IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 27036 / 27113

JAMES ANTHONY O'NEILL,

Plaintiff and Appellant,

vs.

RICHARD DEAN O'NEILL,

Defendant and Appellee.

APPEAL FROM CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT, BENNETT, SOUTH DAKOTA
THE HONORABLE KATHLEEN F. TRANDAHL, CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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NOTICE OF APPEAL FILED MARCH 25, 2014

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INTRODUCTION

This appeal stems from a lengthy and contentious dispute between two brothers – Plaintiff and Appellant James Anthony O'Neill (hereinafter, "Tony") and Defendant and Appellee Richard Dean O'Neill (hereinafter "Rick") – concerning the disassociation of their farming and ranching business. The trial court committed numerous errors, many of which appear to have been motivated by an apparent animus toward Tony. Those errors include, but are not limited to, the following: (1) awarding punitive damages against Tony despite the lack of any compensatory damages; (2) awarding punitive damages in favor of non-parties; (3) awarding punitive damages despite the express rejection of the only underlying tort claim that might support such damages; (4) refusing to disqualify itself despite repeated statements accusing Tony of perjury and efforts to report Tony to law enforcement for prosecution; (5) seeking to prevent Tony from exercising his right to appeal prior to enforcement of the judgment; and (6) rejecting wholesale the testimony of nearly every witness called by Tony. For the reasons set forth herein, Tony respectfully submits that this matter should be reversed.[1]

JURISDICTIONAL STATEMENT

[1] Tony's counsel on appeal did not participate in the underlying trial. Appellate counsel made their notice of appearance on March 12, 2014.

In this consolidated appeal, Tony seeks review of the following underlying orders: (1) the "Findings of Fact and Conclusions of Law" signed on November 4, 2013 and filed on November 5, 2013; (2) the "Order on Court's Findings of Fact & Conclusions of Law" signed on December 23, 2013 and filed on December 26, 2013; (3) the "Order Re: Defendant's Motion for Contempt" signed and filed on March 14, 2014; (4) the trial court's letter dated March 20, 2014, in which it denied Tony's request that it disqualify herself from further proceedings; (5) the "Judgment" signed on May 6, 2014 and filed on May 7, 2014; (6) the "Order Re: Federal Income Tax Returns" signed on May 6 and filed on May 7, 2014; (7) the "Order Re: Plaintiff's Motion for Continuance of Evidentiary Hearing and to Permit Expert Witness Discovery and Plaintiff's Motion for Scheduling Order" signed on May 6, 2014 and filed on May 7, 2014; and (8) the "Order Re: Related Party Receivables" signed on May 6, 2014 and filed on May 7, 2014.[2] All orders were entered by the Circuit Court for the Sixth Judicial Circuit of the State of South Dakota, the Honorable Kathleen F. Trandahl presiding.

No notice of entry was given for the first four orders referenced above. With respect to these orders, Tony filed a Notice of Appeal on March 25, 2014. On April 2, 2014, Rick filed a Motion to Dismiss Appeal for Lack of Appellate Jurisdiction. On April 14, 2014, Tony filed a response to this Motion. On May 23, 2014, this Court entered an "Order Directing Appeal to Proceed." By way of this Order, the Court

[2] For purposes of this brief, references are as follows: (1) the certified record as "CR"; (2) the trial transcript as "TT"; (3) the transcript from the contempt hearing as "CHT"; (4) the transcript from the May 1, 2014 hearing as "MHT"; and (5) the attached appendix as "App."

ordered that the appeal be allowed to proceed in accordance with the applicable rules of appellate procedure.

While this Court was considering whether Tony's appeal would be allowed to proceed, the trial court entered the last four orders referenced above. With respect to these additional orders, Notice of Entry was mailed on May 14, 2014. On June 12, 2014, Tony timely filed a second Notice of Appeal from these additional orders. On August 15, 2014, this Court entered an "Order Consolidating Appeals," which effectively consolidated the two appeals for purposes of briefing and submission to the Court. Tony respectfully submits that jurisdiction over both appeals exists pursuant to SDCL 15-26A-3(1) (appeal from final judgment as a matter of right) and SDCL 15-26A-3(2) (appeal from orders affecting a substantial right).

STATEMENT OF THE ISSUES

I. Did the trial court err in assessing punitive damages against Tony and in favor of two non-party corporations, despite the absence of any compensatory damage award?

The trial court awarded no compensatory damages, yet ordered Tony to pay $450,000 in punitive damages to two non-party corporations.

Relevant Cases:

Schaffer v. Edward D. Jones & Co., 521 N.W.2d 921 (S.D. 1994).

Case v. Murdock, 488 N.W.2d 885 (S.D. 1992).

Phillip Morris USA v. Williams, 549 U.S. 346 (2007).

II. Did the trial court err in refusing to disqualify itself?

Despite openly accusing Tony of perjury and seeking to have him prosecuted, the trial court insisted it could be impartial and refused to disqualify itself.

Relevant Cases and Statutes:

State v. List, 2009 SD 73, 771 N.W.2d 644.

Marko v. Marko, 2012 SD 54, 816 N.W.2d 820.

Louissant v. State, 125 So.3d 256 (Fla. 4th DCA 2013).

South Dakota Code of Judicial Conduct, SDCL Ch. 16-2, App., Canon 3E(1).

III. Did the trial court err in finding Tony in contempt following completion of the trial?

The trial court held Tony in contempt and ordered him to pay Rick $500.00 per day.

Relevant Cases and Statutes:

In re Kahn, 2013 WL 5434624 (Tex. Ct. App. 2013).

State v. Electrolert, Inc. v. Lindeman, 650 n.E.2d 137 (Ohio Ct. App. 1994).

Andruschenko v. Silchuk, 744 N.W.2d 850 (S.D. 2008).

IV. Was the trial court's enforcement of the purported Land Separation Agreement presented by Rick clearly erroneous?

The trial court enforced the Land Separation Agreement.

Relevant Cases:

Angus v. Second Injury Fund, 328 S.W.3d 294 (Mo. Ct. App. 2010).

V. Did the trial court err in finding that Rick did not lease land from Dean O'Neill following the preliminary injunction hearing?

The trial court ruled that Rick did not lease land from Dean O'Neill and that crop insurance proceeds received by Rick were not corporate assets.

Relevant Cases:

Kansas Gas & Elec. v. Ross, 521 N.W.2d 107 (S.D. 1994).

STATEMENT OF THE CASE

Tony and Rick are brothers who began farming and ranching together in 1987. TT 16; App. 1. In 1996, Tony and Rick formed two corporations, O'Neill Cattle Company, Inc. (hereinafter "O'Neill Cattle") and O'Neill Farms, Inc. (hereinafter "O'Neill Farms"). App. 2, 14. Tony and Rick were each 50 percent shareholders in each of the corporations. *Id.*

In 2008, Tony and Rick began discussing the dissolution of their business association. App. 35. However, Tony and Rick were unable to agree to a complete division of the corporate assets. As a result, Tony commenced this action against Rick in February of 2012, requesting that the Court equitably divide the parties' corporate and other assets. App. 1-12.

In April of 2012, Rick brought a counterclaim against Tony. App. 13-31. Rick's Counterclaim stated the following causes of action: (1) specific performance of an alleged Land Separation Agreement; (2) specific performance of an Equipment Separation Agreement; (3) inventory, accounting, and distribution of the parties'

remaining assets; (4) a shareholder derivative action for breach of fiduciary duty; (5) a shareholder derivative action for conversion; (6) punitive damages stemming from the shareholder derivative claims; and (7) a preliminary injunction. App. 16-26.

A court trial was held before the Honorable Kathleen F. Trandahl on July 15-19, 2013. On November 3, 2013, Judge Trandahl issued her "Findings of Fact and Conclusions of Law" ("Findings and Conclusions"). App. 13-31. The Findings and Conclusions awarded O'Neill Farms to Tony and O'Neill Cattle to Rick. App. 69. The trial court also divided the parties' various properties and awarded specific performance of certain alleged contractual obligations. App. 65-80. In addition, the court concluded that Rick's shareholder derivative claim failed because he had waived the issue and because such a claim is only available to minority shareholders. App. 65.

Nevertheless, the court concluded that Tony breached his fiduciary duty to both corporations. App. 75. The court awarded no actual or compensatory damages for this breach, but nevertheless imposed punitive damages against Tony and in favor of the two corporations (neither of which was a party to the proceedings and one of which was awarded to Tony) in the total amount of $450,000.00. App. 79.

On December 23, 2013, the court entered an "Order on Court's Findings of Fact & Conclusions of Law" ("the Order"). App. 32-37. This Order incorporated the court's Findings and Conclusions and fully and completely resolved every issue presented at trial. *Id.* The court ordered that various transfers of property be made and that various other actions be taken to fulfill the court's division of property and order of specific performance. *Id.* Once again, the court's Order awarded no compensatory damages but

nevertheless ordered Tony to pay $450,000.00 in punitive damages to the two non-party corporations. *Id.* Nothing in the Order suggested that any issue remains to be decided. *Id.* Nevertheless, the Order stated:

> This Order is an interim order and shall not be considered a final judgment under SDCL § 15-6-54. The Court shall retain jurisdiction until the parties have completed the items stated above or until further Order of the Court.

App. 37.

Subsequent to the Order, on February 3, 2014, counsel for Rick sent counsel for Tony twenty-nine (29) separate documents purportedly designed to effectuate the Order. On February 21, 2014, after reviewing the voluminous documents prepared by Rick's counsel and discussing the matter with Tony, counsel for Tony advised counsel for Rick that Tony intended to appeal and that he felt it would be appropriate to maintain the status quo until Tony had exercised his right to obtain appellate review.

On February 25, 2014, Rick moved for contempt against Tony, asserting that Tony was in contempt of court. This Motion was supported only by an affidavit of Rick's counsel. A hearing was scheduled before Judge Trandahl for March 13, 2014.

On March 14, 2014, Judge Trandahl entered an "Order Re: Motion for Contempt." App. 81-83. In this Order, Judge Trandahl ordered, among other things: (1) that the judgment was not final because of the supposed agreement between Rick's counsel and Tony's trial counsel; (2) that Tony was in contempt for continuing to run cattle on property awarded to Rick; (3) that Tony was required to pay Rick $500.00 per day in "damages" for the "fair market value" of the property, beginning on January 1, 2014; and

(4) that other issues would be addressed at a second hearing to be held March 27, 2014. *Id.*

On March 17, 2014, counsel for Tony sent a letter to the court requesting that it disqualify itself from further proceedings. App. 84-89. Counsel for Tony respectfully submitted that the court's repeated open accusations against Tony of perjury created a perception of partiality and indicated a bias against Tony. *Id.* On March 18, 2014, the court denied this request and refused to disqualify itself. App. 90-95. In doing so, the court did not address Tony's concerns regarding the objective appearance of partiality. *Id.*

On March 21, 2014, Tony appealed to this Court from various orders entered by the trial court. On April 3, 2014, Rick moved to dismiss this appeal for lack of appellate jurisdiction. On May 23, 2014, this Court entered an order denying Rick's motion to dismiss the appeal and directing that the appeal be allowed to proceed.

After filing of Tony's Notice of Appeal on March 21, however, the trial court continued to hold hearings, receive evidence, and make decisions relating to the substance of this case. In particular, the trial court held hearings on March 27, 2014 and May 1, 2014, at which time the Court received additional evidence and argument. App. 96. On June 12, 2014, Tony timely filed a second Notice of Appeal from these additional orders. The Orders now appealed from represent these subsequent rulings. On August 15, 2014, this Court entered an Order consolidating the two appeals.

STATEMENT OF THE FACTS

Tony and Rick are brothers who began farming and ranching together in 1987. TT 16; App. 1. On February 15, 1988, they entered into a partnership agreement to continue their farming and ranching business. App. 1, 13. Tony contributed 100 head of bred cattle to the partnership and Rick contributed ten (10) head on unbred heifers to the partnership. *Id.*

In 1991, the parties, pursuant to their partnership agreement, purchased three (3) irrigated quarter sections of land in Bennett County, South Dakota. *Id.* By this time, the parties' cattle herd had grown to approximately 300 head of cows and approximately twelve (12) bulls. *Id.* The cattle were used to run a cow/calf operation. *Id.*

In 1995, Tony purchased additional land located in Bennett County, South Dakota. *Id.* This property consisted of two (2) irrigated quarter sections of real estate with a home located on one of the quarters. *Id.* This half section was later transferred to one of two subsequently formed corporations. *Id.*

In 1996, Tony and Rick formed two separate corporations. App. 2, 14. The first corporation was named O'Neill Farms, Inc. (hereinafter "O'Neill Farms") and the second was named O'Neill Cattle Company (hereinafter "O'Neill Cattle"). *Id.* Tony and Rick each owned one-half of the shares of the two corporations. *Id.*

Upon the formation of the corporations, the parties placed certain machinery in each corporation. *Id.* In addition, the five (5) irrigated quarter sections of real estate were transferred to O'Neill Farms. *Id.* The cattle, on the other hand, were all transferred to O'Neill Cattle. *Id.* Upon formation of the corporations, the parties orally agreed that if the corporations were ever liquidated or if the parties ceased doing business together,

Tony would receive the two (2) quarters of real estate purchased in 1994, which was commonly known as the "Byrnes Place." *Id.* The parties further agreed that upon termination of their relationship, Tony would receive 100 head of bred heifers and Rick would receive ten (10) head of open heifers before any remaining cattle was split between the parties. *Id.*

In 1999, O'Neill Cattle purchased seven (7) quarters, plus thirty-seven (37) acres, of real estate commonly known as the "Jacquot Place." *Id.* Two of the seven quarters were irrigated and the remaining real estate consisted of pasture land. *Id.* Tony and Rick subsequently installed irrigation pivots on two of the previously unfarmed quarters, and this land was subsequently farmed. *Id.*

At some point, Tony and Rick began discussing the dissolution of their business association. App. 35. The parties were able to agree to certain issues relating to the termination of their business relationship. App. 4. For example, the parties entered into an agreement which would divide all machinery and equipment between Tony and Rick. *Id.* Pursuant to this agreement, the value of machinery and equipment assigned to Tony was $566,000 and the value of machinery and equipment assigned to Rick was $565,000. *Id.*

The parties, however, were unable to agree to a division of the real estate and livestock owned by the two corporations. At the time this action was commenced, the corporations owned twelve (12) quarters of real estate. App. 2. Of these, nine (9) of the quarter sections of real estate contained irrigation pivot systems. *Id.* The other three (3) quarters contained approximately 100 acres of dry farm land, with the balance being

pasture land. *Id*. Moreover, O'Neill Cattle owned 300 head of bred cows and heifers, 160 bulls, and 80 replacement heifers. *Id.* Of the 160 bulls, approximately 150 were expected to be sold to other parties for breeding purposes in the future. *Id.*

The real estate became a particular sticking point. Rick claimed that he and Tony entered into a Land Separation Agreement purportedly dated August 16, 2011. App. 5. This purported Land Separation Agreement had Tony receiving only three (3) irrigated quarter sections, with Rick receiving the remaining nine (9) quarter sections (six (6) being irrigated and three (3) consisting of dry farm and pasture land). *Id.* Tony denied ever signing such an agreement. *Id.*

In February of 2012, Tony commenced this action. App. 1-12. Tony sought an equitable division of the parties' equipment, machinery, cattle, and real estate. *Id.* Rick counterclaimed. App. 13-31. In his counterclaim, Rick sought: (1) specific performance of the purported August 16, 2011 Land Separation Agreement; (2) specific enforcement of the equipment separation agreement; (3) an inventory, accounting, and distribution of the corporations' remaining assets; (4) damages against Tony pursuant to a shareholder derivative action for breach of fiduciary duties; (5) damages against Tony for a shareholder derivative action for conversion; (6) punitive damages against Tony based on the shareholder derivative actions; and (7) a preliminary injunction. *Id.*

A court trial was held before Judge Trandahl on July 15-19, 2013. During the trial, one of the critical issues before the court was the validity of the purported Land Separation Agreement. Rick insisted that Tony signed the Land Separation Agreement and devoted considerable time to this issue. Tony, on the other hand, insisted that he

signed no such agreement and presented evidence in support of his position. The issue of punitive damages, on the other hand, appeared to be cast aside. Rick devoted little effort to proving his shareholder derivative claims, and the issue of punitive damages was never even considered at trial.

