IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30621

CAL SD, LLC,

Plaintiff and Appellee,

vs.

INTERWEST LEASING, LLC

Defendant and Appellant.

Appeal from the Circuit Court
Seventh Judicial Circuit
Pennington County, South Dakota

THE HONORABLE CRAIG A. PFEIFLE

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Throughout Appellant's Brief, Plaintiff/Appellee Cal SD, LLC is referred to as "Purchaser Cal SD." Defendant/Appellant Interwest Leasing, LLC is referred to as "Owner Interwest." The transcript of the jury trial will be referenced using "TT," followed by the corresponding page number(s). Exhibits admitted at trial are denoted "Exh.," followed by the number of the Exhibit. The settled record is denoted "SR," followed by the appropriate pagination. Documents in the Appendix will be referenced using "APP," followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Owner Interwest appeals from a *Judgment* of the Seventh Circuit Court. *APP at 1.* The *Judgment* was signed and filed on January 5, 2024. *Id.* Purchaser Cal SD filed and served a *Notice of Entry* of the *Judgment* on January 8, 2024. *SR at 725.* Owner Interwest filed a *Notice of Appeal* on February 6, 2024. *SR at 743.* Jurisdiction in this Court is therefore proper under SDCL 15-26A-6.

STATEMENT OF THE ISSUES

I. WHETHER THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT PURCHASER CAL SD'S CLAIM FOR DECLARATORY RELIEF WAS AN ACTION AT LAW.

The circuit court concluded that Purchaser Cal SD's claim, which was actually an equitable claim for cancellation/rescission of a purchase agreement, was an action at law.

Granite Buick GMC, Inc. v. Ray, 2014 S.D. 78, 856 N.W.2d 799.

Moakley v. Hanson, 2020 S.D. 45, 947 N.W.2d 630.

Nizielski v. Tvinnereim, 453 N.W.2d 831 (S.D. 1990).

Nat'l Benefit Ass'n v. Eidy, 14 N.W.2d 883 (S.D. 1944).

S.D. Const. Art. VI, § 6.

SDCL 15-6-39(c).

SDCL 21-13-1.

II. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT SUBMITTED PURCHASER CAL SD'S CLAIM, WHICH WAS EQUITABLE IN NATURE, TO A BINDING JURY.

Because it viewed the claim as an action at law, the circuit court submitted the matter to a jury for a binding verdict, which resulted in Purchaser Cal SD having a lower burden of proof and Owner Interwest being deprived of certain equitable defenses.

Granite Buick GMC, Inc. v. Ray, 2014 S.D. 78, 856 N.W.2d 799.

Nizielski v. Tvinnereim, 453 N.W.2d 831 (S.D. 1990).

SDCL 15-6-39(c).

SDCL 15-6-52(a).

STATEMENT OF THE CASE

This case arises from Purchaser Cal SD's failure to proceed to closing on the purchase of a commercial property located in Rapid City, South Dakota. *APP at 6 (Complaint for Declaratory Relief).* After Purchaser Cal SD failed to complete the purchase, it requested the return of its earnest money held by the title company, contending that it had been unable to secure financing. *Id.* Because Purchaser Cal SD could not demonstrate that it had been unable to secure financing, Owner Interwest disagreed. *SR at 11 (Answer of Defendant Interwest Leasing, LLC).* Purchaser Cal SD subsequently commenced this action in the Seventh Judicial Circuit requesting a declaratory judgment determining the rights and responsibilities of the parties under the purchase agreement, including, but not limited to, cancellation of the purchase

agreement. *APP at 6 (Complaint for Declaratory Relief).* Although the nature of the relief sought by Purchaser Cal SD was equitable in nature (i.e., cancellation/rescission), and over Owner Interwest's objection, the matter was submitted to a jury for a binding verdict using the burden of greater convincing force rather than the appropriate clear and convincing evidence standard. *APP at 6.* At the conclusion of the jury trial, the jury issued a general verdict in favor of Purchaser Cal SD. *APP at 12 (Verdict Form).* Thereafter, the Honorable Craig A. Pfeifle entered a *Judgment. APP at 1.* The *Judgment* did not provide for an award of money damages, but rather decreed equitable relief to Purchaser Cal SD in that it ordered the title company to remit the earnest money to Purchaser Cal SD. *Id.* This appeal followed. *SR at 743.*

STATEMENT OF THE FACTS

On February 6, 2021, Chris Welsh and Owner Interwest entered into a *Commercial Real Estate Purchase Agreement* ("*Purchase Agreement*") *APP at 3.* In the *Purchase Agreement*, "Chris Welsh or Assigns" agreed to purchase a commercial building from Owner Interwest located at 1810 Rand Road in Rapid City. *Id.* The purchase price was $500,000 with earnest money required in the amount of $30,000. *Id.* The *Purchase Agreement* contained certain contingencies, including the offer being contingent upon the purchaser obtaining financing and the results of inspections. *Id.* A few days after the *Purchase Agreement* was entered into, the parties executed an *Addendum/Amendment to Purchase Agreement* whereby the purchaser was changed from Mr. Welsh to a limited liability company managed by Mr. Welsh, Purchaser Cal SD.[1] *Ex.*

[1] The sole member of Purchaser Cal, SD is a California limited liability company called Cal Heavenly, LLC. *TT at 45.* Cal Heavenly, LLC, in turn, is owned by three trusts—the

6.

Although the *Purchase Agreement* provided that the $30,000 in earnest money was required to be delivered within one business day of Owner Interwest's acceptance of the *Purchase Agreement*, it was not. *TT at 83.* As a result, on March 8, Owner Interwest's real estate agent, Chris Long ("Agent Long") sent an e-mail to Mr. Welsh. *Exh. 7.* In his e-mail, Agent Long inquired whether Mr. Welsh planned on cancelling the *Purchase Agreement* because Agent Long's assistant "ha[d] been unable to get [Mr. Welsh's] 1031 exchange company to release the earnest money and [Agent Long] had[] not received any communication in the last 2 weeks." *Exh. 7.* Mr. Welsh responded that he was not aware that the earnest money had not been remitted and would speak with the 1031 exchange company. *Id.* The earnest money was finally remitted on March 10, over one month late. *Exh. 9.*[2]

Sadly, Mr. Welsh passed away on March 15, 2021, approximately twenty-two days prior to the scheduled closing (April 6, 2021). *TT at 46-47.* A couple of weeks later, his long-time companion Tina Roberts began communicating with Agent Long.[3]

Clipper Trust (which was Chris Welsh's trust); the Oxford Trust; and the Aschieris Family Trust. *Id.*

[2] Pursuant to another *Addendum/Amendment to Purchase Agreement*, the parties agreed that the earnest money would be held by First American Title Company in Rapid City, instead of Agent Long's office (Keller Williams Realty – Black Hills). *Exh. 8.*

[3] Owner Interwest discovered at trial that Ms. Roberts was not Mr. Welsh's wife and had in fact never been married to him. *TT at 24.* This came as a surprise since Purchaser Cal SD had repeatedly referred to Ms. Roberts as the wife/widow of Mr. Welsh in court filings and on the record. *See SR at 310, 570 (two separate pretrial conference checklists – "Tina Roberts is Welsh's widow."); SR at 178, 206, 319 (three separate summary judgment briefs); SR at 170, 197 (statement of undisputed material facts). See also Transcript of Motions Hearing at 2 (04/06/23); Pretrial Conference Transcript at 7.*

Exh. 9; TT at 31. On March 30, approximately one week prior to the scheduled closing, Ms. Roberts telephoned Agent Long. *TT at 31.* She introduced herself, explained why she was calling, and asked if the closing date could be extended. *TT at 31-32 ("[W]hat – what can we do for an extension.").* That same morning, Ms. Roberts sent an e-mail to Agent Long stating: "Good morning, Chris, As you can imagine the documents and getting up to speed are brutal right now. Do you have a copy of the escrow instructions? I cannot find them for the life of me and would appreciate some help." *Exh. 9.* Shortly thereafter, Agent Long's assistant e-mailed key information regarding the transaction to Ms. Roberts. *Id.* The e-mail included: (i) copies of the title commitment, the earnest money deposit receipt, the survey, and the purchase documents; (ii) the contact information for the title company; (iii) the contact information for the company handling the section 1031 exchange; (iv) the closing information; and (v) a list of the various deadlines, all of which had expired by that date. *Id.*

Agent Long followed up with Owner Interwest regarding Ms. Roberts' request to extend the closing date. *SR at 87.* According to Agent Long, Owner Interwest was "very accommodating to the idea." *Id.* In his words: "Obviously we were all sympathetic to what had happened." *Id.* On March 31, Agent Long advised Ms. Roberts that Owner Interwest's initial thought was to extend the closing by ten days, but that his contact at Owner Interwest "was going to discuss with [sic] the other owner and let [Agent Long] know today." *Id.* The following day, Agent Long sent an e-mail to Ms. Roberts confirming that Owner Interwest had approved a twelve day extension of the closing date

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Notably, at trial Ms. Roberts acknowledged that Mr. Welsh had been referred to as her husband during her deposition and that she had not corrected the misstatement. *TT at 45.*

and asked Ms. Roberts: "Please confirm that will work and Hannah on my team will send over an amendment." *Id.* Importantly, Ms. Roberts gave no indication that twelve days would not suffice. *Id. See also TT at 50-51.* Instead, she responded: "Thank you. What paperwork do you need from me?" *Id. See also TT at 50-51.*

On April 2, Agent Long advised Ms. Roberts that his assistant would be in touch that day regarding the document which needed to be signed to extend the closing. *Exh. 9.* Additionally, given Mr. Welsh's passing, Agent Long asked Ms. Roberts an important question: "Do we need to assign the agreement to a different name/entity as well or are we good leaving it as is." *Id.* Ms. Roberts responded as follows:

> Hi Chris,
>
> I see the buyer on the addendum to purchase agreement dated 2/10/21 that has Cal SD, LLC. I am the LLC manager for that LLC. As long as we're in the name of Cal SD, LLC, we can simply use that.

Exh. 9 (emphasis added). Unbeknownst to Agent Long and Owner Interwest, Ms. Roberts' representation that she was the Manager for Purchaser Cal SD was untrue. *TT at 52.* So, based upon Ms. Roberts' request and in reliance upon her representations, Agent Long prepared an *Addendum/Amendment to Purchase Agreement* that extended the closing date from April 6 to April 19, 2021. *Exh. 10.* Ms. Roberts signed the document on behalf of Purchaser Cal SD on April 2. *Id.*

Approximately one week later, on April 9, Agent Long received a telephone call from an attorney in California by the name of Mathew Paskerian, who he understood to be Mr. Welsh's attorney. *TT at 90; Exh. 11.* Agent Long recalled that Mr. Paskerian told him that "[they] should have sympathy for the situation, and understanding everything that had happened, they just aren't going to have the ability to close." *Id. at 90-91.*

Agent Long did not recall Mr. Paskerian stating that Purchaser Cal SD was unable to secure financing or that it did not have a Manager with authority to act. *Id. at 91.* After the call, Agent Long sent an e-mail to Owner Interwest stating: "I got a call from Chris Welsh's attorney. He is saying the wife is not able to move forward with the purchase. They are hoping we have compassion for the situation." *Exh. 11 (emphasis added).*

In the ten day period that followed, neither Agent Long nor Owner Interwest heard anything further from Purchaser Cal SD—no communication that it was unable to secure financing; no communication that it was unable to take steps to secure financing because it did not have a Manager; and no communication indicating a desire to purchase the property but simply needing an additional extension of the closing date. *TT at 64-65, 74, 92, 100.* Thereafter, Purchaser Cal SD did not complete the purchase of the property at closing and Owner Interwest subsequently sold the property to another party, 412 Investment Group, LLC. *SR at 3.*

Purchaser Cal SD subsequently claimed that it had been unable to secure financing and was therefore entitled to the return of its earnest money; Owner Interwest disagreed. *APP at 6.* Several months later, in November of 2021, Purchaser Cal SD commenced a declaratory judgment action against Owner Interwest. *Id.* The *Complaint for Declaratory Judgment* included a single count (Count I – Declaratory Judgment) and requested, in pertinent part, a "declaratory judgment determining the rights and responsibilities of the parties under the purchase agreement, including, but not limited to the cancellation, or lack thereof, of the purchase agreement, as well as the Plaintiff's right to the recovery of Plaintiff's earnest money payment." *Id.* In addition to suing Owner Interwest, and despite the fact that 412 Investment Group, LLC was an innocent bona

fide purchaser of the property that had no information about the unsuccessful transaction with Purchaser Cal SD, Purchaser Cal SD also sued 412 Investment Group, LLC, who tendered its defense to Owner Interwest. *SR at 3, 21.*

During discovery, Ms. Roberts testified during a Rule 30(b)(6) deposition of Purchaser Cal SD that, despite representing to Agent Long that she was the Manager of Purchaser Cal SD, she actually had no authority to act on its behalf. *SR at 88, 303.* As a result, and because Owner Interwest had relied upon Ms. Roberts' representations, Owner Interwest was granted leave to file and serve a *Third-Party Complaint* against Ms. Roberts alleging negligent misrepresentation (Count One), fraudulent misrepresentation (Count Two), and interference with a business relationship or expectancy (Count Three). *SR at 91, 107.* The circuit court granted summary judgment in favor of Ms. Roberts on Owner Interwest's third-party claims for negligent and fraudulent misrepresentation. *SR at 542.* Owner Interwest withdrew the remaining claim for interference with a business relationship or expectancy. *Id. See also Transcript of Motions Hearing (04/06/23) at 2.*[4]

At that point, the sole claim that remained for trial was Purchaser Cal SD's claim for declaratory relief. Given the nature of Purchaser Cal SD's claim, Owner Interwest questioned the appropriateness of a jury trial at the pretrial conference. *Pretrial Conference Transcript at 10.* Purchaser Cal SD disagreed, contending "[t]he issue before the jury in the dec action is whether or not my client [Purchaser Cal SD] breached the

[4] In February of 2023, after sixteen months of litigation, Purchaser Cal SD agreed that 412 Investment Group, LLC was "not a necessary party for the Court to enter declaratory relief" and "stipulated to the dismissal of 412 Investment Group, LLC as a party, with prejudice." *SR at 220.*

contract." *Id. at 11.* The circuit court agreed with Purchaser Cal SD, concluding: "the fact is we have a legal question and that legal question I think you're entitled to have a jury determine whether or not there's a breach." *Id. at 12.*[5]

Owner Interwest again objected to the matter being tried to a jury prior to the commencement of the jury trial. *TT at 4-5 ("[G]iven that it's a declaratory judgment action and the relief is almost equitable in nature to sort of like rescind the contract or have it void, I would simply object to it being a jury trial as opposed to a court trial.").* The circuit court overruled the objection. *Id. at 5.* Notably, at no point was there any indication by the circuit court that the jury was being empaneled for the purpose of acting as an advisory jury.[6] *Pretrial Conference Transcript at 1-13; TT at 1-5.*

Purchaser Cal SD's claim for declaratory relief was tried to a jury for a binding verdict. *APP at 1.* At the conclusion of the trial, the jury issued a general verdict in favor of Purchaser Cal SD. *APP at 12.* The circuit court did not issue an independent decision on the matter, nor did it enter the required findings of fact or conclusions of law. Rather,

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[5] The circuit court clearly wrestled with how to best determine Purchaser Cal SD's claim for declaratory relief. Approximately one month prior to trial, it advised counsel of its intent to switch the parties' roles. *SR at 636.* In the circuit court's words:

> [T]he legal question remaining is whether Cal SD breached he agreement, thus entitling Interwest to those damages. As pleaded out, however [sic] Cal SD is the Plaintiff. I think it makes sense in light of those burdens remaining to have Interwest proceed as plaintiff on the sole remaining breach issue.

