IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

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Appeal No. 30255

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**JAMES E GARRETT, SANDRA GARRETT AND LEVI EDWARD CARRETT**

*Defendants/Appellants*

vs.

**RONALD STOCK AND KRISTIN STOCK**

*Plaintiffs/Appellees.*

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APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
SULLY COUNTY, SOUTH DAKOTA

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THE HONORABLE CHRISTINA KLINGER
Circuit Court Judge

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# APPELLANT'S BRIEF

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## PRELIMINARY STATEMENT

Defendants/Appellants James Garrett, Sandra Garrett and Levi Garrett will be collectively referred to as "Garretts" or their individual first names of "James", "Sandra", or "Levi." Plaintiffs/Appellees Ronald Stock and Kristen Stock, will be referred to as the "Stocks." References to the record as reflected by the clerk's index are referenced by "R" following by the page number. Documents in the Appendix are referenced by "APP" followed by the number designation. Citations to the jury transcript are referenced by "T" followed by the page number and line.

## JURISDICTIONAL STATEMENT

James Garrett, Sandra Garrett and Levi Garrett appeal from the Order Denying Defendants' Request to Stay Execution of Eviction and Motion for Judgment as a Matter of Law or Motion for a New Trial. (R: 420.) A two-day jury trial was conducted on December 5 and 6, 2023. The jury returned a verdict in favor of the Stocks. (R: 337.) A Judgement of Eviction was entered on December 7, 2023. (R: 340.) Stocks filed and served a Notice of Entry of Judgement on December 9, 2023. (R: 342.) Thereafter, Garretts filed a Motion for Judgement as a Matter of Law or Motion for a New Trial on December 14, 2023. (R: 349.) A hearing on the same was held on January 9, 2023. (R: 397.) The Order Denying Defendants' Request to Stay Execution of Eviction and Motion for Judgment as a Matter of Law or Motion for a New Trial was signed and filed on January 11, 2023. (R: 420.) The Stocks served a Notice of entry of Order on January 11, 2023. (R: 421.) Garretts filed a Notice of Appeal on February 10, 2023. (R: 805.) The court reporter submitted the jury transcript on January 20, 2023, and the clerk submitted

the certificate on February 24, 2023, with another certificate being submitted on March 1, 2023. Jurisdiction in this Court is proper pursuant to SDCL 15-26A-3.

## STATEMENT OF THE LEGAL ISSUES

*ISSUE I:* Whether the circuit court erred in denying Defendants' Motion for Judgment as a Matter of Law or New Trial when the evidence presented at trial was undisputed that Plaintiffs did not abide by the notice provision in the Farm Lease Agreement that would allow the Defendants to cure any default.

Legal Authority

*Suvada v. Muller*, 2022 S.D. 75, 983 N.W.2d 548

*Rindal v. Sohler*, 2003 S.D. 23, ¶ 6, 658 N.W.2d 769

*ISSUE II:* Whether the Circuit Court erred in denying Defendants' motion to dismiss when parallel litigation existed in federal court that would adjudicate all the parties claims and Plaintiffs failed to give proper notice of default under the contracts.

Legal Authority

*Meservy v. Stoner*, 208 N.W. 781 (S.D. 1926)

*First Nat. Bank in Sioux Falls v. First Nat. Bank South Dakota*, 679 F.3d 763 (8th Cir. 2012)

*ISSUE III:* Whether the Circuit Court erred in rejecting Defendants proposed jury instructions that provided specific language from the contracts, specifically Defendants proposed instruction providing that Section 12 of the Farm Lease Agreement required Plaintiffs to provide proper notice of default and allow Defendants to cure.

Legal Authority

*Knecht v. Evridge*, 2020 S.D. 9, 940 N.W.2d 318

## STATEMENT OF THE CASE

James, Sandra and Levi Garrett have owned and operated a family farm and ranch in Sully County that has been in their family for over 140 years. The Garretts fell on hard financial times after Great Western Bank chose not to honor a commitment letter. A short time later, the Garretts were approached by Ronald Stock, who offered them a deal using three related agreements to build back their credit. The deal was that the Stocks would purchase the Garretts' land for less than what it was worth and lease it back to the Garretts for up to five years; at which point, the Garretts would buy their land back. The Stocks would make approximately $950,000 from the deal.

Ronald Stock, a business man, realtor, owner of eight farms, and co-owner of Big Iron Auctions immediately began to breach the agreements, knowing that he could end up owning the 18-million-dollar property for a cost of 10 million dollars if the Garretts defaulted on the agreements. Evidence presented at trial proved that the Stocks did not abide by the notice provision in the agreement and materially breached additional provisions of the agreements.

The circuit court erred in denying the Garretts' Motion for Judgment as a Matter of Law or New Trial and the Garretts' Motion to Dismiss when evidence proved that the Stocks failed to abide by the notice provision in the farm lease agreement. The circuit court further erred in rejecting the Garretts' Motion to Dismiss as the Garretts were not properly served, failure to mediate precluded the action being brought, the Stocks failed to give proper notice of default, and parallel litigation existed in federal court. Finally, the circuit court erred in rejecting proposed jury instructions that provided specific language about the notice provision in the Farm Lease Agreement. Appellant requests this Court reverse the circuit court's decisions.

## STATEMENT OF THE FACTS

The Garretts have farmed and ranched their whole lives. (T at 135:4.) Their family has owned and operated a farm and ranch in Sully County, South Dakota, since 1882. (T at 135:1-3.) Levi is the fifth generation to operate on the family ranch and farm. (T at 135:4-5.)

### A. Garretts' Financial Hardship

However, in 2015, the Garretts fell on hard financial times. The Garretts had just switched to Great Western Bank due to it supplying a commitment letter for a land note, cattle note, and operating note for the Garretts to expand their operation. (T at 136:9-25.) After contacting two sale barns in Kansas, Great Western Bank gave the Garretts approval to write checks at the sale barn to purchase cattle. (T at 137:1-3.) The Garretts purchased the cattle, but Great Western Bank did not honor the cattle note commitment. (T at 137:6-10.) Instead, Great Western Bank took the money out of the operating line of credit, which prevented the Garretts from having any funds to run their operation or pay for monthly expenses. (T at 137:11-15.) As a result, the Garretts had to file for bankruptcy in order the fix the credit issues caused by Great Western Bank's refusal to honor the cattle note. (T at 137:19-21.)

### B. The Arrangement with the Stocks

The Garretts decided to get out of bankruptcy after a short time and work with their creditors on their own. (T at 137:22-138:1.) Around 2017, the Garretts were approached by Ronald Stock and his realtor, John Erck, regarding a deal for the Garretts to build back their credit. (T at 138:5-10; 39:7-9; 40-3-12.) The deal offered to the Garretts was to use the Stocks good credit and purchase the Garretts' land consisting of

approximately 5200 acres where the land would be leased to the Garretts for a five-year period or less. (T at 40:11-12; 44:12-15; 45: 6-11.) After the five-year period, the Garretts would buy their property back, as they would have built up their credit score during this time. (T at 44: 12-15; 138:5-12.) The intent of the agreement was that Ronald Stock did not have to put any money into the deal by using the equity that the Garretts already had. (T at 138:17-22.) In fact, the Stocks were going to make approximately 950 thousand dollars over the course of the arrangement for doing nothing but signing a note with the Stock's bank. (T at 138:23-139:1.)

Ronald Stock is a successful business man. (T at 80:25-81:9.) He is the co-owner of Big Iron Auctions and a realtor himself. (T at 38:11-12; 41:6-8.) Mr. Stock also owns approximately eight other farms that he operates. (T at 80:17-24.) Mr. Stock and his friend, Steve Maguire, evaluated the Garretts situation and discussed with Rabo Bank how the deal could be made with the Garretts. (T at 41:25-42:7; 43:4-25.) Mr. Stock believed the Garretts' property was worth 18 million dollars when the deal was to take place, and he knew he would get the property for 10 million dollars if the Garretts defaulted on the agreements. (T at 110:13-24.)

**C. The Executed Agreements between the Stocks and the Garretts**

On June 20, 2019, three agreements were executed by the Stocks and the Garretts: a Real Estate Purchase Agreement, a Farm Lease Agreement, and a Closing/Escrow Agreement. (T at 47:1-8, Ex. 1; 51:13-52:2, Ex. 2; 55:10-22, Ex. 3.) The Real Estate Purchase agreement stated the terms on which the Stocks would purchase the Garretts property worth 18 million dollars for 10 million 10 thousand dollars. (Ex 1.) The agreement indicates that the Garretts would lease the property from June 20, 2019, to

December 31, 2024, with an irrevocable option to purchase the property back from the Stocks. (*Id.*) Under the agreement, Mr. Stock would subject the property to a mortgage through Rabo AgriFinance (Rabo Bank), and the Stocks would provide a copy of the mortgage, promissory note, amortization schedule, and schedule of lease payments to the Garretts so that the Garretts could use these number for payment and payoff purposes. (*Id.*) Mr. Stock would pay the first semi-annual mortgage payment to Rabo Bank, and the Garretts would then be responsible for an annual lease payment beginning June 20, 2020, which would total the two semi-annual mortgage payments. (*Id.*) Most importantly, the Real Estate Purchase agreement states that each of the Garretts' annual lease payments will be paid to the escrow agent, BankWest, and then the escrow agent will make the payment to Rabo Bank to cover the mortgage payments. (*Id.*) The Garretts' right to lease the property each year is contingent upon the Garretts making the payments to the escrow agent. (*Id.*)

Likewise, the Farm Lease Agreement dictated the terms of the lease between the Stocks and the Garretts. (Ex. 2.) The Garretts' yearly lease with the Stocks was contingent on the Garretts making the yearly payment to the escrow agent, where the escrow agent would produce the funds to Rabo Bank to cover the mortgage payments. (*Id.*) The lease term was from June 20, 2019, to December 31, 2024. (*Id.*) If the Garretts would default in their obligations under the lease agreement, Section 12 of the agreement states the specific notice that is required:

Section 12.

DEFAULT:

In case of a default in the payment of any lease payment, the Lessees shall have the right to cure the default or breach upon the same being corrected upon sixty (60) days' notice.

If the Tenants shall fail to comply with any of the covenants, terms, and conditions of this Lease, or if the rental payments required hereunder shall not be paid when the same becomes due and payable and such failure of compliance or nonpayment of rent shall continue for sixty (60) days after written notice thereof is given by the Lessor to the Lessees, then this lease shall terminate at the option of the Lessor.

Section 13.

NOTICES

The parties agree that any notices required or permitted hereunder shall be made by the escrow agent effective upon delivery to the parties.

(*Id.*)

The third agreement executed by the parties was a Closing/Escrow Agreement. (Ex. 3.) The purpose of the agreement is to inform the "escrow agent of their specific need to know items agreed upon by the parties in the Purchase Agreement." (*Id.*) The agreement informed the escrow agent that the Garretts' annual lease payments would be paid to the escrow agent and then it would pay Rabo Bank to cover the mortgage on the property. (*Id.*) The rest of the agreement indicated the same terms as stated in the Real Estate Purchase Agreement and the Farm Lease Agreement. (*Compare id.*, *with* Exs. 1 and 2.)

**D. The Stocks Materially Breached the Agreements**

After the agreements were signed by all the parties, the Garretts' first lease payment was coming due on June 20, 2020. The Garretts and the escrow agent, Chase Cooper, attempted to reach out to Mr. Stock regarding the first payment amount with no response. (T at 140:20-141:5.) Finally, Chase Cooper received a response from Howie Heckenlively, Senior Relationship Manager at Rabo Agrifinance, on June 16, 2020, stating the Garretts' first payment amount would be $603,387.07 and that future payments would be closer to $640,286. (T at 216:16-21; Ex. B.) Mr. Stock had made the first mortgage payment in May 2020 totaling $320,143.04. (Ex. B.) The email also indicated that Mr. Stock had to set up an escrow account with Rabo Agrifinance so the payments from the Garretts through the escrow agent could be accepted by Rabo Agrifinance. (*Id.*; T at 220-22-25.) The escrow agent agreed that his job would have been easier if Mr. Stock would have set up the escrow account at Rabo Agrifinance so the escrow agent would be able to deposit the funds. (T at 221:4-222:6.)

Following the Farm Lease Agreement, the Garretts write a check to Rabo Agrifinance for $642,286 on June 15, 2020 accompanied with a letter and delivered it to the escrow agent. (T at 141:23-142:7; 91:19-92:10, Ex. C.) The escrow agent sent the check to Rabo Bank. (T at 222:21-223:1; 225: 1-4.) However, and because Mr. Stock did not set up the escrow account at Rabo Bank, Rabo Bank could not apply the check to the mortgage pursuant to the agreements as Mr. Stock had already made the mortgage payment. (T at 94:23-25.) Between June 20, 2020, and September 22, 2020, the Garretts attempted to negotiate with the Stocks to set up an escrow account at Rabo Bank so the contracts can be followed. (T at 144:8-13.) On September 22, 2020, Mr. Stock emails

multiple people involved in the transaction, including Howie Heckenlively and Chase Cooper, indicating that the problem revolves around Rabo Agrifinance not being allowed to hold the money and that he had already made the mortgage payment. (T at 94:23-25, Ex. C.) Again, Mr. Stock could have set up the escrow account for Rabo Agrifinance to accept the Garretts' payments as indicated by Howie Heckenlively. (Ex. B.)

Knowing that Rabo Bank could accept a check in December for the semi-annual mortgage payment, and on the advice of Chase Cooper, the Garretts issued a check for $320,143.04 to Rabo on December 18, 2020, that was accepted by Rabo Bank. (T at 145:7-146:20; Ex. D; *but see* T at 59:13-25 (indicating Mr. Stock believes the check was made out directly to him).) In January 2021, the Stocks and Garretts agree to enter into mediation in attempt to determine how and when payments were to be made. (T at 61:6-62:1.) The mediation took place in March 2021, where it was agreed that the Garretts would make a payment to Mr. Stock in April for the semi-annual mortgage payment. (T at 95:7-96:25.) The Garretts then issued a cashier's check on April 2, 2021, for $324,105.99 to Mr. Stock and it was sent to him by the escrow agent. (T at 146:21-146:14; 59:13-25; Ex. 4.) After Stock accepted the April 2021 payment, he considered the Garretts all caught up on their payments. (T at 60:8-10.)

While the June 20, 2021, payment was coming due under the agreements, the Garretts were notified by the escrow agent that yet again the Stocks made the mortgage payment to Rabo Bank on April 30, 2021, (See Ex. 8.), preventing the Garretts from making the June 20, 2021, payment to Rabo Bank. (T at 183:17-20.) The soonest the Garretts could make a payment is November 2021. (*Id.*) However, prior to making the November payment, Mr. Stock sent a letter to the Garretts dated August 27, 2021,

indicating that they were in default under the agreements and had until October 15, 2021, to get current. (T at 63:11-65:7; Ex 7.) Not only did the notice not give the Garretts 60 days to cure any default under Section 12 of the Farm Lease Agreement, but it was not delivered by escrow agent as required. (*Compare* Ex. 7, *with* Ex. 2.) Mr. Stock agreed that he did not give them 60 days to cure and it wasn't sent by the escrow agent. (T at 97:10-17; 242:12-13; 243:3-5; 248:1-4.)

Seven days after sending the August 27, 2021, letter, Mr. Stock enters into a settlement agreement on September 3, 2021, regarding a fence-line dispute that the Garretts have had with their neighbors on fence lines that have been in existence for 70 years. (T at 83:3-84:10; 153:9-11; Ex. I.) The settlement agreement executed by Mr. Stock caused the fence line to be moved effectively conveying land to the neighbors. (T at 84:24-85:5; 155:2-10.) Mr. Stock executed the settlement agreement effectively conveying land in breach of the agreements entered into by the parties. Under the Real Estate Purchase agreement, "Ronald E. Stock agrees not to sell, assign, convey or mortgage . . . any part of the property described in this agreement as long as the Garretts are fulfilling their obligations of this agreement." (Ex.1.) Pursuant to the Farm Lease Agreement, "[t]he Lessor may not sell or attempt to sell the leased property during the time the lessees have the exclusive right and option to repurchase the leased land." (Ex. 2.) The Garretts were not in default under the agreement at the time that Mr. Stock conveyed the land as proper notice of default and the Garretts ability to cure was not triggered. Other than Mr. Stock preventing the Garretts from making the lease payments to Rabo Agrifinance, this was the second material breach committed by Stock.

Prior to the improper October 15, 2021, deadline Mr. Stock issued in his August 27, 2021, letter, Mr. Stock left the Garretts a voicemail indicating that Mr. Stock would accept $325,000 by the end of November and he needed it. (T at 99:7-14; 148:10-19.) On November 12, 2021, the Garretts dropped off a check to the escrow agent to abide by Mr. Stocks request, where it was sent to Rabo Agrifinance. (T at 149:10-18; Exs. E and F.) The November 12, 2021, check was delivered to Rabo Agrifinace at 11:44 am on November 18, 2021. (Ex. E.) However, and unbeknownst to the Garretts, Mr. Stock once again prevented Rabo Agrifinance from accepting the check by making a mortgage payment on October 29, 2021. (Ex. 8) This payment was made a whole month earlier than previous payments and right after Mr. Stock requested the Garretts to make the payment in November 2021 from the October voicemail. (*Id.*; T at 99:7-14; 148:10-19.) Mr. Stock should have known that the Garretts would be prevented from making the payment to Rabo Agrifinace as he already made the mortgage payment and it happened the year prior. (T at 151:13-152:1.) As a result, Rabo Agrifinance never accepted the tendered payment in November. (T at 151:8-12.) Again, the Stocks breached the agreements by preventing payment.

On January 28, 2022, the Garretts file a federal lawsuit against the Stocks to clear up the payment issues and regarding the same issues that revolve around this matter (T at 152:2-5; 106:13-19; *see also* R: 90-92 (stating the background of the federal lawsuit).) After the lawsuit being filed, Mr. Stock hired a neighbor around June 2022 to disc up the Garretts property because of weed based on a letter from the Sully County Weed District Mr. Stock never gave to the Garretts. (T at 70:7-12; 108:23-109:1; 158:25-159:8.) Mr.

Stock admits to taking possession of the farm ground and planting sunflowers on the property. (T at 70:12-18; 159:9-19.)

After tilling up the farm ground, the filing of the federal lawsuit by the Garretts, and before the Garretts have every received a proper notice of default under the agreements, the Stocks filed and served a summons and complaint in this action on July 6, 2022. (R: 1-7.) On July 12, 2022, the Garretts file a motion to dismiss with an accompanying brief arguing that the doctrine of claims splitting precluded the Stocks from bringing this lawsuit. (R: 9-10, 11-18.) On July 22, 2022, the court issued an order staying the case until mediation was completed and that the parties submit briefs regarding the parallel litigation issue raised by the Garretts. (R: 69-70.) After a hearing on October 7, 2022, the Court denied Garretts' motion to dismiss via an order dated October 14, 2022. (R: 147.) By order dated October 17, 2022, and after a hearing on the Garretts answer and counterclaims, the trial court struck the Garretts' counterclaims. (R: 162-65.)

