

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

31363

TONYA LORENZ,
Defendant/Appellant,
vs.

JEAN MAHER & WAYNE BRATCHER,
Plaintiffs/Appellees.

Appeal from the Circuit Court
For the Fourth Judicial Circuit
Butte County, South Dakota

THE HONORABLE MICHAEL W. DAY
CIRCUIT COURT JUDGE

APPELLATE'S BRIEF

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NOTICE OF APPEAL FILED: JANUARY 21, 2026

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PRELIMINARY STATEMENT

This is an appeal of Judgment granted in favor of Plaintiffs Jean Maher and Wayne Bratcher against Defendant Tanya Lorenz, holding that Defendants right to use an access easement was extinguished, Canyon Creek Lane is not a public highway, for damages for the maintenance of the easement roadway. “SR” refers to the settled record. “APP” refers to Appellant’s Appendix with page numbers included.

JURISDICTIONAL STATEMENT

Proceedings commenced in the Fourth Judicial Circuit Court in Butte County, before the Honorable Michael W. Day. An Order Granting Judgment was signed and entered December 23, 2025. (SR 388, APP 51). Notice of Entry of Order was filed and served on December 30, 2025. (SR 390). Notice of Appeal was timely filed and served on January 21, 2026. (SR 411). Appellant relies on SDCL § 15-26A-3 and § 15-26A-4 in support of this Appeal.

STATEMENT OF LEGAL ISSUES

1. Did the trial court err in finding that Defendant abandoned the use of the recorded easement?

Boyer v. Dennis, 2007 S.D. 121, 742 N.W.2d 518.

Hofmeister v. Sparks, 2003 S.D. 35, 660 N.W.2d 637.

SDCL § 43-13-12.

2. Did the trial court err in finding that Defendant lacked necessity of access to the recorded easement?

Heumiller v. Hansen, 2020 S.D. 56, 950 N.W.2d 426.

SDCL § 31-22-1.

3. Did the trial court err in failing to find that Canyon Creek Lane is a public highway under South Dakota law?

SDCL § 31-3-1.

4. Did the trial court err in not upholding Defendant's access to her property over the section line right-of-way under South Dakota law?

SDCL § 31-22-1.

5. Did the trial court err in finding that Defendant's actions constituted a nuisance?

Kuper v. Lincoln-Union Elec. Co., 1996 S.D. 145, 557 N.W.2d 748.

Prairie Hills Water and Development Co. v. Gross, 2002 S.D. 133, 653 N.W.2d 745.

SDCL § 21-10-1.

6. Did the trial court err in awarding damages to Plaintiffs without sufficient evidence?

Atkinson v. City of Pierre, 2005 S.D. 114, 706 N.W.2d 791.

STATEMENT OF THE CASE

This appeal arises from a dispute over the extinguishment of a recorded easement and related claims of necessity and nuisance involving Defendant-Appellant Tanya Lorenz and Plaintiffs-Appellees Jean Maher and Wayne Bratcher. Plaintiffs initiated the action in the Fourth Judicial Circuit, Butte County, South Dakota, seeking declaratory judgment to extinguish Lorenz's easement, alleging abandonment, lack of necessity, and nuisance. The trial court granted summary judgment in favor of Plaintiffs, extinguishing Lorenz's recorded easement and rejecting her claims of necessity and public roadway

access. Judgment was entered on December 23, 2025, and Notice of Entry of Judgment was served on December 30, 2025.

Defendant timely appealed, asserting that the trial court erred in its legal conclusions regarding the extinguishment of the easement, the finding a lack of necessity of access, the failure to classify Canyon Creek Lane as a public roadway, and the finding of nuisance by Defendant from her use of the easement roadway. Defendant also challenges the trial court's award of damages to Plaintiffs as not being supported by sufficient evidence.

STANDARD OF REVIEW

The standard of review for summary judgment is de novo. The appellate court reviews whether the trial court correctly applied the law and whether genuine issues of material fact exist. SDCL § 15-6-56(c); Robinson v. Ewalt, 2012 S.D. 1, ¶ 10, 808 N.W.2d 123, 126. Questions of statutory interpretation and legal conclusions are reviewed de novo. Heumiller v. Hansen, 2020 S.D. 56, ¶ 24, 950 N.W.2d 426, 432.

ARGUMENT

This appeal is borne from the trial court's decisions of an action filled with contradictions. Plaintiffs, presented only through counsel and not party testimony, sought and received the destruction of real property rights of Defendant Lorenz. The trial court's decision to follow Plaintiffs' line of argument and not the indisputable facts of the situation resulted in an unjust result. A decider of fact cannot reject objective facts any

more than a person can claim that a bar of lead is actually a bar of gold. Fortunately, this errors in this action can be corrected.

1. The Trial Court Erred in Finding that Defendant Abandoned the Recorded Easement

South Dakota law requires clear and convincing evidence of intent to abandon an easement. SDCL § 43-13-12; Boyer v. Dennis, 2007 S.D. 121, ¶ 9, 742 N.W.2d 518, 521. Mere nonuse is insufficient to establish abandonment. Hofmeister v. Sparks, 2003 S.D. 35, ¶ 13, 660 N.W.2d 637, 641. Plaintiffs failed to meet this burden by simultaneously claiming nonuse and nuisance of the same easement.

The easement at issue was expressly recorded upon the affected real properties and accordingly runs with the land. Plaintiffs alleged that Lorenz abandoned the easement by nonuse and failure to pay maintenance fees. This position is facially invalid for how does someone abandon something while still using it? Answer, they cannot.

Lorenz continued to use the easement intermittently and never expressed intent to abandon it. For a time Lorenz was married to Troy Lorenz who is not a party to this action. During the marriage, Lorenz and her then husband frequently used the field access across Troy Lorenz's premarital property from Highway 34 to their homesite located on the property at issue in this action. Plaintiffs admitted in their Complaint that Lorenz utilized the easement at issue for ingress and egress, undermining any claim of abandonment. Following the divorce of Defendant Lorenz from Troy Lorenz, Defendant Lorenz more fully utilized the easement to reach her property and mostly avoided using the field access road across her ex-husband's property. At this point is when Plaintiffs took issue with Lorenz. The sworn testimony in the action centered on statements of Clint

Swallow, the son-in-law of Jean Maher. It is essential to note that he is not a legal party to the easement.

The trial court relied upon descriptions of speeding, which Plaintiffs' claim is not a public roadway and accordingly no law enforcement could ever cite a person for violating if it occurred, and lack of contribution toward maintenance. As addressed under subheading 3, Canyon Creek Lane meets the definition of a public highway and the trial court erred in not finding it to be as such. Plaintiff cannot point to adjective proof Plaintiff sped over the non-speed controlled roadway, rather they rely upon the untimely response to a request for admission to support their position. The trial court decided to not accept any testimony on this issue despite the Plaintiffs not actually suffering any detriment for the late response. Lorenz addresses this issue here because it is in direct contradiction to the claim of abandonment.

Plaintiffs' further support their claim of abandonment on the speculative evidence such as overgrowth near the easement which does not constitute abandonment under South Dakota law. Boyer, 2007 S.D. 121, ¶ 12. They go so far as to assert Lorenz did not contribute to the maintenance of the easement roadway even though Plaintiff Maher testified she had never performed maintenance and never paid anyone to do it for her. At this point it is important to note that Plaintiff Bratcher never testified in this action including, but not limited to, any payment or efforts in maintenance of the easement roadway at the damages hearing. To the contrary, both non-party Swallow and Plaintiff Maher did not offer evidence of Plaintiff Bratcher's payment for maintenance. Plaintiff Maher herself offered no evidence of payment for any maintenance of the easement.

For this Court, the conclusion is simple. There was no actual evidence of abandonment and if there is it is contradicted by Plaintiffs' and Plaintiffs' witnesses that Lorenz was using the easement. Reversal of the trial court is clearly appropriate on this issue.

2. The Trial Court Erred in Finding a Lack of Necessity for the Easement

The trial court erroneously concluded that Lorenz lacked necessity for the easement due to purported alternative access. An easement by necessity exists when a property is landlocked and has no legal access. Heumiller v. Hansen, 2020 S.D. 56, ¶ 24, 950 N.W.2d 426, 432. No one can dispute that Lorenz's property is landlocked as it meets the requirements of SDCL § 31-22-1. That statute states:

Every owner of an isolated tract of land containing at least ten acres not touched by a passable public highway or smaller tract of land containing at least five acres used or intended to be used in good faith in whole or in part for residential purposes is entitled to an easement or right-of-way across adjacent lands to reach a public highway, which easement or right-of-way may be secured as provided in this chapter. An isolated tract is further defined as an area which is either inaccessible by motor vehicle because of natural barriers from all other land owned by the owner of the isolated tract or is such an area which is not touched by a passable public highway, which is in use or reasonably usable for motor vehicles. A tract of land adjoining a section line right-of-way for at least sixty-six feet is not an isolated tract if a passable road can be built within the adjoining section line to connect to a passable public highway.

The only recognized legal access to the Lorenz property was the easement roadway over Canyon Creek Lane that turns into a section line roadway along Plaintiff Maher's property leading to Lorenz's property. Affidavit of Shane Pullman, SR 258-260, A 28-30. Plaintiffs and the trial court accepted that there is no legal alternative access to Lorenz's property. Alternative access exists solely upon the good graces of Lorenz's ex-husband through a field access road which the State of South Dakota does not recognize it as a

residential approach to Lorenz's property. Id. Lorenz had a legal and approved access to her property across an easement used by multiple properties as for all legal purposes of home and property usage. In fact, the easement at issue is utilized up to Lorenz's property line by William and Barbara Moldenhauer for which a separate action existed deciding issues of the Moldenhauer's easement use on Lorenz's property. 09CIV22-000077. Moldenhauers also occupy a landlocked parcel of property with only access across the Canyon Creek Lane easement and their easement with Lorenz. These facts only contribute to the establishment of the public highway upon Canyon Creek Lane as set forth in Issue 3.

The trial court's reliance on speculative alternative access over third-party property (e.g., Troy Lorenz's land) was legally flawed. No legal easement exists only a mention in divorce documents that Troy Lorenz would allow Defendant Lorenz to cross his property with no mention of its legality in the eyes of the State of South Dakota or the ability to pass the access along as an easement that would run with his and Defendant Lorenz's property. The trial flatly ignored the position of the State of South Dakota Department of Transportation on this issue. Accordingly, the only conclusion is that there is only one legal access to Lorenz's property and that is across the Canyon Creek Lane easement which includes the section line roadway to Lorenz's and Moldenhauer's properties.

It is unknown why the trial court ignored the South Dakota Department of Transportation's official position that the driveway across Troy Lorenz's property is not a lawful residential access to SD Highway 34. See Affidavit of Shane Pullman. SR 258-260, A 28-29. Moreover, Plaintiffs failed to provide evidence of any legal alternative

access. The extinguishment of Lorenz's easement effectively renders her property inaccessible, violating her statutory right to ingress and egress under SDCL § 31-22-1.

3. The Trial Court Erred in Failing to Find Canyon Creek Lane is a Public Highway

SDCL § 31-3-1, is the controlling authority in the determination of whether a road used, worked, and maintained for public access for over 20 years becomes a public highway. SDCL § 31-3-1 states:

Whenever any road shall have been used, worked, and kept in repair as a public highway continuously for twenty years, the same shall be deemed to have been legally located or dedicated to the public, and shall be and remain a public highway until changed or vacated in some manner provided by law.

Such highway shall be sixty-six feet wide and shall be taken equally from each side of the roadbed center line. Nothing herein contained may prevent the highway authority charged with the construction, reconstruction, or repair of any public highway from purchasing or condemning right-of-way for widening the highway to more than sixty-six feet or from purchasing or condemning more right-of-way on one side of the roadbed center line than on the other, provided they deem it necessary so to do in order to provide a better highway, to avoid destruction of trees or valuable buildings or to avoid unsuitable terrain.

Canyon Creek Lane has been used by multiple landowners, including Plaintiffs, Defendant, Moldenhauers, Swallows and the public, for decades. Canyon Creek Lane provides utility access to the section line, commercial access for the residents for their contractors, guests and invitees and direct personal access to homesites. Plaintiffs admitted in their affidavits that Canyon Creek Lane has been maintained and utilized for access to residential properties. The trial court's refusal to classify Canyon Creek Lane as a public highway. The trial court avoided the issue instead of evaluating the settled facts and applying the black-letter law of the State.

This Court should under the undisputed facts of this case declare Canyon Creek Lane a public roadway which would resolve all access issue in this easement dispute. The issue of the cost of maintenance and responsibility for those costs is a simple separate action between all the affected property owners and not just Plaintiffs and Lorenz.

4. The Trial Court Erred in Denying Access Over the Section Line Right-of-Way

South Dakota law provides that landowners of isolated tracts are entitled to access over section line rights-of-way. SDCL § 31-22-1. Lorenz's property abuts a section line, which provides lawful access to Canyon Creek Lane. The trial court failed to consider this statutory right when extinguishing Lorenz's legal right to access since the section line is only reasonably accessible from Canyon Creek Lane. This omission was an error that further compounded the trial court's error in extinguishing Lorenz's easement.

The error of the trial court is easily corrected by the finding that the easement cannot be extinguished under the claim of nonuse, finding that an easement by necessity exists or finding that Canyon Creek Lane is a public highway under SDCL § 31-3-1. Any and all of these grounds resolve this dispute.

5. The Trial Court Erred in Finding Defendant's Actions Constituted a Nuisance

A private nuisance requires substantial and unreasonable interference with another's use and enjoyment of property. SDCL § 21-10-1; Kuper v. Lincoln-Union Elec. Co., 1996 S.D. 145, ¶ 49, 557 N.W.2d 748, 761. Plaintiffs alleged that Lorenz's use of a flashlight to "spotlight" their property constituted a nuisance. However, this occasional conduct does not rise to the level of substantial interference required under South Dakota

law. Prairie Hills Water and Development Co. v. Gross, 2002 S.D. 133, ¶ 31, 653 N.W.2d 745, 753. In the final judgment of the trial court no damages were awarded for the “spotlighting” or any other claimed nuisance action of Lorenz. Without an award of damages for such any alleged action and no trial testimony supporting damages for the same, any claim of civil nuisance must fail. This Court must dismiss any and all claims regarding nuisance as the factual evidence is absent.

6. The Trial Court Erred in Awarding Damages Without Sufficient Evidence

The trial court awarded damages to Plaintiffs without evidence of actual harm or quantifiable loss. Plaintiffs failed to provide evidence of specific damages resulting from Lorenz’s alleged conduct. Without proof of damages, the award is unsustainable.

Atkinson v. City of Pierre, 2005 S.D. 114, ¶¶ 11-17, 706 N.W.2d 791, 796. The sole witness regarding damages was from a non-party, Clint Swallow, who spent some funds for the roadway but never charged the Plaintiffs for any of his alleged maintenance. The trial court extrapolated a bald estimate of the costs of maintenance by non-party resident Swallow and extrapolated it for Lorenz’s use for nine years. The trial court’s finding in regard to these damages wholly destroys any claim of Plaintiffs for abandonment as they are admitting usage of the easement. Any claim of maintenance costs by Plaintiffs are void since Plaintiffs never requested payment for maintenance from any property owner in the history of the easement. Clint Swallow’s gratuitous payment for gravel and expended effort to grade the road is not evidence of a cost of maintenance since it was never paid by any easement beneficiary. A clearer case of insufficient evidence to support an award of speculative damages cannot be made.

This Court must reverse the award of damages in this matter as there is no showing of a damage to Plaintiffs.

CONCLUSION

The trial court's rulings are unsupported by the record and inconsistent with South Dakota law. The recorded easement remains valid and necessary for Lorenz's access to her property. Canyon Creek Lane should be classified as a public highway, and Lorenz's statutory right to access over the section line must be upheld. Plaintiffs failed to establish abandonment, necessity, nuisance, or damages. Defendant respectfully requests that this Court reverse the trial court's judgment, reinstate the recorded easement, and grant all other relief deemed appropriate.

RELIEF SOUGHT

Defendant-Appellant Tanya Lorenz respectfully requests that this Court :

1. Reverse the trial court's judgment extinguishing the recorded easement.
2. Declare Canyon Creek Lane a public highway under SDCL § 31-3-1.
3. Declare Defendant's access rights over the section line right-of-way.
4. Vacate the trial court's finding of nuisance and award of damages.
5. Grant any other relief deemed just and equitable.

Dated this 7th day of March, 2026.

EIESLAND LAW

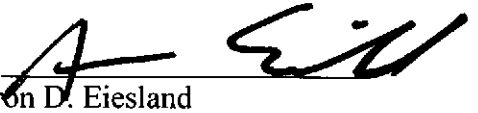


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REQUEST FOR ORAL ARGUMENT

Appellant hereby requests that this matter be set for oral arguments pursuant to SDCL §15-26A-82.

EIESLAND LAW

By 

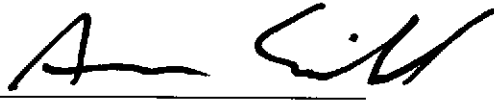
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CERTIFICATE OF COMPLIANCE

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 Microsoft Word, Times New Roman, Font 12, and contains 2696 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 7th day of March, 2026.

EIESLAND LAW

By 

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of March, 2026, I served by electronic mail, EFileandServe, and U.S. Mail the foregoing Brief of Appellant, to the following:

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Attorney for Appellees

EIESLAND LAW

A handwritten signature in black ink, appearing to read 'A. Eiesland', is written over a horizontal line.

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Attorney for Appellant

**APPENDIX TO
BRIEF OF APPELLANT**

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STATE OF SOUTH DAKOTA :
COUNTY OF BUTTE :
SS

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

**JEAN MAHER and WAYNE
BRATCHER,**

Plaintiffs,

vs.

TANYA LORENZ,

Defendant.

09CIV22-000088

**AFFIDAVIT OF TANYA LORENZ
Re: SUMMARY JUDGMENT**

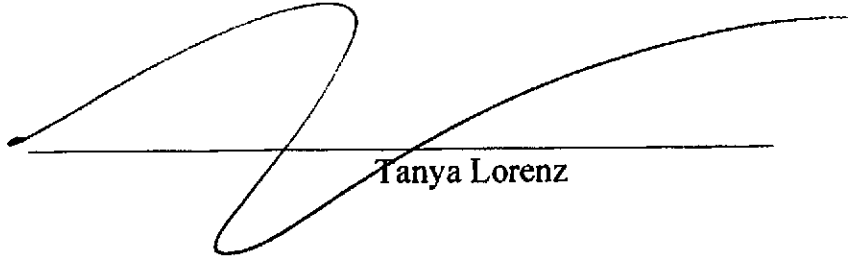
State of South Dakota)
County of Pennington) SS.