Id. Owner Interwest disagreed and submitted a memorandum arguing that it would be improper for the circuit court to require it to proceed as the plaintiff and bear the burden of proof at trial. *SR at 637.* Ultimately, the circuit court ruled that Purchaser Cal SD would proceed as the plaintiff. *SR at 651.*

[6] The singular reference to an advisory jury in the record was made by counsel for Owner Interwest when he discussed the appropriateness of a jury trial during the pretrial conference. *Pretrial Conference Transcript at 11.*

the circuit court entered a *Judgment* providing that Purchaser Cal SD was entitled to the return of its earnest money and directing First American Title Company to remit the funds to Purchaser Cal SD. *APP at 1.*

STANDARD OF REVIEW

This appeal implicates two standards of review: (i) the applicable standard when classifying the nature of a claim (i.e., an action an law or an action in equity); and (ii) the applicable standard when invoking SDCL 15-6-52 to empanel an advisory jury.

Beginning with the former, the circuit court's determination that Purchaser Cal SD's claim was legal in nature—which would entitle Purchaser Cal SD to a jury trial—was a legal conclusion. "This Court reviews questions of law under the de novo standard with no deference afforded to the circuit court's decision." *Lewis & Clark Rural Water Sys., Inc. v. Seeba, 2006 S.D. 7, ¶ 12, 709 N.W.2d 824, 830 (citing Block v. Drake, 2004 SD 72, ¶ 8, 681 N.W.2d 460, 463).*

Turning to the latter, as a general matter, circuit courts have the discretion to empanel an advisory jury to assist it in assessing the appropriate resolution of equitable claims. *Granite Buick GMC, Inc. v. Ray, 2014 S.D. 78, ¶¶ 7, 15, 856 N.W.2d 799, 802-03. 805.* The decision of a circuit court to empanel an advisory jury is generally reviewed using the abuse of discretion standard. *Id.* "Abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Weber v. Weber, 2023 S.D. 64, ¶ 15, 999 N.W.2d 230, 234 (quoting Taylor v. Taylor, 2019 S.D. 27, ¶ 14, 928 N.W.2d 458, 465).* It "'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *Id.* Despite this deferential standard of review, however,

as Granite Buick teaches, no circuit court has the discretion to misapply the required statutory process. *Granite Buick, 2014 S.D. at ¶ 15, 856 N.W.2d at 802-03. Cf. Endres v. Endres, 2022 S.D. 80, ¶ 34, 984 N.W.2d 139, 150 ("[B]y definition, a decision based on an error of law is an abuse of discretion."). See also, e.g., Credit Collection Services, Inc. v. Pesicka, 2006 S.D. 81, ¶ 5, 721 N.W.2d 474, 476; State v. Vento, 1999 S.D. 158, ¶ 6, 604 N.W.2d 468, 469.*

ARGUMENT

"Article VI, Section 6 of the South Dakota Constitution guarantees a right to a jury trial in all cases at law."[7] *Granite Buick, 2014 S.D. at ¶ 7, 856 N.W.2d at 802–03 (quoting Mundhenke v. Holm, 2010 S.D. 67, ¶ 14, 787 N.W.2d 302, 305–06) (emphasis added).* Thus, the right to a jury trial "'does not exist for all civil cases.'" *Id.* "If the pleadings request equitable relief, 'a jury trial is a matter for the trial court's discretion.'" *Id.* Importantly, however, "unless the parties agree to a binding jury in an equitable action, the jury verdict is advisory." *Id.* "'In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue *with an advisory jury,* or the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.'" *Id. (quoting SDCL 15–6–39(c)) (emphasis in original). See also First W. Bank, Sturgis v. Livestock Yards Co., 466 N.W.2d 853, 856 (S.D. 1991) ("If the relief sought is equitable, the decision of*

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[7] Article VI, Section 6 of the South Dakota Constitution provides as follows:

> The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy, but the Legislature may provide for a jury of less than twelve in any court not a court of record and for the decision of civil cases by three-fourths of the jury in any court.

S.D. Const. Art. VI, § 6.

whether to empanel an advisory jury is wholly within the trial court's discretion."); *Nizielski v. Tvinnereim, 453 N.W.2d 831, 834 (S.D. 1990) ("[O]n equitable issues a jury's verdict is advisory only[.]").*

I. WHETHER THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT PURCHASER CAL SD'S CLAIM FOR DECLARATORY RELIEF WAS AN ACTION AT LAW.

Purchaser Cal SD's claim was for declaratory relief. *SR at 3.* That fact, however, is not necessarily dispositive as to whether Purchaser Cal SD's claim was an action at law or an action in equity. Rather, as this Court explained in First National Bank of Philip v. Temple, 2002 S.D. 36, 642 N.W.2d 197, the test turns on assessing the nature of the claim had it not been postured as a declaratory judgment action:

> A litigant is not necessarily deprived of a jury trial merely because it is a party to a declaratory judgment action. Although the declaratory judgment procedure largely originated in equity, declaratory relief *per se* is neither legal nor equitable. The fact that a declaratory judgment is sought neither restricts nor enlarges any right to a jury trial that would exist if the issue were to arise in a more traditional kind of action for affirmative relief. To determine whether there is a right to a jury trial in a declaratory judgment action, it is necessary first to determine the nature of the action in which the issue would have arisen absent the declaratory judgment procedure. In other words, if there would have been a right to a jury trial on the issue had it arisen in an action other than one for declaratory judgment, then there is a right to a jury trial in the declaratory judgement [sic] action; conversely, there is no right to a trial by jury if, absent the declaratory judgment procedure, the issue would have arisen in an equitable proceeding.

First Nat'l Bank of Philip, 2002 S.D. at ¶ 11, 642 N.W.2d at 202 (quoting Northgate Homes, Inc. v. City of Dayton, 126 F.3d 1095, 1098-99 (8th Cir. 1997)) (emphasis added). Applying that principle here, the question turns to whether Purchaser Cal SD's claim was "at law," which would be triable as a matter of right, or whether it sounded in equity. *Granite Buick, 2014 S.D. at ¶ 6, 856 N.W.2d at 803 ("Therefore, we must*

determine whether the defenses were 'cases at law' triable to a jury as a matter of 'right' within the meaning of Article VI, § 6 of the South Dakota Constitution, or whether they were claims sounding in equity.").

This Court "look[s] 'to the common law' to determine whether it is an action at law triable to a jury as a matter of right or whether it is an equitable action for trial to the court." *Granite Buick, 2014 S.D. at ¶ 9, 856 N.W.2d at 803 (quoting Grigsby v. Larson, 124 N.W. 856, 858 (S.D. 1910)).*[8] Ultimately, "[t]he question in determining if an action is at law or equitable 'is whether the 'subject' of the action 'is the type of case in which the movant would have been entitled to a jury trial in the common-law courts.'" *Moakley v. Hanson, 2020 S.D. 45, ¶ 29, 947 N.W.2d 630, 639 (quoting Granite Buick, 2014 S.D. at ¶ 9, 856 N.W.2d at 803) (emphasis added).* As will be seen, Purchaser Cal SD's claim was not an action at law. It was an action in equity.

Because Purchaser Cal SD's claim for declaratory relief is based upon the parties' contract, that is where the analysis must begin. As previously noted, the *Purchase Agreement* was contingent on financing: "This offer is contingent upon the Purchaser obtaining financing on terms and conditions to enable Purchaser, at Purchaser's discretion, to purchase the property." *Id.* The *Purchase Agreement* further set forth the limited circumstances that would entitle Purchaser Cal SD to the return of its earnest money if its failed to complete the purchase:

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[8] "When analyzing the right to trial by jury, the term 'common law' refers to those principles of English law that evolved in the common-law courts such as the Court of the Exchequer, as opposed to those applied in the Admiralty, Chancery, or Ecclesiastical Courts." *Granite Buick, 2014 S.D. at ¶ 9, n. 4 (State v. One 1969 Blue Pontiac Firebird, 2007 S.D. 63, ¶ 18, 737 N.W.2d 271, 276).* This Court "examine[s] the common law as it existed at the time South Dakota's Constitution was adopted." *Id.*

> **EARNEST MONEY/DEPOSITS**: If this offer is not accepted by Seller, or if purchaser is unable to secure financing, if so contingent, or if no agreement is reached regarding conditions found on inspection report(s), this agreement is **void** and Purchaser's earnest money shall be returned in full, less any expenses incurred on Purchaser's behalf, including any inspections, title insurance commitments, surveys, etc., ordered by Seller or on behalf of Purchaser by the Broker in anticipation and preparation of the sale and closing.

APP at 3 (emphasis added). As is readily apparent, the *Purchase Agreement* would be deemed "void" and Purchaser Cal SD would be entitled to the return of its earnest money in the event of only three scenarios: (1) if the offer was not accepted by Owner Interwest; (2) if Purchaser Cal SD was "unable to secure financing;" or (3) if an issue arose with an inspection and the parties are unable to come to an agreement. *Id.*

Given the language in the *Purchase Agreement*, in order to secure the return of the earnest money held by First American Title Company, Purchaser Cal SD needed a court declaration that the *Purchase Agreement* was void—after proving that it had been unable to secure financing. Thus, having the *Purchase Agreement* declared void, or cancelled, was the "subject" of the action. Seeking to void or cancel a contract is an action in equity and not a type of case in which Purchaser Cal SD would have been entitled to a jury trial at common-law.

SDCL 21-13-1 provides as follows:

> A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may upon his application, be so adjudged and ordered to be delivered up or canceled; but if the invalidity is apparent upon its face or upon the face of another instrument necessary to its use in evidence it is not deemed capable of causing such injury.

SDCL 21-13-1. This statute, which is sourced back 1877, is a codification of the

common law. This Court has described it as follows: "These provisions are declaratory of the jurisdiction which courts of equity exercise upon the principle of *quia timet*." *Nat'l Benefit Ass'n v. Eidy, 14 N.W.2d 883, 885 (S.D. 1944) (citing Castro v. Barry, 21 P. 946, 947 (Cal. 1889); Story's Equity Jurisprudence, 14th Ed., § 947).*[9] "*Quia timet*" is defined as "[a] legal doctrine that allows a person to seek equitable relief from future probable harm to a specific right or interest." *Black's Law Dictionary (11th ed. 2019) (emphasis added).* The doctrine/principle of *quia timet* existed well before the adoption of South Dakota's Constitution.

> To start, the doctrine is pronounced "kwee-ə tim-et" and translates from Latin as "because he fears." *Quia timet*, Black's Law Dictionary (10th ed. 2014). Centuries ago, English courts of equity modeled bills *quia timet* on even-more-ancient common law writs known as *brevia anticipantia*—unique relief available before the plaintiff sustained an injury. 2 Edward Coke, The First Part of the Institutes of the Lawes of England 100a (London, Stationers' Co. 1628); *see also* 2 Joseph Story, Commentaries on Equity Jurisprudence § 825 (Boston, Hilliard, Gray, & Co. 1836); George Tucker Bispham, The Principles of Equity § 568 (Philadelphia, Kay & Bro. 1874).

Fidelity & Deposit Co. of Maryland v. Edward E. Gillen Co., 926 F.3d 318, 321-22 (7th Cir. 2019).[10] The equitable remedy of cancellation has been before this Court going back many years. *See Parszyk v. Mach, 74 N.W. 1027, 1027 (S.D. 1898) ("This equitable action to cancel a warranty deed . . . .")*; *In re Bethke's Est., 275 N.W. 74, 76 (S.D. 1937)*

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[9] In Castro v. Barry, the Supreme Court of California noted that "[s]uits to have an instrument canceled or adjudged to be void were quite common in the old chancery practice, and constituted one of the applications of the principle *quia timet*." *Castro v. Barry, 21 P. 946, 947 (Cal. 1889) (emphasis in original).*

[10] In a footnote, the Seventh Court of Appeals noted that a "bill" was "[e]quity pleading's version of a civil complaint." *Fidelity & Deposit Co. of Maryland, 926 F.3d at 322, n. 2.*

("The appellee here was seeking but one remedy, the aid of equity to cancel the two deeds secured by the appellants by fraud or forgery and without consideration."); Gruwell v. Hinds, 130 N.W.2d 92, 93 (S.D. 1964) ("It may be conceded that the original equitable remedies of reformation and cancellation operated in personam upon persons and not in rem against the res.").

Guidance on the subject of a claim can also be taken from the pleadings. *Granite Buick, 2014 S.D. at ¶ 7, 856 N.W.2d at 802-03 ("If the pleadings request equitable relief, 'a jury trial is a matter for the trial court's discretion.'").* In this case, Purchaser Cal SD's pleadings reinforce the conclusion that the subject of its claim is equitable in nature. The sole claim in the *Complaint for Declaratory Judgment* was Count I – Declaratory Judgment, and Purchaser Cal SD's wherefore clause requested, in pertinent part:

> For a declaratory judgment determining the rights and responsibilities of the parties under the purchase agreement, including, but not limited to the cancellation, or lack thereof, of the purchase agreement, as well as the Plaintiff's right to the recovery of Plaintiff's earnest money payment.