**E. The Trial and Subsequent Proceedings**

A two-day jury trial was held on the matter on December 5 and 6, 2022. (R. 174-177.) After the close Mr. Stock's testimony, and while the Stocks made a motion for judgement as a matter of law, the Garretts made a motion for a directed verdict due to the failure by Mr. Stock to give the required notice under the agreement and renewed their motion to dismiss regarding the parallel litigation issue. (T at 129:6-22.) The trial court denied both parties motions for judgement as a matter of law stating that there are issues for the jury to determine. (T at 133:6-9.) Again, after the close of all testimony, the Garretts make a motion for a directed verdict indicating that Mr. Stock admitted to not

abiding by the notice provision in the agreement. (T at 261:6-25.) The trial court again denied both parties motions, sending the case to the jury. (T at 267:13-15.) The jury returned a verdict in favor of the Stocks on a general verdict form only concerning immediate possession of the land, and judgment was entered thereafter on December 9, 2022. (R: 337; 340.)

On December 14, 2022, the Garretts made a motion for judgment as a matter of law or motion for a new trial with an accompanying memorandum in support regarding the unequivocal failure to abide by the notice provision in the lease agreement. (R: 349-357.) After a hearing on the Garretts' motion, the trial court denied the Garretts motion via order dated January 11, 2023. (R: 420) The Garretts now take this appeal to request that the trial court's order denying the motion for judgement as a matter of law or a new trial, and ultimately the jury's verdict, be reversed.

## STANDARD OF REVIEW

"The grant or denial of a motion for judgment as a matter of law is a question of law reviewed de novo." *Suvada v. Muller*, 2022 S.D. 75, ¶ 27, 983 N.W.2d 548, 557 (citing *Magner v Brinkman*, 2016 S.D. 50, ¶ 13, 883 N.W.2d 74, 81). Likewise, a circuit court's decision on a motion to dismiss is reviewed de novo without regard to the determination made by the circuit court. *Hallberg v. South Dakota Bd. of Regents*, 2019 S.D. 67, ¶ 10, 937 N.W.2d 568, 572 (citing *N. Am. Truck & Trailer, Inc. v. M.C.I. Commc'n Servs.*, 2008 S.D. 45, ¶ 6, 751 N.W.2d 710, 712.). "This Court will only overturn a trial court's conclusions of law when the trial court erred as a matter of law." *Rindal v. Sohler*, 2003 S.D. 23, ¶ 6, 658 N.W.2d 769, 771 (citing *Estate of Fountain v. Schroeder*, 2001 S.D. 139, ¶ 6, 637 N.W.2d, 27, 28). "A 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." *Knecht v. Evridge*, 2020 S.D. 9, ¶ 30, 940 N.W.2d 318, 328 (quoting *Bertelsen v. Allstate Ins., Co.*, 2001 S.D. 13, ¶ 26, 796 N.W.2d 685, 695).

## ARGUMENT AND AUTHORITIES

### *I.* The circuit court erred in denying Garretts' Motion for Judgment as a matter of Law or New Trial when the evidence presented at trial was undisputed that the Stocks did not abide by the notice provision in the Farm Lease Agreement that would allow the Garretts to cure any default.

"Matters of contract interpretation are questions of law reviewed de novo, and 'when interpreting a contract, this Court looks to the language that the parties used in the contract to determine their intention.'" *Suvada*, 2022 S.D. 75, ¶ 28, 983 N.W.2d at 558 (quoting *Charlson v. Charlson*, 2017 S.D. 11, ¶ 16, 892 N.W.2d 903, 908). The terms and conditions of a contract are examined as whole, while giving words their plain and ordinary meaning. *Id.* This Court has continuously reiterated that a court cannot rewrite the terms of a contract:

> It is not the function of this Court to rewrite a contract. *See Kroupa v. Kroupa*, 1998 SD 4, ¶ 49, 574 N.W.2d 208, 217 (quoting *Hisgen v. Hisgen*, 1996 SD 122, ¶ 17, 554 N.W.2d 494, 499) (Sabers, J., dissenting) (noting that "'[i]t is not a function of the court to rewrite the parties' agreements' "). *See also Schlosser v. Norwest Bank South Dakota*, 506 N.W.2d 416, 421 (S.D.1993) (quoting *Raben v. Schlottman*, 77 S.D. 184, 190–91, 88 N.W.2d 205, 208 (1958)) (Wuest, J., concurring in part & dissenting in part) (stating that "'a court cannot make a contract for the parties that they did not make for themselves'") and *Amdahl v. Lowe*, 471 N.W.2d 770, 777 (S.D.1991) (concluding that "we cannot create a contract for the parties which they did not intend").

*S. Dakota State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.*, 2000 S.D. 116, ¶ 24, 616 N.W.2d 397, 407.

Here, the provisions in question, and the basis for the Garrets Motion for Judgement as a Matter of Law, are found in the Farm Lease Agreement, which state:

> Section 12.
>
> DEFAULT:
>
> In case of a default in the payment of any lease payment, the Lessees shall have the right to cure the default or breach upon the same being corrected upon sixty (60) days' notice.
>
> If the Tenants shall fail to comply with any of the covenants, terms, and conditions of this Lease, or if the rental payments required hereunder shall not be paid when the same becomes due and payable and such failure of compliance or nonpayment of rent shall continue for sixty (60) days after written notice thereof is given by the Lessor to the Lessees, then this lease shall terminate at the option of the Lessor.
>
> Section 13.
>
> NOTICES
>
> The parties agree that any notices required or permitted hereunder shall be made by the escrow agent effective upon delivery to the parties.

(Ex. 2.) The terms in Section 12 and 13 in the Farm Lease Agreement are clear and unambiguous: if the Garretts were to default in any payment of the lease they would have 60 days to cure the default from the time that notice was given by the escrow agent. (*Id.*)

When the terms are clear, there is no room for the court to interpret the contract:

> Where the terms of the contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written....The court has no right "to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently."...Nor may the courts remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other.

*LoBianco v. Harleysville, Ins. Co.*, 368 N.J. Super. 515, 524 (2003), (citing *Karl's Sales & Serv., Inc. v. Gimbel Bros., Inc.*, 249 N.J. Super. 487, 493, 592 A.2d 647 (App.Div.1991)). Likewise, the jury could not have disregarded the terms of the contract, especially when it related to the default and notice provisions in the Farm Lease Agreement.

During the Plaintiffs' case-in-chief, a letter dated August 27, 2021, was entered into evidence, which was purported to be the "Notice of Default" sent to the Garretts. (Ex. 7.) Mr. Stock testified to numerous deficiencies with this alleged Notice of Default. First, Mr. Stock admitted that he was claiming the Garretts owed $283,244.03, which was the responsibility of Mr. Stock as set forth in Section 5 of the Real Estate Purchase Agreement. (T at 240:19-241:22; Ex. 1.) Secondly, Mr. Stock admitted that the deadline to cure set forth in the letter was on October 15, 2021, which was not sixty (60) days, as required by Section 12 of the Farm Lease Agreement. (T at 242: 12-14; Ex. 2.) Thirdly, Mr. Stock admitted that this alleged Notice of Default was never provided to the escrow agent, Chase Cooper, as required by Section 13 of the Farm Lease Agreement. (T at 240:12-18; Ex. 2.) Escrow agent, Chase Cooper, also testified that he did not send notice of default. (T at 238:2-7.)

The Stocks will assumedly argue that the August 27, 2021, letter substantially complied with the notice provision. However, the doctrine of substantial compliance based on constructive or actual knowledge does not apply here where an expressed provision of a private contractual agreement is clear. *See LoBianco* 368 N.J. Super. at 524 (2003). In *Oppenheimer & Co. v. Oppenheim, Appel, Dixon and Co.*, the New York Court of Appeals found that the written notice requirement in a lease was not satisfied by substantial performance consisting of oral notice within the

deadline. 86 N.Y.2d 685, 636 (1995). The Court held that oral notice certainly would convey actual knowledge, but the contracting party was entitled to insist upon strict enforcement. *Id.* The same applies in the case at bar for the Garretts.

Additionally, in *Hein v. Marts,* this Court addressed the issue of whether actual notice was sufficient and held that "there must be strict compliance with notice provisions where the notice affects property rights or where it is to form the basis for a suit." 295 N.W.2d 167, 170 (SD 1980). The notice requirements in the case at bar affect both property rights and the ability for the Stocks to initiate and maintain suit against the Garretts.

Finally, in *Woodall v. Pharr,* the Court of Appeals of Georgia was tasked with determining whether notice of default in a forfeiture action on a lease required strict compliance. 119 Ga.App. 692 (1970). The Court held "[w]hen a forfeiture depends on giving a written notice of default, it must appear that the notice was given in *strict compliance with the contract* both as to time and contents and that the default occurred." *Id.* at 693 (emphasis added). The Court went on to explain the purpose of the rule requiring strict compliance and stated:

> The manifest purpose of requiring two notices is to give the lessee another chance to avoid a forfeiture by performing the obligation. The provision for the initial notice clearly contemplates that the lessee will be afforded an opportunity to correct the default. A demand for possession of the premises will not operate as a basis for termination of the lease where the circumstances require that an opportunity to perform first be given the tenant. A letter written by the lessor's attorney to the lessees' attorney on January 15, 1965, merely complained of the lessees' default and demanded possession of the premises. As this notice by its terms precluded correction of the default or defaults referred to, it was not sufficient to constitute the notice of default required according to our interpretation of paragraph 8 of the lease.

*Id.* at 694 (internal citations omitted).

The fact remains that the default and notice provisions in the Farm Lease Agreement have yet to be complied with and was never complied with providing the Garretts the ability to cure. No reasonable juror could have, or should have, issued a finding for the Stocks based on the breach of the aforementioned provisions. Thus, the trial court should have granted the Garretts' motion for judgement as a matter of law made at and after trial. (T at 261:6-25.) R: 349-357.) This Court should reverse the trial court's orders denying Garretts' motion for judgment as a matter of law because the default and notice provision was not complied with by the Stocks.

## II. The circuit court erred in denying Garretts' motion to dismiss when the Garretts were not properly served, failure to mediate precluded the action, the Stocks failed to give proper notice of default, and parallel litigation existed in federal court that would adjudicate all the parties' claims.

The Garretts filed a motion to dismiss on July 12, 2022. (R: 9-10.) The Garretts' motion was based on four primary arguments: (1) the Stocks failed to properly serve the Garretts under SDCL 21-16-2; (2) the Stocks failed to request a mandatory mediation under SDCL 54-13-10; (3) the Stocks failed to provide notice to the escrow agent under the Closing/Escrow Agreement; and (4) pursuant to the doctrine of claims splitting, parallel litigation prevented the Stocks actions. (*Id.*) Pursuant to the trial court's order dated October 13, 2022, the Garretts' motion to dismiss was denied.

A. Insufficient Service of Process

Pursuant to SDCL 21-16-2, "all cases arising under subdivisions 21-16-1(4), (5), and (6), three day's written notice to quit must be given to the lessee . . . before proceedings can be instituted, and may be served and returned in like manner as a

summons is served and returned." In computing the time for the three days, statute states:

> In computing any period of time prescribed or allowed by this chapter, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday or, when the act to be done is the filing of a paper in court[.] . . .

SDCL 15-6-6(a)

On July 1, 2022, the Stocks served a notice to quit on the Garretts. (See R: 6, at ¶ 10.) On July 6th, 2022, Stocks served a verified complaint and summons on Garretts. (R: 8.) According to the July 2022 calendar, the Stocks served their complaint and summons early, not giving the Garretts the full three days.[1] *See Meservy v. Stoner*, 208 N.W. 781, 782 (S.D. 1926) (discussing where there is not substantial compliance with SDCL 21-16-2, a Court lacks jurisdiction over a plaintiff's Forcible Entry and Detainer action). Because the trial court lacked jurisdiction due to the Stocks' failure to give the Garretts the required three days, this Court should reverse the denial of the Garretts' motion to dismiss.

B. Mandatory Mediation

Before any action can be brought regarding agricultural land and a debt, mediation is required:

> A creditor desiring to commence an action or a proceeding in this state to enforce a debt totaling fifty thousand dollars or greater against agricultural land or agricultural property of the borrower or to foreclose a contract to sell agricultural land or agricultural

---

[1] July 1, 2022, was a Friday, with Monday July 4, 2022, being a holiday. Therefore, according to SDCL 15-6-6(a), the three days started on July 5.

> property or to enforce a secured interest in agricultural land or agricultural property or pursue any other action, proceeding or remedy relating to agricultural land or agricultural property of the borrower shall file a request for mandatory mediation with the director of the agricultural mediation program. No creditor may commence any such action or proceeding until the creditor receives a mediation release as described in this chapter, or the debtor waives mediation or until a court determines after notice and hearing, that the time delay required for mediation would cause the creditor to suffer irreparable harm because there are reasonable grounds to believe that the borrower may waste, dissipate, or divert agricultural property or that the agricultural property is in imminent danger of deterioration. . . .

SDCL 54-13-10.

On March 18, 2021, a mediation pursuant to SDCL 54-13-10, was held at the request of the Stocks. (T at 95:7-9.) After mediation, on April 2, 2021, the Stocks accepted payment in the amount of $324,105.99. (T at 59:13-25; Ex. 4.) After the April 2021 payment, Mr. Stock considered the Garretts caught up in payments. (T at 60:8-10.) Any further claim for a debt on agricultural property requires another mediation as required by SDCL 54-13-10. The failure to request mandatory mediation by the Stocks prior to bringing their action should have been fatal to their complaint. Even after the Court ordered mediation between the parties, and it was completed, the Stocks complaint should have been dismissed, and they should have had to file again to meet the requirements of the statute. The trial court should have dismissed the Stocks complaint on this reason alone, and its failure to do so constituted reversible error.

C. Notice of Default was never Provided to the Escrow Agent

The same rationale for why the trial court erred in denying the Garretts motion for judgment as a matter of law also applies to the trial court's error in denying the Garretts motion to dismiss. For brevity, Mr. Stock has admitted that he did not abide by the notice

provision under the Farm Lease Agreement. He admitted that he never provided the escrow agent with notice of the Garretts' default. (T at 240:12-18.) Even at the time the trial court considered the motion to dismiss, there was nothing on record that provided the notice provision was followed. Therefore, the trial court should have dismissed the Stocks complaint for failure to abide by the strict terms of the agreement.

D. Parallel Proceedings

Prior to the filing of the Stocks complaint in the matter before this Court, on January 28, 2022, the Garretts filed a federal lawsuit against the Stocks regarding the same issues that revolve around this matter (T at 152:2-5; 106:13-19; *see also* R: 90-92 (stating the background of the federal lawsuit).) By allowing the Stocks to file a complaint involving the same issues between the parties, the trial court allowed the splitting of causes of action and produces parallel litigation.

The rule against splitting causes of action rests upon the concept that "parties are required to bring forward their whole case" and may not try it piecemeal, so as to try an issue as a "convenient trial unit." *First Nat. Bank in Sioux Falls v. First Nat. Bank South Dakota*, 679 F.3d 763, 768 (8th Cir. 2012). Whether an issue is considered to be part of a "convenient trial unit" is determined by whether the issue "arises out of the same nucleus of operative facts as the prior claim." *Id.* Therefore, the rule against splitting causes of action "applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." *Arnold v. K-Mart Corp.*, 747 S.W.2d 130, 132 (Ky. App. 1988) (quoting *Hays v. Sturgill*, 193 S.W.2d 648, 650 (Ky. 1946)).

Here, the basis of the eviction is part of the same "convenient trial unit" that the Garretts have brought forward in Federal Court. In fact, the Stocks have not only answered the Garretts' complaint involving the same issues the eviction action brought forward, but they have counterclaimed against Garretts. The basis of the Garretts' claims in the federal action allege that Stocks breached their duties under the relevant contracts, which led to the Garretts' failure to timely make payments under the same. The Stocks have argued throughout this matter the exact same thing: that the Garretts breached the contracts. However, by only considering the possession of the land, the trial court has split the claims of the parties.

Further, the trial court should have abstained from taking jurisdiction based on the fact that parallel litigation had already commenced. Where pending state and federal court actions are initiated, and both actions involve the same subject matter, parallel proceedings may exist. *Fru-Con Const. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 535 (8th Cir. 2009). While state case law in South Dakota on this point is virtually non-existent, the Eighth Circuit has considered issues involving parallel proceedings.

In order to determine whether two actions in separate forums are parallel and whether a certain court should abstain from exercising jurisdiction, this Court should employ the analysis provided in *Fru-Con Const. Corp. v. Controlled Air, Inc.* The Eighth Circuit in that case first discussed that in order for a court to abstain from exercising jurisdiction, the two actions in question must be considered parallel. *Id.* at 534. To determine whether the two actions are parallel proceedings, the court discussed:

> The prevailing view is that state and federal proceedings are parallel for purposes of *Colorado River* abstention when substantially similar parties are litigating substantially similar

> issues in *both* state and federal court. This circuit requires more precision.
> The pendency of a state claim based on the same general facts or subject matter as a federal claim and involving the same parties is not alone sufficient. *Rather, a substantial similarity must exist between the state and federal proceedings, which similarity occurs when there is a substantial likelihood that the state proceeding will fully dispose of the claims presented in the federal court.*

*Id.* (citations omitted) (emphasis added). While *Fru-Con Const. Corp* was considering whether a Federal court should exercise jurisdiction over an action that was alleged to be parallel in state court, the court's opinion is instructive. *Id.* at 532.

If two actions are deemed parallel, a court considering exercising jurisdiction must use the following factors to determine whether exercising jurisdiction is warranted or whether abstention is warranted:

> (1) whether there is res over which one court has established jurisdiction;
>
> (2) the inconvenience of the [relevant] forum;
>
> (3) whether maintaining separate actions may result in piecemeal litigation, unless the relevant law would require piecemeal litigation and the federal court issue is easily severed;
>
> (4) which case has priority—not necessarily which case was filed first[2] but a greater emphasis on the relative progress made in the cases;
>
> (5) whether state or federal law controls, especially favoring the exercise of jurisdiction where federal law controls; and,
>
> (6) the adequacy of the state forum to protect the federal plaintiff's rights.

---

[2] The "first-filed rule" is a consideration for whether a court should exercise jurisdiction over an action. *See Lewis & Clark Reg'l Water Sys., Inc. v. Carstensen Contracting, Inc.*, 339 F.Supp.3d 886, 892-93 (D.S.D. Sept. 11, 2018) (discussing how the first-filed rule gives priority to the party who first establishes jurisdiction over certain claims, in order to conserve judicial resources and avoid conflicting results).

*Id.* at 534. Where a majority of the factors favor abstention, a court should not exercise jurisdiction over the claims in question. *Id.*

The trial court was tasked with considering whether to exercise jurisdiction over the Stocks complaint, when Federal proceedings were underway regarding the same lease agreements the Stocks complaint is based on. (App 001.) The Stocks brought their eviction claim on the basis that they have grounds to remove the Garretts under SDCL 21-16-1. (*See* R: 4-7.) In order to maintain an action of forcible entry and detainer, the Stocks must show that one or more of the following grounds is established to justify repossession of a leased property:

> (1) If a party has by force, intimidation, fraud, or stealth, entered upon the prior actual possession of real property or the occupied structure of another, and detains the same;
>
> (2) If a party, after entering peaceably upon real property or an occupied structure, turns out by force, threats, or menacing conduct, the party in possession;
>
> (3) If a party by force or by menaces and threats of violence unlawfully holds and keeps the possession of any real property, or occupied structure, whether the same was acquired peaceably or otherwise;
>
> *(4) If a lessee in person or by subtenants holds over after the termination of his lease or expiration of his term, or fails to pay his rent for three days after the same shall be due;*
>
> (5) If a party continues in possession after a sale of the real property or occupied structure under mortgage, execution, order, or any judicial process, after the expiration of the time fixed by law for redemption, and after the execution and delivery of a deed or instrument of ownership;
>
> (6) If a party continues in possession after a judgment in partition, or after a sale under an order or decree of a circuit court;
>
> (7) If a lessee commits waste upon the leased premises, or does or fails to perform any act which, under the terms of the lease operates to terminate the same.