On November 3, 2013, the trial court issued its Findings and Conclusions. App. 38-80. The court awarded O'Neill Farms to Tony and O'Neill Cattle to Rick. App. 69. The court further awarded specific performance of the alleged Land Separation Agreement, thereby awarding the bulk of the parties' real estate to Rick. App. 68. The court rejected Rick's shareholder derivative claims; nevertheless, the court awarded punitive damages against Tony and in favor of O'Neill Farms and O'Neill Cattle (neither of whom was a party) in the amount of $225,000 to each corporation. App. 66, 75-79. Thus, in total, the court awarded punitive damages against Tony in the amount of $450,000. *Id.*

On December 23, 2013, the court entered an Order adopting the court's Findings and Conclusions. App. 32-37. The court further ordered that various transfers be made and actions be taken in order to fulfill the court's division of property and order of specific performance. *Id.* Finally, the court indicated that its Order was *not* final and that no final, appealable judgment would be entered until the parties completed the various transfers and other requirements set forth in its Order. App. 37.

After entering its Order, the court continued to hold hearings and make additional rulings in the case. To the extent these additional hearings and rulings are relevant to the issues on appeal, their substance is set forth in more detail in the Argument portion of this

brief. Finally, on April 7, 2014, the court entered final judgment. App. 96-107. Tony now appeals.

STANDARD OF REVIEW

This Court employs the following familiar standards when reviewing a trial court's findings of fact and conclusions of law.

> We review a trial court's findings of fact under the clearly erroneous standard. Under this standard, we will not disturb the court's findings unless we are firmly and definitely convinced, after a review of the entire evidence, a mistake has been made. We review a trial court's conclusions of law under a de novo standard. Under a de novo review, we give no deference to the trial court's conclusions of law.

Sabhari v. Sapari, 1998 SD 35, ¶ 12, 576 N.W.2d 886, 891 (quoting *Landstrom v. Shaver,* 1997 SD 25, ¶ 37, 561 N.W.2d 1, 7) (citations omitted).

ARGUMENT

I. The trial court erred in accessing punitive damages against Tony.

In his Counterclaim, Rick alleged a shareholder derivative action for breach of fiduciary duty and conversion. App. 21-22. In addition, based solely on the shareholder derivative claim, Rick submitted a claim for punitive damages. App. 22-23. During the five day court trial, Rick made little effort to establish his shareholder derivative claim and never mentioned punitive damages.

In its conclusions of law, the trial court concluded that Rick failed to submit proposed findings and conclusions on the shareholder derivative claim and that this failure constituted waiver of the issue. App. 66. In addition, the trial court concluded

that Rick could not properly state a shareholder derivative claim. *Id.* Nevertheless, despite this ruling and despite the fact that it awarded no actual damages, the trial court proceeded to award *punitive damages* against Tony and in favor of the two non-party corporations in the total amount of $450,000.00. App. 75-79.

The trial court's award of punitive damages is erroneous for several reasons. First, it is axiomatic that a punitive damages may not be awarded in the absence of actual damages. Second, it was improper to award punitive damages in favor of two non-parties. And finally, because the trial court ruled against Rick on his shareholder derivative action, there was no underlying tort claim upon which an award of punitive damages could be based.

1. Punitive damages may not be awarded in the absence of actual damages.

This Court has repeatedly affirmed the basic principle that punitive damages may not be awarded in the absence of a compensatory damage award. *See Schaffer v. Edward D. Jones & Co.*, 521 N.W.2d 921, 928 (S.D. 1994) ("This Court has consistently held that punitive damages are not allowed absent an award of compensatory damages"); *TimeOut, Inc. v Karras*, 469 N.W.2d 380, 386 (S.D. 1991) ("exemplary damages may not be awarded absent an award of compensatory damages"); *Johnson v. Kirkwood*, 306 N.W.2d 640 (S.D. 1981) ("exemplary damages . . . are not allowed absent an award for compensatory damages"); *Henry v. Henry*, 604 N.W2d 285, 288 (S.D. 2000) ("This Court has consistently held that punitive damages are not allowed absent an award for compensatory damages"). "The rationale of the rule requiring actual damages before punitive damages may be awarded is that we do not punish conduct, no matter how

malicious or reprehensible, which in fact causes no injury." *Schaffer*, 521 N.W.2d at 928 (quoting *Dicker v. Smith*, 523 P.2d 371, 375 (Kan. 1974)). Furthermore, "allowing punitive damages without actual damages creates an incentive to bring 'petty outrages' to Court." *Henry*, 604 N.W.2d at 288.

Indeed, the primary case cited by the trial court as authorizing an award of punitive damages recognizes this basic principle. In *Case v. Murdock*, 488 N.W.2d 885 (S.D. 1992), a corporation brought a counterclaim for breach of fiduciary duty. The jury found for the corporation and awarded punitive damages but no compensatory damages. The trial court found that this was inconsistent and ordered a new trial for damages. This Court affirmed, reiterating the basic principle that punitive damages are improper absent an award of compensatory damages.

In this case, the trial court awarded no compensatory damages and suggested that the alleged harm was too speculative to support an award of compensatory damages. As such, there is no question that the trial court's award of punitive damages was completely inappropriate and should be vacated.

2. It was inappropriate to award punitive damages to non-parties.

The trial court's punitive damages award is also erroneous because it awards punitive damages to O'Neill Farms, Inc. and O'Neill Cattle Company, Inc. It is clear that neither of these corporations was ever a party to the underlying litigation. Thus, the trial court awarded punitive damages to two non-parties.

This decision was improper. Courts have long recognized that a judgment may not be entered against or in favor of a non-party. *See Phelps v. Hamilton*, 122 F.3d 1309,

1319 (10th Cir. 1997) ("The general rule . . . is that a judgment may not be rendered for or against one who is not a party to the action or who does not intervene therein"); *Fazzi v. Peters*, 68 Cal.2d 590, 594, 440 P.2d 242 (Cal. 1968) ("A judgment may not be entered for or against one who is not a party to an action or proceeding"); *Winsor v. Powell*, 497 P.2d 292, 297 (Kan. 1972) ("The general rule is that a judgment may not be entered for or against one who is not a party to the action or who did not intervene therein"); *see also BAC Home Loans Servicing, LP v. Traneynger*, 2014 SD 22, ¶16, 847 N.W.2d 137, 142 (recognizing that a party cannot enforce a consent judgment where they were not a party to the action).

This rule is a matter of common sense, but also implicates fundamental due process concerns. Indeed, in *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007), the United States Supreme Court held that "the Constitution's Due Process Clause forbids a State to use punitive damages to punish a defendant for an injury that it inflicts upon nonparties . . . ." *Id.* at 353. The Court explained that "to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation." *Id.* at 354. Moreover, the Court pointed out that if such an award were allowed, "the fundamental due process concerns to which our punitive damages cases refer – risks of arbitrariness, uncertainty, and lack of notice – will be magnified." *Id.* Finally, the Court noted that it could locate "no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others." *Id.*

The risk of arbitrariness is particularly evident in this case. The decision to award punitive damages came after a trial in which punitive damages were never *mentioned*.

Also, the end result of the trial court's ruling is that two non-party corporations – one of which was awarded to Tony – were each awarded $225,000 in punitive damages. This unprecedented result is nothing if not arbitrary.

In addition, the trial court's ruling goes beyond the concerns articulated in *Phillip Morris*. In that case, the concern was that the jury was allowed to consider harm to third parties when awarding punitive damages *to the plaintiff*. The trial court here went beyond even that by directly awarding damages *to non-parties*. The trial court did not identify any authority to support such an illogical result. Accordingly, the trial court's award of punitive damages is patently improper and should be vacated.

3. There was no underlying tort to support an award of punitive damages.

This Court has recognized that "it is indisputable that '[a] claim for punitive damages must be based on some underlying cause of action, since, as a general rule, there is no separate and distinct cause of action for punitive damages.'" *Risse v. Meeks*, 385 N.W.2d 875, 883 (S.D. 1998) (quoting 22 Am.Jur.2d *Damages* § 741 (1995)). Put simply, a "claim for punitive damages is not an independent or additional cause of action which can be separated and stand on its own." *Id.* Instead, punitive damages are merely a different element of damages stemming from the same underlying actionable conduct.

The only cause of action alleged by Rick that could possibly have supported an award of punitive damages was Rick's shareholder derivative action for breach of fiduciary duty and conversion. In fact, the heading describing Rick's punitive damages claim stated: "Derivative Shareholder Action – Punitive Damages." App. 22. Thus, it is

clear that Rick's punitive damages claim was inexorably tied to his shareholder derivative action.

As noted above, the trial court rejected Rick's shareholder derivative claim. This should have been the end of the road for the punitive damages claim as well. There was no other claim that could conceivably support such an award. But inexplicably, the trial court awarded punitive damages. This was clearly improper and the award of punitive damages should be vacated.

II. The trial court erred in refusing to recuse itself from further proceedings.

Tony also submits that the trial court erred in refusing to recuse itself upon the request of his counsel pursuant to SDCL 15-12-21.1. The genesis of this request was two statements from the trial court directly and unequivocally accusing Tony of perjury.

The first such statement occurred on November 4, 2013. On this date – the same day the court entered its Findings of Fact and Conclusions of Law – Judge Trandahl sent a letter to the State's Attorneys and Sheriffs of Bennett County and Tripp County. App. 88-89. In this letter, the court indicated that it was her "duty under the law to report the crime of perjury committed by James Anthony O'Neill . . . ." App. 88. The court attached a copy of its Findings of Fact and Conclusions of Law and advised the recipients that "the court made numerous determinations that Tony's testimony was 'not credible.'" App. 89. The trial court then stated that "[a]s it pertains to the existence of the Land Separation Agreement, the words 'not credible' is judge speak for perjury." App. 89.

The second statement occurred on March 13, 2014. At a hearing on Rick's Motion for Contempt, Judge Trandahl made the following statement in open court:

> Mr. [Tony] O'Neill came into this courtroom, your client, and lied from Day One. Committed perjury from Day One.

CHT at 18.

It was this second statement that prompted Tony's appellate counsel to request that the trial court recuse itself from further proceedings. On March 17, 2014, Tony's counsel sent a letter to the trial court requesting the recusal. App. 84-87. In this letter, counsel referred to the November 4, 2013 letter and to the March 13, 2014 statements in open court. *Id.* Counsel advised that the letter and subsequent statements created "a reasonable basis for questioning" the Court's impartiality and a "personal bias and prejudice." *Id.*

One day later, on March 18, 2014, the court denied the recusal request. App. 90-95. The court indicated that its statements did not prevent it from "keeping an open mind and make separate credibility determinations at future hearing in which Tony testifies." App. 94. Moreover, the court insisted that "[t]his court does not harbor personal bias or prejudice against Tony." App. 95. The court's decision did not address the issue of the appearance of impartiality, which was a point of emphasis in counsel's request.

After the denial of the recusal request, additional proceedings were conducted before the court, which then issued additional orders. At one such hearing, on May 1, 2014, the court reiterated its accusation of perjury with respect to Tony. At this point, the court stated:

> Then the allegation was made that, because of court frustration, and the stern nature of the court's comments, a request was made to take this court off of this case, because it could not be fair. There is no question that, following the trial, the court made findings that, at that trial, the plaintiff committed perjury over the land separation agreement.

MHT at 21-22.

This Court has stated that decisions to recuse lie within a judge's discretion. *See, e.g., State v. List*, 2009 SD 73, ¶9, 771 N.W.2d 644, 646-47; *Hickmann v. Ray*, 519 N.W.2d 79, 80 (S.D. 1994). However, in truth, discretion forms only part of the question. A judge exercises discretion in determining whether the facts and circumstances fit within the disqualifying criteria. "Once the trial judge has answered the question affirmatively, however, he must recuse himself; that is not discretionary." Childers and Davis, *Federal Standards of Review* § 12.05, at 12-31 (3d ed. 1999).

By statute, South Dakota judges must disqualify themselves under specified circumstances. In particular, "[a] judge or magistrate having knowledge of a ground for self-disqualification under the guidelines established by Canon 3C [Canon 3E] shall not, unless Canon 3D [Canon 3F] is utilized, await the filing of an affidavit but *shall remove himself*." SDCL 15-12-37 (emphasis supplied); s*ee also Marko v Marko*, 2012 SD 54, ¶18, 816 N.W.2d 820.

Thus, in determining whether disqualification is required, the Court must look to Canon 3E of the Code of Judicial Conduct. Canon 3E(1) provides that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances" of: (a) "personal bias or prejudice" or "personal knowledge," (b) prior service as a lawyer in the matter, (c)

economic interest, and (d) close personal relationship of relatives or parties to a proceeding. *See* Code of Judicial Conduct, SDCL Ch. 16-2, App., Canon 3E(1).

