IN THE

Supreme Court

of the

State of South Dakota

No. 30786

JEFFREY FISCHER,
ALLISON FISCHER, &
FISCHER FARMS PARTNERSHIP,
PLAINTIFFS/APPELLEES

VS.

MISSY FISCHER-OLSON,
REED J. OLSON, &
EXCEL UNDERGROUND, INC.,
DEFENDANTS/APPELLANTS.

An appeal from the Circuit Court,
Second Judicial Circuit
Lincoln County, South Dakota

The Hon. Rachel Rasmussen
CIRCUIT COURT JUDGE

APPELLANTS' BRIEF

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Notice of Appeal filed on August 8, 2024

Appellees:

Jeffery Fischer; Allison Fischer; and Fischer Farms Partnership, by and through its Receiver, Steve Huff.

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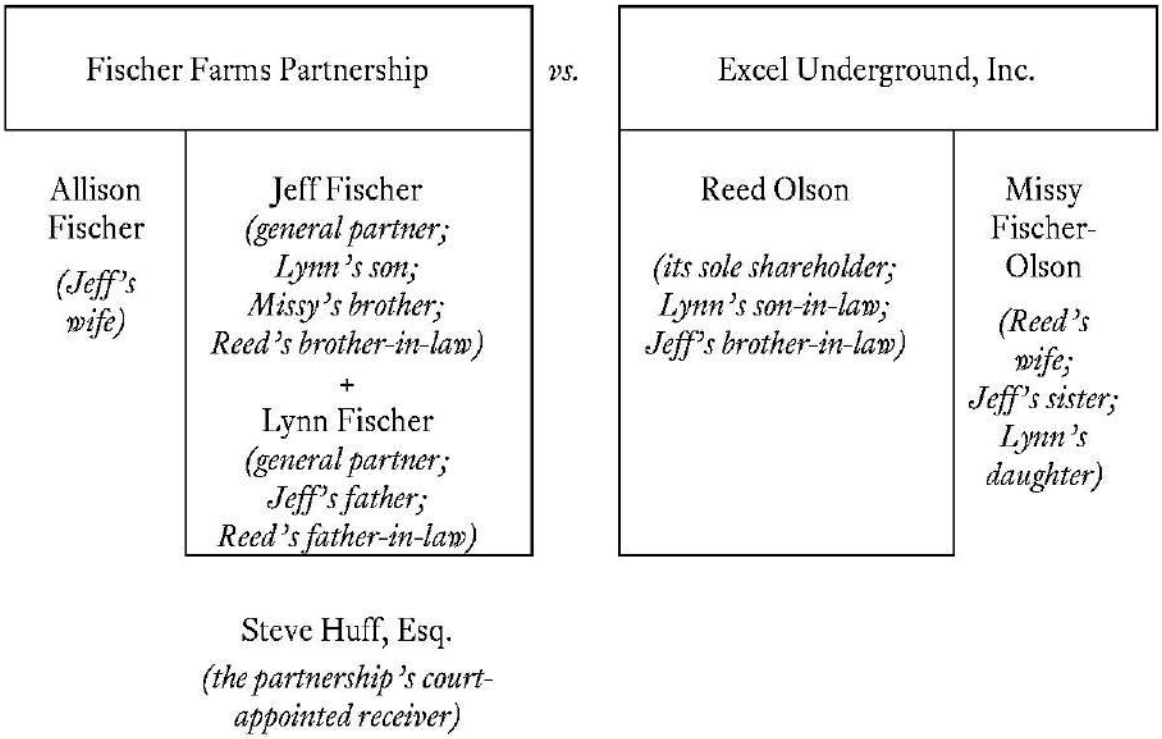
INTRODUCTION

This is a family dispute involving *actual* loans, and, as we argue, a massive, *fictional* loan balance that had little meaningful basis in reality, other than to pad the balance sheets of a failed farming partnership.

The Appellants are Excel Undergound, Inc., along with Reed Olson (its sole shareholder); and Missy Fischer-Olson (Reed's wife).

The Appellees are Fischer Farms Partnership; Jeffrey Fischer (one of its general partners); and Allison Fischer (Jeff's wife). Its other general partner is Lynn Fischer, who is Missy and Jeff's father. Fischer Farms is now in receivership, and its court-appointed receiver is attorney Steve Huff.

Graphically, the key participants in this dispute look like this:



In broad terms, these various family members functioned together like families often do: loaning each other money at various points in time, primarily in the nature of informal transfers, informal repayments, and in-kind services, with minimal contemporaneous documentation other than the transfers themselves. A primary portion of this dispute centers on how to properly account for those transfers (totaling roughly $325,000), and then determining what payments and offsets to apply to the balance.

The other portion of this dispute involves a large, questionable loan balance which was more than three times the sum of all known transfers. At a time when Fischer Farms Partnership was facing severe financial difficulties, its partner Lynn Fischer began listing a very large receivable on its balance sheets, suggesting that Excel Underground (his son-in-law's company) owed Fischer Farms over a million dollars, even though the total of documented transfers was nowhere near this size.

There is no documentary basis supporting an *actual* receivable of this size. Indeed, even Fischer Farms' own banker did not believe this to be a "loan" truly owed to Fischer Farms, but instead viewed it is Lynn Fischer's "hope" for an amount his son-in-law would someday contribute to the farming operation. Likewise, Lynn's son Jeff conceded at trial that

his father was prone to dishonesty and exaggeration on financial matters, and, understood that Fischer Farms was attempting to dress up its balance sheets in 2017 and 2018 because of its inability to find credit.

Other evidence suggested that the million-dollar figure was perhaps a mistaken (or dishonest) conglomeration of two sets of numbers: the total amount of *actual* transfers, plus the face value of large commercial loans that Lynn and Fischer Farms had merely *co-signed*, and which Fischer Farms remained on the hook for until Excel paid those creditors.

Either way, the million-dollar "loan balance" lacked basic indicia of reliability. But the Circuit Court refused to instruct the Jury about the Statute of Frauds.

As a result, there were no restrictions upon the Jury's ability to return a verdict based upon an 'implied' or 'oral' loan, nor any restrictions to prevent a verdict on a loan arising out of an 'implied' agency relationship. In addition, the Circuit Court excluded key testimony about the veracity of the loan. And, the Circuit Court refused to instruct the Jury about the fundamental rule that breach of contract damages "must be reasonably certain."

Meanwhile, the trial was filled with repeated innuendo and

speculation that Reed, Missy, or Excel Underground had conspired with Lynn Fischer to steal a million dollars from Fischer Farms, such as via a secret bank account set up by Lynn, or by funneling grain to a Nebraska elevator. But in spite of numerous questions aimed at numerous witnesses, these accusations found zero factual basis during the trial.

Unrestrained by the evidentiary protections of the Statute of Frauds, and probably swayed by the persistent innuendo of wrongdoing, the Jury returned a verdict for $849,550, from which Excel Underground, Reed, and Missy now appeal. [R01.1155].

JURISDICTIONAL STATEMENT

Appellants appeal entry of Judgment by the Hon. Rachel Rasmussen, entered *nunc pro tunc* on July 11, 2024. [R.502].

Notice of entry of that final judgment was given on July 11, 2024. [R01.2749]. Appellants filed their notice of appeal on August 8, 2024. [R01.2828]. This Court has jurisdiction, per SDCL § 15-26A-3(1).

The Record

The Circuit Court disposed of this matter following a jury trial. The Circuit Court denied relief on various post-verdict submissions including:

denying Defendants' Rule 59 and 50(b) motions; and denying Plaintiffs' claim for prejudgment interest.[1]

The Trial Transcript was transcribed in three different parts, each with separate pagination. The three portions are not chronological as found in the Record. We refer to it by both page number and date, *e.g.,* [TT 123 of 151 (Day One)]. The settled record exists in two volumes; references to the settled record are denoted by R01 or R02, *e.g.,* [R01.456] or [R02.567].

THE PARTIES

For simplicity, in most instances we refer to the plaintiffs/creditors collectively as 'Fischer Farms,' and the defendants/debtors collectively as 'Excel Underground.' We begin with a brief background on each of them.

Excel Underground

Excel Underground is a sewer and water construction company based out of Sioux Falls. Throughout its existence, Reed Olson has been its sole shareholder and has served as its corporate officers. [R01.2523, *et seq*]. Reed Olson's wife is Missy Fischer (also referred to as Missy Fischer-Olson in some documents).

[1] The Fischer Farms plaintiffs/appellees filed a notice of review on a prejudgment interest question. *See,* Appeal # 30793

One of Excel Underground's construction contracts became the subject of a lawsuit in 2014, leading to a trial in 2018, and this Court's affirmance of Excel's verdict in 2020. *See, Excel Underground, Inc. v. Brant Lake Sanitary District,* 2020 S.D. 19.

Fischer Farms

Fischer Farms Partnership is a failed farming venture of Lynn Fischer and Jeff Fischer, father and son.[2] Lynn Fischer is a lifelong farmer from Wagner. Lynn's son Jeff is an eye surgeon from Minnesota who had minimal involvement running the farm.[3]

By around 2017, Fischer Farms' persistent losses had become unsustainable, causing its primary lender, BankWest, to pull out. [R01.2174]. Fischer Farms began looking for other potential lenders. And,

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[2] The dissolution and receivership action is still pending in Circuit Court. *See, Jeff Fischer v. Lynn Fischer and Fischer Farms Partnership,* 11CIV21-000008 (Charles Mix Co.)

[3] The evidence at trial indicated that Jeff's primary connection to the operation was using its Schedule F losses to offset his physician's income, year after year.

By 2017, Fischer Farms was losing around $400,000 per year, and it had lost an estimated $3.5 million over the past five to seven years. Fischer Farms's accountant calculated that these structured losses had "netted Jeff Fischer in excess of $2.8 million of tax savings." [R02.104; TT 84 of 213 (Day Two)]. *See, also,* [R01.1248; Exhibit 21]. Meanwhile, Jeff Fischer had acknowledged, privately, that if the IRS were ever to audit him as to his alleged 'material participation' in the Partnership, "it could end up wiping me out financially." [R01.2183].

at this same time (in 2017) Fischer Farms' balance sheets began showing—for the first time—a much larger "receivable" owing from Excel Underground, the company owned by Lynn Fischer's son-in-law Reed Olson.

In short, at the very moment that Fischer Farms needed to find a new lender, the alleged receivable from Excel tripled in size.

STATEMENT OF THE CASE & FACTS

Because it is simple and accurate, we repeat our introductory sentence from the first page, above:

> This is a family dispute involving *actual* loans, and, as we argue, a massive *fictional* loan balance that had little meaningful basis in reality, other than to pad the balance sheets of a failed farming partnership.

The Actual Loans

The *actual* loans included advances made to Excel Underground, most of them during a financially difficult period in 2012 to 2016, when the company was engaged in a protracted payment dispute (and then litigation) related to a public works project. *See, Excel Underground. v. Brant Lake Sanitary District,* 2020 S.D. 19.

These advances are documented in the form of checks and other transfers to Excel, Reed Olson, and Missy Fischer. The tabulated, total

amount of those advances was around $325,000. *E.g.,* [R01.2609]. (Various repayments and credits were offered into evidence, which are discussed below, in "Payments & Credits.") In addition, Jeff and Allison Fischer extended small, personal loans to Missy and Reed during this time, which (unlike any of the other transfers) were documented via signed writings.[4]

The 'Fictional' Loan Balances

The massive, allegedly *'fictional'* loan balances began appearing on the balance sheets of Fischer Farms Partnership in 2017, including on internal drafts that were created in preparation for a potential Chapter 11 restructuring. The new receivable amount was listed as high as $1,277,500 on early drafts, until being revised downward on an October 2018 draft to $929,500. A final version of the balance sheets, however, was never actually 'finalized.' Then, a year later, in September 2019, Lynn Fischer listed the account receivable with a balance of $640,000. [R01.1560]. At trial, the Fischer Farms plaintiffs urged the Jury to adopt the $929,500 figure.

All of these larger figures contrasted with how the "receivable" was carried on the balance sheets in prior years. In 2015 and 2016, for example,

[4] Complicating matters, there was also testimony that the bulk of the transfers were intended as gifts, rather than loans. [R02.533; TT 96 of 220 (Day Three)]; [R02.349; TT 63 of 151 (Day One)]; [R02.378; TT 92 of 151 (Day One)].

the receivable was variously listed as having a balance of $350,000; $390,000; $500,000; but also 'zero.' These various balance sheet figures are addressed below, but, first we briefly discuss the evidence regarding payments and credits.

Payments & Credits

The evidence at trial demonstrated that Excel Underground had voluntarily made around $160,000 in direct payments, including $125,000 in July 2021; and smaller payments of $29,300 and $5,000 a few years earlier. [R01.2223; R01.2224].

In addition, the evidence showed that Reed Olson had paid the entirety of his own crop proceeds to Fischer Farms at harvest time in 2015, in the amount of $143,079.07. [R01.2210].

At trial, Excel asked for these figures to be counted as a credit against the balance due, which would have largely or completely paid for the balance resulting from documented transfers.

In addition, Reed Olson testified to dirtwork and other services that he performed for Fischer Farms over the years, and likewise asked at trial for a portion of that value be credited, in the amount of $54,000. [R02.645]; [R01.2610-2612].

And, the evidence at trial showed that in the wake of the Fischer Farms receivership, Missy Fischer purchased a sizable number of Fischer Farms' assets in order to reconstitute and continue the operation. During the transition period from the old entity to her own LLC, the evidence showed that Missy had made substantial payments on behalf of Fischer Farms toward its operating expenses. *E.g.,* [R01.2573]. She asked for these to be counted as a credit against any balance.

It is not clear from the Verdict which payments or credits were applied. However, the Jury rejected Excel's claim for unjust enrichment. [R01.1156].

The Balance Sheet Figures

In the years leading up to 2017, a receivable from Excel or Reed had been listed on Fischer Farms' balance sheets in various, smaller amounts:

$350,000	3/19/2015	Commercial State Bank	*See,* [R01.1312]
$350,000	9/8/2015	BankWest	*See,* [R01.1306]
$350,000	6/16/2016	Rabo Agrifinance	*See,* [R01.1327]
$0.00	6/20/2016	Commercial State Bank	*See,* [R01.1344]
$500,000	9/1/2016	Dacotah Bank	*See,* [R01.1318]
$350,000	9/8/2016	BankWest	*See,* [R01.1341]
$390,090	12/1/2016	Dacotah Bank	*See,* [R01.1336]

Although the number jumped up and down, none of those increases or decreases in 2015 and 2016 correspond to any contemporaneous transfers, documentation, or testimony received at trial. Instead, they appeared to be estimations made in the moment, to whichever bank happened to be asking at that time.

By 2017, however, the financial tide had finally turned on Fischer Farms. [R01.2183]. In Jeff's words, the farm was not solvent and "no bank will work with the farm." *Id.*

In that time frame, its principal lender BankWest advised Fischer Farms that it would not renew its operating line. [R01.2174]. Fischer Farms' financial status was now under much closer scrutiny. And, for the first time, Fischer Farms (via Lynn Fischer) began reporting a massive receivable on its balance sheets, as the total purportedly owed from Excel Underground. This occurred for the first time with balance sheets issued to Commercial State Bank in September and December of 2017:

$1,210,000	9/12/2017	Commercial State Bank	*See,* [R01.1356]
$1,210,000	12/19/2017	Commercial State Bank	*See,* [R01.1362][5]

[5] One balance sheet contains a note from 2/14/18 indicating that the debt is over 3 years old, see, [R01.1361; R01.1808], meaning that it was in existence by 2015. But this total is contrary to any of the amounts reported on any of the 2015 and 2016 balance sheets, when the debt would have already been in existence.

At around this time, in 2018, Fischer Farms Partnership hired bankruptcy attorney Laura Ask[6] to evaluate its options for a Chapter 11 filing, or, an informal workout agreement or a new lender. [R.1564]. Laura retained Kathy Meland, a financial professional, to assist with preparing comprehensive, updated balance sheets. Together, Laura and Kathy edited and revised upwards of a dozen versions of the Fischer Farms Partnership financials, between February 2018 and March 2019, but never reached a final version.