SDCL 21-16-1 (emphasis added).

*i. The Stocks are Seeking the Same Remedies in both the State Court Action and the Federal Court Action on the Same Issues Regarding the Lease Agreements in Question.*

There is a substantial likelihood that the Federal court action will fully dispose of the claims at issue in this present action; thus, rendering the two proceedings in question, parallel. *Fru-Con Const. Corp.*, 574 F.3d at 535. As such, the two actions should be deemed parallel.

The issues involved in the present action are the same issues the Federal court is considering. The Stocks allegations pertain to one underlying issue in both cases: the material breaches of the lease agreements in question. (APP. 010.) In order to even determine whether there are grounds for the relief offered by this the Stocks action, the trial court, or a jury, would have to determine whether the Garretts' actually breached the lease agreements in question. *See* SDCL 21-16-1(4). This issue is exactly what is already being litigated in the Federal court action. The Garretts have alleged that the lease agreements were breached by the Stocks, by not allowing them to make lease payments and by wasting and illegally possessing the land in question. Contrarily, the Stocks, in their complaint, alleged the Garretts have breached the same agreements. There are no material differences between the issues that these two actions consider.

The remedies the Stocks were seeking in their complaint are the same remedies they are seeking in Federal court. While the Stocks withdrew their claim for money damages later on the proceedings, the Stocks initially requested two remedies, in *both* this action and the Federal court action: declaratory relief and money damages. In the Federal court action, the Stocks have requested the court find that the lease agreements in question are terminated because of their allegations. (See APP 010.) The Stocks also requested money damages related to those lease agreements. (*Id.* at pg. 6.) The Stocks,

at the time of filing their complaint, requested the same declaratory relief and money damages in this action. (*See* R: 6-7.) Given what the Stocks have already plead at the time, there still exists a substantial likelihood that the Federal court action would fully dispose of the claims at issue between these two parties.

The Trial Court should have abstained from exercising jurisdiction over the issues that the Stocks brought to the forum. The Federal court has already exercised jurisdiction over the lease agreement issues. *Fru-Con Const. Corp.*, 574 F.3d at 534. The discovery processes and Federal mechanisms afforded by the Federal forum that has already exercised jurisdiction over these issues are much more convenient and will serve the interests of justice, compared to the processes afforded by an action under SDCL 21-16.[3] *Id.* The trial court's denial of the Garretts' motion to dismiss has resulted in piecemeal litigation, of which different results could be rendered and the case law governing this does not call for piecemeal litigation. *Id.* Finally, allowing both proceedings to run parallel will certainly damage the Garretts' ability to be afforded a fair discovery process and trial. *Id.*

Further, as a result of the trial court denying Garretts' motion to dismiss, the trial court also denied the Garretts' the ability to present any counterclaims and defenses to the Stocks' lawsuit for possession. The trial court, at the very least, should have allowed the Garretts to present counterclaims to prevent multiplicity of lawsuits and allowed defenses to be presented as it related to the possession issue. The trial court striking the Garretts'

---

[3] The issues between these two parties are too complex and in need of more formal discovery and a jury trial. The mechanisms and quick turnaround for a trial that SDCL 21-16 mandates is inconvenient and will not serve the interests of justice, as was witnessed. *See* SDCL 21-16-8.

ability to present counterclaims and defenses was in error. *See Rindal v. Sohler*, 2003 S.D. 24, ¶¶9-10, 658 N.W.2d 769, 771-72. The matter between the parties is more complicated that a typical landlord tenant issue, and it involves more than just a lease agreement. Justice should require that the Garretts' be presented with the ability to defend the Stocks action appropriately and present their claims.

The trial court should have abstained from exercising jurisdiction over the parallel action the Stocks started. Thus, the Garretts request that this Court reverse the trial court's denial of Garretts' motion to dismiss and allow the parallel case to continue its progress in Federal court.[4]

## III. The Circuit Court erred in rejection Garretts proposed instructions that provided specific language from the contracts, specifically, Garretts proposed instruction providing that Section 12 of the Farm Lease Agreement required Stocks to provide proper notice of default and allow Garretts to cure.

Even though the Garretts believe that the trial court erred in denying their motion for judgment as a matter of law and taking the case from the jury, the trial court should have instructed the jury as to the specific contract provisions that pertain to possession, especially the Garretts proposed instruction that stated:

> The Defendants claim that Plaintiffs were required to provide written notice of default to the escrow agent pursuant to paragraph

---

[4] The Federal court certainly would have supplemental jurisdiction over any claim that might arise from the same operative facts of those pertaining to the lease agreements at issue; namely, whether the Garretts' are still owed possession of the properties attached to those lease agreements. *Woods v. Hillcrest Terrace Corp.*, 170 F.2d 980, 984 (8th Cir. 1949) (where the Eighth Circuit held that a Federal court could exercise jurisdiction over a claim involving eviction under SDCL 21-16); *see also* 28 U.S.C. § 1367(a) ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.")

> 13 of the Farm Lease Agreement, which provides the Garretts 60 days to cure any alleged defect pursuant to Section 12 of the Farm Lease Agreement. If you find that Plaintiff's violated these requirements, then the complaint for forcible entry and detainer must be denied.

(R: 307.)

While the agreements between the parties were admitted, and argued at trial, there existed no instruction stating to the jury that they must rule in favor of the Garretts if the notice and default provisions were not complied with as a condition precedent to any of the other matters argued at trial. *See Knecht*, 2020 S.D. 9, ¶ 33, 940 N.W.2d at 329 (stating that because the jury had access to the leases themselves as exhibits, the jury could be aware of its provisions). This matter is materially different than the facts in *Knecht*, as the jury was never instructed as to the notice as being a condition precedent. Especially, when comparing the Garretts proposed instruction to Instruction #12, the jury could not be aware that the Stock's failure to strictly comply with the notice provisions entitled the Garretts to continued possession. Jury Instruction #12 stated:

> When a breaching party has abandoned the contract and evidenced a clear and unequivocal intent not to complete the contract, a cure notice is not required. The law does not require futile or meaningless acts. Where it would prove meaningless to provide a party with written notice of a breach, a cure notice is not required.

(R: 327.) The jury could have relied on this statement and found that the Stocks did not have to provide notice as the Farm Lease Agreement indicated. For that reason, the trial court erred in rejecting the Garretts proposed instruction regarding the notice and default provision under the Farm Lease Agreement.

## CONCLUSION

Based on the foregoing, Garretts respectfully asks that the Court reverse the trial court for the reasons aforementioned.

Respectfully submitted this 22nd day of May, 2023.

BEARDSLEY, JENSEN & LEE,
PROF. L.L.C.

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ORAL ARGUMENT IS RESPECTFULLY REQUESTED

## CERTIFICATE OF COMPLIANCE

Pursuant to S.D.C.L. §15-26A-66(b)(4), I certify that Appellant's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 9569 words and 47,991 characters. I have relied on the word and character count of our processing system used to prepare this Brief. The original Appellant's brief and all copies are in compliance with this rule.

Dated this 23rd day of May, 2023.

BEARDSLEY, JENSEN & LEE,
PROF. L.L.C.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May, 2023, I emailed the foregoing Appellants Brief and sent one copy of it by U.S. Mail, first-class postage prepaid to:

James Simko
Andrew Hurd
Cadwell Sanford Deibert & Garry
200 East 10th Street Suite 200
Sioux Falls, SD 57104

I further certify that on 22nd day of May, 2023, I electronically filed the foregoing Appellants' Brief and sent the original and one copy of it by U.S. Mail, first-class postage prepaid to:

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

BEARDSLEY, JENSEN & LEE,
PROF. L.L.C.

By:/s/ *Michael S. Beardsley*
Michael S. Beardsley

# APPENDIX INDEX

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| | |
|---|---|
| STATE OF SOUTH DAKOTA ) :SS<br>COUNTY OF SULLY ) | IN CIRCUIT COURT<br>SIXTH JUDICIAL CIRCUIT |
| RONALD STOCK and KRISTIN K. STOCK,<br><br>Plaintiffs,<br><br>vs.<br><br>JAMES E. GARRETT, SANDRA E. GARRETT, and LEVI E. GARRETT,<br><br>Defendants. | 59CIV22-000007<br><br>JUDGMENT OF EVICTION |

A jury trial was held in the above-captioned matter on December 5 and 6, 2022, and Plaintiff by and through its attorney of record having filed a Summons and Complaint forcible entry and detainer against the Defendants, the Defendants having filed an Answer to the Complaint, and the parties having appeared before the Honorable Judge Christina Klinger for trial, with the Plaintiffs having been represented by James Simko and Drew Hurd of the Cadwell, Sanford Deibert & Garry LLP law firm, and the Defendants having been represented by Michael Beardsley and Elliot Bloom of the Beardsley, Jensen and Lee law firm, and the jury having rendered a verdict in favor of the Plaintiffs for immediate possession of the ground at issue, it is hereby

ORDERED ADJUDGED AND DECREED as follows:

1. That Plaintiff is entitled to and is awarded a judgment of eviction against Defendants allowing Plaintiff to immediately and peacefully retake possession of the property and place all personal items of the Defendants that remain on the property in storage, and, if necessary, for a special execution directed to the sheriff or constable of Sully County, authorizing such agency to place Plaintiffs in immediate possession of the land legally described as:

Township 114 North, Range 80 West of the 5th P.M.

Section 7: Lot 4 and the SE¼SW¼ and SE¼
Section 8: S½, Less and Except Lot H-1 in SW¼
Section 16: All
Section 17: All
Section 18: Lots 1, 2, 3, 4 and E½W½ and E½
Section 19: Lots 1, 2, 3, 4 and E½W½ and E½, Less and Except the SW¼
Section 30: Lots 1, 2, 3, 4 and E½W½ and NE¼

Township 114 North, Range 81 West of the 5th P.M.
Section 13: All

Township 115 North, Range 80 West of the 5th P.M.
Section 26: NW¼, Less and Except highway right of way

Township 115 North, Range 79 West of the 5th P.M.
Section 31: Lots 3, 4 and E½SW¼ and SE¼
Section 32: SW¼

Township 114 North, Range 80 West of the 5th P.M.
Section 35: NE¼ and SW¼NW¼ and E½SW¼ and NE¼SE¼ and W½SE¼, Less Lot H-1

All in Sully County, South Dakota.

effective December 6, 2022.

**12/8/2022 10:22:18 AM**

BY THE COURT:

Hon. Christina Klinger, Circuit Court Judge

**Attest:**
**Wittler, Sherise**
**Clerk/Deputy**

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

| | |
|---|---|
| JAMES E. GARRETT, SANDRA A. GARRETT, and LEVI E. GARRETT<br><br>Plaintiffs,<br><br>vs.<br><br>RONALD STOCK and KRISTIN K. STOCK,<br><br>Defendant. | File No.<br><br>22-cv-3003<br><br>**COMPLAINT** |

COMES NOW the Plaintiffs state alleged as follows:

JURISDICTION

1. The Plaintiffs are residents of the State of South Dakota. The Defendants are residents of the State of Nebraska. Pursuant to 28 U.S.C. § 1332 there is diversity of citizenship.

2. The case involves damages and harm in excess of $75,000.

3. Three separate contracts were executed by the parties on or about 2019. The contracts were entitled as follows:

A. Real Estate Purchase Agreement

B. Farm Lease Agreement

C. Closing/Escrow Agreement

All of the essential elements of a valid contract exist for each contract listed above.

4. The breach of these agreements occurred on or about June, 2021. At that time, the Defendant entered into a Settlement Agreement with unknown

third parties who were allowed to remove a fence which subsumed 33 feet of Garrett's property that extends for approximately five and a half miles.

5. It is believed that the Defendant entered into a Settlement Agreement with three other parties i.e. Hartman and Pahl, Missouri River Investment, and Roger Garrett.

6. As a result of the action of Ronald Stock breaching of three separate agreements, the Garretts have been deprived of the use of the property described above. The entity who contracted with Ron Stock removed and destroyed the fence, as well as 19 separate gates.

COUNT I: BREACH OF REAL ESTATE PURCHASE AGREEMENT

7. In addition to improperly conveying property described above, Ronald E. Stock and Kristin Stock also violated the Real Estate Purchase Agreement by interfering with Garretts' right to make payments pursuant to the Agreement stated above.

8. Defendants have paid Rabo Agrifinance Mortgage, contrary to lease agreement. As a result, Rabo Mortgage has refused to accept the payments by the Plaintiffs. Such action by the Defendants is contrary to Paragraph 13 of the Real Estate Purchase Agreement.

9. Additionally, the payment by the Defendants to Rabo Agrifinance violates Paragraph 6 of the Real Estate Purchase Agreement.

10. Paragraph 15 of the Real Estate Purchase Agreement indicates that "Ronald E. Stock agrees not to sell, assign, convey, or mortgage other than to Rabo Agrifinance as described in this Agreement, any part of the property

described in this Agreement as long as the Garretts are fulfilling their obligations to this Agreement." The Defendant violated this paragraph of the Real Estate Purchase Agreement by entering into agreement with other entities who had now taken 33 feet of property that runs for five and a half miles that is the subject of this Real Estate Purchase Agreement.

11. The actions by the Defendant violate Paragraphs 15, 16, 26 of the Real Estate Purchase Agreement.

12. Specifically, Paragraph 16 states as follows:

> "Ronald E. Stock will make no changes to the property described in this Agreement as long as Garretts are making their obligations required by this Agreement." The Defendants conveyance to another entity who then took the property described above, is a violation of Paragraph 16 of this contract.

13. Paragraph 26 is a good-faith mandate to the parties. The Defendants conveyance of property to a third party violates the good-faith provision of this contract.

14. As a result of the actions of the Defendant, the Garretts have been severely damaged in that there is the potential loss of the Plaintiffs' repurchase option, which will potentially cost Plaintiffs $20,000,000.

COUNT II: BREACH OF FARM LEASE AGREEMENT

15. Farm Lease Agreement was entered into in June of 2019 and shall terminate on December 21, 2024. Defendant Ronald E. Stock is the only

"Stock" that has signed this Farm Lease Agreement. As a result, as to this particular account, there is no claim that Kristin Stock violated this Agreement.

16. The following paragraphs of the Farm Lease Agreement have been breached by the actions of Ronald Stock conveying property to a third party who then took 33 feet times five and a half miles of Garretts' property:

Paragraph 3.5, Paragraph 9, Paragraph 10

17. Paragraph 3 was violated when the Plaintiffs were deprived of the opportunity to use the property described earlier as taken by third parties under the Settlement Agreement or consent of the Defendant. (33 feet x 5 ½ Miles)

18. Paragraph 9 was violated in the same manner as Paragraph 3. Specifically, it states the Lessees "shall peaceably and quietly hold and enjoy possession of the leased premises for the term herein specified subject to provisions hereof." The actions by Stock breach that paragraph of the Agreement.

19. Paragraph 9 states that the Lessor or its employees, assigns, agents, invitees, or business associates shall not without express knowledge and written consent of the Lessees enter upon the leased premises at any time. At no time was consent given by the Plaintiffs.

20. Paragraph 10 gives the Lessees exclusive right to repurchase the leased land from the Lessor. The actions by the Lessor in conveying 33 feet x 5 ½ miles prohibits a repurchase by the Plaintiffs thereby violating Paragraph 10.

COUNT III: BREACH OF CLOSING/ESCROW AGREEMENT

21. Previous actions described in Counts I and II also constitute a breach of the Closing/Escrow Agreement. Specifically, Paragraph 5 grants the Garretts the exclusive and irrevocable option to purchase the property back from Ronald E. Stock on the terms described in this Agreement. The action by Ronald E. Stock of conveying to others a portion of the property is violation of Paragraph 5 of the Closing/Escrow Agreement.

22. Paragraph 9 specifically describes the repurchase option available to the Garretts. The conveyance by the Defendants to others is a breach of the repurchase portion of the Agreement which is set forth in Paragraph 9 of the Closing/Escrow Agreement.

23. Paragraph 20 describes the repurchase of the property. The actions of the defendant violate Paragraph 20 of the Closing/Escrow Agreement.

24. Paragraph 24 indicates as follows:

> Alternations: "Ronald E. Stock will make no changes to the property described in this agreement as long as Garretts are making their obligations required by this agreement." The Garretts are making their obligations required by this agreement. Ronald E. Stock's conveyance is a breach of the agreement as set forth in Paragraph 24.

25. The intent of this agreement is set forth in Paragraph 30. It states the intent of this agreement between Ronald E. Stock and Garretts is to provide

Garretts a lease with an option to repurchase the Garretts' real property described in this agreement, dependent only upon the Garretts meeting all obligations described in this agreement. The conveyance by Defendants to others of the property described above (33 feet x 5 ½ Miles) violates the intent of this agreement and specifically Paragraph 30 of the agreement.

26. Paragraph 34 of this agreement provides the parties must act in good faith. Ronald E. Stock violated this section of the agreement by conveying a portion of the property to others. Therefore, he is not acting in good faith, and such action is a violation of Paragraph 34 of this agreement.

27. As indicated previously, Ronald Stock and his wife, Kristen Stock did not have authority to enter the property without written permission from the Plaintiffs. The Defendants allowed an unknown third party to trespass onto the property without permission from the Plaintiff in order to take soil samples. Such trespass is a violation of this agreement.

COUNT IV: FRAUD AND MISREPRESENTATION

28. As indicated previously, the Defendants entered into three separate agreements with the Plaintiffs on or about June of 2019.

29. At that time, the Defendant specifically indicated to Plaintiff that they would not interfere with the Plaintiffs' right to use the property and to repurchase the property within the appropriate time limit set forth in the contracts.

30. The Defendants intentionally and willfully deceived the Plaintiff's into entering into a contract that allows the Plaintiffs to use the property and

repurchase the property. The Defendants did not have any intention of allowing the Plaintiffs to repurchase or freely use the property in the agreements.

31. As a result of the willful deceit by the Defendants, Plaintiffs altered their position based on the deceit by the Defendants

32. Such deceit is a violation of SDCL 20-10-1 and is an intentional act by the Defendants which constitutes fraud, misrepresentation, and deceit.

33. In addition, the actions by the Defendants fraudulently induced the Plaintiffs to enter into the above-mentioned contract. If the Plaintiffs had been aware of how the Defendants would proceed, they would never have entered into these contracts.

WHEREFORE, as a result of the fraud, punitive damages should be awarded as well as consequential damages. The Plaintiff hereby requests judgment against the Defendants as follows:

1. That the Court find that the Defendants violated each and every agreement set forth below.
2. That judgment be entered in favor of the Plaintiffs and against Defendants on all counts.
3. That the Plaintiff receive consequential damages as set forth by this Court pursuant to the breaches; and
4. That the Plaintiffs receive punitive damages for the intentional acts set forth.

Dated this 28th day of January, 20___.

BEARDSLEY, JENSEN & LEE,
Prof. L.L.C.

By: _____
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mbeardsley@blackhillslaw.com
*Attorneys for Plaintiffs*

**DEMAND FOR JURY TRIAL**

Pursuant to the provisions of Federal Rule of Civil Procedure, Rule 38, Plaintiffs, hereby demands a trial by jury.

