

THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 31028

PEGGY A. DETMERS,

Plaintiff/Appellant,

v.

KEVIN COSTNER

Defendant/Appellee.

Appeal from the Circuit Court
Fourth Judicial Circuit
Lawrence County, South Dakota

THE HONORABLE ERIC STRAWN
Circuit Court Judge

APPELLANT'S BRIEF

Andrew R. Damgaard
Woods, Fuller, Shultz & Smith P.C.
300 South Phillips Avenue, Suite 300
Post Office Box 5027
Sioux Falls, SD 57117-5027

A. Russell Janklow
Johnson, Janklow & Abdallah, LLP
101 S. Main Avenue #100
Sioux Falls, S.D. 57104
ATTORNEYS FOR APPELLANT

Stacy R. Hegge
Catherine A. Seeley
Gunderson, Palmer, Nelson
& Ashmore, LLP
111 West Capital Ave., Suite 230
Pierre, SD 57501
ATTORNEYS FOR APPELLEE

Notice of Appeal Filed March 17, 2025.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF LEGAL ISSUES	1
STATEMENT OF THE FACTS & PROCEDURAL HISTORY	2
STANDARD OF REVIEW	4
ARGUMENT.....	5
I. Detmers' claims are ripe because a controversy exists as to the rights and obligations of the parties under the Agreement.	5
II. Summary judgment should have been granted to Detmers, as there are no genuine issues of material fact, and this Court interpreted paragraph three of the Agreement as a matter of law.....	7
III. Additional facts about the parties' "good faith and fair dealing" are not necessary to enter the declaratory judgment.	9
CONCLUSION.....	14
CERTIFICATE OF COMPLIANCE.....	16
CERTIFICATE OF SERVICE.....	17
APPENDIX.....	I

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abata v. Pennington Cnty. Bd. of Comm.</i> , 2019 S.D. 39, 931 N.W.2d 714	6
<i>Alone v. Brunsch, Inc.</i> , 2019 S.D. 41, 931 N.W.2d 707	5
<i>Bingham Farms Trust v. City of Belle Fourche</i> , 2019 S.D. 50, 932 N.W.2d 916	5
<i>Burgi v. East Winds Court, Inc.</i> , 2022 S.D. 6, 969 N.W.2d 919	4
<i>Chem-Age Indus., Inc. v. Glover</i> , 2002 S.D. 122, 652 N.W.2d 756	4
<i>Citibank South Dakota, N.A. v. Schmidt</i> , 2008 S.D. 1, 744 N.W.2d 829	5
<i>Detmers v. Costner</i> , 2012 S.D. 35, 814 N.W.2d 146 (<i>Detmers I</i>)	2, 7, 9, 11, 12, 13
<i>Detmers v. Costner</i> , 2023 S.D. 40, 994 N.W.2d 445 (<i>Detmers II</i>)	1, 2, 3, 5, 6, 7, 8, 9
<i>Farm Credit Servs. of Am. v. Dougan</i> , 2005 S.D. 94, 704 N.W.2d 24	2, 10, 12
<i>Garrett v. BankWest, Inc.</i> , 459 N.W.2d 833 (S.D. 1990)	9, 10
<i>Johnson v. Hayman & Assocs., Inc.</i> , 2015 S.D. 63, 867 N.W.2d 698	4
<i>Kneip v. Herseth</i> , 214 N.W.2d 93 (S.D. 1974)	6
<i>Nygaard v. Sioux Valley Hosps. and Health Sys.</i> , 2007 S.D. 34, 731 N.W.2d 184	10
<i>Smith v. WIPI Group, U.S.A., Inc.</i> , 2025 S.D. 26	1, 6

<i>State v. Bausch</i> , 2017 S.D. 86, 905 N.W.2d 314	14
<i>State v. Piper</i> , 2014 S.D., 842 N.W.2d 338	14
<i>Stern Oil Co., Inc. v. Brown</i> , 2012 S.D. 56, 817 N.W.2d 395	4
Statutes	
SDCL § 15-6-12(c)	5
SDCL § 15-26A-3(1)	1
SDCL § 15-26A-66(b)(4).....	16
SDCL § 21-24-10.....	3, 4
SDCL § 21-24-3.....	1, 6
SDCL § 57A-1-20(19).....	10
Other Authorities	
Restatement (Second) of Contracts § 205 (1981).....	10

JURISDICTIONAL STATEMENT

Peggy Detmers (“Detmers”) appeals from the circuit court’s March 12, 2025, Memorandum Decision and Order, which granted the Defendant, Kevin Costner’s (“Costner’s”), Motion to Dismiss. The Notice of Entry of Order was filed March 13, 2025. The Notice of Appeal was filed March 17, 2025. This Court has jurisdiction to hear this matter pursuant to SDCL § 15-26A-3(1) as an appeal from a final judgment.

STATEMENT OF LEGAL ISSUES

- I. Whether the circuit court erred in concluding Detmers’ claim for a declaratory judgment was not ripe.

Yes. A real controversy exists as to the rights and obligations of the parties under their May 5, 2000, Agreement (“Agreement”) in the event Costner unilaterally moves the sculptures from Tatanka. This Court previously disposed of Costner’s ripeness argument in *Detmers v. Costner*, 2023 S.D. 40, ¶ 31 n. 1, 994 N.W.2d 445, 457 n. 1 (*Detmers II*). Unfortunately, Costner successfully resuscitated that argument on remand and convinced the circuit court to do precisely what it had been reversed for in *Detmers II*—dismissing Detmers’ case.

Detmers II, 2023 S.D. 40, 994 N.W.2d 445
Smith v. WIP Group, U.S.A., Inc., 2025 S.D. 26
SDCL § 21-24-3

- II. Whether the circuit court erred in denying Detmers’ motion for summary judgment.

Yes. In *Detmers II*, this Court remanded this case for “further proceedings consistent with [the] opinion.” *Id.* at ¶ 35. On remand, Detmers amended her complaint to remove the anticipatory repudiation claim because this Court had affirmed the circuit court’s denial of Detmers’ motion for summary judgment on that claim. The only remaining claim was Detmers’ declaratory judgment claim, and Detmers amended that claim to mirror this Court’s holding in *Detmers II* related to the parties’ obligations under the Agreement (i.e., a declaration that Costner’s decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph three of the Agreement unless the parties agree to another location). The declaratory judgment claim was therefore an issue of law and one that had already been resolved by this Court in *Detmers II*.

Detmers II, 2023 S.D. 40, 994 N.W.2d 445
Smith v. WIP Group, U.S.A., Inc., 2025 S.D. 26

- III. Whether the circuit court erred in concluding it needed additional facts about the parties' "good faith and fair dealing."

Yes. The controversy between the parties is purely a legal issue. *Detmers II*, 2023 S.D. 40, ¶ 22, 994 N.W.2d at 454. As mentioned, this Court resolved that issue. *Id.* ¶ 29. It was therefore error for the circuit court to refuse to reduce this Court's holding to a judgment under any rationale.

Detmers II, 2023 S.D. 40, 994 N.W.2d 445

Farm Credit Servs. of Am. v. Dougan, 2005 S.D. 94, 704 N.W.2d 24

STATEMENT OF THE FACTS & PROCEDURAL HISTORY

The facts of this case are set forth in this Court's opinion in *Detmers v. Costner*, 2012 S.D. 35, 814 N.W.2d 146 (*Detmers I*) and *Detmers II*, 2023 S.D. 40, 994 N.W.2d 45. Those facts will not be repeated here.

In *Detmers II*, this Court remanded Detmers' claims for "further proceedings consistent with [the] opinion." *Detmers II*, 2023 S.D. 40, ¶ 35, 994 N.W.2d at 458. On remand, Detmers amended her complaint to conform to this Court's decision in *Detmers II*. (SR at 331). Specifically, the anticipatory repudiation claim was removed because this Court had affirmed the circuit court's denial of summary judgment on that claim. *Id.* at ¶ 35. The following three paragraphs were added to the amended complaint:

39. The South Dakota Supreme Court presided over this action on an appeal from a grant of summary judgment in Costner's favor. *Detmers v. Costner*, 994 N.W.2d 445 (S.D. 2023) (*Detmers II*).

40. The Court held that the requirement that the sculptures be "agreeably displayed elsewhere" was an ongoing obligation. *Id.* at 456.

41. The Court also held that "Costner's decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph three of the Agreement unless the parties agree to another display location." *Id.* at 456.

(SR at 335). Detmers then amended the language of her request for a declaratory judgment to the following:

45. Pursuant to South Dakota's Uniform Declaratory Judgment Act, Detmers respectfully requests a declaration consistent with the mandate by the South Dakota Supreme Court that the obligations in paragraph 3 of the Agreement are ongoing and that Costner's decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph three of the Agreement unless the parties agree to another display location.

(SR at 336). Detmers subsequently moved for summary judgment. (SR at 381). She asked the circuit court to "declare the meaning of paragraph 3 in the contract in a manner identical to the South Dakota Supreme Court's holding and put an end to this litigation." (SR at 386). Costner resisted Detmers' motion and claimed that this Court's language related to the sale clause being triggered in the event of Costner unilaterally relocating the sculptures was "mere dicta." (SR at 409).

Costner also filed a motion to dismiss claiming that the circuit court lacked subject matter jurisdiction because Detmers' claims were not ripe. (SR at 400-01). Alternatively, Costner argued that Detmers' claim should be dismissed pursuant to SDCL § 21-24-10 because a declaratory judgment would not "terminate the uncertainty or controversy giving rise to the proceeding." (SR at 400). Finally, Costner argued that a declaratory judgment should not be entered because Detmers' refusal to allow Costner to relocate the sculptures to Arkansas may be a breach of her duty of good faith and fair dealing and would relieve Costner of his obligations under the Agreement. (SR at 403-04).¹

¹ These are the same or variations of the same arguments Costner made to this Court on appeal, which were rejected in footnotes one and two in *Detmers II*. However, on remand, Costner successfully convinced the circuit court that "the issues presented to the Supreme Court and found ripe in *Detmers II*, are different from the instant request for declaratory judgment in Plaintiff's Amended Complaint, requiring a new examination of ripeness." (SR at 411).

As it had done previously, the circuit court adopted all of Costner's arguments. (SR at 450-52). The circuit court ruled that it lacked subject matter jurisdiction because Detmers' claim was not ripe, that Detmers' claim would not terminate the controversy between the parties and was therefore subject to dismissal pursuant to SDCL § 21-24-10, and that it needed facts related to the parties' good faith and fair dealing before it could enter a declaratory judgment. (*Id.*). Although the circuit court dismissed Detmers' declaratory judgment claim, it apparently believed it was worth mentioning that if a declaratory judgment were to be entered, it would not allow Detmers to "skirt her duties of good faith and fair dealing...." (SR at 451). This appeal follows.

STANDARD OF REVIEW

Summary judgment is properly granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Burgi v. East Winds Court, Inc.*, 2022 S.D. 6, ¶ 15, 969 N.W.2d 919, 923. The evidence is viewed in the light most favorable to the non-moving party and reasonable doubts are resolved in the non-moving party's favor. *Id.*

A summary judgment motion is designed to "isolate and dispose of factually unsupported claims or defenses." *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401 (citing *Chem-Age Indus., Inc. v. Glover*, 2002 S.D. 122, ¶ 18, 652 N.W.2d 756, 765). Once the moving party has established its burden, the nonmoving party must "present specific facts showing that a genuine, material issue for trial exists" to prevent a grant of summary judgment. *Johnson v. Hayman & Assocs., Inc.*, 2015 S.D. 63, ¶ 11, 867 N.W.2d 698, 701 (internal citations and quotations omitted). General allegations and mere denials that do not set forth specific facts will not prevent the

issuance of a judgment. *Citibank South Dakota, N.A. v. Schmidt*, 2008 S.D. 1, ¶ 8, 744 N.W.2d 829, 832.

Although Costner labeled his motion as one to dismiss, the motion came after he had filed an answer to the amended complaint. (SR at 393, 379). As a result, Costner's motion is one for judgment on the pleadings under SDCL § 15-6-12(c). In any event, dismissals for lack of subject matter jurisdiction present a question of law for the court to decide. *Bingham Farms Trust v. City of Belle Fourche*, 2019 S.D. 50, ¶ 11, 932 N.W.2d 916, 919; *Alone v. Brunsch, Inc.*, 2019 S.D. 41, ¶ 11, 931 N.W.2d 707, 710.

ARGUMENT

I. Detmers' claims are ripe because a controversy exists as to the rights and obligations of the parties under the Agreement.

This Court has already disposed of this issue. *Detmers II*, 2023 S.D. 40, ¶ 31 n. 1, 994 N.W.2d 445, 457 n. 1. It took this Court only a footnote to do so. *Id.* Specifically, this Court wrote: "Costner also argues that Detmers' action should be dismissed because her claims are not ripe. Detmers' claims are ripe because a real controversy exists as to the rights and obligations of the parties under the Agreement in the event Costner unilaterally moves the sculptures from Tatanka...." *Id.*

While Costner acknowledged this Court's holding on the ripeness issue, he claimed that the issues were now different because Detmers filed the amended complaint. (SR at 403 n.1). The amended complaint, however, simply changed a handful of paragraphs to make reference to and be consistent with this Court's decision in *Detmers II* as outlined above. (SR at 331-35). Detmers' claim remained one for a declaratory judgment on the meaning of paragraph three of the Agreement. (SR at 336). The

declaration requested also remained the same—that Costner unilaterally moving the sculptures would trigger the sale clause. (*Id.*).

The controversy between the parties has always been the rights and obligations of the parties under paragraph three of the Agreement and that language is not subject to change. (SR at 8, 34). Costner has maintained throughout this action that he has no remaining obligations under the Agreement. (SR at 34). Detmers has maintained that Costner unilaterally moving the sculptures would trigger the sale clause in paragraph three of the Agreement. (SR at 8).²

South Dakota’s Declaratory Judgment Act allows “[a]ny person interested under a...written contract...whose rights...or other legal relations are affected by a...contract...[to] have determined any question of construction...arising under the...contract...and obtain a declaration of rights...or other legal relations thereunder.” SDCL § 21-24-3.

The Declaratory Judgment Act is remedial in nature and should be construed liberally. *Abata v. Pennington Cnty. Bd. of Comm.*, 2019 S.D. 39, ¶ 11, 931 N.W.2d 714, 719. Part of the objective of the Declaratory Judgment Act is “to establish guidelines for parties’ actions so they may keep within the lawful bounds, avoid expense, bitterness of feeling, the disturbance of orderly pursuits and to foster judicial economy.” *Kneip v. Herseth*, 214 N.W.2d 93, 96 (S.D. 1974).

² This Court’s holding in *Detmers II* related to the ripeness of the dispute and the interpretation of paragraph three of the Agreement is the law of the case and the circuit court had no authority to depart from it on remand. *Smith v. WIPI Group, U.S.A., Inc.*, 2025 S.D. 26, ¶ 29. Although the circuit court indicated at the hearing that it would issue a written decision, Detmers nevertheless filed a proposed order in anticipation of another appeal and to avoid the types of issues discussed in Justice Kern’s concurrence in *Smith* in the event of another remand. *Id.* at ¶¶ 60-61 (Kern, J., concurring).

Contrary to Costner and the circuit court's assertions, a declaratory judgment will terminate the controversy. It will fully and finally resolve whether Costner has a remaining obligation to keep the sculptures in an agreeable location or whether he can unilaterally move them without triggering the sale clause.³ The circuit court's dismissal of Detmers' declaratory judgment action should be reversed.

II. Summary judgment should have been granted to Detmers, as there are no genuine issues of material fact, and this Court interpreted paragraph three of the Agreement as a matter of law.

In her proposed order to the circuit court, Detmers included the following language with respect to the declaratory judgment:

ORDERED, ADJUDGED, AND DECREED that consistent with the South Dakota Supreme Court's holding with respect to the interpretation of paragraph three of the May 5, 2000, agreement between the parties, *the condition that "the sculptures are not agreeably displayed elsewhere" is ongoing and therefore Defendant's decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph three of the agreement unless the parties agree to another display location.* *Detmers v. Costner*, 2023 S.D. 40, ¶ 29, 994 N.W.2d 445, 456.

(SR at 482) (emphasis added).

In *Detmers II*, this Court concluded the second section of its opinion, which dealt with "Obligations under the Agreement," by writing the following:

Contrary to the circuit court's reasoning in this action, the circuit court's conclusion in *Detmers I* that Costner "has fully performed" was not a judicial determination that Costner had no further obligation under the Agreement. Rather, it was a determination that Costner was not obligated to sell the sculptures because the

³ Under Costner and the circuit court's reasoning, parties to a contract that have a dispute over the consequences of a condition precedent would have to wait until the condition was triggered before seeking a judicial interpretation of the condition. Such reasoning runs counter to the Declaratory Judgment Act's purpose of providing guidelines to the parties so they may avoid expense and the disturbance of orderly pursuits (i.e., spending a great deal of money to move thousands of pounds of bronze sculptures twelve hundred miles only to find out later that the sculptures are contractually required to be sold).

sculptures' placement at Tatanka was "elsewhere" and "the sculptures are agreeably displayed elsewhere[.]" 2012 S.D. 35, ¶ 24, 814 N.W.2d at 151 (emphasis added). Nothing in the prior litigation released Costner from the provisions and obligations under paragraph three of the Agreement. Since *the condition that "the sculptures are not agreeably displayed elsewhere" is ongoing, Costner's decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph three of the Agreement unless the parties agree to another display location.*

The circuit court erred in its conclusion that Costner had no remaining obligation under paragraph three of the Agreement after the parties agreed to display the sculptures at Tatanka.

Detmers II, 2023 S.D. 40, ¶¶ 29-30, 994 N.W.2d at 456 (emphasis added). The language used in the proposed order is nearly identical to the language used in the Court's opinion, which answered the question presented (i.e., whether Costner could unilaterally sell Tatanka and relocate the sculptures free from any obligation to Detmers). Thus, the proposed order Detmers submitted on remand could not have been more "consistent" with this Court's opinion. *Id.* at ¶ 35 ("We remand Detmers' claims for further proceedings consistent with this opinion").

The circuit court's decision, on the other hand, could not be more inconsistent with *Detmers II*. Indeed, the circuit court apparently adopted Costner's position that the holding in *Detmers II* was "mere dicta."⁴ (SR at 477-78). The result was an opinion from this Court, which rejected Costner's argument that Detmers' case should be dismissed for lack of ripeness, only to have the circuit court dismiss her case on remand—for lack of ripeness. (*Id.*).

⁴ If Costner not being able to unilaterally relocate the sculptures without triggering the sale clause in paragraph three was some comment made in passing, it begs the question: what was the holding?

There are no genuine issues of material fact in this case and the interpretation of paragraph three in the Agreement is a question of law. *Id.* at ¶ 22. That question has already been answered by this Court. *Id.* at ¶ 29. It was therefore error for the circuit court to deny Detmers' motion for summary judgment.

III. Additional facts about the parties' "good faith and fair dealing" are not necessary to enter the declaratory judgment.

Before addressing the merits of this issue, it is important to point out from a practical standpoint why it has been raised. In *Detmers II*, this Court stated, "[t]he condition that 'the sculptures are not agreeably displayed elsewhere' does not impose any obligation on the parties beyond the implied duty of good faith and fair dealing."⁵ *Id.* at ¶ 33 (citing *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990)). To Costner, that language presented yet another opportunity to argue he should be discharged from his obligations under the Agreement. In other words, if Detmers refuses to move the sculptures to Arkansas, Costner now can argue she violated her duty of good faith and fair dealing, which would allow him to do what he has always sought to do—move the sculptures wherever he wants.

As an initial matter, whether Detmers acts in good faith with respect to any proposal made by Costner in the future is a separate issue from whether he was contractually obligated to seek her agreement or trigger the sale clause if he acted unilaterally. In other words, the circuit court did not need facts related to the future good

⁵ The only issue in *Detmers II* that involved the duty of good faith and fair dealing was Costner's argument that Detmers' comments in *Detmers I* violated the duty, constituted an anticipatory repudiation, and discharged Costner's obligations. This Court also rejected that argument in a footnote. *Detmers II*, 2023 S.D. 40, ¶ 33 n. 2, 994 N.W.2d at 457 n. 2.

faith or the lack thereof of the parties seeking an agreement to declare that if Costner does not seek it, he would trigger the sale clause.⁶

With respect to the merits, “[e]very contract contains an implied covenant of good faith and fair dealing which prohibits either contracting party from preventing or injuring the other party’s right to receive the agreed benefits of the contract.” *Garrett*, 459 N.W.2d at 841 (citing Restatement (Second) of Contracts § 205 (1981)). The duty “emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” *Farm Credit Servs. of Am. v. Dougan*, 2005 S.D. 94, ¶ 9, 704 N.W.2d 24, 28. Good faith is defined as “honesty in fact in the conduct or transaction concerned.” *Id.* (quoting SDCL § 57A-1-20(19)); Restatement (Second) of Contracts § 205 (1981)).

“The covenant of good faith does not create an amorphous companion contract with latent provisions to stand at odds with or in modification of the express language of the parties’ agreement. It is not a repository of limitless duties and obligations.” *Id.* Instead, “[t]he implied obligation must arise from the language used or it must be indispensable to effectuate the intention of the parties.” *Nygaard v. Sioux Valley Hosps. and Health Sys.*, 2007 S.D. 34, ¶ 22, 731 N.W.2d 184, 194. Therefore, “if the express language of a contract addresses an issue, then there is no need to construe intent or supply implied terms under the implied covenant.” *Id.* (citing *Farm Credit Servs.*, 2005 S.D. 94 at ¶ 10, 704 N.W.2d at 28).

⁶ This argument is just another variation of Costner’s ripeness argument or his way of saying “you cannot declare that I have an obligation until I can argue Detmers’ lack of good faith relieves me from it.”

The Agreement between the parties does not require an agreement (SR at 10). Nor could Costner justifiably expect one. To the contrary, the Agreement expressly contemplates that there may not be an agreement between the parties. (*Id.*). The failure to come to an agreement does not deprive the parties of the “right to receive the agreed benefits of the contract.” Instead, the Agreement expressly sets forth what benefits the parties receive in the absence of an agreement: the sculptures are sold, Costner recoups the costs related to creation of the sculptures and the cost associated with a sale, the parties split any remaining sale proceeds, and Detmers receives the copyright for her work. To graft an implied duty of good faith on a party to agree would be to ignore or modify the express terms that contemplate a disagreement and set forth what the parties receive in the event of that disagreement.

It would also ignore the fact that Costner knew Detmers might not agree to a location somewhere other than his five-star resort and casino, and that he deliberately drafted the Agreement to preserve his discretion in case she did not. Indeed, in paragraph four of the Agreement, which dealt with temporary placement of the sculptures, Costner reserved the right to unilaterally select the display location in the event Detmers did not agree. Paragraph three, however, contains no such provision for the long-term display of the sculptures in the absence of the resort.

And the absence of such a provision is entirely consistent with the impetus for the Agreement and the Agreement when read as a whole. As set forth in *Detmers I*, the Agreement was the result of Detmers stopping her work on the sculptures in the late 1990’s when the resort had not been built. *Detmers I*, 2012 S.D. 35, ¶ 2, 814 N.W.2d 146, 147. Part of Detmers’ compensation was tied to royalty rights, and those rights are

referenced in four of the five paragraphs in the Agreement. A life-sized reproduction of one of the sculptures was assumed to generate a royalty to Detmers of at least \$60,000, as set forth in paragraph one of the Agreement.

Because there is only a very small fraction of people who can afford to pay that type of money for fine art, the completion of the resort was critical. This explains paragraph three and why in the absence of the resort Detmers had to agree to the location. Alternatively, either party could pull the preverbal plug. But there is no express requirement that either party agree to a location in the absence of the resort. Implying such a requirement would not be “indispensable to effectuate the intention of the parties.” The plain language does not support the notion that Costner be required to display the sculptures at a financial loss every year any more than it supports Detmers having to receive a fraction of the compensation contemplated. Instead, the express language provides what would happen in the event there was not an agreement.

To the extent this Court believes there should be an implied duty to agree to a location in the absence of the resort, Detmers has already fulfilled that duty. It was judicially determined that she agreed to Tatanka, and according to Costner, the display was to be “permanent.” *Detmers I*, 2012 S.D. 35, 814 N.W.2d 146. To hold that Detmers is now required to rescind her original agreement and allow Costner to move the sculptures wherever he desires would create the “repository of limitless duties and obligations” this Court has held to be contrary to the intent of the implied covenant. *Farm Credit Servs.*, 2005 S.D. 94, ¶ 9, 704 N.W.2d at 28 (lender who agreed to loan money did not have an implied duty of good faith and fair dealing to grant an extension).

Although not material to any of the issues in the case, Costner filed an affidavit on remand in which he stated that Lawrence County's construction of a jail adjacent to the Tatanka real estate has made it "less attractive." (SR at 421). He also states that Tatanka has operated at a loss for two decades and that it has experienced "shoplifting" in the gift shop. (*Id.*). Costner goes on to state all the reasons he believes his museum in Arkansas would be a better location for the sculptures. (SR at 421-22).

However, in discovery, Costner admitted that the sculptures depict Lakota Sioux Indian warriors, that Tatanka includes a Northern Plains Peoples Educational Interpretive Center, and that Tatanka has employed Lakota Sioux individuals to educate visitors about the Lakota Sioux culture. (SR at 74). Costner also admitted that Arkansas is not and has never been part of the Great Sioux Nation and does not have any Sioux Indian Tribes. (SR at 73-74).

Detmers has spent most of her life and her career in the Black Hills. Although Costner claims his Arkansas display will be prominent "and with grandeur," he also contractually claimed in May of 2000 he did "not anticipate" his 5-star resort would not materialize and maintained throughout the first action he was attempting to build the resort. (SR at 419); *Detmers I*, 2012 S.D. 35, ¶ 13, 814 N.W.2d 146, 149. That history may make Detmers reluctant to believe Costner will follow through even if she were inclined to have the tribute to the Lakota people she created displayed at the Kevin Costner "movie and memorabilia" museum in Arkansas, which she is not.

There is no reason to have a trial on the implied covenant of good faith and fair dealing. The Agreement expressly does not require an agreement, contemplates there may be a disagreement, and expressly sets forth what happens in that event.

Alternatively, to the extent there was an implied covenant of good faith and fair dealing, Detmers fulfilled that obligation by agreeing to Tatanka, which Costner represented would be permanent. The implied covenant should not be subsequently extended to require Detmers to rescind her previous agreement and agree to the sculptures being moved twelve hundred miles.⁷

CONCLUSION

“The integrity of a hierarchical system of appellate review is not something to be lightly cast aside.” *State v. Bausch*, 2017 S.D. 86, ¶ 19, 905 N.W.2d 314, 319 (quoting *State v. Piper*, 2014 S.D. 2, ¶ 10 n. 5, 842 N.W.2d 338, 343 n. 5). “Therefore, when the direction contained in the mandate is precise and unambiguous, it is the duty of the lower court to carry it into execution, and not to look elsewhere for authority to change its meaning.” *Id.*

Dismissing Detmers’ case on remand based upon an argument that this Court had previously rejected on appeal is not “consistent with [the] opinion.” Instead, it nullifies it. While Costner is willing and has the resources to regurgitate arguments that have been previously rejected by a court of last resort, the circuit court, as a subordinate court, should not have been willing to entertain those arguments, let alone reward Costner for making them.

⁷ As mentioned, this Court does not have to address this issue to resolve the subject of the declaratory judgment (i.e., Costner’s unilaterally selling Tatanka and relocating the sculptures triggering the sale clause). However, if this issue continues to linger, it will almost certainly ensure there is a *Detmers IV*. The circuit court has adopted wholesale every argument Costner has asserted in this action, including res judicata, permanent meaning temporary, discharge, repudiation in the 2008 action, and now lack of ripeness and requiring future facts on the duty of good faith and fair dealing. The circuit court’s comment in its memorandum decision and order that a declaratory judgment would not allow Detmers to “skirt” her duty of good faith and fair dealing does not inspire confidence that this pattern is likely to change.

