Depo. Ex. 8, Appellee App 100).

Based on the August 1, 2012 telephone conversation, when Dowling accepted DeMott's offer to lease the farm for 2013, 2014 and 2015 crop years, Dowling entered into a contract on August 3, 2012 to purchase a new sprayer costing $324,000. (Scott Dowling 12/18/12 Depo. 130:20-23, Appellee App 113; FOF 20, Appellee App 12). Dowling also began harrowing the Midland Farms property in the first part of August at a

cost of $46,000. (FOF 20, Appellee App 20; Scott Dowling 12/18/12 Depo. pp.135-136, Appellee App114-115).

DeMott, on behalf of Midland had reached a verbal agreement for Conrad Clement to purchase Midland for $42 Million Dollars. As part of the purchase package, Clement wanted to farm the Midland property himself. (Scott DeMott 12/18/12 Depo. p. 51, Appellee App 129). The Midland investors had paid around $26,650,000 Million Dollars for the farmland in March of 2008. (Lanny DeMott 12/18/12 Depo. p. 16, Appellee App 132). Midland stood to make a large profit on their investment.

Conrad Clement was an Iowa businessman with various interests. He claimed to have owned and sold 226 farms over the years. (Clement Depo. 7:20-25, Appellee App 134). Midland's quandary was that Clement wanted to put his own farming operation on the Midland property but Dowling had already exercised his option to farm the property for 2013, 2014 and the 2015 crop year.

When Dowling first began farming the Midland property, the farm had been neglected. It was overrun with weeds and was under fertilized. Midland's prior tenant had gone through bankruptcy. He had not properly fertilized nor maintained weed control on the property.

Dowling had the Midland farm mapped for soil types. (Scott Dowling 12/18/12 Depo. p. 118, Appellee App 112). Dowling utilized nontill farming practices and a sophisticated fertilizing regime. Midland Farm became much more productive and achieved a much higher soil profile with Dowling's farm practices. Because Dowling had invested large amounts in Midland Farm, he exercised his option to continue farming the

Midland Farm.

Midland served a Three Day Notice to Quit and Vacate on Dowling on August 17, 2012. A four day Summons and Complaint Forcible Entry and Detainer was also filed shortly thereafter. Dowling was forced from the farm in August of 2012. (Scott Dowling 2/3/14 Depo. 15:22-16:7, Appellee App 117-118). He could not set foot on the farm other than to tend to his sunflower crop still in the field and to attend to the storage bins which held his wheat.

There had been some negotiations after August 1, 2012, wherein Midland offered to lease its farm to Dowling for one year only. (Appellee App 12). Dowling refused and maintained that he had a valid option to rent the Midland farm for 2013, 2014 and 2015 crop years. Although Dowling had harrowed the farm land ($46,000) and had applied fertilizer ($605,866) in the summer of 2012, he was excluded from the land from August 2012 to March of 2013.

d. **Clement Farms The Land**

Clement planted winter wheat on the farm in the fall of 2012. Clement only planted 12, 269 acres of the farm which was a fraction of the farmland. (Appellee App 29). He ran out of wheat seed to plant. When Clement ran out of wheat seed he left a "Doughnut Hole" in the middle of the wheat field of approximately 1,807.5 acres. (Court's Decision April 16, 2014 p. 4 (hereinafter Ct. Dec.; Appellee App 28). Quality wheat seed was scarce when Clement began planting. He had to truck much of the wheat seed that he purchased from Montana. Clement also did not properly fertilize the field.

There was a trial to the court based upon the stipulated depositions with attached

exhibits and documents. The Court entered Findings of Fact and Conclusions of Law dated March 12, 2013. (Appellee App 7-24). The Court found that Dowling had exercised his option to lease the Midland Farms property for 2013, 2014 and 2015 crop years at $70 per acre. (COL 18, Appellee App 24).

After the Court's ruling, Dowling paid rent in the amount of $2,030,865.20 on March 18, 2013. The rent covered the entire 2013 crop year. After March 18, 2013, Dowling was entitled to reenter the land.

When Dowling reentered the farm, the winter wheat planted by Clement was in poor shape. It was a dry year. Also the wheat needed an immediate application of fertilizer. Dowling had fertilizer applied by air at a cost of $605,866.27. Dowling discovered during fertilizing that the middle of the wheat field had not been planted by Clement. (Doughnut Hole).

Both Dowling and Clement had purchased crop insurance on the crop in the field. The weather conditions had been quite dry late into the spring. Because of the Court's ruling that Dowling had possession of the property, Dowling felt in late April of 2013 that he had a meritorious claim on his crop insurance. But, Clement also claimed that he had the meritorious claim for crop insurance. The chaos caused by Clement's conflicting insurance claim caused uncertainty as to what could be done with the wheat crop in the field. Nothing was done with the crop until the summer of 2013 when some of the crop was cut for hay and some of it was harvested. Finally it was decided by federal crop insurance authorities that Dowling had the proper insurable interest.

In June of 2013 it began to rain and Dowling decided to let some of the acres go

to harvest and hay the rest. The rainy weather in June delayed the haying process and it was not completed until sometime in July, 2013. Dowling was not able to plant a second crop as he had originally intended. In the end, the Court ruled that "the more likely reason that Dowling did not get his second crop planted on the acres depicted in gold was the rainy June weather." (Ct. Dec. p. 19, Appellee App 43).

After the court ruled that Dowling was entitled to the three year lease, Clement and Midland argued and wrangled over the amount of Clement's input costs that Midland would pay as reimbursement to Clement under their lease. (Appellee App 78). Midland and Clement finally agreed on July 3, 2013, that Midland would pay Clement $1,187,500.00 for his input costs, inconvenience plus other unspecified expenses. (Trial Exhibit 6, Appellee App 101-105).

Clement's claimed input costs were only a portion of the input costs for the winter wheat crop at issue. Dowling paid for the initial harrowing and chemical burn down costs as well as the costs of fertilizer, spraying weeds, harvesting, trucking, insurance and rent payments associated with the crop. (Ct. Dec. p. 22, Appellee App 46).

The Court found that Dowling was aware that Clement was planting the winter wheat crop. Dowling did not consider it to be a "benefit" as he was adamantly opposed to Clement planting the crop and made both Clement and Midland aware of his opposition. Any claimed benefit conferred to Dowling was without his consent. (Ct. Dec. p. 23, Appellee App 47).

The Court found that Clement's claimed input costs for seed, custom drilling and tendering were considerably higher than what these costs would have been had Dowling

been the one planting the winter wheat. (Ct. Dec. P. 22, Appellee App 46).