Canon 3E(1) encompasses two types of circumstances. First, it encompasses situations where the "judge's impartiality might reasonably be questioned." Second, it addresses instances "including but not limited to" when rules (a) through (d) apply. *Id.* The commentary to Canon 3E(1) explains: "Under this rule, a judge is disqualified *whenever the judge's impartiality might reasonably be questioned*, regardless of whether any of the specific rules in Section 3E(1) apply." *Id.* (emphasis supplied). This is an objective standard, requiring disqualification where there is "an appearance of partiality . . . even though no actual partiality exists." *Liljeberg v Health Services Acquisition Corp.*, 486 U.S. 847, 860, 108 S.Ct. 2194, 2202-03, 100 L.Ed.2d 855 (1988). This is because "[j]udicial fairness requires the appearance as well as the existence of impartiality." *Marko*, 2012 SD SD 54, ¶20.

The issue of whether a court's impartiality might reasonably be questioned cannot be addressed from the perspective of the judge in question. Rather, the test is: "would a reasonable person knowing all the facts conclude that a judge's impartiality might reasonably be questioned?" *Marko*, 2012 SD 54, ¶22. A judge's own subjective view is not relevant to the "appearance of impartiality" inquiry. *Id.* "Judges must imagine how a reasonable, well-informed observer of the judicial system would react." *Id.*

In this case, the court expressed its subjective view that it could be impartial. However, the court's analysis of the issue failed to address the objective "appearance of

impartiality" issue. Thus, the court clearly failed to conduct the proper analysis. Additionally, it is clear that the facts and circumstances of this case provide ample basis for a reasonable person to question the court's impartiality.

There is no dispute that the trial court has repeatedly and consistently accused Tony of perjury. On the same day it signed the Findings of Fact and Conclusions of Law, the court sent a letter to the top law enforcement officials in Bennett County and Tripp County, urging them to investigate and prosecute Tony for the felony offense of perjury. Without prompting, the court repeated these accusations of perjury at both the March 13, 2014 contempt hearing and the May 1, 2014 hearing.

Courts have recognized that statements of this nature by a trial court create an appearance of impartiality requiring recusal. In *Louissant v. State*, 125 So.3d 256 (Fla. Ct. App. 4th Dist. 2013), for example, the court considered a question of whether a trial court was required to disqualify itself prior to sentencing of a criminal defendant. During the course of the trial, the court openly accused the defendant of perjury outside of the presence of the jury. After the jury found defendant guilty, defendant's counsel requested that the court disqualify itself prior to sentencing. The trial court refused, and the issue was appealed.

On appeal, the appellate court held that the trial court erred in failing to disqualify itself prior to sentencing. The court explained:

> In the present case, the trial court erred in failing to grant the motion to disqualify. Appellant's motion and affidavit were legally sufficient, and as such, required the trial court's granting of the motion to disqualify. "As a general proposition, a statement by a trial judge that he or she feels a party

> has lied in the case is generally regarded as indicating a bias against the party."

Id. at 259 (quoting *Campbell Soup Co. v. Roberts*, 676 So.2d 435, 436 (Fla. 2d DCA 1995). The court went on to explain that the focus is not on whether the judge subjectively perceives he or she is able to act fairly, but on whether the judge's impartiality might reasonably be questioned. *Id.* The court concluded that "the trial judge's statement that the defendant had perjured himself would create a well-founded fear in a reasonably prudent person that the person would not receive a fair and impartial hearing." *Id.* Accordingly, the court reversed and remanded for resentencing before another judge. *Id.*

The trial court's statements in this case would similarly cause a reasonable person to question its impartiality. The trial court openly offered its opinion that Tony perjured himself not once, but three times. As the court in *Louissant* stated, such statements are generally regarded as indicating a bias on the part of a trial judge.

Moreover, the case for the trial court's perceived partiality is further bolstered by its other rulings. Most obvious in this regard is its unfounded decision to award punitive damages against Tony and in favor of two nonparties, despite the fact that no compensatory damages were awarded and despite the fact that it rejected the only claim that might conceivably support such an award. A review of the record demonstrates that the court rejected the testimony of Tony and his witnesses on nearly every key point presented at trial. Taken together with the accusations of perjury, these facts and

circumstances would cause any reasonable person to question the trial court's impartiality.

Accordingly, Tony respectfully requests that this Court reverse and remand with instructions that the trial court disqualify itself from any further proceedings in this matter.

III. The trial court erred in finding Tony in contempt following the completion of trial.

On December 23, 2013, the trial court entered its "Order on Court's Findings of Fact & Conclusions of Law" (hereinafter, "the Order"). App. 32-37. The Order disposed of all claims and issues in this case, leaving nothing to be decided. Nevertheless, the Order stated that it was an "interim order" and "not a final judgment under SDCL § 15-6-54." App. 37. The Order further suggested that no final judgment would be entered until all directions set forth in the Order had been completed. *Id.* This included various transfers of property and, presumably, payment of punitive damages by Tony.

On February 3, 2014, counsel for Rick mailed twenty-nine (29) separate documents to Tony's counsel, all designed to effectuate various transfers addressed by the trial court. However, because Tony intended to appeal the trial court's ruling, Tony declined to complete and sign the various documents. Counsel for Tony advised counsel for Rick of his position on February 21, 2014.

As a result, on February 25, 2014, Rick moved to hold Tony in contempt. Rick's motion in this regard was supported only by an affidavit signed by Rick's counsel. Rick sought to hold Tony in contempt for failing to sign the various transfer documents.

In addition, Rick sought to have Tony pay damages in the amount of $500.00 per day for Tony's continued use of certain land.

A hearing on the motion for contempt was held before the trial court on March 13, 2014. At the hearing, the trial court accused Tony of lying to the court and committing perjury. Ultimately, the trial court ordered that Tony remove cattle from land awarded to Rick and awarded damages to Rick of $500.00 per day (starting on December 31, 2013) and set a second hearing on the motion for contempt for March 27, 2014. Prior to the March 27 hearing, Tony filed his Notice of Appeal. Accordingly, Tony's counsel advised the trial court of Tony's appeal and suggested that in light of the appeal, the March 27 hearing was improper and unnecessary. The trial court disagreed, and proceeding with the March 27 hearing. At that hearing, the trial court directed that Tony sign the various transfer documents presented by Rick.

1. The trial court's actions improperly denied Tony of his right to seek appellate review prior to the enforcement of judgment.

Under South Dakota law, it is well settled that a party against whom judgment has been entered enjoys an absolute right to appeal the judgment to the South Dakota Supreme Court. *See* SDCL § 15-26A-3. A party is also entitled to supersede enforcement of the judgment by way of a supersedeas bond. *See* § 15-26A-25. Thus, there can be no question that Tony had a statutory right to obtain appellate review and to preserve the status quo by superseding enforcement of the judgment.

In the present case, the trial court's actions undermined these critical rights. The effect of the December 23, 2013 Order was to compel enforcement of the judgment as a

precondition to entry of a final, appealable order. By compelling Tony to perform various tasks – including the transfer of property and the payment of various sums before final judgment was entered, the trial court acted to deprive Tony of his statutory right to obtain appellate review *before* the judgment is enforced.

Courts have recognized that orders having this ultimate effect are improper. *In re Kahn*, 2013 WL 5434624 (Tex. Ct. App. 2013), for example, involved a dispute as to ownership and control of a professional limited liability company. In that case, the court entered an order requiring one party (Kahn) to execute an order transferring all of his interest in the subject company to the other party (Chaudhry). *Id.* at *1. The Court designated the order as a partial judgment and denied Kahn's request for permission to appeal. *Id.* In effect, Kahn was required to execute the transfer *before* entry of a final judgment.

The Court of Appeals of Texas granted Kahn's request for mandamus relief, holding that the order was improper and that the trial court abused its discretion by requiring compliance with a partial judgment before a final judgment was signed. *Id.* The court explained:

> Generally, a party has a right to suspend the enforcement of a judgment during an appeal. The party's right to supersede the judgment and maintain the status quo may be lost forever where the trial court allows partial enforcement of the judgment before final judgment is entered. Specific performance of an agreement to transfer ownership and control of Xenon Health from Kahn to Chaudhry is a significant part of the ultimate relief being sought in this case. By compelling Kahn to effectuate the transfer before an appealable judgment has been signed, the trial court deprived

> Kahn of his right to obtain appellate review before the judgment is enforced.

Id. (citations omitted).

State ex rel Electrolert, Inc. v. Lindeman, 650 N.E.2d 137 (Ohio Ct. App. 1994) provides further support for this position. This case involved a petition for writ of prohibition stemming from an underlying case in which partial judgment was entered against the defendant and in favor of the plaintiff for $1,000,000. The judgment was not certified as final as claims remained between the parties. Nevertheless, the trial court allowed the plaintiff to proceed with execution on the partial judgment.

The Ohio Court of Appeals concluded "that [the trial court's] orders in aid of execution of the interlocutory cognovit judgment were unlawful because no final judgments had been rendered on all of intervener's claims." *Id.* In so holding, the Court emphasized that "[o]ne cannot execute a claim absent a final judgment as to that claim." *Id.* The Court further explained that if a party were allowed to execute on a partial judgment before entry of final judgment, "a prevailing party could, under court authority, seize the property, garnish the proceeds, or sell the assets of the losing party without the latter having any immediate avenue available for challenging the underlying interlocutory judgment." *Id.*; *see also Flour Enterprises v. Walter Construction*, 172 P.3d 368 (Wash. Ct. App. 2007) (partial judgment is unenforceable and final judgment must be entered before enforcement takes place).

These cases are directly on point. The trial court's Order required Tony to take various actions and to make various transfers to Rick prior to – and indeed as a

precondition of – entry of an appealable judgment. This was clearly improper. A party against whom an adverse ruling has been made enjoys the right to appeal and to supersede enforcement of the judgment during the pendency of the appeal. *See also In re Tarrant County*, 16 S.W.3d 914, 918 (Tex. Ct. App. 2000) (recognizing that a party's right to appeal and supersede a judgment is "one of absolute right" and "not a matter within the trial court's discretion"); *Jannsen v. Tusha*, 297 N.W. 119 (S.D. 1941) (recognizing that effect of supersedeas is to preserve status quo pending appeal).

Given the foregoing, the trial court's Order was improper. This was clearly an effort to impose what the law does not allow – i.e., enforcement of a judgment prior to entry of an appealable judgment. As such, Tony respectfully submits that the trial court's order and resulting rulings on Rick's Motion for Contempt should be reversed.

2. Rick's Motion for Contempt was supported only by an improper

As noted above, at the conclusion of the March 13, 2014 hearing, the trial court ordered Tony to pay Rick damages of $500.00 per day beginning on December 31, 2013. This purportedly reflected the "fair market rental value" for Tony's use of land awarded to Rick. However, the only evidence presented by Rick in this regard was his counsel's affidavit. This was clearly improper.

Use of an attorney's affidavit with respect to facts in dispute is simply not appropriate. Indeed, in *Andruschenko v. Silchuk*, 744 N.W.2d 850 (S.D. 2008), the South Dakota Supreme Court recognized that "[t]he general rule is that attorney affidavits should not be used unless the matter is uncontested or a mere formality." *Id.* at 855. As the Court explained, such affidavits are "governed by the same rules of admissibility in

regard to personal knowledge and competency" and "should not be utilized . . . unless the testimony therefrom would be admissible at trial." *Id.* (quoting *Maryland Cas. Co. v. Delzer*, 283 N..2d 244, 249 (S.D. 1979) Put simply, the affidavit may not "give evidence regarding matters that would be questions of fact." *Id.*

Counsel's affidavit did precisely what *Andruschenko* prohibits. In essence, he testified as to matters in dispute, including the supposed "fair market rental value" of the land in question. Clearly, counsel would not be permitted to testify in this manner in formal proceedings. As such, the affidavit was improper and the court's reliance on it was unfounded. Accordingly, Tony respectfully submits that the trial court's order directing Tony to pay Rick $500 per day in rent was in error and should be reversed.

IV. The trial court's enforcement of the Land Separation Agreement was clearly erroneous.

As discussed above, one of the key disputes at trial centered on the alleged Land Separation Agreement dated August 16, 2011. This agreement contained a nonsensical division of land, with Tony receiving only three of the twelve quarters of land owned by the corporations. Tony denied ever signing such an agreement and asserted that the agreement presented by Rick at trial was a forgery. The trial court rejected these arguments, finding that Tony's testimony was not credible. Accordingly, the court enforced the purported Land Separation Agreement. Tony respectfully submits that the trial court's decision in this regard was clearly erroneous.

At trial, the only forensic document expert to testify regarding the Land Separation Agreement was Janis Tweedy (hereinafter, "Tweedy"). Tweedy is a retired forensic document examiner formerly employed by the Minnesota Division of Criminal Apprehension in St. Paul, Minnesota. TT 603. Tweedy has extensive experience in forensic document examination and has personally trained many of the forensic document examiners employed by the Minnesota Division of Apprehension. TT 603-10. Her education includes forensic document schooling with the Federal Bureau of Investigation (FBI) and the secret service. She has been a member of the American Board of Document Examiners since 1975 and has testified in numerous courts, including federal, state, and military courts. *Id.*

Tweedy opined that there was a "very obvious" misalignment problem with respect to Tony's purported signature on the Land Separation Agreement. TT 613. The signature line for Tony's signature was out of alignment both vertically and horizontally in comparison with the rest of the document. TT 614. Moreover, Tony's signature line was clearly not parallel to Rick's signature line, which appeared directly beneath it. TT 619. Based upon these, Tweedy testified that it was her opinion that Tony's signature was falsified by a "cut and paste" procedure. TT 613, 625.

This procedure, according to Tweedy, means very much what it says. As Tweedy testified:

> Q. And how does one go about – in a general sense – of cutting and pasting, taking a signature from somewhere else and placing it within a document?

> A. A cut and paste, the easiest way, and the quickest, is to find a document that h document you want it to be one. You take the signature; you place it on the document – glue or tape it, however you want to stick it on there – and then you copy it. You make a copy of it. Once – you may copy it twice, until the edges of the paper don't show anymore, and now you have a document that depicts a genuine signature, but the signature is not actually on that document. The biggest problem with a cut and paste done that way is you have alignment problems. You can't always get it in perfect alignment with all the text on the paper.

TT 629. Thus, Tweedy's opinion was that Tony had not actually signed the Land Separation Agreement, but that someone had copied and pasted his signature from another document in order to make it appear that Tony had signed it.[3]

The only other explanation offered by Rick for the misalignment issue was the testimony of Daniel Meinke (hereinafter "Meinke"). Meinke, who is a computer forensic examiner and not a forensic document examiner, acknowledged that a cut and paste was possible, but speculated that it was "more probable" that the misalignment was caused by copying, scanning, or printing issues. TT 505. On cross examination, however, Meinke testified that he could not testify as to what caused the misalignment and that he was merely "giving the possibilities of what may have happened." TT 533.