For the reasons set forth herein, Detmers respectfully requests that the circuit court's decision be reversed and that it be directed to enter the proposed order submitted by Detmers. (App. 012-013).

Respectfully submitted this 24th day of June, 2025.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Andrew R. Damgaard

Andrew R. Damgaard
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Andy.Damgaard@woodsfuller.com

-and-

JOHNSON, JANKLOW, ABDALLAH LLP

A. Russell Janklow
101 S. Main Ave. #100
Sioux Falls, SD 57104
(605) 338-4304
Russ@janklowabdallah.com
Attorneys for the Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 365, Times New Roman (12 point) and contains 4,121 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 24th day of June, 2025.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Andrew R. Damgaard

Andrew R. Damgaard
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Andy.Damgaard@woodsfuller.com

-and-

JOHNSON, JANKLOW & ABDALLAH, LLP

A. Russell Janklow
101 S. Main Ave. #100
Sioux Falls, SD 57104
(605) 338-4304
Russ@janklowabdallah.com
Attorneys for the Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June 2025, I electronically filed and served Plaintiff/Appellant's Brief through the Odyssey File and Serve system upon the following

Stacy Hegge
Catherine A. Seeley
Gunderson, Palmer, Nelson & Ashmore, LLP
111 West Capital Ave., Suite 230
Pierre, SD 57501
Attorneys for Defendant/Appellee

/s/ Andrew R. Damgaard
One of the Attorneys for Plaintiff/Appellant

APPENDIX

1.	Detmers v. Costner, 2023 S.D. 40, 994 N.W.2d 445	App. 001-011
2.	Proposed Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion to Dismiss	App. 012-013
3.	Memorandum Decision and Order (March 12, 2025)	App. 014-020

994 N.W.2d 445
Supreme Court of South Dakota.

Peggy A. DETMERS, Plaintiff and Appellant,
v.
Kevin COSTNER, Defendant and Appellee.

#30117

ARGUED MARCH 22, 2023

OPINION FILED August 2, 2023

Synopsis

Background: Artist brought action against developer of proposed luxury resort, which was never built, after affirmance of judgment for developer in artist's prior declaratory judgment action relating to contract for commissioned bronze sculptures, 814 N.W.2d 146, seeking a declaratory judgment and alleging that developer anticipatorily breached contract by creating online real estate sales listing for his other project that was a tourist attraction at which sculptures had been placed. The Circuit Court, Fourth Judicial Circuit, Lawrence County, Eric J. Strawn, J., granted summary judgment for developer. Artist appealed.

Holdings: The Supreme Court, Jensen, C.J., held that:

[1] res judicata did not bar artist's claims;

[2] contract contained ongoing obligation for sculptures to be "agreeably displayed elsewhere"; and

[3] developer's mere creation of sales listing was not an anticipatory breach of contract.

Affirmed in part, reversed in part, and remanded.

West Headnotes (31)

[1] **Appeal and Error** ⇔ De novo review

Supreme Court reviews a circuit court's entry of summary judgment under the de novo standard of review.

[2] **Appeal and Error** ⇔ Summary Judgment

Appeal and Error ⇔ Review for correctness or error

Supreme Court's task on appeal of entry of summary judgment is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied.

[3] **Appeal and Error** ⇔ Summary judgment

If there exists any basis which supports the ruling of a trial court granting summary judgment, affirmance of a summary judgment is proper.

[4] **Summary Judgment** ⇔ Favoring nonmovant; disfavoring movant

On a motion for summary judgment, the evidence must be viewed most favorably to the non-moving party and reasonable doubts should be resolved against the moving party.

[5] **Summary Judgment** ⇔ Genuine Issue or Dispute as to Material Fact

On a motion for summary judgment, the non-moving party must present specific facts which demonstrate a genuine, material issue for trial.

[6] **Res Judicata** ⇔ Res Judicata

"Res judicata" consists of two preclusion concepts: issue preclusion and claim preclusion.

[7] **Res Judicata** ⇔ Matters Actually Litigated or Determined

"Issue preclusion" refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided.

- [8] **Res Judicata** ⇐ Matters Which Could Have Been Litigated or Determined

"Claim preclusion" refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.

- [9] **Res Judicata** ⇐ Claims or Causes of Action in General

Res Judicata ⇐ Issues or Questions in General

What is prohibited under claim preclusion is the cause of action itself, but under issue preclusion, it is the particular issue or fact common to both actions.

- [10] **Res Judicata** ⇐ Res Judicata

For an action to be barred by res judicata, four elements must be satisfied: (1) the issue in the prior adjudication must be identical to the present issue, (2) there must have been a final judgment on the merits in the previous case, (3) the parties in the two actions must be the same or in privity, and (4) there must have been a full and fair opportunity to litigate the issues in the prior adjudication.

- [11] **Res Judicata** ⇐ Issues or Questions in General

When analyzing the application of claim preclusion, a court's review is not restricted to whether the specific question posed by the parties in both actions was the same or whether the legal question posed by the nature of the suit was the same.

- [12] **Res Judicata** ⇐ Claims or Causes of Action in General

For purposes of claim preclusion, a "cause of action" is comprised of the facts which give rise to, or establish, the right a party seeks to enforce;

the test is a query into whether the wrong sought to be redressed is the same in both actions.

- [13] **Res Judicata** ⇐ Splitting claims or causes of action

Under doctrine of claim preclusion, if the claims arose out of a single act or dispute and one claim has been brought to a final judgment, then all other claims arising out of that same act or dispute are barred.

- [14] **Res Judicata** ⇐ Contracts and Conveyances in General

Issues in artist's first and second actions against developer who commissioned bronze sculptures for proposed luxury resort that was never built were not the same, and therefore res judicata did not bar second action, which sought a declaratory judgment and alleged anticipatory breach of contract by developer arising from his online real estate sales listing for his other project that was a tourist attraction at which sculptures had been placed, where issue in prior action was whether sculptures were "agreeably displayed elsewhere" as set forth in contract when they were placed at attraction, but second action centered on any contractual obligation of developer to sell sculptures, split profits with artist, and assign copyright for sculptures back to artist after sculptures were agreeably displayed at attraction.

- [15] **Res Judicata** ⇐ Contracts and Conveyances in General

Claim preclusion did not bar artist's claims for anticipatory breach of contract and declaratory judgment against developer of proposed luxury resort, which was never built, after affirmance of judgment in developer's favor in artist's first declaratory judgment action concerning a contractual dispute about display of commissioned bronze sculptures at developer's other project that was a tourist attraction, where facts giving rise to second action, involving developer's online real estate sales listing for

attraction, did not occur until years after the first action and appeal were concluded, artist did not know and should not have known that developer would seek to relocate sculptures from attraction, and Supreme Court did not determine in first action whether artist would have any contractual rights if sculptures were no longer displayed at attraction.

[16] **Contracts** ⇨ Duration of Contract in General
Contracts ⇨ Nature and scope in general

Contract concerning commissioned bronze sculptures for proposed luxury resort that was not built within contractual ten-year timeframe included an ongoing obligation for the sculptures to be "agreeably displayed elsewhere" in order to avoid triggering developer's contractual obligation to sell sculptures, split profits with artist, and assign copyright for sculptures back to artist, and therefore developer's placement of sculptures at his other project, a tourist attraction, pursuant to parties' agreement within ten-year building period for the resort, before developer sought to sell attraction many years later, did not satisfy developer's contractual obligations; contract placed no time limit on when the "agreeably displayed elsewhere" condition was satisfied or the obligation triggered thereby.

[17] **Unjust Enrichment and Constructive Contracts** ⇨ Effect of Express Contract
Where there is a valid express contract existing between parties in relation to a transaction fully fixing the rights of each, there is no room for an implied promise.

[18] **Unjust Enrichment and Constructive Contracts** ⇨ Effect of Express Contract
An express contract precludes the existence of a contract implied by law or a quasi-contract.

[19] **Appeal and Error** ⇨ Construction, interpretation, and application in general

Contract interpretation is a question of law reviewed de novo.

[20] **Contracts** ⇨ Language of contract
When interpreting a contract, a court looks to the language that the parties used in the contract to determine their intention.

2 Cases that cite this headnote

[21] **Contracts** ⇨ Language of contract
When the words of a contract are clear and explicit and lead to no absurd consequences, the search for the parties' common intent is at an end.

[22] **Contracts** ⇨ Rewriting, remaking, or revising contract
Courts may neither rewrite the parties' contract nor add to its language.

[23] **Appeal and Error** ⇨ Particular Matters and Rulings
Because an appellate court can review a contract as easily as the trial court, there is no presumption in favor of the trial court's determination.

[24] **Contracts** ⇨ Conditions Precedent in General
A court determines whether a condition precedent exists from the document as a whole and whether the parties intended to agree that the happening or nonoccurrence of the stated event after the contract becomes binding would cause the contract to terminate without further duties or obligations on either party.

[25] **Contracts** ⇨ What are conditions precedent in general
A "condition precedent" is a contract term distinguishable from a normal contractual promise in that it does not create a right or duty, but instead is a limitation on the contractual obligations of the parties.

- [26] **Contracts** ⇌ What are conditions precedent in general

A "condition precedent" is a fact or event which the contracting parties intend must exist or take place before there is a right to performance.

- [27] **Contracts** ⇌ What are conditions precedent in general

A "condition precedent" is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor; if the condition is not fulfilled, the right to enforce the contract does not come into existence.

- [28] **Contracts** ⇌ Construction as a whole

Entire contract and all its provisions must be given meaning if that can be accomplished consistently and reasonably

- [29] **Action** ⇌ Moot, hypothetical or abstract questions

Artist's claims for anticipatory breach of contract against developer of a proposed luxury resort that was never built were ripe in action arising from developer's creation of online real estate sales listing for his other project that was a tourist attraction at which commissioned bronze sculptures had been placed; a real controversy existed as to parties' contractual rights and obligations in the event that developer unilaterally moved sculptures from attraction and as to whether developer's online sales listing rose the level of an anticipatory breach.

- [30] **Contracts** ⇌ Acts constituting renunciation and liabilities therefor

Developer's mere creation of online real estate sales listing for his tourist attraction at which commissioned bronze sculptures had been placed pursuant to agreement with artist when

plans stalled for developer's proposed luxury resort, which was never built, was not an anticipatory breach of contract with artist calling for sculptures to be "agreeably displayed elsewhere" if resort was not built within ten years; the "agreeably displayed elsewhere" condition did not impose any obligation on the parties beyond the implied duty of good faith and fair dealing, and potential sale of attraction merely foreshadowed the possibility of a contractual obligation on developer's part to sell sculptures, split profits with artist, and assign copyright for sculptures back to artist.

- [31] **Contracts** ⇌ Renunciation

A breach of contract caused by a party's anticipatory repudiation, i.e., unequivocally indicating that the party will not perform when performance is due, allows the non-breaching party to treat the repudiation as an immediate breach of contract and sue for damages.

1 Case that cites this headnote

***449 APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, LAWRENCE COUNTY, SOUTH DAKOTA, THE HONORABLE ERIC J. STRAWN, Judge**

Attorneys and Law Firms

ANDREW R. DAMGAARD of Woods, Fuller, Shultz & Smith, P.C., Sioux Falls, South Dakota, A. RUSSELL JANKLOW of Johnson, Janklow & Abdallah, LLP, Sioux Falls, South Dakota, Attorneys for plaintiff and appellant.

STACY R. HEGGE, CATHERINE A. SEELEY of Gunderson, Palmer, Nelson & Ashmore, LLP, Pierre, South Dakota, DANIEL E. ASHMORE of Gunderson, Palmer, Nelson & Ashmore, LLP, Rapid City, South Dakota, Attorneys for defendant and appellee.

Opinion

JENSEN, Chief Justice

[¶1.] In the early 1990s, Kevin Costner commissioned Peggy Detmers to create 17 large, bronze sculptures of buffalo

and Lakota warriors on horseback to display at The Dunbar, a luxury resort **Costner** planned to build on property he owned near Deadwood, South Dakota. **Detmers** commenced litigation against **Costner** in 2008, after The Dunbar had not been built, alleging that **Costner** was required to sell the sculptures and split the profits with **Detmers** pursuant to the terms of a prior written agreement (Agreement) because the parties had not agreed on an alternative location for display of the sculptures. The circuit court rejected **Detmers**' claim and found that the parties had agreed to permanently display the sculptures at Tatanka, another project **Costner** developed on some of the same property where The Dunbar was to be built. This Court affirmed. *Detmers v. Costner*, 2012 S.D. 35, 814 N.W.2d 146 (*Detmers I*).

[¶2.] In 2021, **Detmers** brought the current action against **Costner**, alleging that his sale-listing for Tatanka constituted an anticipatory breach of the agreement to permanently display the sculptures at Tatanka. In the alternative, **Detmers** sought a declaratory judgment that selling the Tatanka property and relocating the sculptures would trigger **Costner's** obligation to sell the sculptures under the terms of the Agreement. The parties filed cross motions for summary judgment. The circuit court granted summary judgment in favor of **Costner** and denied **Detmers**' motion. **Detmers** appeals. We affirm in part, reverse in part, and remand.

Factual and Procedural History

[¶3.] In 1994, **Detmers** began her work on the sculptures pursuant to an oral agreement with **Costner**. By 2000, believing progress had not been made toward developing The Dunbar, **Detmers** refused to finish the sculptures. **Costner** and **Detmers** negotiated and entered into the Agreement on May 5, 2000. As part of the Agreement, **Costner** agreed to pay **Detmers** additional compensation, clarified **Detmers**' royalty rights on reproductions of the sculptures, and provided her with certain rights regarding the display of the sculptures.

[¶4.] The parties' arguments in this appeal focus on three paragraphs of the Agreement:

2. Although I will be the sole owner of all rights in the sculptures, including *450 the copyright, in the sculptures, you will always be attached through your royalty participation. Because I believe that the sculptures are a valuable asset, I feel strongly that it is important that you maintain your 20% of gross retail

price royalty on future sales of fine art reproductions (5% of gross retail price royalty on mass market reproductions selling for under \$200). However, should you desire to sell that interest to me at some point in the future, I would be happy to discuss that with you in good faith.

3. Although I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at [or] above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).
4. We will locate a suitable site for displaying the sculptures if The Dunbar is not under construction within three (3) years after the last sculpture has been delivered to the mold makers. In the meantime, until the sculptures are put on display, I will permit you to market and sell reproductions and you can retain eighty percent 80% of the gross retail sales price and pay 20% to me. Once the sculptures are put on public display in public view, agreed upon by both parties (but with the final decision to be made by me if we do not agree), the percentages will reverse, 80% of the gross retail sales price to me and 20% to you. The marketing must proceed as outlined below.

[¶5.] **Costner** and **Detmers** began looking for alternative locations to display the sculptures in 2002, after the sculptures were completed but construction on The Dunbar had not started. **Costner** eventually suggested permanently displaying the sculptures on a portion of the property originally intended to be part of The Dunbar. This project came to be known as Tatanka and included a visitor center, gift shop, cafe, interactive museum, and nature walkways to accompany the sculptures.

[¶6.] In 2008, **Detmers** sued **Costner**, seeking an order requiring **Costner** to sell the sculptures and disburse the sale proceeds consistent with paragraph three of the Agreement. She alleged that this provision of the Agreement had been triggered because The Dunbar had not been built and the sculptures were "not agreeably displayed elsewhere[.]" She claimed she had not agreed to the permanent display of the sculptures at Tatanka in the absence of The Dunbar

and that Tatanka was not “elsewhere” under the terms of the Agreement. In response, Costner argued he had spent millions of dollars to develop Tatanka and that he and Detmers agreed to permanently place the sculptures at Tatanka, as an alternate location for the display of the sculptures under paragraph three.

[¶7.] The trial in *Detmers I* commenced more than ten years after the parties executed the Agreement. Although The Dunbar had not been built, the circuit court found that Detmers and Costner had agreed to permanently display the sculptures at Tatanka. The court concluded that the sculptures were “agreeably displayed elsewhere” as Tatanka constituted “elsewhere” *451 under the unambiguous terms of the Agreement. Based upon this determination, the circuit court denied Detmers’ claim that Costner was required to sell the sculptures pursuant to paragraph three of the Agreement and expressed that Costner had “fully performed under the terms of the [Agreement].” Detmers appealed the decision, arguing that she only agreed to the location because she had been promised The Dunbar would still be built. This Court affirmed, holding that “[t]he circuit court did not err or make any clearly erroneous factual findings in determining that the sculptures are ‘agreeably displayed elsewhere,’ in the absence of a guarantee from Costner that The Dunbar would be built.” *Id.* ¶ 24, 814 N.W.2d at 151.

[¶8.] In the decade that followed, Detmers continued to receive royalties from replicas of the sculptures sold at Tatanka. Meanwhile, construction on The Dunbar never began, and Costner sold all the property surrounding Tatanka that had been intended for The Dunbar. In the fall of 2021, Costner listed the real estate upon which Tatanka is located for sale online. The listing expressly excluded the sculptures from the sale and indicated that they “will be relocated by seller.”

[¶9.] In November 2021, Detmers brought the current action, claiming the real estate listing and statement concerning the relocation of the sculptures constituted an anticipatory breach of the agreement to display the sculptures at Tatanka. Detmers also included a count for declaratory judgment asking the court to determine her rights under the Agreement and specifically to determine that closing Tatanka or relocating the sculptures from Tatanka would trigger Costner’s obligation to sell the sculptures and assign the copyright to Detmers.

[¶10.] The parties filed cross motions for summary judgment, and the circuit court heard oral arguments on the motions. Detmers argued that Costner was required by *Detmers I* to permanently maintain the sculptures at Tatanka and that his decision to move them was an anticipatory breach of the agreement to permanently display the sculptures at Tatanka as a matter of law. Costner argued that Detmers’ claim was barred under the doctrine of res judicata because *Detmers I* fully resolved all the issues involving the parties’ obligations under the Agreement. Alternatively, Costner argued that he had fully performed under the terms of the Agreement after the parties agreed to locate the sculptures “elsewhere” and that he was not obligated to maintain the sculptures at Tatanka. He also argued the claims for anticipatory breach were not ripe.

[¶11.] The circuit court granted Costner’s motion for summary judgment based upon res judicata, and alternatively, based on its determination that the reference to the “permanent” display of the sculptures in *Detmers I* did not obligate Costner to continue to display the sculptures at Tatanka in perpetuity. The court also determined that the “agreeably displayed elsewhere” language in the Agreement did not “constitute a continuing right or obligation” and that once the parties agreed to display the sculptures at Tatanka, Costner fully performed his obligations under the Agreement. Detmers appeals, raising three issues which we state as follows:

1. Whether the circuit court erred in concluding Detmers’ claims are barred by the doctrine of res judicata.
2. Whether the circuit court erred in its interpretation of the Agreement and in holding Costner was discharged from any further performance under the Agreement.
- *452 3. Whether the circuit court erred in denying Detmers’ motion for summary judgment that Costner anticipatorily breached the agreement to permanently display the sculptures at Tatanka as a matter of law.

Standard of Review

[1] [2] [3] [4] [5] [¶12.] “We review a circuit court’s entry of summary judgment under the de novo standard of review.” *Healy Ranch, Inc. v. Healy*, 2022 S.D. 43, ¶ 17, 978 N.W.2d 786, 793, *reh’g denied* (Sept. 19, 2022) (quoting *Estate of Stoebner v. Huether*, 2019 S.D. 58, ¶ 16, 935 N.W.2d 262, 266). “Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law

was correctly applied. If there exists any basis which supports the ruling of a trial court, affirmance of a summary judgment is proper." *Id.* (quoting *Du-Al Mfg. Co., a Div. of SOS Consol., Inc. v. Sioux Falls Const. Co.*, 487 N.W.2d 29, 31 (S.D. 1992)). "The evidence must be viewed most favorably to the non-moving party and reasonable doubts should be resolved against the moving party." *Id.* (quoting *Du-Al Mfg. Co.*, 487 N.W.2d at 31). However, the non-moving party has the burden to "present specific facts which demonstrate a genuine, material issue for trial." *Id.* (quoting *Du-Al Mfg. Co.*, 487 N.W.2d at 31).

Analysis and Decision

I. Res Judicata

[6] [7] [8] [9] [¶13.] "Res judicata consists of two preclusion concepts: issue preclusion and claim preclusion." *Id.* ¶ 40, 978 N.W.2d at 798 (quoting *Am. Family Ins. Grp. v. Robnik*, 2010 S.D. 69, ¶ 15, 787 N.W.2d 768, 774). "Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Id.* (quoting *Robnik*, 2010 S.D. 69, ¶ 15, 787 N.W.2d at 774). "Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit[.]" *Id.* (alteration in original) (quoting *Robnik*, 2010 S.D. 69, ¶ 15, 787 N.W.2d at 774). "What is prohibited ... under claim preclusion is the cause of action itself, but under issue preclusion, it 'is the particular issue or fact common to both actions.'" *Id.* ¶ 41, 978 N.W.2d at 798 (quoting *Bollinger v. Eldredge*, 524 N.W.2d 118, 122 (S.D. 1994)).

[10] [11] [12] [13] [¶14.] For an action to be barred by res judicata, four elements must be satisfied:

(1) the issue in the prior adjudication must be identical to the present issue, (2) there must have been a final judgment on the merits in the previous case, (3) the parties in the two actions must be the same or in privity, and (4) there must have been a full and fair opportunity to litigate the issues in the prior adjudication. *Id.* ¶ 42, 978 N.W.2d at 799 (quoting *Dakota, Minn., & E.R.R. Corp. v. Acuity*, 2006 S.D. 72, ¶ 17, 720 N.W.2d 655, 661). We apply these elements "under both issue preclusion and claim preclusion theories." *Id.* ¶ 43, 978 N.W.2d at 799. "However, as it relates to claim preclusion, ... 'our review is not restricted to whether the specific question posed by the parties in both

actions was the same or whether the legal question posed by the nature of the suit was the same.'" *Id.* ¶ 44, 978 N.W.2d at 799 (quoting *Farmer v. S.D. Dep't of Revenue & Regul.*, 2010 S.D. 35, ¶ 10, 781 N.W.2d 655, 660). "For purposes of [claim preclusion], a cause of action is comprised of the facts which give rise to, or establish, the right a party seeks to enforce. The test is a query into whether the wrong sought to be redressed is the same in both actions." *Id.* ¶ 45, 978 N.W.2d at 799 (alteration *453 in original) (quoting *Glover v. Krambeck*, 2007 S.D. 11, ¶ 18, 727 N.W.2d 801, 805). "If the claims arose out of a single act or dispute and one claim has been brought to a final judgment, then all other claims arising out of that same act or dispute are barred." *Id.* (quoting *Farmer*, 2010 S.D. 35, ¶ 10, 781 N.W.2d at 660).

[14] [¶15.] Costner asserts that Detmers' current action is precluded by res judicata because Detmers seeks to relitigate the "not agreeably displayed elsewhere" language of the Agreement and because Detmers I affirmed the circuit court's determination that Costner "has fully performed" under the terms of the Agreement after the parties agreed to place the sculptures at Tatanka. Detmers concedes elements two and three of res judicata are satisfied but argues that the issues are not the same in the two cases. She asserts that the only issues determined in Detmers I were (1) whether Detmers agreed to the placement of the sculptures at Tatanka in the absence of the resort and (2) whether the Tatanka location constituted "elsewhere" under the terms of the Agreement.

[¶16.] Detmers argues the current dispute involves Costner's anticipatory breach of the agreement to permanently display the sculptures at Tatanka by stating his intention to unilaterally relocate the sculptures from Tatanka—or, otherwise, his intended action will trigger his obligation to sell the sculptures under the Agreement. She maintains that the facts and issues in this dispute were never before the court in Detmers I and were not capable of being litigated at that time. Detmers claims that she has not had a full and fair opportunity to litigate the parties' rights in the Agreement now that Costner intends to move the sculptures from Tatanka.

[¶17.] Unlike Detmers I, the current dispute between Detmers and Costner centers around the parties' rights and obligations under the Agreement after the parties agreed to display the sculptures at Tatanka. In particular, the parties disagree whether Costner has any remaining obligation under the Agreement to sell the sculptures, split the sale proceeds, and return the copyright to Detmers if he unilaterally relocates the sculptures from the agreed location at Tatanka.

In *Detmers I*, “[t]he sole issue at the bench trial was whether the sculptures were ‘agreeably displayed elsewhere’ ” when they were placed at Tatanka. 2012 S.D. 35, ¶ 7, 814 N.W.2d at 149. The rights and obligations of the parties in the location and display of the sculptures, after they were agreeably displayed at Tatanka, were not litigated or decided in *Detmers I*.

[15] [¶18.] Claim preclusion is also inapplicable because there is no showing that *Detmers* knew or should have known *Costner* would seek to relocate the sculptures from Tatanka. *Detmers I* did not discuss or even acknowledge the possibility that *Costner* might decide to relocate the sculptures in the future, nor was there any determination whether *Detmers* would have any rights under the Agreement in the event the sculptures were no longer displayed at Tatanka. Rather, *Costner* alleged in *Detmers I* that the parties had agreed to permanently display the sculptures at Tatanka. The facts giving rise to this action did not occur until years after the prior action and appeal were concluded. The issue “sought to be redressed” is not the same and did not arise, along with the prior claim, “out of a single act or dispute” See *Healy Ranch, Inc.*, 2022 S.D. 43, ¶ 45, 978 N.W.2d at 799 (citations omitted). We conclude the circuit court erred in holding that *Detmers*’ claims are barred by the doctrine of res judicata.

*454 2. Obligations under the Agreement

[16] [¶19.] *Detmers* argues that because The Dunbar was not built within ten years, paragraph three of the Agreement includes an ongoing obligation for the sculptures to be “agreeably displayed elsewhere.” She also claims that *Costner*’s stated intention to sell Tatanka and relocate the sculptures is an anticipatory repudiation of the agreement found in *Detmers I* to permanently display the sculptures at Tatanka and requires the sculptures to be sold and the copyright transferred to *Detmers* pursuant to paragraph three of the Agreement. She also maintains that if *Costner* unilaterally sells Tatanka and moves the sculptures from Tatanka, this is an event triggering paragraph three of the Agreement, requiring the sculptures to be sold and the profits split. She argues that this position is supported by a plain reading of the Agreement and by the language providing her with ongoing royalty rights on all reproductions of the sculptures.

[¶20.] The circuit court adopted *Costner*’s assertion that his obligations under paragraph three of the Agreement could “be satisfied in one of two ways: (1) The Dunbar is built within ten years ... or (2) the sculptures are agreeably displayed

elsewhere within that time frame.” Under this reading, *Costner* argues the circuit court correctly reasoned that he had satisfied all his contractual duties and had no further obligation under the Agreement after “the sculptures had been agreeably displayed elsewhere at Tatanka within that ten-year time frame[.]” *Costner* claims this construction of the Agreement is consistent with the circuit court’s determination in *Detmers I* that “*Costner* has fully performed under the terms of the [Agreement].”

[17] [18] [¶21.] The circuit court concluded that any discussion in *Detmers I* that the sculptures would be permanently located at Tatanka did not prevent *Costner* from relocating them. In the briefs, the parties devote considerable attention to the definition of “permanent” in the context of the implied agreement referenced by the circuit court in *Detmers I*. *Detmers*’ anticipatory repudiation claim is primarily premised on her argument that the circuit court in *Detmers I* found an implied agreement existed and that this implied agreement requires *Costner* to permanently display the sculptures at Tatanka. However, the current dispute is controlled by the express terms of paragraph three of the Agreement and whether *Costner* can relocate the sculptures from Tatanka without triggering the sale provision of the Agreement, not by any implied agreement found by the court in *Detmers I*. “[W]here there is a valid express contract existing between parties in relation to a transaction fully fixing the rights of each, there is no room for an implied promise.” *J. Clancy, Inc. v. Khan Comfort, LLC*, 2021 S.D. 9, ¶ 27, 955 N.W.2d 382, 391 (quoting *Koopman v. City of Edgemont by Dribble*, 2020 S.D. 37, ¶ 20, 945 N.W.2d 923, 928). “[A]n express contract precludes the existence of a contract implied by law or a quasi-contract.” *Id.* (alteration in original) (quoting *Jorens v. Lorenz Mfg. Co. of Benson, Minn.*, 1998 S.D. 49, ¶ 6, 578 N.W.2d 151, 153).