APP at 6 (emphasis added).[11]

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[11] It is also worth noting that in its initial pretrial conference checklist, Purchaser Cal SD advised the Court that it "believe[d] that the issues between Cal SD, LLC and Interwest Leasing, LLC involve legal determinations or declarations by the Court, and as such, no jury instructions are necessary or appropriate." *SR at 310.* It described the remaining issues vastly different than a breach of contract claim at law:

1. That the Court declare the rights and responsibilities of the parties under the Purchase Agreement;
2. That the Court determine whether the earnest money provision in the Purchase Agreement sets forth an agreement for liquidated damages or a penalty or forfeiture;
3. That the Court interpret the earnest money provisions of the Purchase Agreement, including the parties [sic] respective rights to the recovery of the earnest money."

Id.

It is worth noting that the result is the same if Purchaser Cal SD's claim is viewed as a request for rescission of the *Purchase Agreement*.[12] *See City of Aberdeen v. Rich, 2001 S.D. 55, ¶ 36, 625 N.W.2d 582, 589 (Amundson, J., concurring in result) ("Once a court declares a contract void, it is treated as if it is rescinded").* "An action for rescission may be brought as a legal action pursuant to SDCL [Chapter] 53–11, or as an equitable action pursuant to SDCL [Chapter] 21–12." *Knudsen v. Jensen, 521 N.W.2d 415, 417 (S.D. 1994).* A key characteristic divides legal rescission under SDCL Chapter 53-11 and equitable rescission under SDCL Chapter 21-12: that characteristic is *when* the rescission occurs. If, in contrast to this action, "the rescission has already been accomplished by the unilateral act of one of the parties to the contract," "[t]he rescinding party brings the legal action for rescission to enforce his rights arising from the rescission," pursuant to SDCL Chapter 53-11." *Jones v. Bohn, 311 N.W.2d 211, 213 (S.D. 1981).* On the other hand, if, as here, the claim is brought as an equitable action to judicially effectuate the rescission pursuant to SDCL Chapter 21-12, "the rescission is accomplished by court decree.'" *Knudsen, 521 N.W.2d at 417. See also Sabbagh v. Prof'l & Bus. Men's Life Ins. Co., 116 N.W.2d 513, 517 (1962) ("[R]escission in equity is effected by the decree of the court which entertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief.").*[13]

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[12] "'Cancellation of instruments' generally refers to the process by which a court terminates, cancels, rescinds, or nullifies a contract or other instrument and orders restoration of the parties to the status quo. Courts have referred to this type of judicial termination of an instrument by a variety of names, including 'cancellation,' 'rescission,' and 'equitable rescission' or 'rescission in equity.'" *13 Am.Jur.2d Cancellation of Instruments § 1.*

[13] Cancellation and rescission have frequently been referred to in tandem by this Court.

Here, there is little debate that Purchaser Cal SD's claim was for equitable rescission. First, it requested a court decree in that it prayed for a "declaratory judgment determining the rights and responsibilities of the parties under the purchase agreement, including, but not limited to the cancellation, or lack thereof, of the purchase agreement, as well as the Plaintiff's right to the recovery of Plaintiff's earnest money payment." *APP at 6 (Complaint for Declaratory Relief).* Second, Ms. Roberts' testimony at trial that she was willing to follow through with the purchase of the property well after it had been sold belies any suggestion that Purchaser Cal SD had previously rescinded the *Purchase Agreement. TT at 42, 73.*[14]

Milbank Mut. Ins. Co. v. State Farm Fire & Cas. Co., 294 N.W.2d 426, 428 (S.D. 1980) ("Where there is no mutual agreement establishing the fact of rescission or cancellation . . . ."); Norgren v. Olson, 53 N.W.2d 612, 614 (S.D. 1952) ("'It has been held in this state, with respect to conveyances made in consideration of a promise to support the grantor, that a failure by the grantee to perform will ordinarily justify a rescission and cancellation of the conveyance.'"); Wenzlaff v. Tripp State Bank, 214 N.W. 844, 845 (S.D. 1927) ("Where the mortgage is canceled, the transaction is rescinded . . . ."); Thompson v. Hardy, 102 N.W. 299, 301 (S.D. 1905) (quoting Pomeroy's Equity Jurisprudence for the proposition that: "Remedies of rescission or cancellation, or those by which an instrument, contract, deed, judgment, and even sometimes a legal relation itself subsisting between two parties, is for some cause set aside, avoided, rescinded, or annulled.") Dakota Life Ins. Co. v. Morgan, 199 N.W. 43, 44 (S.D. 1924) ("This could only be done by a rescission or cancellation of the policy. Under the well-recognized rule, this can be done only by an appeal to the equity side of the court.").

[14] In Thompson v. Hardy, 102 N.W. 299 (1905), this Court noted as follows:

> The commissioners seem to recognize the jurisdiction of courts of equity to rescind contracts in proper cases, and the distinction between the rescission of a contract at common law and an action to rescind a contract in equity. The provisions of the Code were not intended to establish a new rule. They simply embodied the principles of the common law as they then existed, and left the rescission of contracts and the cancellation of deeds to courts of equity when the case is such as to require the exercise of their jurisdiction.

Id. at 301 (emphasis added).

Based upon the foregoing, the circuit court erred when it concluded that Purchaser Cal SD's claim for declaratory relief was an action at law.

II. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT SUBMITTED PURCHASER CAL SD'S CLAIM, WHICH WAS EQUITABLE IN NATURE, TO A BINDING JURY.

A. The circuit court failed to adhere to various procedural requirements concomitant with an advisory jury.

While Purchaser Cal SD did not have a *right* to a jury trial because its claim was equitable in nature, that does not end the discussion. This is because even if the circuit court erred by classifying the claim as legal, it retained the discretion to submit the equitable claim to a jury. *Granite Buick, 2014 S.D. at ¶ 15, 856 N.W.2d at 805. See also SDCL 15-6-39(c).* "But, unless the parties agree to a binding verdict in an equitable action, the jury verdict is advisory." *Granite Buick, 2014 S.D. at ¶ 7. See also Nizielski, 453 N.W.2d at 834 ("[O]n equitable issues a jury's verdict is advisory only.").* In this case, Owner Interwest objected to a jury trial at the pretrial conference and then again prior to the commencement of the trial. *Pretrial Conference Transcript at 10; TT at 4-5.*

The use of an advisory jury by a circuit court triggers certain procedural requirements. First, if an advisory jury is employed the jury's decision(s) is/are "'merely advisory to the court." *Granite Buick, 2014 S.D. at ¶ 15, 856 N.W.2d at 805.* The "'responsibility for the decision-rendering process remains with the trial judge." *Id. (citing 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2335, 354-55 (3d Ed. 2008)).* The circuit court may adopt the jury's decision(s) or set it aside and make other findings in opposition to the jury's decision(s). *Id. (quoting F. Meyer Boot & Shoe Co. v. C. Shenkberg Co., 80 N.W. 126, 129 (S.D. 1899)).*

Second, once the circuit court makes its decision, it "must prepare . . . findings of fact and the conclusions of law as it must in any other nonjury case.'" *Id. See also SDCL 15-6-52(a) ("In all actions tried upon the facts without a jury or with an advisory jury, the court shall, unless waived as provided in § 15-6-52(b), find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to § 15-6-58.").*

Third, if a circuit court intends to have the jury sit in an advisory capacity, it must so notify the parties "no later than the time at which the jury selection has begun." *Nizielski, 453 N.W.2d at 834.* "This is to ensure fair notice to the litigants of the arena in which they find themselves in; and, further so that they can knowledgeably proceed with a mental determination as to how they can effectively conduct voir dire examination having a basic viewpoint of the role of the jury in the proceeding." *Id. (citing Hildebrand v. Board of Trustees, 607 F.2d 705 (6th Cir.1979)).*

Here, the circuit court did not take such steps. The jury's decision was not treated as advisory; rather the circuit court treated the jury's verdict as binding. The circuit court yielded the decision-rendering process to the jury, in the form of a binding general verdict. *APP at 12 (Verdict Form) ("We . . . find in favor of . . . __X__ the Plaintiff.").* Next, there was no process or review of the jury's decision by the circuit court for the purpose of deciding whether to adopt the jury's verdict or set it aside and make other findings in opposition. Further, and just as important, the circuit did not make any findings of fact or conclusions of law. "It is well-settled law that it is the [circuit] court's duty to make required findings of fact, and the failure to do so constitutes reversible error." *Thompson v. Bear Runner, 2018 S.D. 57, ¶ 15, 916 N.W.2d 127, 130 (quoting*

Doremus v. Morrow, 2017 S.D. 26, ¶ 10, 897 N.W.2d 341, 345). This is because "[t]he absence of findings . . . makes meaningful review impossible." *Nickles v. Nickles, 2015 S.D. 40, ¶ 27, 865 N.W.2d 142, 152.* Finally—and although it is understandable given that the circuit court had previously concluded that Purchaser Cal SD's claim was an action at law—there was no notice by the circuit court that the jury's verdict would be advisory.

Given the preceding, the circuit court abused its discretion by failing to adhere to various procedural requirements that must be followed when an advisory jury is used to decide an issue(s) that is/are equitable in nature.

B. Remanding the case for findings of fact and conclusions of law will not remedy the circuit court's abuse of discretion and resulting prejudice to Owner Interwest.

Generally, when a case is improperly submitted to a jury for a binding verdict, the verdict must be considered advisory and the "'should be remanded to the [circuit] court for findings of fact and conclusions of law.'" *Black v. Gardner, 320 N.W.2d 153, 156 (S.D. 1982).* This case is different. If this Court agrees that the circuit court abused its discretion, it would be inappropriate for this matter to simply be remanded to the circuit court for findings of fact and conclusions of law. *Granite Buick, 2014 S.D. at ¶ 16, 856 N.W.2d at 805.*

When the circuit court ruled that Purchaser Cal SD's remaining claim involved a "legal question" and that it was "entitled to have a jury determine whether or not there's a breach," that decision crystallized how the case was to be tried as the parties were bound to honor that ruling and proceed forward as if the claim were an action at law. Therefore, consistent with the case being tried as an action at law for breach of contract, both parties

submitted jury instructions appropriate to such a claim. *See SR at 575 (Plaintiff's Proposed Jury Instructions) and SR at 604 (Defendant Interwest Leasing, LLC's Supplemental Requested Jury Instructions).* This, in turn, resulted in two critical distinctions as it concerns how the jury was instructed that unfairly prejudiced Owner Interwest.

First, both parties submitted modified versions of South Dakota Pattern Jury Instruction (Civil) 1-60-10 providing that Purchaser Cal SD's burden of proof was the greater convincing force of the evidence. *See SR at 575, 604.* Given the equitable nature of Purchaser Cal SD's claim, that burden of proof was incorrect and much lower than required under the law. Purchaser Cal SD's burden of proof should have been the higher burden of clear and convincing evidence. The equitable remedy of cancellation, like rescission, is an extraordinary remedy and therefore requires clear and convincing evidence. *Knudsen, 521 N.W.2d at 418 ("The equitable relief of rescission, being extraordinary, should never be granted, except where the evidence is clear and convincing."); Smith v. Hermsen, 1997 S.D. 138, ¶ 16, 572 N.W.2d 835, 840 ("[T]he '[e]quitable relief of rescission should not be granted unless the evidence is clear and convincing.'").*

Second, Owner Interwest was deprived of two important equitable defenses that it had pled—unclean hands and estoppel. *SR at 11 (Answer of Defendant Interwest Leasing, LLC).* Jury instructions on these two defenses were supported by the evidence but, per this Court's instruction in Granite Buick, were unavailable in a binding jury trial

on an action at law.[15]

With regard to its claimed inability to secure financing, Purchaser Cal SD did not produce any document(s) evidencing an effort after Mr. Welsh's death (and in the weeks leading up to closing) to secure a loan or financing that was unsuccessful; nor did it produce any documents from that period reflecting an effort—by Ms. Roberts or anyone else—to secure the appointment of a replacement Manager so that it could take steps to secure financing. No e-mails; no letters; no loan applications; and no rejections of any requests for financing.

Next, as for Ms. Roberts' efforts, her account at trial was directly at odds with her deposition testimony—as was brought out during cross-examination. At trial, Ms. Roberts testified that she had conversations with Purchaser Cal SD's parent entity, Cal Heavenly, LLC, to see what could be done to get authority to secure financing. *TT at 57.* But her deposition testimony was: "I did not have any conversations with them [Cal Heavenly, LLC] at the time." *TT at 58.* After Ms. Roberts suggested that her answer was perhaps taken out of context, she was reminded of another exchange during her deposition when she was asked whether she talked to somebody who owned the company, such as the trustees; her answer again was "No." *TT at 59.* And, when pressed

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[15] The doctrine of unclean hands requires that "'[a] party seeking equity must act fairly and in good faith.'" *Halls v. White, 2006 S.D. 47, ¶ 18, 715 N.W.2d 577, 585 (quoting Action Mech., Inc., v. Deadwood Historic Pres. Comm'n, 2002 S.D. 121, ¶ 26, 652 N.W.2d 742, 751).*

Equitable estoppel consists of four elements: (1) representations or concealment of material facts; (2) the party to whom it was made must have been without knowledge of the real facts; (3) the representations or concealment must have been made with the intention that it should be acted upon; and (4) the party to whom it was made must have relied thereon to his prejudice or injury. *Dakota Truck Underwriters v. S. Dakota Subsequent Injury Fund, 2004 S.D. 120, ¶ 32, 689 N.W.2d 196, 204.*

whether she spoke specifically to Cal Heavenly, LLC, Ms. Roberts reiterated: "I didn't talk to anyone regarding this, no. Regarding the subject at the time, no." *Id.*

Finally, at trial Ms. Roberts claimed that she knew who the trustees of the trusts that owned Cal Heavenly, LLC were and that she had tried to secure her appointment as the Manager. *TT at 59-60 ("I know who they were.").* However, she was forced to admit during cross-examination that at her deposition she had testified that she did not know who the trustees were for the Oxford Trust and the Aschieris Family Trust. *Id. at 60-61 (as to the trustees for the Oxford Trust, "I do not know who the trustees are.") (as for the trustees of the Aschieries Family Trust, "I have no idea.").*

Owner Interwest would additionally note that once the circuit court determined that the matter would be tried to the jury as a breach of contract action at law, it would have been improper for Owner Interwest to propose jury instructions regarding such defenses. To do so would have been to seemingly inject error. This is especially true given that the jury was being asked to issue a general verdict on an action at law while "on equitable issues a jury's verdict is advisory only." *Nizielski, 453 N.W.2d at 834.*

CONCLUSION

For all of the foregoing reasons, Owner Interwest respectfully requests that the *Judgment* be reversed and that this matter be remanded to the circuit court for a trial to the court.