By: _____
Michael S. Beardsley

JS 44 (Rev. 04/21)

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

**I. (a) PLAINTIFFS**

James E. Garrett, Sandra A. Garrett and Levi E. Garrett

**(b)** County of Residence of First Listed Plaintiff Sully
*(EXCEPT IN U.S. PLAINTIFF CASES)*

**(c)** Attorneys *(Firm Name, Address, and Telephone Number)*

Michael S. Beardsley & Steven C. Beardsley
4200 Beach Drive Ste 3. Rapid City, SD 57709

**DEFENDANTS**

Ronald Stock and Kristin Stock

County of Residence of First Listed Defendant Platte
*(IN U.S. PLAINTIFF CASES ONLY)*

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

**II. BASIS OF JURISDICTION** *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

**III. CITIZENSHIP OF PRINCIPAL PARTIES** *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
*(For Diversity Cases Only)*

| | PTF | DEF | | PTF | DEF |
|---|---|---|---|---|---|
| Citizen of This State | ☒ 1 | ☐ 1 | Incorporated *or* Principal Place of Business In This State | ☐ 4 | ☐ 4 |
| Citizen of Another State | ☐ 2 | ☒ 2 | Incorporated *and* Principal Place of Business In Another State | ☐ 5 | ☐ 5 |
| Citizen or Subject of a Foreign Country | ☐ 3 | ☐ 3 | Foreign Nation | ☐ 6 | ☐ 6 |

**IV. NATURE OF SUIT** *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

| CONTRACT | TORTS | | FORFEITURE/PENALTY | BANKRUPTCY | OTHER STATUTES |
|---|---|---|---|---|---|
| ☐ 110 Insurance | PERSONAL INJURY | PERSONAL INJURY | ☐ 625 Drug Related Seizure of Property 21 USC 881 | ☐ 422 Appeal 28 USC 158 | ☐ 375 False Claims Act |
| ☐ 120 Marine | ☐ 310 Airplane | ☐ 365 Personal Injury - Product Liability | ☐ 690 Other | ☐ 423 Withdrawal 28 USC 157 | ☐ 376 Qui Tam (31 USC 3729(a)) |
| ☐ 130 Miller Act | ☐ 315 Airplane Product Liability | ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability | | INTELLECTUAL PROPERTY RIGHTS | ☐ 400 State Reapportionment |
| ☐ 140 Negotiable Instrument | ☐ 320 Assault, Libel & Slander | ☐ 368 Asbestos Personal Injury Product Liability | | ☐ 820 Copyrights | ☐ 410 Antitrust |
| ☐ 150 Recovery of Overpayment & Enforcement of Judgment | ☐ 330 Federal Employers' Liability | PERSONAL PROPERTY | LABOR | ☐ 830 Patent | ☐ 430 Banks and Banking |
| ☐ 151 Medicare Act | ☐ 340 Marine | ☐ 370 Other Fraud | ☐ 710 Fair Labor Standards Act | ☐ 835 Patent - Abbreviated New Drug Application | ☐ 450 Commerce |
| ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans) | ☐ 345 Marine Product Liability | ☐ 371 Truth in Lending | ☐ 720 Labor/Management Relations | ☐ 840 Trademark | ☐ 460 Deportation |
| ☐ 153 Recovery of Overpayment of Veteran's Benefits | ☐ 350 Motor Vehicle | ☐ 380 Other Personal Property Damage | ☐ 740 Railway Labor Act | ☐ 880 Defend Trade Secrets Act of 2016 | ☐ 470 Racketeer Influenced and Corrupt Organizations |
| ☐ 160 Stockholders' Suits | ☐ 355 Motor Vehicle Product Liability | ☐ 385 Property Damage Product Liability | ☐ 751 Family and Medical Leave Act | SOCIAL SECURITY | ☐ 480 Consumer Credit (15 USC 1681 or 1692) |
| ☒ 190 Other Contract | ☐ 360 Other Personal Injury | | ☐ 790 Other Labor Litigation | ☐ 861 HIA (1395ff) | ☐ 485 Telephone Consumer Protection Act |
| ☐ 195 Contract Product Liability | ☐ 362 Personal Injury - Medical Malpractice | | ☐ 791 Employee Retirement Income Security Act | ☐ 862 Black Lung (923) | ☐ 490 Cable/Sat TV |
| ☐ 196 Franchise | | | | ☐ 863 DIWC/DIWW (405(g)) | ☐ 850 Securities/Commodities/ Exchange |
| REAL PROPERTY | CIVIL RIGHTS | PRISONER PETITIONS | IMMIGRATION | ☐ 864 SSID Title XVI | ☐ 890 Other Statutory Actions |
| ☐ 210 Land Condemnation | ☐ 440 Other Civil Rights | Habeas Corpus: | ☐ 462 Naturalization Application | ☐ 865 RSI (405(g)) | ☐ 891 Agricultural Acts |
| ☐ 220 Foreclosure | ☐ 441 Voting | ☐ 463 Alien Detainee | ☐ 465 Other Immigration Actions | FEDERAL TAX SUITS | ☐ 893 Environmental Matters |
| ☐ 230 Rent Lease & Ejectment | ☐ 442 Employment | ☐ 510 Motions to Vacate Sentence | | ☐ 870 Taxes (U.S. Plaintiff or Defendant) | ☐ 895 Freedom of Information Act |
| ☐ 240 Torts to Land | ☐ 443 Housing/ Accommodations | ☐ 530 General | | ☐ 871 IRS—Third Party 26 USC 7609 | ☐ 896 Arbitration |
| ☐ 245 Tort Product Liability | ☐ 445 Amer. w/Disabilities - Employment | ☐ 535 Death Penalty | | | ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision |
| ☐ 290 All Other Real Property | ☐ 446 Amer. w/Disabilities - Other | Other: | | | ☐ 950 Constitutionality of State Statutes |
| | ☐ 448 Education | ☐ 540 Mandamus & Other | | | |
| | | ☐ 550 Civil Rights | | | |
| | | ☐ 555 Prison Condition | | | |
| | | ☐ 560 Civil Detainee - Conditions of Confinement | | | |

**V. ORIGIN** *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
28 USC 1332

Brief description of cause:
Breach of contract

**VII. REQUESTED IN COMPLAINT:**

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

**DEMAND $**

CHECK YES only if demanded in complaint:
**JURY DEMAND:** ☐ Yes ☐ No

**VIII. RELATED CASE(S) IF ANY** *(See instructions)*:

JUDGE _____ DOCKET NUMBER _____

DATE
01/28/2022

SIGNATURE OF ATTORNEY OF RECORD
*/s/* Michael S. Beardsley

**FOR OFFICE USE ONLY**

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

| | |
|---|---|
| JAMES E. GARRETT, SANDRA A. GARRETT and LEVI E. GARRETT,<br><br>Plaintiffs,<br><br>v.<br><br>RONALD STOCK and KRISTIN STOCK,<br><br>Defendants. | 3:22-cv-03003-RAL<br><br><br><br>**ANSWER AND COUNTERCLAIM** |

Defendants Ronald Stock and Kristin K. Stock, through undersigned counsel, Answer Plaintiffs' Complaint and Counterclaim against Plaintiffs as follows:

1. Defendants deny each and every allegation in Plaintiffs' Complaint unless otherwise specifically admitted herein.

2. Defendants admit the allegations of paragraph 1 of Plaintiffs' Complaint.

3. With respect to paragraph 2, Defendants deny that Plaintiffs have suffered any damages.

4. With respect to paragraph 3, Defendants admit that the parties signed the real estate purchase agreement and closing escrow agreement and Defendant Ron Stock admits to signing a farm lease agreement, all dated June 20, 2019; Defendant Kristin Stock denies she signed the farm lease agreement; Defendants admit those documents created valid contracts.

5. With respect to paragraph 4, Defendants deny they breached the agreements and further deny entering into a settlement agreement at that time. Defendants affirmatively assert that as of June 2021, Plaintiffs were in breach of their obligations under the agreements with Defendants for, among other things, failure to make lease payments when due, and failure to comply with their hold harmless and indemnification obligations under the farm lease agreement. Defendants further affirmatively assert that they entered into a settlement agreement in September 2021 to allow a fence line to be removed and replaced along the surveyed boundary lines for the property.

6. With respect to paragraph 5, Defendants admit they entered into a settlement agreement and affirmatively assert the parties to the settlement agreement other than Defendants were C J & G, Inc., Elaine Hartman Hayes, Gene Hartman Hayes, Missouri River Investment Limited Partnership, and Roger Garrett.

7. Defendants deny the allegations of paragraph 6.

8. Defendants deny the allegations of paragraph 7.

9. With respect to paragraph 8, Defendants admit to making payments to Rabo Agrifinance Mortgage, but deny such payments are contrary to the lease agreement, and further denies such payments are contrary to the real estate purchase agreement. Defendants are without knowledge or information sufficient to form a belief as to the remainder of the allegations contained within paragraph 8 and therefore deny them.

10. Defendants deny the allegations in paragraph 9.

11. With respect to the allegations contained in paragraph 10, Defendants state that the real estate purchase agreement speaks for itself. Defendants deny the remainder of the allegations contained within paragraph 10.

12. Defendants deny the allegations contained within paragraph 11.

13. With respect to the allegations contained in paragraph 12, Defendants state that paragraph 16 of the real estate purchase agreement speaks for itself. Defendants deny the remainder of the allegations contained in paragraph 12.

14. Defendants deny the allegations of paragraph 13.

15. Defendants deny the allegations of paragraph 14.

16. With respect to the allegations in paragraph 15, Defendants admit the farm lease agreement was signed in June 2019 and that Ronald Stock signed the agreement and Kristin Stock did not and that there are no claims asserted against Kristin Stock under the farm lease agreement. Defendants deny the remainder of the allegations contained within paragraph 15.

17. Defendants deny the allegations contained in paragraph 16.

18. Defendants deny the allegations contained in paragraph 17.

19. Defendants deny the allegations of paragraph 18.

20. With respect to the allegations contained within paragraph 19, Defendants assert the agreement speaks for itself. Defendants deny the remainder of the allegations contained within paragraph 19.

21. With respect to the allegations contained within paragraph 20, Defendants assert that the lease agreement speaks for itself. Defendants deny the remainder of the allegations contained within paragraph 20.

22. Defendants deny the allegations contained in paragraph 21.

23. Defendants deny the allegations contained in paragraph 22.

24. Defendants deny the allegations contained within paragraph 23.

25. Defendants deny the allegations in paragraph 24.

26. Defendants deny the allegations contained in paragraph 25.

27. Defendants deny the allegations contained in paragraph 26.

28. Defendants deny the allegations contained in paragraph 27.

29. With respect to paragraph 28, Defendant Ron Stock admits that Ron Stock entered into 3 agreements with Plaintiffs in June of 2020; Defendant Kristin Stock denies the allegations contained in paragraph 28 and affirmatively asserts she signed only two agreements with Plaintiffs.

30. Defendants deny the allegations contained in paragraph 29.

31. Defendants deny the allegations contained within paragraph 30.

32. Defendants deny the allegations contained in paragraph 31.

33. Defendants deny the allegations contained in paragraph 32.

34. Defendants deny the allegations contained within paragraph 33.

**Affirmative Defenses:**

35. Plaintiffs' complaint fails to state a claim upon which relief may be granted.

36. Plaintiffs' claims are barred based upon the equitable doctrines of waiver, estoppel, laches and unclean hands.

37. Plaintiffs' claims are barred based upon Plaintiffs own first material breach of the agreements by their failure to, among other things, make lease payments when due.

38. Plaintiffs' damages, if any, are barred or reduced in part by their failure to mitigate.

**Counterclaim**

39. The above responses and affirmative assertions are incorporated herein.

40. Plaintiffs have a history of financial troubles and this lawsuit is their latest attempt to survive.

41. Plaintiffs James Garrett and Sandra Garrett, husband and wife, filed for protection under the United States Bankruptcy Code in September 1999 (BK Case No. 99-30068), 2017 (BK Case No. 17-30033). The 1999 case was dismissed on the Garretts' motion; the 2017 case dismissed on Great Western Bank's motion, and the case ultimately closed after a failure of James and Sandra to prosecute an appeal.

42. Plaintiff Levi Garrett filed for protection under the United States Bankruptcy Code in 2017, (BK Case No., 17-30034) and again in 2019 (BK Case No. 19-30014. The 2017 case was dismissed on Great Western's Bank's motion and ultimately administratively closed on May 31, 2019 following Levi Garrett's failure to prosecute an appeal. The 2019 case was filed days later, on June 21, 2019, and then dismissed upon the debtor's motion on July 19, 2019.

43. On June 21, 2019, the same day that Plaintiff Levi Garrett filed his 2019 Bankruptcy case, Plaintiffs entered into three agreements as follows:

    a. With Ron Stock and Kristin Stock:

        i. Real Estate Purchase Agreement

        ii. Escrow Agreement

    b. With Ron Stock, a Farm Lease Agreement.

44. Collectively, these agreements set forth a structure under which Ron and Kristin Stock purchased farm real estate from the Plaintiffs and agreed to lease the real estate back to the Plaintiffs, with the intention that Plaintiffs would have the opportunity purchase the property back from Stocks in 2024 provided they remained current on their obligations under the lease agreement.

45. The purchase price for the property was $10 million.

46. As part of the agreement, Garretts agreed to lease back the ground from Stocks for annual rent of approximately $650,000 per year.

47. Stocks financed the transaction through Rabo Bank.

48. The loan agreements between Stocks and Rabo Bank require semi-annual payments from Stocks in the approximate amount of $325,000 in May and November of each year.

49. Under the Farm Lease Agreement, Garretts are obligated to pay annual rent on June 20 of each year through 2024.

50. Because of this arrangement, there is an escrow agent, Bankwest, involved to handle payments.

51. Under the Farm Lease Agreement and Escrow Agreement, Garretts are required to pay the rent to the escrow agent, who then is to pay it to Rabo.

52. In June 2020, Levi Garrett issued a check to Bankwest, the escrow agent, for the first payment then due under the Lease Agreement.

53. Levi Garrett told the escrow agent not to cash it until the June 30, 2020, believing he had fulfilled his obligations under the Farm Lease Agreement and Escrow Agreement by simply delivering a check to the Escrow Agent.

54. Subsequently, Rabo refused to cash the check because there was no payment due at that time.

55. Rabo advised Bankwest that Rabo could not accept the lease payment.

56. Bankwest then held the check until November, sending it at that time to Rabo.

57. Rabo had indicated that it would accept the check, apply $325,000 against the November payment, and send the rest directly to Ron Stock.

58. When Rabo received the check, they ran it through and there was a stop payment against the check.

59. When Defendants failed to pay the 2020 lease payments, Stocks initiated a Farm Mediation through the South Dakota Department of Agricultural to attempt to resolve the issues between the parties.

60. The mediation was unsuccessful.

61. In August 2021, Stocks notified Garretts by certified mail and copy to Garretts then attorney, James Hurley, that Stocks were terminating the Farm Lease unless the lease payments were brought current by October 15, 2021.

62. Defendants failed to make the necessary payments to bring the lease current.

63. In November 2021, Defendants sent a check to Ron Stock in the amount of approximately fifteen thousand dollars.

64. Defendants have failed to make the rent payments when due.

65. Defendants currently owe Stocks a minimum of $602,000 for missed rent payments.

66. Defendants have failed to plant the farm real estate and have failed to control weeds on the property, and such failures constitute the commission of waste on the property.

67. Garretts failure to pay rent and commitment of waste constitute a breach of the Farm Lease Agreement and the Escrow Agreement.

68. Garretts breaches of the Farm Lease Agreement and the Escrow Agreement have caused damages to Ron Stock and/or Kristin Stock in an amount to be determined by the jury at trial.

69. Defendants/Counterclaim Plaintiffs are entitled to a declaratory judgment that the Farm Lease Agreement terminated automatically according to its terms upon the Garretts first failure to pay rent when due.

WHEREFORE, Defendants and Counterclaim Plaintiffs, Ron Stock and Kristin Stock request this Court enter judgment as follows:

A. Dismissing Plaintiffs' Complaint in its entirety;
B. Awarding judgment for Defendants and Counterclaim Plaintiffs in an amount to be determined by the jury at trial;
C. Declaring the Farm Lease Agreement terminated for failure to pay rent;
D. Awarding attorney fees and costs to Defendants and Counterclaim Plaintiffs as allowed by law; and
E. For such other and further relief as the Court deems appropriate.

Dated at Sioux Falls, South Dakota, this 17th day of March, 2022.

CADWELL SANFORD DEIBERT & GARRY LLP

By */s/ James S. Simko*

James S. Simko
200 East 10th St., Suite 200
Sioux Falls SD 57104
jsimko@cadlaw.com
(605) 336-0828
Attorneys for Defendants

**Demand for Jury Trial:**

Defendants hereby demand a trial by jury on all issues so triable.

CADWELL SANFORD DEIBERT & GARRY LLP

By */s/ James S. Simko*

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Sioux Falls SD 57104
jsimko@cadlaw.com
(605) 336-0828
Attorneys for Defendants

*Electronically Filed*

| | |
|---|---|
| STATE OF SOUTH DAKOTA ) :SS<br>COUNTY OF SULLY ) | IN CIRCUIT COURT<br>SIXTH JUDICIAL CIRCUIT |
| RONALD STOCK and KRISTIN K. STOCK,<br><br>Plaintiffs,<br><br>vs.<br><br>JAMES E. GARRETT, SANDRA E. GARRETT, and LEVI E. GARRETT,<br><br>Defendants. | 59CIV22-000007<br><br>ORDER DENYING DEFENDANTS' REQUEST TO STAY EXECUTION OF EVICTION AND MOTION FOR JUDGMENT AS A MATTER OF LAW OR MOTION FOR NEW TRIAL |

On January 9, 2023, this Court held a hearing via Zoom regarding Defendants' Request to Stay Execution of Eviction and Motion for Judgment as a Matter of Law or Motion for New Trial; Andrew S. Hurd, counsel for Plaintiff, and Michael Beardsley, counsel for Defendants, each appeared via Zoom. Upon consideration of the Court file and the arguments of counsel, it is hereby

ORDERED that Defendants' Request to Stay Execution of Eviction and Motion for Judgment as a Matter of Law or Motion for New Trial is hereby denied.

DATED this ____ day of January, 2023.

BY THE COURT: 1/11/2023 11:20:11 AM

Christina Klinger

The Honorable Christina Klinger,
Circuit Court Judge

Attest:
Wittler, Sherise
Clerk/Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

---

No. 30255

---

RONALD STOCK AND KRISTIN STOCK

Plaintiffs/Appellees,

vs.

JAMES E. GARRETT, SANDRA GARRETT AND
LEVI EDWARD GARRETT

Defendants/Appellants.

---

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

---

The Honorable Christina Klinger, Presiding Judge

---

# RESPONSE BRIEF OF APPELLEES

---


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Elliot J. Bloom
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& Lee, Prof. LLC
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Filed: 8/14/2023 4:31 PM CST Supreme Court, State of South Dakota #30255

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

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**Cases**

**Statutes**

**Other Authorities**

## STATEMENT REGARDING CITATION CONVENTIONS

Appellees Ronald and Kristin Stock adopt the following citation conventions: Citations to the settled record of the Clerk's Record Index will be denoted "R-____". Citations to the Trial Transcript will be denoted "T-____".

## JURISDICTIONAL STATEMENT

This Court lacks jurisdiction to hear this appeal. The only Order referenced in and attached to the Appellants' Notice of Appeal is the Circuit Court's Order Denying Defendants' Request to Stay Execution of Eviction and Motion for Judgment as a Matter of Law or Motion for New Trial. This is not a final appealable order contemplated by SDCL § 15-26A-3. The Garretts also attached to their Notice of Appeal, without referencing it therein, the Circuit Court's Order denying the Garretts' Motion to Dismiss. This too is not a final appealable order contemplated by SDCL § 15-26A-3. The Garretts did not appeal from the Judgment of Eviction signed by the Circuit Court on December 7, 2022. This Court lacks jurisdiction to hear this appeal for the reasons set forth in Appellees' Motion to Dismiss the Garretts' appeal and in Section I, *infra*.