[19] [20] [21] [22] [23] [¶22.] “ ‘Contract interpretation is a question of law’ reviewed de novo.” *Detmers I*, 2012 S.D. 35, ¶ 20, 814 N.W.2d at 151 (citation omitted). “When interpreting a contract, ‘[a court] looks to the language that the parties used in the contract to determine their intention.’ ” *Id.* (citation omitted). “When the words of a contract are clear and explicit and lead to no absurd consequences, the search for the parties’ common intent is at an end.” *Id.* (quoting *Nelson v. Schellpfeffer*, 2003 S.D. 7, ¶ 8, 656 N.W.2d 740, 743). Courts “may *455 neither rewrite the parties’ contract nor add to its language[.]” *Id.* ¶ 21, 814 N.W.2d at 151 (quoting *Calhane v. W. Nat’l Mut. Ins. Co.*, 2005 S.D. 97, ¶ 27, 704 N.W.2d 287, 297). “Because

we can review the contract as easily as the trial court, there is no presumption in favor of the trial court's determination." *Ziegler Furniture & Funeral Home, Inc. v. Ciesmanec*, 2006 S.D. 6, ¶ 14, 709 N.W.2d 350, 354 (quoting *Cowan v. Mervin Mewes, Inc.*, 1996 S.D. 40, ¶ 6, 546 N.W.2d 104, 107).

[¶23.] Consistent with *Detmers I*, we determine that the controlling language of the Agreement is unambiguous. See *id.* (quoting *Pesticka v. Pesticka*, 2000 S.D. 137, ¶ 6, 618 N.W.2d 725, 726) ("When the meaning of contractual language is plain and unambiguous, construction is not necessary."). Under the plain language of the Agreement, the circuit court erroneously read "not agreeably displayed elsewhere" to expire after ten years. This reading of the language in paragraph three and the conclusion that Costner had fully satisfied his obligation thereunder conflict with the rules of grammar in extending the ten-year time period for building The Dunbar to "not agreeably displayed elsewhere[.]" In the first sentence of paragraph three, the phrase "within ten (10) years" immediately follows the word "built" and is separated from the word "displayed" by the conjunction "or[.]" As a result, "within ten (10) years" modifies only "built[.]" Conversely, "displayed" is not affected by "within ten (10) years[.]" Thus, the plain language of paragraph three establishes that "not agreeably displayed elsewhere" is not limited by time or duration.

[24] [25] [26] [27] [¶24.] The portion of paragraph three addressing what would happen if The Dunbar was not built within ten years, or the sculptures were not agreeably displayed elsewhere, specifies conditions that would trigger Costner's contractual obligation to sell the sculptures, split the profits, and assign the copyright for the sculptures to Detmers. We determine whether a condition precedent exists from "[t]he document as a whole" and whether the parties intended to agree "that the happening or nonoccurrence of the stated event after the contract becomes binding would cause the contract to terminate without further duties or obligations on either party." *Weltzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 38, 714 N.W.2d 884, 896. "A condition precedent is a contract term distinguishable from a normal contractual promise in that it does not create a right or duty, but instead is a limitation on the contractual obligations of the parties. A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor. If the condition is not fulfilled, the right to enforce the contract does not come into existence." *Id.* ¶

38, 714 N.W.2d at 895 (quoting *Johnson v. Coss*, 2003 S.D. 86, ¶ 13, 667 N.W.2d 701, 705-06). Paragraph three imposes a contingent obligation upon Costner to sell the sculptures, divide the profits with Detmers, and return the copyright to Detmers upon the occurrence of two conditions precedent: "Although I do not anticipate this will ever arise, if [these conditions occur], I will give you" (Emphasis added.)

[¶25.] The Dunbar was not built within ten years, meeting the first of two conditions necessary to trigger the sale clause. The second condition is that "the sculptures are not agreeably displayed elsewhere[.]" In *Detmers I*, this condition was not met, and thus Costner's obligation to sell the sculptures in paragraph three was not triggered. As discussed above, however, *456 the Agreement places no time limit on when the second condition may be satisfied or the obligation triggered thereby.

[¶26.] This reading of paragraph three of the Agreement is consistent with our reading of the language in *Detmers I*. In *Detmers I*, we stated, "[u]nder paragraph three, Detmers would only be entitled to specific performance if The Dunbar was not built or the sculptures were not 'agreeably displayed elsewhere.'" 2012 S.D. 35, ¶ 10, 814 N.W.2d at 149. See also *id.* ¶ 21, 814 N.W.2d at 151 ("The plain words of the contract unequivocally provide that if The Dunbar was not built or the sculptures were not agreeably displayed elsewhere, then Detmers would be entitled to the relief described in paragraph three.")

[28] [¶27.] "It is a fundamental rule of contract interpretation that the entire contract and all its provisions must be given meaning if that can be accomplished consistently and reasonably." *Prunty Constr., Inc. v. City of Canistota*, 2004 S.D. 78, ¶ 16, 682 N.W.2d 749, 756 (citation omitted). Paragraph two provides that Costner will be the sole owner of the sculptures but also provides Detmers with ongoing royalties for the sale of reproductions. It states that "it is important that you maintain your 20% of gross retail price royalty on future sales of fine art reproductions[.]" These terms provide Detmers with a continuing interest in the location and display of the sculptures because the value of the royalty payments is integrally related to whether the sculptures are displayed at a location likely to attract visitors and result in more sales of reproductions. If "the sculptures are not agreeably displayed elsewhere," the contingency provision for the sale of the sculptures ensures that Costner recovers the costs he incurred in the sculptures' creation, both

parties share in any profits from the sale of the sculptures, and **Detmers** retains the copyright for the sculptures.

[¶28.] Conversely, paragraph four applied during the time between three years after the last sculpture was delivered to the mold makers without construction having begun on The Dunbar and ten years from the date of the Agreement without The Dunbar having been built. This provision gave Costner the power to make a final decision about an interim location for display of the sculptures. Thereafter, paragraph three, which has applied since ten years passed without The Dunbar being built, requires the sale of the sculptures unless the parties are in agreement about the display location.

[¶29.] Contrary to the circuit court's reasoning in this action, the circuit court's conclusion in *Detmers I* that **Costner** "has fully performed" was not a judicial determination that **Costner** had no further obligation under the Agreement. Rather, it was a determination that **Costner** was not obligated to sell the sculptures because the sculptures' placement at Tatanka was "elsewhere" and "the sculptures are 'agreeably displayed elsewhere[.]'" 2012 S.D. 35, ¶ 24, 814 N.W.2d at 151 (emphasis added). Nothing in the prior litigation released **Costner** from the provisions and obligations under paragraph three of the Agreement. Since the condition that "the sculptures are not agreeably displayed elsewhere" is ongoing, **Costner's** decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph three of the Agreement unless the parties agree to another display location.

[¶30.] The circuit court erred in its conclusion that **Costner** had no remaining obligation under paragraph three of the Agreement after the parties agreed to display the sculptures at Tatanka.

*457 3. Anticipatory Breach

[29] [30] [¶31.] **Detmers** alleges that the circuit court erred in denying her motion for summary judgment on her claim for anticipatory repudiation by **Costner**. She argues that **Costner's** online real estate listing for the Tatanka property was an unequivocal statement that **Costner** intended to breach his obligation to display the sculptures at Tatanka and that the circuit court should have found, as a matter of law, **Costner's** breach of the Agreement. **Costner** responds that **Detmers** has failed to establish an anticipatory repudiation, as a matter of law, based upon the sale listing.¹

[31] [¶32.] "An anticipatory breach of a contract or anticipatory repudiation is 'committed before the time when there is a present duty of performance and results from words or conduct indicating an intention to refuse performance in the future.'" *Union Pac. R.R. v. Certain Underwriters at Lloyd's London*, 2009 S.D. 70, ¶ 39, 771 N.W.2d 611, 621 (quoting 23 Williston on Contracts § 63:29 (4th ed. 2000)). "A breach of contract caused by a party's anticipatory repudiation, i.e., unequivocally indicating that the party will not perform when performance is due[,] allows the nonbreaching party to treat the repudiation as an immediate breach of contract and sue for damages." *Id.* ¶ 39, 771 N.W.2d at 621–22 (alteration in original) (quoting *Weitzel*, 2006 S.D. 45, ¶ 31, 714 N.W.2d at 894).

[¶33.] The condition that "the sculptures are not agreeably displayed elsewhere" does not impose any obligation on the parties beyond the implied duty of good faith and fair dealing. See *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990) ("Every contract contains an implied covenant of good faith and fair dealing which prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract."). Thus, **Costner's** real estate listing for the sale of Tatanka does not—and the sale of the Tatanka real estate in itself would not—breach any contractual obligation under the Agreement. The potential sale of Tatanka merely foreshadows the possibility that the obligation on **Costner** to sell the sculptures, split the profits, and assign the copyright will be triggered unless the parties otherwise agree to the location for the display of the sculptures.² When ten years passed without The Dunbar being built, the first condition was met. In determining that the parties agreed to display the sculptures at Tatanka, *Detmers I* recognized that the second condition had not been met. The second condition may still be satisfied, however, if and when the sculptures are no longer agreeably displayed—that is, if **Costner** sells the Tatanka property or moves them from Tatanka to another location without **Detmers'** agreement.

[¶34.] While **Costner** has admitted he still intends to sell Tatanka, this at most *458 signals that his contingent obligation to sell the sculptures may vest. See *Weitzel*, 2006 S.D. 45, ¶ 38, 714 N.W.2d at 895 (explaining that there is no right to performance until condition precedent occurs). Even if **Costner** sells Tatanka or unilaterally relocates the sculptures from Tatanka to a place not agreeable to **Detmers**, such an action would not breach his obligation under the Agreement. Instead, this event would satisfy the second condition in paragraph three of the Agreement, triggering the

obligation to sell the sculptures, split the profits, and transfer the copyright to Detmers. At present, Costner owes Detmers no obligation with respect to the display or sale of the sculptures that she can enforce against him. See *Union Pac. R.R.*, 2009 S.D. 70, ¶ 39, 771 N.W.2d at 621–22 (explaining that nonbreaching party may seek immediate relief only when repudiating party unequivocally indicates its intent to refuse to perform a duty when it becomes due in the future). For these reasons, Detmers has failed to establish Costner anticipatorily breached the terms of the Agreement as a matter of law, and the circuit court properly denied Detmers' motion for summary judgment on this claim.

Conclusion

Footnotes

- 1 Costner also argues that Detmers' action should be dismissed because her claims are not ripe. Detmers' claims are ripe because a real controversy exists as to the rights and obligations of the parties under the Agreement in the event Costner unilaterally moves the sculptures from Tatanka and as to whether Costner's actions to date rise to anticipatory breach. See *Boever v. S.D. Bd. of Acct.*, 526 N.W.2d 747, 750 (S.D. 1995) (holding that a declaratory judgment action "is sufficiently ripe if the facts indicate imminent conflict").
- 2 In responding to Detmers' claim for anticipatory repudiation, Costner cites Detmers' statement in *Detmers I* that she "has not agreed and will not agree to an alternative permanent location for the [sculptures]" and argues this constituted an anticipatory breach of the Agreement by Detmers. The circuit court adopted this reasoning as an alternative ruling in this action. However, this is inconsistent with the circuit court's finding in *Detmers I* that Detmers had in fact agreed to the display at Tatanka.

[¶35.] We affirm the circuit court's denial of Detmers' motion for summary judgment on the question of anticipatory breach by Costner. We reverse the circuit court's entry of summary judgment for Costner. We remand Detmers' claims for further proceedings consistent with this opinion.

[¶36.] KERN, DEVANEY, and MYREN, Justices, and BARNETT, Circuit Court Judge, concur.

[¶37.] BARNETT, Circuit Court Judge, sitting for SALTER, Justice, who deemed himself disqualified and did not participate.

All Citations

994 N.W.2d 445, 2023 S.D. 40

ORDERED, ADJUDGED, AND DECREED that consistent with the South Dakota Supreme Court's holding with respect to the interpretation of paragraph three of the May 5, 2000, agreement between the parties, the condition that "the sculptures are not agreeably displayed elsewhere" is ongoing and therefore Defendant's decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph three of the agreement unless the parties agree to another display location. *Detmers v Costner*, 2023 S.D. 40, ¶29, 994 N.W.2d 445, 456.

Dated this ____ day of March, 2025.

BY THE COURT:

Honorable Eric Strawn
Circuit Court Judge

Denied: 03/24/2025
/s/ Strawn, Eric

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF LAWRENCE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

PEGGY A. DETMERS,

Plaintiff,

v.

KEVIN COSTNER,

Defendant.

FILE NO. 40CIV22-000017

**MEMORANDUM DECISION AND
ORDER**

This matter came before this Court on Plaintiff's Motion for Summary Judgment (Second) and Defendant's Motion to Dismiss, following remand by the South Dakota Supreme Court. A hearing was held at the Lawrence County Courthouse on February 20, 2025, at 11:00 a.m. where the Plaintiff, Peggy Detmers (Detmers), was represented by her attorneys, Andrew R. Damgaard and A. Russell Janklow. The Defendant, Kevin Costner (Costner), was represented by his attorneys, Stacy R. Hegge and Catherine A. Seeley. The Court, having reviewed the parties' briefs and having heard the arguments of counsel, issues the following Memorandum Decision and Order.

Background

In the early 1990s, Costner sought to build a five-star resort on real property he owned near Deadwood, South Dakota, to be called "The Dunbar." He commissioned Detmers to create a set of sculptures to be displayed at the resort. When The Dunbar had not been built by the late 1990s, Costner and Detmers negotiated and entered a written contract for the completion of the sculptures regardless of whether The Dunbar would be built. The contract dated May 5, 2000, consisted of five paragraphs that outlined the parties' interests in the sculptures and their reproductions.

Relevant to this matter is the third paragraph of the contract,^{1,2} which addresses what may happen if conditions precedent are not met. Paragraph three provides in full:

Although I [(Costner)] do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you [(Detmers)] 50% of the profits from the sale of the one and one-quarter life scale

¹ "Contract" and "Agreement" are used interchangeably by the parties throughout.

² The remaining paragraphs of the contract, summarized here, are not at issue in the current litigation: 1) Paragraph one provides that Detmers shall receive additional compensation for her work; 2) Paragraph two provides that Costner will exclusively own the sculptures and copyright, while Detmers will retain a continuing royalty interest in the sales of reproductions of the sculptures; 3) Paragraph four further addresses the display of the sculptures and provides for locating a suitable site for the sculptures and revenue sharing, before and after the sculptures are publicly displayed; 4) Paragraph five of the contract sets forth certain marketing obligations.

sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our [sic] above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

The Dunbar had not been built, nor was it under construction, by the early 2000s. To comply with the contract, Costner located an alternative site on land intended to be part of The Dunbar upon which to display the sculptures. Costner proposed the location to Detmers, who agreed to the display and assisted with the placement of the sculptures at the site. To accompany the display and to enhance visitors' experiences, Costner erected several amenities at the site, including a visitor center, gift shop, café, interactive museum, and nature walkways. The display, along with the other amenities, came to be known as "Tatanka."

Prior Litigation

In 2008, Detmers initiated suit against Costner, claiming that he breached their May 5, 2000, contract because The Dunbar had not been built and asserting that Detmers did not agree to the placement of the sculptures at Tatanka. The litigation focused primarily on paragraph three of the parties' May 5, 2000, contract.

Despite paragraph three of the May 5, 2000, contract, which indicated that the sculptures could be agreeably displayed elsewhere if The Dunbar was not built within ten years, Detmers's verified complaint dated December 9, 2008, unequivocally stated "Detmers has not agreed and *will not agree* to an alternative permanent location for the monument." See Verified Complaint and Demand for Jury Trial, ¶ 27, originally filed in 52CIV08-002354 (emphasis added).

Throughout the course of that litigation, Detmers advanced two arguments. First, she argued that she did not agree to display the sculptures at Tatanka past 2010 if The Dunbar had not been built. See Plaintiff's Proposed Findings of Fact and Conclusions of Law, ¶ 39, filed in Lawrence County Civ. 09-60. Second, she argued that Tatanka did not constitute "elsewhere" under the terms of the May 5, 2000, contract because Tatanka was located on a portion of real property originally intended as part of The Dunbar. See *Detmers v. Costner*, 2012 S.D. 35, ¶ 17, 814 N.W.2d 146, 150 ("*Detmers I*"). In response to Detmers's assertion that her consent to the sculptures' placement at Tatanka was temporary and contingent, Costner argued that Detmers agreed to place the sculptures at Tatanka for the long term, or permanently, thereby satisfying paragraph three of the parties' May 5, 2000, contract. See 40CIV09-000060 Defendant's Proposed Findings of Fact and Conclusions of Law, ¶ 55.

The circuit court determined that the contract was unambiguous, and after a bench trial, concluded that Detmers "was agreeable to the sculptures' placement at Tatanka for the long term," and that "Costner has fully performed under the terms of the contract." See 40CIV09-000060, Trial Court's Findings of Fact and Conclusions of Law, ¶¶ 14-15. Ultimately, the circuit court entered a final judgment in favor of Costner, which the South Dakota Supreme Court affirmed. See *Detmers I*, 2012 S.D. 35, 814 N.W.2d 146.

After the South Dakota Supreme Court's decision in *Detmers I*, the sculptures remained displayed at Tatanka. In October 2021, a real estate listing was posted for the land upon which Tatanka sits. The real estate listing stated, "Tatanka statues are not included- will be relocated by seller." After becoming aware of that listing, Detmers again sued Costner, alleging breach of

contract under a theory of anticipatory repudiation and alternatively seeking a declaratory judgment. See 40CIV22-000017, Complaint, filed January 18, 2022. At a bench trial on July 22, 2022, held at the Lawrence County Courthouse, this Court heard the parties' cross motions for summary judgment. On August 31, 2022, this Court granted summary judgment in favor of Costner and denied Detmers' motion. Detmers appealed.

The Supreme Court of South Dakota heard arguments on March 22, 2023. In its August 2, 2023, opinion, the Court affirmed in part, reversed in part, and remanded for further proceedings, holding that the doctrine of *res judicata* did not bar Detmers's claims; the May 5, 2005 contract contained two conditions precedent, the second of which, "the sculptures are not agreeably displayed elsewhere," is unmet and ongoing; and Costner's mere creation of sales listing was not an anticipatory breach of contract. *Detmers v. Costner*, 2023 S.D. 40, 994 N.W.2d 445 (*"Detmers II"*).

Post Appeal Factual Background

The sculptures at issue are still displayed at Tatanka, which remains unsold.

Following the South Dakota Supreme Court's ruling in *Detmers II*, this Court granted Plaintiff permission and Plaintiff filed an Amended Complaint on September 5, 2024, which Defendant timely answered. On November 25, 2024, Plaintiff filed a Motion for Summary Judgment (Second), seeking declaratory judgment that "Costner's decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph 3 of the Agreement unless the parties agree to another display location." 40CIV22-000017, Motion for Summary Judgment (Second), at 3-4, filed November 25, 2024). The case was reopened, and on February 5, 2025, Defendant filed a Motion to Dismiss and Response to Plaintiff's Motion for Summary Judgment. Both parties timely filed responses and reply briefs.

Applicable Law

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). The moving party must demonstrate the lack of a genuine issue of material fact and show entitlement to judgment as a matter of law. *Brevet Int'l, Inc. v. Great Plains Luggage Co.*, 2000 S.D. 5, ¶12, 604 N.W.2d 268, 271 (quotation omitted). "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists." *Millard v. City of Sioux Falls*, 1999 S.D. 18, ¶ 8, 589 N.W.2d 217, 218 (quoting *Walther v. KPKA Meadowlands Ltd. Partnership*, 1998 S.D. 78, ¶ 14, 581 N.W.2d 527, 531).

Under the Uniform Declaratory Judgments Act ("Act"), "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." South Dakota Codified Laws (SDCL) § 21-24-1. "A matter is sufficiently ripe [for a declaratory judgment] if the facts indicate imminent conflict." *Boever v. South Dakota Bd. Of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995). Under the Act,

Any person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status, or other legal

relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

SDCL § 21-24-3.

OPINION

Under South Dakota law, this Court should deny Plaintiff's request for declaratory judgment regarding paragraph three of the May 5, 2000, contract because the Court requires facts about the parties' good faith and fair dealing with respect to actions taken which invoke the balance of paragraph three of the May 5, 2000, contract.

Here, "[t]he only claim remaining in this action is a declaratory judgment claim on the interpretation of Paragraph 3 of the Agreement." 40CIV22-000017, Plaintiff's Response to Defendant's Separate Statement of Undisputed Material Facts, at 1, filed February 11, 2025. "On remand, [Plaintiff] is simply asking this Court to declare the meaning of paragraph 3 in the contract in a manner identical to the South Dakota Supreme Court's holding and put an end to this litigation." 40CIV22-000017, Plaintiff's Brief in Support of Motion for Summary Judgment (Second), at 1, filed November 25, 2024. Specifically, Plaintiff requests that this Court declare, "Costner's decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph 3 of the Agreement unless the parties agree to another display location." *Id.*, at 3-4.

Plaintiff argues that she is entitled to declaratory judgment because the Act should be construed liberally (citing *Abata v. Pennington Cnty. Bd. Of Comm.*, 2019 S.D. 39, ¶ 11, 931 N.W.2d 714, 719), and in *Detmers II*, the Supreme Court held, "Costner's obligation under paragraph 3 of the May 5, 2000, contract is ongoing." *Id.*, 2-3. Plaintiff's use of "obligation" refers to the phrase, "the condition [precedent] that 'the sculptures are not agreeably displayed elsewhere' is ongoing." *Id.* (quoting *Detmers II*, 2023 S.D. 40 at ¶ 29, 994 N.W.2d at 457 (quotations in original)).

Defendant moves to dismiss Plaintiff's Amended Complaint "because the requested declaration would insufficiently account for future, speculative events." 40CIV22-000017, Defendant's Reply Brief in Support of Motion for Dismissal of Amended Complaint, at 1, filed February 18, 2025. Defendant argues three points.

First, that the Circuit Court lacks jurisdiction because the matter is not ripe. Defendant argues that the issues presented to the Supreme Court and found ripe in *Detmers II*, are different from the instant request for declaratory judgment in Plaintiff's Amended Complaint, requiring a new examination of ripeness. *See Id.* While declaratory judgment is appropriate with respect to rights which will accrue in the future if conflict is imminent and rights are presently determinable, *see Id.*, at 3 (citing *Danforth v. City of Yankton*, 25 N.W. 50, 413 (S.D. 1946); *Kneip v. Herseth*, 214 N.W.2d 93, 653 (S.D. 1974)), this case is unlike *Kneip* because Plaintiff's specific request involves "parties' rights and obligations that are not currently existing or even determinable." 40CIV22-000017, Defendant's Reply Brief in Support of Motion for Dismissal of Amended Complaint, at 3, filed February 18, 2025 (emphasis in original). Defendant relies on the premise

that the parties' duties of good faith and fair dealing are required, but not guaranteed, to show the matter is not ripe because how a court rules in the future will depend on how the facts develop.

This Court finds Defendant's argument reasonable. While *Detmers I and II* established that the language of the contract is unambiguous, it is mere speculation how any party's future acts will or will not reflect good faith and fair dealing in context of the May 5, 2000, contract.

Next, Defendant argues that even if there is jurisdiction, that the Court should exercise its discretion to decline to enter the requested declaratory judgment. 40CIV22-000017, Defendant's Reply Brief in Support of Motion for Dismissal of Amended Complaint, at 5, filed February 18, 2025. "Although declaratory relief is designed to determine legal rights or relations before an actual injury occurs, courts ordinarily will not render decisions involving future rights contingent upon events that may or may not occur." 40CIV22-000017, Defendant's Response Brief in Opposition to Plaintiff's Motion for Summary Judgment (Second) and Brief in Support of Motion for Dismissal of Amended Complaint, at 7, filed February 5, 2025 (quoting *Boever*, 526 N.W.2d at 750). "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." SDCL § 21-24-10. Defendant argues that granting Plaintiff's motion provides Plaintiff the opportunity to circumvent her duties of good faith and fair dealing in any future discussions with Defendant about relocating the sculptures, and that it would be counter to the purpose of the Act, "[t]o afford security against uncertainty with a view toward avoiding litigation and settling rights before there has been an irrevocable change of position." 40CIV22-000017, Defendant's Reply Brief in Support of Motion for Dismissal of Amended Complaint, at 5-6, filed February 18, 2025 (quoting *Kneip*, 214 N.W.2d at 654). Further, Defendant argues that declaratory judgment would not terminate the uncertainty or controversy related to triggering of the sale provision of the May 5, 2000, Agreement because, as above, a court must consider how the parties' adherence to, or breach of the duties of good faith and fair dealing occurred, and such conduct cannot be foreseen.

While this Court disagrees that a declaratory judgment would permit Plaintiff to skirt her duties of good faith and fair dealing, this Court agrees that a declaratory judgment at this time is unwise because this Court lacks knowledge of the parties' conduct, including good faith and fair dealing, with respect to actions taken which invoke the balance of paragraph three of the May 5, 2000 contract.

Finally, Defendant argues that Plaintiff's statement about the Supreme Court's treatment of the issues of ripeness and good faith in *Detmers II* is misleading because there, the Supreme Court stated, "The condition that 'the sculptures are not agreeably displayed elsewhere' does not impose any obligation on the parties beyond the implied duty of good faith and fair dealing." *Id.*, at 7-8 (quoting *Detmers II*, 2023 SD 40, at ¶33, 994 N.W.2d at 457) (emphasis in Defendant's original). Defendant's argument apparently refers to statements in 40CIV22-000017, Plaintiff's Brief in Support of Motion for Summary Judgment (Second), at 3-4, filed November 25, 2024 (indicating that because the South Dakota Supreme Court held "Costner's obligation under paragraph 3 of the May 5, 2000, contract is ongoing," that the Court should grant summary judgement for Detmers, declaring that "Costner's decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph 3 of the Agreement unless the parties agree to another display location," and that doing so would allow "the clerk to close this matter subject to the parties' right to enforce the sale clause ...").

Based on the Supreme Court's findings in *Detmers II* and the analysis and reasons stated above, this Court need not individually address alleged misstatements by Plaintiff to adjudicate the instant motions filed by Plaintiff and Defendant.

As indicated above, for purposes of Plaintiff's Motion for Summary Judgment (Second), "[t]he evidence must be viewed most favorably to [Costner] and reasonable doubts should be resolved against [Detmers]." *Millard*, 1999 S.D. 18, ¶ 8, 589 N.W.2d at 218.

Here, Plaintiff has failed to overcome her burden under the Act to show that the declaratory judgment sought would "terminate the uncertainty or controversy giving rise to the proceeding." See SDCL § 21-24-10. There, there is no "imminent conflict" needed for a declaratory judgment because there has been no change in material circumstances since the Supreme Court's ruling in *Detmers II*. The sculptures are still displayed at Tatanka, and the land has not been sold.³ Neither Plaintiff nor Defendant has directly alleged facts or adduced evidence to show bad faith or unfair dealing with the other.⁴ Thus, this Court declines to issue the declaratory judgment sought by Plaintiff because this Court will not speculate about the parties' future conduct which may trigger the balance of paragraph three of the May 5, 2000 contract.

As the Amended Complaint averred a single prayer for relief and this Court having found in favor of Defendant under summary judgment, this Court now considers Defendant's Motion to Dismiss. Based upon the reasoning provided above, this Court determined declaratory judgment isn't appropriate under Plaintiff's action and therefore should be denied. Further, and as a direct result of no changes in the party's position since *Detmers II*, and the request for declaratory judgment being the only cause of action in this matter, this Court agrees the action should be dismissed.

Accordingly, for the reasons stated herein, it is hereby

ORDERED, that Plaintiff's Motion for Summary Judgment is denied; and it is further

ORDERED, that Defendant's Motion for Dismissal of Amended Complaint is granted without prejudice.

Dated this 12th day of March, 2025.