Tanya Lorenz, being first duly sworn upon his oath, deposes and states as follows:

1. I am the Defendant in the above-captioned matter. I have personal knowledge as to the statements set forth in this affidavit.
2. During the course of my ownership of my property to which the Easement at issue attaches, I have not used the easement property for proper easement purposes at varying intervals from the time of first ownership and continuing to the present day.
3. I have not shined lights onto Plaintiffs' property for no valid purpose.
4. After my divorce from Troy Lorenz, I have no filed or legally recognized right to cross the property of Troy Lorenz.
5. The easement at issue accesses my agricultural property and not just my residence.
6. I have not denied Plaintiffs the use of the easement property.
7. Without the subject easement my property will be landlocked reducing its value to myself and any subsequent owner.

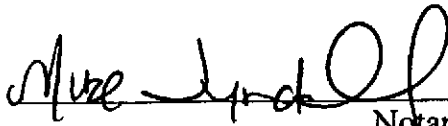
FURTHER THE AFFAINT SAYETH NOT

Dated this 7 day of August, 2024.

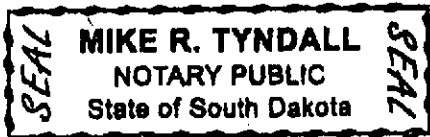

Tanya Lorenz

Subscribed and sworn to before me this 7th day of August, 2024.

(SEAL)



My Commission Expires
April 13, 2030



Notary Public
My Commission expires:

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) ss.	
COUNTY OF BUTTE	)	FOURTH JUDICIAL CIRCUIT
JEAN MAHER, AND WAYNE	)	09CIV22-000088
BRATCHER,	)	
Plaintiffs,	)	
	)	MEMORANDUM OF OPINION
	)	SUMMARY JUDGMENT
v.	)	
	)	
TANYA Y. LORENZ,	)	
	)	
Defendant.	)	

A hearing on Plaintiffs’ Motion for Summary Judgment was held on August 13, 2024, the Plaintiffs appearing by and through their counsel Eric Schlimgen¹ and the Defendant appearing in person with her counsel Aaron Eiesland. This Court having considered the pleadings and arguments of counsel as well as the post hearing submissions² hereby issues this Memorandum of Opinion.

Plaintiffs, Jean Maher and Wayne Bratcher will be referred hereafter as “Plaintiffs.” Defendant, Tanya Y. Lorenz will be referred to as “Lorenz” The Plaintiff’s Statement of Undisputed Material Facts will be referred to as “SUMF.”

¹ Mr. Schlimgen appeared telephonically at the hearing.

² The matter was deemed fully submitted on August 19, 2024.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs filed this case on July 28th, 2022, pursuant to a Verified Complaint for Declaratory Judgment seeking extinguishment of Defendant's right to easement by lack of necessity and by abandonment, nuisance as to Maher and a declaratory Judgment. Plaintiffs served on Defendant, Plaintiffs' First set of Interrogatories and Request for Production of Documents on November 22nd, 2022. On December 21, 2022, Defendant filed a Substitution of Counsel and Defendant's Responses to Plaintiff's Request for Admission. Each answer stated, "Deny. The undersigned has just appeared on this matter and has not had an opportunity to confer with the client or review the file." No response at all was provided to the interrogatories or requests for production, only the blanket statement for the request for admissions.

Plaintiffs' counsel sent a "meet and confer letter" on January 31, 2023.

Plaintiffs' counsel had a phone conversation with Defendant's counsel on February 21, 2023, to discuss possible resolution of the case and when the outstanding discovery requests would be answered. Counsel had another phone call on February 27th, 2023. Plaintiffs' counsel wrote Defendant's counsel on the 27th to recap the agreement that discovery responses would be answered by March 10, 2023. A hearing was subsequently held on May 30, 2024 at which the Defendant was Ordered to pay attorney fees in the amount of \$1,229.40 for her non-compliance with discovery.

Plaintiffs filed their Notice of Hearing, Statement of Undisputed Facts, Motion for Summary Judgment, and Brief in Support of Motion for Summary Judgment on July 9, 2024. A courtesy copy of the named pleadings was sent to Attorney Eiesland ae.law@live.com on July 9th. Mr. *See exhibit 1*, Email, to Brief in Support of Attorney Fees and Costs and Grant Relief Sought. Mr. Eiesland replied acknowledging the receipt of the pleadings as well as stating “I will be filling (sic) a motion for summary judgment and will set it for the same hearing if that hearing time works for my schedule.” *Id.* In the previous sentence he stated, “[f]ortunately, at this time, I believe I can make the hearing time work.” *Id.* Plaintiffs’ counsel replied apologizing that opposing counsel was not first consulted on the date, however Plaintiffs’ counsel did not receive any response that the date would not work. *Id.* The hearing date on Plaintiffs’ Motion for Summary Judgment was scheduled for August 13th, 2024, at 10:30 a.m. at the Butte County Courthouse, Belle Fourche, South Dakota.

On August 7, 2024, Defendant filed her Response to Plaintiffs’ Motion for Summary Judgment, the Affidavit of Tanya Lorenz, Defendant’s Response to Plaintiffs’ Statement of Undisputed Material Facts and Defendant’s Statement of Material Facts in Dispute.

The timeline for a Motion for Summary Judgment and the proceedings thereon is defined in SDCL § 15-6-56(c), which provides:

Unless different periods are fixed or permitted by order of the court, the motion and supporting brief, statement of undisputed material facts, and any affidavits shall be served not later than twenty-eight calendar days before the time specified for the hearing; **any response or reply thereto, including any response to the movant's statement of undisputed material facts, shall be**

served not later than fourteen calendar days before the hearing; and a reply brief or affidavit may be served by the movant not later than seven calendar days before the hearing. The time computation rules of § 15-6-6(a) requiring the exclusion of intermediate Saturdays, Sundays, and legal holidays shall not apply to the seven-calendar-day reply period.

- (1) A party moving for summary judgment shall attach to the motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Each material fact in this required statement must be presented in a separate numbered statement and with appropriate citation to the record in the case.
- (2) A party opposing a motion for summary judgment shall include a separate, short, and concise statement of the material facts as to which the opposing party contends a genuine issue exists to be tried. **The opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record.**
- (3) All material facts set forth in the statement that the moving party is required to serve shall be admitted unless controverted by the statement required to be served by the opposing party.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

SDCL § 15-6-56(c)(emphasis added).

The Defendant's time to file a reply would have been at the latest, July 30th, 2024. However, no response was filed by that date and there was no request submitted to the Court or counsel requesting a continued deadline.

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. SDCL § 15-6-8(d).

At the Summary Judgment hearing Defendant's counsel advised that he had not calendared the summary judgment response deadlines correctly and admitted his submissions were late and that it was his error. Defense counsel did not request a continuance or request the Court to allow the late filings pursuant to the doctrine of excusable neglect.

In cases of excusable neglect, SDCL 15-6-6(b) vests in the trial court discretion to enlarge the time to file pleadings. SDCL 15-6-6(b)(2); *see also Leighton v. Bennett*, 2019 S.D. 19, ¶ 16, 926 N.W.2d 465, 470. Specifically, the statute states that when pleading deadlines are set pursuant to SDCL chap. 15-6 "the court for cause shown may at any time in its discretion: (2) Upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." SDCL 15-6-6(b)(2). A party seeking to establish excusable neglect under SDCL 15-6-6(b) has the burden of bringing forth evidence to support his claims." *Leighton v. Bennett*, 2019 S.D. 19, ¶ 18, 926 N.W.2d 465, 471. Additionally, "when a motion for enlargement of time is filed, a circuit court must consider whether there is prejudice to the party opposing the enlargement of time." *S. Dakota Pub. Assurance All. For Pennington Cty. v. McGuire*, 2018 S.D. 75, ¶ 16, 919 N.W.2d 745, 750.

Here, Defendant's counsel did not motion this Court to enlarge the time to file Defendant's response to Plaintiffs' Motion for Summary Judgment. However, the Court in its discretion will accept Defendant's counsel's claim of a calendaring error as excusable neglect.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiffs' Statement of Undisputed Material Facts consisted of 34 paragraphs with attachments. Most of the Plaintiffs' factual statements were admitted to by the Defendant and will be set forth hereafter.

Wayne Bratcher owns 19083 Canyon Creek Lane, Belle Fourche, Butte County, South Dakota. *SUMF*, ¶ 1. This factual statement was admitted by Defendant in her Response to Plaintiffs' Statement of Undisputed Material Facts.

Wayne Bratcher (hereinafter "Bratcher") owns Legal Address: T08N R2E 30 SE4NW4, GOVT LOTS 1 & 2, known as 19083 Canyon Creek Road, Belle Fourche, SD 57717. *SUMF*, ¶ 2. This factual statement was admitted by Defendant.

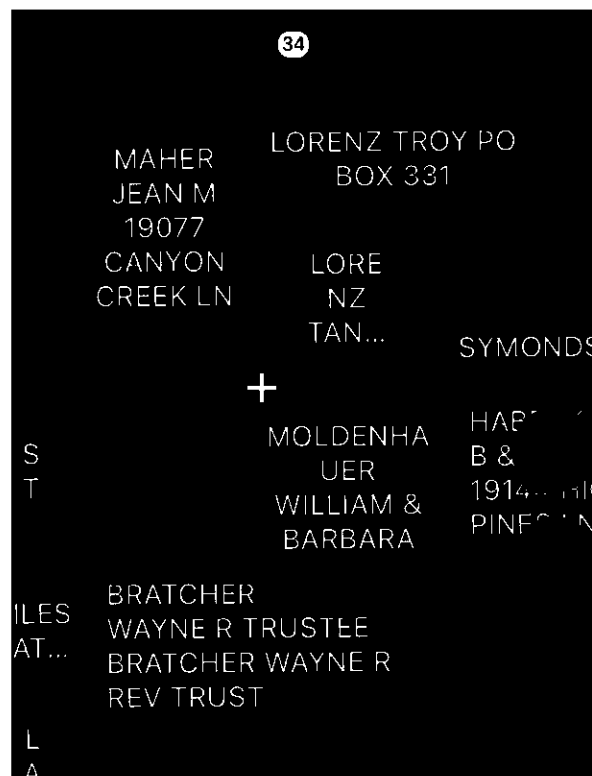
Jean Maher owns 19077 Canyon Creek Lane, Belle Fourche, Butte County, South Dakota. *SUMF*, ¶ 3. This factual statement was admitted by Defendant.

Clint Swallow resides at 19077 Canyon Creek Lane, Belle Fourche, Butte County, South Dakota. *SUMF*, ¶ 4. This factual statement was admitted by Defendant.

Jean Maher (hereinafter "Maher") owns Legal Address: LOTS 3 (LESS TRACT A), LOT 4 SEC 19, T8N, R2E, 1/2 INTEREST IN WATER WELL IN SW CORNER OF SW4SW4SE4SW4 SEC 19, T8N, R2E, also known as 19077 Canyon Creek Road, Belle Fourche, SD 57717. *SUMF*, ¶ 5. This factual statement was admitted by Defendant.

Lorenz own Legal Description: T08N R2E 19 SE4SW4, also known as 19096 Canyon Creek Lane, Belle Fourche, SD 57717. *SUMF*, ¶ 7; *Aff. Bratcher*, ¶ 9. This factual statement was admitted by Defendant.

Lorenz became the sole owner of her property in May of 2022. *SUMF*, ¶ 8; *Def Answer*, ¶ 11. This attached map outlines the ownership of individuals on Canyon Creek Lane. *See SUMF Exhibit 1*, Ownership Map. *Aff. Maher*, ¶ 4; *Aff. Bratcher*, ¶ 4. These factual statements were admitted by Defendant.



Bruce and Kim Crago (hereinafter “Crago”) originally owned Governments Lots 2 and 4 in the Southeast Quarter of the Southwest Quarter of Section 19. As the property was developed, they sold lots and entered into an “Easement Agreement” for access of other purchasers. *SUMF*, ¶ 9; *Aff. Maher*, ¶ 5; *Aff. Bratcher*, ¶ 5. These factual statements were admitted by Defendant.

On January 2nd, 1996, Becky and Randy Gropper, Maher, and Bratcher entered into an “Easement Agreement” regarding Government Lots 3 and 4, the Southeast Quarter of the Southwest Quarter of Section 19; an, the Northeast Quarter of the Northwest Quarter of Section 30, Township 8 North, Range 2 East, BHM Butte County, South Dakota; which was recorded with the Butte County Register of Deeds. *See SUMF ¶ 10; SUMF Exhibit 2*, Easement Agreement. *Aff. Maher, ¶ 6; Aff. Bratcher, ¶ 6*. These factual statements were admitted by Defendant.

The Easement Agreement “is to and shall run with the land, and shall be for the benefit, burden and use of the Grantees herein, their heirs, executors, administrators [,]and assigns.” *SUMF ¶ 11; SUMF Exhibit 2*. This factual statement was admitted by Defendant.

Lorenz became aware of this easement agreement from Black Hills Title insurance company. *SUMF, ¶ 12; Def. Answers, ¶ 15*. This factual statement was admitted by Defendant.

Randy and Becky Gropper bought RR 1, Box 448, Belle Fourche, SD 57717 (now 19096 Canyon Creek Lane) from Bruce G. Crago and Kim Crago in 1996. *See SUMF ¶ 13, SUMF Exhibit 3*, Crago Gropper Warranty Deed. This factual statement was admitted by Defendant.

The land sold two lots to Gropper’s included a “north” 40 acres and a “south” 40 acres. *SUMF, ¶ 14; Aff. Maher, ¶11; Aff. Bratcher, ¶ 11*. This factual statement was admitted by Defendant.

In 2002 Randy and Becky Gropper sold the “north” 40 acres (Section 19) to Margaret and Dallas Nixon. *SUMF*, ¶ 15; *Aff. Maher*, ¶12; *Aff. Bratcher*, ¶ 12. This factual statement was admitted by Defendant.

In June 2000, Randy and Becky Gropper sold the “south” 40 acres, (Section 30) to Moldenhauers. *SUMF*, ¶ 16; *Aff. Maher*, ¶13; *Aff. Bratcher*, ¶ 13. This factual statement was admitted by Defendant.

On August 4, 2017, by Warranty Deed Margaret Nixon n/k/a/ Margaret A. O’Sullivan conveyed Township 8 North, Range 2 East of the Black Hills Meridian, Butte County, South Dakota: Section 19: SD1/4SW1/4 to Troy and Tanya Lorenz. *See Exhibit 4*, Nixon Lorenz Warranty Deed. *SUMF*, ¶ 17, Exhibit 4; *Aff. Maher*, ¶14; *Aff. Bratcher*, ¶ 14. This factual statement was admitted by Defendant.

The Deed specifically states” Subject to all right-of-way and easements for state, county, municipal or private roads, all rights-of-way or easements for public utilities or irrigation and any and all additional easements and rights-of-way of record, if any.” *Id. Aff. Maher*, ¶15; *Aff. Bratcher*, ¶ 15. This factual statement was admitted by Defendant.

On or about March 2021 Tanya and Troy divorced and to the best knowledge and belief of Plaintiffs only Tanya continues to reside at the residence although Troy is still an owner of the property as well. *SUMF*, ¶ 19; *Aff. Maher*, ¶16; *Aff. Bratcher*, ¶ 16. This factual statement was admitted by Defendant.

Sometime after the Lorenz's purchased the "north" 40 acres they built a driveway from Highway 34 directly to their residence. *SUMF*, ¶ 20; *Aff. Maher*, ¶17; *Aff. Bratcher*, ¶ 17. This factual statement was admitted by Defendant.

Previously, the only ingress or egress from the property was using the road in the Easement Agreement. *SUMF*, ¶ 21. *Aff. Maher*, ¶18; *Aff. Bratcher*, ¶ 18. The Defendant's response to this factual statement was: "**Deny. Affidavit of Tanya Lorenz.**" (See Defendant's Response at paragraph 21).

Since building their own driveway Lorenz residence is no longer "land-locked" by neighboring parcels – they have direct access to Highway 34. *SUMF*, ¶ 22; *Aff. Maher*, ¶19; *Aff. Bratcher*, ¶ 19; *Aff. Swallow*, ¶ 3. The Defendant's response to this factual statement was: "**Deny. Affidavit of Tanya Lorenz.**" (See Defendant's Response at paragraph 22).

This portion of access from Highway 34 to Tayna Lorenz property is in fact now graveled. *SUMF*, ¶ 23; *See Exhibit 5. Aff. Maher*, ¶20; *Aff. Bratcher*, ¶ 20; *Aff. Swallow*, ¶ 4. This factual statement was admitted by Defendant.



The line from Highway 34 to the Lorenz property has all been graveled. *SUMF*, ¶ 24; *see id. Aff. Maher*, ¶ 21; *Aff. Bratcher*, ¶ 21; *Aff. Swallow*, ¶ 5. This factual statement was admitted by Defendant.

The below line at the end of the Lorenz property is where the gate was closed. *SUMF*, ¶ 25; *see id. Aff. Maher*, ¶ 22; *Aff. Bratcher*, ¶ 22; *Aff. Swallow*, ¶ 6; *Def. Answers INTS*, ¶ 19 (A temporary wire gate installed for less than a year that did not prevent access by myself or any other authorized person.). The Defendant's response to this factual statement was: **"Deny. Affidavit of Tanya Lorenz."** (See Defendant's Response at paragraph 25).

On or about 2017 and for a period of four (4) years after the Lorenz shut the gate at the end of their property which abutted the easement road and

allowed for overgrowth and waste to occur on their property immediately up to the easement road. *SUMF*, ¶ 26; *Aff. Maher*, ¶ 23; *Aff. Bratcher*, ¶ 23; *Aff. Swallow*, ¶ 7. The Defendant's response to this factual statement was: "**Deny. Affidavit of Tanya Lorenz.**" (See Defendant's Response at paragraph 26).

No one else is allowed to access their property from the road that is graveled to Lorenz property, and which connects to the easement. *SUMF*, ¶ 27; *Aff. Maher*, ¶ 24; *Aff. Bratcher*, ¶ 24; *Aff. Swallow*, ¶ 8; *Def Answers INTS*, ¶ 23. The Defendant's response to this factual statement was: "**Deny. Affidavit of Tanya Lorenz.**" (See Defendant's Response at paragraph 27).