## ISSUES PRESENTED

*Issue I.* Whether this Court has jurisdiction to hear the Garretts' appeal where they have failed to appeal from a final order.

This issue is presented in the Stocks' Motion to Dismiss this appeal, and this Court held ruling on said Motion in abeyance.

SDCL §15-26A-3
SDCL § 15-26A-4

*Wilge v. Cropp*, 54 N.W.2d 568 (S.D. 1952)
*Johnson v. Lebert Constr., Inc.*, 2007 S.D. 74, 736 N.W.2d 878
*Stromberger Farms, Inc. v. Johnson*, 2020 S.D. 22, 942 N.W.2d 249

*Issue II.* Whether the Circuit Court erred in refusing to overturn the jury's finding that the Garretts materially breached the Lease Agreement, thus absolving the Stocks of further duties under the lease.

The Circuit Court denied the Garretts' Motion for Judgment as a Matter of Law or Motion for New Trial

*FB & I Bldg. Prod., Inc. v. Superior Truss & Components, a Div. of Banks Lumber, Inc.*, 2007 S.D. 13, 727 N.W.2d 474
*Soltesz v. Rushmore Plaza Civic Ctr.*, 863 F. Supp. 2d 861 (D.S.D. 2012)
*Alvine Fam. Ltd. P'ship v. Hagemann*, 2010 S.D. 28, 780 N.W.2d 507
*Coffey v. Coffey*, 2016 S.D. 96, 888 N.W.2d 805

*Issue III.* Whether the Circuit Court erred in permitting the Stocks to split their forcible entry and detainer claim into separate actions for possession and damages as is contemplated by SDCL § 21-16-4.

The Circuit Court denied the Garretts' Motion to Dismiss on the basis of alleged defective notice, alleged lack of mediation under SDCL Ch. 54-13 *et seq.*, alleged failure to comply with a notice provision, claim splitting, and parallel litigation. The Circuit Court ruled that the

only issue to be tried in this action was which party was entitled to immediate possession of the real estate without respect to resolving any damages questions.

SDCL § 21-16-2
SDCL § 21-16-4
SDCL Ch. 54-13 et seq.

*Rindal v. Sohler*, 2003 S.D. 24, 658 N.W.2d 769, 772
*Woods v. Hillcrest Terrace Corp.*, 170 F.2d 980 (8th Cir. 1948)
*Lewis & Clark Reg'l Water Sys., Inc. v. Carstensen Contracting, Inc.*, 339 F. Supp. 3d 886, 892-93 (D.S.D. 2018)
*Fru-Con Const. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 535 (8th Cir. 2009)

*Issue IV.* Whether the trial court erred in declining to provide the Garretts' proposed jury instruction that would emphasize a specific contractual provision, given that the jury was already properly instructed on the applicable law.

The Circuit Court denied the Garretts' proposed jury instruction No. 12 which sought to specifically highlight an individual portion of a contract that was entered into evidence.

*Jahnig v. Coisman*, 283 N.W.2d 557, 560 (S.D. 1979)
*Sedlacek v. Prussman Contracting, Inc.*, 2020 S.D. 18, 941 N.W.2d 819
*Overfield v. American Underwriters Life Ins. Co.*, 2000 S.D. 98, 614 N.W.2d 814
*Knecht v. Evridge*, 2020 S.D. 9, 940 N.W.2d 318

## STATEMENT OF THE CASE

Ronald and Kristin Stock (the "Stocks") filed their Complaint seeking the eviction of James Garrett, Sandra Garrett, and Levi Garrett (the "Garretts") from certain farmland on July 6, 2022. R-3. The basis for the claim was the Garretts' failure to pay annual rent for

2021 and 2022 as well as their commission of waste on the property. R-3. The case culminated in a two-day jury trial which took place on December 5 and 6, 2022. R – 424-799. When jury instructions were settled, the basis for the Stocks' forcible entry and detainer claim was limited to the Garretts' nonpayment of rent. R-327 (Jury Instruction No. 13). The jury ruled unanimously in favor of the Stocks, finding that they were entitled to immediate possession of the ground at issue. R-337; T-327:19-25; 328:1-17. A Judgment of Eviction was entered on December 7, 2022. R-340.

The Garretts filed their Notice of Appeal on February 10, 2023. R-805. The Garretts' Notice of Appeal lists only the Circuit Court's Order Denying Defendants' Request to Stay Execution of Eviction and Motion for Judgment as a Matter of Law or Motion for New Trial. *Id.* The Garretts attached a copy of that Order as well as a copy of the Circuit Court's Order denying the Garretts' Motion to Dismiss. The Circuit Court did not err in denying either of the Garretts' motions, and the Circuit Court's ruling as to both should be affirmed.

## FACTS

In 2017, Ronald Stock ("Ron Stock") was approached by a friend of his, John Erck, about a deal regarding the purchase of approximately 5,200 acres of farmland and pastureland in Sully County, South Dakota

(the "Property"). T-38:23-25; 39:1-25; 40:1-12. Originally only three quarter-sections were going to be purchased, but over time the parties reached an agreement whereby the Garretts would sell the entire 5,200 acres. *Id.*; T-47:19-22. The point of the purchase was to help the Garretts who had fallen on hard financial times. T-40:17-20; 44:6-8; 138:5-12.

The Garretts had just recently gone through bankruptcy, and they were looking for financing options for the Property T-137:19-25; 138:1-12. The Garretts agreed to sell the Property to Ron and Kristin Stock (collectively, the "Stocks"), and the Stocks would then agree to lease the Property back to the Garretts for a period of five years or until such time that the Garretts could afford to buy the Stocks out of the Property and regain ownership. R- 246-271. The Property was sold to the Stocks and deeded in their names. T-51:6-10.

The instruments that are pertinent to these proceedings are three agreements that were drafted by the Garretts' attorney, James Hurley—the Real Estate Purchase Agreement (the "Purchase Agreement"), the Farm Lease Agreement (the "Lease Agreement"), and the Closing/Escrow Agreement. T-46:13-14; T-166:10-14; R-246-271. These three agreements were all executed on June 20, 2019. R-254, 261, 271. The three agreements are to be read together. T-12:24-25.

The Lease Agreement is most central as its main purpose is to govern the terms of the lease, although the other two agreements also contain provisions which bear on the lease. R-261. Pursuant to the Lease Agreement, the Stocks financed the purchase of the Property by obtaining a mortgage through Rabo AgriFinance. R-247; T-57:13-15. The mortgage obtained required the Stocks to make two semi-annual payments. R-247-248. The mortgage obtained by the Stocks had semi-annual mortgage payments due in May and November of each year. T-57:16-17. The Garretts' annual lease payment was to be paid on June 20 of each year and was to be equal to the two semi-annual mortgage payments. R-248. The Garretts never paid rent on June 20 of any of the years of the lease. T-58:11-14; 169:12-24; 180:18; 184:24-25. The Garretts did eventually pay rent for 2020—half in November of 2020 and half in April of 2021. T-16:24; T-170:4-7.

The Stocks, themselves, had to make each of their semi-annual mortgage payments to Rabo AgriFinance, contrary to the terms of the Lease Agreement. R-277; T-65:24-25; 71:11-16; 97:1-2; 101:22. The Lease Agreement provided that the Garretts were supposed to pay their annual rent payment to an escrow agent, Bankwest, who was to hold the money until the semi-annual payments became due, at which point the escrow agent was to remit each half of the mortgage,

respectively. R-271. Levi Garrett is the one who wanted Bankwest to act as escrow agent. T-48;21-25; 49:1-2. The Garretts never complied with the provision which required them to pay annual rent through the escrow agent. T-58:11-14; 60:22-25; 169:12-24; 180:18; 184:24-25. In the two instances where partial rent was tendered, the checks were tendered directly to Ron Stock. T-59:16-22. This was supposed to be a "hands off" deal for the Stocks wherein the Garretts would make payment to the escrow agent who would then hold and remit those monies as the mortgage payment came due. T-54:16-22; R-271. The only reason that Ron Stock figured out that the Garretts had defaulted was because he contacted Bankwest to ensure money was in the escrow account as the November mortgage payment was coming due. T-58:21-25. At that point, the Garretts knew that they had not tendered 2020 rent. T-169:10-12.

As the Garretts were getting caught up with 2020-rent in April of 2021, the June 20, 2021, due date for the next year's rent was already approaching. T-60:8-11. The Garretts again did not tender rent to the escrow agent on June 20, 2021. T-184:2-4; 60:17-21. On or about August 27, 2021, Ron Stock sent the Garretts a Notice of Termination of Farm Lease wherein he stated that if the Garretts did not come current with rent before October 15, 2021, the Farm Lease would

terminate on March 1, 2022. R-274-276. Ron then left James Garrett a voicemail in October of 2021, asking that, because there was no money in the escrow account, the Garretts make a payment that would cover the Stocks' upcoming November semi-annual mortgage payment and that would resolve their delinquency. T148:10-19. The Garretts did not tender a November payment to the escrow agent, and the Stocks paid their November semi-annual mortgage payment. T-101:20-22; 103:3-6. The Garretts claim to have sent a check to Rabo AgriFinance to make this payment, but Levi Garrett testified that the money never came out of any of the Garretts' accounts and the check had never been "run". T-149:17-20; 151:6-12. In any event, the Garretts did not pay rent in June of 2021, they did not deposit money in the escrow account to pay the November semi-annual payment, nor did they successfully make that payment directly to Rabo AgriFinance. T-149:17-20; 151:6-12; 180:17-22.

The Garretts then filed suit against the Stocks in South Dakota Federal District Court in January of 2022 to "sort these issues out". T152:2-5.

On May 19, 2022, the Stocks received a notice from the Sully County Weed and Pest Supervisor regarding a weed infestation that was present on the Property. R-278-80. Paula Barber signed the notice.

R-279. Paula Barber also testified at trial that the weed infestation present on the Property when she conducted this investigation in May of 2022 was "[o]ne of the worst [she'd] ever seen." T-252:8-12.

Ron Stock, having not received any rent for coming on a year and having received notice from the County that there was a weed infestation on the Property, reentered the Property in June of 2022 to remediate the weed problem. T105:11-20. Paula Barber testified that since Ron reentered, the status of the weed problem had gotten "a lot better." T-252:22-24.

The Garretts again did not tender rent in June of 2022 nor did they make any arrangements to do so. T-119:12-18; 184:24-25. Having not received rent for two years in a row, the Stocks commenced this forcible entry and detainer action on July 6, 2022. R – 1-7. The Complaint originally sought to evict the Garretts on the grounds of nonpayment of rent as well as the commission of waste on the Property for permitting the weed infestation. R – 3-7.

At no point during or before these proceedings did Ron Stock ever refuse to accept any rent payments that had been tendered to him. T-66:8-9. Ron Stock testified at trial that if the Garretts paid him then, along with "some attorney bills", that he would "definitely take it." T-66:11-16; 118:6.

## STANDARD OF REVIEW

The standard of review for the denial of a renewed motion for judgment as a matter of law is de novo. *Magner v. Brinkman*, 2016 SD 50, ¶ 14, 883 N.W.2d 74, 81 (S.D. 2016). The standard of review was previously an abuse of discretion. *Id.* The Court in *Magner*, however, did not rule as to whether the standard was being changed with respect to orders denying an appellant's motion for a new trial. The standard of review for the denial of a new trial, then, is an abuse of discretion standard. *Hewitt v. Felderman*, 2013 S.D. 91, ¶ 14, 841 N.W.2d 258, 262.

"This Court will uphold a jury verdict 'if the jury's verdict can be explained with reference to the evidence,' viewing the evidence in a light most favorable to the verdict." *Lenards v. Deboer*, 2015 S.D. 49, ¶ 10, 865 N.W.2d 867, 870 (citing *Alvine Family Ltd. P'ship v. Hagemann*, 2010 S.D. 28, ¶ 18, 780 N.W.2d 507, 512). "If sufficient evidence exists so that reasonable minds could differ, judgment as a matter of law is not appropriate." *Magner*, 2016 S.D. 50, ¶ 14, 883 N.W.2d at 81 (citing *Bertelsen v. Allstate Ins. Co.*, 2013 S.D. 44, ¶ 16, 833 N.W.2d 545, 554). "This Court should only set a jury's verdict aside in 'extreme cases' where the jury has acted under passion or prejudice or where 'the jury has palpably mistaken the rules of law.'" *Lenards*,

2015 S.D. 49, ¶ 10, 865 N.W.2d at 870 (citing *Hewitt,* 2013 S.D. 91, ¶ 14, 841 N.W.2d at 262).

The standard of review for reviewing the Garretts' Motion to Dismiss is de novo. *Fodness v. City of Sioux Falls,* 2020 S.D. 43, ¶ 9, 947 N.W.2d 619, 624. This Court need not defer to the ruling of the Circuit Court. *Id.*

The standard of review for the rejection of a proposed jury instruction is an abuse of discretion standard. *Sedlacek v. Prussman Contracting, Inc.*, 2020 S.D. 18, ¶ 17, 941 N.W.2d 819, 823. "The trial court has broad discretion in instructing the jury." *State v. Swan*, 925 N.W.2d 476, 479 (S.D. 2019) (quoting *State v. Randle*, 2018 S.D. 61, ¶ 32, 916 N.W.2d 461, 469). "Jury instructions are satisfactory when, considered as a whole, they properly state the applicable law and inform the jury." *Id.* (citation omitted). "Error is not reversible unless it is prejudicial," and "[t]he burden of demonstrating prejudice in failure to give a proposed instruction is on the party contending error." *Overfield v. American Underwriters Life Ins. Co.*, 2000 S.D. 98, ¶ 11, 614 N.W.2d 814, 816 (citations omitted). "It is not error, however, to refuse to amplify instructions given which substantially cover the principle embodied in the requested instruction." *Jahnig v. Coisman*, 283 N.W.2d 557, 560 (S.D. 1979) (citations omitted).

## ARGUMENT

### I. This Court Lacks Jurisdiction to Hear This Appeal, and It Should Be Dismissed.

#### A. This Court Lacks Jurisdiction to Hear the Garretts' Appeal from the Order Denying Defendants' Request to Stay Execution of Eviction and Motion for Judgment as a Matter of Law or Motion for New Trial.

This Court lacks jurisdiction to hear appeals from orders which are not enumerated in SDCL §15-26A-3. *See Dollar Loan Ctr. of S. Dakota, LLC v. Dep't of Lab. & Regul., Div. of Banking*, 2018 S.D. 77, ¶ 14, 920 N.W.2d 321, 324-25 ("An appeal to this Court may not be taken from a circuit court order 'unless it is authorized under SDCL 15-26A-3'"); *Jacquot v. Rozum*, 2010 SD 84, ¶ 12, 790 N.W.2d 498, 502 ("SDCL 15-26A-3 limits our appellate jurisdiction by allowing appeals only from a final order or judgment"). "When a party attempts an 'appeal from an order from which no appeal lies[,]' this Court only has jurisdiction to dismiss the appeal." *Dollar Loan Ctr. of S. Dakota, LLC*, ¶ 14, 920 N.W.2d at 325 (alterations in original). The right to appeal is statutory, and the right to appeal does not exist "in the absence of a statute permitting it." *Stromberger Farms, Inc. v. Johnson*, 2020 S.D. 22, ¶ 16, 942 N.W.2d 249, 254.

In its Order dated June 30, 2023, this Court requested that the Appellees provide further briefing regarding "whether *Wilge v. Cropp*,

54 N.W.2d 568 (S.D. 1952) applies under these circumstances where there have been changes to the rules of civil appellate procedure since that decision, including the adoption of SDCL 15-26A-4."

While the current rules of appellate procedure were in effect, this Court relied on *Wilge* in the 2007 case of *Johnson v. Lebert Constr., Inc.*, 2007 S.D. 74, ¶ 9, 736 N.W.2d 878, 881-882, when it dismissed an appeal of a denial of a motion for a new trial and judgment notwithstanding the verdict on the basis that it lacked jurisdiction to hear appeals from non-final orders. "In the absence of a properly perfected appeal *from the judgment*, the denial of the post-judgment motions is not reviewable." *Id.* (emphasis added).

> [A] party wishing to appeal the merits of the case cannot rely on a motion for judgment notwithstanding the verdict or a motion for a new trial. An appeal of these post-trial and post-judgment motions only examines whether the motion should have been granted. It does not reopen or resurrect an appeal of the judgment.

*Id.*, ¶ 10, 736 N.W.2d at 882. The Court, in a footnote, concluded that the statutory scheme at the time of *Wilge* "substantially carrie[d] through in the current rules of appellate procedure" and concluded that orders denying new trials could only be reviewed upon noticing appeal from the underlying judgment. *Id.*, ¶ 9, 736 N.W.2d at 882, n. 5 (citing, *inter alia*, SDCL §15-26A-9). Thus, this Court has affirmatively decided

that the pertinent rule from *Wilge* is still in effect, notwithstanding any additions and changes to the code since 1952.

The adoption of SDCL § 15-26A-4 subsequent to this Court's ruling in *Wilge v. Cropp* has no bearing on the Stocks' Motion to Dismiss the Garretts' appeal. Subsection 4 provides the procedure for filing a Notice of Appeal and other attendant documents with respect to "appeal[s] permitted by § 15-26A-3 as of right". SDCL § 15-26A-3, 4. The predicate to the applicability of SDCL § 15-26A-4 is that the appealing party appeal from a final order contemplated by SDCL §15-26A-3—the Garretts have not appealed from such an order.

## II. The Stocks' Failure to Strictly Comply with the Notice Provision of the Farm Lease Agreement Is Not a Legally Sufficient Defense so as to Entitle the Garretts to Judgment as a Matter of Law or New Trial.

The jury, upon being properly instructed, found that the Garretts' first material breach of the agreements excused the Stocks of further performance and rendered it impossible, as a matter of law, for the Stocks to subsequently breach the agreements. Additionally, the contracts, when read as a whole, are ambiguous with respect to the Stocks' need to provide notice, and the ambiguities should be construed against the Garretts as drafters. Finally, the Garretts filing of a lawsuit in January of 2022 against the Stocks demonstrates the futility

of any notice of default that may subsequently have been delivered to the Garretts.

### A. The Jury Found That the Garretts Materially Breached the Contract First, And the Stocks Were Relieved of Any Further Duty to Perform Thereunder.

The Garretts' first material breach of the Lease Agreement excused the Stocks from performance of their obligations under the Lease Agreement, including any provisions regarding notice. "[A] lease is a contract," and South Dakota courts "follow the law of contract in regard to breach." *Thunderstik Lodge, Inc. v. Reuer*, 1998 S.D. 110, ¶ 25, 585 N.W.2d 819, 824. Under South Dakota law, "[i]t is well established that a material breach of a contract excuses the non-breaching party from further performance. *FB & I Bldg. Prod., Inc. v. Superior Truss & Components, a Div. of Banks Lumber, Inc.*, 2007 S.D. 13, ¶ 15, 727 N.W.2d 474, 478 (citations omitted). "Whether a party's conduct constitutes a material breach of contract is a question of fact." *Icehouse, Inc. v. Geissler*, 2001 S.D. 134, ¶ 21, 636 N.W.2d 459, 465; *see also Soltesz v. Rushmore Plaza Civic Ctr.*, 863 F. Supp. 2d 861, 869 (D.S.D. 2012) ("Materiality is a question of fact for the jury[.]").