BY THE COURT

Honorable Eric Strawn
Circuit Court Judge

ATTESTED:

Clerk of Courts

CAROL LATUSECK

DEPUTY

BREE NICOLUSSI



³ "The potential sale of Tatanka merely foreshadows the possibility that the obligation on Costner to sell the sculptures, split the profits, and assign the copyright will be triggered unless the parties otherwise agree to the location for the display of the sculptures," there is no *Detmers II*, 2023 SD 40, at ¶33, 994 N.W.2d at 457.

⁴ "While Costner admitted he still intends to sell Tatanka, this at most signals that his contingent obligation to sell the sculptures may vest." *Id.*, 2023 SD 40, at ¶34, 994 N.W.2d at 457-58.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of the MEMORANDUM DECISION AND ORDER in the case of PEGGY DETMERS VS KEVIN COSTNER(40CIV22-17) upon the persons herein next designated all on the date below shown, by emailing a copy thereof to the parties and receiving a delivery receipt for the same confirming the email was delivered to the recipients' mailboxes.

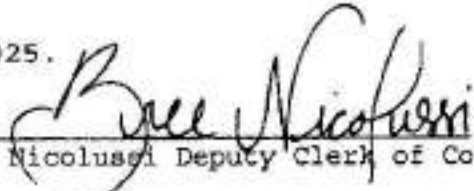
Mr. Russ Janklow
Attorney at Law
russ@janklowabdallah.com

Mr. Andrew Demgaard
Attorney at Law
Andy.damgaard@woodsfuller.com

Mrs. Stacy Hegge
Attorney at Law
shegge@gpna.com

Mrs. Catherine Seeley
Attorney at Law
cseeley@gpna.com

Dated this 12th day of March 2025.


Bree Nicolussi Deputy Clerk of Courts

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 31028

PEGGY A. DETMERS,

Plaintiff/Appellant,

v.

KEVIN COSTNER,

Defendant/Appellee.

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

THE HONORABLE ERIC STRAWN
Circuit Court Judge

APPELLEE'S BRIEF

Attorneys for Plaintiff/Appellants

Andrew R. Damgaard
Woods, Fuller, Shultz & Smith P.C.
300 South Phillips Avenue, Suite 300
P.O. Box 5027
Sioux Falls, SD 57117-5027

Russell Janklow
Johnson, Janklow, Abdallah, & Reiter
101 S. Main Avenue #100
P.O. Box 2348
Sioux Falls, SD 57101

Attorneys for Plaintiff/Appellee

Stacy R. Hegge
Catherine A. Seeley
306 East Capitol Avenue
Suite 300
Pierre, SD 57501
(605) 494-0105

The notice of appeal was filed on the 17th day of March, 2025.

TABLE OF CONTENTS

PRELIMINARY STATEMENT.....	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE LEGAL ISSUES	2
I. Whether Detmers’s Amended Complaint properly invoked the circuit court’s jurisdiction under the Declaratory Judgments Act and the principles of justiciability..	2
II. Whether the circuit court erred in declining to grant Appellant Detmers’s Motion for Summary Judgment due to undeveloped questions of material fact.	3
III. Whether the circuit court abused its discretion in declining to issue a declaratory judgment pursuant to its authority under SDCL 21-24-10 and dismissing the action..	3
STATEMENT OF THE CASE.....	4
FACTUAL AND PROCEDURAL BACKGROUND	5
STANDARD OF REVIEW	7
ARGUMENT.....	8
I. The circuit court lacked subject matter jurisdiction over Detmers’s Amended Complaint.	8
II. Detmers’s Amended Complaint does not present a justiciable controversy and should be subject to dismissal for failure to state a claim.	12
III. The circuit court properly granted Costner’s motion for dismissal because a declaratory judgment would not terminate the uncertainty or end the controversy.	15
A. Circuit courts have significant discretion when declining to issue a declaratory judgment.	15
B. Undeveloped and unpredictable facts relative to the parties’ good faith and fair dealing will determine what, if any, rights and obligations the parties will have..	18
C. Similarly, the parties’ future actions may implicate the prevention doctrine, thus impacting whether rights or obligations accrue.	21
IV. The circuit court properly denied Detmers’s motion for summary judgment because undeveloped questions of fact would necessarily have implications on the parties’ legal rights and statuses under the relevant contract provision.	23
CONCLUSION.....	26
CERTIFICATE OF COMPLIANCE.....	28
CERTIFICATE OF SERVICE	29

TABLE OF AUTHORITIES

Cases

<i>Boever v. Bd. of Acct.</i> , 526 N.W.2d 747 (S.D. 1995)	12, 17
<i>Braun v. New Hope Tp.</i> , 2002 S.D. 67, 646 N.W.2d 737	7
<i>Brillhart v. Excess Ins. Co. of America</i> , 316 U.S. 491 (1942)	15
<i>Detmers v. Costner</i> , 2023 S.D. 40, 994 N.W.2d 445	passim
<i>Dollar Loan Ctr. Of S. Dakota, LLC v. Dep't of Lab. & Reg., Div. of Banking</i> , 2018 S.D. 77, ¶ 14, 920 N.W.2d 321, 324	1
<i>Farm Credit Services of America v. Dougan</i> , 2005 S.D. 94, 704 NW.2d 24	3, 4, 19
<i>FB&I Bldg. Products, Inc. v. Superior Truss & Components, a Div. of Banks Lumber, Inc.</i> , 2007 S.D. 13, 727 N.W.2d 474	19
<i>Garrett v. BankWest, Inc.</i> , 459 N.W.2d 833 (S.D. 1990)	18, 19
<i>Greene v. Wiese</i> , 69 N.W.2d 325 (S.D. 1955)	17
<i>Jensen v. Dep't of Corrections</i> , 2025 S.D. 35	passim
<i>Johnson v. Coss</i> , 2003 S.D. 86, 667 N.W.2d 701	4, 14, 21, 22
<i>Johnson v. Matthew J. Batchelder Co., Inc.</i> , 2010 S.D. 23, 779 N.W.2d 690	3, 23
<i>Kneip v. Herseth</i> , 87 S.D. 642, 214 N.W.2d 93 (S.D. 1974)	3, 10, 17
<i>Lippold v. Meade Cty. Bd. of Commr's</i> , 2018 S.D. 7, 906 N.W.2d 917	8, 9
<i>North Star Mut. Ins. Co. v. Kneen</i> , 484 N.W.2d 908 (S.D. 1992)	15
<i>O'Connor v. King</i> , 479 N.W.2d 162 (S.D. 1991)	15, 16
<i>Osman v. Karlen & Assocs.</i> , 2008 S.D. 16, 746 N.W.2d 437	9, 14
<i>Royal Indem. Co. v. Metro. Cas. Ins. Co. of New York</i> , 128 N.W.2d 111 (S.D. 1964) ..	4, 7, 16
<i>State v. Haase</i> , 446 N.W.2d 62 (S.D. 1989)	9
<i>Stathis v. Marty Indian School</i> , 2019 S.D. 33, 930 N.W.2d 653	8, 9
<i>Uhre Realty Corp. v. Tronnes</i> , 2024 S.D. 10, 3 N.W.3d 427	19
<i>Walker v. Walker</i> , 2009 S.D. 31, 765 N.W.2d 747	8
<i>Weitzel v. Sioux Valley Heart Partners</i> , 2006 S.D. 45, 714 N.W.2d 884	20
<i>Wilton v. Seven Falls Co.</i> , 515 U.S. 277 (1995)	15
<i>Zochert v. Protective Life Ins. Co.</i> , 2018 S.D. 84, 921 N.W.2d 479	19

Statutes

SDCL 15-26A-3(1)	1
SDCL 15-26A-3(2)	1, 2
SDCL 15-26A-60(3)	1
SDCL 15-26A-66(b)	28
SDCL 15-6-56(c)	3, 23
SDCL 21-24	2, 9, 16
SDCL 21-24-1	9
SDCL 21-24-10	passim
SDCL 21-24-14	10
SDCL 21-24-3	9, 10

Constitutional Provisions

S.D. Const. art V. § 5	8
------------------------------	---

PRELIMINARY STATEMENT

Citations to the record will appear as “R. ___” with the page number from the Clerk’s Appeal Index. References to Appellee’s Appendix will be referred to as “APP ___.”

JURISDICTIONAL STATEMENT

This Court lacks subject matter jurisdiction over this appeal.

“An appeal to this Court may not be taken from a circuit court order unless it is authorized under SDCL 15-26A-3.” *Dollar Loan Ctr. Of S. Dakota, LLC v. Dep’t of Lab. & Reg., Div. of Banking*, 2018 S.D. 77, ¶ 14, 920 N.W.2d 321, 324 (quotation and footnote omitted). Accordingly, the South Dakota Rules of Appellant Procedure require that an Appellant’s brief include a jurisdictional statement that “must make it appear, in cases of appeal, that the order sought to be reviewed is appealable.” SDCL 15-26A-60(3). Appellant’s brief states that Appellant seeks to invoke this Court’s jurisdiction under South Dakota Codified Law section 15-26A-3(1). Appellant’s Brief at 1. That subsection explicitly allows parties to appeal “[a] judgment” to this Court, but no judgment was ever entered in this case. SDCL 15-26A-3(1).

Appellant may have intended to invoke this Court’s jurisdiction under South Dakota Codified Law section 15-26A-3(2), which allows for an appeal from “[a]n order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken,” but that subsection does not apply in this case either. The circuit court’s March 12, 2025 Memorandum Decision and Order from which Appellant attempts to appeal was issued without prejudice. Therefore, it does not “determine[] the action,” or “prevent[] a

judgment from which an appeal might be taken.” SDCL 15-26A-3(2). This issue was addressed in Appellee’s Response to Appellant’s Showing filed with this Court on May 1, 2025, and those arguments are incorporated here by this reference.

This Court raised this jurisdictional question when it issued an Order to Show Cause in this case on April 1, 2025. Although this Court did not issue an opinion or decision on the jurisdictional question, it issued an Order Directing Appeal to Proceed on June 17, 2025, and directed the parties to brief the appeal issues on the merits. This Court’s Order Directing Appeal to Proceed seemingly did not decide the jurisdictional issue but left it open for this Court’s later consideration.

STATEMENT OF THE LEGAL ISSUES

Detmers’s appeal seeks to force the circuit court’s hand in order to secure a declaratory judgment that would guarantee her certain contingent interests while preempting Costner’s ability to achieve and defend the parties’ bargained-for exchange. In addition to the question of whether this Court has jurisdiction to hear this appeal, issues on appeal are as follows:

I. Whether Detmers’s Amended Complaint properly invoked the circuit court’s jurisdiction under the Declaratory Judgments Act and the principles of justiciability.

It did not. Detmers’s Amended Complaint sought relief outside the bounds of the authority granted to circuit courts under the Declaratory Judgments Act. Additionally, Detmers’s Amended Complaint does not satisfy the justiciability requirements for declaratory judgment actions. Accordingly, although the circuit court did not issue any decision on jurisdictional grounds, it lacked subject matter jurisdiction over the claims in Detmers’s Amended Complaint.

- SDCL 21-24

- *Kneip v. Herseth*, 87 S.D. 642, 214 N.W.2d 93 (S.D. 1974)
- *Jensen v. Dep't of Corrections*, 2025 S.D. 35

II. Whether the circuit court erred in declining to grant Appellant Detmers's Motion for Summary Judgment due to undeveloped questions of material fact.

No, the circuit court did not err. Detmers's Amended Complaint and Motion for Summary Judgment (Second) requested a definitive statement about a contingent, speculative right that may or may not vest pursuant to the terms the parties' May 5, 2000 letter agreement (Agreement). Because the contingent right or obligation depends on the occurrence of a condition precedent, the parties' legal rights and obligations under the applicable provision will necessarily be impacted by their respective future conduct. Depending on the parties' future actions, there may very likely be disputed facts as to each parties' reasonableness and how the conduct may affect their legal rights and obligations under the Agreement. The circuit court acknowledged that it could not predict the parties' future actions, so it properly denied Detmers's Motion for Summary Judgment.

- SDCL 15-6-56(c)
- *Johnson v. Matthew J. Batchelder Co., Inc.*, 2010 S.D. 23, 779 N.W.2d 690
- *Farm Credit Services of America v. Dougan*, 2005 S.D. 94, 704 NW.2d 24

III. Whether the circuit court abused its discretion in declining to issue a declaratory judgment pursuant to its authority under SDCL 21-24-10 and dismissing the action.

No, the circuit court did not err in granting Defendant's Motion for Dismissal of Amended Complaint. The South Dakota Declaratory Judgments Act provides circuit courts substantial discretion in determining whether and when to issue a declaratory judgment. The circuit court correctly determined that any statement of the parties' legal rights and obligations are dependent on future actions or occurrences given the

contingent status of those rights or obligations. Because the parties' legal rights and statuses could not be determined without the knowledge of future conduct, the circuit court correctly determined that a declaratory judgment would not end the controversy, and it properly granted Defendant's Motion for Dismissal of Amended Complaint.

- SDCL 21-24-10
- *Royal Indem. Co. v. Metro. Cas. Ins. Co. of New York*, 128 N.W.2d 111 (S.D. 1964)
- *Johnson v. Coss*, 2003 S.D. 86, 667 N.W.2d 701
- *Farm Credit Services of America v. Dougan*, 2005 S.D. 94, 704 NW.2d 24

STATEMENT OF THE CASE

Following this Court's decision in *Detmers v. Costner*, 2023 S.D. 40, 994 N.W.2d 445 (*Detmers II*), Appellant Peggy Detmers (Detmers) filed an Amended Complaint raising a single claim for declaratory judgment. R. 307-27, 344-49; APP 10-36. Detmers's Amended Complaint did not ask the circuit court to determine the validity or construction of the parties' May 5, 2000 letter agreement, nor did it seek clarification of an ambiguity in a prior judicial order. *See* R. 344-49; APP 13-36. Rather, it requested the circuit court render a judgment transposing a single sentence from this Court's opinion in *Detmers II* into a declaratory judgment to give the sentence conclusive effect. R. 349; APP 36. Appellee Kevin Costner (Costner) opposed Detmers's Motion for Summary Judgment because undeveloped factual issues would impact the accuracy and legal implications of the requested declaration. R. 395-413. For those same reasons, Costner filed a Motion to Dismiss Detmers's Amended Complaint. R. 393. On March 12, 2025, the Honorable Eric Strawn of the Fourth Judicial Circuit, County of Lawrence, South Dakota, entered a Memorandum Decision and Order denying Plaintiff Peggy Detmers's Motion for Summary Judgment and granting Defendant Kevin Costner's Motion to Dismiss. R. 447-52; APP 41-46. Detmers now appeals. R. 464.

FACTUAL AND PROCEDURAL BACKGROUND

This case has a long factual history of which this Court is well-aware. For purposes of this appeal, however, relatively few of the previously developed facts are relevant. Rather, the determinative events relevant to the relief requested in Detmers's Amended Complaint have not yet occurred.

It is, however, necessary for this Court to consider the procedural posture of this case. Detmers initiated this action alleging that Costner anticipatorily breached a contract and seeking a declaratory judgment that if certain future events occur, it would constitute a breach of the parties' contract. R. 3-9; APP 3-9. After considering competing motions for summary judgment, the circuit court ruled that Costner had no remaining obligations under the parties' agreement relative to the placement of certain sculptures, and it issued an order in Costner's favor which initiated the appeal in *Detmers II*. R. 247-258; 275-283.

This Court issued an opinion on the *Detmers II* appeal issues on August 2, 2023. R. 307-327; APP 10-30. Specifically, this Court held that Costner had not anticipatorily breached the parties' contract and that any remaining obligations relative to the sculptures' placement were merely contingent because the contract contained a condition precedent. *Detmers II*, 2023 S.D. 40, ¶¶ 24-25, 33-34; APP 24-25; 28-30. In this Court's analysis, it considered what could happen if the condition precedent were triggered. *Id.* ¶¶ 29, 34; APP 26, 29-30. At the conclusion of its opinion in *Detmers II*, this Court remanded Detmers's claims "for further proceedings consistent with this opinion." *Id.* ¶ 35; APP 30.

On remand, Detmers filed an Amended Complaint raising a single claim for declaratory judgment. R. 344-349; APP 31-36. Detmers's prayer for relief requested that

the circuit court enter a declaratory judgment “that the obligations in paragraph 3 of the Agreement are ongoing and that Costner’s decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph three of the Agreement unless the parties agree to another display location.” R. 349; APP 36.

Detmers then filed Plaintiff’s Motion for Summary Judgment (Second) with the circuit court, asking that the court enter a declaration that “Costner’s decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph 3 of the Agreement unless the parties agree to another display location.” R. 388-89. Detmers’s filings with the circuit court indicated that she sought to put an end to this litigation. R. 386. Costner resisted Detmers’s motion for summary judgment due to questions of undeveloped fact and due to the misapplication of this Court’s phrasing in *Detmers II* and misstatement of its ultimate holding. R. 395-413.

Costner also filed Defendant’s Motion for Dismissal of Amended Complaint with the circuit court. R. 393. Costner’s motion was based principally on two issues: (1) whether the newly requested declaration was ripe for adjudication, and (2) whether, if ripe, the circuit court should decline to issue a declaratory judgment under the discretion afforded it in SDCL 21-24-10 due to the undeveloped factual issues that would necessarily impact the legal efficacy of the requested declaration. R. 395-413.

The circuit court entered a Memorandum Decision and Order denying Plaintiff’s Motion for Summary Judgment and granting Defendant’s Motion for Dismissal of Amended Complaint. R. 447-52; APP 41-46. In its decision, the circuit court determined that it “should deny Plaintiff’s request for declaratory judgment regarding paragraph three of the... contract because the Court requires facts about the parties’ good faith and fair

dealing with respect to actions taken which invoke the balance of paragraph three of the... contract.” R. 450; APP 44. The circuit court specifically found that a declaratory judgment at that juncture would be “unwise” due to the unknown facts relative to the parties’ conduct. R. 451; APP 45. In its Memorandum Decision and Order, the circuit court explained that it “decline[d] to issue the declaratory judgment sought by Plaintiff because [it] will not speculate about the parties’ future conduct which may trigger the balance of paragraph three of the... contract.” R. 452; APP 46. Not only did the circuit court deny Detmers’s motion for summary judgment, it expressly “determined declaratory judgment isn’t appropriate under Plaintiff’s action and therefore should be denied.” R. 452; APP 46.

STANDARD OF REVIEW

When reviewing a circuit court’s order on a motion for summary judgment, this Court “must determine whether the moving party demonstrated the absence of any genuine issue of material fact and established entitlement to judgment on the merits as a matter of law.” *Braun v. New Hope Tp.*, 2002 S.D. 67, ¶ 8, 646 N.W.2d 737, 740 (cleaned up and quotation omitted). “The evidence must be viewed most favorably to the nonmoving party, and reasonable doubts should be resolved against the moving party,” *Id.* (cleaned up and quotation omitted).

This Court has applied the abuse of discretion standard to its review of a circuit court’s decision not to issue a declaratory judgment based on the discretion vested in it by the Declaratory Judgments Act. *See Royal Indem. Co. v. Metro. Cas. Ins. Co. of New York*, 128 N.W.2d 111, 114 (S.D. 1964) (applying the abuse of discretion standard when considering a trial court’s actions relative to a prior version of SDCL 21-24-10). An abuse of discretion exists “when discretion is exercised to an end or purpose not justified

by, and clearly against, reason and evidence.” *Walker v. Walker*, 2009 S.D. 31, ¶ 2, 765 N.W.2d 747, 749 (cleaned up and quotation omitted). “When applying the abuse of discretion standard, [this Court] do[es] not inquire whether [it] would have made the same decision. Instead, [it] decide[s] only whether the circuit court could reasonably reach the conclusion it did in view of the applicable law and the circumstances of the case.” *Id.*

ARGUMENT

Words have power, and declaratory judgments carry the force of law. Detmers’s Amended Complaint and this appeal attempt to oversimplify complicated legal principles by improperly insinuating her request is a judicial mandate. Appellant’s Brief at 14. However, Detmers’s attempt to merely isolate a single sentence of this Court’s opinion in *Detmers II* and have it rewritten as a declaratory judgment does not give adequate weight to the entirety of this Court’s earlier opinion. Further, the cherry-picked sentence was not this Court’s essential holding as Detmers claims, but rather was a discussion of a possible consequence if the second condition precedent contained within the parties’ Agreement were to occur.

I. The circuit court lacked subject matter jurisdiction over Detmers’s Amended Complaint.

While circuit courts in South Dakota are courts of general jurisdiction, their jurisdiction to hear disputes is not unlimited. S.D. Const. art V. § 5. Rather, “[s]ubject matter jurisdiction is conferred solely by constitutional or statutory provisions.” *Stathis v. Marty Indian School*, 2019 S.D. 33, ¶ 14, 930 N.W.2d 653, 658 (quoting *Lippold v. Meade Cty. Bd. of Commr’s*, 2018 S.D. 7, ¶ 17, 906 N.W.2d 917, 921-22). “The test for determining jurisdiction is ordinarily the nature of the case, as made by the complaint,

and the relief sought.” *Id.* (quoting *Lippold*, 2018 S.D. 7, ¶ 17, 906 N.W.2d at 921-22). Subject matter jurisdiction cannot be conferred upon courts by consent or waiver, and it can be challenged at any point in the proceedings—even for the first time on appeal. *State v. Haase*, 446 N.W.2d 62, 64 (S.D. 1989).¹

Detmers’s Amended Complaint attempted to invoke the circuit court’s jurisdiction under South Dakota’s Uniform Declaratory Judgments Act (Act). R. 344-49. The Act provides circuit courts in this state with the jurisdiction to issue declaratory judgments in certain circumstances. *See generally* SDCL 21-24. Specifically, section 21-24-1 of the Act provides in part that circuit courts “shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.”² SDCL 21-24-1. Section 21-24-3 further provides that “[a]ny person interested under a.... written contract... may have determined any questions of construction or validity arising under the... contract... and obtain a declaration of rights, status, or other legal relations

¹ The circuit court did not issue an order based on jurisdictional grounds, so there is nothing for this Court to review in that regard. *See* Appellee’s Response to Appellant’s Showing, filed May 1, 2025; *see also* R. 447-452; APP 41-46. However, it is proper for courts to inquire into their own subject matter jurisdiction at every stage of litigation. If this Court finds that the circuit court was without jurisdiction, it should still affirm the dismissal of the action. *See Osman v. Karlen & Assocs.*, 2008 S.D. 16, ¶ 23, 746 N.W.2d 437, 444 (noting that this Court “will affirm the circuit court if there is a basis on the record to do so”) (citation omitted).

² SDCL 21-24-1 in full provides as follows:

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

thereunder.”³ SDCL 21-24-3. The Act, because it is remedial in nature, should be liberally construed and administered. SDCL 21-24-14; *Kneip v. Herseth*, 87 S.D. 642, 648, 214 N.W.2d 93, 96 (S.D. 1974). With such liberal construction, this Court has upheld a circuit court’s issuance of a declaratory judgment under certain circumstances that implicated future events. See *Kneip v. Herseth*, 87 S.D. 642, 654, 214 N.W.2d at 99-100 (holding that it was proper for the trial court to issue a declaratory judgment considering the electoral subject matter and the effect that a ruling would have on the plaintiff’s present rights).

However, this Court has also established some boundaries of the Act to avoid it being invoked for purposes of procuring advisory opinions. *Kneip*, 87 S.D. at 648, 214 N.W.2d at 96 (noting that the Act is limited to instances where there is a “justiciable controversy between legally protected rights of parties whose interests are adverse”); *Jensen v. Dep’t of Corrections*, 2025 S.D. 35, ¶ 22 (“[T]his is not to say that the Declaratory Judgments Act authorizes all requests for declaratory relief brought by any type of plaintiff.”). This Court has gone so far as to articulate that “[t]he Declaratory Judgment Act... should allow... the decision of *present rights* or status which are based upon future events when good-faith controversy is brought before the courts.” *Kneip*, 87 S.D. at 648, 214 N.W.2d at 96 (emphasis added).⁴ Although the Act has been properly

³ Detmers’s Amended Complaint does not pose a question of construction or validity. Rather, it requests a declaration about potential consequences of the parties’ speculative future conduct.

⁴ This Court has articulated that it is particularly appropriate to invoke the Act when future events are implicated and the issue involves matters of public interest, such as “the construction of statutes dealing with zoning, taxation, voting or family relations,” and those involving “civil rights, taxation, quasi-criminal legislation and the total electoral process.” *Kneip*, 87 S.D. at 648, 651, 214 N.W.2d at 97, 98. None of those issues are at play in this matter, which involves a potential contract dispute.

invoked when future events may be impacted by a declaration of a party's rights, those instances have involved a declaration of the parties' presently existing rights or legal status. That is not the case here.

Detmers's Amended Complaint does not seek a declaration of a party's present rights under an agreement. R. 349; APP 36. Rather, Detmers attempted to invoke the Act to achieve a declaration stating "Costner's decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph three of the Agreement unless the parties agree to another display location." R. 349; APP 36. Such request seeks a declaration about a future, contingent, and highly speculative right.

Because Detmers's requested relief seeks a statement about a future, contingent right, it seemingly falls outside of the jurisdiction conferred to circuit courts by the Act. In *Detmers II*, this Court found that paragraph three of the parties' Agreement contained two conditions precedent and noted that a condition "creates no right or duty in and of itself but is merely a limiting or modifying factor." *Detmers II*, 2023 S.D. 40, ¶ 24, 994 N.W.2d at 455. To that end, this Court explicitly stated that "[a]t present, Costner owes Detmers no obligation with respect to the display or sale of the sculptures that she can enforce against him." *Detmers II*, 2023 S.D. 40, ¶ 34, 994 N.W.2d at 458. The circumstances since *Detmers II* have not changed, and because Costner has no present obligation, Detmers correspondingly has no present right for the circuit court to determine and articulate.⁵

⁵ It is of note that in *Detmers II* this Court found that jurisdiction existed in relation to the declaratory judgment claim in Detmers's original Complaint. *Detmers II*, 2023 S.D. 40, ¶ 33, 994 N.W.2d at 458 n. 2. However, Detmers's claim for declaratory judgment in her original Complaint sought a determination of the parties' then-existing rights and status

The circuit court did not have jurisdiction over this matter because the Act does not extend jurisdiction to declarations of the nature Detmers requested. Accordingly, her Amended Complaint should be dismissed.

II. Detmers's Amended Complaint does not present a justiciable controversy and should be subject to dismissal for failure to state a claim.

This Court has recently articulated that there are four requirements to state a cognizable claim for a declaratory judgment action. *Jensen v. Dep't of Corrections*, 2025 S.D. 35, ¶ 22. Those four requirements are

(1) *There must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination.*

*Id.*⁶ (citing *Boever v. Bd. of Acct.*, 526 N.W.2d 747, 749-50 (S.D. 1995)) (emphasis in original).

because it was brought with the assumption that paragraph three of the parties' Agreement imposed an obligation and corresponding right to performance on the parties. See R. 7-8; APP 7-8. This is apparent in Detmers's original Complaint because she requested a declaration that certain actions would constitute a "breach" of the parties' Agreement, and there cannot be a "breach" unless there is a right to performance. See *Detmers II*, 2023 S.D. 40, ¶ 34; R. 326, APP 29. This Court's decision in *Detmers II*, dispelled that assumption and conclusively determined that paragraph three contained two conditions precedent and, therefore, did not establish any present rights or obligations on the parties. *Detmers II*, 2023 S.D. 40, ¶¶ 24, 34, 994 N.W.2d at 455, 458; R. 321-22, 326; APP 24-25, 29-30.

⁶ In *Jensen v. Department of Corrections*, this Court acknowledged that it had previously described these requirements as "jurisdictional," but it clarified that it is more accurate to describe them "simply as requirements necessary to state a claim for declaratory relief which is, of course, a predicate to a court exercising jurisdiction in individual cases."