The Court concluded that the cost and income figures showed that Dowling lost money on the 2013 crop. The amount received in sale of the crop plus insurance did not equal the cost of planting, fertilizing, harvesting and sale of the wheat. (Ct. Dec. pp. 13-14, Appellee App 37-38). Consequently, the Court ruled that Dowling had no damages for breach of contract by Midland because "the more acres planted to winter wheat, the greater the net loss to Dowling on this crop." (Ct. Dec. p. 14, Appellee App 38). If Dowling had been allowed to farm the rest of the farm in 2013, he would only have lost more money. In the end Dowling's income for the 2013 crop did not exceed the total amount of Clement and Dowling's in producing a crop.

Following the two trials to the Court, Midland appealed the Finding of Fact and Conclusions of Law of March 14, 2013 and the Trial Decision of April 16, 2014.

ARGUMENT

1. Breach of Contract

a. Standard of Review

The existence of a contract is a question of law LaMore Rest. Grp. LLC v. Akers, 2008 S.D. 32 ¶ 12, 748 N.W. 2d 756, 761. Contract interpretation presents a question of law. Roseth v. Roseth, 2013 S.D. 27 ¶ 13, 829 N.W. 2d 136, 142. Whether a contract is ambiguous is a question of law. Id.

The parties stipulated to the facts contained in depositions together with exhibits in the stipulation dated February 27, 2013. The Court issued its Decision in Findings of Fact (FOF) and Conclusions of Law (COL) filed with Court on March 14, 2013.

b. **Elements of Contract**

The essential elements of the existence of a contract are (a) parties capable of contracting; (b) their consent; (c) a lawful object; and (d) sufficient consideration. SDCL §53-1-2. In order for a contract to exist there must be a meeting of the minds on all essential terms. Jacobson v. Gulbransen, 2001 S.D. 33 ¶ 22, 623 N.W. 2d 84, 90.

The fact that the parties intended that the terms of their agreement be formalized in a new written lease does not mean that they had not reached an agreement as to the essential terms. Amdahl v. Lowe, 471 N.W. 2d 770, 775 (S.D. 1991).

An option to lease real property is defined as a contract by which the Lessor of real property agrees with the Lessee that the latter shall have the right to lease the property at his election within an agreed period of time at a named price. An option contract is an irrevocable offer by the owner to lease on specified terms and creates a power of acceptance in the optionee. The option is exercised when the Optionee accepts the irrevocable offer and an enforcement contract is created. Advanced Recycling Systems, LLC v. Southeast Properties Limited Partnership, 2010 S.D. 70, ¶ 12, 787 N.W.2d 778, 783.

c. **Right of First Refusal**

Dowling was given a right of first refusal to lease the land for the crop years of 2013, 2014 and 2015. (FOF 6, Appellee App 9). A right of first refusal is a conditional and presumptive right which requires an owner, when he receives a third party offer to lease the premises subject to the right of the first refusal and manifests an intention to lease on those terms, to offer the lease terms first to the holder of the right on the same

terms as the third party offer. The right of first refusal ripens into an option contract when the owner receives the third party offer and manifests an intention to lease on those terms. Advanced Recycling Systems, supra at ¶ 13. (COL 9, Appellee App 15).

In interpreting a contract, the Court must give the affect to the plain meanings of the words of the entire contract. If the contract terms are uncertain or ambiguous then parole or extrinsic evidence can be used for clarification, as can customs or usages, in order to clarify the uncertain or ambiguous terms. LaMore Restaurant Group, LLC v. Akers, 2008 S.D. 32 ¶ 30, 748 N.W. 2d 756, 764.

d. **Ambiguous Contract**

A contract is ambiguous if it is capable of more than one meaning by an objective and reasonable person. LaMore, 2008 S.D. 32, ¶ 31, 748 N.W. 2d at 765. Any ambiguity in the contract is interpreted against the party who drafted the contract. All Star Construction Company, Inc., v. Koehn, 2007 S.D. 111, ¶ 38, 741 N.W. 2d, 736, 744. According to the 2011 lease, the drafting party is Scott DeMott, as manager of Midland Farms. (COL 11, Appellee App 16).

An interpretation of a contract which gives a reasonable and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable or of no effect. Spiska Engineering, Inc., v. SPM Therm-Shield, Inc., 2007 S.D. 31, ¶ 24, 730 N.W. 2d 638, 645.

In the instant action, the Court concluded that the option clause as written in paragraph 3 of the 2011 Lease was ambiguous. It then became necessary to look to parole or extrinsic evidence to interpret the meaning of the clause. (COL 13, Appellee

App 16). The parole or extrinsic evidence available to the court to further interpret the option clause included the testimony of Scott DeMott and Scott Dowling regarding the interpretations of the clause and the subsequent actions and communications between the parties. The parties had stipulated for purposes of the hearing that the Court could use the testimony of DeMott and Dowling as the sworn testimony in the case.

The Court ruled that while it was suggested by Midland that paragraph 3 of the 2011 Lease is not a true option clause, but merely constituted an "opportunity" for Dowling to rent the property in subsequent years. It is clear from the record before the Court that both parties considered and treated this clause as an enforceable option contract. To interpret the clause otherwise would result in having essentially no meaning or effect contrary to the intentions of the contracting party. (COL 15, Appellee App 16-17).

Scott DeMott in fact admitted that Dowling had an option to lease the Midland Farms property for the 2013, 2014 and 2015 crop years. DeMott characterized the option clause in the 2011 Lease as a "first right of refusal." (Scott DeMott 12/18/12 Depo. 38:1-12; 61:5, Appellee App 122 & 130; COL 16, Appellee App 17). This ripens into an option contract once the owner manifests an intent to accept a specific third party offer. DeMott explained that Dowling asked what he had to do to "match" the rent with the clear inference being that the price was set by what a third party was willing to pay and Midland Farms was willing to accept. (Scott DeMott 12/18/12 Depo. 40:10-17; 45:6-17, Appellee App 124 & 125).

While the option clause in the 2011 Lease did not set a deadline within which the

option had to be exercised, the Court having found the clause to be ambiguous looked to the customs and usages as well as the conduct and discussions between the parties after the execution of the contract. (COL 18, Appellee App 17). Tolle v. Lev, 2011 S.D. 65, ¶ 17, 804 N.W. 2d 440, 446, Rehearing denied (November 15, 2011); LaMore, 2008 S.D. 32, ¶ 30, 748 N.W. 2d 756, 764. On July 23 , 2012, DeMott notified Dowling that the deadline in which he had to exercise the option was August 1, 2012, which is consistent with the option deadline on the 2010 Cash Farm Lease. (COL 17, Appellee App 17).