Tweedy, however, expressly considered and rejected the theory of copying or printing issues as an explanation for the misalignment. Tweedy explained:

> Q. Do you, in your examination of documents, try to do, in your mind, running th
>
> A. I usually do a "what if" scenario. If all the evidence points in one direction, I signature on the document. And, with that much of a misalignment, I just don't – I can't see how it was done.

[3] Notably, Rick did not produce an original of the purported land separation agreement. Instead, he produced a photocopy. According to Tweedy, there were indications that the photocopy had been copied more than once.

Q. And, if the misalignment was caused by a copy glitch or scanning glitch, does that misalignment, then usually appear throughout a bigger portion of the document than just one line?

A. Yes.

Q. Would you expect a copying-misalignment problem to have carried through to the Rick O'Neill signature line also? If a copy misalignment is what caused that anomaly of Tony's signature, would you expect to see a similar anomaly on Rick's signature line?

A. If the misalignment is noticed at the top of the document, and the claim is

Q. And did you see any alignment issues on the Rick O'Neill signature?

A. No; not in reference to the – I saw that the "Tony O'Neill" and the "Rick O'Neill" were not in alignment.

TT 430-31.

In summary, then, two experts testified as to the misalignment issue concerning Tony's signature. Tweedy, a forensic document examiner who has encountered "cut and paste" situations in the past, testified that the only reasonable explanation for the misalignment was that Tony's signature had been cut and pasted from another document. Tweedy further testified that a printing or copying issue could not have caused the misalignment in question. On the other hand, Meinke, who is a forensic computer expert with no expertise in document examination, testified that he couldn't say what caused the misalignment but that there were other "possibilities."[4]

Nevertheless, the trial court ultimately enforced the Land Separation Agreement. In doing so, the court expressly disregarded Tweedy's entire testimony, concluding that it

[4] As noted previously, Rick never produced an original signed copy of the purported land separation agreement. There was also no evidence that the alleged signing of the agreement was witnessed by anyone, as was the case with the agreement concerning the division of equipment.

was "not consistent" with the evidence. In other words, the trial court concluded that because Tweedy's testimony was not consistent with the court's belief that Tony perjured himself, it was unworthy of consideration.

The trial court's wholesale rejection of Tweedy's testimony is difficult to fathom. Even Rick's own competing expert witness was unwilling to rule out Tweedy's theory. While determinations concerning the weight and credibility of competing evidence are generally matters for the trial court, the court's outright rejection of Tweedy's testimony speaks to a larger concern. *See, e.g., Angus v. Second Injury Fund*, 328 S.W.3d 294, 302 (Mo. Ct. App. 2010) (concluding that labor relation commission in worker's compensation case erred in rejected the only and uncontroverted expert testimony on the issue of medical causation). Put simply, the trial court's rejection of Tweedy's testimony is yet another example of the court's animus toward Tony.

As explained previously, the trial court's attitude toward Tony was apparent throughout the proceedings below. That attitude is reflected in the court's personal attacks against Tony, labeling him a liar and perjurer and demanding that he be prosecuted. It is further reflected in the wholly inappropriate award of punitive damages against Tony. Finally, it is reflected in the court's insistence that Tony be denied his right to appeal until after enforcement of the judgment.

Moreover, the primary evidence that the trial court relied on in concluding that Tony had signed the land separation agreement – i.e., the existence of the agreement on Tony's computer – could easily be explained by other evidence. Indeed, two witnesses (Tony's daughter Tyler O'Neill and hired man Clint Nixon) testified that they witnessed

Rick visiting Tony's house numerous times when he knew Tony was not home. Thus, Tony was certainly not the only person who might have had access to his computer.

Finally, the notion that Tony would ever agree to a division of land that would give Rick 75% of the parties' land is dubious at best. The trial court portrayed Tony as a bully who was determined to prevent Rick from getting his just share of the parties' property. But how does one reconcile this with the court's conclusion that Tony voluntarily agreed to a land separation agreement that was completely lopsided in Rick's favor? The truth is that it would make no logical sense for Tony to agree to such a division. Given the compelling testimony of Janis Tweedy, Rick's claim that Tony gladly gave up three quarters of the brothers' land is nonsense.

Given the circumstances, Tony respectfully submits that the enforcement of the Land Separation Agreement was clearly erroneous. Accordingly, Tony requests that this Court reverse on this issue and remand for further proceedings.

V. The trial court erred in finding that Rick did not lease land from Dean O'Neill following the preliminary injunction hearing.

At the May 7, 2012 preliminary injunction hearing, the trial court made it clear that neither corporation was allowed to lease any of Dean O'Neill's land. At trial, it became clear that Rick had ignored this admonition. Rick, in fact, admitted that he leased *something* from Dean after the preliminary injunction hearing, although he was vague and evasive about exactly what he leased. TT 410. Moreover, the evidence indisputably showed that Rick received a crop insurance payment in the amount of $149,514.93 for

crops on Dean's land. TT 407. This insurance payment was made out to O'Neill Cattle and was endorsed by Rick on behalf of O'Neill Cattle. TT 407-08.

The trial court, however, largely ignored this evidence and instead accepted Rick's convoluted explanation that he had only done custom farming work for Dean. This makes little sense. As noted above, Rick *admitted* that he made lease payments on behalf of O'Neill Cattle to Dean. Moreover, Rick admitted that he received the crop insurance check made out to O'Neill Cattle and that he endorsed the same as an agent of O'Neill Cattle.

The trial court concluded that the crop insurance payment was not a corporate asset, reasoning that it was made out to O'Neill Cattle only because O'Neill Cattle had purchased the insurance policy prior to the preliminary injunction hearing. But this ignores the undisputed fact that the check was made out to O'Neill Cattle and was endorsed by Rick as an agent of O'Neill Cattle. If the payment was made to O'Neill Cattle – as was clearly the case – then it was a corporate asset. As such, it should have been treated as such for purposes of the division of property.

On this point, the trial court also ignored Rick's complete and total failure to explain precisely where the crop insurance proceeds went. Rick's testimony is vague at best, but he appears to suggest that some of the funds went to Dean O'Neill and that Rick retained a portion as payment for his "custom farming." TT 404-412. But if this is true, then Rick's explanation raises more questions than answers. If Rick ultimately kept a portion of the funds that were paid to O'Neill Cattle for his own personal use, then Rick

misappropriated corporation assets. *See Kansas Gas & Elec. v. Ross*, 521 N.W.2d 107, 116 (S.D. 1994) (discussing misappropriation of corporate assets for personal use).

Again, Rick's testimony on these issues was at best unclear and at worst evasive. But the undisputed fact is that the crop insurance payment was made out to O'Neill Cattle and endorsed by Rick as a representative of O'Neill Cattle. Thus, this was corporate property, and the trial court's failure to it as such is reversible error.

CONCLUSION

For the reasons set forth and based upon these numerous errors, Tony respectfully submits that the only just result is to reverse and remand this matter for further proceedings before another judge.

Dated this 9th day of February, 2015.

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REQUEST FOR ORAL ARGUMENT

Tony respectfully requests the opportunity to present oral argument.

Dated this 9th day of February, 2015.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type volume limitation of SDCL 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this brief, the body of the brief contains 9,745 words and 49,975 characters (not including spaces).

/s/ Scott R. Swier
Scott R. Swier

CERTIFICATE OF SERVICE

Scott R. Swier, one of the attorneys for Plaintiff/Appellant James Anthony O'Neill, and pursuant to SDCL Chapter 15-26C (Supreme Court Electronic Filing Rules), hereby certifies that on *February, 9, 2015*, I caused the following documents:

- Appellant's Brief (word format)
- Appellant's Appendix (portable document format)

to be filed electronically with the Clerk of the South Dakota Supreme Court via email and that the original and two hardcopies of these documents were mailed by United States Mail, postage prepaid, to:

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APPENDIX

James Anthony O'Neill, Plaintiff/Appellant

v.

Richard James O'Neill, Defendant/Appellee

Nos. 27036/27113

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27036/27113

JAMES ANTHONY O'NEILL,
Plaintiff and Appellant,

v.

RICHARD DEAN O'NEILL,
Defendant and Appellee.

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

The Honorable Kathleen F. Trandahl
Circuit Court Judge

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Notice of Appeal filed on the 25th day of March, 2014

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Cases

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JURISDICTIONAL STATEMENT

The appellee has no disagreement with the Appellant's statement of the Court's jurisdiction over this appeal.[1]

REQUEST FOR ARGUMENT

The Appellee respectfully requests the privilege of appearing before this Court for oral argument of this appeal.

STATEMENT OF THE ISSUES

I. ***Whether the Circuit Court Properly Awarded Punitive Damages to the Corporations Harmed by Appellant's Breach of Fiduciary Duty***

Relevant Cases and Statutes:

Miiller v. County of Davison, 452 N.W.2d 119, 121 (S.D. 1990)

Schaffer v. Edward D. Jones & Co., 521 N.W.2d 921 (S.D. 1994)

Schaffer v. Jones, 552 N.W.2d 801 (S.D. 1996)

Knodel v. Kassel Tp., 1998 SD 73, 581 N.W.2d 504

Matter of Estate of O'Keefe, 583 N.W.2d 138 (S.D. 1998)

Lovejoy v. Lovejoy, 2010 SD 39, 782 N.W.2d 669

Roth v. Farner-Boken Co., 2003 SD 80, 667 N.W.2d 651

Seymour v. W. Dakota Vocational Technical Inst., 419 N.W.2d 206 (S.D. 1988)

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)

SDCL § 21-1-4.1

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[1] For purposes of this brief, references are as follows: (1) "CR" designates the certified record; (2) "TT" designates the Trial Transcript; (3) "CHT" designates the Contempt Hearing Transcript; (4) "HPI" designates May 4, 2012 Hearing on Preliminary Injunction; (5) App. designates Appellant's Appendix; (6) Appx. designates Appellee's Appendix.

SDCL § 21-3-2

II. Whether the Honorable Judge Kathleen Trandahl Properly Exercised Her Discretion in Denying Appellant's Request for Recusal

Relevant Cases and Statutes:

State v. Hauge, 2013 SD 26, 829 N.W.2d 145

Marko v. Marko, 2012 SD 54, 816 N.W.2d 820

U.S. v. Denton, 434 F.3d 1104 (8th Cir. 2006)

Litecky v. United States, 510 U.S. 540 (1994)

SDCL § 15-12-37

Code of Judicial Conduct Canon 3E(1)

III. Whether the Circuit Court Properly Held Appellant in Contempt Following Appellant's Refusal to Comply with Interim Court Orders Entered by Agreement of Appellant's Former Counsel and Appellee's Counsel

Relevant Cases and Statutes:

Wold Family Farms, Inc. v. Heartland Organic Foods, Inc., 2003 SD 45, 661

N.W.2d 719

Harksen v. Peska, 2001 SD 75, 630 N.W.2d 98

Karras v. Gannon, 345 N.W.2d 854 (S.D. 1984)

Sazama v. State ex rel. Muilenberg, 2007 SD 17, 729 N.W.2d 335

IV. Whether the Circuit Court Properly Found that the Land Separation Agreement presented by Appellee was Credible and Entitled to Enforcement under South Dakota Law

Relevant Cases and Statutes:

Hubbard v. City of Pierre, 2010 SD 55, 784 N.W.2d 499

Harksen v. Peska, 2001 SD 75, 630 N.W.2d 98

V. Whether the Circuit Court's Properly Found that Appellee Did Not Lease Land from Appellant and Appellee's Father following the May 4, 2012 Preliminary Injunction Hearing

Relevant Cases and Statutes:

Hubbard v. City of Pierre, 2010 SD 55, 784 N.W.2d 499

Harksen v. Peska, 2001 SD 75, 630 N.W.2d 98

STATEMENT OF THE CASE

This case is about principles of equity and deference to the finder of fact.

Appellant Tony O'Neill ("Tony") initiated a lawsuit in February 2012 asking the Court to equitably divide the assets and debts acquired by himself and his brother Appellee Rick O'Neill ("Rick") in the course of their nearly 25 years of farming and ranching together. Rick filed a Counterclaim seeking a preliminary injunction, specific enforcement of agreements executed by the brothers, an inventory and accounting of the corporate assets, and multiple derivative shareholder actions. Each brother was a 50% shareholder in O'Neill Cattle Company, Inc. ("O'Neill Cattle") and O'Neill Farms, Inc. ("O'Neill Farms"). App. 2, 14. No corporate bylaws were ever formally adopted by either of the corporations. No written agreement was ever executed prior to 2011 that discussed how the corporations would be dissolved and wound up if the brothers chose to end their business relationship.

The trial court entered an Order for Preliminary Injunction on May 7, 2012, setting forth specific instructions on how the corporations would be run during the pendency of the lawsuit. The court specifically stated: "The parties shall not incur any additional debt, draw on any current lines of credit or enter into any other contractual agreement in the name of O'Neill Farms, Inc. or O'Neill Cattle Company, Inc. without written consent of all shareholders and approval of the Court." Appx. 3.

A court trial was held on July 15-19, 2013. After witnessing and listening to five days of testimony and reviewing thousands of pages of documents, the Honorable

Kathleen Trandahl entered 44 pages of Findings of Fact and Conclusions of Law equitably dividing Tony and Rick's property. App. 38-80; Appx. 5-43. An Order on Court's Findings of Fact & Conclusions of Law was entered on December 23, 2013. App. 32-37; Appx. 48-53. Rick's shareholder derivative action was denied. This was the exact type of relief Tony sought when he filed this lawsuit. App. 1-12.

The December 23, 2013 Order was to be considered an interim order and not a final judgment under SDCL § 15-6-54 because the Order required numerous ownership transfers to take place, tax returns to be completed and shareholder loans to be calculated, which required time and tax assistance to accomplish. App. 37. This arrangement was mutually agreed upon by the parties. Appx. 64-66.

As Rick worked to complete the required obligations to satisfy Judge Trandahl's Order, Tony refused to comply. A Hearing on Rick's Motion for Contempt was held on March 13, 2014. The Court found Tony in contempt. Appx. 64-66.

Tony initially filed an appeal challenging the interim Orders. On May 6, 2014, Judge Trandahl entered a final judgment. Appx. 73-84. Tony filed a second Notice of Appeal thereafter. On August 15, 2014 this Court entered an Order consolidating Tony's two appeals.

STATEMENT OF THE FACTS

Despite Tony's interpretation of the facts of this matter, the facts have already been judicially determined at the trial court level and, absent a clearly erroneous finding of fact or an abuse of the circuit court's discretion, such factual findings and decisions must remain undisturbed by this Court.