This Court's recent decision in *Jensen v. Dep't of Corrections* made clear that plaintiffs seeking a declaratory judgment must have a claim of right in the relief sought independent of the Act itself. *Jensen*, 2025 S.D. 35, ¶ 25. In *Jensen*, this Court considered a plaintiff group's request for a declaratory judgment that the State of South Dakota is subject to a county's zoning ordinance. *Id.* ¶ 4. The plaintiffs in *Jensen*, "used their complaint to present something of a preemptive legal argument on the general topic of whether the State is subject to county zoning regulations."⁷ *Id.* ¶ 9. Because the plaintiffs themselves lacked any authority to enforce the zoning ordinance, they seemingly "relied upon the Declaratory Judgments Act, itself, to provide a basis for their ostensible right to enforce the Zoning Ordinance." *Id.* ¶ 25. This Court held that such was not sufficient to present a claim of right because "the Declaratory Judgments Act does not, itself, confer substantive rights upon plaintiffs." *Id.* Rather, "a claim of right necessary for a justiciable request for declaratory relief must arise from an independent source or substantive legal basis." *Id.* ¶ 29.

In the case currently before this Court, Detmers's Amended Complaint does not present a justiciable controversy because she does not have a right relative to the relief she seeks which she can enforce against Costner. In *Detmers II*, this Court found that "[a]t present, Costner owes Detmers no obligation with respect to the display or sale of

Jensen v. Dep't of Corrections, 2025 S.D. 35, ¶ 22, n.7. Because the parties' competing dispositive motions were considered prior to this Court's decision in *Jensen*, Costner's briefing addressed these requirements in the context of the circuit court's jurisdiction. R. 401-03. Accordingly, an analysis of these requirements is properly preserved for this Court's consideration on appeal.

⁷ The complaint in *Jensen* requested "that the Court shall direct and declare the State... must either conform the future development and use thereof to [the Zoning Ordinance]... [or] seek to change the zoning district." *Jensen*, 2025 S.D. 35, ¶30, n. 9.

the sculptures that she can enforce against him.” *Detmers II*, 2023 S.D. 40, ¶ 34, 994 N.W.2d 445, 458; R. 326; APP 29. Despite the lack of a legally enforceable right, Detmers still brings this declaratory judgment action in an effort to secure a judicial proclamation that a merely contingent right will definitively be triggered upon certain events without allowing for any consideration of circumstances that could potentially negate the creation of that right. See *Johnson v. Coss*, 2003 S.D. 86, ¶15, 667 N.W.2d 701, 707 (“Whether interference by one party to a contract amounts to prevention so as to excuse performance by the other party ... is a question of fact to be decided by the jury under all of the proved facts and circumstances.”). It is evident then, that, just as the plaintiffs in *Jensen*, Detmers attempts to use her Amended Complaint as a preemptive measure to obtain a favorable declaration that she hopes will relieve her from her implied obligations, as discussed further in Sections III(B)-(C) *supra*, under the parties’ Agreement.⁸ That is not allowed under the Act.

Because Detmers does not have a claim of right to the relief she requests, she has not stated a cognizable claim under the Act, and this Court should affirm the circuit court’s dismissal of the action. See *Osman v. Karlen & Assocs.*, 2008 S.D. 16, ¶ 23, 746 N.W.2d 437, 444 (noting that this Court “will affirm the circuit court if there is a basis on the record to do so”) (citation omitted).

⁸ Detmers’s briefing has made it increasingly apparent that she is seeking to misuse the declaratory judgment process to circumvent her implied obligations of good faith and fair dealing in relation to the parties’ Agreement. If the language of the Agreement continues to control, Detmers is obligated to act with the good faith and fair dealing. However, there is no implied obligation of good faith and fair dealing of a declaratory judgment. Detmers seemingly seeks to abuse the Act and its legitimate public policy purpose for her own benefit. Such an abuse of the system should not be tolerated, let alone rewarded.

III. The circuit court properly granted Costner's motion for dismissal because a declaratory judgment would not terminate the uncertainty or end the controversy.

A. Circuit courts have significant discretion when declining to issue a declaratory judgment.

In addition to conferring jurisdiction upon circuit courts to issue declarations of parties' present rights and statuses, the Uniform Declaratory Judgment Act also affords circuit court judges the discretion *not* to issue those declarations. Section 21-24-10 of the Act explicitly provides that "[t]he [circuit] court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." SDCL 21-24-10. "Unquestionably, a trial court has discretion to grant or deny a declaratory judgment action." *North Star Mut. Ins. Co. v. Kneen*, 484 N.W.2d 908, 911 (S.D. 1992); *see also O'Connor v. King*, 479 N.W.2d 162, 165 (S.D. 1991) ("The trial court is vested with discretion to refuse to make a declaration if to do so would not terminate the controversy between the parties.").

Similarly, when considering declaratory judgment actions brought in federal courts, the United States Supreme Court has noted that "district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995) (citing *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942)).

When looking strictly at the language of the Act, it is important to note that it grants powers and discretion only to the circuit court. Detmers seems to suggest that she has some right or entitlement to a declaratory judgment, but the plain language of the Act,

as confirmed by this Court's decision in *Jensen*, does not confer any such right or entitlement. Rather, the Act indicates that parties may have their rights or statuses declared in certain instances, and it grants the circuit court authority to issue those declaratory judgments while expressly granting it discretion not to issue such judgments when the circumstances indicate that it would not end the controversy or uncertainty. *See generally* SDCL 21-24. The discretion afforded to trial courts about whether and when to issue a declaratory judgment is an important part of the Act, which Detmers refuses to acknowledge.

This Court has affirmed a trial court's decision not to enter a declaratory judgment based exclusively on the discretion afforded it under SDCL 21-24-10 on multiple occasions. Specifically, in *Royal Indem. Co. v Metropolitan Cas. Ins. Co of New York*, this Court found that when individuals whose interest may be impacted by a declaratory judgment are not parties to the proceeding, a circuit court is justified in declining to issue a declaratory judgment because the declaration would not end the controversy. *Royal Indem. Co.*, 80 S.D. 541, 547, 128 N.W. 111, 114. Additionally, this Court affirmed a trial court's decision not to issue a declaratory judgment articulating a party's duties under a contract when there were additional claims in the lawsuit that would not be resolved by the requested declaration. *O'Connor*, 479 N.W.2d at 165.

In several other circumstances, this Court has discussed the discretion afforded trial courts not to issue a declaratory judgment interconnectedly with the jurisdictional issue of ripeness. In those decision, this Court highlighted that although the Act "is designed to determine legal rights or relations before an actual injury occurs, courts ordinarily will not render decisions involving future rights contingent upon events that

may or may not occur.” *Boever v. S.D. Bd. of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995); *see also Kneip*, 214 N.W.2d at 96 (stating in its justiciability analysis⁹ that “[c]ourts normally seek to avoid decisions involving future rights based upon contingencies which may or may not occur. Courts often require adverse claims, based upon present rather than speculative facts, which have ripened to a state of being capable of judicial adjustment”). When faced with jurisdictional questions, this Court has noted that “[e]ven if a court has jurisdiction ... it should decline to [decide the issue] if the issue is so premature that the court would have to speculate as to the presence of a real injury.” *Boever*, 526 N.W.2d at 750.

In *Greene v. Wiese*, 69 N.W.2d 325, 327 (S.D. 1955), this Court analyzed the bounds in which the Declaratory Judgments Act should be invoked. In *Greene*, this Court considered whether parties’ rights and obligations under a lease agreement could be determined prior to expiration of the lease. *Green v. Wiese*, 69 N.W.2d 325, 326-28 (S.D. 1955). This Court explicitly stated that “[a] declaration will not be made in a matter where the interest of the plaintiff is merely contingent or in anticipation of an event that may never happen.” *Id.* at 327 (citation omitted). The Court concluded, however, that the ending of the lease would definitely happen on a specified date, so the happening of the event was not contingent or speculative. *Id.*

Unlike the specified date in *Greene*, in the present case, it cannot be said that the “not agreeably displayed elsewhere” condition will definitely occur at some point.

⁹ The analysis in *Kneip* referred to its analysis as one relating to “jurisdiction,” but it actually involved a review and consideration of the justiciability requirements as clarified by this Court in its recent *Jensen* decision.

Detmers's requested relief is contingent and is in anticipation of an event that may never occur, making it inappropriate for declaratory relief.

The case at hand focuses on contingent, future rights that may not develop, and issuing a declaratory judgment as suggested by Detmers would not end a controversy. At present, this Court has already determined that the "not agreeably displayed elsewhere" language in the Agreement is a condition precedent, making any obligation or right relative to that condition contingent and completely dependent upon the happening of future events. As such, there can be no question as to the parties' current rights and statuses under that provision: neither has a current right or obligation other than to continue to act with the implied covenant of good faith and fair dealing. *Detmers II*, 2023 S.D. 40, ¶ 33, 994 N.W.2d at 457; R. 325; APP 28 ("The condition that 'the sculptures are not agreeably displayed elsewhere' does not impose any obligation on the parties beyond the implied duty of good faith and fair dealing.").

B. Undeveloped and unpredictable facts relative to the parties' good faith and fair dealing will determine what, if any, rights and obligations the parties will have.

Both parties' future actions relative to their continuing obligation of good faith and fair dealing may ultimately be determinative of their respective rights and obligations, making any declaration about contingent rights and obligations at this time not only imprudent, but likely impossible. "Every contract contains an implied covenant of good faith and fair dealing which prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract." *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990). Good faith is defined as "honesty in fact in the conduct or transaction concerned," but its specific meaning with regard to a

given contract “varies with the context and emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” *Id.* (citations omitted). The concept of “good faith” contemplates that the parties will “not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties.” *Farm Credit Services of America v. Dougan*, 2005 S.D. 94, ¶ 10, 704 N.W.2d 24, 28-29 (quotation omitted). “The covenant of good faith does not create an amorphous companion contract with latent provisions to stand at odds with or in modification of the express language of the parties’ agreement[,]” but rather, it “honors a party’s justified expectations.” *Farm Credit Services*, 2005 S.D. 94, ¶¶ 9, 12 (quotation omitted).

A lack of good faith in contract actions likewise varies with the context of the parties’ agreement and may be based on “evasion of the spirit of the deal; abuse of power to determine compliance; and, interference with or failure to cooperate in the other party’s performance.” *Uhre Realty Corp. v. Tronnes*, 2024 S.D. 10, ¶ 36, 3 N.W.3d 427, 437 (quoting *Zochert v. Protective Life Ins. Co.*, 2018 S.D. 84, ¶ 22, 921 N.W.2d 479, 487).

When a party breaches its implied duty of good faith and fair dealing, it may give rise to a breach of contract claim which could ultimately relieve the other party of performance. *Zochert*, 2018 S.D. 84, ¶ 22; see *FB&I Bldg. Products, Inc. v. Superior Truss & Components, a Div. of Banks Lumber, Inc.*, 2007 S.D. 13, ¶ 15, 727 N.W.2d 474, 478-79 (citation omitted) (“It is well established that a material breach of a contract excuses the non-breaching party from further performance.”).

The record on appeal evidences that the current location of the sculptures is not ideal for either party given factual developments since their initial placement. R. 421-22; APP 37-38. The parties' Agreement allows for them to agree to the placement of the sculptures, and it is silent as to subsequent placements. R.10-11; APP 1-2. Necessarily then, the implied covenant of good faith and fair dealing would allow the parties to agree to a subsequent location without triggering the sale provision contained in paragraph three of their Agreement. Both parties are entitled to have the other act reasonably in those discussions and to consider alternative proposed placements in good faith. Costner has been exploring an alternative placement for the sculptures and intends to present that proposal to Detmers when details relative to the alternative are more ironed out. R. 421-22. Detmers's briefing has suggested that she would not agree to the alternative placement that Costner proposes, citing a variety of hypothetical considerations. Appellant's Brief, at 13-14. Until a formal proposal for an alternative placement is presented to Detmers, and until she responds to that proposal in some way, there is no way to determine if the parties will ultimately agree to an alternative placement or have otherwise complied with their obligations of good faith and fair dealing in relation to the sculptures' placement location. See *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶31, 714 N.W.2d 884, 894 ("Whether a contract has been breached is a pure question of fact for the trier of fact to resolve."). Accordingly, no court could determine whether rights have developed or whether parties are relieved from obligations until those facts occur.

The implied duty of good faith will necessarily be implicated in determining whether the "not agreeably displayed elsewhere" condition has occurred, thereby

triggering a sale provision in the Agreement. Because the implied duty of good faith and fair dealing is a *mutual* obligation, any conclusive declaration that only considers Costner's actions would run contrary to the basic principles of the implied covenant and would be fundamentally unfair.

The circuit court recognized the incongruity between Detmers's requested declaratory judgment and the legal principles relating to the implied covenant of good faith and fair dealing. It, therefore, properly denied Detmers's motion for summary judgment and granted Costner's motion for dismissal because the enforceability of any contingent rights or obligations of the Agreement will necessarily require an analysis of both parties' future actions.

The circuit court's decision was based on the legal implications of undeveloped facts and was reasonable. Accordingly, it did not abuse its discretion in declining to issue a declaratory judgment and dismissing this action, and this Court should affirm its Memorandum Decision and Order.

C. Similarly, the parties' future actions may implicate the prevention doctrine, thus impacting whether rights or obligations accrue.

If Detmers unjustifiably refuses to agree to the relocation of the sculptures, application of the prevention doctrine could also relieve Costner of his contingent obligation. In *Detmers II*, this Court concluded that Costner had a contingent obligation dependent upon the occurrence of two conditions precedent: (1) the Dunbar not being built within ten years; and (2) "the sculptures are not agreeably displayed elsewhere." *See Detmers II*, 2023 S.D. 40, ¶ 25. "It is a general principle of contract law that failure of a condition precedent... bars enforcement of the contract." *Johnson*, 2003 S.D. 86, ¶ 13, 667 N.W at 705 (cleaned up and quotation omitted). Because of the contingencies

associated with conditions precedent, this Court has noted that a party's additional duty of good faith and fair dealing may require that the parties cooperate to bring about the occurrence of the condition precedent. In cases dealing with conditions precedent, the prevention doctrine functions as a form of estoppel in that "[a]n individual who prevents the occurrence of a condition may be said to be 'estopped' from benefiting from the fact that the condition precedent to his or her obligation failed to occur." *Id.* ¶ 15 (quotation omitted).

In light of this Court's application of conditions precedent in *Detmers II*, the prevention doctrine should also apply to relieve a party from its obligation if the occurrence of an unanticipated condition precedent is brought about by the other party's unilateral unjustified actions.¹⁰ "Whether interference by one party to a contract amounts to prevention so as to excuse performance by the other party and constitute a breach by the interfering party is a question of fact to be decided by the jury under all of the proved facts and circumstances." *Johnson*, 2003 S.D. 86, ¶ 15.

In the case at hand, the prevention doctrine may apply to relieve Costner from the sale provision if Detmers intentionally and unjustifiably refuses to agree to the display location of the sculptures. In order to determine if the prevention doctrine does apply, a

¹⁰ While the existence of a condition precedent was not briefed by the parties in *Detmers II*, typically, "[a] condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance... if the condition is not fulfilled, the right to enforce the contract does not come into existence." *Johnson v. Coss*, 2003 S.D. 86, ¶ 13, 667 N.W.2d 701, 705. However, the explicit language of the Agreement makes it clear that the parties did not intend a failure to agree to occur: "Although I do not anticipate this will ever arise, if... the sculptures are not agreeably displayed elsewhere..." See R. 10-11; APP 1-2; *Detmers II*, 2023 S.D. 40, ¶ 24, 667 N.W.2d at 455. It makes sense that the parties did not intend this to occur, otherwise the provision would essentially be an agreement to later disagree about the sculptures' display location.

careful analysis of the parties' actions will need to be conducted and additional facts will need to be developed. Once that information is gained, a factfinder would need to consider it in light of the parties' obligation to act in good faith. Because the prevention doctrine may function to relieve Costner of any sale obligation under the contract, it was not an abuse of discretion for the circuit court to decline to enter a declaratory judgment.

IV. The circuit court properly denied Detmers's motion for summary judgment because undeveloped questions of fact would necessarily have implications on the parties' legal rights and statuses under the relevant contract provision.

It is well established that summary judgment is only appropriate if the undisputed material facts, when viewed in the light most favorable to the nonmoving party, indicate that the moving party is entitled to judgment as a matter of law. SDCL 15-6-56(c); *Johnson v. Matthew J. Batchelder Co., Inc.*, 2010 S.D. 23, ¶ 8, 779 N.W.2d 690, 693 (quotation omitted) (stating that this Court "view[s] all evidence and favorable inferences from that evidence in a light most favorable to the nonmoving party"). "The moving party has the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Matthew J. Batchelder Co., Inc.*, 2010 S.D. 23, ¶ 8, 779 N.W.2d at 693 (cleaned up and quotation omitted).

Detmers's motion for summary judgment asked the circuit court to issue a declaratory judgment as a statement of the parties' legal rights and obligations based on speculative, undeveloped, and one-sided facts. The circuit court was correct to deny that motion.

Detmers's own briefing acknowledges that the facts may not have fully developed when it indicates that Detmers seeks a declaration about *the consequences* of a condition precedent rather than about her present rights or status. See Appellant's Brief at 7, n. 3.

As an initial matter, it is important to note that a condition precedent will not have any consequence unless and until the condition manifests. Detmers's briefing takes for granted that the condition will eventually occur, but such assumption cannot be made under the summary judgment standard whereby the circuit court must resolve reasonable disputes of fact in Costner's favor. Further, Detmers's assumption does not account for the parties' future actions which may impact their respective legal rights and obligations, particularly in relation to the duties of good faith and the prevention doctrine. See Section III(B)-(C), *supra*.

Unfortunately, Detmers's appellate briefing seems to misstate or mischaracterize the declaration that she seeks in an attempt to argue that her future conduct is irrelevant. Appellant's Brief at 9. Detmers's motion for summary judgment very clearly requested a declaration relative to the parties' future actions and the occurrence of a condition precedent. R. 388-89. However, the appellate briefing suggests that a consideration of Detmers's future actions, specifically in relation to the duty of good faith and fair dealing, is immaterial because Costner is contractually obligated to seek her agreement about the sculptures' placement. Appellant's Brief at 9 ("[W]hether Detmers acts in good faith with respect to any proposal made by Costner in the future is a separate issue from whether he was contractually obligated to seek her agreement or trigger the sale clause if he acted unilaterally.").¹¹ Detmers has never requested a declaration that Costner is contractually

¹¹ Detmers's briefing in this regard is particularly concerning, and it increases Costner's fears that Detmers intends to unequivocally refuse any proposed placement location without giving the proposal any meaningful consideration. That is the situation that Costner hopes to protect against by defending this action. Detmers's briefing has already indicated a number of pretextual and contradictory reasons she may refuse a proposal brought by Costner. Appellant's Brief at 13-14. However, the specifics of the proposal are yet unknown, and the considerations raised in Detmers's briefing actually suggest that

obligated to seek her agreement, and any such declaration would not be supported by this Court's decision in *Detmers II*.¹² Furthermore, although the relocation of the sculptures is not a foregone conclusion, Costner has put forth evidence by affidavit that he intends to seek Detmers's agreement for an alternative placement of the sculptures. Thus, undeveloped material facts about the forthcoming proposal and the parties' future negotiations will determine whether the condition precedent has been satisfied or otherwise extinguished.

Detmers also argues that Costner could not justifiably expect that the parties would agree to a placement of the sculptures because the Agreement contemplates that they may not agree. Appellant's Brief at 11. Not only does Detmers's position in this regard impermissibly ask this Court to view a disputed fact in the movant's favor, but it is also untenable based on the express language of the Agreement and on the parties' implied duties of good faith and fair dealing. The express language of the Agreement contemplates a future agreement of the parties and provides only a contingency if that does not occur: "[a]lthough I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere..." R. 10-11; APP 1-2. When the writing expressly indicates that a party expects that the parties will be able to agree to the sculptures' placement, it is especially reasonable and

a fact finder may need to assess those considerations in light of a proposal to determine whether the parties acted with the requisite good faith or if the prevention doctrine excused performance of the contingent obligation.

¹² This Court's holding in *Detmers II*, that paragraph three contained two conditions precedent does not support a position that Costner is contractually obligated to seek Detmers's agreement. Rather, the finding of a condition precedent indicates only when contingent obligations and rights under the agreement may vest.

justifiable that the parties will act in good faith in an attempt to reach some sort of agreement. It would be absurd to conclude that Costner must forfeit a significant asset that he had commissioned, paid for, and maintained if Detmers is allowed to unilaterally, unjustifiably, and unreasonably withhold her agreement to the sculptures' display. Not to mention, it also contradicts this Court's explicit finding that the condition relative to the sculptures' placement imposes an obligation of good faith and fair dealing on the parties. *Detmers II*, 2023 S.D. 40, ¶ 33.

Because undeveloped facts will necessarily impact the parties rights and obligations under the Agreement, the circuit court was correct to deny Detmers's motion for summary judgment, and this Court should affirm its Memorandum Decision and Order.

CONCLUSION

Unfortunately, Detmers's Amended Complaint and this appeal show that she is eager to point an accusatory finger at Costner while she remains unwilling to acknowledge her own obligation to act in good faith. She seeks to use the judicial machinery to obtain a declaration that will allow her to unjustifiably and unreasonably force Costner's hand to her exclusive benefit, thereby denying him his justified expectations under the Agreement.

Detmers cannot escape the fact that the occurrence or failure of the condition precedent at issue will depend on *both* parties' future conduct, and she cannot distill all conceivable, speculative future actions into a definitive legal declaration. At present, there is no controversy between the parties because the sculptures are agreeably displayed elsewhere. No controversy will materialize until the sculptures are "not agreeably displayed elsewhere" or until there are questions about the parties' good faith

negotiations about such display. Not only is it impossible to ascertain the parties' rights and status under the current facts of this case, but a declaratory judgment would not end any controversy or uncertainty. Therefore, the circuit court did not abuse its discretion when it decided not to issue a declaratory judgment, and this Court should affirm the circuit court's Memorandum Decision and Order.

Respectfully submitted this 8th day of August, 2025.

GUNDERSON, PALMER,
NELSON & ASHMORE, LLP

By: /s/ Stacy R. Hegge
Stacy R. Hegge
Catherine A. Seeley
Attorneys for Appellee/Defendant
306 East Capitol Ave., Suite 300
Pierre, South Dakota 57501
Telephone: (605) 494-0105
shegge@gpna.com
cseeley@gpna.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL § 15-26A-66(b). The font is Times New Roman size 12, which includes serifs. The brief is 27 pages long and the word count is 8,163, exclusive of the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated this 8th day of August, 2025.

By: /s/ Catherine A. Seeley
Stacy R. Hegge
Catherine A. Seeley
Attorneys for Defendant
306 East Capitol Ave., Suite 300
Pierre, South Dakota 57501
Telephone: (605) 494-0105
E-mail: shegge@gpna.com
E-mail: cseeley@gpna.com

CERTIFICATE OF SERVICE

I certify that on August 8, 2025, a true and correct copy of the **APPELLEE'S BRIEF and APPELLEE'S APPENDIX** was electronically filed and served upon the following individuals:

Andrew R. Damgaard
Woods, Fuller, Shultz & Smith P.C.
300 South Phillips Avenue, Suite 300
P.O. Box 5027
Sioux Falls, SD 57117-5027

Russell Janklow
Johnson, Janklow, Abdallah, & Reiter
101 South Main Avenue #100
P.O. Box 2348
Sioux Falls, SD 57101

By: /s/ Catherine A. Seeley

Stacy R. Hegge
Catherine A. Seeley
Attorneys for Defendant
306 East Capitol Ave., Suite 300
Pierre, South Dakota 57501
Telephone: (605) 494-0105
E-mail: shegge@gpna.com
E-mail: cseeley@gpna.com

Appellee's Appendix

Detmers v. Costner, Appeal No. 31028		
1	May 5, 2000 Letter Agreement	APP001
2	Complaint, filed January 18, 2022	APP003
3	Supreme Court Opinion in <i>Detmers v. Costner</i> , 2023 S.D. 40	APP010
4	Amended Complaint, filed September 5, 2024	APP031
5	Affidavit of Kevin Costner, filed February 5, 2025	APP037
6	Memorandum Decision and Order, filed March 12, 2025	APP041

Kevin Costner

COPY

May 5, 2000

Peggy Detmers
Detmers Studios
13488 Shelter Drive
Rapid City, South Dakota 57702

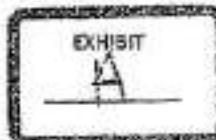
Dear Peggy,

1. In order to assist you during your transition period to other work, I will pay you \$60,000 (\$5,000 per month on the first day of each month over the next year) once the last sculpture has been delivered to the mold makers. I will even make \$10,000 of this a non-taxable gift to you so that you will only have to pay taxes on \$50,000. If we are able to sell the "Ridge Runners" (H&R1, BB1, CW2, and CF3) or the "Collision" (H&R3 and BB13) in the life scale to any party at or above standard bronze market pricing, the \$60,000 will have not to be paid. The receipts from any such sale will be divided as outlined in clause 2.

2. Although I will be the sole owner of all rights in the sculptures, including the copyright, in the sculptures, you will always be attached through your royalty participation. Because I believe that the sculptures are a valuable asset, I feel strongly that it is important that you maintain your 20% of gross retail price royalty on future sales of fine art reproductions (5% of gross retail price royalty on mass market reproductions selling for under \$200). However, should you desire to sell that interest to me at some point in the future, I would be happy to discuss that with you in good faith.

3. Although I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

EXHIBIT
11/10/00

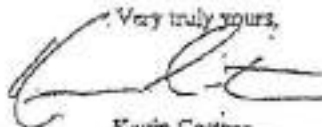


4. We will locate a suitable site for displaying the sculptures if The Dunbar is not under construction within three (3) years after the last sculpture has been delivered to the mold makers. In the meantime, until the sculptures are put on display, I will permit you to market and sell reproductions and you can retain eighty percent 80% of the gross retail sales price and pay 20% to me. Once the sculptures are put on public display in public view, agreed upon by both parties (but with the final decision to be made by me if we do not agree); the percentages will reverse, 80% of the gross retail sales price to me and 20% to you. The marketing must proceed as outlined below.

5. After the sculptures are completed and prior to the resort's completion, I will, upon your request, advance the costs necessary to produce, photograph and advertise up to two (2) maquette limited editions (not to exceed \$7,500 in the aggregate), provided that such advances will be recoupable out of sales proceeds and the royalties paid as indicated above. A minimum of two Southwest Art full page, full color ads are to be purchased (not to exceed \$5,220 in the aggregate) within this first year (2005), to market one of the editions, it being understood that the amounts paid for such ads will be recoupable out of the sales proceeds.

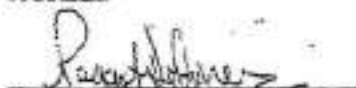
If the foregoing is acceptable, please sign two (2) copies of this letter to confirm our agreement and return them to me.

Very truly yours,



Kevin Costner

AGREED


Peggy DeMars

STATE OF SOUTH DAKOTA

5

IN CIRCUIT COURT

COUNTY OF LAWRENCE

)

SS

FOURTH JUDICIAL CIRCUIT

PEGGY A. DETMERS.

Plaintiff,

V.

KEVIN COSTNER

Defendant.

40CIV. 21 -

COMPLAINT

40CIV22-000017

The Plaintiff, Peggy Detmers ("Detmers") states and alleges the following in support of her Complaint:

1. Detmers is a resident of Pennington County, South Dakota.
2. The Defendant, Kevin Costner ("Costner") is a resident of California.
3. Detmers is an artist known for her production of wildlife sculptures.
4. In the early 1990's, Costner desired to build a five-star international resort and casino in Deadwood, South Dakota.
5. The resort, which was to be named "The Dunbar," was to have 17 buffalo and Lakota bronze sculptures at its entrance.
6. Detmers orally agreed to create the sculptures for Costner.
7. Detmers accepted a significantly reduced fee of \$250,000 in exchange for royalty rights in the sculptures' reproductions, which were to be marketed and sold at The Dunbar.