There is no dispute among the parties over the fact that the rental price was set at $70 per acre, which was conveyed by a verbal offer of DeMott on the July 25th meeting at the 1880 Town. That price was confirmed on August 9, 2012 sent by Dowling to DeMott and was in fact the rental price stated in the Midland Farms subsequent lease with Clement Farms. (Scott DeMott 12/18/12 Depo. Ex. 8, Appellee App 100; COL 18, Appellee App 17).

e. **Meeting of the Minds**

The Court concluded that the essential elements of an enforceable option contract were present in the 2011 lease as further interpreted by the parole or extrinsic evidence in the record. (COL 20, Appellee App 18). The Court further concluded that there was a meeting of the minds between the parties as to the material terms of this option contract, those being the contracting parties, the property at issue, the term of the new lease, and the rental price per acre. (COL 21, Appellee App 18). See, LaMore, 2008 S.D. 32, ¶ 15, 748 N.W. 2d 756, 761 (citing Amdahl, 471 N.W. 2d at 774-775) (S.D. 1991).

Midland Farms has contented that there wasn't a meeting of the minds of the

parties to the contract and the issues of the named tenant, the timing and manner of payment and the irrevocable letter of credit. However, DeMott acknowledged that he was fully aware of the pending changes in the makeup of the Dowling Partnerships at the time he extended the $70 per acre offer to Scott Dowling at the July 25th meeting. Moreover, the clear inference of the August 6, 2012 email from DeMott to Dowling was that Midland Farms agreed to lease the property to Dowling regardless of whether there would be a change in the named Lessee. ("What name do I use for *you* on *our* farm lease?") (emphasis added) (COL 22, Appellee App 18-19; Scott DeMott 12/18/12 Depo. Ex. 5, Appellee App 98). Finally the named entities Dowling provided to DeMott as the tenants on the new lease were the same as those named on the 2011 Lease. (Scott DeMott 12/18/12 Depo. Exhibits 5, 7, and 8, Appellee App 98, 99 & 100; COL 22, Appellee App 18-19).

The Court found that Midland Farms' claimed that there was no meeting of the minds as to the timing and manner of payment is also not supported by the record. While Scott DeMott testified the irrevocable letter of credit was to be provided "ASAP," there is nothing in the record establishing a date certain for when it needed to be provided. In the lease Midland Farms entered into with Clement Farms, the irrevocable letter of credit did not need to be provided until *five days after the execution of the written lease*. Therefore Midland Farms is not in a position to argue that Dowling's failure to provide a irrevocable letter of credit prior to a new written lease being executed, was a breach or a failure to perform. (COL 23, Appellee App 19). Dowling never was offered a new written lease for 2013, 2014 and the 2015 crop year.

Dowling's banker, Richard Bures, confirmed in his testimony that Dowling had the financial means in August of 2012 to satisfy Midland's desire for a guaranteed payment, either through an irrevocable letter of credit or by paying the entire 2013 rent up front. There were ongoing discussions about which option of payment would be the most feasible. There is no dispute over the fact that Dowling had agreed to provide a guaranteed form of payment for the 2013 rent when he advised DeMott on August 1, 2012 that he would "do the deal." (COL 24, Appellee App 19). The South Dakota Supreme Court has held the fact that sellers perceive buyers might have some difficulty making a down payment does not affect the validity of the contract as the existence and performance of the contract are separate considerations. Drake v. Sample, 279 N.W. 2d 685, 689 (S.D. 1979); see also, Wiggens v. Shewmake, 374 N.W. 2d 111, 115-116 (S.D. 1985) (enforcement of a real estate contract does not require an expansive recitation of mortgage financing details) (COL 24, Appellee App 19).

f. **Statute of Frauds**

On the issue of the Statute of Frauds, the Court concluded that there was a meeting of minds as to the material terms of the contract and further determined that there were sufficient writings to satisfy the Statute of Frauds. Under SDCL §43-32-5, no agreement for leasing of real property or an interest therein for longer than one year is valid unless the same or some note or memorandum thereof, be in writing, signed by the Lessor or his agent. (COL 25, Appellee App 20). The Court further found that an option contract is itself a contract that is covered by the Statute of Frauds, as it pertains to an interest in leasing real property. SDCL§§ 43-32-5 and 53-8-2; (COL 26, Appellee App

20).

The South Dakota Supreme Court has held that in order to satisfy the Statute of Frauds, the agreement itself need not be the writing relied upon, rather "a memorandum evidencing the obligation is sufficient." Wiggins, 374 N.W. 2d at 114. The Supreme Court further clarified that "a memorandum is not required to make a contract but merely to evidence in writing that a contract has been entered into," "the memorandum need not embody the exact terms of the contract, it is sufficient that the substance of the contract...is inferred from the writing." Id., (quoting Drake, 279 N.W. 2d at 689) (COL 27, Appellee App 20). The Wiggins court further held that the writing referred to in SDCL §53-8-2 "need not be in one document, the writings may consist of disjointed memoranda or protracted correspondence." Wiggins, 374 N.W. 2d at 115. Email correspondence and type written signatures have been held as sufficient to satisfy the subscription requirement of the Statute of Frauds. Tolle v. Lev, 2001 S.D. 65 at ¶¶ 5, 13; 804 N.W. 2d 440, 442, 444-445, rehearing denied (November 15, 2011); Northstream Investments, Inc., v. 1804 Country Store Company, 2007 S.D. 93, ¶¶ 13-14, 739 N.W. 2d 44, 48-49. (COL 28, Appellee App 20-21).

Regarding the contracts for sale of land (which fall under the same provision of SDCL §53-8-2 as leases longer than one year), the Court has held that while writing sufficient to satisfy the Statute of Frauds must be signed by the party to be charged and describe "the land, the price, and the contracting parties; [they] need not detail form or delivery of deed, the time and place of payment, or any other matters." Amdahl, 471 N.W. 2d at 774-775. (COL 29, Appellee App 21). Further, "a general description of the

land which is the subject of the contract is sufficient, and parole evidence may be admitted to provide the more particular description." Id., at 775. "There is no fatal ambiguity if the contract terms are sufficiently certain to make the acts required of each party clearly ascertainable." Id. See also, Jacobson v. Gulbransen, 2001 S.D. 33, 623 N.W. 2d 83 (COL 29, Appellee App 21).