REQUEST FOR ORAL ARGUMENT

Owner Interwest, by and through its counsel, respectfully requests the opportunity to present oral argument before this Court.

Dated this 16th day of May, 2024.

Respectfully submitted,

THOMAS BRAUN BERNARD & BURKE, LLP
Attorneys for Appellant Interwest Leasing, LLC

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Appellant's Brief* complies with the type volume limitation provided for in SDCL 15-26A-66. *Appellant's Brief* was prepared using Times New Roman typeface in 12-point font and contains 7,493 words. I relied on the word count of our word processing system used to prepare *Appellant's Brief* and the original and all copies are in compliance with this rule.

THOMAS BRAUN BERNARD & BURKE, LLP
Attorneys for Appellant Interwest Leasing, LLC

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Rapid City, SD 57702
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2024, I filed the foregoing *Appellant's Brief* relative to the above-entitled matter via Odyssey File and Serve, and that such system effected service of the same on the following individuals:

Robert J. Galbraith
Nooney & Solay, LLP
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Attorney for Cal SD, LLC and Tina Roberts

Lora A. Waeckerle
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Rapid City, SD 57701
Attorney for 412 Investment Group, LLC

/s/ John W. Burke
John W. Burke

APPENDIX

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

CAL SD, LLC, Plaintiff, vs. INTERWEST LEASING, LLC, Defendant.	51CIV21-001476 **JUDGMENT**

THIS MATTER having been tried to a jury on the 15th day of December, 2023; the Honorable Craig A. Pfeifle, Circuit Court Judge, presiding; the Plaintiff, Cal SD, LLC appearing through its representative, Tina Roberts, and its counsel, Robert Galbraith; the Defendant, Interwest Leasing, LLC appearing through its representative, Ron Young, and its counsel, John Burke; the issues having been duly tried, and the jury having rendered its verdict on December 15, 2023, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Plaintiff, Cal SD, LLC, shall be entitled to the earnest money held under the Commercial Real Estate Purchase Agreement between Cal SD, LLC and Interwest Leasing, LLC; and it is further

ORDERED, ADJUDGED, AND DECREED that First American Title Company is hereby directed to remit the earnest money to the Plaintiff, Cal SD, LLC; and it is further

APP 1

ORDERED, ADJUDGED, AND DECREED that the Plaintiff, Cal SD, LLC, shall have a judgment against the Defendant, Interwest Leasing, LLC for costs in the amount of $1,906.84

1/5/2024 2:35:34 PM

BY THE COURT:

HONORABLE CRAIG PFEIFLE
Circuit Court Judge

Attest:
Marzluf, Patty
Clerk/Deputy

Filed on: 01/05/2024 Pennington County, South Dakota 51CIV21-001476

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Black Hills Association of REALTORS®

COMMERCIAL REAL ESTATE PURCHASE AGREEMENT

(This is a legally binding contract between Purchaser and Seller. If you do not understand it, seek legal advice.)

1. **EARNEST MONEY DEPOSIT - PARTIES TO CONTRACT - PROPERTY.**
Purchaser: Chris A. Welsh or Assigns EIN: _____
Purchaser Address: _____
Earnest Money in the amount of ($ 30,000) Thirty Thousand DOLLARS
in the form of a check made payable to Keller Williams Realty Black Hills will be
delivered within one (1) business day of acceptance of this purchase agreement on the property legally described as:
Watersedge Subd, Lot 2 - Tax ID #50073
Also known as: 1810 Rand Road, Rapid City, SD
Seller: Interwest Leasing LLC

2. Purchaser and Seller acknowledge that they have received a copy of a real estate agency disclosure. Purchaser and Seller acknowledge that Broker is the limited agent of both parties to this transaction as outlined in Section III of the Agency Agreement Addendum and authorized by Purchaser and Seller.
☐ Yes / ☑ No (If yes, Initial) Purchaser _____ / _____ Seller RY 02/06/21 2:03 PM MST / _____
Seller will be represented by: Chris Long Keller Williams Realty Black Hills Listing Agent/Firm
Purchaser will be represented by: _____ Selling Agent/Firm

3. **PURCHASE PRICE.** The total purchase price is to be ($ 500,000) Five Hundred Thousand DOLLARS after earnest money herein is credited, the remaining balance is to be paid by Purchaser at closing.

4. **FINANCING/APPRAISAL.** This offer ☑ is / ☐ is not contingent upon the Purchaser obtaining financing on terms and conditions to enable Purchaser, at Purchaser's discretion, to purchase the property. This offer ☑ is / ☐ is not subject to the property appraising for at least the purchase price. Purchaser shall have 30 days to satisfactorily remove appraisal contingency in writing.

5. **INSPECTIONS:** Purchaser acknowledges that it has been recommended that Purchaser engage, at Purchaser's expense, the services of a professional inspector to inspect the property. Initials. CAW 02/04/21 6:45 AM PST dotloop verified / _____

A. Offer is contingent on an inspection of structure, mechanical and electrical. (initials) yes CAW 02/04/21 6:45 AM PST dotloop verified _____ waived _____ / _____
B. Offer is contingent on an inspection for environmental and hazardous conditions. (initials) yes CAW 02/04/21 6:45 AM PST dotloop verified _____ waived _____ / _____
C. Offer is contingent on an inspection for pest infestation and/or damage. (initials) yes CAW 02/04/21 6:45 AM PST dotloop verified _____ waived _____ / _____

Inspection shall be completed on or before _____ (10) days after acceptance of this Purchase Agreement. During this period, Seller shall provide access to Property upon 24-hour notice to Purchaser and Purchaser's agent, contractors, inspectors, and representatives. Purchaser hereby indemnifies and holds Seller harmless from any liability or claim resulting from Purchaser's inspections.

Purchaser agrees to restore the property to its condition prior to inspections taking place.

Inspections shall be either approved or disapproved in writing by Purchaser within Five (5) Days of receipt of inspection report(s). Should the results of any inspections not be satisfactory to Purchaser, then, within this same period, Purchaser shall notify Seller or Listing Broker in writing of the specific dissatisfaction and at which time the parties may re-negotiate or terminate this contract. If Purchaser fails to specifically approve or disapprove any inspections within the time specified, then Purchaser shall be deemed to have approved the property in its present condition and any real estate licensee involved in the transaction will have no further obligation to Purchaser as to such inspections or agreement.

Initials: Buyer: CAW 02/04/21 Seller: RY 02/06/21
Buyer: _____ Seller: _____

EXHIBIT 5

FILED
Pennington County, SD
IN CIRCUIT COURT
DEC 18 2023
Amber Watkins, Clerk of Courts
By _____ Deputy

6. **SURVEY/PLAT.** All survey work shall be completed by a licensed land surveyor, noting all recorded easements, for Buyer's review and acceptance on or before closing. The cost of survey work will be paid as follows: Seller 100 % Purchaser _____ %
The following will be completed for this transaction: ☑ Improvement Location Exhibit ☐ Boundary Survey
☐ Locate/Replace Missing Boundary Pins ☐ Other: _____

7. **PRORATIONS AND ASSESSMENTS.** Taxes, interest, rents, and association fees will be prorated to the date of closing with tax proration to be based on previous year's taxes or the most current information available at time of closing unless otherwise stated herein. Seller shall pay all assessments on the Property, whether recorded or not recorded by the relevant assessing authority, that accrue prior to the date of closing, whether or not such assessments are currently due and payable. Purchaser shall pay all subsequent taxes and assessments.

Any security deposits held by Seller for this property will be transferred to Purchaser at closing. Seller further agrees that any leases relating to the subject property will be assigned to Purchaser at closing.

8. **FEASIBILITY STUDY.** Purchaser shall have _____ (10) days from the full execution of this agreement to conduct a feasibility study on the property.

If Purchaser determines, in Purchaser's sole discretion, that the property is not suitable for Purchaser's intended use, then Purchaser shall provide Seller with written notice within _____ (10) days after the full execution of this agreement. If Purchaser terminates this agreement within the prescribed time frame, then Seller shall immediately refund Earnest Money to Purchaser and this agreement shall become null and void.

9. **DUE DILIGENCE DOCUMENTS.** Seller agrees to deliver copies of the following documents and information pertaining to the Property to Purchaser on or before _____ (2) days from the full execution of this agreement.

Surveys, plans, Phase I, copy of existing lease & property taxes (if available on plans & surveys)

Seller will provide any notices received by any governmental agency including assessment notices on the subject property, and any other pertinent data in possession of the Seller including all leases and addendums on the currently leased building and real estate to Purchaser and Purchaser's Agent. Seller will also provide documentation of any prior or currently pending insurance claim from the beginning of Seller's ownership of the property.

10. **TITLE.** Merchantable title shall be conveyed by Warranty Deed or other such conveyance instrument sufficient to convey merchantable title, subject to conditions, zoning, restrictions and easements of record, if any, which do not interfere with or restrict the existing use of the property.

11. **COSTS.** Each party shall be responsible for payment of their Attorney fees related to this transaction. Seller will pay for State Transfer Fee and the costs of recording the deed conveying title of the property to Purchaser.

Costs of Title Insurance Premium Owner's Policy	Seller: 50 %	Purchaser: 50 %
Cost of Title Insurance Premium Lender's Policy	Seller: 0 %	Purchaser: 100 %
Cost of Title Company Closing Service Fees	Seller: 50 %	Purchaser: 50 %

12. **CLOSING/POSSESSION.** Possession and closing of said premises, including the buildings situated thereon, which shall be in as good of condition as the same are now, shall be given to Purchaser on or before 04/06/2021, provided, however, delivery of possession is conditioned upon closing.

Closing shall take place at Title company of sellers choice.

Initials: Buyer: CAW 02/04/21 Seller: RG

Buyer: _____ Seller: _____

Serial#: 072681-100160-2192543
Prepared by: Jon Brue | Keller Williams Realty Black Hills | jonbrue@kwcommercial.com |
Form Simplicity
APP 4

13. **EARNEST MONEY/DEPOSITS.** If this offer is not accepted by Seller, or if purchaser is unable to secure financing, if so contingent, or if no agreement is reached regarding conditions found on inspection report(s), this agreement is void and Purchaser's earnest money shall be returned in full, less any expenses incurred on Purchaser's behalf, including any inspections, title insurance commitments, surveys, etc., ordered by Seller or on behalf of Purchaser by the Broker in anticipation and preparation of the sale and closing.

14. **OTHER PROVISIONS.**

Seller hereby acknowledges that it is the intention of the Buyer to complete an I.R.C. 1031 Exchange, which will not delay the close of Escrow or cause additional expense to the Seller. The Buyer's rights and obligations under this agreement may be assigned to an Intermediary of the Buyer's choice for the purpose of completing such an exchange. Seller agrees to cooperate with the Buyer and the Intermediary in a manner necessary to complete the exchange.

15. **ADDENDA TO THIS AGREEMENT.** The following documents are addenda to this contract and are attached and become part of this contract by reference. If none, so state.

16. **WALK THROUGH INSPECTION.** The Purchaser will have the right to conduct a walk-through inspection of the property within 24 hours prior to closing to verify that the property is in substantially the same condition as on the date this agreement was written.

17. **CHOICE OF LAW.** The laws of South Dakota govern the transaction.

TIME IS OF THE ESSENCE OF THIS CONTRACT.

Dated 2/4/21, at 5:00 ☐ a.m. / ☑ p.m.

This agreement is void if not accepted by Seller by 02/06/2021 (date) at 5:00 ☐ a.m. / ☑ p.m.

PURCHASER: [signature] docusign verified 02/04/21 6:45 AM PST 01F0-RTW7-IR2T-YZDY

By: _____

Its: _____

The foregoing offer is ☑ Accepted, ☐ Countered (See Attached Counteroffer), or ☐ Not Accepted
On 2-6-21 (date) at 2:03 ☐ a.m. / ☑ p.m.

SELLER: [signature] docusign verified 02/06/21 2:03 PM MST SPBA-L23V-ZCN0-735X

By: _____

Its: _____

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

CAL SD, LLC, Plaintiff, vs. INTERWEST LEASING, LLC and 412 INVESTMENT GROUP, LLC Defendants.	51CIV21-001476 **COMPLAINT FOR DECLARATORY JUDGMENT**

COMES NOW the Plaintiff, Cal SD, LLC, by and through its undersigned counsel, and for its claim against the Defendants, Interwest Leasing, LLC and 412 Investment Group, LLC states and alleges as follows:

1. The Plaintiff is a South Dakota limited liability company (hereinafter "Cal SD") created by its organizer and manager, Chris Welsh on or about September 29, 2020.

2. Plaintiff is of information and belief that the Defendant, Interwest Leasing, LLC, is a South Dakota limited liability company (hereinafter "Interwest Leasing").

3. Plaintiff is of information and belief that the Defendant, 412 Investment Group, LLC, is a South Dakota limited liability company (hereinafter "412").

4. Interwest Leasing is the former owner of real property in Pennington County, South Dakota located at 1810 Rand Road, Rapid City, South Dakota (hereinafter the "Property").

5. On or about February 4, 2021, Chris Welsh made an offer to purchase the Property from Interwest Leasing for the total sum of $500,000.00.

6. The purchase agreement allowed Chris Welsh to assign his interest to another party.

7. Interwest Leasing, LLC accepted the offer on February 6, 2021.

8. After the purchase agreement was signed, Chris Welsh assigned his interest to Cal SD, LLC.

9. In conjunction with the offer to purchase the Property, Cal SD made an earnest money deposit of $30,000.00.

10. While the purchase agreement was pending, and prior to closing, Chris Welsh passed away on March 15, 2021.

11. As a result of Chris Welsh's passing, the date of closing was extended so that Cal SD could take those steps necessary to determine whether it could continue to take on the obligation of the purchase agreement and obtain the necessary financing.

12. At the time of Chris Welsh's passing, he was both the manager of Cal SD and the trustee of the trust holding the membership units in Cal SD.

13. It was both required and necessary that a new trustee and manager obtain the necessary authority and approvals for the financing or purchase of the Property.