Case Number: CIV 21-
Complaint

8. Detmers began working on the sculptures in the spring of 1994.
9. When The Dunbar had not been built by the late 1990's, however, Detmers stopped working on the sculptures.
10. After several months of discussions between them, he and Detmers entered into a contract.
11. The contract is dated May 5, 2000. It provides that Detmers would receive an additional \$60,000 in compensation and royalty rights on reproductions in exchange for her completing the 17 sculptures. A copy of the contract is attached hereto and incorporated herein as Exhibit A.
12. With respect to royalty rights on reproductions of the sculptures, the contract contemplated the sculptures as a "valuable asset." (*Id.* at ¶ 2).
13. The contract also contemplated that the sculptures would be publically displayed. (*Id.* at ¶ 4).
14. The contract gave Detmers certain rights related to the display of the sculptures.
15. Paragraph 3 of the contract provides:

Although I [Costner] do not anticipate this will ever arise, if The Dunbar is not built within (10) years or the sculptures are not agreeably displayed elsewhere, I will give you [Detmers] 50% of the profits from the sale of the one and one-quarter life scale sculptures after I [Costner] have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at or above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you [Detmers] the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders). (Exhibit A, ¶ 3).
16. Detmers finished the sculptures in June of 2000, which was just over six years after she commenced her work.

Case Number: CIV. 21 -
Complaint

17. Each of the 17 sculptures weighs approximately 2,000 pounds and collectively the 17 pieces are the third-largest bronze sculpture in the world.
18. By January of 2002, The Dunbar still had not been built.
19. The sculptures were displayed on the property where Costner intended to build The Dunbar.
20. The display was called "Tatanka."
21. Tatanka is open to the public and includes a visitor center, gift shop, café, interactive museum, and nature walkways.
22. Although Costner claimed he still intended to build The Dunbar on the same property where Tatanka was located, by 2008 The Dunbar had not been built.
23. Detmers brought an action against Costner in 2008 alleging she did not agree to the placement of the sculptures in the absence of The Dunbar and, as a result, the sculptures had not been agreeably displayed "elsewhere" as required by paragraph 3 of the contract.
24. The trial court ruled for Costner, holding that Tatanka was "elsewhere" pursuant to paragraph 3 of the contract. A copy of the trial court's Findings of Fact and Conclusions of Law are attached and incorporated herein as Exhibit B.
25. The trial court specifically found that Detmers was "agreeable to the sculptures' placement at Tatanka for the long term." *Id.* at p. 9, § 13.
26. The trial court also found that Costner intended to build The Dunbar.
27. On appeal, the South Dakota Supreme Court held that the issue before it was a factual issue and that the trial court's finding that Detmers and Costner agreed to the "permanent display of the sculptures at Tatanka" was not clearly erroneous. *Detmers v. Costner*, 814 N.W.2d 146, 149 (S.D. 2012) (emphasis added). A copy of the decision is attached as Exhibit C.

(04475639.1)

- 3 -

Case Number: CIV. 21 -
Complaint

28. The Supreme Court held that the contract between Detmers and Costner was binding and unambiguous and that Tatanka satisfied the contractual condition of the sculptures being agreeably displayed "elsewhere." *Id.* at 150.
29. The Supreme Court also affirmed the trial court's findings that Costner intended to build the Dunbar and was continuing to try and build it. *Id.* at 149.
30. As a result, the trial court's decision was affirmed. *Id.*
31. In the years that followed the Court's opinion, Detmers continued to receive a small amount of royalties from goods sold at Tatanka that were sold in connection with her name.
32. The royalties, however, were a very small fraction of the royalties she anticipated receiving from selling miniature reproductions of the sculptures at an international 5-star resort and casino.
33. Although she has the original molds for the 17 sculptures, she cannot reproduce the 17 sculptures because Costner owns the copyright.
34. Costner sold his restaurant and casino in Deadwood.
35. Costner sold all of the land where the resort was to be built with the exception of the 35 acres where Tatanka is located.
36. Costner now has listed those 35 acres for sale, which includes the visitor center, gift shop, café, interactive museum, and nature walkways. A copy of the real estate listing is attached hereto and incorporated herein as Exhibit D.
37. The listing, however, expressly excludes the 17 sculptures Detmers created from the sale and provides that they "will be relocated by seller."
38. Neither Costner nor anyone on his behalf has told Detmers where the sculptures will be relocated or attempted to procure her agreement pursuant to paragraph 3 of the contract to relocate the sculptures somewhere other than Tatanka.

{04475629.1}

- 4 -

Case Number: CIV. 21 -
Complaint

39. Detmers has not agreed to the sculptures being displayed somewhere other than Tatanka.

FIRST CAUSE OF ACTION—BREACH OF CONTRACT

40. Paragraphs 1 through 39 are incorporated herein as if set forth in full.
41. The Supreme Court's opinion in *Detmers v. Costner*, 814 N.W.2d 146 (S.D. 2012), affirmed the trial court's finding that Detmers and Costner agreed, pursuant to paragraph 3 of their contract, to display the sculptures at Tatanka, which was "elsewhere."
42. By listing the 35 acres upon which Tatanka is located for sale and unequivocally stating that the sculptures are to be relocated, Costner has committed an anticipatory repudiation of that agreement.
43. Detmers is legally entitled to an Order directing Costner to sell the sculptures and transfer the copyright back to Detmers pursuant to paragraph 3 of their contract.

ALTERNATIVE COUNT—DECLARATORY JUDGMENT

44. Paragraphs 1 through 43 are incorporated herein as if set forth in full.
45. As set forth in the South Dakota Supreme Court's decision, the contract between Detmers and Costner gave Detmers rights "regarding display of the sculptures." *Id.* at 148.
46. Detmers and Costner's contractual rights and legal relations are affected by Costner listing Tatanka for sale and unequivocally stating that the sculptures will be relocated.
47. A controversy exists between Detmers and Costner as to whether selling the real estate, closing Tatanka, and/or relocating the sculptures would breach the agreement between Detmers and Costner to display the sculptures at Tatanka, which included a visitor center, gift shop, café, interactive museum, and nature walkways.

(04475629.1)

- 5 -

Case Number: CIV. 21 -
Complaint

48. A declaratory judgment from this Court would remove any uncertainty and terminate the controversy between the parties.
49. Pursuant to South Dakota's Uniform Declaratory Judgment Act, Detmers respectfully requests a declaration from this Court that closing Tatanka or relocating the sculptures would constitute a breach of Detmers and Costner's agreement and trigger the sale of the sculptures and assignment of the copyright back to Detmers as set forth in paragraph 3 of their contract.

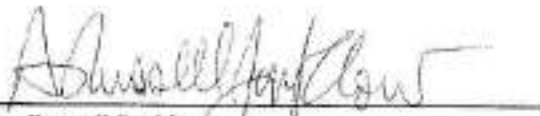
WHEREFORE, the Plaintiff, Peggy Detmers, respectfully requests the following relief:

- (1) For a judgment against Costner for breaching the agreement and an order requiring Costner to sell the sculptures in a commercially reasonable manner and assign the copyright to the sculptures back to Detmers in accordance with paragraph 3 of their contract;
- (2) Alternatively, for a declaration from this Court that closing Tatanka or relocating the sculptures would constitute a breach of the agreement and entitle Detmers to the remedy set forth in paragraph 3 of their contract; and
- (3) For allowable costs and disbursements incurred pursuing this action.

Case Number: CIV. 21 -
Complaint

Dated this 22nd day of Nov, 2021.

**JOHNSON, JANKLOW, ABDALLAH &
REITER, LLP**

BY 

A. Russell Janklow
101 S. Main Ave. #100
Post Office Box 2348
Sioux Falls, SD 57101
(605) 338-4304
Russ@janklowabdallah.com
Attorneys for the Plaintiff

Dated this 22nd day of Nov, 2021.

WOODS, FULLER, SHULTZ & SMITH, PC

BY /s/ Andrew R. Damgaard

Andrew R. Damgaard
300 South Phillips Avenue, Suite 300
Post Office Box 5027
Sioux Falls, SD 57117-5027
(605) 338-4304
Andy.Damgaard@woodsfuller.com
Attorneys for the Plaintiff

{04475629.1}

- 7 -

#30117-aff in pt & rev in pt-SR.J
2023 S.D. 40

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

AUG - 2 2023

Shirley A. Jameson-Rego
Clerk

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

PEGGY A. DETMERS,

Plaintiff and Appellant,

v.

KEVIN COSTNER,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT OF
THE FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE ERIC J. STRAWN
Judge

ANDREW R. DAMGAARD of
Woods, Fuller, Shultz & Smith, P.C.
Sioux Falls, South Dakota

A. RUSSELL JANKLOW of
Johnson, Janklow & Abdallah, LLP
Sioux Falls, South Dakota

Attorneys for plaintiff
and appellant.

STACY R. HEGGE
CATHERINE A. SEELEY of
Gunderson, Palmer, Nelson & Ashmore, LLP
Pierre, South Dakota

STATE OF SOUTH DAKOTA
In the Supreme Court
I, Shirley A. Jameson-Rego, Clerk of the Supreme Court of
South Dakota, hereby certify that the within instrument is a true
and correct copy of the original thereof as the same appears
on record in my office. In witness whereof, I have hereunto set
my hand and placed the seal of said court at Pierre, S.D. this

24th day of Aug. 2023
Shirley A. Jameson-Rego
Clerk of Supreme Court
Dakota

ARGUED
MARCH 22, 2023
OPINION FILED 08/02/23

* * * *

DANIEL E. ASHMORE of
Gunderson, Palmer, Nelson & Ashmore, LLP
Rapid City, South Dakota

Attorneys for defendant
and appellee.

#30117

JENSEN, Chief Justice

[¶1.] In the early 1990s, Kevin Costner commissioned Peggy Detmers to create 17 large, bronze sculptures of buffalo and Lakota warriors on horseback to display at The Dunbar, a luxury resort Costner planned to build on property he owned near Deadwood, South Dakota. Detmers commenced litigation against Costner in 2008, after The Dunbar had not been built, alleging that Costner was required to sell the sculptures and split the profits with Detmers pursuant to the terms of a prior written agreement (Agreement) because the parties had not agreed on an alternative location for display of the sculptures. The circuit court rejected Detmers' claim and found that the parties had agreed to permanently display the sculptures at Tatanka, another project Costner developed on some of the same property where The Dunbar was to be built. This Court affirmed. *Detmers v. Costner*, 2012 S.D. 35, 814 N.W.2d 146 (*Detmers I*).

[¶2.] In 2021, Detmers brought the current action against Costner, alleging that his sale-listing for Tatanka constituted an anticipatory breach of the agreement to permanently display the sculptures at Tatanka. In the alternative, Detmers sought a declaratory judgment that selling the Tatanka property and relocating the sculptures would trigger Costner's obligation to sell the sculptures under the terms of the Agreement. The parties filed cross motions for summary judgment. The circuit court granted summary judgment in favor of Costner and denied Detmers' motion. Detmers appeals. We affirm in part, reverse in part, and remand.

#30117

Factual and Procedural History

[¶3.] In 1994, Detmers began her work on the sculptures pursuant to an oral agreement with Costner. By 2000, believing progress had not been made toward developing The Dunbar, Detmers refused to finish the sculptures. Costner and Detmers negotiated and entered into the Agreement on May 5, 2000. As part of the Agreement, Costner agreed to pay Detmers additional compensation, clarified Detmers' royalty rights on reproductions of the sculptures, and provided her with certain rights regarding the display of the sculptures.

[¶4.] The parties' arguments in this appeal focus on three paragraphs of the Agreement:

2. Although I will be the sole owner of all rights in the sculptures, including the copyright, in the sculptures, you will always be attached through your royalty participation. Because I believe that the sculptures are a valuable asset, I feel strongly that it is important that you maintain your 20% of gross retail price royalty on future sales of fine art reproductions (5% of gross retail price royalty on mass market reproductions selling for under \$200). However, should you desire to sell that interest to me at some point in the future, I would be happy to discuss that with you in good faith.
3. Although I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at [or] above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).
4. We will locate a suitable site for displaying the sculptures if The Dunbar is not under construction within three (3) years after the last sculpture has been delivered to the

#30117

mold makers. In the meantime, until the sculptures are put on display, I will permit you to market and sell reproductions and you can retain eighty percent 80% of the gross retail sales price and pay 20% to me. Once the sculptures are put on public display in public view, agreed upon by both parties (but with the final decision to be made by me if we do not agree), the percentages will reverse, 80% of the gross retail sales price to me and 20% to you. The marketing must proceed as outlined below.

[¶5.] Costner and Detmers began looking for alternative locations to display the sculptures in 2002, after the sculptures were completed but construction on The Dunbar had not started. Costner eventually suggested permanently displaying the sculptures on a portion of the property originally intended to be part of The Dunbar. This project came to be known as Tatanka and included a visitor center, gift shop, cafe, interactive museum, and nature walkways to accompany the sculptures.

[¶6.] In 2008, Detmers sued Costner, seeking an order requiring Costner to sell the sculptures and disburse the sale proceeds consistent with paragraph three of the Agreement. She alleged that this provision of the Agreement had been triggered because The Dunbar had not been built and the sculptures were "not agreeably displayed elsewhere[.]" She claimed she had not agreed to the permanent display of the sculptures at Tatanka in the absence of The Dunbar and that Tatanka was not "elsewhere" under the terms of the Agreement. In response, Costner argued he had spent millions of dollars to develop Tatanka and that he and Detmers agreed to permanently place the sculptures at Tatanka, as an alternate location for the display of the sculptures under paragraph three.

[¶7.] The trial in *Detmers I* commenced more than ten years after the parties executed the Agreement. Although The Dunbar had not been built, the

#30117

circuit court found that Detmers and Costner had agreed to permanently display the sculptures at Tatanka. The court concluded that the sculptures were “agreeably displayed elsewhere” as Tatanka constituted “elsewhere” under the unambiguous terms of the Agreement. Based upon this determination, the circuit court denied Detmers’ claim that Costner was required to sell the sculptures pursuant to paragraph three of the Agreement and expressed that Costner had “fully performed under the terms of the [Agreement].” Detmers appealed the decision, arguing that she only agreed to the location because she had been promised The Dunbar would still be built. This Court affirmed, holding that “[t]he circuit court did not err or make any clearly erroneous factual findings in determining that the sculptures are ‘agreeably displayed elsewhere,’ in the absence of a guarantee from Costner that The Dunbar would be built.” *Id.* ¶ 24, 814 N.W.2d at 151.

[¶8.] In the decade that followed, Detmers continued to receive royalties from replicas of the sculptures sold at Tatanka. Meanwhile, construction on The Dunbar never began, and Costner sold all the property surrounding Tatanka that had been intended for The Dunbar. In the fall of 2021, Costner listed the real estate upon which Tatanka is located for sale online. The listing expressly excluded the sculptures from the sale and indicated that they “will be relocated by seller.”

[¶9.] In November 2021, Detmers brought the current action, claiming the real estate listing and statement concerning the relocation of the sculptures constituted an anticipatory breach of the agreement to display the sculptures at Tatanka. Detmers also included a count for declaratory judgment asking the court to determine her rights under the Agreement and specifically to determine that

#30117

closing Tatanka or relocating the sculptures from Tatanka would trigger Costner's obligation to sell the sculptures and assign the copyright to Detmers.

[¶10.] The parties filed cross motions for summary judgment, and the circuit court heard oral arguments on the motions. Detmers argued that Costner was required by *Detmers I* to permanently maintain the sculptures at Tatanka and that his decision to move them was an anticipatory breach of the agreement to permanently display the sculptures at Tatanka as a matter of law. Costner argued that Detmers' claim was barred under the doctrine of res judicata because *Detmers I* fully resolved all the issues involving the parties' obligations under the Agreement. Alternatively, Costner argued that he had fully performed under the terms of the Agreement after the parties agreed to locate the sculptures "elsewhere" and that he was not obligated to maintain the sculptures at Tatanka. He also argued the claims for anticipatory breach were not ripe.

[¶11.] The circuit court granted Costner's motion for summary judgment based upon res judicata, and alternatively, based on its determination that the reference to the "permanent" display of the sculptures in *Detmers I* did not obligate Costner to continue to display the sculptures at Tatanka in perpetuity. The court also determined that the "agreeably displayed elsewhere" language in the Agreement did not "constitute a continuing right or obligation" and that once the parties agreed to display the sculptures at Tatanka, Costner fully performed his obligations under the Agreement. Detmers appeals, raising three issues which we state as follows:

1. Whether the circuit court erred in concluding Detmers' claims are barred by the doctrine of res judicata.

#30117

2. Whether the circuit court erred in its interpretation of the Agreement and in holding Costner was discharged from any further performance under the Agreement.
3. Whether the circuit court erred in denying Detmers' motion for summary judgment that Costner anticipatorily breached the agreement to permanently display the sculptures at Tatanka as a matter of law.

Standard of Review

[¶12.] “We review a circuit court’s entry of summary judgment under the de novo standard of review.” *Healy Ranch, Inc. v. Healy*, 2022 S.D. 43, ¶ 17, 978 N.W.2d 786, 793, *reh’g denied* (Sept. 19, 2022) (quoting *Estate of Stoebner v. Huether*, 2019 S.D. 58, ¶ 16, 935 N.W.2d 262, 266). “Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of a trial court, affirmance of a summary judgment is proper.” *Id.* (quoting *Du-Al Mfg. Co., a Div. of SOS Consol., Inc. v. Sioux Falls Const. Co.*, 487 N.W.2d 29, 31 (S.D. 1992)). “The evidence must be viewed most favorably to the non-moving party and reasonable doubts should be resolved against the moving party.” *Id.* (quoting *Du-Al Mfg. Co.*, 487 N.W.2d at 31). However, the non-moving party has the burden to “present specific facts which demonstrate a genuine, material issue for trial.” *Id.* (quoting *Du-Al Mfg. Co.*, 487 N.W.2d at 31).

Analysis and Decision

I. Res Judicata

[¶13.] “Res judicata consists of two preclusion concepts: issue preclusion and claim preclusion.” *Id.* ¶ 40, 978 N.W.2d at 798 (quoting *Am. Family Ins. Grp. v. Robnik*, 2010 S.D. 69, ¶ 15, 787 N.W.2d 768, 774). “Issue preclusion refers to the

#30117

effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided.” *Id.* (quoting *Robnik*, 2010 S.D. 69, ¶ 15, 787 N.W.2d at 774). “Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit[.]” *Id.* (alteration in original) (quoting *Robnik*, 2010 S.D. 69, ¶ 15, 787 N.W.2d at 774). “What is prohibited . . . under claim preclusion is the cause of action itself, but under issue preclusion, it ‘is the particular issue or fact common to both actions.’” *Id.* ¶ 41, 978 N.W.2d at 798 (quoting *Bollinger v. Eldredge*, 524 N.W.2d 118, 122 (S.D. 1994)).

[¶ 14] For an action to be barred by *res judicata*, four elements must be satisfied:

(1) the issue in the prior adjudication must be identical to the present issue, (2) there must have been a final judgment on the merits in the previous case, (3) the parties in the two actions must be the same or in privity, and (4) there must have been a full and fair opportunity to litigate the issues in the prior adjudication.

Id. ¶ 42, 978 N.W.2d at 799 (quoting *Dakota, Minn., & E.R.R. Corp. v. Acuity*, 2006 S.D. 72, ¶ 17, 720 N.W.2d 655, 661). We apply these elements “under both issue preclusion and claim preclusion theories.” *Id.* ¶ 43, 978 N.W.2d at 799. “However, as it relates to claim preclusion, . . . our review is *not* restricted to whether the specific question posed by the parties in both actions was the same or whether the legal question posed by the nature of the suit was the same.” *Id.* ¶ 44, 978 N.W.2d at 799 (quoting *Farmer v. S.D. Dep’t of Revenue & Regul.*, 2010 S.D. 35, ¶ 10, 781 N.W.2d 655, 660). “For purposes of [claim preclusion], a cause of action is comprised of the facts which give rise to, or establish, the right a party seeks to

#30117

enforce. The test is a query into whether the wrong sought to be redressed is the same in both actions.” *Id.* ¶ 45, 978 N.W.2d at 799 (alteration in original) (quoting *Glover v. Krambeck*, 2007 S.D. 11, ¶ 18, 727 N.W.2d 801, 805). “If the claims arose out of a single act or dispute and one claim has been brought to a final judgment, then all other claims arising out of that same act or dispute are barred.” *Id.* (quoting *Farmer*, 2010 S.D. 35, ¶ 10, 781 N.W.2d at 660).

[¶15.] Costner asserts that Detmers’ current action is precluded by res judicata because Detmers seeks to relitigate the “not agreeably displayed elsewhere” language of the Agreement and because *Detmers I* affirmed the circuit court’s determination that Costner “has fully performed” under the terms of the Agreement after the parties agreed to place the sculptures at Tatanka. Detmers concedes elements two and three of res judicata are satisfied but argues that the issues are not the same in the two cases. She asserts that the only issues determined in *Detmers I* were (1) whether Detmers agreed to the placement of the sculptures at Tatanka in the absence of the resort and (2) whether the Tatanka location constituted “elsewhere” under the terms of the Agreement.

[¶16.] Detmers argues the current dispute involves Costner’s anticipatory breach of the agreement to permanently display the sculptures at Tatanka by stating his intention to unilaterally relocate the sculptures from Tatanka—or, otherwise, his intended action will trigger his obligation to sell the sculptures under the Agreement. She maintains that the facts and issues in this dispute were never before the court in *Detmers I* and were not capable of being litigated at that time. Detmers claims that she has not had a full and fair opportunity to litigate the

#30117

parties' rights in the Agreement now that Costner intends to move the sculptures from Tatanka.

[¶17.] Unlike *Detmers I*, the current dispute between Detmers and Costner centers around the parties' rights and obligations under the Agreement *after* the parties agreed to display the sculptures at Tatanka. In particular, the parties disagree whether Costner has any remaining obligation under the Agreement to sell the sculptures, split the sale proceeds, and return the copyright to Detmers if he unilaterally relocates the sculptures from the agreed location at Tatanka. In *Detmers I*, "[t]he sole issue at the bench trial was whether the sculptures were 'agreeably displayed elsewhere'" when they were placed at Tatanka. 2012 S.D. 35, ¶ 7, 814 N.W.2d at 149. The rights and obligations of the parties in the location and display of the sculptures, after they were agreeably displayed at Tatanka, were not litigated or decided in *Detmers I*.

[¶18.] Claim preclusion is also inapplicable because there is no showing that Detmers knew or should have known Costner would seek to relocate the sculptures from Tatanka. *Detmers I* did not discuss or even acknowledge the possibility that Costner might decide to relocate the sculptures in the future, nor was there any determination whether Detmers would have any rights under the Agreement in the event the sculptures were no longer displayed at Tatanka. Rather, Costner alleged in *Detmers I* that the parties had agreed to permanently display the sculptures at Tatanka. The facts giving rise to this action did not occur until years after the prior action and appeal were concluded. The issue "sought to be redressed" is not the same and did not arise, along with the prior claim, "out of a single act or dispute

#30117

...” See *Healy Ranch, Inc.*, 2022 S.D. 43, ¶ 45, 978 N.W.2d at 799 (citations omitted). We conclude the circuit court erred in holding that Detmers’ claims are barred by the doctrine of res judicata.

2. *Obligations under the Agreement*

[¶19.] Detmers argues that because The Dunbar was not built within ten years, paragraph three of the Agreement includes an ongoing obligation for the sculptures to be “agreeably displayed elsewhere.” She also claims that Costner’s stated intention to sell Tatanka and relocate the sculptures is an anticipatory repudiation of the agreement found in *Detmers I* to permanently display the sculptures at Tatanka and requires the sculptures to be sold and the copyright transferred to Detmers pursuant to paragraph three of the Agreement. She also maintains that if Costner unilaterally sells Tatanka and moves the sculptures from Tatanka, this is an event triggering paragraph three of the Agreement, requiring the sculptures to be sold and the profits split. She argues that this position is supported by a plain reading of the Agreement and by the language providing her with ongoing royalty rights on all reproductions of the sculptures.

[¶20.] The circuit court adopted Costner’s assertion that his obligations under paragraph three of the Agreement could “be satisfied in one of two ways: (1) The Dunbar is built within ten years . . . or (2) the sculptures are agreeably displayed elsewhere within that time frame.” Under this reading, Costner argues the circuit court correctly reasoned that he had satisfied all his contractual duties and had no further obligation under the Agreement after “the sculptures had been agreeably displayed elsewhere at Tatanka within that ten-year time frame[.]” Costner claims this construction of the Agreement is consistent with the circuit court’s

-10-

#30117

determination in *Detmers I* that “Costner has fully performed under the terms of the [Agreement].”

[¶21.] The circuit court concluded that any discussion in *Detmers I* that the sculptures would be permanently located at Tatanka did not prevent Costner from relocating them. In the briefs, the parties devote considerable attention to the definition of “permanent” in the context of the implied agreement referenced by the circuit court in *Detmers I*. Detmers’ anticipatory repudiation claim is primarily premised on her argument that the circuit court in *Detmers I* found an implied agreement existed and that this implied agreement requires Costner to permanently display the sculptures at Tatanka. However, the current dispute is controlled by the express terms of paragraph three of the Agreement and whether Costner can relocate the sculptures from Tatanka without triggering the sale provision of the Agreement, not by any implied agreement found by the court in *Detmers I*. “[W]here there is a valid express contract existing between parties in relation to a transaction fully fixing the rights of each, there is no room for an implied promise.” *J. Clancy, Inc. v. Khan Comfort, LLC*, 2021 S.D. 9, ¶ 27, 955 N.W.2d 382, 391 (quoting *Koopman v. City of Edgemont by Dribble*, 2020 S.D. 37, ¶ 20, 945 N.W.2d 923, 928). “[A]n express contract precludes the existence of a contract implied by law or a quasi-contract.” *Id.* (alteration in original) (quoting *Surrens v. Lorenz Mfg. Co. of Benson, Minn.*, 1998 S.D. 49, ¶ 6, 578 N.W.2d 151, 153).

[¶22.] “‘Contract interpretation is a question of law’ reviewed de novo.” *Detmers I*, 2012 S.D. 35, ¶ 20, 814 N.W.2d at 151 (citation omitted). “When

#30117

interpreting a contract, “[a court] looks to the language that the parties used in the contract to determine their intention.” *Id.* (citation omitted). “When the words of a contract are clear and explicit and lead to no absurd consequences, the search for the parties’ common intent is at an end.” *Id.* (quoting *Nelson v. Schelipfeffer*, 2003 S.D. 7, ¶ 8, 656 N.W.2d 740, 743). Courts “may neither rewrite the parties’ contract nor add to its language[.]” *Id.* ¶ 21, 814 N.W.2d at 151 (quoting *Culhane v. W. Nat’l Mut. Ins. Co.*, 2005 S.D. 97, ¶ 27, 704 N.W.2d 287, 297). “Because we can review the contract as easily as the trial court, there is no presumption in favor of the trial court’s determination.” *Ziegler Furniture & Funeral Home, Inc. v. Cicmanec*, 2006 S.D. 6, ¶ 14, 709 N.W.2d 350, 354 (quoting *Cowan v. Mervin Mewes, Inc.*, 1996 S.D. 40, ¶ 6, 546 N.W.2d 104, 107).

[¶23.] Consistent with *Detmers I*, we determine that the controlling language of the Agreement is unambiguous. See *id.* (quoting *Pesicka v. Pesicka*, 2000 S.D. 137, ¶ 6, 618 N.W.2d 725, 726) (“When the meaning of contractual language is plain and unambiguous, construction is not necessary.”). Under the plain language of the Agreement, the circuit court erroneously read “not agreeably displayed elsewhere” to expire after ten years. This reading of the language in paragraph three and the conclusion that Costner had fully satisfied his obligation thereunder conflict with the rules of grammar in extending the ten-year time period for building The Dunbar to “not agreeably displayed elsewhere[.]” In the first sentence of paragraph three, the phrase “within ten (10) years” immediately follows the word “built” and is separated from the word “displayed” by the conjunction “or[.]” As a result, “within ten (10) years” modifies only “built[.]” Conversely, “displayed” is not affected by

#30117

"within ten (10) years[.]" Thus, the plain language of paragraph three establishes that "not agreeably displayed elsewhere" is not limited by time or duration.