With regard to the price term in the contract, the Supreme Court, when reviewing the sufficiency of the terms of an option contract in the LaMore case, held that "not all terms such as price, need be set out in the contract as long as they are in fact fixed and determinable or reasonably certain." LaMore, 2008 S.D. at ¶ 18, 748 N.W. 2d at 762. (COL 30, Appellee App 21). Option agreements are enforceable "if either a specific price is provided for the agreement or a practical mode is provided by which the price can be determined by the court without any new express by the parties." Id., at ¶ 20. (COL 30, Appellee App 21).

In our instant case, the Court concluded that there are sufficient writings subscribed by Scott DeMott, acting as agent for Midland Farms, to establish the land, the price, and the contracting parties, and therefore, satisfy the Statute of Frauds in this case. (COL 31, Appellee App 21). There was no question that there was a contract for Dowling to farm the Midland property. There was only the advent of a subsequent buyer with a large purse that made Midland attempt to breach the contract.

There is no issue as to what land was being leased. The 2011 lease containing the option clause at issue and referenced in the July 23, 2012 email sent by Scott Dowling contained the property description. (Plaintiffs' Trial Exhibit 1, Appellee App 59-76;

Scott DeMott 12/18/12 Depo. Ex. 3, Appellee App 97; COL 32, Appellee App 21). **(The Trial Court cited Depo. Exhibit 2, but it is Exhibit 3)**.

The trial court further found that the August 6, 2012 email sent by Scott DeMott to Scott Dowling ("what name do I use for you on our farm lease?") confirms the existence of the oral agreement reached by the parties on August 1st, (which is confirmed by the testimony of both DeMott and Dowling as referenced above). (Scott DeMott 12/18/12 Depo. Ex. 5, Appellee App 98; COL 33, Appellee App 22). The lower court concluded that the language in this email can be distinguished from the language used in the written correspondence at issue in Shaw v. George, 141 N.W. 2d 405 (S.D. 1966), which was relied upon by Midland. The court noted that in Shaw, the Lessor wrote to the proposed Lessee stating that after the abstract was checked, "we will draw up a lease. *I will let you know in a couple weeks*." Id., at 406. Here the court found that in contrast "the email sent by DeMott does not reference any contingencies, nor does it indicate that a final decision had yet to be made. The clear inference of DeMott's August 6th email is that an agreement had been reached and the written lease evidencing such was in the process of being drafted." (COL 33, Appellee App 22).

DeMott's July 23, 2012 email to Dowling confirmed that in order to rent the property for 2013, 2014 and 2015 crop years the then existing $55 per acre was not sufficient and that there were other qualified interested parties willing to lease the farm, i.e., the Clements. (Scott DeMott 12/18/12 Depo. Ex. 3, Appellee App 97). After DeMott offered the $70 per acre rent at the July 25th meeting, which Dowling orally accepted on August 1st and confirmed in writing in his August 9th email, Midland Farms

entered into a written lease agreement with Clement Farms which included the land leased by the Dowlings for the same price as $70 per acres. (Scott DeMott 12/18/12 Depo. Ex. 7, Appellee App 99; Trial Exhibit 2, Appellee App 77-85). The Court concluded "that these disjointed memoranda when viewed in their totality, provided sufficient writing subscribed by Midland Farms to satisfy the Statue of Frauds as to the price term." (COL 35, Appellee App 22).

This case is not like Deadwood Lodge No. 508 v. Albert, 319 N.W. 2d 823 (S.D. 1982). In the present case there is no dispute between DeMott and Dowling that the price was $70 per acre. The Court is not being asked to set a price. (COL 36, Appellee App 23).

In this case the Court specifically found that (1) the 2011 Lease; (2) the July 23rd and August 6th emails from DeMott; (3) paragraph 4 of Clement's lease, all subscribed by Scott DeMott as agent for Midland Farms sufficiently defined the contracting parties for the 2013, 2014 and 2015 farm lease. (Appellee App 59-64, 97, 98, 78). The lower court "rejected the contention of Midland Farms that due to the pending changes in the make up of Dowling's partnerships, the contracting tenant was unknown, when it was clear from DeMott's August 6th email that Midland Farms had agreed to enter into a new lease with Scott Dowling, regardless of the potential change in the name or make up of the partnerships." (COL 37, Appellee App 23).

g. **Promissory Estoppel**

In addition to concluding that the Statute of Frauds had been satisfied, the court specifically concluded that the *Doctrine of Promissory Estoppel* also supports the

enforceability of the contract at issue in this case. The *Doctrine of Promissory Estoppel* prevents a party from asserting a Statute of Frauds' defense to assure that the Statute of Frauds is not employed to work an injustice. Jacobson, 2001 S.D. 33 at ¶ 26; 623 N.W. 2d at 90-91. (COL 38, Appellee App 23). In order to maintain promissory estoppel, Dowling must prove that: (1) the detriment suffered in reliance on the promise was substantial in an economic sense; (2) the loss to the promisee was foreseeable by the promisor; and (3) the promisee must have acted reasonably in justifiable reliance on the promise made. Vander Heide v. Boke Ranch, Inc., 207 S.D. 69, ¶ 28, 736 N.W. 2d 824, 834. (COL 39, Appellee App 23-24).

The lower court in this instance concluded that "Dowling has established by clear and convincing evidence that the specific price term was conveyed by DeMott at the July 25th meeting, that Dowling was reasonably justified in relying upon this irrevocable offer and his power of acceptance per the option contract." (COL 40, Appellee App 24). Therefore, "Dowling's expenditures for spraying and harrowing costs constituted a substantial economic detriment, and these expenditures were foreseeable by Midland Farms based on the prior dealings between the parties and DeMott's knowledge of the customs and trade practices establishing the time frames for preparing the land for fall planting. Therefore, Dowling has met his burden of establishing the elements of *promissory estoppel* and is entitled enforce the contract against Midland Farms." (COL 40, Appellee App 24).

The Court then ordered on March 12, 2013 "that an enforceable contract exists between the parties in this matter, and Dowling has lawfully exercised the right to lease

the Midland Farms property described in the 2011 lease for the 2013, 2014 and 2015 crop years at the rate of $70 per acre." (Appellee App 24).

The temptation of a multimillion dollar profit was a powerful motive for Midland to breach the contract with Dowling. Midland had invested to make a profit. A profit was within their grasp if they could get rid of their renter Dowling. Dowling had invested four years of farming and building up the soil profile on the Midland farm. He exercised his three year option to continue farming the land. A looming profitable transaction does not allow Midland to breach its contract. Dowling exercised his option to farm the Midland property for 2013, 2014 and the 2015 crop year.