The balance sheets initially continued to use an amount in the $1.2 million range, until eventually revising it downward by $348,000, apparently to exclude the third-party debt that Fischer Farms had helped Excel procure from Commercial State Bank.

But there is no documentation or testimony which explains how the receivable figure jumped from $390,000 in December 2016 to $1,210,000 a year later.

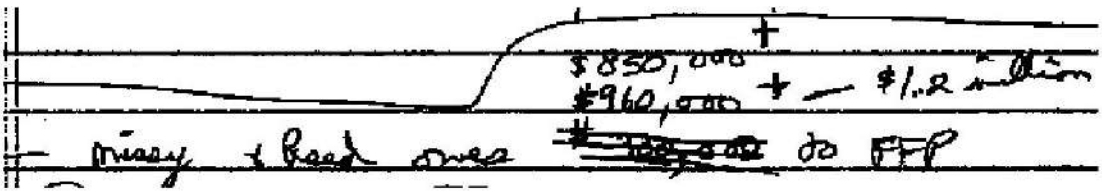
[6] She has subsequently been appointed as a judge to the Bankruptcy Court in this District.

Moreover, the final balance sheet Fischer Farms created in September 2019 was signed by Lynn Fischer and shows the receivable at only $640,000. Here is a summary of these various figures from 2018 and 2019:

$1,277,500	2/28/2018	*draft*	*See,* [R01.1419]
$1,277,500	5/22/2018	*draft*	*See,* [R01.1425]
$1,277,500	9/30/2018	*draft*	*See,* [R01.1443]
$929,500	10/25/2018	*draft* - Laura Ask notes	*See,* [R01.1473]
$640,000	9/25/2019	Commercial State Bank	*See,* [R01.1560]

However, the undisputed testimony was that the figures that attorney Ask included on the balance sheets were not based upon any documentation, and, instead, upon Lynn's oral assertions. [R02.476, 480. April 26, 2024, TT 39, 43 of 220].

For example, the Record includes handwritten notes that Ask made during a bankruptcy planning attorney-client meeting at her office in August 2018, attended by the various principals of Fischer Farms Partnership, including Missy (but not Reed or Excel). Ask's notes, at [R01.1892; Exhibit D], demonstrate the vague and inconclusive picture of the alleged debt:



The numbers in Lynn Fischer's head

At trial, Craig Dodds (Fischer Farms' loan officer at BankWest) described a conversation he had with Lynn Fischer in 2017 about the purported loan balance. Lynn described the amount as being over a million dollars.

When Mr. Dodds asked Lynn "more specific questions about details...how he arrived at that number," Dodds described Lynn as saying that "it's a number that he, you know, *put together in his head, in his mind* that he'd been accumulating, or, I guess, aggregating all those years." [R02.102; TT 82 of 213 (Day Two)]. *See, also,* [R01.1248; Exhibit 21]. Lynn said: "[I]t's something I just keep in my head." [R02.105; TT 845 of 213 (Day Two)].

Persistent questions about Lynn's numbers

There are several instances in the Record that demonstrate that nobody thought Lynn's figures were accurate. Jeff Fischer observed in March 2019 (in an email to Kathy Meland) that Lynn was "trying to make their balance sheet appear as good as possible, but that does not mean that you are getting reliable information....What you are being given is biased to

give a better than accurate portrait of the actual fiscal health of FFP...." [R01.2144].

At trial, Jeff agreed that he had directly accused his father of fuzzy math, in a text message to Lynn saying: "Your math never seems to add up in the real world the way it does in your mind....[Accountant] Frank [Bures] has shown you the real numbers but you don't believe them." [R01.2177]

Jeff also acknowledged to family members that Lynn appeared not to be able to comprehend basic financial information: "I was stunned today by just how little [Lynn] can contribute to any conversation anymore. I'm not sure if he can't hear what is being said or he just doesn't have the mental faculties anymore to spit out the answers. How little he knew of his financial situation is beyond comprehension." [R01.2180]

The doubts about Lynn's numbers persisted. In January 2019, Jeff Fischer *still* regarded the amount owed to be uncertain, and he sent an email to Fischer Farms' accountant in an effort to sort that out. [R01.2169]. In response, Fischer Farms' accountant, Frank Bures, pulled together a spreadsheet that showed a total number of $759,574.02, but which included $348,799.02 of co-signed debt issued by Commercial State Bank. When that co-signed debt is excluded, the total, documented amount that Fischer

Farms had advanced to Excel was $410,775. However, $110,000 of that figure was comprised of transfers from Seth Fischer, another relative, who is not a partner in Fischer Farms. [R01.2170]. When that amount is backed out, Bures's net total for documented Fischer Farms transfers is around $300,000.

Other tabulations arrived at similar figures, including one sent by Fischer Farms' attorney in January 2020. [R01.2188]. That itemization showed a total of $654,020.71, of which $348,799.02 was a third-party debt to Commercial State Bank that Fischer Farms had co-signed. Or, in other words, this left a net amount of $305,221.69. Another tabulation showed the total amount of transfers as $324,325. [R01.2609].

Where does the large number come from?

The ultimate problem in this case was attempting to discern where Lynn Fischer's numbers were coming from. The potential answers are that it is valid but unsupported by any known documentation; or, that Lynn was completely fabricating the number;[7] or, that Lynn was inflating the number by adding actual transfers with other numbers, such as including the loans

[7] Fischer Farms' other banker, Mike Frei from Commercial State Bank, called Lynn "a liar." [R02.96; TT 76 of 213 (Day Two)].

from Seth Fischer, plus the amounts of co-signed and guaranteed debt, for which Fischer Farms remained liable until Excel paid those third-party lenders (Commercial State Bank and BankWest).

The evidence was undisputed that Lynn Fischer and Fischer Farms *co-signed* or *guaranteed* a large series of loans that Excel Underground made with commercial lenders. (Excel eventually paid back all of those lenders after collecting on its judgment).

The co-signed or guaranteed debt at BankWest started with a smaller loan but then reached an ultimate balance of $419,857 on joint debt:

$109,100	2011	co-signed BankWest	*See,* [R.1565]
$419,857	2012	co-maker BankWest	*See,* [R.1570]

And Fischer Farms also helped Excel as the guarantor of a carried balance of $350,000 at Commercial State (i.e., the total of a $100,000 and a $250,000 line of credit):

$100,050	2014	guarantor, Commercial State	*See,* [R.1574]
$250,000	2014	guarantor, Commercial State	*See,* [R.1589]
($350,000	*2014*	*guarantor, Commercial State*	*Total of above.)*

When the total of these various forms of financial assistance are all added together, it yields a number quite close to Lynn's 2017 total:

Commercial State Bank	$350,000
BankWest	$420,000
From Seth Fischer	$110,000
Checks & Transfers	$330,000
Total	**$1,210,000**

Thus, it appears plausible that Lynn's total is a mistaken, inflated version of an account receivable, which includes both third-party debt as well as first-party debt.

Another possibility is that Lynn secretly funneled massive amounts of money to Excel, Reed, and Missy. There is not a factual basis in support of this theory. But this did not stop Fischer Farms from fanning the flames of suspicion during the trial, all the way through closing arguments.

Innuendo & Speculation

Throughout the trial, counsel for Fischer Farms elicited testimony that served no purpose other than to create innuendo and invite the Jury to speculate. The purpose of these lines of questioning did not become apparent until the final paragraph of the plaintiffs' closing argument rebuttal.

These lines of questions related to alleged flows of money from a secret bank account Lynn had set up at Fort Randall Credit Union, and, alleged transfers of grain to an elevator in Nebraska.

The credit union account.

A long series of questions was asked regarding Lynn Fischer's checking account at a credit union, from which Lynn allegedly made millions of dollars of payments outside of the view of Commercial State Bank, one of its secured creditors. But in spite of the alleged wrongdoing by Lynn and the credit union, the investigation "didn't find any documents" showing "that any of [the diverted funds] went to Reed, Missy, or Excel." [R02.75; TT 55 of 213 (Day Two); Mike Frei testimony]. The receiver, Steve Huff, agreed that there was no evidence connecting the stream of checks to Excel. [R02.330; TT 44 of 151 (Day One)].

Grain sales in Nebraska.

Another series of questions for various witnesses centered upon the possibility that Lynn Fischer had illicitly diverted grain sales from Fischer Farms into the name of Reed and Missy. But again, the witnesses conceded that this was baseless. After a full investigation, Mike Frei agreed that there is "no evidence suggesting...or confirming" that any grain was sent to the

Nebraska grain elevator in the names of Reed, or Missy, or Excel. [R02.96; 76 of 213 (Day Two)].

Closing argument and rebuttal.

This persistent refrain by Fischer Farms' counsel about 'alleged wrongdoing' continued into closing argument. Even though *none* of the evidence at trial supported the theory of illicit transfers of cash or grain, these baseless allegations were the primary focus of Fischer Farms' argument:

> All right. $1,277,500. Okay. And one of the, um, key elements here is that this money got to Excel Underground this way, *under the table*....[Its accountant] Frank Bures...didn't find all this because what we found out was that Lynn Fischer was diverting millions of dollars to an account he didn't tell anybody about. And was selling grain in places that, ah, ah, facilitated money going in the direction of Excel Underground.

[R02.630; TT 193 of 220 (Day Three)].

As to the nefarious allegations regarding the credit union account, Fischer Farms' counsel argued:

> [W]e eventually found out that Lynn had diverted over $2,000,000 to a personal account, and...*what happened with that money afterwards, we don't know*, ah, ah, because it's, it's, it's a long story, long process.

[R02.653; TT 216 of 220 (Day Three)].

And in the closing seconds of rebuttal, Fischer Farms' attorney brought the innuendo to a full crescendo, telling the Jury this:

> And in a perfect society, this, this kind of stuff would not go on, but we're not in a perfect society. People do bad things. And sometimes they get away with it, but every once in a while the justice system, you all, intervene to stop it.

[R02.654; TT 217 of 220 (Day Three)].

Reed Olson & Missy Fischer's Statements

Ultimately, the primary evidence related to the alleged loan balance came from various statements made by Reed Olson and Missy Fischer. But the statements are neither specific nor conclusive about the debt that Fischer Farms seeks to enforce. And few, if any, of the statements are signed writings that would meet the Statute of Frauds.

During the Excel trial in 2018, Reed testified that, as an estimate, his father-in-law Lynn had provided financial assistance that was "getting close to a million dollars now." [R01.590]. At that trial, his testimony about family debt was minimal, involving less than two pages out of 348 pages of trial testimony.

At the current trial, Reed further explained that he understood the figure to include the advances from Fischer Farms, as well as the amount of third-party debt that Fischer Farms had backed for Excel. [R02.504-05].

Throughout this time, Reed's wife Missy helped run the horse operations at Fischer Farms, and during 2018, Missy was attempting to help her father and Fischer Farms obtain financing from a new lender. During this time she made various statements about the account receivable, including:

- Missy responded to an inquiry from Laura Ask about when Excel's judgment might get paid, and her (rather optimistic) estimate was in March 2019. [R.1713].
- In October 2018, attorney Laura Ask asked for various Fischer Farms parties to review her draft of the balance sheet, so that she could "determine feasibility for a Chapter 11 or other informal restructuring," and advised the Fischer Farms parties on the email chain that "it is crucial that it is accurate." [R.1715-1716]. Missy was included on the email but did not respond.
- Missy also shared a draft of a letter she thought about posting on social media about Excel's lawsuit, in which she acknowledges that her parents had helped Excel, and suggesting

that the judgment would someday be used to repay a whole host of creditors, but without listing any figures. [R01.1229].

Ultimately, none of these communications contain the crucial, underlying details necessary to enforce a loan: information about how the loan was calculated (i.e., what components comprised the principal); an interest rate; the date the advances were made; and a due date. Nor did any of the documents and communications demonstrate that Excel Underground issued a signed writing authorizing Missy, as an agent, to create a binding loan obligation. [R02.500].

The Jury was given instructions about implied and oral agreements, but not instructed about the Statute of Frauds. In addition, the Jury was instructed about the principle of equitable estoppel, but it did not return any findings as to that issue.

From these flawed instructions, the Jury returned a Verdict of $849,550, a figure which does not appear to correspond to *any* loan balance in the Record, whether oral or written.

Excel Underground, Reed, and Missy appeal, assigning two errors.

LEGAL ISSUES

1.

The Statute of Frauds is an evidentiary rule which serves to remove uncertainty by requiring written evidence of certain obligations, such as loans. Compliance (or lack thereof) is a question of fact for the Jury. Here, Fischer Farms brought claims regarding undocumented, oral loans or gifts, which allegedly totaled over a million dollars. *Was it error for the Circuit Court to refuse to instruct the Jury about the Statute of Frauds?*

Yes, this was error. The remedy is a new trial.

Circuit Court's holding:

The Circuit Court refused all Statute of Frauds instructions, stating that "the whole of the instructions so far cover these terms that would be applicable to the case and what the Jury needs to determine." [R02.599; TT 162 of 220 (Day Three)]. The Circuit Court also stated that: "I would prefer not to have the Jury analyze the legal background of statute of frauds…since it's the subject of multiple hours and hundreds of pages of briefing that we've done." [R02.601-602; TT 164-165 of 220 (Day Three)].

Pertinent authority:

- SDCL 53-8-2(4) (Statute of Frauds)
- *Hahne v. Burr,* 2005 S.D. 108 (purpose of Statute)
- *Cambron v. Moyer,* 519 N.W.2d 381 (Iowa 1994) (application of Statute of Frauds to disputed facts is a Jury question)
- *State v. Pfieffer,* 2024 S.D. 71, ¶ 38 (Jury's instructions, as a whole, reviewed *de novo*)
- SDCL 15-6-59(h) (new trial for legal errors)

2.

An award of damages for breach of contract must proven with reasonable certainty. This standard requires proof of a rational basis for measuring the loss, without speculation. Here, none of the witnesses were able to explain the origin of the underlying, alleged loan balance. ***Did the Circuit Court err by refusing to instruct the Jury as to the evidentiary standard required for contract damages?***

Yes, the Circuit Court erred.

Circuit Court's holding:

The Circuit Court was asked four times to give an instruction regarding the 'reasonably certain' requirement for contract damages. This included three times (orally) related to the settlement of instructions, and, also in a proposed written instruction. The Record does not seem to indicate a reason for the refusal. [R02.545; TT 108 of 220 (Day Three)]; [R02.604; TT 167 of 220 (Day Three)]; [R02.620; TT 183 of 220 (Day Three)]; [R01.2818].

Pertinent authority:

- *Excel Underground, Inc. v. Brant Lake Sanitary Dist.*, 2020 S.D. 19, ¶ 51 (reasonable certainty)
- *Stern Oil, Inc. v. Brown,* 2018 S.D. 15, ¶ 17 (same)
- *Von Sternberg v. Caffee*, 2005 S.D. 14, ¶ 17 (same)

STANDARD OF REVIEW

The following standards of review are applicable to this appeal:

- *Jury Instructions.* Although a trial court's "wording" and "arrangement" of particular instructions is reviewed for an abuse of discretion, this Court applies *de novo* review "when *the question is whether a jury was properly instructed overall.*" *State v. Rouse,* 2025 S.D. 29, ¶ 42 (quotations omitted) (emphasis added).
- *New Trial (based upon erroneous instructions).* "Whether an instruction is erroneous is a legal question, and granting a new trial for error in instructions is reviewed, *not* for abuse of discretion, but for legal error [and] *de novo* and *without deference* to [the Circuit Court]." *SDDS, Inc. v. State*, 2002 S.D. 90, ¶ 18 (citing Charles Alan Wright, FEDERAL COURTS § 95 (5th ed.1995) (emphasis added)).
- *New Trial (other errors).* As to errors other than legal errors, a "motion for a new trial is reviewed under an abuse of discretion standard. However, deference to the circuit court is not without its limits." *Matter of Est. of Tank*, 2023 S.D. 59, ¶ 56 (quotations omitted). "If the trial court finds an injustice has been done by the jury's verdict, the

remedy lies in granting a new trial. "[M]ore deference is given to the trial court's grant of a new trial than its denial of one." *Lewis v. Sanford Med. Ctr.*, 2013 S.D. 80, ¶ 15 (quotation omitted).