The road Lorenz put into her property is a more direct route to her house. *SUMF*, ¶ 28; *Aff. Maher*, ¶ 25; *Aff. Bratcher*, ¶ 25; *Aff. Swallow*, ¶ 9. The Defendant's response to this factual statement was: "**Deny. Affidavit of Tanya Lorenz.**" (See Defendant's Response at paragraph 28).

On or about October 2021, Tanya Lorenz started using the easement road again. *SUMF*, ¶ 29; *Aff. Maher*, ¶ 26; *Aff. Bratcher*, ¶ 26; *Aff. Swallow*, ¶ 10. The Defendant's response to this factual statement was: "**Deny. Affidavit of Tanya Lorenz.**" (See Defendant's Response at paragraph 29).

Lorenz has paid nothing to the other Easement holders for road maintenance (gravel/grading/snow removal) since 2017. *SUMF*, ¶ 30; *Aff. Maher*, ¶ 27; *Aff. Bratcher*, ¶ 27; *Aff. Swallow*, ¶ 11; *Def. Answers INT*, ¶ 16; *Def. Answers R4A*, ¶ 1. This factual statement was admitted by Defendant.

Plaintiffs have continuously maintained the Easement by paying for upkeep; gravel and grading each year. *SUMF*, ¶ 31; *Aff. Maher*, ¶ 28; *Aff.*

Bratcher, ¶ 28. The Defendant’s response to this factual statement was: “**Deny. Affidavit of Tanya Lorenz.**” (See Defendant’s Response at paragraph 31).

On or about 2021 Tanya Lorenz in her field adjacent to the Maher property would “spotlight” the residence with a hi-beam flashlight on multiple occasions for no valid purpose. *SUMF*, ¶ 33; *Aff. Maher*, ¶ 30; *Aff. Swallow*, ¶ 12. The Defendant’s response to this factual statement was: “**Deny. Affidavit of Tanya Lorenz.**” (See Defendant’s Response at paragraph 33).

Clint Swallow was present multiple times when this happened. *SUMF*, ¶ 34; *Aff. Swallow*, ¶ 13. The Defendant’s response to this factual statement was: “**Deny. Affidavit of Tanya Lorenz.**” (See Defendant’s Response at paragraph 34).

AUTHORITY AND ANALYSIS

Summary judgment is authorized “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” SDCL § 15-6-56(c). For summary judgment purposes, “[a] disputed fact is not ‘material’ unless it would affect the outcome of the suit under the governing substantive law in that a ‘reasonable jury could return a verdict for the nonmoving party.’” *Robinson v. Ewalt*, 2012 S.D. 1, ¶ 10, 808 N.W.2d 123, 126.

While Plaintiff has “the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law,” *Johnson v. Matthew J. Batchelder Co., Inc.*, 2010 S.D. 23, ¶ 8, 779

N.W.2d 690, 693 (additional citations omitted), Defendants’ “must substantiate [their] allegations with sufficient probative evidence that would permit a finding in [their] favor on more than mere speculation, conjecture, or fantasy.” *Tolle v. Lev*, 2011 S.D. 65, ¶ 11, 804 N.W.2d 440, 444. Defendants’ “response, by affidavits or as otherwise provided in SDCL § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial.” *Dakota Indus., Inc. v. Cabela’s. Com, Inc.*, 2009 S.D. 39, ¶14, 766 N.W.2d 510, 514 (quoting SDCL § 15-6-56(e)) (emphasis in original). Defendant bears the burden to show that [they] will be able to place sufficient evidence in the record at trial to establish the existence of every element [they have] the burden of proving. *Id.* at ¶ 11. Otherwise “[e]ntry of summary judgment is mandated.” *Id.* (additional citations omitted).

“Summary judgment is a preferred process to dispose of meritless claims.” *Horne v. Crozier*, 1997 S.D. 65, ¶ 5, 565 N.W.2d 50, 53. It should never be viewed as a “disfavored procedural shortcut but rather, as an integral part of [our rules] as a whole, which are designed ‘to secure the just, speedy, and inexpensive determination of every action.’” *Accounts Management, Inc. v. Litchfield*, 1998 S.D. 24, ¶ 4, 576 N.W.2d 233, 234 (citation omitted).

Plaintiffs point to SDCL 15-6-56(c)(2) which provides:

(2) A party opposing a motion for summary judgment shall include a separate, short, and concise statement of the material facts as to which the opposing party contends a genuine issue exists to be tried. The opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record.

A failure to properly respond results in the Court disregarding the response in whole which produces an unsavory effect pursuant to SDCL 15-6-56(e):

.....If he does not so respond, summary judgment, if appropriate, shall be entered against him.

No exception is provided in SDCL 15-6-56(c) nor (e) for failure to comply. Here the issue is whether Defendant properly “respond[ed] to each numbered paragraph in the Plaintiffs’ statement with a separately numbered response and appropriate citations to the record.” SDCL 15-6-56(c)(2).

In regard to the numbered paragraphs in Plaintiffs’ statement that the Defendant did not admit, Defendant’s response each time was: “**Deny. Affidavit of Tanya Lorenz.**”

The Supreme Court of South Dakota observed such a situation in *Domson, Inc. v. Kadrmas Lee & Jackson, Inc.*, 2018 SD 67¶6-7. Although the issue was not squarely before it, the facts leading to the situation and noted by the Court, were addressed at the circuit court level. The Supreme Court called attention to the circuit courts resolution of the matter when the circuit applied a “benefit of the doubt” standard. The circuit’s decision on this specific issue was not appealed. The Supreme Court didn’t opine on the standard applied at the circuit level in *Domson*, yet it took great care to illustrate such a situation in its factual recitation, even though the issue wasn’t directly before them. In that case the circuit court judge held Domson failed to properly comply with 15-6-56(c)(2) yet found the submissions made by Domson met the “benefits of the doubt” criteria. This Court is unaware if “benefits of the doubt” is akin to “substantial compliance,” but as mentioned above, the Supreme Court only highlighted the issue and drew attention to it; but, couldn’t address the question as it wasn’t properly before it. This Court finds the “substantial compliance” criteria more befitting of this situation; but, without statutory

authority to apply this criterion, this Court rejects both criteria when reviewing a response pursuant to SDCL 15-6-56(c)(2).

Therefore, this Court reviews the Response to determine if it complies with the exact requirements of the statute.

Pursuant to subsection (2), the responding party of a motion for summary judgment “shall”: include a separate, short, and concise statement of the material facts as to which the opposing party contends a genuine issue exists to be tried. The opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record.

Here, Defendant did submit a separate statement as denoted in the filed response. Defendant has met the threshold for the first provision of the statute, insofar as she did prepare a separate document. Defendants are required to respond to each numbered paragraph in the moving parties’ statement with a separately numbered response. The Defendant does number each of her paragraphs in her response yielding 34 separate paragraphs. However, her responses of “**Deny. Affidavit of Tanya Lorenz**” do not comply with the statute and are insufficient. In these responses the Defendant provides no argument nor citation to the record explaining what material issues of genuine fact existed for trial.

This Court concludes the requirements of SDCL 15-6-56(c)(2) have not been met and now must consider the application of SDCL 15-6-56(e):

.....If he does not so respond, summary judgment, if appropriate, shall be entered against him.

There are two components to SDCL 15-6-56(e), which are (1) no response results in summary judgment (2) if appropriate. A moving party for summary judgment doesn’t automatically prevail if the non-moving party fails to respond. The burden is still on the moving

party to demonstrate summary judgment is “appropriate” based on the motion for summary judgment and corresponding pleadings.

In *Reed v. Bennett*, 312 F.3d 119054 Fed.R.Serv.3d 937, the Tenth Circuit, considered a failure to timely file a response explaining the operative language to consider in 56(e) is “if appropriate” meaning the Court should still review the Motion for Summary Judgment. As the Tenth Circuit guided:

To summarize, a party's failure to file a response to a summary judgment motion is not, by itself, a sufficient basis on which to enter judgment against the party. The district court must make the additional determination that judgment for the moving party is “appropriate” under Rule 56. Summary judgment is appropriate only if the moving party demonstrates that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. By failing to file a response within the time specified by the local rule, the nonmoving party waives the right to respond or to controvert the facts asserted in the summary judgment motion. The court should accept as true all material facts asserted and properly supported in the summary judgment motion. But only if those facts entitle the moving party to judgment as a matter of law should the court grant summary judgment.

Id., at 1195.

By failing to comply with SDCL 15-6-56(c)(2) the Defendant is deemed to have not responded. This Court now needs to determine as a matter of law, whether the Plaintiffs should prevail under summary judgment.

EXTINGUISHMENT OF LORENZ RIGHT TO EASEMENT BY LACK OF NECESSITY

“The common law recognizes two types of implied easements: easements by necessity and easements implied from prior use.” *Springer v. Cahoy*, 2013 S.D. 86, ¶¶ 8-9, 841 N.W.2d 15, 19 (quoting *Thompson v. E.I.G. Palace Mall, LLC*, 2003 S.D. 12, ¶ 11, 657 N.W.2d 300, 304. An implied easement by necessity “can occur when a grantor conveys to another an inner portion of land surrounded by lands owned by the grantor or the grantor and others. *Id.* Unless a contrary

intent is manifest, the landlocked grantee will be entitled to have a right-of-way across the retained land of the grantor for ingress and egress.” *Id.* The necessity for access over the grantor's land must have arisen at the time of severance, in addition to a present necessity. *Magnuson v. Cossette*, 707 N.W.2d 738, 746 (Minn.Ct.App.2006); *Cobb v. Daugherty*, 225 W.Va. 435, 693 S.E.2d 800, 808–09 (2010); see *Thompson*, 2003 S.D. 12, ¶ 13, 657 N.W.2d at 305. See generally 25 Am. Jur. 2d *Easements and Licenses* § 35 (2013). In order to determine whether there was a necessity at the time of severance, the circuit court found that it must trace back to the date of the unitary parcel's severance. *Id.* ¶ 9.

Plaintiffs’ agree, an “Easement Agreement” existed as to the larger 80 acres that was divided into two (2) 40 acre tracts sold to the Groppers, now owned by Troy Lorenz (north 40) and Tayna Lorenz (south 40). See *SUMF* ¶¶ 14-20. However, there is no necessity for this easement as noted by *SUMF Exhibit 5*, Lorenz has access to Hwy 34 through an improved gravel road across the north 40 acres. *SUMF*, ¶¶ 21-23. The Lorenz’s collectively when married owned the south and north 40 acres (80 total) that now Tanya Lorenz claims she is “land-locked” without access through the easement. The joint ownership at one-time of the 80 acres and the blocking for a period of years of the easement access, non-payment of easement upkeep dues, and improved access to Hwy 34 indicate an extinguishment of easement by necessity. *SUMF*, ¶¶ 19-31.

EXTINGUISHMENT OF LORENZ RIGHT TO EASEMENT BY ABANDONMENT

SDCL § 43–13–12 sets forth the requirements to extinguish an easement. “A servitude is extinguished by the performance of any act upon either tenement,

by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise.” *Hofmeister v. Sparks*, 2003 S.D. 35, ¶ 11, 660 N.W.2d 637, 641 (quoting *Selway Homeowners Association v. Cummings*, 2003 SD 11, 657 N.W.2d 307). Intent to abandon the easement is also required.

Under this statute, “there must be an affirmative act of abandonment on the part of the owner of the easement to extinguish the easement. Mere nonuse of an easement, created by grant, is insufficient to satisfy this requirement.” *Hofmeister v. Sparks*, 2003 SD 35, ¶ 13, 660 N.W.2d 637, 641 (citing *Clark v. Redlich*, 147 Cal.App.2d 500, 305 P.2d 239, 244 (1957)). However, a substituted access may serve as evidence of abandonment, but that by itself is not dispositive. *Id.* Use of a substitute road may be evidence of an abandonment of the old road; however, “[t]he mere use of a new right-of-way will not extinguish the old. There must also be an abandonment by non-use of the old right-of-way.” *Id.* (quoting *Shippy v. Hollopeter*, 304 N.W.2d 118, 122 (S.D.1981)). Those claiming abandonment carry the burden of showing by clear and convincing evidence an intent to abandon the easement. *Cleveland v. Tinaglia*, 1998 SD 91, ¶ 26, 582 N.W.2d 720, 725; see *Mueller v. Bohannon*, 256 Neb. 286, 589 N.W.2d 852, 859 (1999).

Graves, 2004 SD 137, ¶ 11, 691 N.W.2d at 318. The clear and convincing evidence of intent to abandon was emphasized in *Graves*:

Failure to take advantage of a servitude benefit, even for a lengthy period, is seldom sufficient to persuade a court that abandonment has occurred. Some additional action on the part of the beneficiary inconsistent with continued existence of the servitude is normally required, although the amount of additional evidence required tends to diminish as the period of nonuse grows longer. In cases where a very long period of time has passed, abandonment may be found even without other evidence of intent.

Boyer v. Dennis, 2007 S.D. 121, ¶ 9, 742 N.W.2d 518, 520–21; *Id.* ¶ 12, 691 N.W.2d at 318 (quoting Restatement (Third) of Property, § 7.4 cmt. c (2000)).

Ultimately, because of the nature of these cases: “A finding of abandonment is

usually based on circumstantial evidence rather than on direct expressions of intent....” *Id.*

The South Dakota Supreme Court cited with approval the Iowa Supreme Court Decision of *Harrington v. Kessler*, that,

It has often been held that an unintentional or a partial blocking is insufficient to disclose abandonment and so long as the purpose of ingress and egress is not substantially interfered with, no rights of the owners are lost.... As a general rule, a mere neglect of the condition of a way is not enough in addition to nonuser to show abandonment.

Boyer v. Dennis, 2007 S.D. 121, ¶ 12, 742 N.W.2d 518, 521 (citing *Harrington v. Kessler*, 247 Iowa 1106, 111, 77 N.W.2d 633, 635 (Iowa 1956).

In the present case, on or about 2017 for a period of four (4) years after the Lorenz shut the gate at the end of their property which abutted the easement road she allowed for overgrowth and waste to occur on their property immediately up to the easement road. *SUMF*, ¶ 26; *Aff. Maher*, ¶ 23; *Aff. Bratcher*, ¶ 23; *Aff. Swallow*, ¶ 7. No one else is allowed to access their property from the road that is graveled to Lorenz property, and which connects to the easement. *SUMF*, ¶ 27; *Aff. Maher*, ¶ 24; *Aff. Bratcher*, ¶ 24; *Aff. Swallow*, ¶ 8; *Def Answers INTS*, ¶ 23. On or about October 2021, Tanya Lorenz started using the easement road again. *SUMF*, ¶ 29; *Aff. Maher*, ¶ 26; *Aff. Bratcher*, ¶ 26; *Aff. Swallow*, ¶ 10. Lorenz took an intentional act to prevent egress and ingress and shut off access to the easement for a period of years.

The use of a substituted way may be evidence of abandonment of the original way. *Shippy v. Hollopeter*, 304 N.W.2d 118, 121–22 (S.D. 1981); *See*: 25 Am.Jur.2d Easements and Licenses s 105 (1966); Annot., 25 A.L.R.2d 1265,

s 13 (1952). This, however, is not conclusive of non-use. *Id.* The mere use of a new right-of-way will not extinguish the old. *Id.* There must also be an abandonment by non-use of the old right-of-way. *Id.* (citing *Miller v. Southard*, 38 S.D. 477, 162 N.W. 146 (1917)).

Since building their own driveway Lorenz residence is no longer “land-locked” by neighboring parcels – they have direct access to Highway 34. *SUMF*, ¶ 22; *Aff. Maher*, ¶ 19; *Aff. Bratcher*, ¶ 19; *Aff. Swallow*, ¶ 3. The road Lorenz put into her property is a more direct route to her house. *SUMF*, ¶ 28; *Aff. Maher*, ¶ 25; *Aff. Bratcher*, ¶ 25; *Aff. Swallow*, ¶ 9. This portion of access from Highway 34 to Tayna Lorenz property is in fact now graveled. *SUMF*, ¶ 23; *See Exhibit 5. Aff. Maher*, ¶ 20; *Aff. Bratcher*, ¶ 20; *Aff. Swallow*, ¶ 4.

For extinguishment to occur pursuant to SDCL § 43–13–12, Browns' “performance of any act” (commercial use of the water) would have to be “incompatible with [the servitude's] nature or exercise.” *Brown v. Hanson*, 2007 S.D. 134, ¶ 13, 743 N.W.2d 677, 681 (quoting SDCL § 43–13–12. Since the term “incompatible” is not defined in the statute we rely on its plain and ordinary meaning. *Id.* “Incompatible” is defined by the Merriam–Webster dictionary as “incapable of association or harmonious coexistence.” <http://www.merriam-webster.com>, last visited December 21, 2007.

Lorenz has paid nothing to the other Easement holders for road maintenance (gravel/grading/snow removal) since 2017. *SUMF*, ¶ 30; *Aff. Maher*, ¶ 27; *Aff. Bratcher*, ¶ 27; *Aff. Swallow*, ¶ 11; *Def. Answers INT*, ¶ 16; *Def. Answers R4A*, ¶ 1. Plaintiffs have continuously maintained the Easement

by paying for upkeep; gravel and grading each year. *SUMF*, ¶ 31; *Aff. Maher*, ¶ 28; *Aff. Bratcher*, ¶ 28.

Lorenz fencing across the easement is incompatible with the use of the easement and is evidence of intent to abandon. Additionally, Lorenz now has improved direct access to Hwy 34 and is no longer a landlocked parcel. Lastly, the non-payment of any upkeep or obligations of the easement evidence intent to abandon it.

NUISANCE AS TO MAHER

A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:

- (1) Annoys, injures, or endangers the comfort, repose, health, or safety of others;
- (2) Offends decency;
- (3) Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake or navigable river, bay, stream, canal, or basin, or any public park, square, sidewalk, street, or highway;
- (4) In any way renders other persons insecure in life, or in the use of property.

SDCL § 21-10-1. A private nuisance exists if a person's conduct is:

the legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either, (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Kuper v. Lincoln-Union Elec. Co., 1996 S.D. 145, ¶ 49, 557 N.W.2d 748, 761 (citing Restatement (Second) of Torts § 822).

On or about 2021 Tanya Lorenz in her field adjacent to the Maher property would “spotlight” the residence with a hi-beam flashlight on multiple occasions

for no valid purpose. *SUMF*, ¶ 33 *Aff. Maher*, ¶ 30; *Aff. Swallow*, ¶ 12. Clint Swallow was present multiple times when this happened. *SUMF*, ¶ 24. *Aff. Swallow*, ¶ 13. There was no valid purpose to this “spotlighting” which Lorenz did in this case (she has other instances of this conduct, *see* 09TPO21-56; 09CIV22-77). This repeated act was only done to annoy the comfort of others. It offends the decency of a normal society and affected Plaintiffs’ enjoyment of property.