2. Unjust Enrichment

a. **Standard of Review**

Unjust enrichment is an equitable claim. Therefore a decision in equity granting or denying relief is reviewed for abuse of discretion. Hofeldt v. Mehling, 2003 S.D. 25, ¶¶ 9, 14, 658 N.W. 2d 783, 786-87, 788. The Circuit Court's Finding of Fact can be reversed only if clearly erroneous, while its Conclusions of Law are reviewed *de novo*. Id.

b. **Unjust Enrichment Law**

Midland has contended that the contract between Dowling and Midland did not fix any rights or obligations on the issues covered by unjust enrichment. The Court concurred. Midland does not have a legal remedy for breach of contract on which a claim for damages could be sought.

The equitable remedy of unjust enrichment may be available in the absence of a

contract when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying; Parker v. Western Dakota Insurers, 200 S.D. 14, ¶ 17, 605 N.W.2d 181, 187. But, to prevail on a claim of unjust enrichment, Midland must show that, (1) Dowling received the benefit; (2) Dowling was aware he was receiving a benefit; and (3) that it is inequitable for Dowling to retain this benefit without paying for it. Hofeldt v. Mehling, 2003 S.D. 25, ¶ 16, 658 N.W.2d 783, 788. All three elements must be established in order to obtain relief under an unjust enrichment theory. (Ct. Dec. p. 20, Appellee App 44).

Unjust enrichment "is an equitable remedy and a court has discretion to grant or deny it." Hofeldt v. Mehling, Id., at ¶ 14, 658 N.W.2d at 788, (citations omitted). In Hofeldt, the Court cited the Restatement of Restitution and noted that "a person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be unjust." Id., (citing Restatement of Restitution §1 CMT. A(1937).

The Hofeldt case dealt with a land sale in which the buyer made the required down payment but the seller failed in violation of the contract to deliver clear title for nearly five years. 2003 S.D. 25, ¶ 1, 658 N.W. 2d at 785. During the time frame the buyer continued to farm the land and paid no rent yet kept all the FSA subsidy payments for the land. Id. After the sale finally closed, the seller sued the buyer to obtain rent and subsidies on an unjust enrichment theory. After concluding that nothing in the parties contract for deed required the buyer to pay rent or share the subsidy payments with the landowner while the sale was pending, the Court then considered whether the buyer was unjustly enriched by receiving these subsidies from the land while failing to pay rent.

In applying the three elements above, the Court found that the buyer obtained a benefit by not having to pay the landowner rent or repay part of the subsidies he received, and was aware he was receiving this benefit. However, in analyzing the third element "proof of unfairness in retaining the benefit without payment, the relevant inquiries whether the circumstances are such that equitably the beneficiary should restore to the benefactor the benefit or its value." Id., at ¶ 18, 658 N.W.2d at 788 (citations omitted). The Court concluded that "to grant relief in equity to [the landowner] *considering his own failure to adhere to the express terms of the contract to deliver clear title* seems neither obviously justified nor necessarily fair." Id., at ¶ 19, 658 N.W.2d at 789 (emphasis added). The South Dakota Supreme Court thus affirmed the trial court's denial of the landowners unjust enrichment claim. (Appellee App 44).

c. **Unclean Hands**

Dowling contends that Midland is not entitled to the equitable remedy of unjust enrichment because Midland does not come to the Court with "clean hands," and that this is a case of a wrongdoer seeking equity. In Talley v. Talley, 1997 S.D. 88, 566 N.W.2d 846, the Supreme Court declined to afford a party found to be in a breach of contract the equitable remedy of specific performance. "A [person] who does not come into equity with clean hands is not entitled to any relief herein, but should be left in the position in which the court finds him." Id., at ¶ 29, 566 N.W.2d at 852 (quoting Kane v. Schnitzler, 376 N.W.2d 337, 341 (S.D. 1985).

In its brief to the Court, Midland cited out of state authorities for the proposition that not all breaches of contract require the application of the "unclean hands" doctrine.

But the South Dakota Supreme Court did in fact conclude that in Talley that the party who had breached several material terms of the contract "has not entered the court with clean hands." Talley at ¶ 14, 566 N.W.2d at 852. The lower court held that even if the breach of contract was not based upon fraud, deception or bad faith, such that the party breaching the contract should be deemed to have unclean hands, the fact of the breach is still a circumstance that must be taken into account in balancing the equities of the case to determine whether any enrichment to the nonbreaching party would be unjust. (Ct. Dec. p. 22, Appellee App 46).

d. **Benefit**

The lower court found that as to the first element of an unjust enrichment claim, Dowling did receive some benefit in that Clement and ultimately Midland, paid for some, but not all of input costs for the winter wheat crop at issue. (Ct. Dec. p.22, Appellee App 46). But, Dowling paid for the initial harrowing, the chemical burn down, the costs of fertilizer, spraying weeds, harvesting, trucking, insurance plus the $2,030,865.20 rent payment associated with the 2013 crop. (Ct. Dec. p. 22, Appellee App 46).

The Court tempered its comments regarding benefits when it questioned whether Dowling was "enriched." The Court found there was much debate as to whether or by how much Dowling was actually *enriched* by Clements/Midland's incurrence of its portion of input costs. (Ct. Dec. p. 22, Appellee App 46). Midland did not sustain its burden of showing that Dowling was enriched by Clement's input costs.

What the Court did find was that Clement's input costs for seed, custom drilling and tendering were considerably higher than what these same costs would have been had

Dowling been the one planting the winter wheat. (Ct. Dec. p. 22, Appellee App 46). The Court made a specific finding that Dowling's testimony was credible. (Ct. Dec. p. 22, Appellee App 46). The Court further found that any benefit or enrichment to Dowling should be measured by what the input costs would have been had Dowling planted the winter wheat, rather than the amounts Clement expended and Midland reimbursed. (Ct. Dec. p. 22, Appellee App 46).

The Court ruled that Dowling could not claim damage for loss of the use of the whole farm in 2013 because the limited wheat crop that was planted lost money that year. The rainy weather in June prevented a second crop. (Ct. Dec. p. 19, Appellee App 43). Dowling's total expense per acre to plant wheat was $158.25 per acre. The crop insurance payout was $98.89 per acre. The Court concluded "consequently, the more acres planted to winter wheat, the greater the net loss to Dowling on this crop." (Ct. Dec. p. 14, Appellee App 38).

e. **Lack of Consent**

As to the second element on the unclean hands doctrine the Court found that although Dowling was aware that Clement was planting the winter wheat, he clearly did not consider it to be a "benefit" as he was adamantly opposed to Clement planting the crop and made Clement and Midland acutely aware of his opposition. The Court found "thus any benefit conferred to Dowling was without his consent." (Ct. Dec. p. 23, Appellee App 47). Clement had limited experience in planting wheat. He used some proper and some improper wheat for the type of soil on the farm. He ran out of wheat seed and left a large "doughnut hole" in the middle of the field. The "doughnut hole"

amounted to 1807.5 acres. The unplanted doughnut hole was not known by Dowling until he regained possession of the property and was refertilizing the fields in April of 2013.