ARGUMENT

1. The Circuit Court's instructions were incomplete and erroneous because they permitted a Verdict upon on alleged loan, but without regard to the Statute of Frauds

The Circuit Court refused to give any instructions regarding the Statute of Frauds. The Jury was thus deprived of the ability to consider its application to these facts. This was an error of law which is a question reviewed *de novo,* and, which merits a new trial.

On appeal, we are required to "construe jury instructions as a whole to learn if they provided a full and correct statement of the law." *State v. Rouse,* 2025 S.D. 29, ¶ 42 (quotations omitted).

South Dakota's Statute of Frauds is found at SDCL 53-8-2, which outlines several types of agreements for which a signed writing is required. In pertinent part, it contains two requirements applicable to these facts:

(i) it requires "an agreement for a loan of money" to be "in writing and subscribed by the party to be charged or his agent," and,

(ii) when the document evidencing a loan is "subscribed by…his [the debtor's] agent," then, the debtor's agent must *also* be "authorized in writing" to enter into the loan. SDCL 53-8-2(4).

"The role of the statute of frauds is evidentiary in nature, and serves to remove uncertainty by requiring 'written evidence of an enforceable obligation.'" *Hahne v. Burr*, 2005 S.D. 108, ¶ 7. In short, it requires written, signed evidence of a loan, as well as written, signed evidence of agency in order to bind another party to a loan.

This does not mean that oral loans are somehow illegal; indeed, they are made all the time, and are voluntarily repaid all the time. Instead, the Statute of Frauds serves as a protective mechanism to prevent our judicial machinery from being used to enforce questionable, unverifiable debts.

As this Court has observed, the Statute "does not prohibit the *making* of [such an agreement], but merely makes such contract [unenforceable via a lawsuit] unless reduced to writing." *See, Trovese v. O'Meara,* 493 N.W.2d 221, 222 (S.D. 1992) (quoting *Brown v. Wisconsin Granite Co.,* 201 N.W.2d 555, 556 (S.D. 1924) (applying SDCL 53-8-2(1) (emphasis added)). As applied here, it is not *wrong* to extend informal loans to relatives. But, their enforcement via formal litigation will be constrained.

It is well-settled that the applicability of the Statute of Frauds is a jury question. *E.g., Cambron v. Moyer*, 519 N.W.2d 381, 384 (Iowa 1994) (when the underlying facts are in dispute, "compliance (or lack thereof) with the statute of frauds is a question of fact for the jury") (citing *Samuels Bros. v. Falwell,* 246 N.W. 657, 658-59 (Iowa 1933); *Richmann v. Beach,* 206 N.W. 806, 806-07 (Iowa 1926); 67 Am.Jur.2d *Sales* § 187, at 459 (1985). *Accord, Hinchman v. Lincoln*, 124 U.S. 38, 48 (1888) ("the general rule [makes it] a question for the jury whether, under all the circumstances [the transaction falls] within the terms of the statute of

frauds") (citing two "Queen's Bench" cases,[8] and also, *Borrowscale* v. *Bosworth*, 99 Mass. 381 (1868); *Wartman* v. *Breed*, 117 Mass. 18 (1875)).

The facts of this case merited two instructions regarding the Statute of Frauds. The Circuit Court refused both.

(a) Error by failing to instruct on the requirement of a signed writing

The Circuit Court erred by giving three "general" instructions about contract law, but failing to give Excel Underground's proposed instructions (#112 and #114) pertaining to the Statute of Frauds.

Although Final Instructions #5, #6, and #7 were accurate statements of general contract principles, the failure to give any Statute of Frauds instructions permitted the Jury to find an oral or implied loan.

Excel Underground asked the Court to instruct the Jury specifically about the Statute of Frauds, namely, the requirement that a loan agreement must be in writing and signed by the debtor to be enforceable. *See,* PROPOSED INSTRUCTIONS 112 and 114. [R01.1056; 1058]. The Court

[8] The Queen's Bench is "the highest common law court in England." Black's Law Dictionary, 1259 (7th ed. 1999).

refused these Instructions. Instead, the Court gave Instructions 5, 6, and 7 which discussed contracts more generally. [R01.1130-1132].

Final Instruction 5 told the Jury that "a contract is either express or implied...[and that in] an implied contract, the existence and terms are shown by conduct." FINAL INSTRUCTION 5. [R01.1130].

Final Instruction 6 amplified the error. It allowed the Jury to find an "express contract" that was "created orally." *See,* FINAL INSTRUCTION 6. This contradicts the requirements of the Statute of Frauds. *See,* SDCL 53-8-2.

Final Instruction 7 compounded these errors even further. It advised the Jury that an "implied" contract exists when the "the parties do not directly or expressly in words set forth an intention to enter a contract...." *See,* FINAL INSTRUCTION 7. This, again, is contrary to the mandates of the Statute of Frauds, which requires the loan to be in writing and signed by the debtor. Instruction 7 also invited the Jury to find the existence of a loan by the parties' "conduct, language, or acts or other pertinent circumstances attending the transaction...." *Id.*

Without Excel Underground's proposed Instruction 112 or 114 to explain the Statute of Frauds and its applicability here, the broad language of

Instructions 5, 6, and 7 was faulty. These instructions permitted the Jury to apply broad principles of contract law and return a Verdict upon a loan that was "created orally," or which was "implied," or whose "existence and terms are shown by conduct," or when the parties did "not directly or expressly in words set forth an intention to enter a contract," or because the loan could be inferred by "conduct [or] pertinent circumstances." Although *other* types of contracts can be formed in this way, legally enforceable debt obligations cannot be. *See,* SDCL 53-8-2(4).

There are, of course, *exceptions* to the Statute of Frauds. But those must be instructed upon separately, so that a Jury can determine their application *in conjunction with the Statute of Frauds*.[9]

During this lawsuit, Fischer Farms has argued for the applicability of one such exception to the Statute: promissory estoppel. And at their request, an instruction was given on this issue (albeit without reference to its role as an exception to the Statute of Frauds). *See,* FINAL INSTRUCTION

[9] It is likewise a Jury question whether an *exception* to the Statute of Frauds has been met. *E.g., Indicium Digital Network, LLC v. CDW Direct, LLC*, No. EP-17-CV-00054-FM, 2018 WL 2410991, at *6 (W.D. Tex. Jan. 19, 2018) ("Whether the circumstances of a particular case fall within an exception to the Statute of Frauds is generally a question of fact and thus is usually for a jury to decide.") (quotation omitted)

19. [R01.1144]. In turn, the Special Verdict Form contained a question about promissory estoppel. [R01.1155-1156].

But, the Jury left this portion of the form blank, because it had determined that this portion of the form did not apply, having already found the existence of a loan agreement. But because of Instructions 5, 6, and 7, the Jury was permitted to find such loan agreement without a signed writing. And because of the failure to instruct on the Statute of Frauds, the Jury could not have capably reached the promissory estoppel issue.

All of this is legally backwards: the instructions permitted the Jury to enforce an oral agreement, but did not require Fischer Farms to prove the promissory estoppel exception.

The remedy is a new trial, which was the outcome in a similar case:

> The trial court's rather standard instructions to the jury, which stated that a contract would exist if a meeting of the minds had occurred, failed to adequately convey the law applicable to this case....[C]ompliance (or the lack thereof) with the statute of frauds is a question of fact for the jury.... Because we conclude that the trial court erred in failing to consider the applicability of [Iowa's statute of frauds code], a new trial of the whole case is necessary.

Cambron v. Moyer, 519 N.W.2d at 384-385.

(b) Error as to the requirement of a signed writing giving the agency necessary to create debt for another

The error discussed in the previous subsection is sufficient to merit a new trial, but, in order to ensure that the law applied at the second trial is accurate, we also ask the Court to rule on another error in the instructions, pertaining to the agency requirements within the Statute of Frauds.

By law, the Statute of Frauds prevents a party from making a loan agreement on someone else's behalf unless the agent's authority is given in a signed writing. This means that loan agreements are unenforceable against a corporation, unless the corporate agent's own authorization is in writing. SDCL 53-8-2(4). (It also means that Reed and Missy cannot bind each other to loans, absent their written authority.) The Circuit Court likewise refused to instruct the Jury on this issue.

Instead, the Circuit Court issued a long series of agency instructions which, taken as a whole, are contrary to the protections afforded by the Statute of Frauds.

In pertinent part, SDCL 53-8-2(4) provides:

> An agreement for a loan of money…[is] not enforceable by action unless the contract or some memorandum thereof is in writing and subscribed by the party to be charged or *his agent, as authorized in writing.*

(emphasis added). The Final Instructions given to the Jury on agency omit (and circumvent) this additional requirement of the Statute of Frauds, namely, that an agent cannot create debt unless the agent has been authorized in writing to create the debt.

Similar to the generic instructions given as to contract formation, Final Instructions 11 through 17 provide generally accurate statements about agency, *but,* they fail to correctly instruct the Jury about the specific agency requirements for a corporate loan. *See,* [R01.1136-1142].

As a remedy, Defendants had proposed Instructions 112, 113, and 114, each of which explains the requirements of the Statute of Frauds for enforceable corporate debt. [R01.1056-1058].

Here are the simple, necessary, and undisputed principles of law that Excel Underground sought to instruct the Jury upon, relative to corporate debt:

- "[F]or an alleged loan to be enforceable against a corporation, an additional condition must be met…The written loan contract or memorandum must be signed by an officer of the corporation, or signed by an agent of the

corporation who has written authority to enter into the loan." *See,* PROPOSED INSTRUCTION 112.

- "[A]n agent cannot bind a corporation to a loan unless that agent also has written authority to enter into the loan;" *See,* PROPOSED INSTRUCTION 113.
- "An agent of a corporation only has authority to enter into a loan agreement if authorized in writing to do so." *See,* PROPOSED INSTRUCTION 114.

The Statute of Frauds ensures that a legally enforceable debt by Excel cannot come into existence without a signed writing from Excel giving Missy (or another of its agents) express agency to create the debt. By failing to instruct the Jury on this, the Circuit Court prevented the Jury from considering any protections afforded to Excel by the Statute of Fraud.

The rationale for the Circuit Court's refusal on this issue is unclear. Moreover, the Circuit Court similarly refused *any* instructions about corporate agency. Even though the primary defendant in this case was a corporation, the Circuit Court explained that: "I didn't find that there was an argument, or the evidence supported corporate matters. I find this to be

more of a family farming operation rather than a corporation and agents in the corporation sense." [R02.599; TT 162 of 220 (Day Three)].

This is error. Excel Underground is a corporation. The evidence at trial repeatedly intersected with the limits of how a corporation can function via its agents. One of the protections afforded corporations is the requirement of a signed writing in order to create corporate debt. The failure to instruct on this was error, which merits a new trial.

(c) Error as to "insufficiently definite" memorandum

There was a further error that should also be corrected prior to a retrial. This error pertains to the *sufficiency* of the signed memorandum necessary to create an enforceable debt. To this end, Excel requested Instruction #112(b). [R01.1056]. It was refused.

The mere *existence* of a writing is not sufficient for enforcement of a debt obligation: if the memorandum is insufficiently definite, the writing fails. *Jacobson v. Gulbransen,* 2001 S.D. 33, ¶ 26. *Accord, Werner v. Norwest Bank S. Dakota, N.A.,* 499 N.W.2d 138, 142 (S.D. 1993) ("Where there was no understanding as to the exact amount of money, interest rate, time and method of repayment, and no exchange of documents, no enforceable contract can be said to exist."); *Id.* ("No enforceable obligation can be

established from this lack of specific terms."); *J. Clancy, Inc. v. Khan Comfort, LLC,* 2021 S.D. 9, ¶ 18 ("To form a contract, there must be ... mutual assent on all essential terms.")

Here, even when all of the writings in evidence are read together, there is *still* not a clear sense of the terms of the agreement. Nobody can explain how the original $1,210,000 number was calculated, nor what elements comprise it. Without the certainty of the *components* of the loan balance, it is impossible for Excel Underground to perform, and impossible for a Jury to enforce and police that compliance.

None of the writings in this case provide insight on the due date for payment; an interest rate; collateral; the exact parties to the loan; the dates the disbursements were made; the amounts of the disbursements; and the date of the agreement.

The Circuit Court erred by refusing Proposed Instruction #112(b). The law requires more certainty than what Fischer Farms presented at trial.

(d) No claims can be brought for gifts, so it was error for the Circuit Court to refuse a 'gift' instruction

In pursuit of their recovery here, Fischer Farms introduced testimony that Lynn Fischer 'was *giving*' money to Reed and Missy. [R02.349; TT 63 of 151 (Day One)]; [R02.378; TT 92 of 151 (Day One)]. This concession

aligned with Missy's testimony that Lynn told her "don't worry about it...we'll figure it out when its done and over." [R02.533; TT 96 of 220].

But gifts are not enforceable contracts, because they lack consideration. *Winegeart v. Winegeart*, 2018 S.D. 32; SDCL 53-1-1, SDCL 53-1-2, SDCL 53-1-3. Nor are gifts intended to be repaid via judgment.

In a retrial, the Circuit Court should give an instruction as to the unenforceability of gifts.

2. Contract damages must be 'reasonably certain'

The Circuit Court erred by failing to instruct the Jury on the evidentiary standard necessary to award damages for a contract breach.

"[D]amages must be reasonably certain' and not speculative." *Peska Props., Inc. v. N. Rental Corp.*, 2022 S.D. 33, ¶ 22 (quoting *Excel Underground v. Brant Lake Sanitary District,* 2020 S.D. 19, ¶ 51). "To satisfy this requirement, 'a plaintiff must establish a reasonable relationship between the method used to calculate damages and the amount claimed.'" *Excel Underground, Inc. v. Brant Lake Sanitary Dist.*, 2020 S.D. 19, ¶ 51 (quoting *Stern Oil, Inc. v. Brown,* 2018 S.D. 15, ¶ 17). *See also, Von Sternberg v. Caffee*, 2005 S.D. 14, ¶ 17 ("Damages must be reasonably certain. Reasonable

certainty requires proof of a rational basis for measuring loss, without allowing a jury to speculate.")

In line with this evidentiary requirement, Excel Underground proposed Instruction #123. [R01.2818]

Three times during the final day of trial, Excel Underground urged the Circuit Court to include a "reasonably certain" requirement. The Circuit Court refused.

Without the evidentiary protections of reasonable certainty, the Jury was not properly restrained in its consideration of damages. Jeff Fischer testified that he does not know what comprised the $1,210,000 number. He was unable to offer any evidence as to what else comprised it, such as gifts, transfers, co-signed debt at BankWest, etc. The court-appointed receiver, Steve Huff, was equally unable to offer evidence about the alleged principal.

If a reasonably certain standard were applied, the parties seeking judgment upon these "loans" had no way of proving their damages, *except for* the method proposed by Excel: totaling up the verified, documented transfers, subtracting the payments, and factoring in any other offsets for in-kind services. Even if we accept the Jury's rejection of the in-kind offsets, the verifiable transfers are limited to around $300,000, and the payment

total ranges from $160,000 to $300,000. The Verdict of $849,550 was not based upon a reasonably certain methodology.

Instead, the Plaintiffs and the Jury alike were left to speculate as to how to calculate these "loan" damages. "Whether the fact of a loss has been proven to a reasonable certainty is ordinarily a question for the trier of fact." *Von Sternberg v. Caffee*, 2005 S.D. 14, ¶ 17. The trier of fact was left to make the decision on damages here without the necessary guidelines for how to assess those damages. This was an error that invited speculation, and, which merits a new trial.

CONCLUSION

The Statute of Frauds was adopted for this type of dispute, where a large loan is alleged without adequate evidentiary foundation. The failure to instruct the Jury on the Statute of Frauds denied Excel Underground of the evidentiary protections intended by it.

And, damages for a breach of contract must be proven to a decree of reasonable certainty. The failure to instruct the Jury on this standard permitted Fischer Farms to receive a Verdict without meeting the necessary evidentiary standard.

The remedy is a new trial.

Dated this 9th day of September, 2025.