Brothers Rick and Tony started their farming operation in 1996. O'Neill Cattle was formed with Tony named as a director, president and treasurer and Rick named as a director, vice-president, and secretary. O'Neill Farms was formed with Rick named as a director, president, and treasurer and Tony named as a director, vice-president, and secretary. Each brother was a 50/50 shareholder. Formal bylaws were never adopted and no agreed upon comprehensive method for dissolution and wind up was ever executed.

Tony testified at trial that he contemplated ending the business relationship with Rick as early as 2008. However, he didn't approach Rick about dissolving the two companies until early 2011. That summer, the brothers met multiple times to discuss how to split the corporate assets. The brothers' plan was to split the land first, followed by the equipment, the cattle, tools, and the remaining assets and debt. The brothers agreed at a July 2011 meeting that Tony would prepare a proposed written agreement splitting the corporate real estate into two groups of parcels. The brothers would meet again and then Rick would pick which of the two groups he wanted. This was a common method the brothers had employed throughout their lives – "one brother splits the pie, then the other brother gets first pick." On August 16, 2011 Tony and Rick signed the written land separation agreement drafted by Tony. Rick chose the parcels of land referred to in the litigation as the Jacquot Place and Tony received what was called the Byrnes Place or Headquarters. Based on the brothers' signed agreement, Rick moved from the Byrnes Place to the Jacquot Place.

In December 2011, the brothers met again to split up the equipment. Again, an agreement was signed. Another meeting was held thereafter to discuss how to split the cattle. During this meeting, Tony disputed the existence of an agreement regarding the

land separation. The brothers' effort to separate and dissolve the corporations ceased. Tony filed suit and asked the court for an equitable division of the real estate, equipment, cattle, debt and other assets. Rick asked that the August 2011 Land Separation Agreement and the December 2011 Equipment Separation Agreement be specifically enforced as part of the equitable division.

On July 15, 2013, a five-day court trial commenced in Bennett County, South Dakota. Judge Trandahl heard hours of live, in-court testimony and received thousands of pages of documentary evidence.

Rick claimed that the parties had already agreed in writing as to the division of corporate real estate and equipment. Tony alleged that the written land separation agreement was a forgery. He claimed he never saw the version, signed or otherwise, that Rick proffered at trial until the start of the lawsuit. Rick provided evidence at trial from computer forensic expert Dan Meinke that showed that the documents Tony denied knowledge of were created on Tony's computer and drafted in advance of the lawsuit.

Based upon the evidence and testimony presented at trial, Judge Trandahl issued 232 detailed Findings of Fact commenting on the credibility of the evidence the court received and 112 Conclusions of Law equitably dividing Tony and Rick's land, equipment, cattle, assets, debt, and corporations. App. 38-80; Appx. 5-43. The court specifically enforced the land separation agreement and the equipment separation agreement. App. 100-102; Appx. 74-76.

The court also found that Tony, as a director of O'Neill Farms and O'Neill Cattle, breached his fiduciary duties to the corporations by engaging in willful, wanton and malicious conduct to the injury and to the detriment of the corporations. App. 61-66, 75-

79; Appx. 28-32, 42-46. Further, the court found that Tony had violated the court's Order for Preliminary Injunction regarding the handling of corporate assets and debt. Appx. 45, *COL* 102. Tony was ordered to pay punitive damages in the amount of $225,000 each to O'Neill Farms and O'Neill Cattle. App. 108; Appx. 82.

STANDARD OF REVIEW & ARGUMENT

" 'We give the trial court's opportunity to judge the credibility of witnesses and to weigh their testimony due regard when reviewing the trial court's findings of fact.'" *Walker v. Walker,* 2006 SD 68, ¶ 11, 720 N.W.2d 67, 70-71 (quoting *Midzak v. Midzak,* 2005 SD 58 ¶ 14, 697 N.W.2d 733, 737-38). A circuit court's findings of fact are reviewed "under the clearly erroneous standard." *Peterson v. Issenhuth,* 2014 SD 1, ¶ 15, 842 N.W.2d 351, 355 (quoting *Eagle Ridge Estates Homeowners Ass'n, Inc. v. Anderson,* 2013 SD 21, ¶ 12, 827 N.W.2d 859, 864). Under the clearly erroneous standard, the Court is not to substitute its own opinions as to the weight and credibility of the evidence. *See Edinger v. Edinger*, 2006 SD 103, ¶ 15, 724 N.W.2d 852, 857. "On review, this Court defers to the circuit court, as fact finder, to determine the credibility of witnesses and the weight to be given to their testimony." *Hubbard v. City of Pierre,* 2010 SD 55, ¶ 26, 784 N.W.2d 499, 511. The Court is "not to set aside a trial court's findings of fact unless they are clearly erroneous." *Harksen v. Peska*, 2001 SD 75, ¶ 9, 630 N.W.2d 98, 101.

We review the circuit court's conclusions of law de novo. *Peterson,* ¶ 15, 842 N.W.2d at 355.

I. Punitive Damages Appropriately Granted in this Case

A. Tony's Willful, Wanton and Malicious Conduct Caused Harm

Judge Trandahl found that Tony "engaged in a continuous pattern of conduct that was conceived in the spirit of mischief or criminal indifference to civil obligations." Appx. 45, *COL* 102. The court found numerous instances when Tony breached his fiduciary duties to the corporations, violated the court's Order for Preliminary Injunction, and intentionally attempted to bully Rick by inequitably obtaining a superior financial position. *See* Appx. 28-32, *FOF* 209-231; Appx. 42-46, *COL* 78-111. Even though the court had specifically forbidden either party from incurring any additional debt, drawing on any current lines of credit or entering into any other contractual agreement in the name of O'Neill Farms, Inc. or O'Neill Cattle Company, Inc. without written consent of all shareholders and approval of the circuit court during the pendency of the litigation, Tony used corporate assets to secure credit for himself and other players in his ultra vires business ventures without the consent of Rick or the court. Appx. 45, *COL* 102. Judge Trandahl found that Tony breached his fiduciary duties to the corporations, violated the court's orders, and engaged in willful, wanton and malicious conduct:

> The evidence is clear and convincing, and this court concludes that Tony breached his fiduciary duty to O'Neill Farms, Inc. and O'Neill Cattle Company, Inc. by engaging in conduct that is willful, wanton and malicious. Appx. 42, *COL* 84.
>
> The Farm Credit Services loans to pay off Wells Fargo Bank was a scam designed to place Tony in a superior financial position over Rick, individually and as an officer and director of O'Neill Farms, Inc. and O'Neill Cattle Company, Inc. Appx. 30, *FOF* 223.
>
> The only purpose Tony had for forming Maximum Recovery, LLC and transferring the corporate debt to that entity was for him to gain a financial advantage over Rick. Appx. 30, *FOF* 224.
>
> Tony admits that he believes he can use O'Neill Farms, Inc. and O'Neill Cattle Company, Inc. to guarantee loans of non-O'Neill Farms Inc. and non-O'Neill Cattle Company, Inc. business ventures any time he wants without consulting Rick and without sharing the profits generated

> thereby, and Tony admits he has done so in the past. [Transcript of Tony's Deposition, p. 110, lines 3-13]. Appx. 43, *COL* 88.
>
> The evidence is clear and uncontradicted. When Tony, as a director of O'Neill Farms, Inc. and O'Neill Cattle Company, Inc. formed Maximum Recovery, LLC for the sole purpose of purchasing the corporate debt, he breached his fiduciary duty to the corporations by creating a scam that placed Tony in a superior and potentially coercive position that gives him leverage over Rick and the corporate assets. The corporate debt went from being held by a neutral creditor (Wells Fargo Bank) to a hostile creditor (Tony). It is evident and the court concludes that Tony took these actions of purchasing the corporate debt in "the spirit of mischief or criminal indifference to civil obligations." Appx. 44, *COL* 95.
>
> The evidence is clear and uncontradicted that Tony put his own personal interests over and above the corporate interests of O'Neill Farms, Inc. and O'Neill Cattle Company, Inc. Tony, as an officer and director of these two corporations, engaged in a continuous pattern of conduct that was conceived in the spirit of mischief or criminal indifference to civil obligations. He continued these actions even after the court entered its Order for Preliminary Injunction dated May 7, 2012 prohibiting him from using corporate assets to guarantee ultra vires loans. Appx. 45, *COL* 102.

Tony argues that Judge Trandahl's award of punitive damages to the corporations must be set aside because no compensatory damages were awarded. However, "[t]he rationale of the rule requiring actual damages before punitive damages may be awarded is that we do not punish conduct, no matter how malicious or reprehensible, which in fact causes no injury." *Schaffer v. Edward D. Jones & Co.*, 521 N.W.2d 921, 928 (S.D. 1994). While the trial court may not have specifically awarded compensatory damages in this equitable case, Judge Trandahl did find injury to the corporations. She chose to award punitive damages to the corporations as part of her equitable division of the parties' assets and debts in recognition of the harm Tony caused to the corporations. Judge Trandahl held:

> In this case, O'Neill Farms, Inc. and O'Neill Cattle Company, Inc. may not be completely compensated for the economic harm caused by Tony, as an officer and director of the corporations. Even with the equitable division of

> the corporate assets between these two corporations, Tony's actions of using corporate credit to guarantee ultra vires loans, leaves both corporations potentially liable for $4,440,263.74 owed to Farm Credit Services for Tony's personal debt and the debt of his other business ventures. There is no guarantee that Farm Credit Services will allow Tony to removed [sic] O'Neill Cattle Company, Inc. as the guarantor for any or all of these loans.
>
> Tony contends that O'Neill Farms, Inc. and O'Neill Cattle Company, Inc. have not been harmed by these ultra vires loans at Farm Credit Services because to date, neither corporation has had to make any payments on these loans. The court is not persuaded by this argument. Both corporations suffer immediate harm because these loans limit the ability of the corporations to obtain sufficient operating loans based upon their net worth, which is reduced by these ultra vires loans. Both corporations also have potential harm should Tony decide on any one or all of the Farm Credit Service loans to default on those loans. Tony is in a position with each of those loans as the sole decision maker to decide whether he will make the payments or default on the payments. Given the malice he has shown towards Rick personally, that is a real concern to Rick and it is a real concern to O'Neill Cattle Company, Inc., which is the corporation Rick has been awarded.
>
> ...
>
> When the court considers the relationship between the harm, or the potential harm, suffered by O'Neill Farms, Inc. and O'Neill Cattle Company, just as it relates to the ultra vires loans that Tony utilized for his own personal gain, and balancing that potential harm of $4,440,263.74 against Tony's financial condition, the court concludes that punitive damages of over $4 million dollars would be excessive as it would be out of line for what Tony has the ability to pay.

Appx. 45-46, *COL* 104, 105, 108.

Based on this careful analysis and weighing of the equities involved in this property division, Judge Trandahl awarded punitive damages in the amount of $225,000 to each corporation. Appx. 46, *COL* 110, 111.

B. Equitable Relief and Punitive Damages Interconnected

While historically, punitive damages have only been awarded in conjunction with compensatory damages, a rule prohibiting punitive damages without compensatory

damages is unworkable in a case at equity where oppressive, fraudulent, or malicious behavior permeates the action. Willful and wanton conduct should not be ignored when the victim turns to the justice system for equitable instead of monetary relief.

Principles of equity and purposes of punitive damages have a symbiotic relationship. A party seeking equity in the court must do equity, including entering the court with clean hands." *Knodel v. Kassel Tp.*, 1998 SD 73, ¶ 8, 581 N.W.2d 504, 507 (quoting *Talley v. Talley*, 1997 SD 88, ¶ 29, 566 N.W.2d 846, 852). A party seeking equity must act fairly and in good faith. *Miiller v. County of Davison*, 452 N.W.2d 119, 121 (S.D. 1990) (quoting *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806 (1945)). One of the established principles of equity is "that an individual should not be allowed to profit through his or her own wrongdoing." *Matter of Estate of O'Keefe*, 583 N.W.2d 138, 140 (S.D. 1998) (quoting *Noble v. McNerney*, 419 N.W.2d 424, 434 (Mich. 1988)); *see Lovejoy v. Lovejoy*, 2010 SD 39, ¶ 16, 782 N.W.2d 669, 674.

For punitive damages to be considered there must be evidence of "oppression, fraud, or malice." SDCL § 21-3-2; *Sporleder v. Van Liere*, 569 N.W.2d 8, 31 (S.D. 1997).

> Punitive damage awards extend not only to act as punishment for the individual defendant for past tortious acts and deter the defendant from repetition, but also to serve notice to others who would be tempted to repeat such actions in the future, that they do so at their substantial peril. To accomplish these purposes, the punitive damages must be "relatively large."

Schaffer v. Jones, 552 N.W.2d 801, 809 (S.D. 1996) (internal citations omitted).

When a court equitably divides property, it takes into consideration equity and the circumstances of the parties. *Halbersma v. Halbersma*, 2009 SD 98, 775 N.W.2d 210, 214. "It is axiomatic that each case must be judged upon its own set of facts." *Grode v.*

Grode, 1996 SD 15, 543 N.W.2d 795, 800. The same is true when the court considers the degree of reprehensibility of an individual's conduct in determining what amount, if any, to award in punitive damages. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003); *Roth v. Farner-Boken Co.,* 2003 SD 80, ¶ 47, 667 N.W.2d 651, 666. The court considers whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, deceit, or mere accident." *Roth,* 667 N.W.2d at 666.

> In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, or in any case of wrongful injury to animals, being subjects of property, committed intentionally or by willful and wanton misconduct, in disregard of humanity, the jury, in addition to the actual damage, may give damages for the sake of example, and by way of punishing the defendant.

SDCL § 21-3-2.

Rick is not asking the Court to rule that punitive damages are always available in cases at equity. Rather, the same standards that govern whether punitive damages can be considered by a jury would also govern whether a judge may consider imposing punitive damages at equity. First, a judge would have to consider whether there was clear and convincing evidence indicating "a reasonable basis to believe that there had been willful, wanton or malicious conduct on the part of the party claimed against." SDCL § 21-1-4.1. If such a finding was made, the trial court would then consider the type of harm and conduct involved in determining what amount, if any, should be awarded in punitive damages. *Campbell*, 538 U.S. at 419; *Roth.*, ¶ 47, 667 N.W.2d at 666.

This approach was effectively utilized by the circuit court in deciding to impose punitive damages. Judge Trandahl was vested with the responsibility to judge the credibility of the witnesses, weigh the evidence, and render a decision consistent with equity principles. For five days Judge Trandahl listened to and received evidence regarding the establishment and administration of O'Neill Cattle and O'Neill Farms, including the accounting and banking practices, and the timeline, creation and execution of a land separation agreement affecting each party's residence and pivot ownership.