Dowling's adamant opposition to Clement planting the crop was based on Clement's lack of knowledge and experience in planting wheat, especially on this large 29,000+ acre piece of land. In the end, Clement only planted 12,268 acres of winter wheat. Thus any arguable benefit conferred upon Dowling was clearly without his consent. (Ct. Dec. p. 23, Appellee App 47).

Midland cites the case of Aetna Life Insurance Company v. Satterle, et al, 475 N.W.2d 563 (S.D. 1991) for the proposition that they are entitled to unjust enrichment. In Aetna a farmer claimed unjust enrichment for harrowing a field for a crop that the farmer did not receive. Aetna received the crop. The court set forth the facts that the farmer (Kirby) was not supposed to do the harrowing. It was done against the wishes of Aetna, who was in possession of the land. The court held that the farmer was not entitled to a claim for unjust enrichment. "Kirby's actions were in direct opposition to Aetna's possessory rights and in direct opposition to Aetna's instruction not to fallow the land." Aetna, at p. 574. Kirby fallowed the land for his own purposes. The court ruled Kirby was not entitled to unjust enrichment for fallowing the land.

In our instant case, Clement planted the crop with the understanding that he may not have the right to plant it. There was litigation going on to determine if Dowling had exercised his option for 2013, 2014 and 2015. The lease between Midland and Clement acknowledged that there may very well be no right to plant a crop on the Midland farm.

(¶ 4 Earlier Termination. Appellee App 78). Midland was anxious to preserve the sale of the farm to Clement. Midland told Clement to go ahead and plant the crop and Midland would cover the planting costs plus other expense and $100,000 for his inconvenience. If Dowling was ruled to rightfully hold the lease, nothing in the Midland/Clement lease bound Dowling to pay for the input costs.

Midland focused on the fact that Dowling accepted the insurance claim payment and revenue derived from the winter wheat that was eventually hayed and harvested. Dowling paid the premium for that insurance and should receive the benefit that was paid. Those were all proceeds that Dowling was entitled to from the outset had Midland not breached the contract and deprived him of the opportunity to plant the winter wheat as he planned. See, Hofeldt., 2003 S.D. 25, ¶ 18, 658 N.W.2d at 789 ("Mehling only received what he would have received if Hofeldt acted diligently in the beginning."). (Ct. Dec. p. 23, Appellee App 47).

f. **Weighing the Equities**

Finally, the Court found that even if the first two elements were found to be met in an unjust enrichment claim, the third element, after weighing the equities of the case "this court finds and concludes, like South Dakota Supreme Court concluded in Hofeldt that it would be unjust and inequitable to grant relief to the party who breached the contract under the facts in this case." (Ct. Dec. p. 23, Appellee App 47). The Court was quite explicit, it found that there was undisputed testimony before the court which established that Dowling had been a reliable tenant and had vastly improved the condition of the property to Midland Farms' benefit during the course of the tenancy. (Ct. Dec. p.

23, Appellee App 47). The Court rightly concluded that: "Despite Dowling's agreement to rent the property for 2013, 2014 and 2015 crop years on Midland's terms and despite Dowling's incurrence of significant costs to prepare the land for the fall planting in reliance on the contract, Midland essentially decided to pull the rug out from underneath his feet because a better offer came along from a tenant who was willing to purchase the property at a lucrative price." (Ct. Dec. p. 23, Appellee App 47).

Having Clement plant a portion of the farm in 2013 was like watching a disaster happen in slow motion. The Court held that in balancing the equities in this case, that "Midland has failed to establish that Dowling was unjustly enriched, it would be inequitable to award Midland any damages on the basis of an unjust enrichment theory." (Ct. Dec. p. 23, Appellee App 47).

CONCLUSION

Midland's action of breaching the contract was the product of pure greed. It is a constant theme from Old Testament accounts, Greek tragedies and Shakespearean plays. A $16 Million Dollar windfall can make one forget contractual obligations and the damage caused by broken contracts. Here, Midland chose to breach the contract and reach for the $16 Million Dollars. The Court has the power to do equity and determine whether Midland had clean hands in its dealings with Mr. Dowling. After a trial of all the issues, the Court determined (1) Dowling was credible and that (2) Midland did not have clean hands. It properly held that Midland could not avail itself of the equitable remedy of unjust enrichment under those circumstances. (Ct. Dec. pp. 22-24, Appellee App 46-48).

Dated this 10th day of November, 2014.

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Certificate of Compliance

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using WordPerfect X6, Times New Roman, Font 12, and contains 8,889 words, 42,803 characters, excluding the table of contents, table of cases, jurisdictional statement and statement of legal issues. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 10th day of November, 2014.

JOHNSON EIESLAND LAW OFFICES, P.C.

By _____
Gregory A. Eiesland

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **APPELLEES' BRIEF** was served on the following attorney for Defendants, by mailing said copy to them at the foregoing address by United States mail, first class, postage prepaid thereon, this 10th day of November, 2014.

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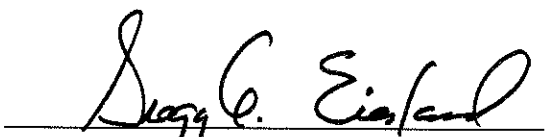

Gregory A. Eiesland

Appendix

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27114

DOWLING FAMILY PARTNERSHIP;
DOWLING BROTHERS PARTNERSHIP,

Appellees,

v.

MIDLAND FARMS, LLC,

Appellant,

LANNY DEMOTT,

Defendant.

Appeal from the Circuit Court
Sixth Judicial Circuit
Haakon County, South Dakota

THE HONORABLE PATRICIA DEVANEY
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed June 19, 2014

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Table of Authorities

Cases:

In November, 2013, Appellees Dowling Family Partnership and Dowling Brothers Partnership ("Dowling") filed an amended complaint asserting seven claims. After summary judgment, the case was later tried to the court on one of Dowling's claims, for breach of the 2011 lease with Midland Farms, and on Midland Farms' claim for unjust enrichment. After entry of judgment following a court trial in which Dowling was awarded no damages based on the circuit court's holding that Midland Farms had breached the 2011 lease, Dowling has now abandoned his claim for damages on appeal. That leaves only Midland Farms' arguments that it should have recovered against Dowling based on unjust enrichment, and that the circuit court erred in holding that Midland Farms breached the 2011 lease.