HOVLAND, RASMUS,
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellants' Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 7,428 words, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, statement of Legal Issues, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2025, I electronically filed the foregoing via the Odyssey File and Serve system with the Supreme Court Clerk, which will send notice to Appellees' Counsel:

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I also hereby certify that on this 9th day of September, 2025, I sent a bound copy of the foregoing to the Supreme Court Clerk at the following address:

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Pierre, South Dakota 57501

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

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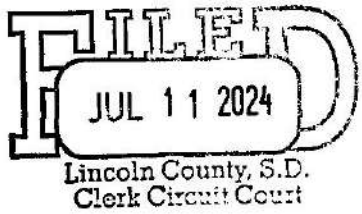
STATE OF SOUTH DAKOTA) :SS COUNTY OF LINCOLN)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
JEFFREY FISCHER, ALLISON FISCHER, and FISCHER FARMS PARTNERSHIP, Plaintiffs, vs. MISSY FISCHER-OLSON, REED J. OLSON, and EXCEL UNDERGROUND, INC., Defendants.	41CIV20-461 CORRECTED JUDGMENT PER SDCL § 15-6-60(a)

This action was tried to a jury on April 24-26, 2024, in the Lincoln County Courthouse in Canton, South Dakota, before Circuit Court Judge Rachel R. Rasmussen, and the jury entered a verdict for the Plaintiffs, and therefore:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs shall have and recover from Defendants, jointly and severally, a judgment in the sum of $849,550.00. It is further,

ORDERED, ADJUDGED, AND DECREED that all counterclaims and set-offs pled by Defendants are in all respects dismissed on their merits with prejudice. It is further,

ORDERED, ADJUDGED, AND DECREED that pursuant to SDCL §§ 15-6-54 and 15-17-37 et seq., the Plaintiffs shall be entitled to their costs and disbursements herein in the amount of $2,492.73 [inserted by the Clerk].



Dated, *nunc pro tunc*, this 7th day of June, 2024.

Rachel R. Rasmussen, Circuit Court Judge

Attest: Brittan Anderson,
Clerk of Courts

By: JMBaker,
Clerk/Deputy

STATE OF SOUTH DAKOTA) :SS COUNTY OF LINCOLN)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
JEFFREY FISCHER, ALLISON FISCHER, and FISCHER FARMS PARTNERSHIP, Plaintiffs, vs. MISSY FISCHER-OLSON, REED J. OLSON, and EXCEL UNDERGROUND, INC., Defendants.	41CIV20-461 ORDER DENYING DEFENDANTS' POST-TRIAL MOTIONS

This action was tried to a jury on April 24-26, 2024, in the Lincoln County Courthouse in Canton, South Dakota, before Circuit Court Judge Rachel R. Rasmussen. The jury entered a verdict for the Plaintiffs on April 26, 2024. The above-named Defendants filed a Motion for a judgement as a matter of law pursuant to SDCL § 15-6-50(a) on June 20, 2024, to reflect a document that was inadvertently not filed on April 26, 2024. The Defendants also filed a Motion for a judgement as a matter of law pursuant to SDCL § 15-6-50(b) and an alternative Motion for a new trial on June 20, 2024. Plaintiffs filed a Brief in Opposition to Defendants' Post-Trial Motions on June 28, 2024. The Court was notified by the Defendants of said motions late in the day on July 10, 2024, when Defendants emailed the Court and filed a proposed Order to extend the time for ruling on Defendants' motions under Rules 50(b) and 59 for good cause shown. Upon review of the file and appropriate law, this Court finds,

NO ACTION is necessary to take on Defendant's Motion for Judgement as a Matter of Law under SDCL § 15-6-50(a), and the prior record will speak for itself. The Court further,

FINDS that good cause has not been shown to extend the 20-day period under SDCL § 15-6-59. This Court further,

DENIES the Defendants' post-trial motions made pursuant to SDCL §§ 15-6-50(b) and 15-6-59.

Dated this 11th day of July, 2024.

Rachel R. Rasmussen, Circuit Court Judge

Attest: Brittan Anderson,
Clerk of Courts

By: LM Baker,
Clerk/Deputy

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
: §§§ :
COUNTY OF LINCOLN) SECOND JUDICIAL CIRCUIT

JEFFREY FISCHER, ALLISON FISCHER, and FISCHER FARMS PARTNERSHIP, Plaintiffs, vs. MISSY FISCHER-OLSON, REED J. OLSON, and EXCEL UNDERGROUND, INC., Defendants.	41CIV20-000461 **ORDER**

Defendants filed a motion for new trial on June 20, 2024. Pursuant to SDCL 15-6-59(b), the motion is deemed 'denied' if the motion has not been decided by the Court within 20 days, or, if the Court does not otherwise extend the time for its ruling.

Here, the Court has not had an opportunity to fully review the filings, and, a hearing has not yet been held on the motion, and, thus, for good cause shown, the Court extends the time for its ruling upon the motion, and directs the parties to schedule a hearing. Now, therefore it is hereby

ORDERED that pursuant to SDCL 15-6-59(b), the Court extends the time for entering its decision upon the motion for new trial until August 1, 2024.

BY THE COURT:

Denied: 07/10/2024
/s/ Rasmussen, Rachel

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 30786

JEFFREY FISCHER, ALLISON FISCHER and STEVEN HUFF AS COURT APPOINTED RECEIVER FOR FISCHER FARMS PARTNERSHIP, a South Dakota general partnership,

PLAINTIFFS/APPELLEES,

vs.

MISSY FISCHER OLSON, REED J. OLSON and EXCEL UNDERGROUND, INC.,

DEFENDANTS/APPELLANTS.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA

THE HONORABLE RACHEL RASMUSSEN, PRESIDING JUDGE

APPELLEES' BRIEF

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Filed: 10/17/2025 11:31 AM CST Supreme Court, State of South Dakota #30786

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JURISDICTIONAL STATEMENT

After post-trial motions under SDCL 15A-6-49(a) and -50(a), and after denying Plaintiffs' Proposed Judgment that included prejudgment interest (*see* attached Order Denying Plaintiffs' Proposed Judgment, App. 001), the Trial Court entered a Corrected Judgment consistent with the verdict dated June 7, 2024, and filed July 11, 2024. Index 2747, App. 005. Defendants' Notice of Appeal was timely filed on August 8, 2024. Index 2828. On August 20, 2024, Plaintiffs timely filed their Notice of Review. Due to competing work issues, the court reporters were unable to fully complete the requested trial transcripts until July 22, 2025. Thereafter, Defendants filed their Appellants' Brief on September 9, 2025.

STATEMENT OF THE ISSUES

I. The Trial Court Did Not Err in Refusing to Instruct the Jury on the Statute of Frauds.

Trial Court: Refused to Give the Requested Instruction

Tolle v. Ler, 804 N.W.2d 440, 444-45, 2011 SD 65 *13

Uline Loan Co. v. Standard Oil Co., 185 N.W. 1012 (S.D. 1921)

Suvada v. Muller, 983 N.W.2d 548, 2022 SD 75

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II. The Trial Court Did Not Err in Refusing to Give Defendants' Proposed Instruction 123 on Proving Damages With Reasonable Certainty.

Trial Court: Refused to Give the Requested Instruction

Von Sternberg v. Caffee, 692 N.W.2d 549, 554-55, 2005 SD 14

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Mash v. Cutler, 488 N.W.2d 642, 649 (S.D. 1992)

III. The Trial Court Erred in Failing to Award Pre-Judgment Interest on the Verdict Damages Amount.

Trial Court: Refused to Award Pre-Judgment Interest

Ingersoll v. Mason, 254 F.2d 899 (8th Cir. 1958)

SDCL 15-6-49(a)

SDCL 21-1-13.1

SDCL Chapter 54-3

STATEMENT OF THE CASE AND FACTS[1]

CASE HISTORY

This is an action to collect on loan repayment obligations fully and unqualifiedly admitted by the Defendants. Jeffrey Fischer ("Jeff") is an ophthalmologist practicing in Willmar, Minnesota. Allison Fischer ("Allison") is his wife. Fischer Farms Partnership ("FFP") is a South Dakota general partnership with Jeff and his father, Lynn Fischer, of Wagner, South Dakota ("Lynn"), as sole

[1] As noted in Appellants' Brief, the trial transcript is in several volumes, one for each day, separately page-numbered for each volume. Accordingly, page references to the transcript will list the day number (1, 2 or 3) followed by that volume's page number (i.e. Tr. 1:10). Filed documents shown on the Clerk's Alphabetical Index will be referenced by the Index page (i.e. Index 100).

general partners. Tr. 1:54-55. Steven Huff is the court-appointed Receiver of FFP. Tr. 1:29-30.

Missy Fischer Olson ("Missy") is Jeff's sister. Tr. 1:54. She is married to Reed Olson ("Reed"), who was and is the sole shareholder, officer and director of Excel Underground, Inc. ("Excel"), a South Dakota corporation engaged in business as a sewer and water construction company based in Sioux Falls. Tr. 3:62.

Plaintiffs commenced this action in Circuit Court for the Second Judicial Circuit, Lincoln County, South Dakota, by service in June 2020 and filing on July 31, 2020, seeking to enforce admitted loan repayment obligations from Defendants. Index 3. After a period of time, the suit was mediated and provisionally settled. Defendants, however, failed to fully perform their obligations under the Settlement Agreement and the action was revived. Index 476, 516. After discovery and motions, the case was tried to a jury on April 26-28, 2024 in the Lincoln County Courthouse, Canton, South Dakota. Both sides proposed jury instructions, some of which were included by the Court in its Final Jury Instructions and some were not. Index 1002, 1043, 1064, 1078, 1126, 2812. After deliberations, the jury returned a verdict in favor of Plaintiffs in the amount of $845,550. Index 1155. The Trial Court denied Plaintiffs' proposed Judgment that included pre-judgment interest (Index 2635) and Defendants' post-trial motions (Index 2745).

STATEMENT OF THE FACTS

Lynn was principally responsible for conducting FFP's Charles Mix County farm operations on land owned by a separate entity, Fischer Farms, LLC. To facilitate that effort, Jeff granted Lynn a power of attorney. Ex. 26. Coincident in time, Excel got into a dispute over a project at Lake Brant with the Lake Brant Sanitary District. That dispute led to litigation that spanned from 2014 to a successful jury verdict for Excel on February 1, 2018. Defendants appealed to the South Dakota Supreme Court, leading to affirmance of the jury verdict and judgment by this Court in 2020. *See Excel Underground v. Brant Lake Sanitary District*, 941 N.W.2d 791, 2020 SD 19.

Along the very long way of the *Excel* litigation, Lynn secretly, and without Jeff's consent, made numerous loans of FFP money to the Defendants to help pay for the litigation expenses and to support the business and personal expenses of the Defendants. Ex. 19, App. 007. Jeff was unaware of this money exit to Defendants until he received a financial statement from Mike Frei at Commercial State Bank in Wagner on January 27, 2018. The statement showed an account receivable of $1,210,000 on FFP's balance sheet as of December 19, 2017. Ex. 12. This first disclosure was made close to the beginning of the 9-day *Excel* jury trial, which ended with a verdict in favor of Excel on February 1, 2018.

In the *Excel v. Lake Brant Sanitary District* trial, Reed Olson gave sworn testimony shown in attached Exhibit 19, in which he described borrowings from Lynn (FFP) and Jeff totaling some $1,100,000. Ex. 19. In addition, Excel's

counsel (also counsel for Defendants in this action) stated in closing argument to the jury:

> Over the course of time, Excel was unable to continue working. It was borrowing money trying to finance the Brant Lake project.
>
> This other number, 1.168 million dollars, that's how much Reed has borrowed from family just to stay afloat.

Exhibit 19.

Then, in fall 2018, Missy sent a series of emails to Andy Pedersen of Structured Asset Finance, whose company was considering providing financing to FFP. The financial statements showed receivables from Excel Underground, Inc. at $1,277,500. At various times, Missy gave assurances to Mr. Pedersen:

> As stated on Fischer Farms' balance sheet, our company owes Fischer Farms and they will be paid in full once we receive the judgment." [in the Excel lawsuit].

Exhibit 2.

> "When the judgment is received, Fischer Farms will be repaid in full."

Exhibit 3. Missy also emailed Pedersen and attached a letter from Defendants' counsel that addressed her as follows:

> Melissa Fischer-Olson
> EXCEL UNDERGROUND, INC.
> P.O. Box 220
> Sioux Falls, SD

for the purpose of explaining how the judgment will be collected. Ex. 4.

Mike Frei also emailed Andy Pedersen in late December 2018 advising that "Missy owes FF I believe around 1.4M . . . ." Exhibit 5.

Also, in 2017, FFP retained Laura Kulm Ask as attorney for potential bankruptcy purposes. Tr. 3:25. Attorney Ask retained Kathy Meland to provide financial statement services for that effort. Tr. 2:88-96. Meetings, discussions and other communications were had among attorney Ask, Meland, Jeff, Lynn, and Missy. Attorney Ask emphasized how important it was that financial statements be accurate. In fact, she said, "It is crucial that this is accurate and Kathy can only prepare what she is given to work with." Exhibit 22. In addition, she asked: "When will the $1,277,500 judgment be paid to FFP?" Missy's answer: "We are expecting this settled in March of 19." Exhibit 22. *See also* Tr. 3:23-60.

As a result of the financial difficulties of FFP related to Lynn's bad activity, Jeff's previous power of attorney to Lynn was revoked. Jeff was then granted a power of attorney to act for FFP. Ex. 36.

The Excel judgment against Brant Lake Sanitary District was finally collected by Excel on July 27, 2021. The next day, Defendants' counsel sent Lynn Fischer's personal counsel a check for $125,000 (Exhibit U), which Lynn deposited in his own personal account. Thus, the funds never reached FFP. Obviously, payment should have been made to Jeff as controlling partner of FFP. No other payment was made on Defendants' debt to FFP and this litigation resulted.[2]

---

[2] There were also testimony and exhibits supporting Plaintiffs' claims for promissory estoppel and unjust enrichment, but since the jury did not answer special interrogatories on those claims (due to finding breach of contract), Plaintiffs omit discussion of that evidence.

ARGUMENT

I. The Trial Court Did Not Err in Refusing to Instruct the Jury on the Statute of Frauds.

As described below, all Defendants stated in writing the amount of the debt and the obligation to repay it. Accordingly, SDCL 53-8-2 is inapplicable. The main problem here creating disputed facts, if there are any, arises from Lynn's and Defendants' stealth and concealment. All the loans to Defendants were made without the permission, participation or knowledge of Jeff. Plaintiffs therefore cannot determine independently the precise amounts or dates of each loan since they were made mostly from accounts or sources that were not FFP's bank accounts.

So, the rule Defendants ask this Court to adopt is: If opposing parties are successful in their concealment of that which was done without a victim's knowledge or permission, then the victim loses. But, if ever that supposed rule has any applicability, it is not in this case. "[B]reaching parties may not complain when the task is made more difficult by their own acts." *AFSCME v. Sioux Falls Sch. Dist. 49-5,* 605 N.W.2d 811, 2000 SD 20; *Mash v. Cutler,* 488 N.W.2d 642, 649 (S.D. 1992). Here, the parties with actual knowledge (the recipients) repeatedly stated in writing amounts of loans (borrowings) that are quite consistent with the jury's verdict.

Missy Fischer Olson over-and-over presented financial statements consistent with the verdict, promised over-and-over that repayment would be made

when Excel collected its Judgment. Exhibits 1-4, 22, 25, 29. This was reaffirmed after FFP's bankruptcy counsel, Laura Kulm Ask, insisted that those numbers needed to be accurate.[3] Exhibit 22. Missy's emails are "signed" in the way required for them to be considered "writings." *See* Instruction 10; *Tolle v. Ler*, 804 N.W.2d 440, 444-45, 2011 SD 65 *13.