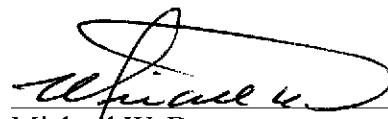
CONCLUSION

This Court finds there are no genuine issues of material fact and that Plaintiffs are entitled to Judgment against the Defendant as a matter of law. As to any claims for damages a trial to the court is necessary. The Court is going to deny Plaintiffs’ claim for attorney’s fees for Defendant’s tardy response to Plaintiffs’ Motion for Summary Judgment. Counsel for Plaintiffs shall prepare an order consistent with and incorporating this Court’s Memorandum of Decision.

Dated this 8th day of November, 2024.

BY THE COURT:

11/8/2024 1:54:26 PM



Michael W. Day
Circuit Court Judge

Attest:
Jensen, Alana
Clerk/Deputy



STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS:	
COUNTY OF BUTTE	)	FOURTH JUDICIAL CIRCUIT

JEAN MAHER and	)	
WAYNE BRATCHER	)	09CIV22-000088
Plaintiffs,	)	
	)	
v.	)	ORDER FOLLOWING
	)	SUMMARY JUDGMENT
TANYA Y. LORENZ,	)	
Defendant.	)	

A hearing was held on this matter before the Honorable Judge Michael Day at the Butte County Courthouse on August 13th, 2024. Plaintiffs appeared through counsel, Eric Schlingen who appeared telephonically. Defendant was personally present and represented by Aaron Eiesland. The Court having considered the pleadings and arguments of counsel as well as the post hearing submissions entered a Memorandum Opinion on November 11th, 2024, this Order is consistent with that Decision, and it is hereby; it is further

ORDERED that Plaintiffs' Motion for Summary Judgment is granted in full, as there are no material facts in dispute; it is further

ORDERED that Plaintiffs' Motion for Summary Judgment is granted in full, and the Easement of Tanya Lorenz, "Easement Agreement" regarding Government Lots 3 and 4, the Southeast Quarter of the Southwest Quarter of Section 19; an, the Northeast Quarter of the Northwest Quarter of Section 30, Township 8 North, Range 2 East, BHM Butte County, South Dakota; which was recorded with the Butte County Register of Deeds is extinguished by lack of necessity; it is further

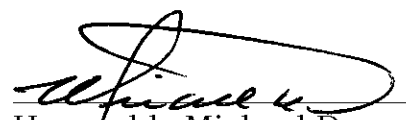
ORDERED that Plaintiffs' Motion for Summary Judgment is granted in full, and the Easement of Tanya Lorenz, "Easement Agreement" regarding Government Lots 3 and 4, the Southeast Quarter of the Southwest Quarter of Section 19; an, the Northeast Quarter of the Northwest Quarter of Section 30, Township 8 North, Range 2 East, BHM Butte County, South Dakota; which was recorded with the Butte County Register of Deeds is extinguished abandonment; it is further

ORDERED that the Butte County Register of Deeds shall record a new easement agreement voiding the access of Tanya Lorenz and the property she owns: T08N R2E 19 SE4SW4, also known as 19096 Canyon Creek Lane, Belle Fourche, SD 57717; it is further

ORDERED that Plaintiffs' Motion for Summary Judgment is granted in full, and that Tanya Lorenz committed a nuisance against Plaintiffs Maher; it is further

ORDERED that damages will be determined at a trial to the court if necessary.

BY THE COURT: **11/14/2024 2:15:21 PM**


Honorable Michael Day
Circuit Court Judge

Attest:
Jensen, Alana
Clerk/Deputy



STATE OF SOUTH DAKOTA :
SS
COUNTY OF BUTTE :

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

JEAN MAHER and WAYNE
BRATCHER,

Plaintiffs,

vs.

TANYA LORENZ,

Defendant.

09CIV22-000088

AFFIDAVIT OF SHANE PULLMAN
Re: SD HIGHWAY 34 ACCESS

State of South Dakota)
County of Pennington) SS.

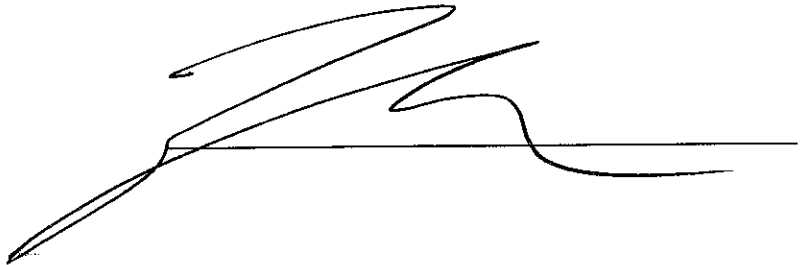
Shane Pullman, being first duly sworn upon his oath, deposes and states as follows:

1. I, Shane Pullman, and am employed as an Attorney for the South Dakota Department of Transportation ("SDDOT") and submit the information in this Affidavit upon personal knowledge.
2. SDDOT is required to manage and permit accesses to the State Trunk Highway System.
3. Direct access to SD Highway 34 is subject to the law of South Dakota and the Administrative Rules of South Dakota.
4. The SDDOT Access Location Criteria is found at SD Admin Rule 70:09.
5. I have analyzed the character of the private access off of SD Highway 34 to property owned by Troy Lorenz south of SD Highway 34 just east of Canyon Creek Lane which is located West of Belle Fourche, Butte County, South Dakota.
6. A screenshot from the Butte County GIS is attached hereto for reference as Exhibit A.

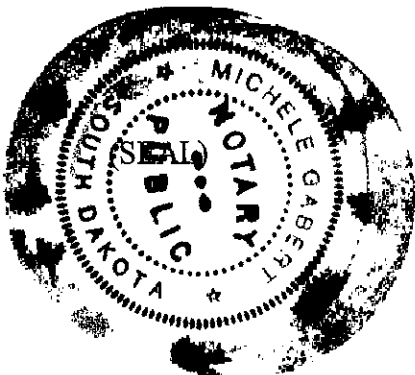
7. After a due and diligent search, SDDOT could not locate a valid permit for this access to Hwy 34. This likely means that the access was constructed prior to SDDOT's permitting rules went into effect in 2002.
8. According to historic aerial imagery, sometime between 2016 and 2021, the subject access to Highway 34 was further graded and extended to property to the South, which bears the physical address of 19096 Canyon Creek Rd.
7. SDDOT's view of the subject access is that it is a field approach only for agricultural use. The subject access to Highway 34 is not permitted for residential use.
8. If the subject access road were to be used for a residential approach, the change in use would require a valid permit from SDDOT.
9. If this change in use is sought, an application from the property owner would need to be filed with the SDDOT Belle Fourche Area office and the access would need to meet all spacing, density, and sight distance requirements contained within the administrative rules in order for the permit to be granted.
10. The real property located at 19096 Canyon Creek Rd appears to have legal residential access to and from Canyon Creek Lane, and not directly to Highway 34.

FURTHER THE AFFAINT SAYETH NOT

Dated this 17 day of July, 2025.



Subscribed and sworn to before me this 17 day of July, 2025.



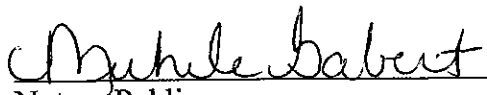
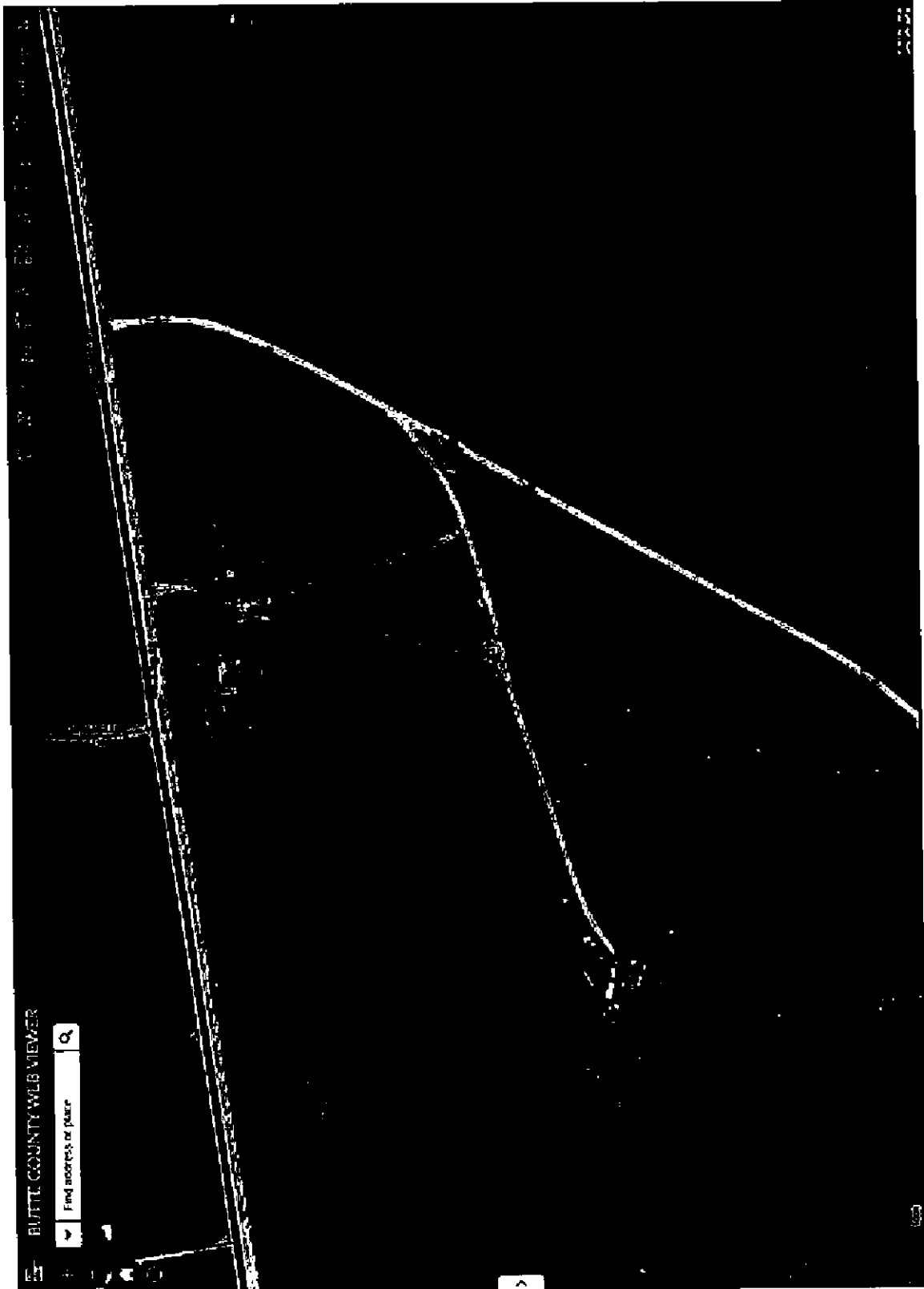

Notary Public
My commission expires: May 5, 2030

Exhibit A



STATE OF SOUTH DAKOTA)
)SS:
COUNTY OF BUTTE)
 FOURTH JUDICIAL CIRCUIT

JEAN MAHER and	)	
WAYNE BRATCHER	)	09CIV22-000088
Plaintiff,	)	
	)	
v.	)	ORDER FOLLOWING DEFENDANT'S
	)	MOTION FOR SUMMARY JUDGMENT
TANYA Y. LORENZ,	)	RECONSIDERATION HEARING
	)	
Defendant.	)	

A hearing was held on Defendant's *Motion for Reconsideration of Summary Judgment and for Declaration of Public Roadway* before the Honorable Judge, Michael W. Day at the Butte County Courthouse, Belle Fourche, SD on August 25th, 2025. Plaintiff appeared through counsel, Eric Schlimgen. Defendant was personally present and represented by counsel, Aaron Eiesland. The Court having considered the pleadings and arguments of counsel as well as the entirety of the record, including the November 11th, 2024, *Memorandum Opinion* of the Court, hereby issues the following;

ORDERED that the Court made oral findings on the record which are hereby expressly included by reference into this ORDER; and it is further

ORDERED that this file started in 2022 by Plaintiff's Verified Complaint for extinguishment of easement by lack of necessity and by abandonment. Discovery was served on Defendant and discovery was not timely answered resulting in sanctions against Defendant. Plaintiff in 2024 brought a Motion for Summary Judgment (hereinafter "MSJ"), which Defendant represented to the Court, that Defendant would be filing a competing, cross-MSJ which was never filed. Defendant's response to Plaintiff's MSJ was untimely. The only supporting affidavit was that of the Defendant, Ms. Lorenz.

This Court granted summary judgment in favor of Plaintiff in a *Memorandum Opinion* on November 8th, 2024. An *Order Following Summary Judgment* was signed by the Court November 14th, 2024, granting Plaintiff's causes

Order Following Defendant's Renewed MSJ

of action as to extinguishment of easement by lack of necessity, extinguishment of easement by abandonment, and as to nuisance.

Defendant verbally indicated at a Scheduling Hearing set by Plaintiff that Defendant would make a motion to reargue summary judgment on June 18th, 2025. The Court notes no new facts have been presented, or any basis for excusable neglect and there is no basis for reconsideration. The Court asked counsel for Defendant if he was really asking for summary judgment on the declaration of public highway to which Defendant was unsure. The Court considered the declaration as part of the MSJ. If it were to be a summary judgment on the declaration of public highway, the Defendant did not comply with the summary judgment statutes. *See* Title 31 and Title 11; and it is further

ORDERED, South Dakota statute and precedent establish that a party who fails to file a motion for summary judgment and later seeks relief after the opposing party's motion has been granted, cannot re-ask the court for such relief unless exceptional circumstances under Rule 60(b) are demonstrated. No such exceptional circumstances exist; this is the last pleading in a case fraught with missed deadlines for filings and awarding attorney fees and costs for neglect of deadlines. The finality of summary judgment and the procedural requirements for opposing such motions underscore the importance of diligence and compliance during the initial litigation process and as such, although the Court's *Memorandum Opinion* stands, the only matter left for consideration of this Court is the damages awardable to Plaintiff, and Defendant's MSJ is **DENIED**; and it is further

ORDERED Defendant's MSJ does not meet the statutory requirements of filing a Statement of Undisputed Material Fact (hereinafter "SUMF"). *See* SDCL § 15-6-56(c)(1); *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 25, 757 N.W.2d 756, 764 (The plain meaning of SDCL § 15-6-56(c) leaves no doubt that the moving party must file a statement of undisputed material facts with a motion for summary judgment). The South Dakota Supreme Court has considered this same statutory deficiency, and therefore Defendants MSJ is **DENIED**; and it is further

ORDERED in *People ex rel. S.M.D.N.*, 2004 S.D. 5, ¶ 7, 674 N.W.2d 516, 517, [the South Dakota Supreme Court] held that “an order dismissing a motion to reconsider entered by the circuit court does not create a new avenue for appeal.” “A motion for reconsideration is not a separate and appealable order. Rather, it is ‘an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment.’ ” *Id.* (quoting *Breeden v. Neb. Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441, 444 (1999)).

In *S.M.D.N.*, [the South Dakota Supreme Court] determined this Court lacked jurisdiction to consider an appeal of an order denying a motion to reconsider because the underlying order being challenged had previously been summarily affirmed by this Court and the statutory right to appeal the order had long since passed. 2004 S.D. 5, ¶ 7, 674 N.W.2d at 517. *S.M.D.N.* properly recognized that a motion to reconsider could not revive the appeal period for the underlying order. *Matter of Shirley A. Hickey Living Tr.*, 2022 S.D. 53, ¶¶ 15-16, 979 N.W.2d 558, 563 (citing *Id.*).

As such, this denial of Defendant’s *Motion for Reconsideration of Summary Judgment and for Declaration of Public Roadway* is not a separate and appealable order.

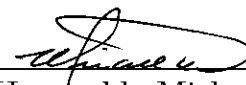
Dated this 4th day of September 2025.

9/4/2025 2:32:31 PM

BY THE COURT:

Attest:
Wynia, Becky
Clerk/Deputy




Honorable Michael w. Day
Presiding Circuit Court Judge

Order Following Defendant's Renewed MSJ

3 of 3

FILED

STATE OF SOUTH DAKOTA DEC 23 2025 IN CIRCUIT COURT
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
COUNTY OF BUTTE 4TH CIRCUIT CLERK OF COURT
By _____ FOURTH JUDICIAL CIRCUIT

JEAN MAHER and
WAYNE BRATCHER,
Plaintiffs,

09CIV22-000088

v.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

TANYA Y. LORENZ,
Defendant.

This matter came before the Court on September 25th, 2025, at 8:30 a.m. at the Butte County Courthouse, Belle Fourche, South Dakota. Plaintiffs, Jean Maher was personally present, Wayne Bratcher was not present but appeared through counsel, Eric M. Schlingens. Defendant, Tayna Y. Lorenz was personally present with counsel, Aaron Eiesland. The Court, being familiar with the file, having fully reviewed all pleadings and having heard the testimony of Defendant and any witnesses, hereby issues these Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. All Findings of Fact and Conclusions of Law stated on the record are incorporated herein by Reference. Findings of Fact are based on the evidence in the record as of September 25, 2025, and all past pleadings and evidence.
2. The Plaintiffs, Jean Maher (hereinafter "Jean") and Wayne Bratcher are residents of Butte County, South Dakota.
3. The Defendant Tayna Y. Lorenz (hereinafter "Tanya") is a resident of Butte County, South Dakota.

4. The Court has jurisdiction over the parties and subject matter. Venue is proper.
5. This case was initiated by Plaintiff's *Verified Complaint for Declaratory Judgment* seeking extinguishment of Defendant's right to easement by lack of necessity and by abandonment, nuisance as to Maher on July 28th, 2022.
6. The easement at issue in this case regarded the use of Canyon Creek Lane, (hereinafter "CCL") in Butte County, South Dakota.
7. Jean resides at 19077 Cayon Creek Lane with her daughter and son-in-law, Clinton Swallow (hereinafter "Clint"); Wayne Bratcher resides at 19083 Canyon Creek Lane; William and Barbara Moldenhauer at 19099 Canyon Creek Lane; and Tanya (and once Troy – her ex-husband) at 19096 Canyon Creek Lane.
8. A Trial to the Court on the issue of damages was held September 25th, 2025, and Plaintiff's *Exhibit 1*, was offered and received by the Court without objection depicts the parties in relation to CCL.
9. Prior to the Damages Trial, Plaintiff's in 2024 filed for Summary Judgment which was granted in a *Memorandum Opinion*, November 8th, 2024, and incorporated in an *Order Following Summary Judgment* signed by this Court November 14th, 2025.
10. The Defendant postured to the Court and opposing Counsel, that Defendant would file a competing Motion for Summary Judgment to simultaneously be considered but no motion was filed.