Based upon the evidence and testimony received at trial, the court found Tony's testimony not credible and his actions before and during the trial to be inexcusable.

> Tony's strategy in dealing with Rick has been one of dishonesty and malicious mischief. Tony was not honest with Rick before this lawsuit, and during this lawsuit, in the handling of the corporate financing. In addition, Tony committed fraud on this court by lying about the existence of a signed Land Separation Agreement [Exhibit C]. The evidence is clear that Tony signed the Land Separation Agreement [Exhibit C] on August 16, 2011. Tony was also not honest with this court when he denied the existence of the negotiated agreement reached between the parties by their attorneys regarding the silage chopper in order to obtain an $827.93 advantage.
>
> Tony actions prior to this lawsuit, and during the pendency of this lawsuit, clearly evidence the fact that Tony does not enter this court with "clean hands".

Appx. 34, *COL* 12, 13.

Conduct evincing unclean hands and bad faith sounds in both equity and punitive damages. The court decided that "there was reasonable basis to believe that there has been willful, wanton or malicious conduct by Tony and against O'Neill Farms, Inc. and O'Neill Cattle, Inc." Specifically, the trial court found that Tony violated his fiduciary duties as a director and officer of the corporation in his failure to make full and frank disclosures of circumstances in a deal affecting the corporation. *See Schurr v. Weavers*,

53 N.W.2d 290, 293 (S.D. 1952). Additionally, the circuit court found that Tony took specific and deliberate actions that demonstrated a disregard for the rights of the corporations. Appx. 42-43, *COL* 85-87. Among other things, Tony used corporate credit to guarantee ultra vires loans without Rick's permission and without sharing profits. Appx. 43, *COL* 87-88. He also created Maximum Recovery, LLC for the sole purpose of purchasing corporate debt behind Rick's back. Appx. 43, *COL* 89.

Tasked with equitably separating Tony and Rick's assets and debt, Judge Trandahl had to recognize that equity principles mandate that Tony *not* be allowed to profit from his wrongdoings. *Estate of O'Keefe*, 583 N.W.2d at 140. Because punitive damages may be awarded if a party breaches a fiduciary duty owed to a corporation by engaging in willful, wanton and malicious conduct, Judge Trandahl was able to uphold the principles of equity by imposing a punitive damages award. The punitive damages assessed thus became part of the equitable separation.

In *Lovejoy*, the husband sought to admit evidence of an undisclosed debt after the close of trial but before the court issued its findings of fact and conclusions of law. 2010 SD 39, ¶ 5, 782 N.W.2d 669, 671. Following the wife's objection, and two hearings, the trial court agreed. *Id.* ¶ 15, 782 N.W.2d at 674. It then distributed the debt as part of the equitable property distribution. *Id.* Husband was ordered to pay 75% of the debt. *Id.* Husband appealed on the grounds that the trial court abused its discretion when it "divided the debts inequitably." *Id.* ¶ 5, 782 N.W.2d at 671.

The South Dakota Supreme Court affirmed the trial court's equitable property separation, including the debt allocation. *Id.* ¶ 16, 782 N.W.2d at 672.

> In dividing the marital property, the court is to consider the equity and circumstances of the parties. Here, the circumstances failed to satisfy the

> circuit court that the late disclosure was entirely blameless. Considering the relative circumstances of the parties, we see no abuse of discretion in the court's decision to allocate to [husband] a greater portion of the omitted sealed grain debt.

Id.

This Court has consistently stated that it "will not overturn a right result even though it is based on a wrong reason." *Seymour v. W. Dakota Vocational Technical Inst.*, 419 N.W.2d 206, 209 (S.D. 1988) (citations omitted). In the present action, Tony guaranteed ultra vires loans with corporate assets without Rick or the corporations' approval. His actions made both corporations potentially liable for $4,440,263.74. Consistent with the *Lovejoy* Court and South Dakota law, the trial court refused to let Tony capitalize on his misconduct. *Id.* Judge Trandahl reached the right result.

An individual seeking equity should not be foreclosed from holding the other party responsible for their oppressive, fraudulent, or malicious actions. It would be inconsistent with the purposes of equity and of punitive damages to passively condone past tortious acts and future repetition of the same by excluding cases in equity from the possibility of punitive damages. Therefore, the circuit court's November 4, 2013 Findings of Fact and Conclusions of Law and December 23, 2013 Order imposing punitive damages must be AFFIRMED.

Alternatively, if the Court declines to recognize equitable claims warrant the possibility of a punitive damages award, this matter should be remanded back to the trial court for reconsideration as the punitive damages award was clearly a considerable factor in the trial court's equitable division of assets and debts. When malicious conduct is wholly supported by the evidence, as it is in this case, the trial court should have another

opportunity to correctly apply the law to the facts in order to avoid an injustice. *See Henry v. Henry*, 2000 SD 4, ¶ 9, 604 N.W.2d 285, 289.

II. Recusal Request Untimely; Judge Trandahl Honored South Dakota Code of Judicial Conduct

A. Tony's Recusal Request Properly Denied as Untimely

South Dakota law provides a mechanism for a party to ask a Judge to recuse himself or herself from his matter without stating a reason. The request for recusal must be done prior to submitting argument or pleading to that particular judge. SDCL § 15-12-24. Failure to do so waives "the right thereafter to file an affidavit for change of such judge . . . Such waiver shall continue until the final determination of the action, and includes all subsequent motions, hearings, proceedings, trials, new trials, and all proceedings to enforce, amend, or vacate any order or judgment." SDCL § 15-12-24.

> The purpose behind our peremptory recusal rules is to allow removal of a judge without stating any reason if a party entertains a concern about a judge's impartiality. Once a party puts a matter before a judge, however, judicial economy and fairness to the parties require that it remain there.

State v. Burgers, 1999 SD 140, ¶ 13, 602 N.W.2d 277, 280.

Tony filed suit against Rick in February 2012. The Honorable Kathleen Trandahl was assigned to hear and decide the case. The first hearing was scheduled for May 4, 2012. Pleadings and arguments were submitted by the parties. SDCL § 15-12-24. Nearly two years later, on March 17, 2014, Tony informally asked Judge Trandahl to recuse herself. None of these facts are in dispute.

Pursuant to SDCL § 15-12-24, Tony waived his right to ask Judge Trandahl to recuse herself back in 2012. Judge Trandahl's denial of Tony's recusal request on the

grounds that it was untimely is firmly rooted in and required under South Dakota law. Appx. 67-72.

B. Disagreement and Disgruntlement with Judge's Decision Does Not Entitle Tony to, nor Warrant, Judicial Disqualification

Judicial disqualification "was never intended to enable a discontented litigant to oust a judge because of adverse rulings made[.]" *Marko v. Marko,* 2012 SD 54, ¶ 21, 816 N.W.2d 820, 827 (quoting *Ex parte American Steel Barrel Co.,* 230 U.S. 35, 44 (1913)).

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed toward the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas, he could never render decisions."

Litecky v. United States, 510 U.S. 540, 550-551 (1994) (internal citations omitted).

It is well-settled "that decisions to recuse lie within a judge's discretion." *Marko*, ¶ 18, 816 N.W.2d at 826. "The right to a change of judge is not one of absolute right. The judge is entitled to consult his or her own mind and he or she, perhaps better than anyone else, knows whether or not he or she can give a defendant a fair and impartial trial in every way." *Tri-State Refining and Inv. Co., Inc. v. Apaloosa Co.*, 45 N.W.2d 104, 107 (S.D. 1990) (citing *State v. Smith*, 242 N.W.2d 320 (Iowa 1976)). "A judge exercises discretion in deciding whether the facts and circumstances fit within the disqualifying criteria." *Marko,* ¶ 18, 816 N.W.2d at 826. If a judge answers this question affirmatively, recusal is required. *Id.*

Conversely, if the disqualification requirements are not satisfied, a judge has an "equally strong duty not to recuse when the circumstances do not require recusal."

Marko, ¶ 21 (citing Center for Professional Responsibility, American Bar Association, Annotated Model Code of Judicial Conduct 187 (2004)). A "judge *shall* hear and decide matters assigned to the judge except those in which disqualification is required." Code of Judicial Conduct, SDCL ch. 16-2, App., Canon 3B(1) (emphasis supplied). "A judge's duty to hear a case discourages potential abuse of the recusal process." *Id.*

In certain circumstances judges have a legal and ethical obligation to recuse themselves *sua sponte.* SDCL § 15-12-37. Canon 3E(1) provides that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonable be questioned, including but not limited to instances" of (a) "personal bias or prejudice" or "personal knowledge," (b) prior service as a lawyer in the matter, (c) economic interest, and (d) close personal relationship of relatives or parties to a proceeding." *Marko*, ¶ 19 (citing Code of Judicial Conduct, SDCL chapter 16-2, App., Canon 3E(1). Commentary for Canon 3E(1) explains that "Under this rule, a judge is disqualified whenever the judge's impartiality might *reasonably* be questioned, regardless whether any of the specific rules in Section 3E(1) apply." South Dakota Code of Judicial Conduct, Canon 3E(1), *E(1) Commentary* (emphasis supplied).

The question of whether a judge's "impartiality might reasonably be questioned," however, "cannot be addressed from the perspective of a disappointed litigant or even from the perspective of the judge in question. Rather, the test is: would a reasonable person knowing all the facts conclude that the judge's impartiality might reasonably be questioned?" *Marko*, ¶ 22, 816 N.W.2d at 827 (quoting *Sao Paulo State v. Am. Tobacco Co., Inc.,* 535 U.S. 229, 232-33 (2002); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 861 (1988)).

"Ordinarily, a judge cannot be disqualified for views formed on the basis of what the judge learned in court." *Marko,* ¶ 23 (citing *Litecky*, 510 U.S. at 550-56). "Likewise, even in cases where judges have had prior judicial exposure to parties, without more, appellate courts have ruled that this is insufficient to show that impartiality might reasonably be questioned." *Id.* (citing *U.S. v. Ayala*, 289 F.3d 16, 27 (1st Cir. 2002); *U.S. v. Parrilla Bonilla*, 626 F.2d 177, 180 (1st Cir. 1980).

> Every judge is called upon to form opinions on the merits of a case and often on the parties and witnesses involved, but that does not mean the judge has a prejudice or bias. Simply put, "[t]he objective appearance of an adverse disposition attributable to information acquired in a prior trial is not an objective appearance of personal bias or prejudice, and hence not an objective appearance of improper partiality."

Marko, ¶ 23 (quoting *Litecky*, 510 U.S. at 550-56).

Judge Trandahl was assigned to and presided over the O'Neills' matter since its inception. As Tony requested and South Dakota's Code of Judicial Conduct requires she "hear[d] and decide[d] matters assigned to the judge except those in which disqualification is required." Code of Judicial Conduct, SDCL ch. 16-2, App., Canon 3B(1). She sat through numerous hearings, reviewed voluminous pleadings and documents, and listened to live, in-court testimony from Tony, Rick, experts hired by both sides, other O'Neill family members, and more during a five-day court trial. As Judge Trandahl set upon to equitably divide the brothers' land and assets as Tony had asked, she issued 44 pages of Findings of Fact and Conclusions of Law articulating her decision and her rationale. Despite Judge Trandahl's finding that Tony's testimony was not credible, the December 23, 2013 Order was not an all-or-nothing decision in any party's favor.

> Both Tony and Rick were awarded a corporation, real estate, corporate cattle, farm equipment, other corporate assets, and corporate debt. The

> court determined that the custom combining business was Tony's separate property. The court also awarded Rick punitive damages.

Appx. 68.

A judge is presumed to be impartial. Tony, as "the parking seeking disqualification bears the substantial burden of proving otherwise." *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir. 2003). In order to "establish bias or prejudice from court conduct," Tony must show that the judge had a disposition "so extreme as to display clear inability to render fair judgment." *Litecky,* 510 U.S. at 551. "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 555.

It is acknowledged that Judge Trandahl shared her opinion that Tony perjured himself at the trial via a letter to the Bennett County Sheriff's Office and during the Hearing on the Motion for Contempt. Tony, however, only cited Judge Trandahl's remark at the Contempt Hearing as his rationale for Judge Trandahl's mandated recusal. That fact, standing alone, is insufficient under South Dakota and federal case law to require or allow judicial recusal. *Marko,* ¶23 (citing *Litecky*, 510 U.S. at 550-56). As the judge appointed in this matter, Judge Trandahl was "called upon to form opinion on the merits of [the] case and [ ] on the parties and witnesses involved." *Marko*, ¶ 23. Judge Trandahl's opinion was formed following a five-day court trial where she sat as the arbiter of fact, listening to live testimony and receiving evidence. Judge Trandahl did her job. Judge Trandahl did the job Tony asked her to do. Judges are not to make decisions in

a vacuum. Tony's discontent should not overshadow Judge Trandahl's adherence to the South Dakota Code of Judicial Conduct.

> Just because the court found that portions of Tony's testimony was not credible and may have crossed the line to perjury does not mean the court is incapable of keeping an open mind and make separate credibility determinations at future hearing in which Tony testifies.

Appx. 71.

Tony points to nothing more than Judge Trandahl's two comments regarding Tony's truthfulness at trial to support his allegation that Judge Trandahl harbors "a deep-seated favoritism or antagonism that would make fair judgment impossible." Pursuant to South Dakota law, Judge Trandahl's expression of her opinions formed on the basis of what she learned in court is insufficient to show that her impartiality might reasonably be questioned. *Marko,* ¶ 23 (citing *Ayala*, 289 F.3d at 27; *Parrilla Bonilla*, 626 F.2d at 180). Tony cannot and has not satisfied his burden to disqualify Judge Trandahl from presiding over the O'Neill in the past or in the future. Therefore, Judge Trandahl's denial of Tony's informal request to recuse herself from further proceedings should be AFFIRMED.

III. Tony O'Neill Properly Held in Contempt of December 23, 2013 Order; Contempt Order was Remedial in Nature and Afforded Opportunity to "Purge"

"The appropriate remedy or punishment for contempt of court lies within the sound discretion of the trial court." *Keller v. Keller,* 2003 SD 36, ¶ 8, 660 N.W.2d 619, 622 (citing *Harksen v. Peska*, 2001 SD 75, 630 N.W.2d 98). "Abuse of discretion is discretion not justified by, and clearly against, reason and evidence. The test is whether a judicial mind, in view of the law and circumstances, could reasonably have reached the conclusion." *Harksen,* ¶ 10, 630 N.W.2d at 101.