[¶24.] The portion of paragraph three addressing what would happen if The Dunbar was not built within ten years, or the sculptures were not agreeably displayed elsewhere, specifies conditions that would trigger Costner's contractual obligation to sell the sculptures, split the profits, and assign the copyright for the sculptures to Detmers. We determine whether a condition precedent exists from "[t]he document as a whole" and whether the parties intended to agree "that the happening or nonoccurrence of the stated event after the contract becomes binding would cause the contract to terminate without further duties or obligations on either party." *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 43, ¶ 38, 714 N.W.2d 884, 896. "A condition precedent is a contract term distinguishable from a normal contractual promise in that it does not create a right or duty, but instead is a limitation on the contractual obligations of the parties. A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor. If the condition is not fulfilled, the right to enforce the contract does not come into existence." *Id.* ¶ 38, 714 N.W.2d at 895 (quoting *Johnson v. Coss*, 2003 S.D. 86, ¶ 13, 667 N.W.2d 701, 705-06). Paragraph three imposes a contingent obligation upon Costner to sell the sculptures, divide the profits with Detmers, and return the copyright to Detmers upon the occurrence of two conditions precedent: "Although I

#30117

do not anticipate this will ever arise, if [these conditions occur], I will give you”
(Emphasis added.)

[¶25.] The Dunbar was not built within ten years, meeting the first of two conditions necessary to trigger the sale clause. The second condition is that “the sculptures are not agreeably displayed elsewhere[.]” In *Detmers I*, this condition was not met, and thus Costner’s obligation to sell the sculptures in paragraph three was not triggered. As discussed above, however, the Agreement places no time limit on when the second condition may be satisfied or the obligation triggered thereby.

[¶26.] This reading of paragraph three of the Agreement is consistent with our reading of the language in *Detmers I*. In *Detmers I*, we stated, “[u]nder paragraph three, Detmers would only be entitled to specific performance if The Dunbar was not built or the sculptures were not ‘agreeably displayed elsewhere.’” 2012 S.D. 35, ¶ 10, 814 N.W.2d at 149. See also *id.* ¶ 21, 814 N.W.2d at 151 (“The plain words of the contract unequivocally provide that if The Dunbar was not built or the sculptures were not agreeably displayed elsewhere, then Detmers would be entitled to the relief described in paragraph three.”).

[¶27.] “It is a fundamental rule of contract interpretation that the entire contract and all its provisions must be given meaning if that can be accomplished consistently and reasonably.” *Prunty Constr., Inc. v. City of Canistota*, 2004 S.D. 78, ¶ 16, 682 N.W.2d 749, 756 (citation omitted). Paragraph two provides that Costner will be the sole owner of the sculptures but also provides Detmers with ongoing royalties for the sale of reproductions. It states that “it is important that you maintain your 20% of gross retail price royalty on future sales of fine art

#30117

reproductions[.]” These terms provide Detmers with a continuing interest in the location and display of the sculptures because the value of the royalty payments is integrally related to whether the sculptures are displayed at a location likely to attract visitors and result in more sales of reproductions. If “the sculptures are not agreeably displayed elsewhere,” the contingency provision for the sale of the sculptures ensures that Costner recovers the costs he incurred in the sculptures’ creation, both parties share in any profits from the sale of the sculptures, and Detmers retains the copyright for the sculptures.

[¶28.] Conversely, paragraph four applied during the time between three years after the last sculpture was delivered to the mold makers without construction having begun on The Dunbar and ten years from the date of the Agreement without The Dunbar having been built. This provision gave Costner the power to make a final decision about an interim location for display of the sculptures. Thereafter, paragraph three, which has applied since ten years passed without The Dunbar being built, requires the sale of the sculptures unless the parties are in agreement about the display location.

[¶29.] Contrary to the circuit court’s reasoning in this action, the circuit court’s conclusion in *Detmers I* that Costner “has fully performed” was not a judicial determination that Costner had no further obligation under the Agreement. Rather, it was a determination that Costner was not obligated to sell the sculptures because the sculptures’ placement at Tatanka was “elsewhere” and “the sculptures are ‘agreeably displayed elsewhere[.]’” 2012 S.D. 35, ¶ 24, 814 N.W.2d at 151 (emphasis added). Nothing in the prior litigation released Costner from the

#30117

provisions and obligations under paragraph three of the Agreement. Since the condition that "the sculptures are not agreeably displayed elsewhere" is ongoing, Costner's decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph three of the Agreement unless the parties agree to another display location.

[¶30.] The circuit court erred in its conclusion that Costner had no remaining obligation under paragraph three of the Agreement after the parties agreed to display the sculptures at Tatanka.

3. *Anticipatory Breach*

[¶31.] Detmers alleges that the circuit court erred in denying her motion for summary judgment on her claim for anticipatory repudiation by Costner. She argues that Costner's online real estate listing for the Tatanka property was an unequivocal statement that Costner intended to breach his obligation to display the sculptures at Tatanka and that the circuit court should have found, as a matter of law, Costner's breach of the Agreement. Costner responds that Detmers has failed to establish an anticipatory repudiation, as a matter of law, based upon the sale listing.¹

[¶32.] "An anticipatory breach of a contract or anticipatory repudiation is 'committed before the time when there is a present duty of performance and results

1. Costner also argues that Detmers' action should be dismissed because her claims are not ripe. Detmers' claims are ripe because a real controversy exists as to the rights and obligations of the parties under the Agreement in the event Costner unilaterally moves the sculptures from Tatanka and as to whether Costner's actions to date rise to anticipatory breach. See *Boever v. S.D. Bd. of Acct.*, 526 N.W.2d 747, 750 (S.D. 1995) (holding that a declaratory judgment action "is sufficiently ripe if the facts indicate imminent conflict").

#30117

from words or conduct indicating an intention to refuse performance in the future.”
Union Pac. R.R. v. Certain Underwriters at Lloyd's London, 2009 S.D. 70, ¶ 39, 771
N.W.2d 611, 621 (quoting 23 Williston on Contracts § 63:20 (4th ed. 2000)). “A
breach of contract caused by a party's anticipatory repudiation, *i.e.*, unequivocally
indicating that the party will not perform when performance is due[,] allows the
nonbreaching party to treat the repudiation as an immediate breach of contract and
sue for damages.” *Id.* ¶ 39, 711 N.W.2d at 621–22 (alteration in original) (quoting
Weitzel, 2006 S.D. 45, ¶ 31, 714 N.W.2d at 894).

[¶33.] The condition that “the sculptures are not agreeably displayed
elsewhere” does not impose any obligation on the parties beyond the implied duty of
good faith and fair dealing. See *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841
(S.D. 1990) (“Every contract contains an implied covenant of good faith and fair
dealing which prohibits either contracting party from preventing or injuring the
other party's right to receive the agreed benefits of the contract.”). Thus, Costner's
real estate listing for the sale of Tatanka does not—and the sale of the Tatanka real
estate in itself would not—breach any contractual obligation under the Agreement.
The potential sale of Tatanka merely foreshadows the possibility that the obligation
on Costner to sell the sculptures, split the profits, and assign the copyright will be
triggered unless the parties otherwise agree to the location for the display of the
sculptures.² When ten years passed without The Dunbar being built, the first

2. In responding to Detmers' claim for anticipatory repudiation, Costner cites
Detmers' statement in *Detmers I* that she “has not agreed and will not agree
to an alternative permanent location for the [sculptures]” and argues this
constituted an anticipatory breach of the Agreement by Detmers. The circuit
(continued . . .)

#30117

condition was met. In determining that the parties agreed to display the sculptures at Tatanka, *Detmers I* recognized that the second condition had not been met. The second condition may still be satisfied, however, if and when the sculptures are no longer agreeably displayed—that is, if Costner sells the Tatanka property or moves them from Tatanka to another location without Detmers' agreement.

[¶34.] While Costner has admitted he still intends to sell Tatanka, this at most signals that his contingent obligation to sell the sculptures may vest. See *Weitzel*, 2006 S.D. 45, ¶ 38, 714 N.W.2d at 895 (explaining that there is no right to performance until condition precedent occurs). Even if Costner sells Tatanka or unilaterally relocates the sculptures from Tatanka to a place not agreeable to Detmers, such an action would not breach his obligation under the Agreement. Instead, this event would satisfy the second condition in paragraph three of the Agreement, triggering the obligation to sell the sculptures, split the profits, and transfer the copyright to Detmers. At present, Costner owes Detmers no obligation with respect to the display or sale of the sculptures that she can enforce against him. See *Union Pac. R.R.*, 2009 S.D. 70, ¶ 39, 771 N.W.2d at 621–22 (explaining that nonbreaching party may seek immediate relief only when repudiating party unequivocally indicates its intent to refuse to perform a duty when it becomes due in the future). For these reasons, Detmers has failed to establish Costner

(... continued)

court adopted this reasoning as an alternative ruling in this action. However, this is inconsistent with the circuit court's finding in *Detmers I* that Detmers had in fact agreed to the display at Tatanka.

#30117

anticipatorily breached the terms of the Agreement as a matter of law, and the circuit court properly denied Detmers' motion for summary judgment on this claim.

Conclusion

[¶35.] We affirm the circuit court's denial of Detmers' motion for summary judgment on the question of anticipatory breach by Costner. We reverse the circuit court's entry of summary judgment for Costner. We remand Detmers' claims for further proceedings consistent with this opinion.

[¶36.] KERN, DEVANEY, and MYREN, Justices, and BARNETT, Circuit Court Judge, concur.

[¶37.] BARNETT, Circuit Court Judge, sitting for SALTER, Justice, who deemed himself disqualified and did not participate.

Case Number: 40CIV22-000017
Amended Complaint

9. When The Dunbar had not been built by the late 1990's, however, Detmers stopped working on the sculptures.

10. After several months of discussions between them, he and Detmers entered into a contract.

11. The contract is dated May 5, 2000. It provides that Detmers would receive an additional \$60,000 in compensation and royalty rights on reproductions in exchange for her completing the 17 sculptures. A copy of the contract is attached hereto and incorporated herein as Exhibit A.

12. With respect to royalty rights on reproductions of the sculptures, the contract contemplated the sculptures as a "valuable asset." (*Id.* at ¶ 2).

13. The contract also contemplated that the sculptures would be publicly displayed. (*Id.* at ¶ 4).

14. The contract gave Detmers certain rights related to the display of the sculptures.

15. Paragraph 3 of the contract provides:

Although I [Costner] do not anticipate this will ever arise, if The Dunbar is not built within (10) years or the sculptures are not agreeably displayed elsewhere, I will give you [Detmers] 50% of the profits from the sale of the one and one-quarter life scale sculptures after I [Costner] have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at or above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you [Detmers] the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders). (Exhibit A, ¶ 3).

16. Detmers finished the sculptures in June of 2000, which was just over six years after she commenced her work.

Case Number: 40CIV22-000017
Amended Complaint

17. Each of the 17 sculptures weighs approximately 2,000 pounds and collectively the 17 pieces are the third-largest bronze sculpture in the world.

18. By January of 2002, The Dunbar still had not been built.

19. The sculptures were displayed on the property where Costner intended to build The Dunbar.

20. The display was called "Tatanka."

21. Tatanka is open to the public and includes a visitor center, gift shop, café, interactive museum, and nature walkways.

22. Although Costner claimed he still intended to build The Dunbar on the same property where Tatanka was located, by 2008 The Dunbar had not been built.

23. Detmers brought an action against Costner in 2008 alleging she did not agree to the placement of the sculptures in the absence of The Dunbar and, as a result, the sculptures had not been agreeably displayed "elsewhere" as required by paragraph 3 of the contract.

24. The trial court ruled for Costner, holding that Tatanka was "elsewhere" pursuant to paragraph 3 of the contract. A copy of the trial court's Findings of Fact and Conclusions of Law are attached and incorporated herein as Exhibit B.

25. The trial court specifically found that Detmers was "agreeable to the sculptures' placement at Tatanka for the long term." *Id.* at p. 9, § 13.

26. The trial court also found that Costner intended to build The Dunbar.

27. On appeal, the South Dakota Supreme Court held that the issue before it was a factual issue and that the trial court's finding that Detmers and Costner agreed to the "*permanent*

Case Number: 40CIV22-000017
Amended Complaint

display of the sculptures at 'Tatanka' was not clearly erroneous. *Detmers v. Costner*, 814 N.W.2d 146, 149 (S.D. 2012) (emphasis added). A copy of the decision is attached as Exhibit C.

28. The Supreme Court held that the contract between Detmers and Costner was binding and unambiguous and that Tatanka satisfied the contractual condition of the sculptures being agreeably displayed "elsewhere." *Id.* at 150.

29. The Supreme Court also affirmed the trial court's findings that Costner intended to build the Dunbar and was continuing to try and build it. *Id.* at 149.

30. As a result, the trial court's decision was affirmed. *Id.*

31. In the years that followed the Court's opinion, Detmers continued to receive a small amount of royalties from goods sold at Tatanka that were sold in connection with her name.

32. The royalties, however, were a very small fraction of the royalties she anticipated receiving from selling miniature reproductions of the sculptures at an international 5-star resort and casino.

33. Although she has the original molds for the 17 sculptures, she cannot reproduce the 17 sculptures because Costner owns the copyright.

34. Costner sold his restaurant and casino in Deadwood.

35. Costner sold all of the land where the resort was to be built with the exception of the 35 acres where Tatanka is located.

Case Number: 40CIV22-000017
Amended Complaint

36. Costner now has listed those 35 acres for sale, which includes the visitor center, gift shop, café, interactive museum, and nature walkways. A copy of the real estate listing is attached hereto and incorporated herein as Exhibit D.

37. The listing, however, expressly excludes the 17 sculptures Detmers created from the sale and provides that they “will be relocated by seller.”

38. Detmers has not agreed to the sculptures being displayed somewhere other than Tatanka.

39. The South Dakota Supreme Court presided over this action on an appeal from a grant of summary judgment in Costner’s favor. *Detmers v. Costner*, 994 N.W.2d 445 (S.D. 2023) (Detmers II).

40. The Court held that the requirement that the sculptures be “agreeably displayed elsewhere” was an ongoing obligation. *Id.* at 456.

41. The Court also held that “Costner’s decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph three of the Agreement unless the parties agree to another display location.” *Id.* at 456.

CAUSE OF ACTION—DECLARATORY JUDGMENT

42. Paragraphs 1 through 41 are incorporated herein as if set forth in full.

43. Detmers and Costner’s contractual rights and legal relations are affected by Costner listing Tatanka for sale and unequivocally stating that the sculptures will be relocated,

Case Number: 40CIV22-000017
Amended Complaint

44. A controversy existed between Detmers and Costner as to whether selling the real estate, closing Tatanka, and/or unilaterally relocating the sculptures would trigger the sale clause in paragraph three of the Agreement.

45. Pursuant to South Dakota's Uniform Declaratory Judgment Act, Detmers respectfully requests a declaration consistent with the mandate by the South Dakota Supreme Court that the obligations in paragraph 3 of the Agreement are ongoing and that Costner's decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph three of the Agreement unless the parties agree to another display location.

WHEREFORE, Detmers respectfully requests for the following relief:

- (1) For a declaratory judgment as set forth above;
- (2) For her allowable costs and disbursements;

Dated this 5th day of September, 2024.

WOODS, FULLER, SHULTZ & SMITH, PC

By /s/ Andrew R. Damgaard
Andrew R. Damgaard
300 South Phillips Avenue, Suite 300
PO Box 5027
Sioux Falls, SD 57117-5027
(605) 336-3890
Andy.Damgaard@woodsfuller.com

A. Russell Janklow
Johnson, Janklow, Abdallah, & Reiter
101 S. Main Avenue #100
PO Box 2348
Sioux Falls, SD 57101
(605) 338-4304
Russ@janklowabdallah.com
Attorneys for the Plaintiff

- 6 -

4359-1045-0570, v. 1

STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

COUNTY OF LAWRENCE)

FOURTH JUDICIAL CIRCUIT

PEGGY A. DETMERS,)

FILE NO. 40CIV22-17

Plaintiff,)

v.)

**AFFIDAVIT OF
KEVIN COSTNER**

KEVIN COSINER,)

Defendant.)

STATE OF

COUNTY OF

) SS

I, Kevin Costner, being duly sworn upon my oath, depose and state that the following is

true to my own best knowledge, information, and belief:

1. I own and fund an attraction near Deadwood, South Dakota, called Tatanka which displays sculptures that I had imagined and commissioned.
2. Tatanka has faced operational difficulties and for approximately two decades has operated at a significant loss. For many of those years, the yearly loss at Tatanka has approached or exceeded \$100,000. And despite all the difficulties, I continue to run it.
3. Several factors have contributed to Tatanka's losses, including the lack of foot traffic, the lack of the area as a tourist/family destination, the need for Tatanka to bus in tourists, and the increased levels of theft. These changes have made the continued operation of a fully functioning gift shop difficult as more employee coverage is required to prevent or discourage shoplifting.
4. Despite my efforts to increase visitors to Tatanka, roadblocks to making Tatanka successful continue to develop. For example a newly-constructed county jail with a 130-bed capacity, essentially a prison, is now being constructed directly adjacent to the Tatanka location, making it less attractive as a tourist destination. Insurance and other business concerns associated with operating a bus company to bring tourists to Tatanka have made that part of the operation no longer viable. Because there is no foot traffic, my team literally has to commission tickets to attract tourists, reducing net receipts from an already small tourist base. And despite all the difficulties, I continue to run it.

5. Due to the changing landscape and the operational struggles of Tatanka, I have been exploring other display locations for my sculptures for several years, all while attempting to make Tatanka's operations profitable and supporting its ongoing financial losses.
6. One alternative display location that I have considered is a new 25,000 square foot museum I would develop with other local partners in Hot Springs, Arkansas. Although this option is still in the planning phase, I contemplate displaying the sculptures prominently at such museum. The Hot Springs location is very attractive because it has a large tourist base and a large portion of that base is composed of foot traffic or people driving by the location. As a result, I anticipate ticket sales will increase by at least fourfold.
7. In addition, this newly contemplated location would be central to the entertainment and business district and within walking distance from the convention center and the tourist center. It is also near bus and trolley stops, is in a prime location for main street advertising and billboards, and is in close proximity to four major hotels.
8. Early mock-ups that have been completed of the Hot Springs, Arkansas museum have the sculptures displayed prominently and with grandeur.
9. I have conducted research and compiled information regarding the number of tourists that visit Hot Springs, Arkansas, in comparison with those that visit Deadwood, South Dakota, each year. In 2022, 9.3 million people visited Hot Springs, Arkansas, in comparison with the 2.5 million that visited Deadwood, South Dakota.
10. The research also suggests that a museum in Hot Springs, Arkansas, would have substantially increased revenue, not only by virtue of the ticket sales, but also from foot traffic directly into the giftshop and café.
11. I have not yet approached Ms. Detmers about the possibility of relocating the sculptures to a Hot Springs museum because the project is still in the planning and development stages, but I intend to provide a proposal to her when the project details become more definite. I expect that the new location would provide a substantial increase in exposure for the sculptures which, in turn, would bring a meaningful benefit for Ms. Detmers. My expectation is that Ms. Detmers will consider my proposal in good faith.

[Signature on following page]

Dated February 5, 2025.


Kevin Costner

Subscribed and sworn to before me on February ____, 2025.

(SEAL)

Notary Public
My Commission Expires: _____

CALIFORNIA JURAT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

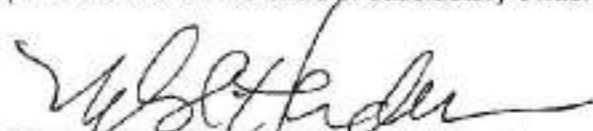
STATE OF CALIFORNIA
COUNTY OF SANTA BARBARA

Subscribed and sworn to (or affirmed) before me

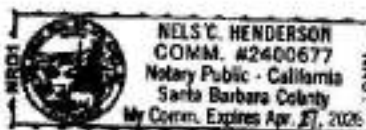
on this 5 day of FEBRUARY, 2025

by KEVIN COSTNER

proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.



Nels C. Henderson, Notary Public



[SEAL]

Description of Attached Document (Optional)

The preceding California Jurat is attached to a document titled/for the purpose of:

affidavit
Containing _____ pages, and dated 2/5/2025

The signer(s) capacity or authority is/are as:

☒ Individual(s)

☐ Attorney-in-Fact

☐ Corporate Officer(s): _____

☐ Guardian/Conservator

☐ Partner - Limited/General

☐ Trustee(s)

Representing: _____

Method of Signer Identification

Proved to me on the basis of satisfactory evidence:

- ☒ Form(s) of Identification
☐ Credible Witness(es)

Notarial Event is detailed in notary journal on:

Page # 55 Entry # 9

Notarized by:

Nels C. Henderson, Notary Public
Santa Barbara Mobile Notary
<http://www.sbmobilenotary.com>
(805) 335-8360

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
PEGGY A. DETMERS,	)	FILE NO. 40CIV22-000017
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM DECISION AND
	)	ORDER
	)	
KEVIN COSTNER,	)	
	)	
Defendant.	)	

This matter came before this Court on Plaintiff's Motion for Summary Judgment (Second) and Defendant's Motion to Dismiss, following remand by the South Dakota Supreme Court. A hearing was held at the Lawrence County Courthouse on February 20, 2025, at 11:00 a.m. where the Plaintiff, Peggy Detmers (Detmers), was represented by her attorneys, Andrew R. Damgaard and A. Russell Janklow. The Defendant, Kevin Costner (Costner), was represented by his attorneys, Stacy R. Hegge and Catherine A. Seeley. The Court, having reviewed the parties' briefs and having heard the arguments of counsel, issues the following Memorandum Decision and Order.

Background

In the early 1990s, Costner sought to build a five-star resort on real property he owned near Deadwood, South Dakota, to be called "The Dunbar." He commissioned Detmers to create a set of sculptures to be displayed at the resort. When The Dunbar had not been built by the late 1990s, Costner and Detmers negotiated and entered a written contract for the completion of the sculptures regardless of whether The Dunbar would be built. The contract dated May 5, 2000, consisted of five paragraphs that outlined the parties' interests in the sculptures and their reproductions.

Relevant to this matter is the third paragraph of the contract,^{1,2} which addresses what may happen if conditions precedent are not met. Paragraph three provides in full:

Although I [(Costner)] do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you [(Detmers)] 50% of the profits from the sale of the one and one-quarter life scale

¹ "Contract" and "Agreement" are used interchangeably by the parties throughout.

² The remaining paragraphs of the contract, summarized here, are not at issue in the current litigation: 1) Paragraph one provides that Detmers shall receive additional compensation for her work; 2) Paragraph two provides that Costner will exclusively own the sculptures and copyright, while Detmers will retain a continuing royalty interest in the sales of reproductions of the sculptures; 3) Paragraph four further addresses the display of the sculptures and provides for locating a suitable site for the sculptures and revenue sharing, before and after the sculptures are publicly displayed; 4) Paragraph five of the contract sets forth certain marketing obligations.

sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our [sic] above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

The Dunbar had not been built, nor was it under construction, by the early 2000s. To comply with the contract, Costner located an alternative site on land intended to be part of The Dunbar upon which to display the sculptures. Costner proposed the location to Detmers, who agreed to the display and assisted with the placement of the sculptures at the site. To accompany the display and to enhance visitors' experiences, Costner erected several amenities at the site, including a visitor center, gift shop, café, interactive museum, and nature walkways. The display, along with the other amenities, came to be known as "Tatanka."

Prior Litigation

In 2008, Detmers initiated suit against Costner, claiming that he breached their May 5, 2000, contract because The Dunbar had not been built and asserting that Detmers did not agree to the placement of the sculptures at Tatanka. The litigation focused primarily on paragraph three of the parties' May 5, 2000, contract.

Despite paragraph three of the May 5, 2000, contract, which indicated that the sculptures could be agreeably displayed elsewhere if The Dunbar was not built within ten years, Detmers's verified complaint dated December 9, 2008, unequivocally stated "Detmers has not agreed and will not agree to an alternative permanent location for the monument." See Verified Complaint and Demand for Jury Trial, ¶ 27, originally filed in 52CIV08-002354 (emphasis added).

Throughout the course of that litigation, Detmers advanced two arguments. First, she argued that she did not agree to display the sculptures at Tatanka past 2010 if The Dunbar had not been built. See Plaintiff's Proposed Findings of Fact and Conclusions of Law, ¶ 39, filed in Lawrence County Civ. 09-60. Second, she argued that Tatanka did not constitute "elsewhere" under the terms of the May 5, 2000, contract because Tatanka was located on a portion of real property originally intended as part of The Dunbar. See *Detmers v. Costner*, 2012 S.D. 35, ¶ 17, 814 N.W.2d 146, 150 ("*Detmers I*"). In response to Detmers's assertion that her consent to the sculptures' placement at Tatanka was temporary and contingent, Costner argued that Detmers agreed to place the sculptures at Tatanka for the long term, or permanently, thereby satisfying paragraph three of the parties' May 5, 2000, contract. See 40CIV09-000060 Defendant's Proposed Findings of Fact and Conclusions of Law, ¶ 55.

The circuit court determined that the contract was unambiguous, and after a bench trial, concluded that Detmers "was agreeable to the sculptures' placement at Tatanka for the long term," and that "Costner has fully performed under the terms of the contract." See 40CIV09-000060, Trial Court's Findings of Fact and Conclusions of Law, ¶¶ 14-15. Ultimately, the circuit court entered a final judgment in favor of Costner, which the South Dakota Supreme Court affirmed. See *Detmers I*, 2012 S.D. 35, 814 N.W.2d 146.

After the South Dakota Supreme Court's decision in *Detmers I*, the sculptures remained displayed at Tatanka. In October 2021, a real estate listing was posted for the land upon which Tatanka sits. The real estate listing stated, "Tatanka statues are not included- will be relocated by seller." After becoming aware of that listing, Detmers again sued Costner, alleging breach of

contract under a theory of anticipatory repudiation and alternatively seeking a declaratory judgment. See 40CIV22-000017, Complaint, filed January 18, 2022. At a bench trial on July 22, 2022, held at the Lawrence County Courthouse, this Court heard the parties' cross motions for summary judgment. On August 31, 2022, this Court granted summary judgment in favor of Costner and denied Detmers' motion. Detmers appealed.

The Supreme Court of South Dakota heard arguments on March 22, 2023. In its August 2, 2023, opinion, the Court affirmed in part, reversed in part, and remanded for further proceedings, holding that the doctrine of *res judicata* did not bar Detmers's claims; the May 5, 2005 contract contained two conditions precedent, the second of which, "the sculptures are not agreeably displayed elsewhere," is unmet and ongoing; and Costner's mere creation of sales listing was not an anticipatory breach of contract. *Detmers v. Costner*, 2023 S.D. 40, 994 N.W.2d 445 ("*Detmers II*").

Post Appeal Factual Background

The sculptures at issue are still displayed at Tatanka, which remains unsold.

Following the South Dakota Supreme Court's ruling in *Detmers II*, this Court granted Plaintiff permission and Plaintiff filed an Amended Complaint on September 5, 2024, which Defendant timely answered. On November 25, 2024, Plaintiff filed a Motion for Summary Judgment (Second), seeking declaratory judgment that "Costner's decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph 3 of the Agreement unless the parties agree to another display location." 40CIV22-000017, Motion for Summary Judgment (Second), at 3-4, filed November 25, 2024). The case was reopened, and on February 5, 2025, Defendant filed a Motion to Dismiss and Response to Plaintiff's Motion for Summary Judgment. Both parties timely filed responses and reply briefs.

Applicable Law

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). The moving party must demonstrate the lack of a genuine issue of material fact and show entitlement to judgment as a matter of law. *Brevet Int'l. Inc. v. Great Plains Luggage Co.*, 2000 S.D. 5, ¶12, 604 N.W.2d 268, 271 (quotation omitted). "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists." *Millard v. City of Sioux Falls*, 1999 S.D. 18, ¶ 8, 589 N.W.2d 217, 218 (quoting *Walther v. KPKA Meadowlands Ltd. Partnership*, 1998 S.D. 78, ¶ 14, 581 N.W.2d 527, 531).