Filed: 11/18/2021 1:31 PM CST Pennington County, South Dakota 51CIV21-001476

14. Cal SD was not able to obtain the necessary approvals for the financing or purchase of the Property by the closing date.

15. After the closing date, the parties failed to agree upon a mutually acceptable cancellation of the purchase agreement, such that, as of the date of this Complaint, there has not been a cancellation of the purchase agreement.

16. After the closing date passed, and despite the fact that the parties had not agreed upon a cancellation of the purchase agreement, Interwest Leasing entered into a purchase agreement and sold the Property to 412 for the purchase price of $500,000 on or about June 3, 2021.

17. Interwest Leasing utilized a different title company to close the sale of the Property to 412.

18. Plaintiff is of information and belief that Interest Leasing used a different title company because the title company currently holding the earnest money would not have closed the transaction without a cancellation of the purchase agreement.

19. Cal SD has made demands of Interwest Leasing for return of the earnest money and Interwest Leasing has failed and/or refused to agree to the return of those earnest monies, despite the fact that Interwest Leasing sold the Property to 412 for the same price.

20. Cal SD has made demand of Interwest Leasing to provide evidence or documentation of any damages suffered by Interwest Leasing as a result of Cal SD's failure to close on the purchase of the Property, including any additional carrying costs or other costs or fees that would not have been

incurred by Interwest Leasing had Cal SD closed on the sale of the property. Interwest Leasing has failed and/or refused to provide any such information.

21. Under the terms of the purchase agreement, Cal SD was unable to obtain or even pursue financing prior to the closing date, as a result of the death of Chris Welsh.

22. Subsequent to the closing date, Cal SD has informed Interwest Leasing that, to the extent Interwest Leasing does not believe the purchase agreement was or should have been cancelled, that Cal SD is now in a position to move forward with the purchase of the Property.

23. Interwest Leasing sold the Property to 412 for the exact same amount Cal SD had offered to purchase the property, $500,000.

24. Plaintiff is of information and belief that 412 is the current title holder to the Property.

25. If Interwest Leasing is of the belief that the purchase agreement between Cal SD and Interwest Leasing was not cancelled (which would have allowed Interwest Leasing to move forward with the sale of the Property to 412), then Interwest Leasing sold the Property to 412 while the Property was still subject to a purchase agreement between Cal SD and Interwest Leasing.

26. Interwest Leasing has demanded the release of the earnest money payment to Interwest Leasing, despite the fact that Interwest Leasing sold the Property to 412, Interwest Leasing received the same purchase price for the Property, and Interwest Leasing has failed and/or refused to provide documentation or evidence of any additional costs incurred.

27. Interwest Leasing's demand amounts to a punitive damage, penalty, and/or windfall to Interwest Leasing.

COUNT I - DECLARATORY JUDGMENT

28. Plaintiff realleges paragraphs 1 through 27 above as set forth in their entirety.

29. Consistent with SDCL § 21-24-1, et seq, the purchase agreement is a contract which is subject to declaratory relief as more fully set forth in SDCL § 21-24-1, *et seq.*

30. Pursuant to SDCL § 21-24-7, 412 is a person or entity which may have a claim or interest which would be affected by the Court's declaration with respect to the purchase agreement and cancellation, or lack thereof, of the same, such that 412 shall be made a party to these proceedings.

31. Plaintiff requests that this Court declare the rights and responsibilities of the parties under the purchase agreement, including but not limited to the cancellation, or lack thereof, of the purchase agreement, as well as the Plaintiff's right to the recovery of Plaintiff's earnest money payment.

32. Plaintiff further requests that should this Court declare the purchase agreement cancelled, that this Court declare that the release of Plaintiff's earnest money payment should extinguish any claim that the Defendant has to the same.

33. Plaintiff further requests the recovery of Plaintiff's damages, including, but not limited to, Plaintiff's costs and interest accrued as a result of

the Defendant's failure and/or refusal to agree to the release of Plaintiff's earnest money payment.

WHEREFORE, the Plaintiff, Cal SD, LLC, prays for judgment against the Defendant, Interwest Leasing, LLC, as follows:

1. For a declaratory judgment determining the rights and responsibilities of the parties under the purchase agreement, including but not limited to the cancellation, or lack thereof, of the purchase agreement, as well as the Plaintiff's right to the recovery of Plaintiff's earnest money payment;

2. For the recovery of Plaintiff's damages, including, but not limited to Plaintiff's costs and interest accrued in an amount to be determined at the time of trial;

3. For the recovery of Plaintiff's reasonable costs and disbursements associated with this action, including attorney's fees as permitted by South Dakota law;

4. For such other and further relief that the Court deems just and equitable.

Dated this 15th day of October, 2021.

NOONEY & SOLAY, LLP

/s/ Robert J. Galbraith
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PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY ON ALL ISSUES TRIABLE TO A JURY

Filed: 11/18/2021 1:31 PM CST Pennington County, South Dakota 51CIV21-001476

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
	)	
CAL SD, LLC,	)	FILE NO. 51CIV21-001476
Plaintiff,	)	
	)	
v.	)	**VERDICT FORM**
	)	
INTERWEST LEASING, LLC,	)	
	)	
Defendant.	)	

We, the jury, duly impaneled in the above-entitled action, and sworn to try the issues, find in favor of:

(PLEASE CHECK ONLY ONE)

X the Plaintiff.

____ the Defendant.

Dated this 15 day of December 2023.

Foreperson

FILED
Pennington County, SD
IN CIRCUIT COURT

DEC 18 2023

Amber Watkins, Clerk of Courts
By _____ Deputy

APP 12

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30621

CAL SD, LLC,
Plaintiff/Appellee,

vs.

INTERWEST LEASING, LLC
Defendant/Appellant.

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

The Honorable Craig A. Pfeifle
Circuit Court Judge

APPELLEE'S BRIEF

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NOTICE OF APPEAL FILED FEBRUARY 6, 2024

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PRELIMINARY STATEMENT

For ease of reference, citations to the pleadings will be referred to as Settled Record ("SR") and the numbers assigned by the Clerk, and the pleading and any further designation as appropriate, e.g. "SR 003, Complaint." References to the documents in the Appellant's Appendix will be referred to by the specified document and designation to the Appellant's Appendix, e.g. "Purchase Agreement, Appellant's App. 05." Citations to the transcripts will be designated by the hearing date and/or trial, along with the page, and line number, e.g. "Trial Transcript, p. 3:9 – 3:12."

The Appellant, Interwest Leasing, LLC, will be referred to as "Interwest Leasing." The Appellee, Cal SD, LLC, will be referred to as "Cal SD."

JURISDICTIONAL STATEMENT

Cal SD does not dispute the recitation of the Jurisdictional Statement contained in the Appellant's Brief or that this Court has jurisdiction of this appeal pursuant to SDCL § 15-26A-3.

STATEMENT OF ISSUES

I. Whether the parties were entitled to a jury trial.

The trial court held in the affirmative.

MOST RELEVANT AUTHORITIES

S.D. Const. art. VI, § 6

SDCL § 15-6-38(a)

First Nat. Bank of Philip v. Temple,
2002 S.D. 36, 642 N.W.2d 197

STATEMENT OF THE CASE

As was stated at the trial court several times, Cal SD does not dispute that the manner in which this breach of contract case is before the Court is somewhat unique. In this case, Interwest Leasing argues entitlement to an earnest money payment (held by a title company), as liquidated damages, under a real estate purchase agreement. However, despite ongoing conversations and a demand for return of the earnest money, Interwest Leasing failed and/or refused to initiate an action for breach of contract. As a result, Cal SD initiated an action utilizing a Complaint for Declaratory Judgment. SR 003, Complaint. The Complaint sought:

> Plaintiff [Cal SD] requests that this Court declare the rights and responsibilities of the parties under the purchase agreement, including but not limited to the cancellation, or lack thereof, of the purchase agreement, as well as Plaintiff's right to the recovery of Plaintiff's earnest money payment.

SR 003, Complaint, ¶ 31. The Complaint included a jury trial demand. SR 003, Complaint, p. 6.

Despite Interwest Leasing's insistence within the Appellant's Brief that the parties tried the "cancellation" of the purchase agreement, the purchase agreement was never cancelled, prior to, during, or after trial. In fact, the only discussion of "cancellation" during trial (there was no discussion of cancellation during any hearings including the pretrial conference) was testimony regarding the fact that a cancellation was

drafted, but never signed because the parties could not come to an agreement with respect to the earnest money.

Instead, and as is disregarded by Interwest Leasing, the issue the parties ***agreed*** to try was whether or not Cal SD breached the terms of the purchase agreement, an issue which, at least initially, the parties agreed should be tried to a jury. During the scheduling hearing, at which time the jury trial was sent, the parties and counsel had the following dialogue:

> Court: Remind me. Was it a jury trial or a court trial?
>
> Ms. Waeckerle [Interwest Leasing]: Both have made a jury demand, Your Honor.
>
> Mr. Galbraith [Cal SD]: Because I think the central issue now – this is a unique case, because my client, obviously, couldn't file it as a breach of contract case, because the allegation is that my client breached the contract.
>
> But I think the issue we are trying is a breach of contract. I think breach of contract is a fact issue for a jury. I think the Court has interpreted the provisions of the contract that we have asked the Court to interpret, but I think the rest of it becomes a jury question on whether or not there was a breach.

Hearing Transcript 7/27/23, p. 6, line 7 – line 21. Prior to this scheduling hearing, the parties have filed cross motions for summary judgment related to the issue of whether the earnest money provision was an enforceable liquidated damages provision or whether it was invalid as a impermissible penalty. SR 129, Defendant Interwest Leasing, LLC's Motion for Partial Summary Judgment; SR 167, Cal SD, LLC's

Motion for Summary Judgment. Within those motions for summary judgment, the parties argued the legal issue whether or not the earnest money constituted an enforceable liquidated damages provision or an unenforceable penalty *if Cal SD breached the terms of the purchase agreement.*

In its Motion for Partial Summary Judgment, Interwest Leasing made arguments like "*[d]espite breaching the contract*, Plaintiff Cal SD requested that Defendant Interwest Leasing refund its earnest money deposit [held by the title company]. Defendant Interwest Leasing indicated that it was not legally obligated to do so. Plaintiff Cal SD then initiated this lawsuit against Defendant Interwest Leasing in an effort to recover the money" and "*the evidence demonstrates that Plaintiff Cal SD simply breached the contract* by not proceeding [and] Defendant Interwest Leasing is entitled to partial summary judgment in the form of a declaration that it is entitled, as a matter of law, to retain the $30,000 earnest money deposit." SR 131 Brief in Support of Defendant Interwest Leasing, LLC's Motion for Partial Summary Judgment, p. 3, 6.

There was no question that Interwest Leasing alleged that Cal SD breached its obligation to close on the sale under the purchase agreement, and that as a result of the alleged breach, Interwest Leasing was entitled to the earnest money as liquidated damages (Interwest Leasing acknowledged it had no actual damages as Interwest Leasing

sold the property to a new buyer for the same price and under the same terms). Yet, Interwest Leasing refused to bring any claim alleging such a breach, presumably with the results of this appeal in mind, forcing Cal SD to initiate this action. Even then, Interwest Leasing failed and or refused to file a counterclaim related to the alleged breach. But, as recognized by the Court, and more fully set forth below, the issue in determining a parties' right to trial by jury is not how the action is captioned or whether a declaratory judgment is sought, but "the nature of the action in which the issue would have arisen absent the declaratory judgment procedure," in this case, breach of contract.

At the time the parties agreed to try the breach of contract issue to a jury, the parties submitted jury instructions to the Court related to the alleged breach and resulting consequences.[1] Interwest Leasing proposed an instruction which required the jury to determine:

> Whether Plaintiff Cal SD, LLC acted in good faith and used its best efforts to secure financing but was unable to do so.

SR 604, Defendant Interwest Leasing, LLC's Supplemental Requested Jury Instructions, p. 24. While Interwest Leasing avoided the "breach of contract" language the requirement of "good faith" stems in contract and

[1] Interwest Leasing argues in its Appellant's Brief that Interwest Leasing was somehow prohibited from trying certain issues or arguing the appropriate burden of proof because the Court denied it's request for a Court trial. However, Interwest Leasing submitted proposed jury instructions on February 23, 2023 (SR 444) and November 14, 2023 (SR 604) and Interwest Leasing did not raise any objection to the agreed upon jury trial until the pretrial conference on November 16, 2023.

the alleged breach involved Cal SD's ultimate lack of financing. Interwest Leasing further proposed an instruction which stated:

> Under South Dakota law, a purchaser's failure to close a purchase agreement by remitting the agreed upon purchase price in full at closing constitutes a breach of contract.

SR 604, Defendant Interwest Leasing, LLC's Supplemental Requested Jury Instructions, p. 25. Interwest Leasing's proposed Verdict Form provided, simply:

> We, the jury, duly empaneled to try the issues in this case, find that the following party is entitled to the earnest money:
>
> Plaintiff _____
>
> Defendant _____

SR 604, Defendant Interwest Leasing, LLC's Supplemental Requested Jury Instructions, p. 29. Interwest Leasing did not raise cancellation, discuss cancellation, or even use the word cancellation.

After the parties agreed upon a jointly set a jury trial during the July 27, 2023 scheduling hearing and submitted proposed instructions related to the alleged breach of contract, the issue came up again several weeks before trial during the pretrial conference. At the pretrial conference, the parties had the following exchange with the Court:

> Court: Yeah, my understanding is as we sit here today, gentlemen, the only factual question that we're asking our jury to determine is whether there was a breach.
>
> Mr. Galbraith [Cal, SD]: And I think I've proffered a verdict form that simply says: Was there – essentially was there a breach? Yes or no. And I think that is the issue in front of the jury.

> Court: Because the previous finding by the Cour ton the liquidated damages if you've got a clause that fixes those, and I agree that it was a liquidated damages clause versus a penalty.
>
> Are we all on the same page?
>
> Mr. Galbraith [Cal, SD]: Yes.
>
> Court: Okay.
>
> Mr. Burke [Interwest Leasing]: We are Your Honor. Except in my proposed instructions, I tailored the issue more narrowly to – because I thought it was cleaner for the jury, but I didn't – I'd like to come back to that, but do you want me to stay on track with the motions in limine or –

Hearing Transcript 11/16/23, p. 4, line 4 – line 23.