11. The Defendant only submitted one (1) affidavit, that of Tanya in opposition to Plaintiff's Motion for Summary Judgment.
12. The *Memorandum Opinion* granted Plaintiff's causes of action to extinguishment of easement by lack of necessity, extinguishment of easement by abandonment, and as to nuisance.
13. Pursuant to the *Memorandum Opinion* the only remaining issue before the Court was the issue of damages at to the use of CCL from 2017 until present since Plaintiffs contended that Defendant continued to use CCL even after the Court extinguished the easement.
14. A Scheduling Hearing was held before this Court on June 17th, 2025, before this Court to set a Trial on the remaining issue, damages.
15. Defendant, without noticing the motion, orally motioned to reconsider summary judgment.
16. The Court permitted Defendants motion and set deadlines regarding briefing.
17. A hearing on Defendant's *Motion for Reconsideration of Summary Judgment and for Declaration of Public Roadway* was held August 25th, 2025, counsel for both parties were personally present.
18. The Court on September 4th entered an *Order Following Defendant's Renewed MSJ* denying Defendants requested relief.
19. The *Order Following Defendant's Renewed MSJ*, as well as the *Memorandum Opinion*, and *Order Following Summary Judgment* are incorporated herein.

20. Notice of Entry of the *Order Following Defendant's Renewed MSJ* was filed September 25th.

21. A Trial to the Court on the sole remaining issue of damages was held on September 25th, Plaintiffs offered testimony from Jean and Clint.

22. Plaintiffs offered and without objection, the Court received Plaintiffs

Exhibits one through and including nine, which are as follows:

- (1) Photos of property lines and roadway;
- (2) Photos of Lorenz Property fenced off;
- (3) Easement Agreement;
- (4) Trail Cam photo 06.21.2025;
- (5) Legacy Enterprises Bid 08.05.2025;
- (6) Johner & Sons Bid 07.31.2025;
- (7) Black Hills Transport Bid 05.10.2018;
- (8) Johner Gravel Bid 05.14.2018; and
- (9) Johner Gravel Bid 09.12.2022.

23. Defendant and her counsel were present but offered no testimony or evidence.

24. Testimony established an "Easement Agreement" dated January 1996, which prior to this Court's *2024 Memorandum Opinion*, controlled landowner's usage, obligations, and costs, of CCL, including the Plaintiffs and Tanya.

25. The "Easement Agreement" was offered, received by the Court without objection as Plaintiffs *Exhibit 3*, in pertinent part states:

2. LANDS BENEFITED

The easement granted herein shall inure to the use and benefit of the Grantees and the land owned or being acquired by the Grantees generally described as follows:

Township 8 North, Range 2 East, BHM, Butte County, South Dakota

Section 19: Government Lot 3 ;
Government Lot 4; and
Southeast Quarter of the Southwest Quarter.

Section 30: Government Lot 1;
Government Lot 2;
Southeast Quarter of the Northwest Quarter; and,
Northeast Quarter of the Northwest Quarter.

As to the lands described in this paragraph, the easement shall be deemed appurtenant to, and shall run with and for the benefit of the lands described here in as the dominant tenement lands.

3. USE, MAINTENANCE AND SPEED LIMIT

For the benefit of all Grantees, their heirs, successors and assigns, Grantees agree to repair and maintain the platted road right of way described in Plat Book 12, Page 76 by contributing a proportionate share (1/3) of the total costs of such repair and maintenance in order to maintain accessibility to all of the above described property benefited by such private road right of way. The Duty and obligation of the Grantees to repair and maintain the private road right of way shall also apply to the removal of snow.

It is further understood and agreed that the construction, maintenance, repair and snow removal north of the section line between Sections 19 and 30 and the 1/16 line east of Lot 4 in the South Half of the South Half of the Southeast Quarter of the Southwest Quarter of Section 19 as above described shall be the sole duty, obligation and expense of Grantee Groppers, their successors and assigns, which access and right of way is for their exclusive use and benefit to their property, South Half of the Southeast Quarter of the Southwest Quarter of Section 19 and Northeast Quarter of the Northwest Quarter of Section 30.

Any party or parties may specifically enforce the mutual repair and maintenance obligations of this easement agreement in the event any party or parties fail to repair and maintain as provided.

...

4. EASEMENT APPURTENT

The easement described in this instrument is to and shall run with the land, and shall be for the benefit, burden and use of the Grantees herein, their heirs, executors, administrators and assigns.

(pages 3 and 4.)

26. Clint and Jean testified to the accuracy of *Exhibit 3* and having reviewed and been familiar with the same.
27. Jean testified that at the time the Easement Agreement was signed, only three (3) owners had properties that required use of CCL.
28. Tayna (and Troy for a time) were one (1) of the now four (4) users (Lorenz, Moldenhauer, Maher, Bratcher), of the road prior to this Court's termination of Tanya's easement interest.
29. Jean testified Tanya never paid any portion of her required obligation of "maintenance" to include repair, maintenance, and snow removal.
30. Those funds from the time Tanya first started using the CCL roadway until her easement was extinguished but her use continued (till present day) are owed to Plaintiffs.
31. Tanya did not exercise her use of easement from 2017 until 2021 when she enclosed her access to CCL by gating it off and used a different means of access to South Dakota Hwy 34; however, her position throughout the case was in opposition to extinguishment or abandonment of her interest in the easement. *See Exhibit 2*, Photos of Lorenz Property Fenced Off.
32. The Trail Cam Photo of 06.21.2025 showed evidence of Tanya's continued use of CCL even after the Courts November 2024 Order. *See Exhibit 4*, Trail Cam photo 06.21.2025.

33. Clint testified that he has a background in road maintenance and performed maintenance throughout the years on CCL to include graveling, repairing potholes, grading, and general upkeep of the road.
34. Jean testified to Clint's maintenance on CCL including grading, repairing potholes, adding gravel, and general upkeep of the road.
35. Jean and Clint testified that during the period of time the lawsuit was pending the use of outside providers of graveling and maintenance services were not obtained but that Jean (through Clint) and the Bratchers and Moldenhauers worked together through shared efforts of equipment or material to provide the upkeep of CCL that was normally contracted out.
36. The upkeep and maintenance work that was generally contracted out in the past included invoices and bids which were offered and received and testified to by both Clint and Jean as to the costs. *See Exhibits, 5 and 6.*
37. Invoices supported the efforts made by the parties to perform general upkeep and maintenance of the road without a contractor doing the services and Clint testified to paying these invoices. *See Exhibits, 7, 8, and 9.*
38. Jean and Clint testified that the maintenance and upkeep required (weather dependent – wet years more work) typically two (2) “gravelings” to keep the road in drivable condition, not pristine condition.
39. The average cost of the bid work for one (1) graveling by a contracted company is approximately \$1,500.00 a time for an average of \$3,000.00 a year.

40. Tanya used CCL for nine (9) years and continues to despite this Court's Order extinguishing her right to do so.
41. Nine (9) years of use with the average cost of yearly maintenance being \$3,000.00 totals \$27,000.00, Tanya's $\frac{1}{4}$ share of that cost is \$6,750.00.
42. Tayna shall pay Plaintiffs \$6,750.00 as her share of unpaid maintenance costs pursuant to the Easement Agreement. *See Exhibit 3*, Easement Agreement (Any party or parties may specifically enforce the mutual repair and maintenance obligations of this easement agreement in the event any party or parties fail to repair and maintain as provided).
43. The Court finds Clint credible as a witness and knowledgeable in the area of road maintenance and upkeep from the experience he testified to regarding the same.
44. The Court finds Jean credible as a witness.
45. No testimony from any named party was offered as to nuisance damages.
46. Defendant through counsel at the conclusion of Plaintiff's case offered no evidence but made an oral Motion to Dismiss based on lack of evidence.
47. Plaintiff's counsel contended the testimony offered was credible, uncontested, and to assert a position to the contrary now (that Tanya owed no money for non-usage) was juxtaposed to a position previously argued by Tayna.
48. The Court denied Defendant's Motion to Dismiss.

49. The Court required the parties to submit any FOF/COL by October 10th, 2025, by 5:00 p.m.¹

CONCLUSIONS OF LAW

1. Any Finding of Fact or Conclusion of Law deemed more appropriate the alternative shall be construed as such.
2. All prior paragraphs are incorporated by reference in the Conclusions of Law.
3. This Court has jurisdiction of the subject matter of this action.
4. The Court has personal jurisdiction of all the parties hereto.
5. SDCL § 15-6-52(a) as amended provides that “[f]indings of fact, whether based on oral or documentary evidence, may not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” *Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.*, 2005 S.D. 82, ¶ 13, 700 N.W.2d 729, 733.
6. “[T]he failure of an appellant to object to findings of fact and conclusions of law and to propose his or her own findings, limits review to the question of whether the findings support the conclusions of law and judgment.” *Id.* ¶ 11 at 733 (citing *Premier Bank, N.A. v. Mahoney*, 520 N.W.2d 894, 895 (S.D.1994) (quoting *Huth v. Hoffman*, 464 N.W.2d 637, 638 (S.D.1991)); see

¹ This matter was deemed fully submitted to the Court on October 10, 2025.

also *Selway Homeowners Ass'n v. Cummings*, 2003 SD 11, ¶ 14, 657 N.W.2d 307, 312.

Witness Credibility & Evidence

7. “Determining the credibility of the witnesses is the role of the factfinder.”
Schneider v. S. Dakota Dep't of Transp., 2001 S.D. 70, ¶ 14, 628 N.W.2d 725, 730 (quoting *Mash v. Cutler*, 488 N.W.2d 642, 653–54 (S.D. 1992)).
8. In keeping with this stance, “[t]he credibility of the witnesses, the import to be accorded their testimony, and the weight of the evidence must be determined by the trial court, and [the South Dakota Supreme Court gives] due regard to the trial court's opportunity to observe the witnesses and examine the evidence.” *Lamb v. Winkler*, 2023 S.D. 10, ¶ 18, 987 N.W.2d 398, 405 (citing *Hubbard v. City of Pierre*, 2010 S.D. 55, ¶ 26, 784 N.W.2d 499, 511) (quoting *Baun v. Estate of Kramlich*, 2003 S.D. 89, ¶ 21, 667 N.W.2d 672, 677).
9. “[F]acts proven by uncontradicted testimony not inherently improbable should be taken as conclusively established.” *Lamb v. Winkler*, 2023 S.D. 10, ¶ 24, 987 N.W.2d 398, 407 (citing *Roden v. General Cas. Co. of Wisconsin*, 2003 S.D. 130, ¶ 16, 671 N.W.2d 622, 626 (quoting *Nat'l Bank of Com. of N.Y. v. Bottolfson*, 55 S.D. 196, 225 N.W. 385, 386 (1929))
10. The Court finds Clint credible as a witness and knowledgeable in the areas of road maintenance and upkeep from the experience he testified to regarding the same including his years of upkeep work and machinery usage.

11. The Court finds Jean credible as a witness.
12. No testimony was offered from Defendant.
13. Clint and Jean testified to the accuracy of all offered *exhibits* having reviewed and been familiar with the same all of which were received without objection.
14. Jean testified Tanya never paid any portion of her required obligation of “maintenance” to include repair, maintenance, and snow removal.
15. Clint testified that he has a background in road maintenance and performed maintenance throughout the years on CCL to include graveling, repairing potholes, grading, and general upkeep of the road.
16. Jean testified to Clint’s maintenance on CCL including grading, repairing potholes, adding gravel, and general upkeep of the road.

Damages

17. Proving damages is “an essential element for recovery.” *Lamb v. Winkler*, 2023 S.D. 10, ¶ 21, 987 N.W.2d 398, 406 (quoting *McKie v. Huntley*, 2000 S.D. 160, ¶ 20, 620 N.W.2d 599, 604).
18. The existence of damages must be shown by a preponderance of the evidence. *Rumpza v. Zubke*, 2017 S.D. 49, ¶ 19, 900 N.W.2d 601, 607–08 (citing *McKie*, 2000 S.D. 160, ¶ 20, 620 N.W.2d at 604) (stating the burden to prove compensatory damages and applying the standard to a contractual dispute).
When determining a damages amount, “[f]acts must exist and be shown by the evidence which afford a basis for measuring the loss of the plaintiff with

reasonable certainty.” *Weekley v. Prostrullo*, 2010 S.D. 13, ¶ 26, 778 N.W.2d 823, 830 (alteration in original) (quoting *Drier v. Perfection, Inc.*, 259 N.W.2d 496, 506 (S.D. 1977)).

19. [The South Dakota Supreme] Court has defined a reasonable certainty as “ ‘proof of a rational basis for measuring loss,’ without requiring the trier of fact to speculate.” *ISG, Corp. v. PLE, Inc.*, 2018 S.D. 64, ¶ 29, 917 N.W.2d 23, 33 (quoting *Kreisers Inc. v. First Dakota Title Ltd. P'ship*, 2014 S.D. 56, ¶ 40, 852 N.W.2d 413, 424).

20. Jean and Clint testified that during the period of time the lawsuit was pending the use of outside providers of graveling and maintenance services were not obtained but that Jean (through Clint) and the Bratchers and Moldenhauers worked together through shared efforts of equipment or material to provide the upkeep of CCL that was normally contracted out.

21. The upkeep and maintenance work that was generally contracted out in the past included invoices and bids which were offered and received and testified to by both Clint and Jean as to the costs. *See Exhibits, 5 and 6.*

22. Invoices supported the efforts made by the parties to perform general upkeep and maintenance of the road without a contractor doing the services and Clint testified to paying these invoices. *See Exhibits, 7, 8, and 9.*

23. Jean and Clint testified that the maintenance and upkeep required (weather dependent – wet years more work) typically two (2) “gravelings” to keep the road in drivable condition, not pristine condition.

24. The average cost of the bid for one (1) graveling by a contracted company is approximately \$1,500.00 a time for an average of \$3,000.00 a year.
25. Tanya used CCL for nine (9) years and continues to despite this Court's Order extinguishing her right to do so.
26. Nine (9) years of use with the average cost of yearly maintenance being \$3,000.00 totals \$27,000.00, Tanya's ¼ share of that cost is \$6,750.00.
27. Tanya shall pay Plaintiffs \$6,750.00, as her share of unpaid maintenance costs pursuant to the Easement Agreement as Plaintiffs proved damages by a preponderance of the evidence. *See Lamb v. Winkler*, 2023 S.D. 10, ¶ 21, 987 N.W.2d 398, 406; *Rumpza v. Zubke*, 2017 S.D. 49, ¶ 19, 900 N.W.2d 601, 607–08.

Plaintiffs Burden and Judicial Estoppel

28. The Defendant's oral Motion to Dismiss upon the conclusion of Plaintiff's case and chief is denied, Plaintiff met its burden of proof and the supporting testimony and evidence offered is credible.
29. Moreover, the Defendant's position that Defendant should not have to pay for CCL for the years she did not use CCL is precluded by the doctrine of estoppel.
30. [The South Dakota Supreme] Court has considered the following elements in deciding whether to apply judicial estoppel:
- [T]he later position must be clearly inconsistent with the earlier one; the earlier position was judicially accepted, creating the risk of inconsistent legal determinations; and the party taking the inconsistent position would derive an

unfair advantage or impose an unfair detriment to the opponent if not estopped.

Wilcox v. Vermeulen, 2010 S.D. 29, ¶ 10, 781 N.W.2d 464, 468; *Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.*, 2005 SD 82, ¶ 34, 700 N.W.2d 729, 737 (quoting *Watertown Concrete Prod., Inc. v. Foster*, 2001 SD 79, ¶ 12, 630 N.W.2d 108, 112–13 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808, 1814–15, 149 L.Ed.2d 968, 977)) (additional citations omitted).

31. The Defendant previously objected and contested the extinguishment as well as abandonment of her easement access to CCL.

32. The Defendant's position now of non-use equating to a lack of obligation to pay for maintenance and upkeep is inconsistent with the previously stated position and precluded by judicial estoppel.

Consideration of Prior Rulings

33. “[O]n appeal from a judgment the Supreme Court may review any order, ruling, or determination of the trial court ... involving the merits and necessarily affecting the judgment and appearing upon the record.” *DRD Enters., LLC v. Flickema*, 2010 S.D. 88, ¶ 15, 791 N.W.2d 180, 185 (quoting SDCL § 15-26A-7. *See also Lang v. Burns*, 77 S.D. 626, 631, 97 N.W.2d 863, 866 (1959) (“On an appeal from a judgment this [C]ourt may review intermediate orders [that] involve the merits and necessarily affect the judgment appealed from.”))

34. All prior Orders of this Court, including but not limited to the following, *Defendant's Renewed MSJ*, as well as the *Memorandum Opinion*, and *Order Following Summary Judgment* are incorporated herein.

Interest

35. Under SDCL § 21-1-13.1, a person entitled to damages “is entitled to recover interest thereon from the day that the loss or damage occurred, except during such time as the debtor is prevented by law, or by act of the creditor, from paying the debt.” *City of Aberdeen v. Rich*, 2003 S.D. 27, ¶ 19, 658 N.W.2d 775, 781
36. When applying this statute, [the South Dakota Supreme] Court has made clear that “South Dakota statutes require an award of prejudgment interest on compensatory damages, calculated ‘from the day that the loss or damage occurred[.]’ ” *JAS Enters., Inc. v. BBS Enters., Inc.*, 2013 S.D. 54, ¶ 45, 835 N.W.2d 117, 129 (alteration in original) (quoting SDCL § 21-1-13.1).
37. Therefore, “[p]rejudgment interest is now mandatory, not discretionary[.]” *Wright v. Temple*, 2023 S.D. 34, ¶ 30, 993 N.W.2d 553, 562; see *Alvine v. Mercedes-Benz of N. Am.*, 2001 S.D. 3, ¶ 29, 620 N.W.2d 608, 614.
38. SDCL § 15-16-3 states that “[w]hen a judgment is for the recovery of money, interest from the time of the verdict or decision until judgment be finally

entered must be added to the judgment of the party entitled thereto.” *City of Aberdeen v. Rich*, 2003 S.D. 27, ¶ 21, 658 N.W.2d 775, 781.