1. Dowling was unjustly enriched.

a. The doctrine of unclean hands does not foreclose recovery.

Dowling's brief does not respond to most of the argument that Midland Farms made on appeal. With respect to unjust enrichment, Dowling does not address the two arguments that Midland Farms made about the doctrine of unclean hands: (1) that the doctrine of unclean hands does not apply absent evidence of bad faith (Midland Farms Br. at 19-21); and (2) that Midland Farms' breach of the lease was unrelated to its claim based on unjust enrichment (*id.* at 21-24). Dowling's only argument about unclean hands is that this Court's decision in

Talley v. Talley, 1997 S.D. 88, 566 N.W.2d 846, is dispositive of the issue. (Dowling Br. at 26-27.) His position differs significantly from the circuit court's decision in this respect. The circuit court did not hold that the decision in *Talley* precluded Midland Farms from recovery due to unclean hands. Rather, the circuit court noted that even if Midland Farms did not act in bad faith, under *Talley* "the fact of the breach is still a circumstance that must be taken into account in balancing the equities of the case." (App. 046.) In other words, the circuit court did not expressly decide the issue of unclean hands, and clearly did not decide it based on *Talley*, as Dowling suggests.

Midland Farms argued on appeal that *Talley* is not dispositive of the issue of unclean hands because the case involved a claim for specific performance, not unjust enrichment, and that the two are different for purposes of applying the doctrine of unclean hands. (Midland Farms. Br. at 21-22.) Dowling ignores this argument. Midland Farms also distinguished *Talley* because the party there sought specific performance of the agreement that he had materially breached. (*Id.*) Here, by contrast, Midland Farms seeks to recover for unjust enrichment created by its payment to Clement Farms for the winter wheat crop that was planted, which was outside the terms of the lease between Dowling and Midland Farms. Dowling also ignores this argument, but concedes on appeal that "the contract between Dowling and Midland did not fix any rights or obligations on the issues covered by

unjust enrichment." (Dowling Br. at 24.) In other words, Midland Farms does not seek to recover anything based on the terms of the lease, which is the agreement that the circuit court held was breached. A breach of that agreement is therefore irrelevant to Midland Farms' claim for unjust enrichment. The decision in *Talley* is not a bar to recovery.

b. Midland Farms proved the elements of unjust enrichment.

First, the circuit court held that Dowling received a benefit because Clement planted the crop. "Dowling did receive a benefit in that Clement, and ultimately Midland, paid for some, but not all of the input costs for the winter wheat crop at issue." (App. 46.) Dowling does not acknowledge this fact on appeal. Instead, Dowling contends that the circuit court held that Midland Farms could not recover because Dowling lost money on the winter-wheat crop. (Dowling Br. at 27-28.) Dowling is correct that the circuit court found that he lost money on the crop, but not that the circuit court considered that fact in its decision on unjust enrichment. (App. 46.) Whether Dowling ultimately made a profit on the crop is not the issue for purposes of determining whether Dowling received a benefit. He received income from the crop, and did not incur any planting expense or seed cost. The expense he did not incur was a benefit, as the circuit court held, no matter what his income was.

Second, Dowling was aware of the benefit. On appeal, Dowling repeats the circuit court's conclusion that "any benefit conferred to Dowling was without his consent." (Dowling Br. at 28 (quoting App. 47).) Not only is this not the standard, but it is error. The issue is not whether Dowling wanted Clement to plant the farm, but whether Dowling knew that by claiming the crop as his own in the spring of 2012 when he regained possession he was obtaining a benefit because he had incurred no expense in planting the crop. The question is not whether Dowling objected to the planting, but whether he voluntarily accepted the crop.

The facts on this point are no different than in *Aetna Life Ins. Co. v. Satterlee*, in which Kirby, one of the parties with redemption rights, agreed that Aetna, which was foreclosing on a mortgage, could plant the 1989 crop during the redemption period. 475 N.W.2d 569, 572 (S.D. 1991). Aetna planted and harvested the crop pursuant to the agreement and without objection from Kirby. *Id.* This Court held that it would unjustly enrich Kirby to claim the crop that Aetna had planted and harvested even though "Aetna realized a net loss from the crop." *Id.*

Dowling argues that the decision on the second issue in *Aetna*, whether Kirby was entitled to recover summer fallow expense, supports his position. (Dowling Br. at 29.) In *Aetna*, Kirby summer fallowed portions of the property despite the agreement stating that Aetna had the right to any crop during the 1989

crop season; the agreement "specifically gave Aetna the right to enter the land and prepare, plant and harvest the 1989 crops." 475 N.W.2d at 574. This Court held that Kirby was not entitled to recover summer fallow expense on a claim for restitution under a theory of implied contract because the rights of the parties were controlled by their express agreement. *Id.* Here, by contrast, the circuit court held, and Dowling agrees, that the contract did not address the damages sought based on unjust enrichment. (Dowling Br. at 24.) Dowling's argument based on *Aetna* is therefore out of context and incorrect.

Third, it would be inequitable for Dowling to retain the benefit. Dowling does not address Midland Farms' argument that the emotional expenses of litigation, on which the circuit court ultimately relied to deny recovery to Midland Farms, are not recoverable. (Midland Farms Br. at 26-27.) Instead, Dowling, like the circuit court, cites *Hofeldt v. Mehling*, 2003 S.D. 25, 658 N.W.2d 783, as the basis for concluding that it would not be unjust to allow Dowling to retain the benefit he received by not having to pay the cost of planting the winter wheat. (Dowling Br. at 30.) But Dowling does not respond to the argument that his situation differs from that in *Hofeldt* because by not having to pay for the planting expense, he was ultimately placed in a better position than if there had been no breach of the 2012 lease. (Midland Farms Br. at 27-28.) By failing to respond to

this argument, Dowling in effect concedes that he has been unfairly allowed to retain a benefit at the expense of Midland Farms.

Finally, Dowling does not respond to Midland Farms' arguments about the amount of any recovery for unjust enrichment. (Midland Farms. Br. at 28-29.)

2. Midland Farms did not breach the 2011 lease.[1]

a. The 2011 lease did not create a valid option.