The purpose of the civil contempt proceeding is to force a party "to comply with orders and decrees issued by a court in a civil action for the benefit of an opposing party." *Wold Family Farms, Inc. v. Heartland Organic Foods, Inc.*, 2003 SD 45, ¶ 14, 661 N.W.2d 719, 723. For the circuit court to make a finding of civil contempt, the following elements must be satisfied:

(1) existence of an order;

(2) knowledge of the order;

(3) ability to comply with the order; and

(4) willful or contumacious disobedience of the order.

Harksen, ¶ 10, 630 N.W.2d at 101.

Additionally, "[t]o form the basis for a subsequent finding of contempt, an order must state the details of compliance in such clear, specific, and unambiguous terms that the person to whom it is directed will know exactly what duties or obligations are imposed upon him." *Karras v. Gannon*, 345 N.W.2d 854, 859 (S.D. 1984).

> The purpose of civil contempt is to compel compliance with the court's order. Its sanction is coercive. The sanction becomes coercive when the contemnor is allowed to purge himself of contempt. Without it, the sanction is merely punitive. Other jurisdictions have held that the ability to purge is a requirement of a civil contempt sanction.

Harksen, ¶ 22, 630 N.W.2d at 102 (internal citations omitted).

The nature of the sanction in a civil contempt proceedings is intended to be coercive in nature, as it seeks to compel "the person to act in accordance with the court's order[,]" rather than to punish for past conduct. *Wold Family Farms*, ¶ 14, 661 N.W.2d at 723. "A sanction will be civil and remedial in nature if it 'coerces the defendant into compliance with the court's order, or compensates the complainant for losses sustained.'"

Sazama v. State ex rel. Muilenberg, 2007 SD 17, ¶ 27, 729 N.W.2d 335, 344 (quoting *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 829 (1994)).

It is undisputed that Judge Trandahl issued an interim Order on Court's Findings of Fact & Conclusions of Law on December 23, 2013. App. 32-37; *Harksen,* ¶ 10, 630 N.W.2d at 101. Not only did the circuit court split the brothers' companies, property, and equipment as Tony had asked, but, by way of bold headings and paragraph explanations, it explicitly articulated Tony and Rick's responsibilities, obligations, and timelines to do so. Specifically, Tony and Rick were ordered to execute all necessary documents and cooperate with the other to accomplish the same as it pertained to transferring corporate ownership, land, equipment, and cattle brands by December 31, 2013. *Karras*, 345 N.W.2d at 859. Additionally, the Court required "[e]ach party [to] cooperate and provide the necessary information so that all income tax returns can be accurately completed in accordance with this order." *See id.*

There is nothing in the record to suggest that Tony lacked knowledge of the Court's Order. Tony has not made any claim to the contrary. *Harksen,* ¶ 10, 630 N.W.2d at 101.

At the time the Court issued its December 23, 2013 Order, both Rick and Tony were living on the land awarded to them. To finalize the land separation and the brothers' possession of certain Pivots and Parcels, the Order required the "formal transfer of ownership of the real estate" be completed by December 31, 2013. The O'Neill brothers' long-time CPA firm, Fred A. Lockwood & Co., drafted the necessary transfer documents. Rick signed the documents and provided them to Tony to do the same. Tony refused.

Tony's refusal to finalize the formal transfer was only part of his disregard for the trial court's Order. Despite Rick's possession and award of Pivots 1 and 2, Tony did not remove his cattle from said Pivots by December 31, 2013. As of the March 13, 2014 Contempt Hearing Tony still had 500 head of cattle grazing on Rick's property without Rick's permission. Tony had multiple hired-hands and equipment to utilize to transport the cattle from Rick's land to Tony's. Tony chose to leave the cattle on Rick's land. Tony also trespassed upon Rick's property to dismantle protection panels surrounding the irrigation pivots. Tony's 500-head trampled, flattened, and crushed the exposed irrigation pivots' electrical components.

The Contempt Order entered on March 14, 2014 required Tony to pay Rick rent in the amount of $1 per day, per cow, for a total of $500 a day, for each day his cattle were wrongfully grazing on the cornstalks on Rick's land. The court commanded Tony to get his cattle off of Rick's property by March 16, 2014 at the latest. The amount Tony owed Rick would be calculated from January 1, 2014 until March 16, 2014. This sanction was remedial in nature, "coerc[ing] [Tony] into compliance with the court's order" and "compensat[ing] [Rick] for the losses he sustained" as a result of Tony's refusal to honor the court's Order. *State ex. rel Muilenberg,* ¶ 27, 729 N.W.2d at 345. Additionally, the court gave Tony the opportunity to "purge himself of contempt" if he removed the cattle earlier than the March 16, 2014 deadline. Imposition of a remedial sanction, that Tony could purge if he so chose, ensured that the court's Contempt Order was not punitive in nature. *See Harksen*, ¶ 22, 630 N.W.2d at 102.

In his Motion for Contempt, Rick had requested that the court impose strict, aggressive sanctions upon Tony for his willful disobedience and spiteful actions.

19. Rick is requesting an Order of Civil Contempt as follows:

a. Tony shall be confined in jail until he i) executed all of the asset transfer documents, ii) relinquishes possession of Pivots 1 & 2 by removing all Tony's livestock therefrom and iii) provides Fred A. Lockwood & Co. all necessary and requested information in his possession.

b. Tony shall pay Rick for the use of Pivots 1 & 2 from January 1, 2014 to the present. Rick will testify that the going fair rental value is $1 per day per head. Approximately 500 head per day for 50 days amounts to $25,000.

c. Tony shall pay Rick for the damage caused to Pivots 1 & 2 by the [sic] Tony's cattle. Rick will not be able to determine the full extent of the damage until he attempts to use the pivots this spring.

d. Tony shall pay rick $1,000 for the 4 panels and 1 gate that were removed and have not been returned.

e. Tony shall pay for Rick's attorney's fees in bringing this Motion.

Appx. 54-58.

Rick asked the court to find Tony in civil and criminal contempt and punish Tony for violating the December 23, 2013 Order. *State ex rel Muilenberg*, ¶ 24, 729 N.W.2d at 344. Despite the authority and latitude to do so, the court declined to impose all but one of Rick's requested sanctions. The Contempt Order went far enough so as to "compensate [Rick] for the losses he sustained" without punishing Tony for his previous conduct. Tony's ability to purge himself as the contemnor further illustrated that the Court only found Tony to be in civil contempt. *Id.*; *Int'l Union*, 512 U.S. at 829. Again, just as was the case in the December 23, 2013 Order, the court did not employ an all-or-nothing approach in its Contempt Order.

It is undisputed that Judge Trandahl met with Tony and Rick's counsel on December 19, 2013, prior to entering the December 23, 2013 Order, to discuss the status of the separation and possible extensions. Appx. 64-65. Tony and Rick's counsel mutually

agreed that the Order should not be finalized until the transfers were completed and the tax consequences ascertained. Appx. 64-65. The December 23, 2013 Order memorialized the parties' agreement and obligations. Tony did not file an objection to the court's Order.

Two months later it was brought to Judge Trandahl's attention that Tony was actively refusing to comply with the court's Order. The Affidavit of Clint Sargent which accompanied the Motion for Contempt stated that Tony had refused to sign the necessary land and asset transfer documents prepared by his longtime CPA firm, that Tony had failed to remove cattle, approximately 500-head, off of Rick's property by January 1, 2014, that the cattle remained on Rick's property without his permission at the time the Affidavit was filed, and that the Tony had intentionally damaged the protection panels surrounding the irrigation pivots on Rick's property. Tony did not attend the hearing. Tony's counsel agreed on the record that the court could accept the statements in Attorney Sargent's affidavit as true. With no factual dispute requiring an evidentiary hearing, Judge Trandahl allowed each party to make legal arguments before ruling. Despite Tony's agreement to complete certain transfers before a final order was issued, Tony contended that his right to appeal superseded any and all obligations under the Order.

Tony is foreclosed from retroactively challenging the facts contained in the Affidavit. Tony was provided with the Affidavit of Clint Sargent in advance of the March 13, 2014 Contempt Hearing. Rick was prepared to put on evidence in support of his Motion for Contempt. Tony, however, agreed that there were no factual issues in dispute. CHT. 5:12-6:5. "Tony and Rick stipulated that the Court could accept the factual allegations contained in the Affidavit of Clint Sargent dated February 25, 2014 as true for the purposes of the hearing." Appx. 64. Because the fair market rental value was

addressed in the Affidavit, Tony's acceptance of the Affidavit's truthfulness encompasses and includes that fact. Appx. 64, CHT: 5:12-6:5.

Furthermore, it is within the trial court's discretion to fashion an "appropriate remedy or punishment for contempt of court." *Keller* ¶ 8, 660 N.W.2d at 622. Had the trial court disagreed with the Affidavit's proposed calculation for land rent it was within the trial court's discretion to impose a remedy or punishment it deemed appropriate.

Tony didn't just disobey the circuit court's December 23, 2013 Order, he actively refused to sign the transfer documents and he intentionally and maliciously damaged the land awarded to Rick. Tony then justified his conduct and behavior under the guise of "appellate procedure." Based upon the law and the evidence presented, it was within the trial court's discretion to compel Tony's compliance with the December 23, 2013 Order by holding him in contempt and ordering that he pay Rick $500 a day in land rent for each day he was in contempt. *Harksen,* ¶ 10, 630 N.W.2d at 101.

The trial court's March 14, 2014 Contempt Order should remain undisturbed unless the court's conclusion was "not justified by, and clearly against, reason and evidence." *Id.* Therefore, the trial court's March 14, 2014 Contempt Order should be AFFIRMED.

IV. Trial Court's Rejection of Janice Tweedy's Testimony Was Within the Court's Discretion; Trial Court Properly Enforced the Land Separation Agreement

Tony testified, live and under oath, that he created, brought with, and filled in the blanks on a land separation agreement he titled "Tony and Rick O'Neill separation," at the August 16, 2011 meeting with Rick. TT. 98:20-99:6. Despite these admissions, Tony denied that the August 2011 meeting culminated with the brothers signing the land

separation agreement. TT. 107:6-10. Tony went so far as to tell the trial court that he had never seen a land separation version that split up the pivots until March 2012.

Tony's forgery allegation was directly undermined by computer forensic expert Daniel Meinke. Based upon his analysis of Tony's computer, Meinke definitively told the court that Tony had both seen and drafted the land separation agreement. TT. 492:10-24. Meinke's expert testimony further underlined Tony's disingenuous version of events when it corroborated and supported the testimony of Kari and Dean who said they saw a signed version of "Tony and Rick O'Neill separation" in August 2011. TT. 547:23-548:11; 586:15-587:18.

Despite being caught in his own lies by contradictory documents, forensic evidence, and testimony, Tony was undeterred. On rebuttal, he alleged a nefarious conspiracy by Rick to explain away his lies. Under Tony's scenario, his farmer brother Rick snuck into Tony's house, got on to Tony's computer, typed up a land separation agreement, had the knowledge and ability to alter the meta data related to the creation of the alleged forged document, had the knowledge and ability to cover his tracks so that a computer forensic expert wouldn't be able to find it, had the foresight to think that if the matter ever went to court it was important that he cover his tracks on Tony's computer because it may be examined by a computer examiner, and that he then cut and pasted Tony's signature onto the land separation agreement but misaligned the signature line within millimeters of the alignment of the other text on the document. Tony used handwriting expert, Janice Tweedy, to support his creative concoction.

Judge Trandahl made 64 specific findings of fact with regard to the corporate real estate and the Land Separation Agreement. *See* Appx. 7-14, *FOF* 26-89. Judge Trandahl

reviewed documents, listened to audio recordings of conversations, received testimony from 3 expert witnesses and heard eyewitness testimony of events from Tony, Rick, Dean and Kari. Judge Trandahl made specific findings as to each witness's credibility. With regard to Tony's expert, Janice Tweedy, Judge Trandahl made the following finding:

> The court finds that the opinion of Janis Tweedy that Tony's signature was "cut and pasted" into Exhibit C is not consistent with all of the other evidence in this case. The court finds that the evidence in this case outweighs the opinion of Janis Tweedy, and the court disregards her opinion entirely.

Appx. 13, *FOF* 84.

Judge Trandahl properly applied the law in considering the testimony of Tony's expert, Janice Tweedy. The court stated in Conclusion of Law 7:

> When the finder of fact considers the weight to be given to an expert's opinion, the finder of fact should consider the expert's qualifications, credibility, and reasons for the opinion. The finder of fact is not bound by the opinion. Of course, the mere fact that an expert testifies does not mean that his or her opinion must be accepted by the trial court. A trial court, when also sitting as the fact finder, is the sole judge of the credibility of the witnesses and can accept or reject all or part of the expert's testimony. *State v. Jensen,* 1998 SD 52, ¶54. If the finder of fact determines that the reasons for the expert's opinion are unsound, or that other evidence outweighs the opinion, the finder of fact may disregard the opinion entirely. *Stormo v. Strong,* 469 NW2d 816 (SD 1991); *see also,* Civil Jury Instruction 1-30-50.

Appx. 33.

Tony asked Judge Trandahl to judge the credibility of the witnesses and weigh the evidence. Based upon the evidence and testimony received at the five-day court trial, the Court found Tony's testimony and Tweedy's expert opinion challenging the signed land separation agreement's authenticity not to be credible, inconsistent with the forensic findings from his computer, and contradicted by the credible testimony of forensic

computer expert Dan Meinke, Dean, Kari, and Rick. The Court disregarded Tweedy's opinion in its entirety.

Unless the trial court's findings of fact are clearly erroneous, this Honorable Court must defer to the factfinder's determination as to the credibility of witnesses and the weight to be afforded certain evidence. *Hubbard,* ¶ 26, N.W.2d at 511. The circuit court's acceptance of Meinke's opinion and rejection of Tweedy's opinion must not be set aside. *Harksen,* ¶ 9, 630 N.W.2d at 101. Therefore, the circuit court's November 4, 2013 Findings of Fact and Conclusions of Law and December 23, 2013 Order enforcing the land separation agreement proffered by Rick must be AFFIRMED.

V. Rick's Custom-Hire Work for Dean was Authorized by the Circuit Court and Complied with May 7, 2012 Preliminary Injunction Order

Following the May 4, 2012 Preliminary Injunction Evidentiary Hearing, Judge Trandahl ordered that neither Rick nor Tony were to "incur any additional debt, draw on any current lines of credit or enter into any other contractual agreement in the name of O'Neill Farms, Inc. or O'Neill Cattle Company, Inc. without written consent of all shareholders and approval of the Court." Appx. 1-3. Specifically, the brothers' corporations were forbidden from leasing Dean's property. HPI. 197:5-9. Judge Trandahl, however, made it clear that Dean was free to hire Tony or Rick for custom farm work if he chose.