Only at the close of the pretrial conference did Interwest Leasing first raise the issue of whether a jury was appropriate under the auspices of a "housekeeping matter" and even then, Interwest Leasing did not objection to a jury trial. That discussion went as follows:

> Mr. Burke [Interwest Leasing]: Well, that and I had a housekeeping. I don't know if you got into yours or maybe that was a little – I had a couple housekeeping matters...
>
> ...And this one's kind of odd and I'm going to confess that. So I was reading the checklist to get ready and I went back and looked at the prior checklists from both parties, and the reason why I hesitated earlier when the Court said here's the issue is I think plaintiff has said it's whether there's a breach of contract. When you look at the defendant's instructions, it's more narrow. It's were they able to secure financing. Because at the end of the day, in the summary judgment briefing that was the plaintiff's position is – so I really think that's what the issue is. Could they or was there an effort to obtain financing.
>
> But what I got kind of hung up on is I was looking at Cal SD's checklist before and under the jury instructions they wrote that

Cal SD believes that the issues between Cal SD and Interwest Leasing involved legal determinations or declarations by the Court, and as such, no jury instructions are necessary or appropriate.

And I wondered, because I thought that this should be the time, given that the sole count remaining is a dec action, I wondered would it not be prudent, if they're saying that no jury instructions are appropriate, that we're not having a court trial.

Mr. Galbraith [Cal SD]: It was prior to the Court's summary judgment rulings, at which time it was our position that the Court was going to declare the earnest money provision a penalty and that there wasn't going to be a jury trial. The issue before the jury in the dec action is whether or not my client breached the contract. Whether or not my client breached the contract is a fact question for the jury. So I think the jury needs to determine that question and the Court has set the damages under the dec action.

It was – this case was brought in a unique fashion because I had to bring it. I couldn't allege breach of contract because the allegation was that my client breached the contract. And so I brought it as a dec action for the return of the earnest money as a result of the fact that my client didn't breach the contract and it's been suggested in response to that that she did.

And so I do think it's a jury question as to whether or not my client breached the contract, and the Court has then already made the declaratory ruling as it concerns what happens based upon the jury making that decision.

The Court: Well, I read the declaratory relief to be whether or not it was a penalty clause or a liquidated damages clause and I did make that determination. And I think then when you subsequently brought another motion for summary judgment, I took the position that I believed the factual question existed as to whether or not there was relief available to your client; in other words, you could now keep what I have determined to be a validated – a valid liquidated damages payment.

And so I think we circle back to the fact is we have a legal question and that legal question I think you're entitled to have a jury determine whether or not there's a breach.

> Mr. Burke [Interwest Leasing]: Okay. I thought I should ask because of it being a dec action and I didn't know if it was more in the form of an advisory jury or not. But that was worth the inquiry.
>
> I think that's it from the plaintiff's perspective.

Hearing Transcript 11/16/23, p. 7, line 19 – p. 12 line 13. Interwest Leasing did not actually object to the jury trial or make any record regarding the "cancellation" of the purchase agreement or the appropriate standard of proof.

The morning of trial, outside the presence of the waiting jury, Interwest Leasing first objected to a jury trial in this matter. The following record was made:

> The Court: And then, Mr. Burke, you had one other matter you wanted to make a record on.
>
> Mr. Burke [Interwest Leasing]: Very briefly. Just so that the issue is not waived, given that it's a declaratory judgment action and the relief is almost equitable in nature to sort of like rescind the contract or have it void, I would simply object to it being a jury trial as opposed to a court trial.
>
> The Court: The objection's overruled.

Trial Transcript, p. 4, line 20 – pg. 5, line 3.

At trial, the parties tried the issue of whether or not Cal SD breached its contract with Interwest Leasing in not making a good faith effort to secure financing as required under the contract. The jury was instructed on the elements of breach of contract and asked to decide whether or not Cal SD breached the contract (Instructions 19, 20, 21, 22, 23, 24, Verdict Form). SR 692.

The jury rendered a verdict in favor of Cal SD, finding that Cal SD did not breach the contract. Based on the jury's verdict that Cal SD did not breach the contract, the Court (having previously found that the earnest money was intended as liquidated damages if Cal SD breached the contract), held that the earnest money should be returned to Cal SD. Judgment, Appellant's App. 01. This appeal followed. SR 743, Notice of Appeal.

STATEMENT OF THE FACTS

Interwest Leasing provided a great deal of tried facts related to this case, impeachment testimony, and even some criticism related to how Tina Roberts testified and/or responded to inquiries related to the purchase agreement. But, Interwest Leasing's appeal is not factual. Interwest Leasing has appealed whether or not the trial court committed error in submitting this case for a binding jury verdict. All of the facts presented by Interwest Leasing in it's Appellant's Brief were also presented to the jury before it ruled in Cal SD's favor. While Cal SD does believe an understanding of the baseline facts, and the issues actually tried to the jury are germane to this appeal.

The parties do agree that this case centers around a "Black Hills Association of REALTORS COMMERCIAL REAL ESTATE PURCHASE AGREEMENT" (hereinafter "Purchase Agreement). Trial Exhibit 5. On February 6, 2021, Chris A. Welsh or Assigns and Interwest Leasing

entered into the Purchase Agreement for the sale of property located at 1810 Rand Road in Rapid City, South Dakota. Under the terms of the Purchase Agreement, Cal SD paid earnest money in the amount of $30,000, which money was ultimately deposited with First American Title Company in Rapid City and is still held there today. The sale was contingent upon Cal SD obtaining financing allowing Cal SD to purchase the property. That provision provided:

> **FINANCING/APPRAISAL**. This offer is contingent upon the Purchaser obtaining financing on terms and conditions to enable Purchaser, at Purchaser's discretion, to purchase the property.

Trial Exhibit 5. If the sale of property did not close, the return of the earnest money/deposit was addressed as follows:

> **EARNEST MONEY/DEPOSITS.** If this offer is not accepted by Seller, or if purchaser is unable to secure financing, if so contingent, or if no agreement is reached regarding conditions found on inspection report(s), this agreement is void and Purchaser's earnest money shall be returned in full, less any expenses incurred on Purchaser's behalf, including any inspections, title insurance commitments, surveys, etc., ordered by Seller or on behalf of Purchaser by the Broker in anticipation and preparation of the sale and closing.

Trial Exhibit 5. On February 9, 2021, Chris Welsh and Interwest Leasing agreed to change the buyer from Welsh to Cal SD. Trial Exhibit 6.

However, tragically, Chris Welsh passed away suddenly from a heart attack on March 15, 2021, approximately three weeks before closing. Trial Transcript, p. 27, line 24 through p. 28, line 3; p. 46, line 19 – 21. Tina Roberts, who testified on behalf of Cal SD, was Welsh's

long-time partner. Their relationship was close enough that they often referred to one another as being married, although they never were. Trial Transcript p. 24, line 10 through 25. Prior to Welsh's death, Tina Roberts was not involved in any of Welsh's real estate investments. Trial Transcript, p. 25, line 18 through p. 26, line 6. On March 30, 2021, approximately two weeks after Chris Welsh's sudden passing, Tina Roberts called and emailed realtor Chris Long about the Rand Road transaction, looking for any information she could get as she was trying to understand all of the various aspects of what Chris Welsh had ongoing at the time of his passing. Trial Transcript p. 28, line 19 through 22; Trial Exhibit 9; Trial Transcript, p. 31, line 16 – p. 32, line 2. At that time, closing was scheduled for April 6, 2021. Trial Exhibit 5. As information was gathered, Interwest Leasing agreed to extend the closing date to April 19, 2021. Trial Exhibit 10. Tina Roberts signed the extension document on behalf of Cal SD. As it concerns here ability or authority to sign the extension, Tina Roberts testified as follows:

> So when Chris passed away, his trust was – he was the trustee of his own trust and basically his trust was bequeathed to me as the trustee and the beneficiary of the trust. I believe that being the trustee and the ben – beneficiary didn't matter, but being the trustee of that trust and that trust having an LLC manager could sign on behalf of it.
>
> I didn't understand at that time that there's a series of documents that you have to do to go through signing for something. I just didn't know it. I mean, it's two weeks after he passed away.

Trial Transcript, p. 34, line 21 – p. 35, line 6.

Cal SD was wholly owned by Cal Heavenly, LLC. Cal Heavenly, LLC was owned by three separate trusts, including Chris Welsh's trust. Trial Transcript, p. 35, line 7 – 17. Since Chris Welsh's passing, Tina Roberts testified she has learned a great deal about the "arduous process" that was required to sign on behalf of any of Chris Welsh's trusts or entities. Trial Transcript. P. 36, line 11 – 20. After singing the extension of the Purchase Agreement, Tina Roberts learned that she did not have the legal authority to sign on behalf of Cal SD to obtain financing. Tina Roberts testified:

Q: What did you learn about your ability to sign for financing even if you could have secured it from a bank?

A: Well, I was unable to get financing because I couldn't sing on behalf of – eventually learned I couldn't sign on behalf of anything unless I have all the documentation for it. But that wasn't at that time. That was a year later.

Q: In April of 2021, could you have signed bank documents on behalf of Cal SD?

A: No.

...

Q: In April of 2021, could you have signed bank documents on behalf of Cal Heavenly?

A: No.

Trial Transcript, p. 38, line 23 – p. 39, line 14.

On April 9, 2021, within one week of signing the extension, Chris Welsh's attorney called Chris Long to advise that Cal SD could not close on the sale. Trial Transcript, p. 41, line 23 – p. 42, line 12.

Several months later, Tina Roberts signed an Amendment to Operating Agreement of Cal SD, LLC. Trial Exhibit 12. That document was prepared in August of 2021 and signed sometime thereafter. Trial Transcript, p. 69, line 19 through 23. Tina Roberts testified that the Amendment was necessary to have the necessary authority to sign or obtain financing on behalf of Cal SD. Trial Transcript, p. 69, line 4 through 9; p. 69, line 24 – p. 70, line 3. When Tina Roberts had the authority to secure and obtain financing on behalf of Cal SD, Tina Roberts offered to close on the transaction. Trial Transcript, p. 73, line 5 – 16 (Cal SD learned just prior to filing this case that Interwest Leasing could not sell the property to Cal SD because Interwest Leasing had sold the property to another purchaser under nearly the same terms and for the same purchase price; that evidence was not submitted to the jury because the trial court had determined that the earnest money deposited was intended to have been liquidated damages in the event Cal SD breached the purchase agreement and actual damages were not relevant to the issues before the jury).

Further facts related to this case are included in the relevant arguments below.

ARGUMENT

I. THE PARTIES WERE ENTITLED TO A JURY TRIAL

A. STANDARD OF REVIEW

"Article VI, Section 6 of the South Dakota Constitution guarantees a right to a jury trial in all cases at law. Thus, this 'right ... does not exist for all civil cases.' If the pleadings request equitable relief, 'a jury trial is a matter for the trial court's discretion.' *Granite Buick GMC, Inc. v. Ray*, 2014 S.D. 78, ¶ 7, 856 N.W.2d 799, 802 (citing *Mundhenke v. Holm*, 2010 S.D. 67, ¶ 14, 787 N.W.2d 302, 305–06 (quoting *First Nat'l Bank of Philip*, 2002 S.D. 36, ¶ 10, 642 N.W.2d 197, 201)). "The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy[.]" S.D. Const. art. VI, § 6. As such, the Court has no discretion to deny the parties a jury trial if requested by either party in *all cases at law*.

B. THE PARTIES WERE GUARANTEED A RIGHT TO A JURY TRIAL UNDER THE SOUTH DAKOTA CONSTITUTION, BY STATUTE, AND ACCORDING TO SOUTH DAKOTA CASELAW

"The right of trial by jury as declared by S.D. Const., Art. VI, § 6 or as given by a statute of South Dakota shall be preserved to the parties inviolate." SDCL § 15-6-38(a). This case was brought as a declaratory judgment action, which, in-and-of itself is not a legal or equitable claim. As Interwest Leasing points out, *First Nat. Bank of Philip v. Temple*

addresses a party's right to a trial by jury in a declaratory judgment action. That Court held:

> A litigant is not necessarily deprived of a jury trial merely because it is a party to a declaratory judgment action. Although the declaratory judgment procedure largely originated in equity, *declaratory relief* per se *is neither legal nor equitable*. The fact that a declaratory judgment is sought neither restricts nor enlarges any right to a jury trial that would exist if the issue were to arise in a more traditional kind of action for affirmative relief. *To determine whether there is a right to a jury trial in a declaratory judgment action, it is necessary first to determine the nature of the action in which the issue would have arisen absent the declaratory judgment procedure. In other words, if there would have been a right to a jury trial on the issue had it arisen in an action other than one for declaratory judgment, then there is a right to a jury trial in the declaratory judgement action*; conversely, there is no right to a trial by jury if, absent the declaratory judgment procedure, the issue would have arisen in an equitable proceeding.

First Nat. Bank of Philip v. Temple, 2002 S.D. 36, ¶ 11, 642 N.W.2d 197, 201–02 (quoting *Northgate Homes, Inc. v. City of Dayton*, 126 F.3d 1095, 1098–1099 (8th Cir. 1997)).

As the trial court held, and as the parties agreed, the declaration sought in this case was whether Cal SD breached its obligations under the Purchase Agreement by failing to make a good faith effort to secure financing. The parties filed cross motions for summary judgment regarding whether or not the earnest money constituted liquidated damages in the event that Cal SD breached the Purchase Agreement (it was important for Interwest Leasing to establish that the earnest money constituted liquidated damages because Interwest Leasing did not have

any actual damages). The parties tried the issue of whether Cal SD breached its obligation to secure financing under the Purchase Agreement to the jury. Interwest Leasing never objected to trying the issue of breach of contract issue and never raised the issue of cancellation.

The action underlying this declaratory judgment action was Interwest Leasing's assertion that Cal SD breached the contract between Interwest Leasing and Cal SD. Had this action been brought, other than within the scope of a declaratory judgment action, it would have been brought as a breach of contract, with Interwest Leasing arguing for the right to the earnest money payment as liquidated damages. A cause of action for "[b]reach of contract presents a pure question of fact, for a jury." *Rindal v. Sohler,* 658 N.W.2d 769, 772 (S.D. 2003) (citing *Moe v. John Deere Co.,* 516 N.W.2d 332, 335 (S.D.1994); *C & W Enterprises v. City of Sioux Falls,* 2001 SD 132, ¶ 19, 635 N.W.2d 752, 758; *Harms v. Northland Ford Dealers,* 1999 SD 143, ¶ 21, 602 N.W.2d 58, 63; *Swiden Appliance v. Nat. Bank of S.D.,* 357 N.W.2d 271, 277 (S.D.1984)). "A suit for money damages [including the liquidated damages claimed by Interwest Leasing in this case] also preserves the... right to a jury trial." *Id.* at 772-73.