Under the Uniform Declaratory Judgments Act ("Act"), "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." South Dakota Codified Laws (SDCL) § 21-24-1. "A matter is sufficiently ripe [for a declaratory judgment] if the facts indicate imminent conflict." *Boever v. South Dakota Bd. Of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995). Under the Act,

Any person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status, or other legal

relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

SDCL § 21-24-3.

OPINION

Under South Dakota law, this Court should deny Plaintiff's request for declaratory judgment regarding paragraph three of the May 5, 2000, contract because the Court requires facts about the parties' good faith and fair dealing with respect to actions taken which invoke the balance of paragraph three of the May 5, 2000, contract.

Here, "[t]he only claim remaining in this action is a declaratory judgment claim on the interpretation of Paragraph 3 of the Agreement." 40CIV22-000017, Plaintiff's Response to Defendant's Separate Statement of Undisputed Material Facts, at 1, filed February 11, 2025. "On remand, [Plaintiff] is simply asking this Court to declare the meaning of paragraph 3 in the contract in a manner identical to the South Dakota Supreme Court's holding and put an end to this litigation." 40CIV22-000017, Plaintiff's Brief in Support of Motion for Summary Judgment (Second), at 1, filed November 25, 2024. Specifically, Plaintiff requests that this Court declare, "Costner's decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph 3 of the Agreement unless the parties agree to another display location." *Id.*, at 3-4.

Plaintiff argues that she is entitled to declaratory judgment because the Act should be construed liberally (citing *Abata v. Pennington Cnty. Bd. Of Comm.*, 2019 S.D. 39, ¶ 11, 931 N.W.2d 714, 719), and in *Detmers II*, the Supreme Court held, "Costner's obligation under paragraph 3 of the May 5, 2000, contract is ongoing." *Id.*, 2-3. Plaintiff's use of "obligation" refers to the phrase, "the condition [precedent] that 'the sculptures are not agreeably displayed elsewhere' is ongoing." *Id.* (quoting *Detmers II*, 2023 S.D. 40 at ¶ 29, 994 N.W.2d at 457 (quotations in original)).

Defendant moves to dismiss Plaintiff's Amended Complaint "because the requested declaration would insufficiently account for future, speculative events." 40CIV22-000017, Defendant's Reply Brief in Support of Motion for Dismissal of Amended Complaint, at 1, filed February 18, 2025. Defendant argues three points.

First, that the Circuit Court lacks jurisdiction because the matter is not ripe. Defendant argues that the issues presented to the Supreme Court and found ripe in *Detmers II*, are different from the instant request for declaratory judgment in Plaintiff's Amended Complaint, requiring a new examination of ripeness. *See id.* While declaratory judgment is appropriate with respect to rights which will accrue in the future if conflict is imminent and rights are presently determinable, *see id.*, at 3 (citing *Danforth v. City of Yankton*, 25 N.W. 50, 413 (S.D. 1946); *Knelp v. Herseth*, 214 N.W.2d 93, 653 (S.D. 1974)), this case is unlike *Knelp* because Plaintiff's specific request involves "parties' rights and obligations that are not currently existing or even determinable." 40CIV22-000017, Defendant's Reply Brief in Support of Motion for Dismissal of Amended Complaint, at 3, filed February 18, 2025 (emphasis in original). Defendant relies on the premise

that the parties' duties of good faith and fair dealing are required, but not guaranteed, to show the matter is not ripe because how a court rules in the future will depend on how the facts develop.

This Court finds Defendant's argument reasonable. While *Detmers I and II* established that the language of the contract is unambiguous, it is mere speculation how any party's future acts will or will not reflect good faith and fair dealing in context of the May 5, 2000, contract.

Next, Defendant argues that even if there is jurisdiction, that the Court should exercise its discretion to decline to enter the requested declaratory judgment. 40CIV22-000017, Defendant's Reply Brief in Support of Motion for Dismissal of Amended Complaint, at 5, filed February 18, 2025. "Although declaratory relief is designed to determine legal rights or relations before an actual injury occurs, courts ordinarily will not render decisions involving future rights contingent upon events that may or may not occur." 40CIV22-000017, Defendant's Response Brief in Opposition to Plaintiff's Motion for Summary Judgment (Second) and Brief in Support of Motion for Dismissal of Amended Complaint, at 7, filed February 5, 2025 (quoting *Boever*, 526 N.W.2d at 750). "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." SDCL § 21-24-10. Defendant argues that granting Plaintiff's motion provides Plaintiff the opportunity to circumvent her duties of good faith and fair dealing in any future discussions with Defendant about relocating the sculptures, and that it would be counter to the purpose of the Act, "[t]o afford security against uncertainty with a view toward avoiding litigation and settling rights before there has been an irrevocable change of position." 40CIV22-000017, Defendant's Reply Brief in Support of Motion for Dismissal of Amended Complaint, at 5-6, filed February 18, 2025 (quoting *Knelp*, 214 N.W.2d at 654). Further, Defendant argues that declaratory judgment would not terminate the uncertainty or controversy related to triggering of the sale provision of the May 5, 2000, Agreement because, as above, a court must consider how the parties' adherence to, or breach of the duties of good faith and fair dealing occurred, and such conduct cannot be foreseen.

While this Court disagrees that a declaratory judgment would permit Plaintiff to skirt her duties of good faith and fair dealing, this Court agrees that a declaratory judgment at this time is unwise because this Court lacks knowledge of the parties' conduct, including good faith and fair dealing, with respect to actions taken which invoke the balance of paragraph three of the May 5, 2000 contract.

Finally, Defendant argues that Plaintiff's statement about the Supreme Court's treatment of the issues of ripeness and good faith in *Detmers II* is misleading because there, the Supreme Court stated, "The condition that 'the sculptures are not agreeably displayed elsewhere' does not impose any obligation on the parties beyond the implied duty of good faith and fair dealing." *Id.*, at 7-8 (quoting *Detmers II*, 2023 SD 40, at ¶33, 994 N.W.2d at 457) (emphasis in Defendant's original). Defendant's argument apparently refers to statements in 40CIV22-000017, Plaintiff's Brief in Support of Motion for Summary Judgment (Second), at 3-4, filed November 25, 2024 (indicating that because the South Dakota Supreme Court held "Costner's obligation under paragraph 3 of the May 5, 2000, contract is ongoing," that the Court should grant summary judgement for Detmers, declaring that "Costner's decision to unilaterally sell Tatanka and relocate the sculptures would trigger the sale clause in paragraph 3 of the Agreement unless the parties agree to another display location," and that doing so would allow "the clerk to close this matter subject to the parties' right to enforce the sale clause ...").

Based on the Supreme Court's findings in *Detmers II* and the analysis and reasons stated above, this Court need not individually address alleged misstatements by Plaintiff to adjudicate the instant motions filed by Plaintiff and Defendant.

As indicated above, for purposes of Plaintiff's Motion for Summary Judgment (Second), "[t]he evidence must be viewed most favorably to [Costner] and reasonable doubts should be resolved against [Detmers]." *Millard*, 1999 S.D. 18, ¶ 8, 589 N.W.2d at 218.

Here, Plaintiff has failed to overcome her burden under the Act to show that the declaratory judgment sought would "terminate the uncertainty or controversy giving rise to the proceeding." See SDCL § 21-24-10. There, there is no "imminent conflict" needed for a declaratory judgment because there has been no change in material circumstances since the Supreme Court's ruling in *Detmers II*. The sculptures are still displayed at Tatanka, and the land has not been sold.³ Neither Plaintiff nor Defendant has directly alleged facts or adduced evidence to show bad faith or unfair dealing with the other.⁴ Thus, this Court declines to issue the declaratory judgment sought by Plaintiff because this Court will not speculate about the parties' future conduct which may trigger the balance of paragraph three of the May 5, 2000 contract.

As the Amended Complaint averred a single prayer for relief and this Court having found in favor of Defendant under summary judgment, this Court now considers Defendant's Motion to Dismiss. Based upon the reasoning provided above, this Court determined declaratory judgment isn't appropriate under Plaintiff's action and therefore should be denied. Further, and as a direct result of no changes in the party's position since *Detmers II*, and the request for declaratory judgment being the only cause of action in this matter, this Court agrees the action should be dismissed.

Accordingly, for the reasons stated herein, it is hereby

ORDERED, that Plaintiff's Motion for Summary Judgment is denied; and it is further

ORDERED, that Defendant's Motion for Dismissal of Amended Complaint is granted without prejudice.

Dated this 12th day of March, 2025.

BY THE COURT

Honorable Eric Strawn
Circuit Court Judge

ATTESTED:

Clerk of Courts

CAROL LATUSECK

DEPUTY

BREE NICOLUSSI



³ "The potential sale of Tatanka merely foreshadows the possibility that the obligation on Costner to sell the sculptures, split the profits, and assign the copyright will be triggered unless the parties otherwise agree to the location for the display of the sculptures," there is no *Detmers II*, 2023 SD 40, at ¶33, 994 N.W.2d at 457.

⁴ "While Costner admitted he still intends to sell Tatanka, this at most signals that his contingent obligation to sell the sculptures may vest." *Id.*, 2023 SD 40, at ¶34, 994 N.W.2d at 457-58.

THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 31028

PEGGY A. DETMERS,

Plaintiff/Appellant,

v.

KEVIN COSTNER,

Defendant/Appellee.

Appeal from the Circuit Court
Fourth Judicial Circuit
Lawrence County, South Dakota

THE HONORABLE ERIC STRAWN
Circuit Court Judge

APPELLANT'S REPLY BRIEF

Andrew R. Damgaard
Woods, Fuller, Shultz & Smith P.C.
300 South Phillips Avenue, Suite 300
Post Office Box 5027
Sioux Falls, SD 57117-5027

A. Russell Janklow
Johnson, Janklow & Abdallah, LLP
101 S. Main Avenue #100
Sioux Falls, SD 57104
ATTORNEYS FOR APPELLANT

Stacy R. Hegge
Catherine A. Seeley
Gunderson, Palmer, Nelson
& Ashmore, LLP
111 West Capital Ave., Suite 230
Pierre, SD 57501
ATTORNEYS FOR APPELLEE

Notice of Appeal Filed March 17, 2025.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
ARGUMENT.....	1
I. Lack of subject matter jurisdiction was one of the grounds for the circuit court's dismissal.....	1
II. Detmers' declaratory judgment claim is ripe.....	2
III. The circuit court's dismissal of the declaratory judgment claim pursuant to SDCL § 21-24-10 is an abuse of discretion because it was based upon an error of law and violates the mandate rule.....	5
CONCLUSION.....	8
CERTIFICATE OF COMPLIANCE.....	10
CERTIFICATE OF SERVICE.....	11

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Altman v. Rumbolz</i> , 2002 S.D. 79, 648 N.W.2d 823	5
<i>Am. Council of Blind v. Mnuchin</i> , 977 F.3d 1 (D.C. Cir. 2020).....	8
<i>Ball v. LeBlanc</i> , 881 F.3d 346 (5th Cir. 2018).....	8
<i>Bingham Farms Trust v. City of Belle Foursche</i> , 2019 S.D. 50, 932 N.W.2d 921	6
<i>Boever v. S.D. Board of Acct.</i> , 526 N.W.2d 747 (S.D. 1995).....	4, 6
<i>Cherrie v. Virginia Health Servs., Inc.</i> , 787 S.E.2d 855 (Va. 2016).....	3
<i>Detmers v. Costner (Detmers, II)</i> 2023 S.D. 40, 994 N.W.2d 445	3, 4, 6, 7
<i>Jensen v. Dep. of Corrections</i> , 2025 S.D. 35, --- N.W.3d ---	3
<i>Kneip v. Herseth</i> , 214 N.W.2d 93 (S.D. 1974)	3
<i>North Star Mut. Ins. Co. v. Kneen</i> , 448 N.W.2d 908 (S.D. 1989)	5
<i>O'Connor v. King</i> , 479 N.W.2d 162 (S.D. 1991)	5
<i>Royal Indem. Co. v. Metropolitan Cas. Ins. Co. of New York</i> , 128 N.W.2d 111 (S.D. 1964).....	5
<i>Smith v. Wipi Group, USA, Inc.</i> , 2025 S.D. 26, 23 N.W.3d 168.....	7
<i>Wagner v. Tovar</i> , 2025 S.D. 44, --- N.W.3d ---	5

Statutes

SDCL § 21-24-10	ii, 4, 5
-----------------------	----------

Other Authorities

18B Wright & Miller, Federal Practice and Procedure § 4478.3 (3d ed., updated May 21, 2025)	8
---	---

ARGUMENT

Costner spends twenty-seven pages essentially saying this Court presided over an appeal in which it did not have subject matter jurisdiction, remanded the case to the circuit court for proceedings over which it did not have subject matter jurisdiction, and that the circuit court's subsequent dismissal cannot be scrutinized because this Court lacks appellate jurisdiction. Costner's arguments, however, are foreclosed by this Court's decision in *Detmers II* and this Court's Order Directing Appeal to Proceed. While Costner characterizes Detmers' arguments as an "attempt to oversimplify complicated legal principles," the reality is that issues that previously have been decided by a court of last resort, especially in the same case, should be straightforward.

I. Lack of subject matter jurisdiction was one of the grounds for the circuit court's dismissal.

On remand, the first argument Costner made in support of his motion to dismiss was that Detmers' claims were not ripe and therefore the circuit court lacked subject matter jurisdiction. (SR at 399). On appeal and notwithstanding this Court's Order Directing Appeal to Proceed, Costner now claims that "[t]he circuit court did not issue an order based on jurisdictional grounds, so there is nothing for this Court to review in that regard." (Appellee Br. p. 9, n.9).

The circuit court's Memorandum Decision and Order, however, provides in relevant part:

Defendant moves to dismiss Plaintiff's Amended Complaint because the requested declaration would insufficiently account for future, speculative events. Defendant argues three points.

First, that the Circuit Court lacks jurisdiction because the matter is not ripe. Defendant argues that the issues presented to the Supreme Court and found ripe in *Detmers II*, are different from the instant request for declaratory judgment in Plaintiff's Amended Complaint, requiring a new

examination of ripeness. While Declaratory Judgment is appropriate with respect to rights which will accrue in the future if conflict is imminent and rights are presently determinable, this case is unlike *Kneip* because Plaintiff's specific request involves parties' rights and obligations that are not currently existing or even determinable.

Defendant relies on the premise that the parties' duties of good faith and fair dealing are required, but not guaranteed, to show the matter is not ripe because how a court rules in the future will depend on how the facts develop.

This Court finds the Defendant's argument reasonable. While *Detmers I* and *II* established that the language of the contract is unambiguous, it is mere speculation how any party's future acts will or will not reflect good faith and fair dealing in context of the May 5, 2000, contract.

(SR 450-451) (internal citations and quotation marks omitted). Contrary to Costner's assertion, lack of subject matter jurisdiction served as a basis for the circuit court's decision.¹

II. Detmers' declaratory judgment claim is ripe.

Costner claims that Detmers' declaratory judgment action is not ripe because it is based upon a "future, contingent, and highly speculative right." (Appellee Br. p. 11). According to Costner, because he has "no present obligation, Detmers correspondingly has no present right for the circuit court to determine and articulate." (*Id.*). Costner's argument fails for four reasons.

First, Costner unilaterally moving the sculptures was not speculative or hypothetical. Costner listed the real estate upon which Tatanka is located for sale and indicated in the real estate listing that the sculptures "will be relocated by seller."

¹ Costner began characterizing the circuit court's decision as not being based on jurisdictional grounds after Detmers responded to this Court's Order to Show Cause. Despite a unanimous Order directing the appeal to proceed and no directive from this Court to revisit the issue in the briefs on the merits, Costner dedicates his Jurisdictional Statement to claiming this Court lacks appellate jurisdiction. Other than Section A. above, Detmers will rely upon her response to the Order to Show Cause with respect to any appellate jurisdiction issues.

Detmers II, 2023 S.D. 40, ¶ 8, 994 N.W.2d 445, 451. He also admitted in discovery his intent was to move the sculptures to another location. (SR 73). Finally, on remand, Costner indicated he has completed mockups of the sculptures at the Arkansas location and that the sculptures would be displayed “prominently and with grandeur.” (SR 422).

Second, a real controversy existed between Costner and Detmers with respect to the interpretation of paragraph three of their Agreement. Costner claimed that he had satisfied all of his contractual duties and had no further obligations under the Agreement. *Detmers II*, 2023 S.D. 40, ¶ 20, 994 N.W.2d at 454. Detmers’ position, on the other hand, was that there was an ongoing obligation for the sculptures to be “agreeably displayed elsewhere” and that if Costner were to unilaterally move the sculptures, it would trigger the sale clause in paragraph three of the Agreement. *Id.* ¶ 19, 445 N.W.2d at 454.

Third, once a good faith controversy existed, Detmers could request a judicial declaration of her status and rights based upon future events. *Kneip v. Herseth*, 214 N.W.2d 93, 96 (S.D. 1974) (“The liberality to be afforded the construction of the Declaratory Judgment Act, because of its remedial goals, should allow, however, the decision of present rights or status which are based upon future events when a good-faith controversy is brought before the courts”). In fact, some of the goals of the Declaratory Judgment Act are to establish guidelines for parties’ actions to *prevent* an actual invasion of parties’ rights and to avoid expense. *Id.* at 647-648; *see also Jensen v. Dep. of Corrections*, 2025 S.D. 35, ¶ 27, --N.W.3d-- (quoting *Cherrie v. Virginia Health Servs., Inc.*, 787 S.E.2d 855, 859 (Va. 2016) (declaratory judgment statutes permit the declaration of rights before they mature) (emphasis added)). As a result, the notion that

Detmers would have to wait for Costner to unilaterally move the sculptures before she could obtain a judicial declaration that it would trigger the sale clause is not tenable.

Fourth, and most important, this Court already held that Detmers' claims were ripe "because a real controversy exists as to the rights and obligations of the parties under the Agreement in the event Costner unilaterally moves the sculptures from Tatanka...." *Detmers II*, 2023 S.D. 40, ¶ 31 n. 1, 994 N.W.2d at 457, n. 1.² And if that was the *controversy*, then this Court's interpretation of paragraph three in the Agreement as being an ongoing obligation and that Costner unilaterally moving the sculptures would trigger the sale clause was the *holding*—not "mere dicta" or a "discussion of a possible consequence...." (SR 409); (Appellee Br. p. 8).

To the extent Costner wanted to reargue that there was in fact no controversy and that this Court's holding was a speculative and impermissible advisory opinion, those arguments should have been made to this Court on a petition for rehearing—not on remand to a subordinate court. Costner's invitation to relitigate issues that had already been decided by this Court, and the circuit court's acceptance of that invitation, have served only to prolong the case and drain the resources of Detmers and the judiciary.

² Costner relies upon *Boever v. S.D. Board of Acct.*, for the proposition that declaratory judgments involving contingent events are not ripe, 526 N.W.2d 747, 750 (S.D. 1995); (Appellee Br. pp. 16-17). He does so notwithstanding the fact that this Court relied on *Boever* in ruling against Costner on the ripeness issue, concluding that when the facts indicate an imminent conflict, a declaratory judgment action is "sufficiently ripe." *Detmers II*, 2023 S.D. 40, ¶ 31, n. 1, 994 N.W.2d 445, 457, n. 1 (citing *Boever*, 526 N.W.2d at 750).

III. The circuit court's dismissal of the declaratory judgment claim pursuant to SDCL § 21-24-10 is an abuse of discretion because it was based upon an error of law and violates the mandate rule.

South Dakota Codified Law § 21-24-10 provides “[the] court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.” Circuit courts have discretion to grant or deny a declaratory judgment. *North Star Mut. Ins. Co. v. Kneen*, 448 N.W.2d 908, 911 (S.D. 1989). For example, if there are individuals who have a legal interest in the outcome of the declaratory judgment that were not made parties to the action, the circuit court may properly refuse to make a declaration. *Royal Indem. Co. v. Metropolitan Cas. Ins. Co. of New York*, 128 N.W.2d 111, 114 (S.D. 1964). Similarly, if the pleadings raise issues beyond the narrow scope of the declaratory judgment subject matter, and those additional issues will remain in controversy, the circuit court may properly refuse to make a declaration and instead schedule a trial on the merits of all issues. *O'Connor v. King*, 479 N.W.2d 162, 165 (S.D. 1991).

In support of his claim that the circuit court properly dismissed Detmers’ action under SDCL § 21-24-10, Costner relies on the same arguments that he relies upon for his claim that Detmers’ declaratory judgment action is not ripe. (Appellee Br. pp. 15-18). But according to Costner, unlike the ripeness claim, which deals with lack of subject matter jurisdiction, the dismissal under SDCL § 21-24-10 is purely discretionary. (*Id.* at p. 15).

An error of law, however, is an abuse of discretion. *Wagner v. Tovar*, 2025 S.D. 44, ¶ 20, --- N.W.3d --- (citing *Altman v. Rumbolz*, 2002 S.D. 79, ¶ 7, 648 N.W.2d 823,

825 (per curiam)). And whether a court has subject matter jurisdiction to preside over a declaratory judgment claim is a question of law. *Bingham Farms Trust v. City of Belle Foursche*, 2019 S.D. 50, ¶¶ 11-17, 932 N.W.2d 921-922; *Boever*, 526 N.W.2d at 749; (“We are only faced with the legal question of ripeness”).

While Costner repeatedly claims, in perfunctory fashion, that a declaratory judgment will not terminate the controversy, he conveniently neglects to cite the pleadings and *Detmers II* that set forth the specific controversy. *Detmers II* plainly sets forth the controversy between the parties: “In particular, the parties disagree whether Costner has any remaining obligation under the Agreement to sell the sculptures, split the sale proceeds, and return the copyright to Detmers if he unilaterally relocates the sculptures from the agreed location at Tatanka.” *Detmers II*, 2023 S.D. 40, ¶ 17, 994 N.W.2d at 453. And that question was not inspired by Detmers’ desire for an advisory opinion or this Court’s willingness to engage in some hypothetical intellectual exercise. Instead, it was Costner listing the Tatanka real estate for sale and indicating the sculptures “will be relocated by the seller” that was the impetus for this action. *Id.* at ¶ 8, 994 N.W.2d at 451.

The controversy was legitimate, as *Detmers I* “did not discuss or even acknowledge the possibility that Costner might decide to relocate the sculptures in the future, nor was there any determination whether Detmers would have any rights under the Agreement in the event the sculptures were no longer displayed at Tatanka.” *Id.* at ¶ 18, 994 N.W.2d at 453. This Court held that Detmers’ claims were ripe, which included the declaratory judgment claim. *Id.* at ¶ 31, n. 1, 994 N.W.2d at 457, n.1. Ultimately, this Court held that “Costner’s decision to unilaterally sell Tatanka and relocate the sculptures

would trigger the sale clause in paragraph three of the Agreement unless that parties agree to another display location.” *Id.* at ¶ 29, 994 N.W.2d at 456.

Costner also claims that the Amended Complaint permitted the circuit court to revisit the ripeness issue and dismiss Detmers’ case. The Amended Complaint, however, only added a handful of paragraphs that referenced *Detmers II* and amended the request for a declaration in a manner that used the language of the holding in *Detmers II* almost verbatim.³ The claim remained the same (i.e. declaratory judgment) and the declaration remained the same—Costner unilaterally relocating the sculptures would trigger the sale clause in paragraph three of the Agreement. In short, Detmers’ Amended Complaint sought to reduce this Court’s holding to a judgment and end the controversy.

Costner injects arguments, which were not raised prior to *Detmers II* or in that appeal, suggesting Detmers has duties of good faith and fair dealing and to not “prevent” Costner from performing in the future. He then suggests these future occurrences, or the lack thereof are grounds for dismissing Detmers’ declaratory judgment claim. But none of those claims were raised by the pleadings and none of them relate to the resolution of what was solely at issue (i.e., whether Costner could unilaterally relocate the sculptures without triggering the sale clause in paragraph three).⁴ That question is solely one of contract interpretation and it is not impacted by any facts, whether past, present, or future.

This Court’s holding related to the ripeness of Detmers’ declaratory judgment claim and the interpretation of paragraph three of the Agreement are the law of the case. *Smith v. Wipi Group, USA, Inc.*, 2025 S.D. 26, ¶ 29, 23 N.W.3d 168, 179. Within that

³ Under what in hindsight was the mistaken belief that no party could make a meritorious objection to that language and no jurist would ever sustain it.

⁴ In that sense, Costner is attempting to benefit from problems he creates.

doctrine, there is no stronger rule than the mandate rule. 18B Wright & Miller, Federal Practice and Procedure § 4478.3 (3d ed., updated May 21, 2025) (“Principles of authority, however, do inhere in the “mandate rule” that binds a lower court on remand to the law of the case established on appeal. The very structure of a hierarchical court system demands as much”) (internal quotations in original). The circuit court violated the mandate of *Detmers II*, committed legal error, and therefore abused its discretion.⁵

CONCLUSION

Many years ago, Costner convinced a South Dakota circuit court that he and Detmers agreed to “permanently” display the sculptures she created at Tatanka in the absence of his five-star resort. It allowed him to keep the sculptures and the copyright to the sculptures. It resulted in Detmers receiving a pittance of the royalties contemplated by the Agreement and placed her completely at his mercy with respect to reproducing her work.

When it was no longer convenient for Costner, Tatanka was not so “permanent.” He listed the real estate for sale and intended to unilaterally move the sculptures free from any obligation to Detmers.

This Court’s opinion in *Detmers II*, however, obstructed Costner’s plans. So, on remand, Costner characterized the opinion as an advisory opinion, raised issues that had previously been rejected in *Detmers II*, and successfully convinced the circuit to do what it had been reversed for doing previously—dismissing Detmers’ case. That decision plainly violated this Court’s mandate, drained Detmers’ time and resources by forcing her

⁵ Some federal circuits review whether the mandate rule forecloses the trial court’s actions on remand under the *de novo* standard. *Ball v. LeBlanc*, 881 F.3d 346, 350 (5th Cir. 2018). Other federal circuits hold that a violation of a court of appeals’ mandate is a *per se* abuse of discretion. *Am. Council of Blind v. Mnuchin*, 977 F.3d 1, 5 (D.C. Cir. 2020).

to play legal whack-a-mole, and drained judicial resources by relitigating issues that had already been determined by South Dakota's highest court.

Detmers respectfully requests that the circuit court's decision be reversed and that it be directed to enter Detmers' proposed order or any other relief this Court believes will prevent the relitigating of these same issues on a third occasion. (Appellant's Br., App. 012-013).⁶

Respectfully submitted this 18th day of August, 2025.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Andrew R. Damgaard

Andrew R. Damgaard
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Andy.Damgaard@woodsfuller.com

-and-

JOHNSON, JANKLOW, ABDALLAH LLP

A. Russell Janklow
101 S. Main Ave. #100
Sioux Falls, SD 57104
(605) 338-4304
Russ@janklowabdallah.com
Attorneys for the Plaintiff/Appellant

⁶ Undoubtedly, the next issue that will "pop up" is whether Costner can tie up Detmers in future litigation by claiming a jury needs to determine if her refusal to let Costner move the sculptures wherever he desires violates her duty of good faith and fair dealing. As mentioned, this Court does not have to address that issue to resolve the declaratory judgment action. To the extent the Court does want to address the good faith and fair dealing issue, Detmers' arguments related to that issue are set forth in Section III. of her opening brief.

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 365, Times New Roman (12 point) and contains 2,671 words, excluding the table of contents, table of authorities, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 18th day of August, 2025.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Andrew R. Damgaard

Andrew R. Damgaard
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Andy.Damgaard@woodsfuller.com

-and-

JOHNSON, JANKLOW & ABDALLAH, LLP

A. Russell Janklow
101 S. Main Ave. #100
Sioux Falls, SD 57104
(605) 338-4304
Russ@janklowabdallah.com
Attorneys for the Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August 2025, I electronically filed and served Plaintiff/Appellant's Reply Brief through the Odyssey File and Serve system upon the following:

Stacy Hegge
Catherine A. Seeley
Gunderson, Palmer, Nelson & Ashmore, LLP
111 West Capital Ave., Suite 230
Pierre, SD 57501
Attorneys for Defendant/Appellee

/s/ Andrew R. Damgaard
One of the Attorneys for Plaintiff/Appellant