The cases and arguments cited by the Garretts in their brief are factually, legally, and materially distinguishable from the case at bar. The Garretts have cherry-picked language out of cases without giving

the requisite context for the language they cite. *See S. Dakota State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.*, 2000 S.D. 116, ¶ 24, 616 N.W.2d 397, 407 (the Court cannot write language into an insurance agreement to provide coverage that wasn't contracted for); *Oppenheimer & Co. v. Oppenheim, Appel, Dixon and Co.*, 660 N.E.2d 415, 421 (N.Y. Ct. App. 1995) (whether a tenants' failure to provide a prospective subtenant written notice of the landlord's permission to sublet was a condition precedent precluding the formation of a sublease); *Hein v. Marts*, 295 N.W.2d 167 (S.D. 1980) ("[a]s a general rule, where a method of giving notice *is prescribed by statute*, there must be strict compliance") (emphasis added); *Woodall v. Pharr*, 168 S.E.2d 645 (Ga. App. 1969) ("There is no evidence in the record showing the lessees had breached the contract in any respect when the lessor demanded possession of the premises"). The Garretts have even cited a case which has been explicitly overruled on the exact grounds for which they cite it. *LoBianco v. Harleyville Ins. Co.*, 847 A.2d 684 (N.J. Super. 2003), *overruled by Vega v. 21st Century Ins. Co.*, 61 A.3d 170 (N.J. Super. 2013) (rejecting *LoBianco*'s strict compliance standard).

The United States District Court for the District of South Dakota, interpreting South Dakota law, has examined a legal issue similar to the one argued by the Garretts. In *Soltesz v. Rushmore Plaza Civic*

*Ctr.*, 863 F. Supp. 2d 861, *supra*, the plaintiff-lessee ran a concession stand at the Rapid City event center and got into a physical altercation with a customer. The defendant-lessor summarily evicted the plaintiff-lessee by writing him a letter of termination and, contemporaneously therewith, sent the plaintiff-lessee a Notice of No Trespass; the defendant-lessor did not utilize the South Dakota forcible entry and detainer proceedings. The plaintiff-lessee was barred from re-entry and brought suit against the defendant-lessor for a money judgment and the return of his property.

Plaintiff-lessee moved for partial summary judgment on the issue of whether the defendant-lessor's failure to provide 45-days' written notice under the lease was a material breach so as to entitle the plaintiff-lessor to damages.[1] *SOLTESZ, d/b/a Top Dog Enterprises, Plaintiff, v. Rushmore Plaza Civic Center and City of Rapid City, Defendants.*, 2011 WL 12610084 (D.S.D.). The District Court, denied the plaintiff's motion for summary judgment, ruling that, should a jury find that the plaintiff-lessee first materially breached the lease, then the defendant-lessor would have been excused of its further obligations

[1] Notably, and in conformance with the legal principles cited above, the plaintiff-lessee did not argue that the failure to provide notice precluded the defendant-lessor from evicting the plaintiff-lessee, only that it was a breach of the lease entitling plaintiff-lessee to damages.

under the lease. The lessor in *Soltesz* did not dispute that they "never gave Mr. Soltesz 45–days' notice prior to terminating the contract." *Soltesz*, 863 F. Supp. 2d at 876. The District Court, however, relying on South Dakota law providing that "a material breach of a contract excuses the non-breaching party from further performance," found that the lessor was relieved of this 45-day notice provision in light of the lessee's first material breach. *Id.* (quoting *FB & I Bldg. Products, Inc. v. Superior Truss & Components,* 2007 SD 13, ¶ 15, 727 N.W.2d 474, 478). The Court ruled that "if [the lessee] did breach the contract, and if his breach of the contract was material, defendants may have been excused from further performance under the contract, including the giving of the 45–day notice prior to termination of the contract." *Id.* (citing *FB & I Bldg. Products, Inc.,* 2007 SD 13, ¶ 15, 727 N.W.2d at 478).

Here, a jury made the factual determination that the Garretts first materially breached the Lease Agreement by failing to timely make rent. The jury's finding that the Stocks are entitled to immediate possession of the Leased Premises is directly in accordance with South Dakota law and the law the jury was instructed to follow. Jury Instruction No. 11 that was delivered to the jury provides, in its entirety:

> A material breach is one that defeats the main objective of the parties when they entered into the agreement or one that makes it impossible for the other party to perform under the contract. If you find that the Defendants failed to pay rent, and Defendants' failure to pay rent under their lease agreement deprived the Plaintiffs of the benefit they were to receive as a result of entering into the Lease Agreement, such failure is a material breach of the contract.
>
> If you find that Defendants failed to pay rent and that Defendants' failure to pay rent was a material breach of the contract, you must also find that the Plaintiffs were relieved of their current and future obligations to perform under the contract. If you find the Defendants materially breached the lease by failing to pay rent, *you cannot find that the Plaintiffs subsequently breached the lease.*
>
> If you find that Defendants failed to pay rent and that failure was due to Plaintiffs' interference with the payments, then the Defendants' breach would be excused.
>
> If you find that Plaintiffs first materially breached the Lease Agreement, Defendants breaches would thereby be excused.

(emphasis added). The Garretts did not object to the giving of this instruction in its final form—in fact, they contributed to it. In finding for the Stocks, the jury necessarily found that the Garretts were the first to materially breach the Lease Agreement, and pursuant to the above-quoted instruction, found that this material breach excused the Stocks from further performance under the Lease Agreement, including the provision regarding providing notice through the escrow agent.

The jury having been instructed as stated above, and the Garretts having failed to object to said instruction, Jury Instruction No. 11 became the "law of the case", and the Garretts may not now argue "a different state of the law than that upon which the jury was instructed in Instruction [11]". *Alvine Fam. Ltd. P'ship*,, 2010 S.D. 28, ¶ 20, 780 N.W.2d at 514 ("Absent a proper objection, we have long held that the jury instructions become the law of the case"); *Knudson v. Hess,* 1996 S.D. 137, ¶ 11, 556 N.W.2d 73, 77 ("[T]he complaining party must have properly objected to the instruction in order to preserve the issue on appeal, or the improper instruction becomes the law of the case.") The Garretts did not object to Instruction No. 11, and they may not now argue that the law contained therein was improper guidance for the jury.

### B. The Garretts' Filing of a Lawsuit in January of 2022 Rendered Any Subsequent Notice of Default from the Stocks Futile and Relieved the Stocks of Any Notice Requirement for the Garretts' Failure to Pay Rent in 2022.

The Stocks sending the Garretts notice of default for their failure to pay rent for a second time in June of 2022 would have been futile in light of the fact that the Garretts had already sued the Stocks over the lease and related agreements in January of 2022. "The law does not require futile acts." *Tri-City Assocs., L.P. v. Belmont, Inc.*, 2016 SD 46,

¶ 14, 881 N.W.2d 20 (citation omitted). "Where the breaching party has abandoned the contract and evidenced a clear and unequivocal intent not to complete the contract, a cure notice is not required." *Id.* (quoting 5 Bruner & O'Connor Construction Law § 18:15). Like in *Tri-City*, the lawsuit brought by the Garretts in federal court "indicate[d] that it would be meaningless to require [the Stocks] to provide [the Garretts] written notice affording the cure period. *Id.*, ¶15, 881 N.W.2d at 23. The Garretts "repudiated any intention to perform under the lease", and the Stocks were relieved of strict compliance with the notice provision. *Id.*, ¶15, 881 N.W.2d at 23-24.

### C. The Notice Provision is Ambiguous and Conflicts with Other Provisions of the Contract, and Such Ambiguities and Conflicts Should Be Construed Against the Garretts as Drafters.

The Stocks were not bound by the notice requirement because the notice requirement is ambiguous as it conflicts with a number of other provisions contained within the three agreements at issue. "[A] contract is ambiguous only when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the *entire integrated agreement*." *Pesicka v. Pesicka*, 2000 S.D. 137, ¶ 10, 618 N.W.2d 725, 727 (citations omitted) (emphasis added). "In order to ascertain the terms and conditions of a contract, *we*

*must examine the contract as a whole* and give words their 'plain and ordinary meaning.'" *Coffey v. Coffey*, 2016 S.D. 96, ¶ 8, 888 N.W.2d 805, 809 (emphasis added). The Garretts have presented Sections 12 and 13 of the Lease Agreement in isolation to support their argument that the provisions are unambiguous. However, there are provisions contained within the three agreements which directly contradict one another with respect to the consequences of the Garretts' failure to pay rent when due. The conflicting provisions are as follows:

> Real Estate Purchase Agreement
>
> Section 13
>
> Garretts' right to continue to lease the property each year 2020, 2021, 2022, 2023, and 2024, *is contingent upon payment of each year's lease payment* to the escrow agent.
>
> . . .
>
> If any annual lease payment is not paid on or before June 20 of each year then *the lease shall terminate immediately* and the purchase option provided in this agreement will be void.
>
> R- 250.
>
> Farm Lease Agreement
>
> Section 4
>
> Lessees' right to continue to lease the property each year 2020, 2021, 2022, 2023, and 2024, *is contingent upon Lessees' payment of each year's lease payment* to the escrow agent.
>
> . . .

If any annual lease payment is not paid on or before June 20 of each year then *this lease shall terminate immediately* and the purchase option provided in this agreement will be void.

Section 5

Lessees, *upon paying the lease payments and performing all of the covenants of this Lease*, shall peaceably and quietly hold and enjoy possession of the leased premises for the term herein specified subject to the provisions hereof.

. . .

Section 12

In case of a default in the payment of any lease payment, the Lessees shall have the right to cure the default or breach upon the same being corrected upon sixty (60) days' notice.

If the Tenants shall fail to comply with any of the covenants, terms, and conditions of this Lease, or if the rental payments required hereunder shall not be paid when the same becomes due and payable and such failure of compliance or nonpayment of rent shall continue for sixty (60) days after written notice thereof is given by the Lessor to the Lessees, then this lease shall terminate at the option of the Lessor.

R- 256-57, 261 (emphasis added).

Closing Escrow Agreement

Section 16

. . .

Garretts' right to continue to lease the property each year 2020, 2021, 2022, 2023, and 2024, *is contingent upon payment of each year's lease payment* to the escrow agent.

Section 17

. . .

> If any annual lease payment is not paid on or before June 20 of each year then *the lease shall terminate immediately* and the purchase option provided in this agreement will be void.

R – 266 (emphasis added).

There are seven (7) provisions which either provide that the lease terminates immediately upon nonpayment or that the Garretts' rights under the lease are conditioned upon their payment of rent and performance of other obligations; there is one (1) provision which provides for a 60-day notice-and-cure period. These provisions directly conflict with one another, and thus legal principles of contract construction govern the resolution and interpretation of the ambiguous provisions. *Pesicka*, ¶ 6, 618 N.W.2d at 726 (citations omitted).

These ambiguities should be construed against the Garretts as the drafters of the agreements. "This Court has said that '[a]mbiguities arising in a contract should be interpreted and construed against the scrivener.'" *Coffey*, ¶ 9, 888 N.W.2d at 809 (citing *Advanced Recycling Sys., LLC v. Southeast Prop. Ltd. P'ship*, 2010 S.D. 70, ¶ 19, 787 N.W.2d 778, 785). "This is a rule of construction to be applied against one who drafted an ambiguous contract." *Campion v. Parkview Apartments*, 1999 S.D. 10, ¶ 34, 588 N.W.2d 897, 904 (citations omitted). The unrefuted testimony from Levi Garrett at trial was that

the Garretts' attorney, James Hurley, drafted the three agreements at issue. As such, the conflicting provisions should be construed against the Garretts, and this Court should find that the proper interpretation of the three agreements was that the Garretts' leasehold interest in the Leased Premises terminated immediately upon their failure to satisfy the condition precedent of paying rent.

## III. The Stocks' Forcible Entry and Detainer Lawsuit was both Procedurally and Substantively Sound and Sufficient, and the Circuit Court Did Not Err in Denying the Garretts' Motion to Dismiss.

### A. The Garretts Were Properly Served with the Notice to Quit and Summons and Complaint.

The Garretts were served with the Notice to Quit on July 1, 2022, and the Summons and Complaint on July 6, 2022. R – 1-7. SDCL 21-16-2 states, in pertinent part:

> In all cases arising under subdivisions 21-16-1(4), (5) and (6), three days' written notice to quit must be given to the lessee, subtenant, or party in possession, before proceedings can be instituted[.]

SDCL § 21-16-1(4) is the subsection which provides for evictions upon the nonpayment of rent. An eviction based on a tenant's commission of waste on the leased premises—found in subsection (7)—is not an event of default that requires a three-day notice to quit. SDCL §21-16-1(7). The Garretts' commission of waste on the Property was among the

instances of default for which the Stocks sought to evict the Garretts.[2] R-6.

Furthermore, SDCL Ch. 21-16 *et seq.* provides for an expedited procedure for determining the immediate right to possession of real property. Because the chapter is intended as an expedited procedure, SDCL Ch. 21-16 *et seq.* is excluded from the rules of civil procedure. Specifically, SDCL 15-6-81 (a) states:

> This chapter does not govern pleadings, practice, and procedure in the statutory and other proceedings included in but no limited to those listed in Appendix A to this Chapter insofar as they are inconsistent or in conflict with this chapter.

Appendix A specifically includes forcible entry and detainer actions as among those to which the rules of civil procedure do not apply to the extent that rules of civil procedure are inconsistent or conflict therewith. Because the point of the notice to quit period contemplated by SDCL § 21-16-2 is to provide a short period for the payment of rent before a landlord begins summary proceedings against a tenant, the computation of time set forth in SDCL 15-6-6(a) is inapplicable to this

[2] This theory of breach remained live in the case until jury instructions were settled on the last day of trial, during which the parties and Court agreed to narrow the issue to solely the nonpayment of rent. R-13.

proceeding as it conflicts with the expedited nature of these proceedings and the point of the notice to quit period.

### B. The Stocks Were Not Required to Participate in a Mediation Pursuant to SDCL § 54-13-10 Because They Were Not a Creditor to the Garretts.

The Stocks and the Garretts were not in a debtor-creditor relationship within the purview of SDCL Ch. 54-13 *et seq.* SDCL Ch. 54-13 provides rules for the State Farm Mediation Board. SDCL § 54-13-1(4) defines "Borrower" as "an individual . . . who is engaged in farming or ranching and who derives more than sixty percent of total gross income from farming or ranching and who has been extended agricultural credit[.]" SDCL 54-13-1(5) defines a "Creditor" as "any individual . . . to whom is owed agricultural debt by a borrower[.]" "Agricultural Credit" is not defined by the statute. The Garretts were the Stocks' tenants who were to prepay the rent amount for the following year. The Stocks never extended any credit to the Garretts.

SDCL § 54-13-10 provides that a creditor seeking to enforce a debt of more than $50,000 against agricultural land or agricultural property must file a request for mandatory mediation with the director of the agricultural mediation program and obtain a mediation release before commencing suit. Again, the Stocks are not a creditor of the Garretts in the sense contemplated by SDCL Ch. 54-13. No money was

lent to the Garretts. The arrangement was set up so that the Garretts would prepay rent for each year, so that no money would be due or owing to the Stocks during the lease period. Further, this action was not to collect a debt, but rather to obtain immediate possession of the leased premises. The requirements of SDCL §54-13-10 are simply inapplicable to this case.

#### 1. Should the Court find that the Stocks were subject to SDCL Ch. 54-13 *et seq.*, the Mediation ordered by the Circuit Court before permitting the case to proceed renders moot and harmless any failure to do so before commencing the action.

After the Garretts' raised this issue in their original motion to dismiss, the Circuit Court ordered that the forcible entry and detainer proceedings be stayed until the parties engaged in a mediation. R-69. The parties did engage in such a mediation and were unable to come to a resolution. Should the Court determine that SDCL §54-13-10 applies in this case, any harm that may have arisen due to some failure of strict compliance was remedied by the parties' court-ordered mediation.

### C. The Stocks' Failure to Strictly Comply with the Notice Provision in the Farm Lease Does Not Serve as a Basis to Dismiss the Stocks' Lawsuit.

This argument is addressed in Section II, *supra*. Additionally, the Stocks alleged failure to provide proper notice to the Garretts would not have deprived the Circuit Court of jurisdiction to hear the case in any

event, and it would not be a basis for granting Garretts' motion to dismiss. *See* SDCL § 15-6-12(b); SDCL § 21-16-3.

### D. The Rule Against Claim-Splitting Is Inapplicable to Forcible Entry and Detainer Proceedings In South Dakota.

#### 1. This is an issue of first impression in South Dakota.

There is virtually no case law in South Dakota regarding the issue of claim-splitting, and the Stocks have not identified a case from any jurisdiction wherein a court analyzed claim-splitting as between a federal district court and a state court concerning an eviction action.

The Stocks only found one instance of the South Dakota Supreme Court referring to "claim splitting" or "splitting a cause of action," and that is in Justice Sabers' dissent in *Wintersteen v. Benning*, wherein he stated that "the main purpose of the rule against claim splitting is to protect the defendant from being harassed by repetitive actions based on the same claim[.]" 513 N.W.2d 920, 922 (S.D. 1994).

The rule of claim-splitting is a derivative of the rules regarding res judicata and claim preclusion. *Davis v. Sun Oil Co.,* 148 F.3d 606, 613 (6th Cir. 1998) (referring to claim-splitting as "the 'other action pending' facet of the res judicata doctrine"); *Shaver v. F. W Woolworth Co.,* 840 F.2d 1361, 1365 (7th Cir. 1988) ("This application of the doctrine of res judicata prevents the splitting of a single cause of action

and the use of several theories of recovery as the basis for separate suits.").

The United States Supreme Court has ruled, regarding claim-splitting, that "[p]laintiffs generally must bring all claims arising out of a common set of facts in a single lawsuit, and federal district courts have discretion to enforce that requirement as necessary 'to avoid duplicative litigation.'" *Elgin v. Dep't of Treasury*, 567 U.S. 1, 34 (2012) (citations omitted). The Court cited favorably the notion that courts apply "principles of 'claim splitting' that are similar to claim preclusion, but that do not require prior judgment[.]'" *Id.* at 33 (quoting 18 C. Wright et al., Federal Practice and Procedure § 4406, p. 40 (2d ed. 2002, Supp. 2011)).

**2. South Dakota's Forcible Entry and Detainer Procedure Expressly Contemplates That the Stocks May Split Their Claims for Possession and Past Due Rents Between Separate Actions.**

South Dakota's forcible entry and detainer statutes expressly contemplate that lessors may split their claims for possession and past due rent. SDCL § 21-16-4 provides: "An action under the provisions of this chapter cannot be brought in connection with any other except for rents and profits or damages *but the plaintiff may bring separate actions for the same if he so desire.*" SDCL § 21-16-4 (emphasis added).

SDCL § 21-16-4 clearly contemplates that the Stocks could bring two separate actions—one for declaratory relief and one for monetary relief.