If all that were not enough, there is a written transcript of the *Excel v. Lake Brant Sanitary District* trial. That written transcript contains Reed Olson's sworn testimony that he "borrowed" (Reed's word of choice) $1,050,000 from his father-in-law (Lynn) and another $50,000 from his brother-in-law (Jeff). Furthermore, Reed's and Excel's counsel used those figures in his argument to the jury in that case [*See* Exhibit 19, App. 007] and in his appeal brief to this Court. [*See* App. 018.] Also, interestingly, Defendants' counsel sent a letter to Missy dated December 11, 2018 addressing her as follows:

> Missy Fischer-Olson
> EXCEL UNDERGROUND, INC.
> P.O. Box 220
> Sioux Falls, SD

to describe how the judgment would be collected. *See* Exhibit 4. Thus, we have written admissions from all Defendants detailing the existence of the debt to FFP and the amounts owned. Since the existence of those writings is plainly

[3] Attorney Ask and the retained financial consultant, Kathy Meland, reduced the debt from $1,277,500 down to $929,550 because the subtracted difference was actually a loan from Commercial State Bank, not FFP. Exhibit 23.

indisputable in the trial record, the statute of frauds is not of any applicability and is unsupported. The Court correctly denied the requested instruction.

Defendants argue that there is no written agency authorization as required by SDCL 53-8-2(4). However, that subpart of the statute applies only to agreements for the loan of money, in other words, for agreement by FFP to loan money to Defendants. Conversely, the agreement subject of this action is an agreement to repay a loan, not to make a loan.

Furthermore, there is no question of agency authorization. Reed Olson was the sole shareholder, director and officer of Excel. Thus, there is no separation to create an agency, i.e. a separation of principal and agent. He is everything. When he undisputedly said that Lynn (FFP in actuality) loaned $1,050,000 and Jeff loaned an additional $50,000, he did so as both principal and agent. *See also Uline Loan Co. v. Standard Oil Co.,* 185 N.W. 1012 (S.D. 1921) (written agent authority not required for corporate officers).

Nor was there sufficient evidence in dispute on the "gift" issue to justify Defendants' proposed instruction on gifts. Every financial statement showed the amount as debt owed by Defendants to FFP. Missy Fischer Olson swore up and down that it would be paid when Excel collected on its judgment. In meetings with Lynn, Missy and Jeff, Laura Kulm Ask was told it was debt to be repaid. Reed Olson testified in the Excel trial that the money had been borrowed. His counsel (also Defendants' counsel in this case) used that debt existence and

amount in his closing argument to support damages claimed against Brant Lake Sanitary District.

Defendants also complain about other instructions that supposedly should not have been given. Erroneous jury instructions provide basis for a reversal only when they are prejudicial, i.e. when in all probability they produced some effect upon the verdict and harmed the substantial rights of the appellants. Otherwise, they are harmless error. *Suvada v. Muller,* 983 N.W.2d 548, 2022 SD 75; *Carlson v. Construction Co.*, 761 N.W.2d 595, 2009 SD 6; *Steffen v. Schwan's Sales Enterprises, Inc.*, 713 N.W.2d 614, 2006 SD 41. *See also* SDCL 15-6-61. Here, there could be no doubt Appellants cannot meet this "prejudicial" standard. Missy Fischer Olson obviously stated over-and-over, in writing by email, that the amount was a debt owed to FFP; and Reed Olson by sworn testimony characterized the amount as being borrowed. If SDCL 53-8-2 applies, this evidence is more than sufficient. Furthermore, these are undoubtedly and indisputably binding admissions against interest.

II. The Trial Court Did Not Err in Refusing to Give Defendants' Proposed Instruction 123 on Proving Damages With Reasonable Certainty.

Defendants claim reversible error for the trial court's failure to give their Requested Instruction 123, which reads as follows:

> The measure of damages for a breach of contract or agreement is the amount which will compensate the aggrieved party for all detriment legally caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach.

> Damages for a breach of contract or agreement which are not clearly ascertainable in both their nature and origin are unrecoverable.
>
> Proof of damages requires a reasonable relationship between the method used to calculate damages and the amount claimed. There is no specific formula; to recover damages, that party must prove the damages with reasonable certainty. Reasonable certainty requires proof of a rational basis for measuring loss, without speculation.

The Court did in fact include SD Pattern Jury Instruction 50-70-10, as Instruction No. 23, which is the same as the first two paragraphs of Defendants' Requested Instruction 123. The Court's Instruction No. 23 omits the last paragraph of Defendants' Requested Instruction 123. But importantly, it should be noted that while the phrase "reasonable certainty" is not used in Pattern Instruction 50-70-10, the Instruction is nearly a direct quotation from this Court's approved explanation of "reasonable certainty" in *Von Sternberg v. Caffee*, 692 N.W.2d 549, 554-55, 2005 SD 14.

Obviously, this Court has rendered a number of opinions on the subject of "reasonable certainty," including decisions which provide clarification of the term. For instance, in *AFSCME v. Sioux Falls Sch Dist 49-5*, 605 N.W.2d 811, 2000 SD 20, this Court held:

> There need only be a reasonable basis for measuring the loss and it is only necessary that damages can be measured with reasonable certainty . . . . Any doubt persisting on the certainty of damages should be resolved against the contract breaker.

605 N.W.2d at 815. In *City of Bridgewater v. Morris, Inc.*, 594 N.W.2d 712, 1999 SD 64, this Court also held:

> Under any damage model, "There need only be a reasonable basis for measuring the loss and it is only necessary that damages can be measured with reasonable certainty." [quoting *Tri-State Ref. & Int. Co. v. Appaloosa Co.*, 452 N.W.2d 104, 110 (SD 1990)]

This Court has held numerous times that absolute certainty is not required. *See, e.g. Weitzel v. Sioux Valley Heart Partners*, 714 N.W.2d 884, 2006 SD 45. In *Von Sternberg*, 692 N.W.2d 549, 2005 SD 14, this Court characterized the standard as follows:

> Damages must be reasonably certain . . . . Reasonable certainty requires proof of a rational basis for measuring loss, without allowing a jury to speculate. . . . . [citations omitted] *Id.* at 555.

The Court further approved the following as part of the trial court's Instructions:

> The measure of damages for a breach of contract is the amount which will compensate the aggrieved party for all detriment proximately caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach.
>
> No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin. *Id.*

This quotation is essentially Pattern Instruction 50-70-10. This Court concluded that the jury instructions were appropriate for both causation and damages.

In *Stern Oil Co. v. Brown*, 908 N.W.2d 144, 2018 SD 15, this Court held:

> The trial court has discretion in the wording and arrangement of its jury instructions, and therefore we generally review a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard. However, no court has discretion to give incorrect, misleading, conflicting or confusing constructions.
>
> . . . .

> In general, to prove damages for lost profits, a plaintiff must establish a reasonable relationship between the method used to calculate damages and the amount claimed. Damages must also be "reasonably certain and not speculative." *Id.* at 150, 151.

Of course, lost profits were not at issue in this action.

In *FB&I Bldg. Prods. v. Superior Truss & Components*, 727 N.W.2d 474, 2007 SD 13, this Court characterized the damages standard as follows:

> To recover damages for breach of contract, the loss must be clearly ascertainable in both its nature and origin . . . . In proving damages, the party must establish "a reasonable relationship between the method used to calculate damages and the amount claimed." . . . . Whether damages have been proven with reasonable certainty is a question of fact. [citations omitted] *Id.* at 480.

In *Excel Underground v. Brant Lake Sanitary District*, 941 N.W.2d 791, 2020 SD 19, this Court did hold:

> To successfully recover contract damages, a litigant must first prove "the damages were in fact caused by the breach" . . . .
>
> Further, damages must not be speculative; that is, the damages must be reasonably certain . . . . To satisfy this requirement, "A plaintiff must establish a reasonable relationship between the method used to calculate damages and the amount claimed." [citations omitted] *Id.* at 806.

In the two most recent decisions on "reasonable certainty," this Court used divergent descriptions. In *Lamb v. Winkler*, 987 N.W.2d 398, 2023 SD 10, this Court characterized "reasonable certainty" as "'proof of a rational basis for measuring loss,' without requiring the trier of fact to speculate." *Id.* at 406 [citations omitted].

In *Smith v. WIPI Grp., USA, Inc.*, 996 N.W.2d 368, 2023 SD 48, this Court characterized "reasonable certainty" in multiple ways:

- Damages must not be speculative; that is, the damages must be reasonably certain.
- Proof of damages requires a reasonable relationship between the method used to calculate damages and the amount claimed.
- Reasonable certainty requires proof of a rational basis for measuring loss, without allowing [a fact finder] to speculate.

Id. at 383-84 [citations omitted]

Most importantly, and determinative here, this Court has never overruled any of its prior characterizations of "reasonable certainty" and never held that only the latest characterizations may be used as instruction to the jury. Since the Pattern Jury Instruction 50-70-10 given by the trial court matches that used in decisions of this Court, particularly in *Von Sternberg, supra,* it should be regarded as adequate for this case, particularly since the damages consisted solely of repayment of debt principal admitted by Defendants.

In fact, the context in which this issue arises is certainly important and determinative. This action was simply for recovery of the total amount of admitted loans/borrowings. There is certainly no dispute about whether the damages are clearly ascertainable in both their nature and origin. Furthermore, there is no genuine dispute as to a "reasonable relationship between the method used to calculate damages and the amount claimed." The amount was admitted

repeatedly and was refined and fixed by bankruptcy counsel and specially retained financial consultant. Nor could there be any genuine dispute as to whether there is a "rational basis for measuring loss, without speculation," all for the same reasons. The Court's instructions to the jury certainly gave Defendants adequate means and basis for their defense arguments (even though absurd).

The patent insufficiency of Defendants' arguments about Requested Instruction 123 is further underscored by the undeniable fact that Defendants, as recipients of the "underground" loans, had exclusive personal knowledge as to the dates and exact amounts of all such loans. Defendants' assertion of insufficient proof of damages is both ironic and insufficient. Since all loans were made "under the table" and without Jeff's knowledge, any alleged uncertainty regarding the precise amount needing to be repaid is solely Defendants' cause and responsibility. To say, in effect, "ha-ha, you can't recover because we who know will not give you a straight answer" cannot be sufficient as a matter of law and undisputed fact. In fact, such an assertion is contrary to holdings of this Court to the effect that "breaching parties may not complain when the task is made more difficult by their own acts." *AFSCME v. Sioux Falls Sch. Dist. 49-5*, 605 N.W.2d 811, 2000 SD 20; *Mash v. Cutler*, 488 N.W.2d 642, 649 (S.D. 1992).

The Court correctly determined that the unpaid amount was an issue of fact to be determined by the jury. The amount so determined by the jury is consistent with the evidence and has sufficient source therein. If the $125,000 paid to Lynn is subtracted from the $929,550 determined by Attorney Ask and the retained

accountant, the resulting net is $804,550. When the $50,000 admittedly borrowed from Jeff is added to that number, the total is $854,550. Thus the $849,550 verdict is within the total determinable by the facts at trial. These amounts were, of course, disputed, but there was certainly a factual basis in the record for the jury's number.

III. The Trial Court Erred in Failing to Award Pre-Judgment Interest on the Verdict Damages Amount.

Finally, on Plaintiffs' cross-appeal regarding prejudgment interest, there was no issue to submit to the jury. While Defendants requested a special interrogatory to the jury on the applicable interest rate, that request was denied by the Court. The argument on that issue ended as follows:

> MR. SANFORD: Well, I . . . just think that even if there's no interest due, once the breach occurs, that is they don't pay it . . . when the judgment . . . is collected, then statutory interest should accrue after that.
>
> THE COURT: I would agree. I'm not going to include it on the verdict form.

Tr. 3:190.[4]

The only needed evidence regarding prejudgment interest was the admission that repayment was due when the Judgment was paid and collected. That judgment payment occurred at the latest on July 27, 2021, the indisputable date stated in the Satisfaction of Judgment in the *Excel v. Lake Brant Sanitary*

[4] Plaintiffs' counsel earlier advised the Court that Plaintiffs are not seeking interest up to the date of payment of the *Excel v. Brant Lake* Judgment. Tr. 3:188.

District case. *See* Defendants' Counsel's Opening Statement Tr. 1:12. Of course, Excel's counsel [and Defendants' counsel in this action] sent $125,000 to Lynn the day after Judgment payment. *See* Exhibit U.

Furthermore, SDCL 21-1-13.1 states the statutory requirement of prejudgment interest and the applicable rate of interest (10%) to be paid from and after the due date. This omits an accrual of interest from the date of each loan, since there was no claim or proof of the same, thus no jury question on that subject.

Of particular importance within SDCL 21-1-13.1 are the following portions:

> If there is a question of fact as to when the loss or damage occurred, prejudgment interest shall commence on the date specified in the verdict or decision and shall run to, and include, the date of the verdict or, if there is no verdict, the date the judgment is entered. If necessary, special interrogatories shall be submitted to the jury. . . . . The court shall compute and award the interest provided in this section and shall include such interest in the judgment in the same manner as it taxes costs.

In other words, if there is no factual dispute as above-described, the Court shall "include such interest in the judgment . . . ." Thus, this subject is unlike other possible subjects of SDCL 15-6-49(a) in which the Court has some discretion.

Even if SDCL 21-1-13.1 did not exist, there is plenty of statutory authority for the assessment of accrued interest from and after the *Excel v. Lake Brant* payment collection date.

Effect of SDCL Ch. 54-3.

Another way to look at the interest issue is to recognize that, because this involves loans of money and not just a contract, SDCL Chapter 54-3 is relevant. More particularly:

> 54-3-2. Loan of money--Presumption as to interest.
>
> Whenever a loan of money is made it is presumed to be made upon interest, unless it is otherwise expressly stipulated at the time in writing.
>
> 54-3-3. Annual rate of interest where not specified.
>
> When a rate of interest is prescribed by a law or contract, without specifying the period of time by which such rate is to be calculated, it is to be deemed an annual rate.
>
> 54-3-4. Maximum rate of interest where no rate specified--Commencement where date not specified.
>
> Under an obligation to pay interest, no rate being specified, interest is payable from date of incurrence of debt, unless the parties have otherwise agreed, at a maximum rate of the Category C rate of interest as established in § 54-3-16, and in the like proportion for a longer or shorter term. In the computation of interest for less than a year, three hundred sixty days are deemed to constitute a year.
>
> 54-3-16. Official state interest rates.
>
> The official state interest rates, as referenced throughout the South Dakota Codified Laws, are as follows:
>
> (1) Category A rate of interest is four and one-half percent per year;
>
> (2) Category B rate of interest is ten percent per year;
>
> (3) Category C rate of interest is twelve percent per year;
>
> (4) Category D rate of interest is one percent per month or fraction thereof;

(5) Category E rate of interest is four percent per year;

(6) Category F rate of interest is fifteen percent per year; and

(7) Category G rate of interest is five-sixth percent per month or fraction thereof.

Nevertheless, Plaintiffs agree that 10% can be used instead of the 12% resulting from application of Chapter 54-3.

Since the due date is beyond factual dispute and since the requested interest rate is 10% instead of the 12% provided by the above statute, there is no legal basis for denial of prejudgment interest.

The trial court had complete authority under SDCL 15-6-49(a) to award interest [even ignoring the mandatory requirements of SDCL 21-1-13.1] since the issue was not submitted to the jury, was not requested by any party to be submitted, and the due date was not disputable and interest was statutorily required.

There is no doubt Plaintiffs requested prejudgment interest in their Complaint and Amended Complaint. Even ignoring SDCL 21-1-13.1, SDCL 15-6-49(a) could not be read to give the trial court absolute and unreviewable discretion. In other words, there should be and are circumstances in which the trial court should make determination of issues not submitted to the jury. If ever there were such an instance, it would be this one, at least.[5] Wright and Miller,

[5] This is particularly true in this case, since the Trial Court stated her agreement with Plaintiffs' counsel's statement concerning pre-judgment interest. Tr. 3:190.

Federal Practice and Procedure, § 2507; *Ingersoll v. Mason,* 254 F.2d 899 (8th Cir. 1958) [interpreting FRCP 49(a), which is the same as SDCL 15-6-49(a)].

CONCLUSION

For all the reasons above-stated, Plaintiffs/Appellees respectfully request that the Judgment be in all respects affirmed, except that statutory pre-judgment interest from and after July 27, 2021 be added pursuant to SDCL 21-1-13.1.

REQUEST FOR ORAL ARGUMENT

Plaintiffs/Appellees respectfully request the privilege of being heard at oral argument.