39. Prejudgment shall accrue as from the first date of ownership of Tanya to property permitting usage of the CCL easement until the date of entry of Judgment, in which post-judgment interest shall accrue at the statutory rate of 10% per annum.

ORDER

Consistent with the above findings and conclusions of law, the Court hereby **ORDERS** the following:

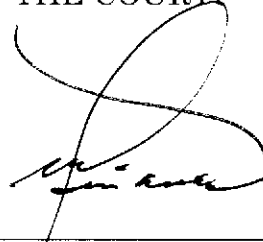
1. As previously Ordered and included in the *Memorandum Opinion*, November 8th, 2024, and incorporated in the *Order Following Summary Judgment* signed by this Court November 14th, 2025, there is no dispute of material fact, Plaintiff is awarded Declaratory Judgment, Tanya’s CCL Easement is extinguished by abandonment, Tanya’s CCL Easement is extinguished by lack of necessity, a new easement voiding the interest of Tanya shall be recorded, and the Court relies on the reasoning and rational contained within the aforementioned *Opinion* and *Judgment*.
2. As previously Ordered and included in the *Order Following Defendant’s Motion for Summary Judgment Reconsideration Hearing* signed by this Court September 4th, 2025, Defendant’s *Motion for Reconsideration of Summary Judgment and for Declaration of Public Roadway* is DENIED

and the Court relies on the reasoning and rational contained within the
aforementioned *Order*.

3. That the Defendant owes Plaintiffs damages in the amount of \$6,750.00,
as her share of unpaid maintenance costs pursuant to the Easement
Agreement plus prejudgment interest from 2017 and post-judgment
interest shall accrue at the statutory rate of 10% per annum.

Dated this 23rd day of December, 2025.

BY THE COURT:



Attest:
Wynia, Becky
Clerk/Deputy

Michael W. Day
Circuit Court Judge



FILED

DEC 23 2025

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

Findings of Fact and Conclusions of Law

STATE OF SOUTH DAKOTA DEC. 23 2025 IN CIRCUIT COURT
COUNTY OF BUTTE SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT FOURTH JUDICIAL CIRCUIT

09CIV22-000088

JUDGMENT

This matter came before the Court on September 25th, 2025, at 8:30 a.m. at

As previously Ordered and included in the *Memorandum Opinion*, November 8th, 2024, and incorporated in the *Order Following Summary Judgment* signed by this Court November 14th, 2025, there is no dispute of material fact, Plaintiff is awarded Declaratory Judgment, Tanya's CCL Easement is extinguished by abandonment, Defendant's CCL Easement is extinguished by lack of necessity, a new easement voiding the interest of Defendant shall be recorded, and the Court

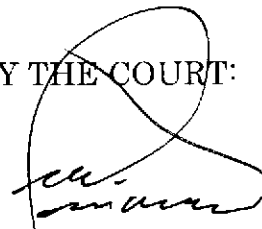
relies on the reasoning and rational contained within the aforementioned *Opinion* and *Judgment*.

As previously Ordered and included in the *Order Following Defendant's Motion for Summary Judgment Reconsideration Hearing* signed by this Court September 4th, 2025, Defendant's *Motion for Reconsideration of Summary Judgment and for Declaration of Public Roadway* is DENIED and the Court relies on the reasoning and rational contained within the aforementioned *Order*.

That Defendant owes Plaintiffs damages in the amount of \$6,750.00, as her share of unpaid maintenance costs pursuant to the Easement Agreement plus prejudgment interest from 2017 and post-judgment interest shall accrue at the statutory rate of 10% per annum from the date of this Judgment.

Dated this 23rd day of December, 2025.

BY THE COURT:



Attest:
Wynia, Becky
Clerk/Deputy

Michael W. Day
Circuit Court Judge



FILED

DEC 23 2025

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

Judgment
2 of 2

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 31363

TANYA LORENZ,	)
Appellant,	)
	)
v.	)
	)
JEAN MAHER & WAYNE	)
BRATCHER,	)
Appellees.	)

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
BUTTE COUNTY, SOUTH DAKOTA

NOTICE OF APPEAL FILED: January 21, 2026

The Honorable Michael Day, Circuit Court Judge, presiding

APPELLEE'S REPLY BRIEF

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PRELIMINARY STATEMENT

Throughout Appellee's Brief, Appellant, Tanya Lorenz, will be referred to as "Tanya." Appellees, Jean Maher and Wayne Bratcher will be referred to as or "Jean" or "Wayne." The settled record is denoted "SR." follow by the appropriate pagination. The transcripts of the Motions Hearing, held on August 28th, 2025, are denoted as "MH." followed by the appropriate citation.

JURISDICTIONAL STATEMENT

The trial court, the Honorable Judge Michael Day presiding, adopted Plaintiff's Proposed Findings of Fact and Conclusions of Law issuing the Court's Findings of Fact and Conclusions of Law (hereinafter "Findings") October 10th, 2025, which incorporated the trial court's November 8th, 2024, Memorandum Decision and the September 4th, 2025, Order denying Tanya's reconsideration request. SR. 172, 322, 371. The trial court entered Judgment December 23rd, 2025. SR. 388. Notice of Entry thereof was filed December 30th, 2025. SR. 411. Appellant filed his Notice of Appeal January 21st, 2026. SR. 390, 413.

STATEMENT OF THE ISSUES

- I. Whether Tanya Abandoned the CCL Easement
SDCL § 43-13-12
Boyer v. Dennis, 2007 S.D. 121, ¶ 9, 742 N.W.2d 518, 521.
Hofmeister v. Sparks, 2003 S.D. 35, ¶ 13, 660 N.W.2d 637, 641.
- II. Whether the Easement CCL can be Extinguished for Lack of Necessity
SDCL § 43-13-12
Springer v. Cahoy, 2013 S.D. 86, ¶ 8, 841 N.W.2d 15, 19
- III. Whether the CLL is a Public Roadway
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- IV. Whether there is a Section Line right-of-way
S.M.D.N., 2004 S.D.5, ¶ 7, 674 N.W.2d 516, 517
Frawley Ranches, Inc. v. Lasher, 270 N.W.2d 366, 369 (S.D. 1978).
- V. Whether Tanya Committed a Nuisance
Est. of Olsen v. Agtegra Coop., 2024 S.D. 39, ¶ 27, 9 N.W.3d 763, 771.
SDCL § 15-6-56(c)(2)
- VI. Whether damages were correctly awarded
Rumpza v. Zubke, 2017 S.D. 49, ¶ 19, 900 N.W.2d 601, 607–08
Weekley v. Prostrullo, 2010 S.D. 13, ¶ 26, 778 N.W.2d 823, 830

STATEMENT OF THE CASE AND FACTS

This action was initiated by Jean and Wayne’s *Verified Complaint for Declaratory Judgment* seeking extinguishment of Tanya’s right to easement by lack of necessity and by abandonment, and nuisance as to Jean in July 2024. SR. 3. The easement at issue is for the use of Canyon Creek Lane, (hereinafter “CCL”) in Butte County, South Dakota. SR. 3. Tanya did not file a Counterclaim seeking any relief from the Court, only an Answer. SR. 24.

From the commencement of the action and Jean and Wayne moving for Summary Judgment, discovery was conducted. Jean and Wayne moved to compel discovery in March of 2023 and were awarded fees. SR. 36, 56, 59.

Plaintiffs filed their Notice of Hearing, Statement of Undisputed Facts, Motion for Summary Judgment, and Brief in Support of Motion for Summary Judgment—which included affidavits of Wayne, Jean, Clinton Swallow (hereinafter “Clint”), as well as Tanya’s Answers to Discovery—on July 9, 2024. SR. 67, 69, 121, 123. Wayne and Jean filed a Motion for Summary Judgment (hereinafter “MSJ”). SR. 121. The MSJ was supported by Statement of Undisputed Material Facts. SR. 69.

A courtesy copy of the pleadings was sent to Tanya's attorneys' email in addition to being e-filed. Tanya's counsel replied acknowledging the receipt of the pleadings as well as stating "I will be filling (sic) a motion for summary judgment and will set it for the same hearing if that hearing time works for my schedule." SR. 173. August 2024, Tanya filed her Response to Plaintiffs' Motion for Summary Judgment, Affidavit of Tanya, Defendant's Response to Plaintiffs' Statement of Undisputed Material Facts and Defendant's Statement of Material Facts in Dispute. SR. 148, 158, 161.

Tanya's reply was untimely. SR. 173, p.5. The trial court adopted in whole Wayne and Jean's SUMF within the Memorandum Opinion and considered Tanya's Affidavit. SR. 173. The trial court noted as to "[Tanya's] responses of 'Deny. Affidavit of Tanya Lorenz' do not comply with the statute and are insufficient. In these responses, the Defendant provides no argument nor citation to the record explain what material issues of genuine fact existed for trial." SR. 173.

The facts considered by the trial court were as follows: on January 2nd, 1996, Becky and Randy Gropper, Maher, and Bratcher entered into an "Easement Agreement" regarding multiple lots in Butte County, South Dakota, which was recorded with the Butte County Register of Deeds. SR. 69.

Tanya became aware of this easement agreement from Black Hills Title with title insurance company. SR. 69. Randy and Becky Gropper bought RR 1, Box 448, Belle Fourche, SD 57717 (now 19096 Canyon Creek Lane) from Bruce G. Crago and Kim Crago in 1996. *See Exhibit 3*, Crago Gropper Warranty Deed. SR. 69. The land sold two lots to Gropper's included a "north" 40 acres and a "south" 40 acres. SR. 69.

In 2002, Randy and Becky Gropper sold the “north” 40 acres (Section 19) to Margaret and Dallas Nixon. SR. 69. In June 2000, Randy and Becky Gropper sold the “south” 40 acres, (Section 30) to Moldenhauers. SR. 69. On August 4, 2017, by Warranty Deed Margaret Nixon n/k/a/ Margaret A. O’Sullivan conveyed the “north” 40 acres to Troy and Tanya Lorenz (hereinafter “Lorenz” referring to Troy and Tanya). SR. 69. The Deed specifically states “Subject to all right-of-way and easements for state, county, municipal or private roads, all rights-of-way or easements for public utilities or irrigation and any and all additional easements and rights-of-way of record, if any.” SR. 69.

On or about March 2021, Tanya and Troy divorced, and to the best knowledge and belief of Jean and Wayne, only Tanya continues to reside at the residence, although Troy is still an owner of the property as well. SR. 69. Sometime after the Lorenz’s purchased the “north” 40 acres, they built a driveway from Highway 34 directly to their residence. SR. 69. Previously, Lorenz’s only ingress or egress from the property was using the road in the Easement Agreement. SR. 69.

Since building their own driveway, Tanya’s residence is no longer “land-locked” by neighboring parcels – she has direct access to Highway 34. SR. 69. This portion of access from Highway 34 to Tanya’s property is in fact now graveled. SR. 69.

On or about 2017, and for a period of four (4) years after the Lorenz’s shut the gate at the end of her property which abutted the easement road and allowed for overgrowth and waste to occur on their property immediately up to the easement road. SR. 69. No one else is allowed to access the Lorenz property from the Highway 34 road, which is graveled to the Lorenz property and connects to the easement. SR. 69.

On or about October 2021, Tanya started using the easement road again. SR. 69. Tanya has paid nothing to the other Easement holders for road maintenance (gravel/grading/snow removal) since 2017. SR. 69. Jean and Wayne have continuously maintained the Easement by paying for upkeep; gravel and grading each year. SR. 69.

The trial court granted Jean and Waynes' requested relief finding Tanya's easement was; extinguished by lack of necessity, extinguished by abandonment, and that she committed a nuisance as to Jean. SR. 173.

Pursuant to the *Memorandum Opinion*, the only remaining issue before the trial court was the issue of damages as to the use of CCL from 2017 until present; since Jean and Wayne contended that Tanya continued to use CCL even after the Court extinguished the easement. SR. 371. Tanya tried to appeal but that appeal was denied as it was not a final order. SR. 203, 207, 233, 236, 237, 239, 240, 241.

Jean and Wanye noticed a Scheduling Hearing for June 17th, 2025, to set a Trial on the remaining issue: damages. SR. 246. Tanya, without noticing her motion, orally motioned to reconsider summary judgment at the Scheduling Hearing.

The trial court permitted Tanya's motion and set deadlines regarding briefing. SR. 248. Tanya's *Motion for Reconsideration Summary Judgment and for Declaration of Public Roadway* was based on the affidavit of Shane Pullman, (hereinafter "Pullman"), an employee of South Dakota Department of Transportations and did not include a SUMF. SR. 250.

Jean and Wayne argued in response that Tanya failed, pursuant to SDCL § 15-6-60(b), to provide grounds for relief, as well as failed to file, as required by statute, a SUMF in support of MSJ. SR. 266. Jean and Wanye also contended Tanya exercises at

least two (2) alternate methods of egress / ingress to her property and Highway 34 (drive-way and Symonds) and any claim of “un-officialness” or “non-recognized use by SDDOT” as to her “drive-way” despite her years of use while married to Troy Lorenz, her continued use to this day, her exclusive four years of use; that position of “un-officialness,” is only because Tanya has not taken the steps to apply for that access to be recognized! SR. 266. Tanya did not submit an affidavit showing she applied, and the request was denied, nor does the supporting affidavit say (even though Pullman is not the person reviewing applications) that it would be denied. SR. 266.

A hearing on Tanya’s *Motion for Reconsideration of Summary Judgment and for Declaration of Public Roadway* was held August 25th, 2025. The trial court noted:

You know, this case was started back in 2022 by a verified complaint seeking extinguishment of the [Tanya’s] right to easement by lack of necessity and by abandonment as to Maher.

[Jean and Wanye] then served discovery on the [Tanya], which were not timely answered. [Tanya] was sanctioned at this time.

[Jean and Wayne] brought a motion for summary judgment. [Tanya’s] response was late. And the only support of that motion was the affidavit of [Tanya].

After hearing, the Court issued a memorandum opinion granting summary judgment in favor of the [Wayne and Jean]. And the Court also ruled that any claims for damages would be tried -- have to have a Court trial. [this Court’s memorandum opinion, [Tanya’s counsel] said "I will be filing a motion for summary judgment and we'll set it for the same hearing, if that hearing time works for my schedule." And that was back in 2024. [Tanya] never filed that motion and waited to verbally make a motion to reargue the summary judgment on June 18th of this year at a hearing.

At that point, no new facts had been presented. No basis for excusable neglect or anything had been filed by [Tanya] to support its decision. And it seems like we're at that same place now.

As I read the motion, which is -- and that is why I asked [Tanya's counsel]. He's asking me to reconsider my summary judgment, claiming that it is not a final order.

And then when I ask, "Well, are you really asking for summary judgment on the declaration of public highway?" he's not sure. So, I took it as he was asking for a motion for summary judgment on the declaration of public highway.

And it's clear South Dakota Supreme Court has said that summary judgment is a final determination of all claims determined by it and once summary judgment has become final, those claims no longer exist.

There's been no motion filed under 15-6-60(b) to seek relief from the summary judgment that was granted. And 60(b) does provide limited grounds, such as mistake, newly discovered evidence, fraud, or other exigent circumstances. But none of those have been alleged in this case. So, I think, if you look at this, she's -- [Tanya] is asking for a mulligan, basically. "I want a do-over. Even though I didn't comply with the rules, even though we were late. Even though my affidavit was insufficient, pursuant to the summary judgment standards. I want a redo of that, basically, a year later."

And, generally, courts do not reconsider or vacate summary judgment when the party opposing the motion had the opportunity to litigate the issue but failed to do so adequately. Now, if it is a summary judgment on the declaration of public highway, then it's clear that the Defendant did not comply with the summary judgment statutes.

There's no statement of undisputed material facts that have been filed as required by law. And so, the Court is not going to reconsider this matter. And South Dakota Supreme Court is clear that, if the Court denies a motion to reconsider, it's not a separate appealable order.

So, I'm not going to do that. And, also, if it is a claim for summary judgment on the declaration of public highway, the Court finds that [Tanya] has not complied with South Dakota law. Specifically, there's no statement of undisputed material facts and, therefore, the Court is going to deny that as well.

MH, 2:4-3:21.

The trial court on September 4th entered an *Order Following Defendant's Renewed MSJ* denying [Tanya's] requested relief. SR. 322.

A Trial was held before the circuit court regarding the issue of damages. Clint as well as Jean testified and offered exhibits supporting their position as to easement use and damages. SR. 371. Tanya offered no exhibits or witnesses. SR. 371. Jean testified that at the time the Easement Agreement was signed, only three (3) owners had properties that required use of CCL. SR. 371. Tanya (and Troy for a time) were one (1) of the now four (4) users (Tayna, Moldenhauer, Maher, Bratcher), of the road prior to this Court's termination of Tanya's easement interest. SR. 371. Jean testified Tanya never paid any portion of her required obligation of "maintenance" to include repair, maintenance, and snow removal. SR. 371.

Tanya did not exercise her use of easement from 2017 until 2021 when she enclosed her access to CCL by gating it off and used a different means of access to South Dakota Highway 34; however, her position throughout the case was in opposition to extinguishment or abandonment of her interest in the easement. SR. 371.

Photos showed evidence of Tanya's continued use of CCL even after the circuit courts November 2024 Order. SR. 371. Clint testified that he has a background in road maintenance and performed maintenance throughout the years on CCL, which includes graveling, repairing potholes, grading, and general upkeep of the road. SR. 371. Jean testified to Clint's maintenance on CCL including the grading, repairing potholes, adding gravel, and general upkeep of the road. SR. 371. Jean and Clint testified that during the period of time the lawsuit was pending, the use of outside providers of graveling and maintenance services were not obtained but that Jean (through Clint) and the Bratchers and Moldenhauers worked together through shared efforts of equipment or material to provide the upkeep of CCL that was normally contracted out. SR. 371. The upkeep and

maintenance work that was generally contracted out in the past included invoices and bids which were offered and received and testified to by both Clint and Jean as to the costs. SR. 371.

Invoices supported the efforts made by the parties to perform general upkeep and maintenance of the road without a contractor doing the services and Clint testified to paying these invoices. SR. 371. Jean and Clint testified that the maintenance and upkeep required (weather dependent – wet years more work) typically two (2) “gravelings” to keep the road in drivable condition, not pristine condition. SR. 371. The average cost of the bid for one (1) graveling by a contracted company is approximately \$1,500.00 a time for an average of \$3,000.00 a year. SR. 371. Tanya used CCL for nine (9) years and continues to despite this Court’s Order extinguishing her right to do so. SR. 371. Nine (9) years of use with the average cost of yearly maintenance being \$3,000.00 totals \$27,000.00, Tanya’s $\frac{1}{4}$ share of that cost is \$6,750.00. SR. 371. Tanya shall pay Jean and Waynes’ \$6,750.00 as her share of unpaid maintenance costs pursuant to the Easement Agreement. SR. 371.