Midland Farms argued that the provision in the 2011 lease did not create a valid option. Dowling agrees that an option contract is an irrevocable offer by the owner based on specific terms that creates a power of acceptance (Dowling Br. at 13), but does not cite to any specific terms in the 2011 lease. Rather, given that the agreement itself states that the "[t]erms and conditions [were] to be agreed to by Landlord and Tenant" (Ex. 1, ¶ 3 (App. 59)), there was no express option contract. The circuit court cited *Amdahl v. Lowe*, 471 N.W.2d 770 (S.D. 1991) for the proposition that the parties can reach agreement on all material terms and then enter into a written agreement, but Midland Farms distinguished the facts in

[1] This issue is not mooted by Dowling's abandonment of his notice of review. The circuit court relied on its conclusion that Midland Farms breached the 2011 lease as support for its conclusion that Dowling was not unjustly enriched by failing to pay for the cost of planting the winter wheat. In other words, if this Court concludes that Midland Farms did not breach the 2011 lease, that conclusion could affect a decision on Midland Farms' claim for unjust enrichment.

Amdahl and argued that it is inapposite to the question whether the 2011 lease created a binding option. Dowling has no response to this argument.

Instead, Dowling argues on appeal that extrinsic evidence established that the parties agreed on all material terms of the option. (Dowling Br. at 16.) For this argument to have merit, however, the terms of the 2011 lease must have been ambiguous with respect to the option. (Midland Farms Br. at 31-33.) Dowling entirely ignores this argument on appeal, and fails to respond in any way to the proposition that the subjective intent of the parties cannot make an agreement ambiguous. "A contract is not rendered ambiguous simply because the parties do not agree on its proper construction or their intent upon executing the contract." *Estate of Fisher v. Fisher*, 2002 S.D. 62, ¶ 12, 645 N.W.2d 841, 845. Dowling merely states that the circuit court concluded that the option clause was ambiguous (Dowling Br. at 14) without any explanation or argument why the circuit court was correct. Because the 2011 lease is not ambiguous, extrinsic evidence cannot be considered, which means that the lease did not give Dowling the power of acceptance for a three-year extension. The parties needed to come to terms for the lease to continue.

b. The parties did not agree on all material terms.

It is apparent from Dowling's appeal brief that the parties did not agree on the terms to secure payment of the multi-million dollar rent due February 1 for

each year of the lease. Dowling's own brief states that "there is nothing in the record establishing a date certain for when [security for the rent] needed to be provided." (Dowling Br. at 17.) It is also apparent that Dowling has no response to the fact that he testified that he had not agreed to provide security by a date certain because it was not required anywhere in writing. (Midland Farms Br. at 38.) Nor does Dowling respond to the fact that he continued to negotiate with Midland Farms over security for the rent until the end of August, 2012, without the parties reaching an agreement. (*Id.* at 12-13.) Dowling cites no authority that security for rent of slightly more than $2 million due February 1 each year of a three-year lease is not a material term. The circuit court erred in concluding that the parties had orally agreed to all the material terms of an extended lease.

c. An extended lease had to be in writing to satisfy the statute of frauds.

As Midland Farms argued in its opening brief, the issue is not whether a writing sufficient to satisfy the statute of frauds can consist of more than one document, but whether all material terms of the parties' agreement were in writing. (Midland Farms. Br. at 41.) Dowling testified that he was not bound to provide a letter of credit because that requirement was not in writing: "I don't have any–I have no lease that demands it of me." (Dowling depo., Dec. 18, 2012, at 102 (SR 188).) Dowling's discussion of *Wiggins v. Shewmake*, 374 N.W.2d 111, 114 (S.D. 1985), ignores this point. (Dowling Br. at 19.) Midland Farms is not disputing

that e-mails or other written exchanges between the parties could have satisfied the statute of frauds, but that the statute of frauds was not satisfied because the parties did not reach agreement on all material terms. It is undisputed that there is no writing anywhere in the record documenting how and when the annual rent would be secured.

Dowling also argues that the doctrine of promissory estoppel applies to prevent Midland Farms from relying on the statute of frauds. (Dowling Br. at 22-24.) Dowling's brief does little more than quote from paragraphs 38-40 of the circuit court's conclusions of law dated March 12, 2013. (App. 23-24.) Dowling's brief does not explain how the argument overcomes the fact that the parties did not agree on all material terms. The circuit court concluded that when Scott DeMott told Dowling on July 25 that the rent would be $70/acre, Dowling "was reasonably justified in relying upon this irrevocable offer and his power of acceptance per the option contract." (App. 24, ¶ 40.) The conclusion wrongly assumed: (1) that the 2011 lease contained a valid option agreement; and (2) that the parties had agreed to all material terms. In other words, Dowling cannot use the defense of promissory estoppel, which can be an exception to the statute of frauds, to

affirmatively create an agreement where none existed. Promissory estoppel presumes that there was an enforceable promise. In this case, there was not.[2]

Conclusion

Dowling's brief is a further recitation of the circuit court's findings and conclusions on the issues of unjust enrichment and breach of contract, but it does not engage the arguments that Midland Farms has raised on appeal. The circuit court's decisions are not self-evidently correct, and Midland Farms has raised arguments that merited a response. Midland Farms respectfully requests that the judgments be reversed.

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[2] The time period that Dowling claims he justifiably relied on DeMott's alleged promise is very short. DeMott and Dowling agreed on the rent on August 1, 2012. (App. 11, ¶ 15.) DeMott called Dowling to tell him that Clement was going to buy the farm on August 8, 2012. (*Id.* ¶ 18.) The substantial economic detriment that Dowling claims during this time was the purchase of a new sprayer on August 3 and the fact that he began harrowing the property "in the first part of August." (*Id.* at 12, ¶ 20.) Notably, before pleading the damage claim that was tried to the court, Dowling pleaded a claim for restitution based on these facts. (SR 2, ¶¶ 16, 56.) He later withdrew the claim before trial. (SR 1146.)

Dated this 26th day of November, 2014.

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Certificate of Compliance

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using WordPerfect X6, Times New Roman, Font 13, and contains 2,442 words, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 26th day of November, 2014.

WOODS, FULLER, SHULTZ & SMITH P.C.

By _____

James E. Moore

Certificate of Service

I hereby certify that on the 26th day of November, 2014, I sent by United States first-class mail, postage prepaid, two true and correct copies of the foregoing Appellants' Reply Brief, to the following:

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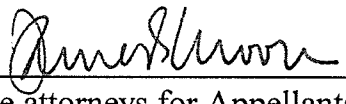

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