Dated: October 17, 2025

CADWELL SANFORD DEIBERT
& GARRY LLP

By _/s/ SW Sanford_____

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CERTIFICATE OF COMPLIANCE

I hereby certify that Plaintiffs/Appellees' Brief complies with the type volume requirements of SDCL 15-26A-66. The Brief was prepared using Microsoft Word 2021 and proportionally spaced Times New Roman 13-point type. The Brief is 20 pages and, based on the word-count feature of that software, contains 4,502 words.

Dated: October 17, 2025

CADWELL SANFORD DEIBERT
& GARRY LLP

By _/s/ SW Sanford_____

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Appellees' Brief, with attached Appendix, was filed with the Supreme Court and served on counsel shown below through eFileSD on October 17, 2025:

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Additionally, one copy of Appellees' Brief, with attached Appendix, was mailed, by U.S. mail, postage prepaid, as follows:

Ms. Shirley Jameson-Fergel
South Dakota Supreme Court Clerk
500 East Capitol Avenue
Pierre SD 57501-5070

on October 17, 2025.

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Attorneys for Plaintiffs/Appellees

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 30786

JEFFREY FISCHER, ALLISON FISCHER and STEVEN HUFF AS COURT APPOINTED RECEIVER FOR FISCHER FARMS PARTNERSHIP, a South Dakota general partnership,

PLAINTIFFS/APPELLEES,

vs.

MISSY FISCHER OLSON, REED J. OLSON and EXCEL UNDERGROUND, INC.,

DEFENDANTS/APPELLANTS.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA

THE HONORABLE RACHEL RASMUSSEN, PRESIDING JUDGE

APPENDIX TO APPELLEES' BRIEF

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STATE OF SOUTH DAKOTA) :SS COUNTY OF LINCOLN)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
JEFFREY FISCHER, ALLISON FISCHER, and FISCHER FARMS PARTNERSHIP, Plaintiffs, vs. MISSY FISCHER-OLSON, REED J. OLSON, and EXCEL UNDERGROUND, INC., Defendants.	41CIV20-461 ORDER DENYING PLAINTIFFS' PROPOSED JUDGMENT

A jury trial was held in this case from April 26-28, 2024. Throughout the trial the Plaintiffs were present and represented by counsel Steven W. Sanford. The Defendants were present and represented by counsel Daniel K. Brendtro. The jury entered a verdict against the Defendants and for the Plaintiffs in the amount of $849,550. The Plaintiffs submitted a proposed judgment to the Court on May 1, 2024. The proposed judgment included an additional recovery award of $234,612 in prejudgment interest. The Defendants objected to the inclusion of prejudgment interest and the parties subsequently filed briefs on the same. The post-judgment issue before the Court is whether Plaintiffs are entitled to prejudgment interest on their successful claim for damages. The Court has reviewed the submissions and relevant statutory and case law.

Plaintiffs claim the language of SDCL § 15-6-49(a) allows a court to enter a finding of fact regarding the date Plaintiffs' "loss or damage occurred" in accordance with SDCL §§ 21-1-13.1 and 54-3-16. The relevant part of SDCL § 15-6-49(a) states:

> ...The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a jury trial of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Plaintiffs' Amended Complaint prays for relief of various monetary amounts, "together with interest thereon at the highest lawful rate in favor of Jeffrey Fischer and Allison Fischer." Am. Compl. p. 6, ¶ 2. In this case the issue of prejudgment interest is an "issue of fact raised by the pleadings" under SDCL § 15-6-49(a). "South Dakota statutes require an award of prejudgment interest on compensatory damages, calculated 'from the day the loss of damage occurred.'" JAS Enterprises, Inc. v. BBS Enterprises, Inc., 2013 S.D. 54, ¶ 45 (citing SDCL § 21-1-13.1). "If there is a question of fact as to when the loss or damage occurred, prejudgment interest shall commence on the date specified in the verdict or decision and shall run to, and include, the date of the verdict, ... If necessary, special interrogatories shall be submitted to the jury." SDCL § 21-1-13.1.

Plaintiffs prayed for prejudgment interest in their initial Complaint filed on July 31, 2020, and again in their Amended Complaint filed on October 22, 2022. Plaintiffs filed proposed jury instructions on April 3 and April 6, 2024, and a brief in support of their proposed instructions on April 10, 2024. Plaintiffs did not request any jury instructions on prejudgment interest or a special verdict interrogatory on the date of loss. Plaintiffs, as the prevailing party, now argue that the Court can make the finding of fact under the "may" language at the end of SDCL § 15-6-49(a) to award prejudgment interest as required by SDCL 21-1-13.1.

The Court finds guidance in *Mealy v. Prins*, 2019 S.D 57. "Calculation of prejudgment interest is only a question of fact for the jury's consideration when the date of loss or damage is at issue." Id. at ¶ 40. In *Mealy*, the Plaintiff sued Defendant under a breach of contract claim based on multiple promissory notes. The jury considered seven promissory notes and ruled in favor of the Plaintiff. The jury also determined the date from which the prejudgment interest would accrue based on the special verdict they received from the court. One of the issues on appeal in *Mealy* was whether the prejudgment interest should have been submitted to the jury as a question of fact when each note already declared an applicable interest rate and due date.

In its *Mealy* holding, the Supreme Court relied on SDCL 21-1-13.1: "Prejudgment interest on damages arising from a contract should be at the contract rate, if so provided in the contract[.]" Id. at ¶38. The trial court used a special verdict form that asked the jury to determine the date of accrual for prejudgment interest. The Plaintiff did not object to the special verdict form during the settling of jury instructions, but had offered their own special verdict form that did not include such date. That prior submission, together with the Plaintiff's notice to the trial court in post-trial proceedings, was enough for the Supreme Court to review this issue and determine that prejudgment interest should not have been an issue of fact for the jury in that case.

The present case is distinguishable from *Mealy*. Most importantly, Plaintiffs here never filed proposed jury instructions or a proposed special verdict form that included the issue of prejudgment interest. Prejudgment interest was not raised in any form in 18 months from the Amended Complaint and in almost four years from the original Complaint. Plaintiffs argue there is ample evidence for this Court to make a finding under SDCL § 15-6-49(a) that the date of loss is the date the Defendants received their settlement, and that would be the latest prejudgment interest could begin to accrue and least detrimental to Defendants.

The language of SDCL 15-6-49(a) gives this Court discretion to make a finding not submitted to the jury or brought up by counsel prior to the jury retiring to deliberate. Under the facts and circumstances of this case, it is not appropriate for the Court to exercise its discretion and make a finding on the date of loss pursuant to SDCL §§ 15-6-49(a) and 21-1-13.1. Unlike *Mealy*, here there are no clear written notes with interest rates and due dates. The jury may have found the loss occurred on the exact date the Defendants received their settlement; or, they may have found the loss occurred months before the Defendants' settlement was actually paid; or, they may have found it occurred weeks after the settlement. Of utmost concern here is if the jury's consideration of when prejudgment interest should begin accruing would have influenced how they determined the actual damage amount. In sum, the date of loss or damage is at issue and therefore Plaintiffs should have requested that the jury determine the appropriate date to begin calculation of prejudgment interest in order to recover the same.

Based on the forgoing, this Court hereby DENIES Plaintiffs' proposed final judgment.

Dated this 7th day of June, 2024.

Attest:
Anderson, Brittan
Clerk/Deputy

Rachel R. Rasmussen, Circuit Court Judge

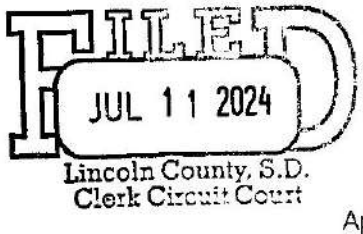
STATE OF SOUTH DAKOTA) :SS COUNTY OF LINCOLN)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
JEFFREY FISCHER, ALLISON FISCHER, and FISCHER FARMS PARTNERSHIP, Plaintiffs, vs. MISSY FISCHER-OLSON, REED J. OLSON, and EXCEL UNDERGROUND, INC., Defendants.	41CIV20-461 CORRECTED JUDGMENT PER SDCL § 15-6-60(a)

This action was tried to a jury on April 24-26, 2024, in the Lincoln County Courthouse in Canton, South Dakota, before Circuit Court Judge Rachel R. Rasmussen, and the jury entered a verdict for the Plaintiffs, and therefore:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs shall have and recover from Defendants, jointly and severally, a judgment in the sum of $849,550.00. It is further,

ORDERED, ADJUDGED, AND DECREED that all counterclaims and set-offs pled by Defendants are in all respects dismissed on their merits with prejudice. It is further,

ORDERED, ADJUDGED, AND DECREED that pursuant to SDCL §§ 15-6-54 and 15-17-37 et seq., the Plaintiffs shall be entitled to their costs and disbursements herein in the amount of $2,492.73 [inserted by the Clerk].



Dated, *nunc pro tunc*, this 7th day of June, 2024.

Rachel R. Rasmussen, Circuit Court Judge

Attest: Brittan Anderson,
Clerk of Courts

By: JMBaker,
Clerk/Deputy

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

COUNTY OF LAKE) THIRD JUDICIAL CIRCUIT

****

EXCEL UNDERGROUND, INC.,

Plaintiff,

vs. 39CIV14-000050

BRANT LAKE SANITARY DISTRICT,

Defendant.

****

BRANT LAKE SANITARY DISTRICT,

Plaintiff,

vs.

EXCEL UNDERGROUND, INC., and

GRANITE RE, INC.,

Defendants.

* * * * 39CIV14-000018

GRANITE RE INC.,

Third-Party Plaintiff,

vs.

REED I. OLSON &

MELISSA D. FISCHER-OLSON,

Third-Party Defendants.

****

JURY TRIAL INDEX

****

EXHIBIT 19 tabbies

PROCEEDINGS: Jury Trial was January 22, 2018, through February 1st, 2018, in the Courtroom of the Lake County Courthouse, in Madison, South Dakota.

BEFORE: The Honorable PATRICK T. PARDY, Circuit Court Judge

APPEARANCES: MR. DANIEL K. BRENDTRO
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else that would like a hearing assist? Just one in the back? Thank you.

I'll introduce real quick the parties to this matter. This is a civil lawsuit with a number of parties. Representing Excel underground is Mr. Brendtro. Lake Sanitary District is represented by Miss Bogard, Miss Hertz, and Mr. Lammers. And the other party, or one of the other parties, Granite Re, is represented by Mr. Nilan and Mr. Fuller. And then the -- Mr. and Mrs. Olson are also represented by Mr. Brendtro. So thoe are the people that are up here. To the far left is my Law Clerk Briana Polmauki.

THE COURT: The hardest name in South Dakota to say. Alright. Are the parties ready to proceed?

MR. FULLER: We are.

MR. BRENDTRO: Yes, Judge.

MS. BOGARD: Yes, Your Honor.

THE COURT: Alright. First we will start these proceedings with Voir Dire, so we are going to select a Jury now. We'll call 17 people up to the Jury box, when your name is called I'll ask you to come to the Jury box, back row, and then work right to left, second row right to left, and then the folding chairs right to left as you face the Jury box. When we do

A I could have done a million and a half, and maybe a million seven, eight, I'm sure.
Q Is there any doubt in your mind about the million and a half?
A No.
Q Reed, did you have to borrow money in order to complete the Brant Lake job?
A Yes, I did.
Q Did you have to borrow money to stay afloat from 2014 until today?
A Yes.
Q Did you borrow money from your father-in-law?
A Yes, I did.
Q How much?
A Altogether we're getting close to a million dollars now.
Q What's it like to borrow money from your father-in-law?
A You lose --
MS. BOGARD: I'll object on relevancy, Your Honor.
THE COURT: Sustained.
Q (BY MR. BRENDTRO:) Is that money that he had to give?
A Things are pretty tight right now with the

farm.
Q In addition to your father-in-law, did you borrow from other family members?
A Yes.
Q Who else?
A Also from my brother-in-law, I borrowed $50,000. I borrowed from my father another $50,000. And I actually borrowed from my stepson, and that's about -- I think it's about $68,000.
Q Is debt something -- let me ask that differently, is debt like that to family members something new for you and Excel?
A Yes, I never borrowed --
MS. BOGARD: Excuse me, I'll object on relevance.
THE COURT: Sustained.
Q (BY MR. BRENDTRO:) Okay. Well, prior to Brant Lake, were you borrowing around a million dollars from your father-in-law to run your business?
MS. BOGARD: Same objection.
THE COURT: Sustained.
Q (BY MR. BRENDTRO:) Your Honor, may we approach?
THE COURT: You may.

(Off the record discussion was had between

Court and Counsel at the bench, after which time the following was had back on the record with all parties being present, including the Jury.)

THE COURT: The objection was sustained.

Q (BY MR. BRENDTRO:) Reed, did I list those correctly that you got about a million dollars from your father-in-law, 50,000 from your brother-in-law, and 68,000 from your stepson?

A Yes, and also another $50,000 from my dad.

Q What's your stepson's name?

A Seth Fisher.

Q Reed, my estimate of math on that is about 1.16 million, is that what you get, too?

A Yes.

Q Prior to the Brant Lake job, from any sources, did Excel have a need to borrow a total like that?

A No, it did not.

Q Prior to the Brant Lake job, what were your feelings about debt?

MS. BOGARD: I'll object on relevancy grounds.

THE COURT: Sustained.

Q (BY MR. BRENDTRO:) Prior to the Brant Lake job, what was Excel Underground's practice with debt?

A I had borrowed all the money from banks that I

present, for reading of the Jury Instructions and Closing Argument).

THE COURT: Thank you, please be seated. Alright, the record should reflect that the Jury is back in the Courtroom. Is Brant Lake ready to proceed?

MS. BOGARD: Yes, Your Honor.

THE COURT: Mr. Brendtro?

MR. BRENDTRO: Yes, Judge.

THE COURT: Mr. Nilan?

MR. NILAN: Yes, Your Honor.

(The Court read the Jury Instructions out loud to the Jury in open court, after which time the attorneys gave their Closing Arguments).

THE COURT: Are the parties prepared to proceed with closing arguments?

MS. BOGARD: Yes, Your Honor.

MR. BRENDTRO: Yes, Your Honor.

MR. NILAN: Yes, Your Honor.

THE COURT: Mr. Brendtro, you may proceed, you have 45 minutes.

MR. BRENDTRO: Thank you, Your Honor. Well,

111,000. In 2014 to 2018 it was zero. So we can input circumstantially that Excel had a loss of at least $111,000 per year of profits, that he was unable to generate because of his impaired bonding ability.

You heard testimony about selling equipment. Reed's list of diggers, trucks, backhoes, you heard what he owed on it, which was nothing. Other than $300,000 of general debt, you heard what he owes today, and you saw when everything was sold. The math that I can share with you is this is essentially a $372,000 change in the net equity of Excel as far as its assets. Over the course of the time, Excel was unable to continue working. And was borrowing money trying to finance the Brant Lake project.

This other number, 1.168 million dollars, that's how much Reed has borrowed from family to stay afloat. Now, going through this yesterday, I noticed that the total of these two, meaning the loss of his equity, the amounts that he's had to borrow, is 1.54 million dollars. Which is very, very close to the amount that we believe Excel is owed. Circumstantially, this makes sense, because some of these losses begin 2013, when Reed is borrowing trying to keep the project going. They continue

going forward. So some of this money represents a loss of profits, and some of it represents just what it takes to keep going.

Now, in opening, the District made some promises to you. They said he had just done a lot of small projects. Well, he done a million plus in revenues per year, you heard Travis Gusso and Scott Olson talk about it's easier to do one bigger project than a bunch of small ones, that add up to a million. You also heard testimony that Scott had handled a 2.23 million dollar project in the past. And had proved it was even larger than Reed's. He had the manpower, and they were capable of doing this type of work.

You heard some comments about how their bond was unusual. Travis Gusso told you that there was nothing about it, and had suggested that Excel wasn't any way risky. It's just a different way of doing the bond. You heard Brant Lake tell you in Opening about the insulation discs being installed incorrectly. Well, Excel installed them in the lid just the way that the engineer wanted to do.