The Court issued its Findings of Fact and Conclusions of Law adopting all prior memorandum and judgments on December 23rd, 2025, and Judgment of the same was entered December 23rd, 2025. SR. 371, 388. Notice of Entry of the Findings of Fact and Conclusions of Law as well as the Judgment was entered December 30th, 2025. SR. 390. Tanya filed Notice of Appeal on January 21st, 2026. SR. SR. 411, 413, 486.

STANDARD OF REVIEW

This Court reviews “a circuit court’s entry of summary judgment under the de novo standard of review.” *Paulsen v. McKennan*, 2025 S.D. 37, ¶¶ 11, 24 N.W.3d 522, 526 (quoting *Ries v. JM Custom Homes, LLC*, 2022 S.D. 52, ¶ 14, 980 N.W.2d 217, 222) (citation omitted). Under the de novo standard of review, “no deference is given to the decision of the [circuit] court.” *Id.* (citing *Estate of Zoss v. S.D. Dep’t of Revenue*, 2001 S.D. 124, ¶ 6, 635 N.W.2d 553, 554) (citation omitted).

“Summary judgment is appropriate ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Id.* at ¶ 12 citing (*Karst v. Shur-Co.*, 2016 S.D. 35, ¶ 15, 878 N.W.2d 604, 612) (quoting SDCL § 15-6-56(c)). “The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists.” *Id.* (citation omitted). “A showing is not sufficient unless ‘the party challenging summary judgment substantiate[s its] allegations with sufficient probative evidence that would permit a finding in [its] favor on more than mere speculation, conjecture, or fantasy.’” *Id.* (alterations in original) (citation omitted). “[S]ummary judgment is appropriate to dispose of legal, not factual questions.” *Id.* at *Hayes v. N. Hills Gen. Hosp.*, 1999 S.D. 28, ¶ 30 n.6, 590 N.W.2d 243, 250 n.6 (alteration in original) (citation omitted).

Tanya’s “response, by affidavits or as otherwise provided in SDCL § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial.” *Dakota Indus., Inc. v. Cabela’s. Com, Inc.*, 2009 S.D. 39, ¶14, 766 N.W.2d 510, 514 (quoting

SDCL § 15-6-56(e)) (emphasis in original). Tayna bore the burden to show that [she] will be able to place sufficient evidence in the record at trial to establish the existence of every element [they have] the burden of proving. *Id.* at ¶ 11. Otherwise “[e]ntry of summary judgment is mandated.” *Id.* (additional citations omitted).

“When challenging a summary judgment, the nonmoving party must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy.” *Inst. of Range & the Am. Mustang v. Nature Conservancy*, 2018 S.D. 88, ¶ 28, 922 N.W.2d 1, 9 (citing *Peters v. Great W. Bank, Inc.*, 2015 S.D. 4, ¶ 13, 859 N.W.2d 618, 624 (quoting *Estate of Elliott v. A & B Welding Supply Co.*, 1999 S.D. 57, ¶ 16, 594 N.W.2d 707, 710)). “Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Id.* (quoting *One Star v. Sisters of St. Francis, Denver, Colo.*, 2008 S.D. 55, ¶ 9, 752 N.W.2d 668, 674).

Standard of review for testimony and evidence received at trial to the circuit court. “Conclusions of law are reviewed under a de novo standard of review and no deference is given to the trial court’s conclusions of law.” *FDJ, LLC v. Determan*, 2024 S.D. 42, ¶ 10, 10 N.W.3d 220, 224 (quoting *Melstad v. Kovac*, 2006 S.D. 92, ¶ 6, 723 N.W.2d 699, 702). “Factual findings are examined under the clearly erroneous standard.” *Id.* (quoting *Eagle Ridge Ests. Homeowners Ass’n v. Anderson*, 2013 S.D. 21, ¶ 12, 827 N.W.2d 859, 864). “[T]he credibility of the witnesses, the import to be accorded their testimony, and the weight of the evidence must be determined by the trial court, and [the

South Dakota Supreme Court] give[s] due regard to the trial court's opportunity to observe the witnesses and examine the evidence." *Id.* ¶ 12 (alteration in original).

ARGUMENT¹

I. The Trial Court Correctly Held Tanya Abandoned the CCL Easement.

The trial court addressed the issue of abandonment of the easement by Tanya in Jean and Wayne's motion for summary judgment (hereinafter "MSJ"). Jean and Wayne as the moving party plead through multiple affidavits the Statement of Undisputed Material Facts (hereinafter "SUMF"), MSJ, and brief in support. SR. 69, 121, 123.

After a party files for MSJ, "an adverse party may not rest upon the mere allegations or denials of his pleading, but [their] response, by affidavits or as otherwise provided in SDCL § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial." *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 15, 816 N.W.2d 96, 102 (citing SDCL § 15-65(e). "If he does not so respond, summary judgment, if appropriate, shall be entered against him." *Id.* See also *Dakota Indus., Inc. v. Cabela's.Com, Inc.*, 2009 S.D. 39, ¶ 14, 766 N.W.2d 510, 514 (finding that under SDCL § 15-6-56(e), once the moving

¹ As to Count I and all others, this Court's appellate procedure regarding the appellant's brief requires that "[e]ach statement of a material fact *shall be accompanied by a reference to the record where such fact appears.*" *Dakota Indus., Inc. v. Cabela's.Com, Inc.*, 2009 S.D. 39, 766 N.W.2d 510, 515 n.4. (citing SDCL § 15-26A-60(5) (emphasis in original). "[T]he ultimate responsibility for presenting an adequate record on appeal falls on the appellant" Tanya here has not met that burden. *Id.*; See *Baltodano v. N. Cent. Health Servs., Inc.*, 508 N.W.2d 892, 894 (S.D.1993) (citation omitted).

It is well settled that this Court's review is "restricted to facts contained within the settled record." *Klutman v. Sioux Falls Storm*, 2009 S.D. 55, ¶ 36, 769 N.W.2d 440, 453 (citing *Toben v. Jeske*, 2006 SD 57, ¶ 11, 718 N.W.2d 32, 35). "Moreover, all parties are obligated to see that the settled record contains all matters necessary for the disposition of the issues raised on appeal, and the ultimate responsibility for presenting an adequate record on appeal falls upon the appellant." *Id.* (quoting *Caneva v. Miners & Merchants Bank*, 335 N.W.2d 339, 342 (S.D.1983)). "The failure to cite supporting authority is a violation of SDCL 15-26A-60(6) and the issue is thereby deemed waived." *State v. Pellegrino*, 1998 S.D. 39, ¶ 22, 577 N.W.2d 590, 599 (citing *State v. Knoche*, 515 N.W.2d 834, 840 (S.D.1994); *State v. Dixon*, 419 N.W.2d 699, 701 (S.D.1988).

party meets its initial burden of proof, the burden shifts to the non-moving party to identify facts disputing the moving party's allegations).

Tanya's response to Jean and Wanye's SUMF only had general admissions or denials, no disputed facts or evidence. SR. 161. Tanya's affidavit stated, "[d]uring the course of my ownership of my property to which an Easement at issue attaches, I have not used the easement property for proper easement purposes at varying intervals from the time of first ownership and continuing to the present day." SR. 158, ¶ 2. Tanya's statement of material facts in dispute, in addition to being untimely (which the trial court concluded as excusable neglect), was unsupported by affidavit, and did not contain any material facts in controversy – only rhetorical questions. SR. 169. The trial court concluded this responsive pleading was insufficient as required by SDCL § 15-6-56(c)(2). SR. 169.

Jean and Wayne as the moving party met their burden. The burden shifted to Tanya, and she failed to meet her burden. SR. 173. The trial court conducted an analysis of Tanya's responsive pleadings and found that the responses were insufficient pursuant to SDCL § 15-6-56(c)(2). SR. 173. The trial court relying on *Reed v. Bennet*, 312 F.3d 119054 Fed.R.Serv.3d 937, held that by failing to comply with SDCL § 15-6-56(c)(2) Tanya was deemed to have not responded. SR. 173.

The trial court further found that a failure to reply as required by statute "produces an unsavory effect pursuant to SDCL § 15-6-56(e)." SR. 173; *See Inst. of Range & the Am. Mustang*, 2018 S.D. 88, ¶ 28, 922 N.W.2d 1, 9; *One Star*, 2008 S.D. 55, ¶ 9, 752 N.W.2d 668, 674 (Entry of summary judgment is mandated against a party who fails to

make a showing sufficient to establish the existence of an element essential to that party's case).

The trial courts decisions is consistent with this Courts precedent. SDCL § 43-13-12 sets forth the requirements to extinguish an easement. *Hofmeister v. Sparks*, 2003 S.D. 35, ¶ 13, 660 N.W.2d 637, 641. "A servitude is extinguished by the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise." *Id.* However, under SDCL § 43-13-12, there must be an affirmative act of abandonment on the part of the owner of the easement to extinguish the easement. *Id.* Mere nonuse of an easement, created by grant, is insufficient to satisfy this requirement. *Id.* This Court has held that substituted access may be evidence of abandonment, that factor alone is not dispositive.

The use of a substituted way may be evidence of abandonment of the original way. This, however, is not conclusive of non-use. The mere use of a new right-of-way will not extinguish the old. There must also be an abandonment by non-use of the old right-of-way.

Id. (quoting *Shippy v. Hollopeter*, 304 N.W.2d 118, 121–122 (S.D.1981)) (further citations omitted). The party claiming abandonment in such cases must show an intent to abandon the easement. *Id.* (citing *Cleveland v. Tinaglia*, 1998 SD 91, ¶ 26, 582 N.W.2d 720, 725). Ultimately, because of the nature of these cases: "A finding of abandonment is usually based on circumstantial evidence rather than on direct expressions of intent...." *Boyer v. Dennis*, 2007 S.D. 121, ¶ 9, 742 N.W.2d 518, 521. Tanya has failed to show any evidence of a contrary intent.

The intent to abandon here was evidenced as the trial court found based on the uncontroverted evidence; Tanya's four (4) year period of non-use, fencing off the gate, permitting overgrowth to occur on the easement access point, investing money and

resources into paving a new roadway to Hwy 34, utilizing that new roadway for a period of years, failure to pay for the maintenance and upkeep of the easement, and two (2) methods of ingress and egress as argued by Jean and Wayne. SR. 215, 266, 279, 285. No facts or precedent argued by Tanya support a different position. *See Appellant's Brief* (no citations to record, no preservation of argument); *Dakota Indus., Inc.*, 2009 S.D. 39, 766 N.W.2d 510, 515 n.4. (citing SDCL § 15-26A-60(5)); *Baltodano v. North Cen. Health Serv.*, 508 N.W.2d 892, 894 (S.D.1993).

II. The Trial Court Correctly Extinguished the CCL Easement for Lack of Necessity.

The trial court addressed the issue of extinguishment of the easement by lack of necessity in Jean and Wayne's MSJ. Jean and Wayne as the moving party plead through multiple affidavits the SUMF, MSJ, and brief in support. SR. 69, 121, 123.

After a party file for MSJ, "an adverse party may not rest upon the mere allegations or denials of his pleading, but [their] response, by affidavits or as otherwise provided in SDCL § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial." *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 15, 816 N.W.2d 96, 102 (citing SDCL § 15-65(e). "If he does not so respond, summary judgment, if appropriate, shall be entered against him." *Id.* See also *Dakota Indus., Inc. v. Cabela's.Com, Inc.*, 2009 S.D. 39, ¶ 14, 766 N.W.2d 510, 514 (finding that under SDCL § 15-6-56(e), once the moving party meets its initial burden of proof, the burden shifts to the non-moving party to identify facts disputing the moving party's allegations).

Tanya's response to Jean and Wayne's SUMF only had general admissions or denials, no disputed facts or evidence. SR. 161. Tanya's affidavit stated, "[d]uring the course of my ownership of my property to which an Easement at issue attaches, I have

not used the easement property for proper easement purposes at varying intervals from the time of first ownership and continuing to the present day.” SR. 158, ¶ 2. Tanya’s statement of material facts in dispute, in addition to being untimely (which the trial court concluded as excusable neglect), was unsupported by affidavit, and did not contain any material facts in controversy – only rhetorical questions. SR. 169. The trial court concluded this responsive pleading was insufficient as required by SDCL § 15-6-56(c)(2). SR. 169.

Jean and Wayne as the moving party met their burden. The burden shifted to Tanya, and she failed to meet her burden. SR. 173. The trial court conducted an analysis of Tanya’s responsive pleadings and found that the responses were insufficient pursuant to SDCL § 15-6-56(c)(2). SR. 173. The trial court relying on *Reed*, 312 F.3d 119054 Fed.R.Serv.3d 937, held that by failing to comply with SDCL § 15-6-56(c)(2) Tanya was deemed to have not responded. SR. 173.

The trial court further found that a failure to reply as required by statute “produces an unsavory effect pursuant to SDCL § 15-6-56(e).” SR. 173; *See Inst. of Range & the Am. Mustang*, 2018 S.D. 88, ¶ 28, 922 N.W.2d 1, 9; *One Star*, 2008 S.D. 55, ¶ 9, 752 N.W.2d 668, 674 (Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case). In order to determine whether there was a necessity at the time of severance, the circuit court found that it must trace back to the date of the unitary parcel’s severance. *Id.* ¶ 9.

The trial court conducted the appropriate analysis next to whether [Jean and Wanye] should prevail under summary judgment. SR. 169, p. 17. The trial court

conducted the appropriate analysis next to whether [Jean and Wanye] should prevail under summary judgment. SR. 169, p. 17. The trial court reasoned, the necessity for access over the grantor's land must have arisen at the time of severance, in addition to a present necessity. SR. 169; *See generally* 25 Am. Jur. 2d *Easements and Licenses* § 35 (2013).

An “Easement Agreement” existed as to the larger 80 acres that was divided into two (2) 40 acre tracts sold to the Groppers, now owned by Troy Lorenz (north 40) and Tayna Lorenz (south 40). SR. 169. However, there is no necessity for this easement as Tanya has access to Hwy. 34 through an improved gravel road across the north 40 acres. SR. 169. The Lorenz’s collectively when married owned the south and north 40 acres (80 total) that now Tanya claims she is “land-locked” without access through the easement. SR. 169. The joint ownership at one-time of the 80 acres and the blocking for a period of years of easement access, non-payment of easement upkeep dues, and improved access to Hwy 34 indicate an extinguishment of easement by necessity. SR. 169.

A servitude is extinguished by the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise. SDCL § 43-13-12. As the trial court noted, “the common law recognizes two types of implied easements: easements by necessity and easements implied from prior use.” *Springer v. Cahoy*, 2013 S.D. 86, ¶ 8, 841 N.W.2d 15, 19 (quoting *Thompson v. E.I.G. Palace Mall, LLC*, 2003 S.D. 12, ¶ 11, 657 N.W.2d 300, 304. An implied easement by necessity “can occur when a grantor conveys to another an inner portion of land surrounded by lands owned by the grantor or the grantor and others. *Id.* Unless a contrary intent is manifest, the landlocked grantee will be entitled to have a right-of-way

across the retained land of the grantor for ingress and egress.” *Id.* The necessity for access over the grantor's land must have arisen at the time of severance, in addition to a present necessity. *Id.*; see *Thompson*, 2003 S.D. 12, ¶ 13, 657 N.W.2d at 305. See generally 25 Am. Jur. 2d *Easements and Licenses* § 35 (2013).

Here, Lorenz’s (Tanya and Troy) owned the entire parcel of land from where the gate to the CCL was “fenced-off” to Hwy. 34 and during the period of time (4 years) that it was fenced off. During that period of time a new means of ingress and egress was created from Tanya’s property over Troy’s parcel to Hwy. 34. While not explicitly stated by the trial court (but could be sought by Tanya — as well as approval from the South Dakota Highway Division) the result is that Tanya now has an implied easement² over Troy’s parcel. Tanya is no longer a “land-locked” parcel despite her own actions to abandon the CCL easement, and then the subsequent division of ownership of the larger parcel between herself and Troy shortly after the period of non-use, the subsequent actions and ownership support the trial courts determination of extinguishment of the easement by lack of necessity. No facts or precedent support a different position. See *Appellant’s Brief* (no citations to record, no preservation of argument); *Dakota Indus., Inc.*, 2009 S.D. 39, 766 N.W.2d 510, 515 n.4. (citing SDCL § 15-26A-60(5)); *Baltodano*, 508 N.W.2d 892, 894 (S.D.1993).

III. The Trial Court Correctly Held CCL is Not a Public Roadway.

² To obtain an easement implied from prior use, a claimant must establish four elements:

- (1) the relevant parcels of land had been in unitary ownership;
- (2) the use giving rise to the easement was in existence at the time of the conveyance dividing ownership of the property;
- (3) the use had been so long continued and so obvious as to show that it was meant to be permanent; and
- (4) at the time of the severance, the easement was necessary for the proper and reasonable enjoyment of the dominant tract.

Fuoss v. Dahlke Fam. Ltd. P'ship, 2023 S.D. 3, ¶ 56, 984 N.W.2d 693, 707–08 (citing *Heumiller v. Hansen*, 2020 S.D. 56, ¶ 16, 950 N.W.2d 426, 430) (quoting *Springer v. Cahoy*, 2012 S.D. 32, ¶ 7, 814 N.W.2d 131, 133).

This question was not properly before the trial court, was not plead in an Answer or Counterclaim, was correctly ruled on by the trial court and has no basis for consideration before this Court. SR. 26. Questions not raised or preserved in the trial court will not be considered on appeal. *Pearson v. Adams*, 279 N.W.2d 674, 676 (S.D. 1979) (citing *Breckweg v. Knochenmus*, 81 S.D. 244, 133 N.W.2d 860 (1965)).