> I am not going to allow the corporations to lease any of Dean's property. They can custom-farm and work out with Dean individually and get paid for the work that they do. But none of us has the ability to tell Dean what to do. He is not a party to this action.

HPI. 197:5-9.

At the July 2013 court trial, Dean testified that he honored the court's preliminary injunction order and did not lease any of his land to either Rick or Tony.

TT. 552:14-19. Dean confirmed that he hired Rick on a "custom-hire" basis to assist him. TT. 552:20-22; TT: 552:23-553:2. The circuit court found Dean to be a credible witness and that Dean's "custom-hire" of Rick was sanctioned. Appx. 10, *FOF* 49; Appx. 38, *COL* 47-48.

> 47. At the evidentiary hearing on Preliminary Injunction held on May 4, 2012, the court instructed the parties they could not lease Dean's land. The court did indicate it would allow Tony and/or Rick to do custom work for Dean.
>
> 48. Rick did not violate this court directive when he did custom work for Dean. Tony is not entitled to one-half of the crop loss check date December of 2012because that crop loss check is not a corporate asset. [Exhibit 105]

Appx. 38, *COL* 47-48.

Absent a clearly erroneous finding, the circuit court's decision must be given due regard. Therefore, the circuit court's November 4, 2013 Findings of Fact and Conclusions of Law and December 23, 2013 Order awarding the December 2012 crop loss check to Rick must be AFFIRMED.

CONCLUSION

In conclusion, Appellee Rick O'Neill respectfully requests that this Honorable Court AFFIRM the trial court's December 23, 2013 Order awarding punitive damages, AFFIRM Judge Trandahl's Denial of Appellant Tony O'Neill's Informal Request for Recusal; AFFIRM the circuit court's March 14, 2014 Contempt Order, AFFIRM the trial court's December 23, 2013 Order enforcing the land separation agreement; and AFFIRM the circuit court's December 23, 2013 Order awarding the December 2012 crop loss check to Rick.

Respectfully submitted this 23rd day of March, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Appellee's Brief and all appendices were emailed and mailed by first class mail, postage prepaid to:

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On this 23rd day of March, 2015.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 9,047 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 27036 / 27113

JAMES ANTHONY O'NEILL,

Plaintiff and Appellant,

vs.

RICHARD DEAN O'NEILL,

Defendant and Appellee.

APPEAL FROM CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT, BENNETT COUNTY, SOUTH DAKOTA
THE HONORABLE KATHLEEN F. TRANDAHL, CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Plaintiff and Appellant Tony O'Neill (hereinafter, "Tony") respectfully submits the following as his Reply Brief in this matter pursuant to SDCL 15-26A-75(3). For the reasons set forth, as well as the reasons set forth in his initial Appellant's Brief, Tony respectfully submits that this matter should be reversed.[1]

ARGUMENT

I. The trial court's award of punitive damages is fundamentally inconsistent with settled South Dakota law.

On the issue of whether punitive damages may be awarded in the absence of compensatory damages, this Court's prior decisions could not be clearer. This Court has consistently and repeatedly held that *punitive damages may not be awarded in the absence of a compensatory damage award. See Schaffer v. Edward D. Jones & Co.*, 521 N.W.2d 921, 928 (S.D. 1994) ("This Court has consistently held that punitive damages are not allowed absent an award of compensatory damages"); *TimeOut, Inc. v Karras*, 469 N.W.2d 380, 386 (S.D. 1991) ("exemplary damages may not be awarded absent an award of compensatory damages"); *Johnson v. Kirkwood*, 306 N.W.2d 640 (S.D. 1981) ("exemplary damages . . . are not allowed absent an award for compensatory damages"); *Henry v. Henry*, 604 N.W2d 285, 288 (S.D. 2000) ("This Court has consistently held that punitive damages are not allowed absent an award for compensatory damages"). There is nothing ambiguous about these cases, and this Court has never wavered from this well-settled principle.

[1] Tony's counsel on appeal did not participate in the underlying trial. Appellate counsel made their notice of appearance on March 12, 2014.

Nevertheless, Rick insists that this Court should overrule its long line of decisions and hold that punitive damages may be awarded in an equitable case even in the absence of actual damages. Rick contends that equitable relief and punitive damages are "interconnected" and that it would be "inconsistent with purposes of equity" to disallow punitive damages in this case. Rick's strained argument, however, should be rejected for several reasons.

First, the rule that punitive damages may not be awarded in the absence of actual damages is not a creation of case law, but a statutory rule embodied in SDCL 21-3-2. This section provides:

> In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, or in any case of wrongful injury to animals, being subjects of property, committed intentionally or by willful and wanton misconduct, in disregard of humanity, the jury, *in addition to the actual damage*, may give damages for the sake of example, and by way of punishing the defendant.

SDCL 21-3-2 (emphasis added). The express language of SDCL 21-3-2 contemplates that punitive damages may *only* be awarded in conjunction with an award of actual damages. Of course, it is firmly established that "[i]n this jurisdiction, punitive damages have not been recoverable at common law, but rather only where specifically authorized by statute." *Olson-Roti v. Kilcom*, 2002 SD 131, ¶39, 653 N.W.2d 254, 261 (Gilbertson, C.J., concurring). Because Rick has not pointed to any statutory provision authorizing punitive damages beyond those contemplated by SDCL 21-3-2, his argument must fail.

Second, Rick has pointed to no authority suggesting that punitive damages may be awarded in equity. To the contrary, this very argument has been rejected by numerous

courts. *See Campbell v. Bi-Lo, Inc.*, 392 S.E.2d 477 (S.C. Ct. App. 1990) (recognizing that punitive damages are not available in equity); *Harber v. Etheridge*, 348 S.E.2d 374 (S.C. Ct. App. 1986) (same); *Mortgage Finance, Inc. v. Podleski*, 742 P.2d 900 (Colo. 1987) (same); *Seal v. Hart*, 755 P.2d 462 (Colo. Ct. App. 1988) (same); *Kaitz v. District Court*, 650 P.2d 553, 556 (Colo. 1982) (same). Rick has simply shown no reason for this Court to adopt a rule which so drastically departs from settled South Dakota law.

Finally, Rick's equity argument completely ignores the other arguments advanced by Tony with regard to the punitive damages issue. As explained previously, the trial court's award of punitive damages is inappropriate for reasons beyond the absence of actual damages. In particular, the trial court also erred by: (1) awarding punitive damages in favor of non-parties; and (2) awarding punitive damages without a supporting cause of action. *See Phelps v. Hamilton*, 122 F.3d 1309, 1319 (10th Cir. 1997) ("The general rule . . . is that a judgment may not be rendered for or against one who is not a party to the action or who does not intervene therein"); *Phillip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) ("the Constitution's Due Process Clause forbids a state to use punitive damages to punish a defendant for injury that it inflicts upon nonparties . . . ."); *Risse v. Meeks*, 385 N.W.2d 875, 883 (S.D. 1998) ("a claim for punitive damages must be based on some underlying cause of action"); *Olson-Roti*, 2002 SD 131 at ¶27, 653 N.W.2d at 259 ("Punitive damages are allowable only when supported by a cause of action").

Rick's failure to address (or even acknowledge) these compelling arguments speaks volumes. Rick is simply unable to justify such an illogical result. Thus, even if

this Court were to abandon its prior holdings and accept Rick's flawed "equity" argument, the award of punitive damages in this case would still be reversible error. Accordingly, Tony respectfully submits that this Court should reverse and remand with instructions to vacate the punitive damages award.

II. The trial court erred in failing to recuse itself.

Despite repeatedly accusing Tony of perjury, the trial court refused to disqualify itself. In his effort to justify the trial court's refusal, Rick makes two arguments. First, he contends that Tony's request was untimely pursuant to SDCL 15-12-24. Second, he argues that the trial court's perjury accusations amounted to nothing more than ordinary credibility determinations. Each of these arguments fails.

First, the assertion that Tony's request for recusal was untimely under SDCL 15-12-24 is a diversion. SDCL 15-12-24 deals with the timeliness of peremptory affidavits for a change of judge filed pursuant to SDCL 15-12-21. But Tony did not file any such affidavit in this case. Instead, Tony simply made an informal request for recusal pursuant to SDCL 15-12-21.1. While such a request is a statutory prerequisite to filing an affidavit for change of judge pursuant to SDCL 15-12-21, it does not follow that an informal request for approval may only be made in conjunction with the filing of a peremptory affidavit for change of judge.

Rick's untimeliness argument rests completely on the false premise that the only way a party may request recusal of a sitting judge is by the filing of a peremptory affidavit at the start of the case. Once the parties have filed pleadings and put the matter before a judge, Rick argues, the parties have forever waived their ability to seek recusal

for any reason. This argument is completely inconsistent with settled South Dakota law. Indeed, one of the primary cases cited by Rick, *Marko v. Marko*, 2012 SD 54, 816 N.W.2d 820, expressly considered an informal request for recusal under SDCL 15-12-12.1 made after the beginning of trial. *Marko*, 2012 SD 54 at ¶14, 816 N.W.2d at 825. In doing so, the Court recognized that "[j]udicial disqualification for 'personal bias or prejudice concerning a party' cannot be voluntarily waived." *Id.* at ¶14, 816 N.W.2d at 825 n.1 (quoting Code of Judicial Conduct, SDCL Ch. 16-2, App., Canon 3F).

Second, the suggestion that the trial court's accusations of perjury amounted to mere credibility determinations based upon information learned at trial is misguided. The trial court repeatedly and consistently accused Tony of perjury in open court. Moreover, the trial court sent a letter to the chief law enforcement officials in Bennett County and Tripp County, urging them to investigate and prosecute Tony for the felony offense of perjury. This goes beyond a mere credibility determination and bears all the objective earmarks of "personal bias or prejudice" against Tony.

Also, new information concerning the trial court's animus toward Tony has recently come to light. After referring the matter to law enforcement for investigation and prosecution, the trial court actively participated as a witness in a perjury investigation against Tony. On December 3, 2013, the trial court was interviewed by law enforcement in connection with this perjury investigation. *See* Appellant's Motion to Supplement Record. This occurred *months before* Tony informally requested that the trial court recuse itself. Yet the trial court, despite its participation in a law enforcement investigative interview, and knowing that it was a primary witness against Tony in the

criminal investigation, did not disclose the December 3, 2013 interview to Tony or his counsel.

Again, the issue of whether a court's impartiality might reasonably be questioned cannot be addressed from the perspective of the judge in question. Instead, the test is "would a reasonable person knowing all the facts conclude that a judge's impartiality might reasonably be questioned." *Marko*, 2012 SD 54, ¶22. A judge's own subjective view is not relevant to the "appearance of impartiality" inquiry. *Id.* "Judges must imagine how a reasonable, well-informed observer of the judicial system would react." *Id*.

Thus, the question is whether a reasonable observer might question the trial court's impartiality, knowing that: (1) on more than one occasion, the trial court accused Tony of perjury in open court; (2) the trial court referred the matter to law enforcement officials, urging them to prosecute Tony for perjury; (3) the trial court was interviewed by law enforcement as a witness in a criminal investigation of Tony; and (4) Tony has now been charged with perjury, with the trial court identified as a primary witness against Tony in these criminal proceedings.

Under these circumstances, any reasonable observer would certainly have ample reason to question the trial court's impartiality and its prejudice against Tony. Indeed, it is difficult to imagine a clearer case for judicial disqualification. According, Tony requests that this Court reverse and remand with instructions for the trial court to recuse itself.

III. The trial court erred in finding Tony in contempt.

In his Appellant's Brief, Tony makes two arguments concerning the inappropriateness of the trial court's contempt ruling. First, Tony argues that the trial court's actions improperly denied Tony of his right to seek appellate review prior to the enforcement of the judgment. Rick has completely failed to address the first argument in any meaningful fashion. Therefore, Tony refers this Court to his earlier argument on this point.

Second, Tony argues that Rick's Motion for Contempt was supported only by an improper affidavit of counsel. With respect to this argument, Rick contends that Tony is foreclosed from challenging the facts contained in Rick's counsel's affidavit because he agreed at the contempt hearing that there were no factual issues in dispute. This is a fundamental mischaracterization of the contempt hearing proceedings. Tony's counsel did not agree that all facts contained in the affidavit were accurate, but instead simply indicated that he did not dispute that the documents in question were not executed. Tony's counsel further indicated that the proper focus should be on its legal argument regarding the improper of the judgment prior to appeal. *See* CHT at 5-6. Thus, Rick's response to this argument similarly fails.

IV. The trial court committed additional errors.

In his Appellant's Brief, Tony also argues: (1) that the trial court's enforcement of the Land Separation Agreement was erroneous; and (2) that the trial court erred in finding that Rick did not lease land from Dean O'Neill following the preliminary injunction hearing. Regarding these arguments, Rick primarily argues that the trial court has wide

discretion concerning the weighing of evidence and credibility of witnesses, and that the trial court's rulings should not be disturbed.

Tony agrees that trial courts are generally afforded wide discretion in such matters. This case, however, presents something of a unique situation. The trial court's animus toward Tony permeated the entirety of these proceedings. As previously explained, this animus manifested itself in the trial court's accusations of perjury, its efforts to have Tony prosecuted, its role as a primary witness in law enforcement's investigation of Tony, and its inexplicable decision to impose punitive damages against Tony. Tony respectfully submits that the trial court's animus toward him further affected the trial court's rulings on the land separation agreement and the alleged leasing of land from Dean O'Neill. Accordingly, in reviewing the evidence presented on these points, Tony submits that this Court should carefully consider the trial court's ruling in light of the entirely of the unique circumstances presented in this case.

CONCLUSION

Based upon these numerous errors, Tony respectfully submits that the only just result in these proceeding is to reverse on all points and remand this matter for further proceedings before another judge.

Dated this 10th day of April, 2015.

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REQUEST FOR ORAL ARGUMENT

Tony respectfully requests the opportunity to present oral argument.

Dated this 10th day of April, 2015.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this reply brief complies with the type volume limitation of SDCL 15-26A-66(b)(2). Based upon the word and character count of the word processing program used to prepare this reply brief, the body of the brief contains 2,095 words and 11,114 characters (not including spaces).

/s/ Scott R. Swier
Scott R. Swier

CERTIFICATE OF SERVICE

Scott R. Swier, one of the attorneys for Plaintiff/Appellant James Anthony O'Neill, and pursuant to SDCL Chapter 15-26C (Supreme Court Electronic Filing Rules), hereby certifies that on *April 10, 2015*, I caused the following document:

■ Appellant's Reply Brief (word format)

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