Other jurisdictions with similar forcible entry and detainer statutory schemes have analyzed the rule against claim-splitting in the context of evictions and ruled that the statutes provide an exception to the general rule against claim-splitting. *See Virginia Dynamics Co. v. Payne,* 421 S.E.2d 421, 423 (Va. 1992) ("In creating an exemption to the rules of claim splitting, Code § 8.01-128 provides the lessor with an opportunity to evict the lessee without losing its right to recover any later deficiency in rent after making an effort to minimize the lessee's damages by renting to another tenant. Such an exemption serves the public policies of maximizing the lessor's use of land and minimizing the defaulting lessee's damages"); *Minnesota v. Spence,* 768 N.W.2d 104, 109 (Minn. 2009) ("An unlawful detainer action merely determines the right to present possession and does not adjudicate the ultimate legal or equitable rights of ownership possessed by the parties"); *Boca Park Martketplace Syndications Grp., LLC v. Higco, Inc.,* 407 P.3d 761, 763 (Nev. 2017) ("By design, the summary eviction statutes provide an expeditious way for a landlord to regain possession of its property; requiring litigation of the related damage claims and potential counterclaims would frustrate, not promote, judicial efficiency").

The Restatement (Second) Judgments provides:

> When any of the following circumstances exists, the general rule [against claim-splitting] does not apply to extinguish the claim . . .
>
> . . .
>
> (d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or *it is the sense of the scheme that the plaintiff should be permitted to split his claim*[.]

Restatement (Second) of Judgments § 26 (1982) (emphasis added). Here, it is unambiguously the "sense" of South Dakota's forcible entry and detainer statutory scheme that the Stocks should be permitted to split their claim.

The reason the exception is exists in forcible entry and detainer actions is two-fold. First, it is designed to provide "a summary remedy for speedy possession of real estate." *Rindal v. Sohler,* 2003 S.D. 24, ¶9, 658 N.W.2d 769, 772 (citing *LPN Trust v. Farrar Outdoor Advertising,* 1996 S.D. 97, ¶9, 552 N.W.2d 796, 798). The statutory scheme is intended to return possession to the lessor immediately upon a determination that one or more of the occurrences of default, enumerated in SDCL § 21-16-1, has occurred. "The very purpose of an expedited proceeding would be undermined if lawyers felt obligated to append a multitude of related claims, lest they be barred by claim

preclusion from raising them in a separate action." Rosemary Smith, *Locked Out: The Hidden Threat of Claim Preclusion for Tenants in Summary Process,* 15 Suffolk J. Trial & App. Advoc. 1, 25 (2010). This allows the lessor to both stem any damages arising out of the waste or misuse of the premises and relet the premises to mitigate his damages. Incidentally, this second consideration is also for the benefit of the defaulting tenant, as the landlord need not wait for the entire case to be litigated before it can relet the premises and stem the damages flowing from the tenant's breach—which would be recoverable from the tenant. *See Virginia Dynamics Co.,* 421 S.E.2d at 423.

The Stocks' claims in the state court eviction action and their claims in the federal court lawsuit are not duplicative, and the final judgment of the Stocks' claims in either the State or the Federal Court would not preclude the other court from making a ruling as to the remaining claim. The Circuit Court made a ruling early on in the state court eviction case that the only issue being decided therein was the question of which party was entitled to immediate possession of the ground. This does not preclude the Federal District Court from hearing the Stocks' claim for past due rents and other damages. Further, public policy strongly favors the ouster of unproductive tenants and replacing

them with tenants that will use the land in a productive manner and consistent with the tenant's obligations under the lease.

### 3. The Rule Against Claim-Splitting Does Not Apply Because the Federal Court Lacked Jurisdiction to Hear the Stocks' Claim for Possession.

"It is well-established that the general rule against splitting causes of action does not apply when suit is brought in a court that does not have jurisdiction over all of a plaintiff's claims." *Borrero v. United Healthcare of New York, Inc.,* 610 F.3d 1296, 1307 (11th Cir. 2010) (citation omitted). The Garretts' suit was brought in federal district court, and for the reasons explained below, the federal district court lacked jurisdiction to hear the Stocks' forcible entry and detainer claim.

SDCL § 21-16-4 provides that "Any *circuit court or magistrate court* presided over by a magistrate judge has jurisdiction in any case of forcible entry and detainer[.]" (emphasis added). In *Woods v. Hillcrest Terrace Corp.,* the 8th Circuit Federal Court of Appeals analyzed a suit wherein a complaint brought by the Office of Housing Expediter[3] was dismissed on the basis that the district court did not believe that it had the jurisdiction to rule on questions regarding whether the landlord

[3] The Housing Expediter is an enforcement arm of the federal government which prevents landlord malfeasance in cases where rent and living conditions are governed by federal statute.

was entitled to an eviction. 170 F.2d 980 (8th Cir. 1948). The 8th Circuit reversed on the basis that the Housing Expediter could enjoin state eviction actions which would violate federal law. In so doing, the 8th Circuit held that:

> The fact that the State courts of South Dakota have *exclusive jurisdiction of proceedings to evict tenants* does not in any way impair or affect the right of the Expediter to maintain this enforcement action in the United States District Court for the purpose of securing an injunction against violations of the Act and the Regulation[.]

*Id.* at 984 (emphasis added); *see also Woods v. Petchell,* 175 F.2d 202,205 (8th Cir. 1949) ("[T]he Housing Expediter was authorized to bring this action in the Federal court, although *a proceeding in eviction of a tenant is within the exclusive jurisdiction of the state courts*") (emphasis added). This tacit acknowledgement that federal courts lack jurisdiction over state court eviction proceedings has been echoed by other jurisdictions. *See e.g., Ally v. Sukkar,* 128 F. App'x 194, 195 (2d Cir. 2005) ("[The] complaint arises out of a landlord-tenant dispute over which the federal courts simply have no jurisdiction.") *Jordan v. Levine,* 2012 WL 2921024, at *2 (E.D.N.Y. July 17, 2012), affd, 536 F. App'x 158 (2d Cir. 2013) ("Federal courts do not have subject matter jurisdiction over landlord-tenant matters. Wrongful eviction claims . . . are state law claims, and this Court lacks subject matter jurisdiction

over them"); *Birmingham v. Profeta,* 2019 WL 1115 862, at * 4 (D. Conn. Jan. 29, 2019) ("In this case, plaintiffs seek possession of a piece of real property, a quintessentially state law claim"). Because the Stocks could not have brought this forcible entry and detainer action for possession in federal court, the rule against claim-splitting cannot apply to the Stocks' separate actions.

### E. The Stocks' Claims in the State Court Action and the Federal Court Action Are Not Parallel, and the Circuit Court Did Not Err in Permitting Both Actions to Continue Contemporaneously.

#### 1. The Stocks' State Court Claims and Federal Court Claims Are Not Parallel Because They Involve Different Issues and Seek Different Remedies.

The State Court Action and the Federal Court Action are not parallel proceedings because the Stocks did not bring the same claim in separate actions. As stated above, the Stocks' state law claim is for possession and their federal court counterclaim is for money damages.

The term "parallel litigation" is used in a variety of contexts and can mean different things. *See* James P. George, *Parallel Litigation,* 51 Baylor L. Rev. 769, 774 (1999). One scholar stated:

> Parallel litigation would seem to mean identical or mirror image lawsuits between identical parties, but is often used when the lawsuits are not identical. Duplicative litigation has been defined as the "simultaneous prosecution of two or more suits in which some of the parties or issues are so closely related that the judgment in one will necessarily have a res judicata effect on the other."

*Id.* The concerns with parallel litigation echo many of those which apply to claim-splitting, namely an objection of wasting judicial resources and the risk of inconsistent results. *Id.*

The concept of "parallel litigation" as between state and federal courts is a term which most often[4] arises within the context discussed by the United States Supreme Court in *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817-18 (1976), where the rule arose within the context of determining whether a federal court should stay or dismiss a federal action in the face of pending state litigation on the same facts and issues. *See* James P. George, *Parallel Litigation,* 51 Baylor L. Rev. 769 (1999) ("*Colorado River v. United States* provides the essential state-federal parallel doctrine").
The first step of the *Colorado River* analysis is to determine whether the state court and federal court actions are, in fact, parallel. *Fru-Con Const. Corp. v. Controlled Air, Inc.,* 574 F.3d 527, 535 (8th Cir. 2009) (citations omitted). In *Fru-Con,* the 8th Circuit Federal Court of Appeals held that a breach of contract action, which was filed first and

[4] The term "parallel litigation" also arises in the context of a litigant asserting separate suits on the same common nucleus of operative facts in two federal district courts or two different state courts, but those cases mainly concern the scarcity of judicial resources.

pending in federal court, and a subsequently filed state court action seeking to foreclose on a materialman's lien which arose out of the performance of the same contract were not parallel proceedings such that either court should abstain from proceeding. The 8th Circuit developed among the narrower tests of the federal circuits for determining whether actions are "parallel" for the purpose of *Colorado River* analysis.

> The pendency of a state claim based on the same general facts or subject matter as a federal claim and involving the same parties is not alone sufficient. *Federated Rural Elec. Ins. Corp. v. Ark. Elec. Coop., Inc.,* 48 F.3d 294, 297 (8th Cir. 1995). Rather, a substantial similarity must exist between the state and federal proceedings, *which similarity occurs when there is a substantial likelihood that the state proceeding will fully dispose of the claims presented in the federal court. TruServ Corp. v. Flegles, Inc.,* 419 F.3d 584, 592 (7th Cir. 2005).

*Id.* (emphasis added).

Here there is no substantial likelihood that the Stocks' claim in the state proceeding will dispose of the Stocks' claim in the Federal Court Action for past due rent.[5] *See Wells Fargo Bank NA v. Badrawi,* 2012 WL 5990292, at *3 (Minn. Ct. App. Dec. 3, 2012) ("[T]he district

[5] The Judgment of Eviction entered in this case served as a basis for the federal court granting the Stocks' motion for partial summary judgment in the federal court case with respect to the Garretts' breach of contract claims. It did not, however, dispose of the Stocks' claim for money damages which remains to be tried.

court did not abuse its discretion by denying appellants' motion for a stay of the eviction proceeding because resolution of [tenants'] federal claims was not necessary and essential to a fair determination of the issue underlying the eviction proceeding—whether the bank was entitled to recover possession of the contested premises by eviction—nor was the issue underlying the federal claims identical to the issue underlying the eviction proceeding.")

### 2. Even If This Court Decides the Two Actions Are Parallel, There Existed Exceptional and Compelling Circumstances Which Justified the Circuit Court's Deviation from The First-Filed Rule.

The "first-filed rule gives priority, for purposes of choosing among possible venues when parallel litigation has been instituted in separate courts, to the party who first establishes jurisdiction." *Lewis & Clark Reg'l Water Sys., Inc. v. Carstensen Contracting, Inc.*, 339 F. Supp. 3d 886, 892-93 (D.S.D. 2018) (citations omitted). The first-filed rule "conserve[s] judicial resources and avoid[s] conflicting rulings." *Id* (citations omitted) (alterations in original). However, the rule "is not intended to be rigid, mechanical, or inflexible." *Id.* (citations omitted). The rule "yields to the interests of justice, and will not be applied where a court finds 'compelling circumstances' supporting its abrogation." *Id.* (citations omitted) (emphasis added). The party opposing the first-filed

rule has the burden of showing compelling circumstances. *Id.* at 892-93 (citations omitted).

The 8th Circuit has developed a two-prong "red flag" test for analyzing whether compelling circumstances exist so as to justify deviation from the first-filed rule. The first "flag" is whether the party who filed first was on notice that the party which filed second was going to file suit. *Id.* at 893. Here, that flag is present. The Garretts had already been served with a notice of default and were well behind on their rental obligations when they filed their suit in federal court. The federal lawsuit was a last-ditch effort to avoid the Stocks' foreclosing on the agreements and ejecting the Garretts from the Property. The first-filed rule should not apply here where the Garretts had not paid rent for almost a year before filing a federal lawsuit hoping to delay any ejectment proceedings. As a general matter, the first filed rule should not apply to any eviction action where the tenant has defaulted and files a federal action for the sole purpose of seeking to obstruct a landlord's exercise of their rights as lessor.

The second "flag" is closely related to the first as it applies to the facts of this case. The second red flag is that the "first-filed action is for declaratory judgment rather than for damages or equitable relief." *Id.* at 894 (citations omitted). While the Garretts aren't strictly speaking

seeking declaratory relief, they are in essence asking that the district court declare that they are no longer bound by any of the agreements in an attempt to side-step the fact they'd been in breach of those agreements for coming on a year and, in fact, have never performed any of the agreements as originally contemplated.

Even if this Court determines that the Stock's actions for possession and damages are parallel, compelling circumstances existed justifying the Circuit Court's departure from the first-filed rule. A tenant should not be permitted to file a lawsuit after he is in breach as a means of retaining possession of the leased premises—without paying rent—for the duration of the pending lawsuit. The Circuit Court had jurisdiction to rule on the parties' immediate possessory rights without deciding any of the issues in the federal court and exercised that jurisdiction so that the Stocks could make proper use of the Property.

## IV. The Circuit Court's Instructions to the Jury Were Adequate, and the Circuit Court did not Err When It Rejected the Garretts' Proposed Instructions Which Sought to Highlight Specific, Individual Paragraphs of the Lease Agreement.

The duty of the trial court is to provide instructions to the jury which, as a whole, correctly state the applicable law based on the evidence presented at trial. "The trial court has a duty to instruct the jury on applicable law where the theory is supported by competent

evidence." *Jahnig*, 283 N.W.2d at 560 (citations omitted). "Instructions are adequate when, considered as a whole, they give a full and correct statement of the applicable law." *Id.* "It is not error . . . to refuse to amplify instructions given which substantially cover the principle embodied in the requested instruction." *Id.* (citations omitted).

The Garretts are not entitled to instructions highlighting specific pieces of evidence that the Garretts believe support their theory of the case. They are entitled only to the jury being instructed, as a whole, consistent with the applicable laws. Similarly, the Stocks proposed an instruction regarding a provision of the Lease Agreement that provided for immediate termination upon nonpayment of rent, and that instruction was also denied. R-302. Instructions No. 9 – 13 provide most of the substantive law applicable to each parties' theory of the case. The Garretts presented evidence as to each of their defenses—i.e., interference with making payments, settling the fence dispute, and failing to provide a notice of default—and the jury was permitted to take the Lease Agreement and attendant agreements with them for review during deliberation. It cannot be said that the jury was not aware of the notice defense or the contractual basis for the defense. *See Knecht v. Evridge*, 2020 S.D. 9, ¶ 33, 940 N.W.2d 318, 329; T-271:1-4 ("The Court is not inclined to highlight any particular section of the

farm lease or any documents. Those documents have all be [sic] entered into evidence. They speak for themselves.")

The Court must uphold a jury's verdict "'if it can be explained with reference to the evidence,' viewing the evidence in the light most favorable to the verdict." *Lenards*, 2015 S.D. 49, ¶ 10, 865 N.W.2d at 870 (citations omitted). There exists competent evidence to show either/both that the jury determined that the Stocks were relieved of the notice requirement based on the Garretts' first material breach, R-325 (Instruction No. 11), and/or that the Stocks providing notice to the Garretts after they had already sued the Stocks in federal court would be futile, thus relieving the Stocks of any obligation to comply with the notice provision. R-326 (Instruction No. 12). Those findings would be consistent with the evidence presented, how the jury was instructed, and the applicable law. The Circuit Court did not err in refusing to highlight specific contractual provisions when, as a whole, the instructions given properly instructed the jury on the applicable law.

## CONCLUSION

For the forgoing reasons, the Stocks respectfully request that this Court DISMISS the Garretts' appeal for failing to appeal from a final order pursuant to SDCL § 15-26A-3. Should the Court deny the Stocks' Motion to Dismiss for lack of jurisdiction, the Stocks respectfully

request that this Court AFFIRM the rulings of the trial Court as to each issue presented in the Garretts' appeal.

Dated this 14th day of August, 2023.

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 9,925 words, excluding the table of contents, table of cases, signature block, and certificates of counsel. I have relied on the word and character count of the word-processing program used to prepare this Certificate.

*/s/ Andrew S. Hurd*
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## CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing was electronically filed and served through Odyssey File and Serve System to:

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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

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Appeal No. 30255

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**JAMES E GARRETT, SANDRA GARRETT AND LEVI EDWARD CARRETT**

*Defendants/Appellants*

vs.

**RONALD STOCK AND KRISTIN STOCK**

*Plaintiffs/Appellees.*

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APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
SULLY COUNTY, SOUTH DAKOTA

---

THE HONORABLE CHRISTINA KLINGER
Circuit Court Judge

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# APPELLANT'S REPLY BRIEF

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**CASES**

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## PRELIMINARY STATEMENT

Defendants/Appellants James Garrett, Sandra Garrett and Levi Garrett will be collectively referred to as "Garretts" or their individual first names of "James", "Sandra", or "Levi." Plaintiffs/Appellees Ronald Stock and Kristen Stock, will be referred to as the "Stocks." References to the record as reflected by the clerk's index are referenced by "R" following by the page number. Documents in the Appendix are referenced by "APP" followed by the number designation. Citations to the jury transcript are referenced by "T" followed by the page number and line.

## STATEMENT OF THE LEGAL ISSUES

*ISSUE I:* Whether the circuit court erred in denying Defendants' Motion for Judgment as a Matter of Law or New Trial when the evidence presented at trial was undisputed that Plaintiffs did not abide by the notice provision in the Farm Lease Agreement that would allow the Defendants to cure any default.

Legal Authority

*Suvada v. Muller*, 2022 S.D. 75, 983 N.W.2d 548

*Rindal v. Sohler*, 2003 S.D. 23, ¶ 6, 658 N.W.2d 769

*ISSUE II:* Whether the Circuit Court erred in denying Defendants' motion to dismiss when parallel litigation existed in federal court that would adjudicate all the parties claims and Plaintiffs failed to give proper notice of default under the contracts.

Legal Authority

*Meservy v. Stoner*, 208 N.W. 781 (S.D. 1926)

*First Nat. Bank in Sioux Falls v. First Nat. Bank South Dakota*, 679 F.3d 763 (8th Cir. 2012)

*ISSUE III:* Whether the Circuit Court erred in rejecting Defendants proposed jury instructions that provided specific language from the contracts, specifically Defendants proposed instruction providing that Section 12 of

the Farm Lease Agreement required Plaintiffs to provide proper notice of default and allow Defendants to cure.

Legal Authority

*Knecht v. Evridge*, 2020 S.D. 9, 940 N.W.2d 318

## ARGUMENT

### I. This Court Has Jurisdiction to Hear the Garretts' Appeal.

On June 30, 2023, this Court ordered the parties to this appeal to address whether the rule outlined in *Wilge v. Cropp*, 54 N.W.2d 568 (S.D. 1952) applies to the current circumstances given the changes to the appellate rules of civil procedure. In *Wilge*, this Court dismissed an appeal from an order denying motions for a new trial and for judgement notwithstanding the verdict. 54 N.W.2d at 568. The order appealed from was made after the judgement had been entered on a jury verdict and before the appeal time had expired on the judgement. *Id.* This Court's rationale for dismissing the appeal relied solely on SDC 33.071, which provided from what orders appeals could be taken. *Id.* At the time, an order denying a new trial or on a motion for judgment notwithstanding the verdict was not such an order enumerated in the statute for which to appeal from. *Id.* at 569.

This Court again addressed the appeal of an order denying motions for a new trial and judgment notwithstanding the verdict in *Johnson v. Lebert Constr., Inc.*, 2007 S.D 74, 736 N.W.2d 878. In that case, the plaintiff only appealed the order denying the post-trial motions, as the time for appealing the judgement had lapsed. *Johnson*, 2007 S.D. 74, ¶ 5, 736 N.W.2d at 879. The Court, while dismissing the appeal of the order as untimely, ventured away from the hardline rule stated in *Wilge* by articulating that "[a]n appeal of

these post-trial and post-judgment motions only examines whether the motion should have been granted. It does not reopen or resurrect an appeal of the judgement." *Id.* at ¶ 10, 736 N.W. 2d at 882. Thus, an appeal from the post-trial or post-judgement order is allowed, but the Court's review is limited as to the granting or denial of the post-trial motion. Again, this was in the context of the plaintiff failing to file a timely notice of appeal, which we do not have in the present case and the current rules of appellant procedure allows this Court to exercise jurisdiction.