Jean and Wanye's MSJ was properly before the trial court on August 13th, 2024. SR. 67. Tanya did not file any competing MSJ arguments, including that CCL is a public highway at the first and only MSJ hearing.³

The trial court's Order indicated that as noted by this Court in *People ex rel. S.M.D.N.*, 2004 S.D.5, ¶ 7, 674 N.W.2d 516, 517 [the South Dakota Supreme Court] held that "an order dismissing a motion to reconsider entered by the court does not create a new avenue for appeal. A motion for reconsideration is not a sperate appealable order. Rather it is 'an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment.' " *Id.* (quoting *Breeden v. Neb. Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441, 444 (1999)); SR. 322. In *S.M.D.N.*, [the South Dakota Supreme Court] determined this Court lacked jurisdiction to consider an appeal of an order denying a motion to reconsider because the underlying order being challenged had

³ In this posture, the circuit court is permitted to be right for the wrong reason. *Culhane v. Thovson*, 2026 S.D. 23, ¶ 48, n.5, ___ N.W.3d ___, __; *Mach v. Conners*, 2022 S.D. 48, 979 N.W.2d 161; *Pfuhl v. Pfuhl*, 2014 S.D. 25, ¶ 7, 846 N.W.2d 778, 780. While the record reflects the circuit court denied the existence of excusable neglect under SDCL § 15-6-60(b), the same excusable neglect standard applies to SDCL § 15-6-6(b), which commands, after the expiration of the specified period, additional time is only permitted in the event of "excusable neglect."

It was well within the circuit court discretion to refuse an extension in this situation given the circuit court's oral findings that Tayna did not comply with the rules. SR 322. Additionally, the circuit court is permitted, and has broad discretion, to limit or strike a party's ability to resist summary judgment on the question of liability after years of delay. SDCL § 15-6-37(b). The Defendant had every opportunity to resist under the confines of SDCL § 15-6-56 and failed to comply with the rules or preserve the record.

previously been summarily affirmed by this Court, and the statutory right to appeal the order had long since passed. 2004 S.D. 5, ¶ 7, 674 N.W.2d at 517; SR. 322. As such, this issue is not properly before this Court and should not be considered, but for preservation of arguments and rebuttal, Wayne and Jean further provide the following reasons to affirm the circuit court.

The trial court denied Tanya's "second attempt" at MSJ, which included very loosely the argument: CCL is a public highway. SR. 322. The trial court additionally outlined its basis for the denial on the record as well as in an Order. MH, 2:4-3:21; SR. 322. Specifically, on the record, the trial court stated, "if it is a claim for summary judgment on the declaration of public highway, the Court finds [Tanya] has not complied with South Dakota law." MH, 4:16-18. Oral findings may be referenced to clarify a trial court's written findings if there is no discrepancy. *People ex rel. D.A.J.*, 2008 S.D. 92, 757 N.W.2d 70, 75, n. 3.

Within the written Order, the trial court noted the failure of [Tanya] to file a SUMF, SDCL § 15-6-56(c)(1) and lack of grounds pursuant to Rule 60(b). SR. SR. 322. The trial court stated, "[Tanya] verbally indicated at a Scheduling Hearing set by [Jean and Wanye] that [Tanya] would make a motion to reargue summary judgment on June 18th, 2025. The Court notes no new facts have been presented, or any basis for excusable neglect for reconsideration. The Court asked counsel for [Tanya] if he was really asking for summary judgment on the declaration of public highway to which [Tanya's counsel] was unsure. The Court considered the declaration as part of the MSJ. If it were to be a summary judgment on the declaration of public highway, [Tanya] did not comply with the summary judgment statutes." SR. 322.

Tanya offered no evidence by exhibit, testimony, from government (county, state-wide) actor, or as required by statute, to permit the trial court to make a finding that CCL is a public roadway as defined by SDCL Chapter 31-3. Tanya, in her argument to this Court, relies on the affidavits of Jean and Wanye as well as their witnesses and can provide no facts or caselaw to support that proposition. Tanya incorrectly argues “[t]his Court should under the undisputed facts of this case. . .” which is wrong as Tanya did not introduce a SUMF. SR. 250. Continuing, “declare Canyon Creek Lane a public roadway which would resolve all access issues in this easement dispute.” Again, this Court cannot for the first time take up issues raised on appeal and Tanya failed to raise this issue as a competing MSJ argument, or properly before the trial court at a “second MSJ” without a SUMF or basis under Rule 60(b). SR. 322. There is no evidence here that the easement may be dedicated to public use if the owner clearly acts to so dedicate it and the public entity accepts the dedication. *See Turgeon v. City of Spearfish*, 2026 S.D. 22, ¶ 19.

This requested relief was not ever properly before the circuit court for consideration, is not properly before this Court for consideration, and even if considered, no factual or legal authority support this requested relief by Tanya. SR. 24. [F]ailure to cite supporting authority in an appellate brief violates SDCL§ 15-26A-60(6) and waives the issue before this court.” *State v. Patterson*, 2017 S.D. 64, ¶ 31, 904 N.W.2d 43, 52 (quoting *First Nat'l Bank in Sioux Falls v. Drier*, 1998 S.D. 1, ¶ 20, 574 N.W.2d 597, 601).

IV. The Trial Court Correctly Denied Tanya's Section Line Right-of-Way Argument.

This question was not properly before the trial court, was not plead in an Answer or Counterclaim, was correctly ruled on by the trial court and has no basis for consideration before this Court. SR. 24. Questions not raised or preserved in the trial court will not be considered on appeal. *Pearson*, 279 N.W.2d 674, 676 (S.D. 1979) (citing *Breckweg*, 81 S.D. 244, 133 N.W.2d 860 (1965)).

Jean and Wanye's MSJ was properly before the trial court on August 13th, 2024. SR. 67. Tanya did not file for that relief in a counterclaim, competing MSJ arguments, including the section line right-of-way argument at the first, and only MSJ hearing. SR. 24.

The trial court's Order indicated that, as noted by this Court in *People ex rel. S.M.D.N.*, 2004 S.D.5, ¶ 7, 674 N.W.2d 516, 517, [the South Dakota Supreme Court] held that "an order dismissing a motion to reconsider entered by the court does not create a new avenue for appeal. A motion for reconsideration is not a sperate appealable order. Rather it is 'an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment.' " *Id.* (quoting *Breeden v. Neb. Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441, 444 (1999)); SR. 322. In *S.M.D.N.*, [the South Dakota Supreme Court] determined this Court lacked jurisdiction to consider an appeal of an order denying a motion to reconsider because the underlying order being challenged had previously been summarily affirmed by this Court, and the statutory right to appeal the order had long since passed. 2004 S.D. 5, ¶ 7, 674 N.W.2d at 517; SR. 322. As such, this issue is not properly before this Court and should not considered, but for

preservation of arguments and rebuttal, Wayne and Jean further provide the following reasons to affirm the circuit court.

Tanya's request to this Court that alleges the circuit court denied the "section line right-of-way" argument is confusing and was not plead in a Counterclaim or as requested relief. SR. 24. Tanya did not include the relief that the trial court grant access over the section line right-of-way in her prayer for relief. *See* SR. 250, 302. Tanya offered no evidence by exhibit, testimony, from government (county, state-wide) actor, or as required by statute, to permit the trial court to make a ruling that Tanya have access pursuant to a public right-of-way as defined by SDCL Chapter 31-22. Tanya, in her briefing to this Court, cites no caselaw to support this proposition as requested. Paradoxically to Tanya's refusal to pay any maintenance fees or do any maintenance for CCL, under this requested relief, under SDCL§ 31-22-8, the maintenance and upkeep of the right-of-way are the sole responsibility of the isolated tract owner. *Frawley Ranches, Inc. v. Lasher*, 270 N.W.2d 366, 369 (S.D. 1978).

This requested relief was not ever properly before the circuit court for consideration, is not properly before this Court for consideration, and even if considered, no factual or legal authority support this requested relief by Tanya. [F]ailure to cite supporting authority in an appellate brief violates SDCL§ 15-26A-60(6) and waives the issue before this court." *Patterson*, 2017 S.D. 64, ¶ 31, 904 N.W.2d 43, 52 (quoting *Drier*, 1998 S.D. 1, ¶ 20, 574 N.W.2d 597, 601).

V. The Trial Court Correctly Held Tanya Committed a Nuisance.

The trial court addressed the issue of nuisance by Tanya in the trial court's consideration of motions for summary judgment. Jean and Wayne as the moving party plead through multiple affidavits the Statement of Undisputed Material Facts (hereinafter "SUMF"). SR. 69. The SUMF supported by the affidavit of Jean and Clint stated, on or about 2021 Tanya Lorenz in her field adjacent to the Maher property would "spotlight" the residence with a hi-beam flashlight on multiple occasions for no valid purpose. SR. 69, ¶ 33. Clint Swallow was present multiple times when this happened. SR. 69, ¶ 33.

Tanya's affidavit stated, "I have not shined lights onto Plaintiffs' property for no valid purpose." SR. 158, ¶ 3. Tanya's statement of material facts in dispute, in addition to being untimely, was unsupported by affidavit and did not contain any material facts in controversy – only asking rhetorical questions. SR. 169. Tanya's response to Jean and Wayne's SUMF only had general admissions or denials, no contested facts or evidence. SR. 161.

After a party files a summary judgment motion, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in SDCL § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial." *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 15, 816 N.W.2d 96, 102 (citing SDCL § 15-6-56(e). "If he does not so respond, summary judgment, if appropriate, shall be entered against him." *Id.* See also *Dakota Indus., Inc. v. Cabela's.Com, Inc.*, 2009 S.D. 39, ¶ 14, 766 N.W.2d 510, 514 (finding that under SDCL § 15-6-56(e), once the moving party meets its initial burden of proof, the burden shifts to the non-moving party to identify facts disputing the moving party's allegations).

Jean and Wayne as the moving party met their burden, the burden shifted to Tanya and she failed to meet her burden. SR. 173. The trial court conducted an analysis of Tanya's responsive pleadings and found that the responses were insufficient in consideration of SDCL § 15-6-56(c)(2). SR. 173. The trial court relying on *Reed v. Bennet*, 312 F.3d 119054 Fed.R.Serv.3d 937, held that by failing to comply with SDCL § 15-6-56(c)(2) Tanya is deemed to have not responded. SR. 173. The trial court concluded "[t]here was valid purpose to this 'spotlighting' which [Tanya] did in this case (she has other instances of this conduct, *see* 09TPO21-56; 09CIV22-77). This repeated act was only done to annoy the comfort of others. It offends the decency of a normal society and affected Plaintiffs' enjoyment of property." SR. 173, p. 23. No damages were awarded or sought as to this claim.

Tanya in her briefing to this Court does not deny this conduct, only that "this occasional conduct does not rise to the level of substantial interference." There are no facts to assert otherwise or law to support that proposition and the trial court correctly ruled on this issue. To the exact contrary to the point argued by Tanya, this Court has held nuisance claims, which do not require a showing of damages to survive summary judgment. *Est. of Olsen v. Agtegra Coop.*, 2024 S.D. 39, ¶ 27, 9 N.W.3d 763, 771. [F]ailure to cite supporting authority in an appellate brief violates SDCL § 15-26A-60(6) and waives the issue before this court." *Patterson*, 2017 S.D. 64, ¶ 31, 904 N.W.2d 43, 52 (quoting *Drier*, 1998 S.D. 1, ¶ 20, 574 N.W.2d 597, 601).

VI. The Trial Court Correctly Awarded Damages.

The circuit court held a trial on the sole remaining issue of damages September 25th, Jean and Wayne offered testimony from Jean and Clint. SR. 371, ¶ 21. The trial court found Jean and Clint credible as witnesses and Clinton knowledgeable in road maintenance and upkeep. SR. 371, ¶¶ 33, 43, 44. Tanya was present with counsel, but offered no evidence for the court to consider. SR. 371, ¶ 24.

Jean and Wayne offered and without objection, the Court received exhibits one (1) through and including nine (9). SR. 371, ¶ 22.

The "Easement Agreement" was offered, received by the trial court without objection and, in pertinent part states:

3. USE, MAINTENANCE AND SPEED LIMIT

For the benefit of all Grantees, their heirs, successors and assigns, Grantees agree to repair and maintain the platted road right of way described in Plat Book 12, Page 76 by contributing a proportionate share (1/3) of the total costs of such repair and maintenance in order to maintain accessibility to all of the above described property benefited by such private road right of way. The Duty and obligation of the Grantees to repair and maintain the private road right of way shall also apply to the removal of snow.

Jean testified that at the time the Easement Agreement was signed, only three (3) owners had properties that required use of CCL. SR. 371, ¶ 27. Tayna (and Troy for a time) were one (1) of the now four (4) users (Lorenz, Moldenhauer, Maher, Bratcher), of the road prior to this Court's termination of Tanya's easement interest. SR. 371, ¶ 28.

Jean testified Tanya never paid any portion of her required obligation of "maintenance" to include repair, maintenance, and snow removal. SR. 371, ¶ 29. Tanya did not exercise her use of easement from 2017 until 2021 when

she enclosed her access to CCL by gating it off and used a different means of access to South Dakota Hwy 34; however, her position throughout the case was in opposition to extinguishment or abandonment of her interest in the easement. SR. 371, ¶ 31. Photos evidenced Tanya's continued use of CCL even after the Order extinguished the easement. SR. 371, ¶ 32.

Clint testified that he has a background in road maintenance and performed maintenance throughout the years on CCL to include graveling, repairing potholes, grading, and general upkeep of the road. SR. 371, ¶ 33. Jean testified to Clint's maintenance on CCL including grading, repairing potholes, adding gravel, and general upkeep of the road. SR. 371, ¶ 34. Jean and Clint testified that during the period of time the lawsuit was pending the use of outside providers of graveling and maintenance services were not obtained but that Jean (through Clint) and the Bratchers and Moldenhauers worked together through shared efforts of equipment or material to provide the upkeep of CCL that was normally contracted out. SR. 371, ¶ 35.

The upkeep and maintenance work that was generally contracted out in the past included invoices and bids which were offered and received and testified to by both Clint and Jean as to the costs as shown in bids. SR. 371, ¶ 36. Invoices supported the efforts made by the parties to perform general upkeep and maintenance of the road without a contractor doing the services and Clint testified to paying these invoices. SR. 371, ¶ 37.

Jean and Clint testified that the maintenance and upkeep required (weather dependent – wet years more work) typically two (2) “gravelings” to keep the road in drivable condition, not pristine condition. SR. 371, ¶ 38. The average cost of the “bid work” for one (1) graveling by a contracted company is approximately \$1,500.00 a time for an average of \$3,000.00 a year. SR. 371, ¶ 39. Tanya used CCL for nine (9) years and continues to despite this Court’s Order extinguishing her right to do so. SR. 371, ¶ 40. Nine (9) years of use with the average cost of yearly maintenance being \$3,000.00 totals \$27,000.00, Tanya’s ¼ share of that cost is \$6,750.00. SR. 371, ¶ 41.

Proving damages is “an essential element for recovery.” *Lamb v. Winkler*, 2023 S.D. 10, ¶ 21, 987 N.W.2d 398, 406 (quoting *McKie v. Huntley*, 2000 S.D. 160, ¶ 20, 620 N.W.2d 599, 604). SR. 371, ¶ 17. The existence of damages must be shown by a preponderance of the evidence. *Rumpza v. Zubke*, 2017 S.D. 49, ¶ 19, 900 N.W.2d 601, 607–08 (citing *McKie*, 2000 S.D. 160, ¶ 20, 620 N.W.2d at 604) (stating the burden to prove compensatory damages and applying the standard to a contractual dispute). SR. 371, ¶ 18. When determining a damages amount, “[f]acts must exist and be shown by the evidence which afford a basis for measuring the loss of the plaintiff with reasonable certainty.” *Weekley v. Prostrullo*, 2010 S.D. 13, ¶ 26, 778 N.W.2d 823, 830 (alteration in original) (quoting *Drier v. Perfection, Inc.*, 259 N.W.2d 496, 506 (S.D. 1977)). *Id.*

[The South Dakota Supreme] Court has defined a reasonable certainty as “ ‘proof of a rational basis for measuring loss,’ without requiring the trier of fact to speculate.” *ISG, Corp. v. PLE, Inc.*, 2018 S.D. 64, ¶ 29, 917 N.W.2d 23, 33 (quoting *Kreisers Inc. v. First Dakota Title Ltd. P'ship*, 2014 S.D. 56, ¶ 40, 852 N.W.2d 413, 424). SR. 371, ¶ 19. Jean and Clint testified that during the period of time the lawsuit was pending the use of outside providers of graveling and maintenance services were not obtained but that Jean (through Clint) and the Bratchers and Moldenhauers worked together through shared efforts of equipment or material to provide the upkeep of CCL that was normally contracted out. SR. 371, ¶ 20.

The upkeep and maintenance work that was generally contracted out in the past included invoices and bids which were offered and received and testified to by both Clint and Jean as to the costs. SR. 371, ¶ 21.

Invoices supported the efforts made by the parties to perform general upkeep and maintenance of the road without a contractor doing the services and Clint testified to paying these invoices. SR. 371, ¶ 22. Jean and Clint testified that the maintenance and upkeep required (weather dependent – wet years more work) typically two (2) “gravelings” to keep the road in drivable condition, not pristine condition. SR. 371, ¶ 23.

The average cost of the bid for one (1) graveling by a contracted company is approximately \$1,500.00 a time for an average of \$3,000.00 a

year. SR. 371, ¶ 24. Tanya used CCL for nine (9) years and continued to despite this Court's Order extinguishing her right to do so. SR. 371, ¶ 25. The trial court by a preponderance of the evidence, which included testimony, exhibits, all of which were not contested, objected to, or in opposition of evidence offered by Tanya, support the trial court's calculation of damages. No damages were sought or awarded as to nuisance.

CONCLUSION

Jean and Wayne respectfully request this Court AFFIRM the circuit court's decision as to all of the issues raised by Tanya.

Dated April 21, 2026

SCHLIMGEN LAW FIRM, LLC

By: 

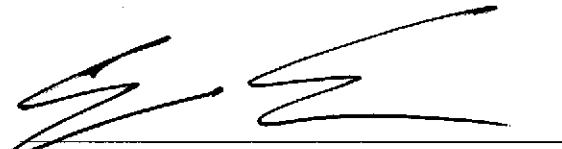
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ORAL ARGUMENT IS HEREBY RESPECTFULLY REQUESTED

CERTIFICATE OF COMPLIANCE

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

The foregoing brief is 33 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The footnotes are Times New Roman 10 point. The word processor used to prepare this brief indicates that there are a total of 33 pages, 8,763 words, and 51,594 characters (no spaces) in the body of the Brief.

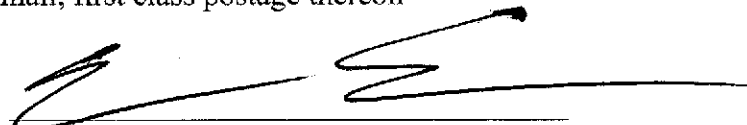

ERIC M. SCHLIMGEN

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 21, 2026, he electronically filed the foregoing documents with the Clerk of the Supreme Court via Odyssey File and Serve and via email at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also emailed to:

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


ERIC M. SCHLIMGEN

APPENDIX A
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