You heard the allegation that it took two full-time inspectors to monitor all this work. Even with two full-time people as of April of 2014, there was

STATE OF SOUTH DAKOTA)
COUNTY OF LAKE) CERTIFICATE

I, Kim E. Callies, an Official Court Reporter within and for the State of South Dakota, hereby certify that I was present during the proceedings had, and that the foregoing pages, 1-1849, inclusive, is a true and accurate transcript of my Stenotype notes taken in said matter.

Dated this 12 day of April, 2018.

Kim E. Callies

Kim E. Callies
Official Court Reporter

IN THE

Supreme Court

of the

State of South Dakota

No. 28580

excel underground, inc.,
Plaintiff/Appellee
v.
brant lake sanitary district,
Defendant/Appellant

and

brant lake sanitary district,
Plaintiff/Appellant
v.
excel underground, inc.,
Defendant and Third-Party Defendant/Appellee
&
granite re, inc.,
Defendant and Third-Party Plaintiff/Appellee
v.
reed olson & missy fischer-olson
Third-Party Defendants/Appellees

An appeal of two cases, combined for discovery and trial
in the Third Judicial Circuit
Lake County, South Dakota
the hon. patrick pardy
CIRCUIT COURT JUDGE

BRIEF OF APPELLEE, EXCEL UNDERGROUND, INC.

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Attorney for Excel Underground, Inc., Reed Olson, & Melissa Fischer

Notice of Appeal filed on March 30, 2018

the testimony of Reed Olson who explained that the company stopped doing business in 2017. (Exhibit 12; TT 825:8-9; Record 1994).

The EBITDA method provided a reasonable method from which to calculate Excel's lost profits.

Method 2: Net Worth (More Debt & Less Equipment)

That lost profits figure of $800,000 was further corroborated by testimony about how Excel operated its business before and after the Sewer District project. Reed Olson offered extensive testimony about the company's assets and debts. He explained that in 2012, the company owned around a dozen pieces of equipment, worth around $575,000, and owed general business debt to the bank of around $300,000. (TT 827-829; TT 1050-1051) As of the date of trial, Excel had sold all but one piece of equipment; it had taken out new loans of $1.16 million; and its general business debt to the bank was now $177,000. (TT 1048-1051.)

In closing argument, counsel for Excel showed this math for the Jury, and noted that the company swung from a positive net worth of roughly $275,000 to a negative net worth of ($1,265,000), i.e., a downward swing of $1,540,000. (TT 1788-1789). Counsel then pointed out that this swing was roughly equal to the total amounts that Excel was seeking at trial: unpaid contract items of around $750,000, and lost profits of $800,000. In other

IN THE

Supreme Court

of the

State of South Dakota

No. 30786 & 30793

JEFFREY FISCHER,
ALLISON FISCHER, &
FISCHER FARMS PARTNERSHIP,
PLAINTIFFS/APPELLEES

VS.

MISSY FISCHER-OLSON,
REED J. OLSON, &
EXCEL UNDERGROUND, INC.,
DEFENDANTS/APPELLANTS.

An appeal from the Circuit Court,
Second Judicial Circuit
Lincoln County, South Dakota

The Hon. Rachel Rasmussen
CIRCUIT COURT JUDGE

APPELLANTS' REPLY BRIEF

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Notice of Appeal filed on August 8, 2024

Appellees:

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Secondary Sources

72 AM.JUR.2D *STATUTE OF FRAUDS* § 285 (1974) 1
Kent, J., 2 Commentaries on American Law 511 (6th ed. 1848) 13
Ketterling, D., *Oral Contracts for the Sale of Agricultural Products*, 22 S.D. L. Rev. 619 (1977) 1, 3, 3 n.1, 7
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INTRODUCTION & SUMMARY

Part 1: Excel's Appeal, #30786.

The Statute of Frauds is a centuries-old doctrine which "permits the courts to guard not only against the dishonesty of parties and the perjury of witnesses, but also against the misunderstandings and mistakes of honest men." Ketterling, D., *Oral Contracts for the Sale of Agricultural Products,* 22 S.D. L. REV. 619, 622 (1977) (citing 72 AM.JUR.2D *Statute of Frauds* § 285 (1974)). The facts of this case required that the Jury be instructed upon it. The failure to do so was prejudicial error and denied the Defendants of those protections.

Part 2: The Fischers' Notice of Review, #30793.

The issue presented in the Fischers' cross-appeal is narrow and simple: Can a creditor collect prejudgment interest upon a zero-interest contract or loan? The answer comes directly from statute: No. Or, in the alternative, the Fischers waived the issue by failing to request special interrogatories.

1.
ARGUMENT-IN-REPLY
(APPEAL #30786)

A. The Statute of Frauds is not an idle requirement

Section I of the Fischers' brief is an example of the adage, '*When the law is against you, argue the facts.*' *See,* Fischers' Brief, pp. 7-10.

Yes, there are facts that *might* support the existence of a debt, and facts which *might* demonstrate compliance with the Statute of Frauds. But from this Record, and based upon the Instructions given, we do not know which facts the Jury used, nor do we know which legal theory the Jury relied upon to reach its very large Verdict.

Merely arguing the facts does not extinguish the need for the Jury to be properly instructed on the law. Excel, like all other debtors, is entitled to the protections of the Statute of Frauds.

(1) The Fischers fail to refute any legal arguments related to the Statute of Frauds

Most of our opening Brief is left untouched. For example, the Fischers do not attempt to refute the basic legal premise that compliance with the Statute of Frauds is a question for the Jury, nor do they refute the authority declaring it error to refuse to instructions on that issue. *See,*

Excel's Opening Brief, pp. 29-30 (citing, *inter alia,* the directly analogous Iowa case of *Cambron v. Moyer*, 519 N.W.2d 381)).

The Fischers do not dispute the public policy rationale behind the centuries-old Statute of Frauds.[1] Its purpose is to prevent the unrestrained "enforcement of obligations depending for their evidence on the unassisted memory of witnesses." Ketterling, D., 22 S.D. L. REV. at 621.

Likewise, the Fischers offer no response to Section 1(a), where we discuss that a loan is enforceable only via a signed writing. There is no such thing as an enforceable 'implied loan,' nor a loan proven 'by conduct' or 'circumstances.' But here, the Jury was permitted to so find.

The Fischers offer no response to Section 1(b), where we discuss that the Statute of Frauds also requires a writing signed by a principal in order to create debt via an agent's actions. The instructions disregard this.

And, the Fischers fail to address the requirements we discuss in Section 1(c) that the Jury in this case did not determine whether the 'signed

[1] "The progenitor of the Statute of Frauds as enacted in South Dakota was the English statute entitled, an *Act for the Prevention of Frauds and Prejudices*" from 1676, which became effective in the English Colonies at that same time. Ketterling, D., *Oral Contracts for the Sale of Agricultural Products,* 22 S.D. L. REV. at 620 (citing *McIntosch v. Murphy,* 469 P.2d 177, 179 (Haw. 1970)). Nearly every state has maintained a version of it ever since.

memorandum' is *sufficiently definite* to take the agreement out of the Statute of Frauds and create an enforceable debt.

On the issue of *sufficiently definite*, the Fischers ignore all three South Dakota cases we cited. In addition, we have found similar authority in North Dakota: *Rohrich v. Kaplan*, 248 N.W.2d 801, 803 (N.D. 1976) ("A memorandum is *sufficient* to take an oral contract out of the Statute if it discloses the identity of the contracting parties, the subject matter of the agreement, and *the expressed consideration, as well as the terms and conditions upon which the contract was entered into.*") (emphasis added) (citing *Johnson v. Auran*, 214 N.W.2d 641, 651 (N.D.1974)); *Hoth v. Kahler*, 74 N.W.2d 440, 441 (N.D. 1956); *Goetz v. Hubbell*, 266 N.W. 836, 838 (N.D. 1936)).[2]

The approach taken by the Circuit Court's instructions was wrong, as a matter of law.

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[2] *See, also, Johnson*, 214 N.W.2d at 650 ("The fact that the consideration cannot be determined from the writing which is relied upon as a memorandum, without resort to outside evidence, renders the writing *insufficient* as a memorandum to take the transaction out of the statute of frauds.") (emphasis added)

Here, the Fischers offered no written evidence whatsoever as to what transfers comprised the alleged total (*i.e.*, the consideration); and no written evidence about the terms and conditions of the loans when they were entered into.

(2) The Circuit Court was required to instruct the Jury on the Statute of Frauds

This was a Statute of Frauds case from start to finish. The Fischer Farms transfers were undisputably *oral* at the time they were made. The only possible mechanism to judicially enforce any transfers as 'loans' is for the Fischers to prove they can bring them out of the Statute of Frauds. The evidence regarding this was disputed, ambiguous, and filled with holes.

Given the state of the evidence, the Circuit Court was *required* to instruct the Jury about the Statute of Frauds. "It is the trial court's *duty* to set forth instructions to the jury 'as to the law of the case as it pertains to *any theory of the parties supported by the evidence.*'" *LDL Cattle Co. v. Guetter*, 1996 S.D. 22, ¶ 33 (emphasis added) (quoting *Glanzer v. St. Joseph Indian School,* 438 N.W.2d 204, 209 (S.D. 1989) and citing *Cody v. Edward D. Jones Co.,* 502 N.W.2d 558, 563 (S.D. 1993); *Sommervold v. Grevlos,* 518 N.W.2d 733, 739 (S.D. 1994)).

The Circuit Court failed in its duty to instruct.

(3) The failure to instruct on the Statute of Frauds was prejudicial

The Fischers' primary argument about the Statute of Frauds is that there was no prejudice from the missing jury instructions. The Fischers

contend that some of their evidence *might* have supported a proper Verdict, and thus, there was no prejudice. But that is not the test for prejudice.

As this Court has repeatedly held, "[f]ailure to give a requested instruction that correctly sets forth the law is prejudicial error." *City of Rapid City v. Big Sky, LLC*, 2018 S.D. 45, ¶ 26 (quoting *Sundt Corp. v. State ex rel. S.D. Dep't of Transp.*, 1997 S.D. 91, ¶ 19 (quoting *Kuper v. Lincoln-Union Elec. Co.*, 1996 S.D. 145, ¶ 32).

The Fischers suggest these errors were harmless. But here, in all probability, the erroneous instructions and the missing instructions produced an effect upon the Verdict, and, in all probability this was "harmful to the substantial rights" of these Defendants.[3]

The entire premise of the Statute of Frauds is to protect would-be debtors from the problems of unwritten agreements. This includes protections from faulty memories; dishonest parties; "but also...the misunderstandings and mistakes of honest men." Ketterling, D., 22 S.D. L. REV. at 622 (citing 72 AM.JUR.2D *Statute of Frauds* § 285 (1974)).

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[3] Examples of when faulty instructions are *not* prejudicial include: *Schultz v. Scandrett*, 2015 S.D. 52, ¶ 26 ("jury instructions were *more favorable to the Plaintiffs than the law required*"); *Suvada v. Muller*, 2022 S.D. 75, ¶ 37 ("jury awarded the Mullers nothing for their fraud claim, making the error harmless").

Here, there is a very real possibility that the Jury found an "implied" loan, an "oral" loan; a loan "shown by conduct," a loan "inferred by circumstances," or a loan created via *implied* agency. This would deny Excel Underground any of the protections intended by the Statute of Frauds.

And even though the Fischers offered "writings" into evidence, the wording of the instructions as a whole meant that the Jury was not required to consider *any* of their proffered documents to reach their decision.[4] The wording of the instructions excused the Fischers from providing the details of where the alleged loan balance came from. The instructions invited a Verdict based upon an aggregate balance that likely included 'loans' for which no consideration was exchanged, and, instead, were merely co-signed loans that Excel paid back to third-party lenders. And although promissory estoppel is an *exception* to the Statute of Frauds, the Fischers were not required to prove it.

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[4] In support of the Verdict, the Fischers take substantial liberties with the Record. They now argue (without authority) that a *transcript* of Reed's testimony in prior court proceedings can serve as a signed writing. Fischers' Brief, p. 8. The Fischers try to sidestep the agency problem by claiming that Reed was the principal (while ignoring the glaring absence of any writing by which Reed gave Missy agency to create corporate debt for Excel). *Id.,* at 9. And the Fischers claim that the proffered writings were "plainly indisputable" which they are not. *Id.,* at 8-9. And nowhere do the Fischers address the problem that the alleged debt total appears to include an amalgam of actual transfers, as well as co-signed commercial debt which Excel already paid back to those lenders.

Prejudice can also be inferred because the amount of the Jury's Verdict did not match the amount allegedly owed under *any* proffered writing. In short, the prejudice in this case is emblematic of the very types of uncertain arrangements the Statute of Frauds is designed to guard against.

"These bad instructions, in all probability, had some effect upon the final result and affected [plaintiff's] rights." *Darrow v. Schumacher*, 495 N.W.2d 511, 524 (S.D.1993) (Henderson, J., dissenting)).

(4) The Circuit Court erred by failing to give a gift instruction

The only portion of Section 1 that the Fischers directly responded to is 1(d), which addresses the need for an instruction that gifts are not enforceable because they lack consideration. But again, the Fischers argue the *facts* and ask this Court to weigh them. That is impermissible on appeal. *See, Flint v. Flint*, 2022 S.D. 27, ¶ 40 ("our role as a reviewing court forbids us from…weighing the evidence"). Sufficient evidence was received to warrant a gift instruction.

In fact, the instructions gave the Jury no room to address the family's loose arrangements about repayment, with each side offering transfers and services gratuitously.

(5) The Fischers cannot claim they are the "victim" of their own partnership's oral loans

Finally, the Fischers advance a "victim" argument on page 7 of their Brief. The argument is misplaced. Jeff Fischer complains that his partner (his father Lynn) made surreptitious loans and transfers which are now difficult to enforce because of a lack of documentation.

Lynn's rather loose manner of operating the partnership was well-known to Jeff. Indeed, the partnership continued to lose money year after year, from which Jeff benefitted via the offsets to his physician income. If Jeff's partner ran the partnership badly, or, failed to document transfers, or engaged in actual misconduct, or issued oral loans that would be difficult or legally impossible to enforce, that is a problem between Jeff Fischer and Lynn Fischer, as partners.

As a partner, Jeff's remedy was to keep a closer eye on the partnership; or, to bring suit against his partner Lynn for misconduct. Jeff cannot complain that it is now Excel's fault that Lynn made ambiguous, undocumented, loose, oral transfers from the Partnership.

Furthermore, when Fischer Farms Partnership fully and finally failed, Jeff petitioned the Circuit Court for a receivership to manage that process. After an investigation of sweeping breadth by the receiver (attorney Steve

Huff), *no evidence was found* connecting Reed, Missy, or Excel to *any* illicit transfers of grain nor to any funds from 'secret' bank accounts. The only transfers in evidence were those documented by the Partnership's accountant, and which Reed, Missy, and Excel acknowledged.

Jeff's assertions of victimhood are the frustrated rumblings of a distant son who failed to keep track of his father's farm mismanagement (and who only brought suit after the partnership's losses no longer benefitted him). The 'victim theory' did not extinguish the Circuit Court's duty to give Statute of Frauds instructions.

B. The failure to give a "reasonable certainty" instruction is particularly problematic in a case like this, where nearly every aspect of the alleged loans is in dispute

The Record is filled with problems related to the alleged "total" loan balance. The total amount of loans and transfers was something that Lynn Fischer "put together in his head."[5] The total amount was not something that Reed Olson or Missy Fischer-Olson actively kept track of.[6] Fischer Farms' accountant *did* keep track, but, at trial the Fischers complained that his records were incomplete…which again is a problem of the Partnership's

[5] TT 81-82; R02.101-102 (Day 2)

[6] TT 187; R.02.207 (Day 2); TT 95; R02.532 (Day 3)

own making. While there was no evidence of undocumented transfers, the evidence repeatedly showed the total included *both* direct transfers, *as well as* co-signed notes from banks which Excel repaid.