Interwest Leasing's new claim within this appeal, that something other than breach of contract was requested or tried by the jury does not

conform to the case presented (which was agreed upon by the parties) and was not actually a matter tried, in any fashion, below.

Interwest Leasing relies upon arguments that Cal SD was required to obtain a holding from the trial court that the Purchase Agreement was void or cancelled. But this argument is new on appeal. During the scheduling hearing at which this matter was set for trial, Interwest Leasing's counsel was the first to respond to the Court's question that this case was needed to be set for a jury trial. Hearing Transcript 7/27/23, p. 6, line 7 – line 21. At the pretrial conference (after submitting all pretrial conference submittals including a pretrial conference checklist, motions in limine, and proposed jury instructions), Interwest Leasing's counsel asked a question about whether this trial should be a court trial or jury trial. Hearing Transcript 11/16/23, p. 4, line 4 – line 23; p. 7, line 19 – p. 12 line 13. Interwest Leasing proffered no objection to the trial court's statement, "Yeah, my understanding is as we sit here today, gentlemen, the only factual question that we're asking our jury to determine is whether there was a breach." Hearing Transcript 11/16/23, p. 4, line 4 – line 23.

As this Court has held time and time again, "[a]rguments not raised at the trial level are deemed waived on appeal." *Hauck v. Clay Cnty. Comm'n*, 2023 S.D. 43, 994 N.W.2d 707, 709 (citing *State v. Hi Ta Lar*, 2018 S.D. 18, ¶ 17 n.5, 908 N.W.2d 181, 187 n.5 (citing *Supreme*

Pork, Inc. v. Master Blaster, Inc., 2009 S.D. 20, ¶ 12 n.5, 764 N.W.2d 474, 480 n.5); *See Long v. State*, 2017 S.D. 79, ¶ 19, 904 N.W.2d 502, 510 ("an issue may not be raised for the first time on appeal"). Interwest Leasing only raised an actual objection to a jury trial on the morning of the jury trial. Even then, Interwest Leasing did not object (at any time) to the fact that the issue being tried was whether Cal SD breached the contract (Purchase Agreement) by failing to make good faith efforts to secure financing. Interestingly enough, one of the issues the parties did not address below (because the issue was not properly raised) was what would happen as a result of trying the issues now being raised by Interwest Leasing. If Cal SD and Interwest Leasing tried the issue of whether or not the Purchase Agreement was cancelled or void, should Cal SD prevail, as the jury determined should be the case, the Purchase Agreement would be cancelled or void and Cal SD would receive back it's earnest money payment. But, if the Purchase Agreement was not cancelled or void, is it still valid? Is Cal SD required to close on the purchase of property no longer owned by Interwest Leasing? Is Interwest Leasing then required to prove breach of contract or actual damages? The result being sought by Interwest Leasing, in addition to not being raised at the trial level, raises more questions than answers and could lead to a resulting ruling that doesn't resolve the issue between the parties.

The issue before the jury was whether Cal SD breached a contract by failing to make a good faith effort to secure financing to close on the purchase of property under the Purchase Agreement. The jury was instructed, without objection, on the elements of contract, the burden of proof for breach of contract, and asked to make a finding/determination whether Cal SD breached its obligations under the contract. Interwest Leasing cannot now complain that a different cause of action, which it did not ask for, should be retried to the Court. The trial court did not err in submitting this matter to binding jury.

II. EVEN IF THE JURY'S VERDICT SHOULD HAVE BEEN CONSIDERED AN ADVISORY VERDICT, THE MATTER SHOULD NOT BE REMANDED FOR A NEW TRIAL

As Interwest Leasing points out in its Appellant's Brief, "[g]enerally, when a case is improperly submitted to a jury for a binding verdict, the verdict must be considered advisory and the "'should be remanded to the [circuit] court for findings of fact and conclusions of law." Appellant's Brief, p. 21 (citing *Black v. Gardner*, 320 N.W.2d 153, 156 (S.D. 1982)). Interwest Leasing argues that this case is different. But, there is no law cited to explain why. Interwest Leasing argues:

> This case is different. If this Court agrees that the circuit court abused its discretion, it would be inappropriate for this matter to simply be remanded to the circuit court for findings of fact and conclusions of law. *Granite Buick*, 2014 S.D. [sic] at ¶ 16, 856 N.W.2d at 805.

Appellant's Brief, p. 21. But, *Granite Buick* holds the exact opposite. The Court held, "[w]hen a case is '[im]properly submitted to a jury for a binding verdict,' the verdict must be considered advisory and the 'case should be remanded to the [circuit] court for findings of fact and conclusions of law.' *Black v. Gardner,* 320 N.W.2d 153, 156 (S.D.1982). We reverse and remand for the entry of findings of fact and conclusions of law on the equitable claims and defenses relating to the request for injunctive relief." *Granite Buick GMC, Inc. v. Ray*, 2014 S.D. 78, ¶ 16, 856 N.W.2d 799, 805.

Interwest Leasing goes on to describe the different burdens of proof (none of which were argued below) and the evidence related to those claims (upon which it cites trial transcript, testimony, or exhibits). Interwest Leasing has not provided any evidence is was not permitted to introduce (aside from perhaps the fact that Interwest Leasing did not suffer any actual damages), or provide any law to support its argument that a retrial would be necessary. This argument too, should fail.

CONCLUSION

For the foregoing arguments and authority set forth herein, the Appellee, Cal SD, LLC, respectfully requests that this Court affirm the rulings of the trial court, as more fully set forth in this Appellee's Brief.

Dated this 16th day of July, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellee's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This brief contains 5,402 words and 26,194 characters ***with no spaces***. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated this 16th day of July, 2024.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

CAL SD, LLC, Plaintiff/Appellee v. INTERWEST LEASING, LLC, Defendant/Appellant.	Appeal No. 30621 **CERTIFICATE OF SERVICE**

I, Robert J. Galbraith, attorney for the Appellee, Cal SD, LLC, hereby certify that a true and correct copy of the foregoing *Appellee's Brief* was served vid Odyssey on this 16th day of July, 2024 to:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30621

CAL SD, LLC,

Plaintiff and Appellee,

vs.

INTERWEST LEASING, LLC

Defendant and Appellant.

Appeal from the Circuit Court
Seventh Judicial Circuit
Pennington County, South Dakota

THE HONORABLE CRAIG A. PFEIFLE

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed February 6, 2024

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PRELIMINARY STATEMENT

Throughout *Appellant's Reply Brief*, Plaintiff/Appellee Cal SD, LLC is referred to as "Purchaser Cal SD" and Defendant/Appellant Interwest Leasing, LLC is referred to as "Owner Interwest." The transcript of the jury trial is referenced using "TT," followed by the corresponding page number(s). Exhibits admitted at trial are denoted "EXH.," followed by the Exhibit number. The settled record is denoted "SR," followed by the appropriate pagination.

ARGUMENT

In *Appellee's Brief*, Purchaser Cal SD advances two arguments in an effort to avoid reversal. First, it contends that it was "guaranteed a right to a jury trial under the South Dakota Constitution, by statute, and according to South Dakota caselaw." *Appellee's Brief at 16.* Second, it maintains that "even if the jury's verdict should have been considered an advisory verdict, the matter should not be remanded for a new trial." *Id. at 21.* As will be seen, both arguments lack merit.[1]

I. WHETHER PURCHASER CAL SD WAS GUARANTEED A RIGHT TO A JURY TRIAL.

Purchaser Cal SD agrees that the Constitutional right to a jury trial is afforded only to actions at law. *Appellee's Brief at 16.* Purchaser Cal SD further agrees that the right to a jury trial in a declaratory judgment action such as this case turns on "the nature of the action in which the issue would have arisen absent the declaratory judgment

[1] Purchaser Cal SD frames the issue as: "The parties were guaranteed a right to a jury trial under the South Dakota Constitution, by statute, and according to South Dakota caselaw." *Appellee's Brief at 16 (emphasis added).* Interwest Leasing has never argued that Interwest Leasing was guaranteed a right to a jury trial on Purchaser Cal SD's equitable claim.

procedure." *First Nat'l Bank of Philip v. Temple, 2002 S.D. 36, ¶ 11, 642 N.W.2d 197, 202 (quoting Northgate Homes, Inc. v. City of Dayton, 126 F.3d 1095, 1098-99 (8th Cir. 1997))*. "In other words, if there would have been a right to a jury trial on the issue had it arisen in an action other than one for declaratory judgment, then there is a right to a jury trial in the declaratory judgement [sic] action; conversely, there is no right to a trial by jury if, absent the declaratory judgment procedure, the issue would have arisen in an equitable proceeding." *Id.* Thus, the inquiry is whether Purchaser Cal SD's claim was "at law," which would be triable as a matter of right, or whether it sounded in equity. *Granite Buick GMC, Inc. v. Ray, 2014 S.D. 78, ¶ 6. 856 N.W.2d 799, 803 ("Therefore, we must determine whether the defenses were 'cases at law' triable to a jury as a matter of 'right' within the meaning of Article VI, § 6 of the South Dakota Constitution, or whether they were claims sounding in equity.")*.

In its initial brief, Owner Interwest noted that this Court "look[s] 'to the common law' to determine whether a claim is an action at law triable to a jury as a matter of right or whether it is an equitable action for trial to the court." *Granite Buick, 2014 S.D. at ¶ 9, 856 N.W.2d at 803 (quoting Grigsby v. Larson, 124 N.W. 856, 858 (S.D. 1910))*. Owner Interwest further explained that the ultimate question "'is whether the 'subject' of the action 'is the type of case in which the movant would have been entitled to a jury trial in the common-law courts.'" *Moakley v. Hanson, 2020 S.D. 45, ¶ 29, 947 N.W.2d 630, 639 (quoting Granite Buick, 2014 S.D. at ¶ 9, 856 N.W.2d at 803) (emphasis added)*. In its *Appellee's Brief*, Purchaser Cal SD did not refute that this is the decisive inquiry. Purchaser Cal SD additionally did not dispute that seeking to void or cancel a contract is an action in equity, and not a type of case in which Purchaser Cal SD would have been

entitled to a jury trial at common-law.

It is at this point in the analysis that the parties diverge. Specifically, with regard to the "subject" of the action, Purchaser Cal SD submits that "[t]he action underlying this declaratory judgment action was *Interwest Leasing's assertion* that Cal SD breached the contract between Interwest Leasing and Cal SD." *Appellee's Brief at 18 (emphasis added).* Purchaser Cal SD's approach is problematic in two respects.

First, Purchaser Cal SD confuses the subject of an action with legal theories that support the relief sought in the action. The *Purchase Agreement* was contingent on financing and set forth the limited circumstances that could entitle Purchaser Cal SD to the return of its earnest money if it failed to complete the purchase:

> **EARNEST MONEY/DEPOSITS**: If this offer is not accepted by Seller, or if purchaser is unable to secure financing, if so contingent, or if no agreement is reached regarding conditions found on inspection report(s), this agreement is **void** and Purchaser's earnest money shall be returned in full, less any expenses incurred on Purchaser's behalf, including any inspections, title insurance commitments, surveys, etc., ordered by Seller or on behalf of Purchaser by the Broker in anticipation and preparation of the sale and closing.

EXH. 5 (emphasis added). This provision made it clear that the *Purchase Agreement* would be deemed "void" and Purchaser Cal SD entitled to the return of its earnest money only in the event of three circumstances: (1) if the offer was not accepted by Owner Interwest; (2) if Purchaser Cal SD was "unable to secure financing;" or (3) if an issue arose with an inspection and the parties were unable to come to an agreement. *Id.*

In this case, Purchaser Cal SD needed a declaration from the circuit court voiding the *Purchase Agreement* that it could present to the title company so that it would release the earnest money to Purchaser Cal SD. Accomplishing this required proving that it had

been unable to secure financing. Thus, the subject of the action was having the *Purchase Agreement* declared void, or cancelled, and was therefore equitable in nature.

Second, by stating that the subject of the action "was Interwest Leasing's assertion that Purchaser Cal SD breached the contract," Purchaser Cal SD incorrectly shifted the focus from the claim that it actually brought. Rather than acknowledging that its claim was equitable in nature, Purchaser Cal SD blurs the analysis by highlighting arguments Owner Interwest could advance in response to the equitable claim. *Appellee's Brief at 18.* Purchaser Cal SD provides no authority for such a proposition. *Hart v. Miller, 2000 S.D. 53, ¶ 42, 609 N.W.2d 138, 148 ("Failure to cite authority waives this argument.").* Further, while Purchaser Cal SD notes in its brief that Owner Interwest referred in various filings to Purchaser Cal SD as having breached the contract, that is true, but is of no import. *Appellee's Brief at 5.* Purchaser Cal SD breached the contract when it failed to close on the purchase; however, its entitlement to the return of its earnest money, a separate question, was dependent upon it demonstrating that the *Purchase Agreement* was void because it was "unable to secure financing ." *EXH. 5.*

Purchaser Cal SD also argues that "Interwest Leasing never objected to trying the issue of breach of contract issue [sic] and never raised the issue of cancellation." *Appellee's Brief at 18.* That is incorrect. Owner Interwest questioned the appropriateness of a jury trial at the pretrial conference and, specifically, whether it was correct to regard the issue as a breach of contract:

> MR. BURKE: . . . [T]he reason why I hesitated earlier when the Court said here's the issue is I think [Purchaser Cal SD] has said it's whether there's a breach of contract. When you look at [Owner Interwest's] instructions, it's more narrow. It's were they able to secure financing. Because at the end of the day, in the summary judgment briefing that was

> [Purchaser Cal SD's] position is -- so I really think that's what the issue is. Could they or was there an effort to obtain financing. But what I got kind of hung up on is I was looking at Cal SD's checklist before and under the jury instructions they wrote that Cal SD believes that the issues between Cal SD and Interwest Leasing involved legal determinations or declarations by the Court and, as such, no jury instructions are necessary or appropriate. And I wondered, because I thought that this should be the time, given that the sole count remaining is a dec action, I wondered would it not be prudent, if they're saying that no jury instructions are appropriate, that we're not having a court trial.