In the case at bar, the Judgment of Eviction was entered against the Garretts on December 9, 2022. On December 14, 2022, the Garretts filed a Motion for Judgment as a Matter of Law or Motion for New Trial. The lower court entered an order denying the Garretts' motion on January 11, 2023. The Garretts filed their Notice of Appeal on February 10, 2023, within the statutory timeframe for both the underlying judgment and the post-trial motions. *See* SDCL 15-26A-6 (stating that the time for filing a notice of appeal is terminated by a timely motion for a new trial or judgment as a matter of law until the order on such motions is "signed, attested, filed, and written notice of entry thereof" is served). In contrast, it would be self-defeating to notice an appeal on the judgment before the circuit court has had a chance to rule on the post-trial motions, as was the case at bar. *See O'Neil v. O'Neil*, 2016 S.D. 15, ¶ 34, 876 N.W.2d 486, 499 (quoting *Reaser v. Reaser*, 2004 S.D. 116, ¶ 28, 688 N.W.2d 429,437) ("An appeal from a judgment or order strips the circuit court's jurisdiction over the subject matter of the judgment or order."). Thus, and pursuant to the time period outlined in SDCL 15-26A-6, the Garretts filed their notice of appeal within the 30-day requirement to appeal the order denying the post-trial motions and the judgment.

The parties to this matter have been put on notice of the issues. The absence of the word "judgment" in the notice of appeal is a mere technicality that can be corrected by the Court. "[N]otices of appeal are 'to be liberally construed in favor of their sufficiency.'" *People ex rel. S. Dakota Dep't of Soc. Servs.*, 2011 S.D. 26, ¶ 8, 799 N.W.2d 408, 409 (quoting *Int'l Union of Operating Eng'rs Local No. 49 v. Aberdeen Sch. Dist No 6-1*, 463 N.W.2d 843, 844 (S.D. 1990)). The embodiment of the aforementioned statement is provided in SDCL 15-26A-4. That statute provides in part that the "[f]ailure of an appellant to take any step other than timely service and filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal." SDCL 15-26A-4.

The Garretts timely served and filed the notice of appeal, and the technicality of missing the word "Judgment" should not be an appropriate reason for the Court to deem the appeal dismissed. Alternatively, even if this Court accepts that the only thing appealed is the decision on the post-trial motions, this Court "may review all matters properly and timely presented to the court by the application for a new trial." SDCL 15-26A-9; *see also Johnson*, 2007 S.D. 74, ¶ 10, 736 N.W.2d at 882 (stating the appeal of "post-trial and post-judgment motions only examines whether the motion should have been granted"). The Garrett's main complaint is grounded in the lower court's error in denying the motion for judgment as a matter of law or new trial during the trial and post-judgment when the Stocks did not abide by the notice provision allowing a cure of default. Thus, and while this Court should deem appropriate to hear an appeal from the judgment, the appeal on the issue of the Stock's failure to give notice under the default

provision in the Farm Lease Agreement is properly before this Court. *See O'Neil*, 2016 S.D. 15, ¶ 31, 876 N.W.2d 486, 498 (stating "it is the substance of the decision rather than its form or name that is the test of finality").

## II. Judgement as a Matter of Law was Warranted When the Stocks Failed to Abide by the Notice Provision Allowing the Garretts to Cure Any Default.

The Stocks argue that the jury returned a verdict finding that the Garretts were first to materially breach the agreements, which excused the Stocks from abiding by the notice provision in the Farm Lease Agreement. As persuasion for this argument, the Stocks attempt to distinguish settled statements of law from various jurisdictions regarding contracts, cite to Jury Instruction #11, and cite a United States District Court for the District of South Dakota opinion on a summary judgment disposition that is distinguishable to the facts here.

The Stocks first point to the cases cited by the Garretts as being legally distinguishable but fail to provide the legal rationale as to why this is the case. Rather, they point to the factual distinctions. The Garretts' rely on the cases cited in their original brief to this Court for clear statements of law, not the factual underpinnings. To illustrate, the Stocks point out that the Garretts cited *LoBianco v. Harleysville, Ins. Co.*, 368 N.J. Super. 515 (2003), which was overruled by *Vega v. 21st Century Ins. Co.*, 61 A.3d 170 (N.J. Super 2013) in an attempt to discredit the authority. However, the court did not overrule the statement of law that the Garretts relied on. The court only overruled the holding in *LoBianco* to the extent that a party wishing to nullify an arbitration award does not have to use the exact words of "We demand a trial." *Vega*, 61 A. 3d 170 at 172. The statement of law as directed in *LoBianco* is still correct:

> Where the terms of the contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written....The court has no right "to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently."...Nor may the courts remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other.

368 N.J. Super. at 524 (citing *Karl's Sales & Serv., Inc. v. Gimbel Bros., Inc.*, 249 N.J. Super. 487, 493, 592 A.2d 647 (App.Div.1991)). In fact, this Court has reiterated this same pillar of contract law:

> It is not the function of this Court to rewrite a contract. *See Kroupa v. Kroupa*, 1998 SD 4, ¶ 49, 574 N.W.2d 208, 217 (quoting *Hisgen v. Hisgen*, 1996 SD 122, ¶ 17, 554 N.W.2d 494, 499) (Sabers, J., dissenting) (noting that "'[i]t is not a function of the court to rewrite the parties' agreements' "). *See also Schlosser v. Norwest Bank South Dakota*, 506 N.W.2d 416, 421 (S.D.1993) (quoting *Raben v. Schlottman*, 77 S.D. 184, 190–91, 88 N.W.2d 205, 208 (1958)) (Wuest, J., concurring in part & dissenting in part) (stating that "'a court cannot make a contract for the parties that they did not make for themselves'") and *Amdahl v. Lowe*, 471 N.W.2d 770, 777 (S.D.1991) (concluding that "we cannot create a contract for the parties which they did not intend").

*S. Dakota State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.*, 2000 S.D. 116, ¶ 24, 616 N.W.2d 397, 407. Thus, the principles of contract interpretation and enforcement as cited by the Garretts remain relevant to the extent the parties agreed to the notice provision allowing the Garretts to cure a default, and courts should not disturb the parties' intentions when transcribed to the plain words in the contract.

The Stocks next point to *Soltesz v. Rushmore Plaza Civic Center*, 863 F.Supp.2d 861 (D.S.D. 2012) as being similar to the facts at hand. This is not the case. At issue in *Soltesz* was the failure of the lessor to provide notice of the lease's termination and

whether that warranted summary judgment on behalf of the lessee. 863 F.Supp.2d at 869. The circumstances in this matter do not involve a termination provision allowing the parties to cancel the agreement by giving so many day's notice like in *Soltesz*. Here, and at issue, is a notice provision involving the ability for the Garretts to correct a default involving their ranch that has been in the family for over 140 years. The Stocks have not provided the notice required under the Farm Lease Agreement allowing the Garretts to cure any default. "[T]here must be strict compliance with notice provisions where the notice affects property rights or where it is to form the basis for a suit." *Hein v. Marts*, 295 N.W.2d 167, 170 (S.D. 1980). The Court of Appeals in Georgia was correct in stating that "[w]hen a forfeiture depends on giving a written notice of default, it must appear that the notice was given in *strict compliance with the contract* both as to time and contents and that the default occurred." *Woodall v. Pharr,* 119 Ga. App. 692, 693, 168 S.E.2d 645, 647 (1969), aff'd, 226 Ga. 1, 172 S.E.2d 404 (1970) (emphasis added). Again, the Stocks failed to provide the Garretts with notice of a default and the issue should have never been presented to the jury.

The Stocks further argue that the jury determined that the Garretts were the first to materially breach the Lease Agreement by failing to pay rent and that the Jury relied on Jury Instruction No. 11. However, the only thing the Jury did determine is that the Stocks were entitled to possession as there was a general verdict form delivered. (R. at 337.) The Jury could have wrongfully relied on Jury Instruction No. 12 indicating a cure notice is not required. Regardless, the Stocks miss the point as to the Garretts' chief complaint: the jury should never have received the issue of possession because the notice of default provision was never complied with.

Next, the Stocks attempt to state that because the Garretts filed suit to establish their rights under the contracts, it relieved the Stocks of the duty to follow the agreements. The entirety of this matter was the inability of the Stocks to abide by the terms of the agreements: whether preventing payment, tilling up ground; or transferring ground that was all in violation of the same. Further, the Stocks cite to *Tri-City Assocs. L.P. v. Belmont, Inc.*, 2016 S.D. 46, 881 N.W.2d 20 for their proposition. This Court indicated the cure notice would be futile because it was the Landlord that was seeking the cure. *Tri-City Assocs. L.P.*, 2016 S.D. 46, ¶ 15, 881 N.W.2d at 23-24. The evidence at trial was clear that the Garretts continued to complete the contract as the terms dictated: by giving the escrow agent the rent payments, even though these actions were thwarted by the Stocks in failing to set up an escrow account. There was no intent by the Garretts to not complete the contract. *See id.* (stating "where the breaching party has abandoned the contract and evidence a clear and unequivocal intent not the complete the contract, a cure notice is not required").

Finally, the Stocks attempt to direct this Court to ambiguities in the agreements. However, all such provisions that the Stocks portray to be ambiguous all relate back to the fact of the Garretts paying rent, which the Garretts should have had the ability to cure if the notice was properly given according to the Farm Lease Agreement. In short, there is no ambiguities as the termination provisions as outlined by the Stock do not take effect until after the 60-day default period as outlined in the Farm Lease Agreement. There exists no ambiguity from a plain reading of the documents, and this Court should reverse the lower court's holding denying the Garretts' judgment as a matter of law and thereby vacate the judgment.

III. The Garretts Were Not Properly Served, the Failure to Mediate Precluded the Action, the Stocks Failed to Give Notice of Default, and Parallel Litigation Existed as to Prevent This Action.

A. Insufficient Service

The Garretts were not properly served pursuant to SDCL 21-16-2. However, the Stocks argue that because they mentioned the word waste in the complaint, it relieves them of the statutory obligation, and jurisdictional prerequisite, to provide the three-day notice to quit. The entirety of the Stocks complaint rests on the notion that the Garretts have failed to pay rent. (*See* R. at 4-7.) The Stocks only mention waste once in their complaint: "Defendants have also breached the lease agreement by abandoning the Premises, committing waste on the Premises, and by failing to plant crops before insurance deadlines." (R. at 6.). However, the Stocks were clear in their complaint that they were bring the action under SDCL 21-16-1(4) as it is mentioned in their complaint, and they also indicate that the required notice was given according to SDCL 21-16-2. It is only now they are saying that the notice provision does not apply.

It would be an absurd result to allow landlords to bring an eviction under the guise of the tenant committing waste, avoid the three-day notice to quit requirement, and then abandon that theory prior to trial. That is what has happened here. Now the Stocks argue that the computation of time requirement in SDCL 15-6-6(a) does not apply as well. The Stocks failed to recognize that the rules of civil procedure do apply only "to the extent that the rules of civil procedure are inconsistent or conflict with this chapter." SDCL 15-6-81(a). The timing rules as stated in SDCL 15-6-6(a) are not inconsistent with the forcible entry and detainer statutory scheme; and

therefore, would still apply to calculating the appropriate time period for service of the notice to quit. The Stocks even admit to giving the notice to quit in their complaint so they must have thought it applied to the facts here. (*See* R. at 6.).

The Garretts were not provided the jurisdictional requirement of the three-day notice to quit and the circuit court should have granted the motion to dismiss. *See Meservy v. Stoner*, 208 N.W. 781, 782 (S.D. 1926) (discussing where there is not substantial compliance with SDCL 21-16-2, a Court lacks jurisdiction over a plaintiff's Forcible Entry and Detainer action).

B. Mandatory Mediation

Pursuant to SDCL 54-13-10:

> A creditor desiring to commence an action or a proceeding in this state to enforce a debt totaling fifty thousand dollars or greater against agricultural land or agricultural property of the borrower or to foreclose a contract to sell agricultural land or agricultural property or to enforce a secured interest in agricultural land or agricultural property or pursue any other action, proceeding or remedy relating to agricultural land or agricultural property of the borrower shall file a request for mandatory mediation with the director of the agricultural mediation program. No creditor may commence any such action or proceeding until the creditor receives a mediation release as described in this chapter, or the debtor waives mediation or until a court determines after notice and hearing, that the time delay required for mediation would cause the creditor to suffer irreparable harm because there are reasonable grounds to believe that the borrower may waste, dissipate, or divert agricultural property or that the agricultural property is in imminent danger of deterioration. . . .

The Stocks argue that the statute does not apply because the Stocks are not considered a creditor and the Garretts did not owe a debt. The Garretts, however, did owe a debt to the Stocks according to their own complaint that they failed to pay rent.

The Stocks in their complaint request that the Garretts pay them the rent that is owed. (*See* R. at 6.) The ordinary definition of a debt is contemplated by this matter as the Garretts owed sums to the Stocks. DEBT, Black's Law Dictionary (11th ed. 2019) (state that debt is defined as a "[l]iability on a claim; a specific sum of money due by agreement or otherwise"). The Stocks were required to participate in mediation as they were a creditor, the Garretts were a borrower, debt existed, and it involved agricultural property, which is all contemplated by the statute.

The Stocks further indicated that because the lower court ordered mediation, the failure to strictly comply with the requirement was harmless. This argument misses the jurisdictional nature of the requirement to mediation prior to bringing an action. The lower court should have granted the motion to dismiss, requiring the Stocks to refile their complaint after the required mediation as contemplated by SDCL 54-13-10.

C. Failure to comply with the notice of default provision warranted dismissal.

This argument has been addressed in length in Section II, *supra*. For brevity, the Garretts direct the Court to that Section and their original brief.

D. Parallel Litigation

The Stocks spend a majority of their argument regarding the ability to split their causes of action in a forcible entry and detainer action. However, the Garretts focused on the parallel litigation being conducted by the Federal Court prior to the Stocks filing the forcible entry and detainer action. Thus, the Stocks simplified argument is that the subject matter is different between the Federal suit and state suit, as the Stocks are seeking rent in the Federal suit. Again, the request for relief are the same in both actions. While the Stocks withdrew their claim for money damages later on in the state court

proceedings, the Stocks initially requested two remedies in *both* this action and the Federal court action: declaratory relief and money damages. In the Federal court action, the Stocks have requested the court find that the lease agreements in question be terminated because of their allegations. (See APP 010.) The Stocks also requested money damages related to those lease agreements. (*Id.* at pg. 6.) The Stocks, at the time of filing their complaint, requested the same declaratory relief and money damages in this action. (*See* R: 6-7.) To say these two actions are different ignores what the Stocks have alleged in both actions.

The Stocks finally argue that a Federal Court does not have jurisdiction over state eviction matters, and thus, the two actions cannot be parallel. The Stocks fail to address that the Federal Court would have jurisdiction of a compulsory counterclaim that would need to be brought in response to the Federal action.

Informative is *Barrington Bank & Tr. Co., Nat'l Ass'n v. Fed. Deposit Ins. Corp., No. 14 C 06710*, 2015 WL 1888284, at *4 (N.D. Ill. Apr. 24, 2015). In that case, and while the facts are complicated, the Federal court first determined it had subject matter jurisdiction over the parties landlord tenant claims as it related to a declaratory judgment involving a federal question. *Id.* at * 3. The court then addressed its ability to hear the eviction action brought by the landlord that was removed to federal court. *Id.* at *4-5. The Federal Court reasoned that the eviction action was a compulsory counterclaim, and thus, fell within the supplemental jurisdiction of the Federal Court. Id. The Federal Court also reasoned why it is not a per se rule that federal courts cannot exercise jurisdiction over state law claims, as the Stocks are arguing. *Id.* at *5. Like in that case, the Stocks had the duty to bring the compulsory counterclaim regarding the eviction, which would

have given the federal court supplemental jurisdiction over the matter and avoided the parallel litigation that has occurred here. The trial court should have abstained from exercising jurisdiction over the parallel action the Stocks started. Thus, the Garretts request that this Court reverse the trial court's denial of Garretts' motion to dismiss and allow the parallel case to continue its progress in Federal court.

## IV. Not Providing the Jury with Instructions as to the Default Notice Provision was Error.

The Garretts proposed a jury instruction not the specific contract language, but the law as it relates to the jury finding for the Garretts if they found the notice provision was not followed by the Stocks. The court refused this instruction indicating that no contract provisions would be highlighted. The specific instruction was as follows:

> The Defendants claim that Plaintiffs were required to provide written notice of default to the escrow agent pursuant to paragraph 13 of the Farm Lease Agreement, which provides the Garretts 60 days to cure any alleged defect pursuant to Section 12 of the Farm Lease Agreement. If you find that Plaintiff's violated these requirements, then the complaint for forcible entry and detainer must be denied.

(R: 307.)

The Stocks attempt to highlight that the Garretts were allowed to present evidence on their theories of the case, and thus, the failure to give the instruction is not error. The Stocks' argument fails to recognize that an instruction to the jury stating the exact opposite was given in Jury Instruction #12. Jury Instruction #12 states:

> When a breaching party has abandoned the contract and evidenced a clear and unequivocal intent not to complete the contract, a cure notice is not required. The law does not require futile or meaningless acts. Where it would prove meaningless to provide a party with written notice of a breach, a cure notice is not required.

(R: 327.) The instruction plainly indicated that the jury could ignore the notice provision if they find the Garretts' materially breached the contracts. Without giving the instruction to the jury that they had to rule in favor of the Garretts' if they found that the notice provision was not complied with, prevented the jury from considering that result. The court only allowed them to disregard the ability of the Garretts to cure notice by instructing them on Jury Instruction # 12.

The Stocks violation of the notice provision is the lynch pin in the lower court's error during and after trial. After the court denied the motion for judgement as a matter of law during trial, the court should have allowed the jury to consider the Garretts ability to cure any default if they determined that they did in fact fail to pay rent, which is what the Stocks are arguing that the jury found. Failure of the lower court to provide the jury with the instruction regarding the contract language, and specifically the notice provision allowing a cure of default, was in error, and this Court should reverse on this matter and remand for a new trial so that the jury can be properly instructed.

## CONCLUSION

Based on the foregoing, the Garretts respectfully ask that the Court reverse the trial court for the reasons aforementioned.

Respectfully submitted this 14th day of September, 2023.

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ORAL ARGUMENT IS RESPECTFULLY REQUESTED

## CERTIFICATE OF COMPLIANCE

Pursuant to S.D.C.L. §15-26A-66(b)(4), I certify that Appellant's Reply Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 4060 words and 24,114 characters. I have relied on the word and character count of our processing system used to prepare this Brief. The original Appellants' Reply Brief and all copies are in compliance with this rule.

Dated this 14th day of September, 2023.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2023, I electronically served the foregoing Appellants Reply Brief and sent one copy of it by U.S. Mail, first-class postage prepaid to:

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I further certify that on 14th day of September, 2023, I electronically filed the foregoing Appellants' Reply Brief and sent the original and one copy of it by U.S. Mail, first-class postage prepaid to:

Shirley A. Jameson-Fergel, Clerk
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