In some ways, the lack of certainty about the loan balance is something that could have been remedied within the Statute of Frauds instructions.[7]

But in this case, it was also imperative to instruct the Jury that their Verdict could *only* award damages for unpaid loan balances for which the evidence was *reasonably certain.*

We agree that the 2005 case of *Von Sternberg v. Caffee* endorsed a jury instruction similar to the one used here, without the 'reasonably certain' language. But, we note that case was likewise a Statute of Frauds case. This Court reversed the Jury's award on the counterclaim because the Circuit Court allowed evidence of an oral modification that did not comport with the Statute of Frauds. Thus, that reversal imposed the guardrail of 'reasonable certainty.'

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[7] *See.* note 2 above, regarding the "sufficiency" of a writing. *See, also, Neujahr v. Producers Comm'n Ass'n*, 838 F.2d 1003, 1003-04 (8th Cir. 1988) (citing RESTATEMENT (SECOND) OF CONTRACTS § 131) ("the writing must state with *reasonable certainty* the essential terms of the unperformed promises in the alleged oral contract") (emphasis added).

We also acknowledge that a Circuit Court "commits no error when it refuses to *amplify* instructions which substantially cover the principle embodied in the requested instruction." *Tammen v. K & K Mgmt. Servs., Inc./Fryn' Pan*, 2019 S.D. 29, ¶ 13 (emphasis added).

But our argument is that the 'reasonably certain' language is more than just *amplification* of the pattern damages instruction, at least under these facts. In fact, in numerous cases since *Von Sternberg*, this Court has endorsed the use of the 'reasonably certain' phrase, including within jury instructions. That phrase forms the legal touchstone for evaluating damages in contract cases:

- *Smith v. WIPI Grp., USA, Inc.*, 2023 S.D. 48, ¶ 57 ("It is well settled that damages must not be speculative; that is, the damages must be reasonably certain.")
- *Peska Props., Inc. v. N. Rental Corp.*, 2022 S.D. 33, ¶ 22 (in a breach of contract action, "damages must be reasonably certain")
- *Excel Underground, Inc. v. Brant Lake Sanitary Dist.*, 2020 S.D. 19, ¶ 51 (contract damages "must be reasonably certain")
- *Lamar Advert. of S. Dakota, Inc. v. Heavy Constructors, Inc.*, 2008 S.D. 10, ¶ 14, 745 N.W.2d 371, 376 (to recover damages for a breach of contract "damages must also be reasonably certain and not speculative")

- *FB & I Bldg. Prods., Inc. v. Superior Truss & Components, a Div. of Banks Lumber, Inc.*, 2007 S.D. 13, ¶ 20 (in breach of contract action, damages must be "proven with reasonable certainty")

The concept of *reasonable certainty* permeates contract law. "A contract is an agreement to do or not do a *certain* thing." SDCL 51-1-1 (emphasis added). Consent is not "mutual" unless there is *certainty* as to the agreement, *i.e.,* when "the parties all agree upon the *same thing* in the *same sense.*" SDCL 51-3-3 (emphasis added). The Statute of Frauds has long required that "the terms of the bargain must be specified...and stated with *reasonable certainty.*" *Salmon Falls Mfg. Co. v. Goddard,* 55 U.S. 446, 459 (1852) (citing James Kent, 2 COMMENTARIES ON AMERICAN LAW 511 (6th ed. 1848)). As shown above, the touchstone for contract damages is *reasonable certainty.* [8] And a 'loan' is a species of contract which requires its own, unique set of *certain* terms to be enforceable. [R01.1056 (Excel's proposed instruction, and citing authority)].

[8] In South Dakota caselaw (and apparently in other jurisdictions) the phrase 'reasonably certain' was used initially with regard to 'future' damages, but is regarded as the correct standard for other contract damages, too. *See, Structural Polymer Grp., Ltd. v. Zoltek Corp.,* 543 F.3d 987, 1000 (8th Cir. 2008).

When the Jury Instructions are considered as a whole, there were minimal controls upon the Jury's ability to issue a Verdict upon a flimsy, ambiguous "loan" theory, and it was not restrained in calculating damages that comprised the loan balances. Here, the Instructions as a whole do not impose the necessary level of *reasonable certainty* for a recovery of this magnitude upon alleged loans. Taken as a whole, the Instructions failed.

Within their argument about the 'reasonable certainty' instruction, Jeff Fischer *again* raises his partnership dispute with his father Lynn.

Jeff claims that evidence regarding all of the loan advances is in the exclusive possession of Excel, and thus, Excel should not be able to complain about the sufficiency of the damages evidence. Jeff claims it is "ironic" that Excel would dare to complain about insufficient proof.

But Lynn could not explain where the number came from. Missy and Reed could not explain that total. Jeff could not explain where the number came from. Nor could the Partnership's accountant. Nor could the Partnership's court-appointed receiver.

Again, the problem is that Jeff disagrees with his partner's original decision to transfer money via an ambiguous, oral arrangement. Since Jeff and Lynn are partners, all of the same evidence about these transfers (if it

indeed ever existed) is likewise in possession of the *partnership*. Jeff is legally presumed to have access to that same information. And Jeff did not call Lynn to testify at trial.

Jeff cannot circumvent the requirement of providing reasonably certain evidence about damages because of his own partnership's failure to create and maintain adequate records.

Under these facts, the 'reasonably certain' language in Instruction 123 should have been given. In light of the overall failure of the Instructions, this omission compounded the error.

2.
RESPONSE TO NOTICE OF REVIEW
APPEAL #30786

By notice of review, the Fischers assign error to the Circuit Court's failure to award prejudgment interest. *See,* Appellees' Brief, pp. 16-20.

The Fischers' argument is erroneous. The Fischers' position can be summarized by the following four premises: (i) the Fischers claim the 'only' evidence necessary for a prejudgment interest calculation was the 'due date' of the alleged loans; (ii) they claim the 'due date' is 'beyond factual dispute,' and, indeed is 'indisputable'; (iii) they claim there was no issue that could have been submitted to the Jury as to prejudgment interest; and (iv) they

claim the Circuit Court has authority under Rule 49(a) to decide the prejudgment interest issue, despite the statutory requirements of SDCL 21-1-13.1.

The first two premises are factually wrong; and the second two premises are legally wrong. The Fischers' argument contravenes several basic principles governing prejudgment interest:

- "[P]rejudgment interest on damages arising from a contract shall be *at the contract rate*...." SDCL 21-1-13.1 (emphasis added). *Accord, Cavalry SPV I, LLC v. Watkins,* 249 Cal. Rptr. 3d 334, 352 (Cal.App. 2019) (interpreting California's similar prejudgment statute; collecting cases).
- A Circuit Court's calculation of interest is performed "as a matter of law" and thus a Circuit Court *cannot* perform such calculations by resolving disputed facts. *JAS Enterprises, v. BBS Enterprises,* 2013 S.D. 54, ¶44.
- In factually disputed cases, the underlying questions related to prejudgment interest must be submitted to the Jury via special interrogatories. *See,* SDCL 21-1-13.1.

- Failure to request special interrogatories acts as a waiver of prejudgment interest when the facts are disputed. *Miller v. Hernandez,* 520 N.W.2d 266 (S.D. 1994).

Those basic principles prevent the Fischers' ability to recover prejudgment interest upon this Record, for two reasons. First, prejudgment interest is not available on a zero-interest loan. Second, this case does not involve written loans with *undisputed* due dates, and, the Fischers failed to request special interrogatories to establish the dates of loss.

A. Prejudgment interest is not recoverable on a zero-interest loan

When a contract specifies a rate of interest, that rate becomes the same rate which is used for prejudgment interest calculations. SDCL 21-1-13.1. *Accord, Cavalry SPV I, LLC,* 249 Cal. Rptr.3d at 352 (collecting cases; creditor may "apply the statutory 10 percent prejudgment interest rate, if and only if the contract does not stipulate a legal rate of interest").

The trial testimony established that the rate of interest on the alleged loans was zero percent. *See,* [R.02.500; TT 63 (Day 3)].[9] In fact, no

[9] Reed Olson testified he had conversations a few times with Lynn Fischer about interest, and Lynn told Reed, "[h]e wasn't charging me any interest." When asked, "Is that typical for how he engaged in financial assistance with his family," Reed answered, "Yes. He has a big heart and wants to help people out."

testimony of any kind was received *other* than the zero-percent rate. Furthermore, during settlement of instructions, Fischers' counsel conceded that the alleged balances were not accruing interest (or, at least agreed that no such interest was sought by the Fischers for the time prior to the payment of the Brant Lake judgment). *See,* TT 188-190; R02.625-627.

In an attempt to clarify the zero percent interest rate, Excel correctly requested a special interrogatory. The Fischers objected, and, the Circuit Court refused it. *Id.*

In contrast, Fischers' counsel mistakenly believed that a new, "statutory" interest rate would apply after the loan became due, triggering an increase to 10%.[10] Or, in other words, Fischers' counsel believed that upon a failure to pay, a zero-interest loan automatically reverts to a 10% loan. But that is not the law. Instead, by statute, "prejudgment interest on damages arising from a contract shall be *at the contract rate*...." SDCL 21-1-13.1 (emphasis added).

It is notable that on appeal the Fischers do not point to any testimony or evidence in the Record that would have created a dispute regarding the

[10] Fischers' specific argument during the settlement of instructions was that, "even if there's no interest due [on the loan] then *statutory interest* should accrue after that." [R02.627; TT 190 (Day Three)].

interest rate. Instead, they refer to several statutes in Chapter 54-3. *See,* Fischers' Brief, 18-19 (quoting SDCL 54-3-2; -3; -4; and -16).

Those statutes are superfluous to the questions here. But even if they applied, the key language in SDCL 54-3-4 forecloses their arguments: "...interest is payable from date of incurrence of debt, unless the parties have otherwise agreed...."

Procedurally, the Fischers did one of two things: (i) they effectively conceded that the contract rate was zero percent, which prevents further prejudgment interest under SDCL 21-1-13.1; or, (ii) the Fischers refused to allow the Jury's specific determination of that rate by objecting to the special interrogatory, thus leaving a factual dispute about an interest rate that the Circuit Court was incapable of resolving after the Verdict, and which this Court cannot fix on appeal. *See, Underwood v. Underwood*, 684 S.W.3d 896, 904 (Ark.App. 2024) (when interest rate on loan is in dispute, but was not submitted to jury, "[i]t is not the appellate court's place to try issues of fact."); *Tri-Eagle Enters. v. Regions Bank*, 373 S.W.3d 399, 404 (Ark.App. 2010) (circuit court erred by resolving disputed interest rate issue, which "should have been submitted to the fact finder").

In short, the Fischers conceded the interest rate, or they created error by preventing a finding on the interest rate. "[A] party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit." *Karst v. Shur-Co.*, 2016 S.D. 35, ¶ 37, *as modified on denial of reh'g* (June 20, 2016). Either way, the Fischers cannot recover prejudgment interest.

The facts here are distinct from 'typical' loan cases where there is a written promissory note identifying the key terms. In such cases, a Plaintiff is normally entitled to prejudgment interest, and the Circuit Court is capable of calculating it, even after the Verdict. *E.g., Mealy v. Prins,* 2019 S.D. 57, ¶¶ 39-40 (issue was "still easily correctable" during post-trial proceedings because "each note reflects the date of execution and the interest applicable to it" and thus, the "circuit court [can] recalculate prejudgment interest based upon the terms of each promissory note"). That is not the case here.

The Circuit Court's decision on prejudgment interest[11] did not address the zero-interest-rate question (even though Excel expressly raised that issue).[12]

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[11] *See,* [R02.2635-2639]

[12] *See,* [R02.2619-2621]

Instead, the Circuit Court denied prejudgment interest based upon Excel's *other* rationale, *i.e.*, that the dates of loss were varied and in dispute. We address that issue in the next section.

But we remind the Court that it can still uphold the Circuit Court's decision to reject prejudgment interest on *either* theory. A Circuit Court's *result* can be upheld for reasons other than those given by it. *Schmiedt v. Loewen*, 2010 S.D. 76, ¶ 1 ("We affirm the circuit court's judgment, but we do so for a different reason.")

B. Prejudgment interest is not recoverable when the dates of loss are disputed

Second, even if the Fischers could overcome the zero-interest problem, the next hurdle is that the Jury did not identify any dates of loss. In factually complicated cases like this one, the Jury must be asked to set the dates of loss.

"[I]f there is a question of fact as to when the loss or damage occurred, prejudgment interest shall commence on the date specified in the verdict....If necessary, special interrogatories shall be submitted to the Jury." SDCL 21-1-13.1. A Circuit Court's calculation of interest is limited to legal questions and cannot be performed in the face of disputed facts. *JAS Enterprises,* 2013 S.D. 54, ¶44.

The facts here were disputed about the dates of loss, for two reasons. First, disputed testimony was received in every respect to the question of the loans, their existence, offsets, the timing of repayment, and even whether the loans needed to be repaid.[13] And second, Jeff and Allison also sought recovery in this lawsuit upon a written, personal note for $30,000 (Exhibit 7) with a due date of December 13, 2013. [R. 1187]. It is thus unclear what loans the Jury awarded, and thus unclear when the Verdict balance came due.

The Fischers' simple remedy was to request the necessary, special findings about the date of loss. They failed to do so.

The Circuit Court denied prejudgment interest by distinguishing this case from the situation in *Mealy v. Prins,* 2019 S.D. 57. "Unlike in *Mealy,* here there are no clear written notes with interest rates and due dates....In sum, the date of loss or damage is at issue and therefore Plaintiffs should have requested that the Jury determine the appropriate date to begin calculation of prejudgment interest in order to recover the same." [R02.2638].

[13] On this last issue, Seth Fischer's statement was that Lynn said these were gifts; and Melissa Fischer-Olson's testimony was that Lynn said the amounts only needed to be repaid if Lynn needed the money at that time, and, in that case, only what she were able to repay. This is not definite enough for the Court to identify a due date from which to calculate interest in a post-trial vacuum.

The Circuit Court also rejected the Fischers' invitation to exercise its discretion under Rule 49(a). It concluded that "under the facts and circumstances of this case, it is not appropriate for the Court to exercise its discretion and make a finding [as to] the date of loss...." [R02.2638].

In their brief, the Fischers do not spell out their theory as to why this was an *abuse* of discretion. Their conclusory argument is no more than this: "[I]f ever there were such an instance, it would be this one, at least." Fischers' Brief, p. 19. This is an insufficient basis upon which to find an *abuse* of discretion.[14]

The Fischers failed to request special interrogatories and thus waived their ability to recover prejudgment interest. *Miller v. Hernandez,* 520 N.W.2d 266 (S.D. 1994) ("Plaintiff has waived the issue of prejudgment interest...by her failure to timely point out this problem to the circuit court while the jury was still impaneled").

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[14] Further, although "the court in answering an omitted question will *theoretically* be free to make a finding favoring either side," the Circuit Court's ability to do so under Rule 49(a) is tempered by the parties' right to a jury trial on factual issues. *Lore v. City of Syracuse*, 670 F.3d 127, 167 (2d Cir. 2012) (citing *Wade v. Orange County Sheriff's Office,* 844 F.2d 951, 954 (2d Cir.1988)) (emphasis added).

In the present case, the Jury's Verdict did not match any figure alleged by any party, making it impossible to identify which loans the Jury was awarding damages for. The Circuit Court could not calculate prejudgment interest without invading the province of the Jury.

And, as shown above, even if the Fischers had preserved the date-of-loss issue, they were not entitled to recover prejudgment interest on zero-interest loans. For either reason, the Fischers cannot recover prejudgment interest. (And, the interest issue is moot if the Court directs a new trial.)

CONCLUSION

The remedy is a new trial, at which the Jury must be instructed about the Statute of Frauds, and, at which the Jury should be shielded from efforts to award damages based upon speculation, innuendo, or flimsy theories.

Dated this 14th day of November, 2025.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellants' Reply Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 4,999 words, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, statement of Legal Issues, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2025, I electronically filed the foregoing via the Odyssey File and Serve system with the Supreme Court Clerk, which will send notice to Appellees' Counsel:

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I also hereby certify that on this 14th day of November, 2025, I sent a bound copy of the foregoing to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Supreme Court Clerk
500 East Capitol Avenue
Pierre, South Dakota 57501

/s/ Daniel K. Brendtro
One of the attorneys for Appellants