Pretrial Conference Transcript (11/16/23) at 10 (emphasis added).[2]

Owner Interwest raised the matter again prior to the commencement of the jury trial, stating: "[G]iven that it's a declaratory judgment action and the relief is almost equitable in nature to sort of like rescind the contract or have it void, I would simply object to it being a jury trial as opposed to a court trial." *TT at 4-5.* While Purchaser Cal SD is correct that Owner Interwest did not use the word "cancellation" in its objection, and instead referred to Plaintiff Cal SD seeking to "rescind the contract or have it void," that is a distinction without a difference. The terms are commonly interchanged and have frequently been referred to in tandem by this Court.[3] *Cf. State v. Guzman, 2022 S.D. 70,*

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[2] Plaintiff Cal SD acknowledges that Owner Interwest raised the issue at the pretrial conference, but criticizes counsel for using the phrase "housekeeping matter," seemingly implying that it was perhaps not an "actual objection." *Appellee's Brief at 8, 20.* Such an argument places form over substance. Owner Interwest clearly raised the issue, as evidenced by the fact that Purchaser Cal SD responded with argument and the circuit court made a ruling: "[T]he fact is we have a legal question and that legal question I think you're entitled to have a jury determine whether or not there's a breach." *Id. Pretrial Conference Transcript at 10-12.* "To preserve issues for appellate review litigants must make known to trial courts the action they seek to achieve or object to the actions of the court, giving their reasons." *Matter of Estate of Tank, 2023 S.D. at ¶ 31, 998 N.W.2d at 120 (quoting In re M.D.D., 2009 S.D. at ¶ 11, 774 N.W.2d at 796-97).*

[3] *See Milbank Mut. Ins. Co. v. State Farm Fire & Cas. Co., 294 N.W.2d 426, 428 (S.D. 1980) ("Where there is no mutual agreement establishing the fact of rescission or cancellation . . . ."); Norgren v. Olson, 53 N.W.2d 612, 614 (S.D. 1952) ("'It has been*

¶ 27, 982 N.W.2d 875, 886 (holding that in order to preserve an objection in an unrelated context, a party need only request their relief without the need to use specific words). Further, while Plaintiff Cal SD states that the objection was made "[t]he morning of trial," the issue had been previously raised at the pretrial conference, as just noted. Moreover, this Court will recall that the circuit court was grappling with how to best determine Purchaser Cal SD's claim for declaratory relief given that, approximately a month prior to the trial, it had indicated an intent to switch the parties' roles. *Appellant's Brief at n. 5; SR at 636.* In the end, the trial court [was] given an opportunity to correct [the] claimed error . . . ." *Matter of Estate of Tank, 2023 S.D. 59, ¶ 31, 998 N.W.2d 109, 120 (quoting In re M.D.D., 2009 S.D. 94, ¶ 11, 774 N.W.2d 793, 796-97).*

Purchaser Cal SD next argues that Owner Interwest is making "new" arguments on appeal. *Appellee's Brief at 19 (the argument that Purchaser Cal SD "was required to obtain a holding from the trial court that the Purchase Agreement was void or cancelled" is "new on appeal."); Appellee's Brief at 18 ("Interwest Leasing's new claim within this appeal, that something other than a breach of contract was requested or tried by a jury*

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held in this state, with respect to conveyances made in consideration of a promise to support the grantor, that a failure by the grantee to perform will ordinarily justify a rescission and cancellation of the conveyance.'"); Wenzlaff v. Tripp State Bank, 214 N.W. 844, 845 (S.D. 1927) ("Where the mortgage is canceled, the transaction is rescinded . . . ."); Thompson v. Hardy, 102 N.W. 299, 301 (S.D. 1905) (quoting Pomeroy's Equity Jurisprudence for the proposition that: "Remedies of rescission or cancellation, or those by which an instrument, contract, deed, judgment, and even sometimes a legal relation itself subsisting between two parties, is for some cause set aside, avoided, rescinded, or annulled.") Dakota Life Ins. Co. v. Morgan, 199 N.W. 43, 44 (S.D. 1924) ("This could only be done by a rescission or cancellation of the policy. Under the well-recognized rule, this can be done only by an appeal to the equity side of the court.").

does not conform to the case presented . . . ."). Owner Interwest respectfully disagrees.

First, as just detailed, Owner Interwest specifically stated that it viewed the relief sought by Purchaser Cal SD as equitable in nature and that therefore a jury trial was not appropriate. *TT at 4-5 ("[G]iven that it's a declaratory judgment action and the relief is almost equitable in nature to sort of like rescind the contract or have it void, I would simply object to it being a jury trial as opposed to a court trial."). See also Pretrial Conference Transcript (11/16/23) at 10 ("It's were they able to secure financing. *** . . . given that the sole count remaining is a dec action, I wondered would it not be prudent, if they're saying that no jury instructions are appropriate, that we're not having a court trial.").*[4]

Second, this Court has taken guidance from a party's pleadings when determining the subject of a claim. *Granite Buick, 2014 S.D. at ¶ 7, 856 N.W.2d at 802-03 ("If the pleadings request equitable relief, 'a jury trial is a matter for the trial court's discretion.'").* In this case, Purchaser Cal SD's pleadings confirm "that something other than breach of contract was requested;" its pleadings are instead consistent with equitable relief. *Appellee's Brief at 18.* Purchaser Cal SD's sole claim in its *Complaint for Declaratory Judgment* was Count I – Declaratory Judgment and the prayer for relief requested, in pertinent part:

> For a declaratory judgment determining the rights and responsibilities of the parties under the purchase agreement, <u>including, but not limited to the</u>

[4] Purchaser Cal SD states that "the purchase agreement was never cancelled, prior to, during, or after trial." *Appellee's Brief at 3.* Purchaser Cal SD's statement is interesting. If Purchaser Cal SD is correct that the *Purchase Agreement* was never cancelled, then its breach of the *Purchase Agreement* by failing to close would not be excused and it is not be entitled to the return of its earnest money.

> cancellation, or lack thereof, of the purchase agreement, as well as the Plaintiff's right to the recovery of Plaintiff's earnest money payment.

SR at 3 (emphasis added). Again, in its initial pretrial conference checklist, Purchaser Cal SD stated that it "believe[d] that the issues between Cal SD, LLC and Interwest Leasing, LLC involve legal determinations or declarations by the Court, and as such, no jury instructions are necessary or appropriate." *SR at 310.*

From the preceding, it is clear that Purchaser Cal SD did not have a right to a jury trial. Therefore the circuit court erred by submitting the case to a jury.[5]

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[5] Given that Purchaser Cal SD did not have a right to a jury trial, the only manner by which Purchaser Cal SD's claim could be submitted to a jury for a binding verdict would be if the parties consented. *See SDCL 15-6-39(c).* Purchaser Cal SD does not directly argue that Owner Interwest consented to a binding verdict on Purchaser Cal SD's equitable claim. In fact, *Appellee's Brief* makes no reference to SDCL 15-6-39(c) and the word "consent" is never used. However, Purchaser Cal SD comments that "at least initially," the parties agreed that the issue should be tried to a jury. *Appellee's Brief at 4.* Owner Interwest did not consent to Purchaser Cal SD's equitable claim being submitted to a jury for a binding verdict. While Purchaser Cal SD quotes an exchange during a hearing, the transcript is not part of the record. Without the benefit of the transcript, this Court is deprived of the ability to read the entire exchange and evaluate counsels' statements. *See Graff v. Child.'s Care Hosp. & Sch., 2020 S.D. 26, ¶ 16, 943 N.W.2d 484, 489 ("We will review the trial court record insofar as it exists."); State v. Horse, 2024 S.D. 4, ¶ 20, 2 N.W.3d 383, 391.* Both parties had not demanded a jury trial on Purchaser Cal SD's claim for declaratory relief. Owner Interwest's *Answer* does not contain a jury demand. *SR at 11 (Answer of Defendant Interwest Leasing, LLC).* The only jury demand that Owner Interwest made concerned its third-party claim against Tina Roberts, which had been dismissed by summary judgment. *SR at 542 (Order Granting Tina Roberts' Motion for Summary Judgment).* Further, the notion that Owner Interwest had consented to a binding jury verdict is belied by the fact that the parties continued to argue about the issue up until the morning of trial. *Pretrial Conference Transcript (11/16/23) at 11 ([Counsel for Purchaser Cal SD:] "Whether or not my client breached the contract is a fact question for the jury.").*

II. WHETHER REMAND IS APPROPRIATE EVEN IF THE JURY'S VERDICT SHOULD HAVE BEEN CONSIDERED AN ADVISORY VERDICT, BUT WAS NOT.

Once it has been established that (i) the claim was equitable in nature and (ii) the parties did not consent to a binding jury verdict, the final question is whether the circuit court followed this Court's procedure for advisory juries, as outlined in Granite Buick. *Granite Buick, 2014 S.D. at ¶ 7, 856 N.W.2d at 803. See also SDCL 15-6-39(c).* As noted in *Appellant's Brief*, the use of an advisory jury comes with certain mandatory processes:

(1) The "'responsibility for the decision-rendering process remains with the trial judge.'" *Id.* The circuit court may adopt the jury's decision(s) or set it aside and make other findings in opposition to the jury's decision(s). *Id.*

(2) Once the circuit court makes its decision, it "'must prepare . . . findings of fact and the conclusions of law as it must in any other nonjury case.'" *Id.*[6]

(3) If the circuit court intends employ an advisory jury, it must so notify the parties "no later than the time at which the jury selection has begun." *Nizielski v. Tvinnereim, 453 N.W.2d 831, 834 (S.D. 1990).* "This is to ensure fair notice to the litigants of the arena in which they find themselves in; and, further so that they can knowledgeably proceed with a mental determination as to how they can effectively conduct voir dire examination having a basic viewpoint of the role of the jury in the

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[6] *See SDCL 15-6-52(a) ("In all actions tried upon the facts without a jury or with an advisory jury, the court shall, unless waived as provided in § 15-6-52(b), find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to § 15-6-58.").*

proceeding." *Id.*

It was reversible error for the circuit court to treat the jury's verdict as binding, rather than as advisory. *SR at 690. (Verdict Form) ("We . . . find in favor of . . . __X__ the Plaintiff.").* The circuit court did not review the jury's decision for the purpose of deciding whether to adopt its verdict or set it aside and make other findings in opposition. No findings of fact or conclusions of law were entered. Finally, there was no advance notice by the circuit court that the jury's verdict would be advisory—which was consistent with the circuit court having previously concluded in error that Purchaser Cal SD had a right to a jury trial.

In its *Appellee's Brief*, Purchaser Cal SD does not dispute that a circuit court must take these steps, does not dispute that the circuit court in this case failed to do so, and does not dispute that such a failure constitutes an abuse of discretion. Instead, Purchaser Cal SD disagrees with how this Court should proceed.

The general rule is that when a case is improperly submitted to a jury for a binding verdict, the verdict must be considered advisory and the case "'should be remanded to the [circuit] court for findings of fact and conclusions of law.'" *Granite Buick, 2014 S.D. at ¶ 16, 856 N.W.2d at 805; Black v. Gardner, 320 N.W.2d 153, 156 (S.D. 1982).* In this case, however, it would be inappropriate to simply remand this matter for entry of findings of fact and conclusions of law. This is due to the fact that the circuit court's decision to try the matter as an action at law resulted in Owner Interwest being unfairly prejudiced in two key respects: (1) Purchaser Cal SD had the benefit of a lower burden of proof (greater convincing force instead of clear and convincing evidence) and (2) Owner Interwest was deprived of two important equitable defenses,

unclean hands and estoppel.

In response, Purchaser Cal SD advances two arguments. First, it contends that Owner Interwest has not "provide[d] any law to support its argument that a retrial would be necessary." *Appellee's Brief at 22.* Owner Interwest disagrees. In its *Appellant's Brief*, Owner Interwest explained that "[t]he equitable remedy of cancellation, like rescission, is an extraordinary remedy and therefore requires clear and convincing evidence." *Appellant's Brief at 22 (citing Knudsen v. Jensen, 521 N.W.2d 415, 418 (S.D. 1994; Smith v. Hermsen, 1997 S.D. 138, ¶ 16, 572 N.W.2d 835, 840).* Owner Interwest further set forth the requirements of the defenses of unclean hands and equitable estoppel (*see Appellant's Brief at n. 15)* and detailed facts which would have supported the jury being instructed on both defenses. *Appellant's Brief at 22-24.* Typically, "[t]he trial court should instruct the jury on issues supported by competent evidence in the record," and, generally the "failure to give a requested instruction that correctly sets forth the law is prejudicial error." *Sommervold v. Grevlos, 518 N.W.2d 733, 739 (S.D. 1994) (citing Kallis v. Beers, 375 N.W.2d 642, 644 (S.D. 1985); Schelske v. South Dakota Poultry Co-op, 465 N.W.2d 187, 190 (S.D. 1991)).* Here, however, given that they were equitable defenses, they would not be available in a jury trial on an action at law. *Granite Buick, 2014 S.D. at ¶ 10, 856 N.W.2d at 803-804.*

Purchaser Cal SD submits that Owner Interwest "has not provided any evidence is [sic] was not permitted to introduce." *Appellee's Brief at 22.* Purchaser Cal SD misses the point. While much of the evidence may be the same, the burden of proof considered by the jury was lower and, just as important, the jury was not aware of—or able to consider—the legal effect of certain evidence (i.e., unclean hands and equitable estoppel).

Owner Interwest maintains that it would have been improper for it to seemingly inject error by asking the circuit court—in a matter it had ruled was an action at law—to (i) instruct the jury on the higher equitable burden of proof and (ii) instruct the jury on equitable defenses.

CONCLUSION

For all of the foregoing reasons, Owner Interwest respectfully requests that an order of reversal be entered pursuant to SDCL 15-26A-87.1(C) with instruction that the matter be retried to the court.

Dated this 14th day of August, 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Appellant's Reply Brief* complies with the type volume limitation provided for in SDCL 15-26A-66. *Appellant's Reply Brief* was prepared using Times New Roman typeface in 12-point font and contains 3,935 words. I relied on the word count of our word processing system used to prepare *Appellant's Brief* and the original and all copies are in compliance with this rule.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, 2024, I filed the foregoing *Appellant's Reply Brief* relative to the above-entitled matter via Odyssey File and Serve, and that such system effected service of the same on the following individuals:

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