IN THE

Supreme Court

of the

State of South Dakota

No.

LONDA LUNDSTROM RAMSEY,
PLAINTIFF/APPELLANT
AND LOWELL LUNDSTROM, JR.,
PLAINTIFF

VS.

LOWELL LUNDSTROM MINISTRIES, INC.,
JAN HAWKINS, SI LIECHTY, JIM OLSON,
PAUL ANDERSON, RANDY DIRKS,
DERRICK ROSS, KURT RINGLEY, LYNDA BORDREAU,
JASON HEATH, JEFF JOHNSON, AND DARNELL JONES,
DEFENDANTS/APPELLEES

An appeal from the Circuit Court
Fifth Judicial Circuit
Roberts County, South Dakota
The Hon. Jon S. Flemmer
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Plaintiff/Appellant Londa Lundstrom Ramsey appeals the final order entered by the Hon. Jon S. Flemmer on July 21, 2020,[1] following a motions hearing held on July 9, 2020,[2] and its related acts and decisions, including the Court's Memorandum Decision entered on November 4, 2019.[3] and the Order July 9, 2020, order referenced above.

This Court has jurisdiction under SDCL § 15-26A-3. Appellant filed her notice of appeal on August 11, 2020.

REQUEST FOR ORAL ARGUMENT

Appellants request the privilege of appearing before this Court for Oral Argument.

STATEMENT OF THE ISSUES

I. Did the Trial Court Err in Interpreting the Facts When Evaluating the Competing Motions for Summary Judgment?

Yes, the trial court erred. In granting Defendants' motion for summary judgment, the trial court made factual findings and inferences in Defendants' favor. The trial court also made factual errors while granting Defendants' motion for summary judgment and denying Londa's motion for partial summary judgment. Reversal is warranted to correct those errors.

- *In re Estate of Tank*, 2020 S.D. 2, 938 N.W.2d 449
- *Fisher v. Kahler*, 2002 S.D. 30, 641 N.W.2d 122

[1] App 043-046 (notice of entry of order regarding July 21, 2020, hearing).
[2] App 012-042 (transcript from July 21, 2020, hearing).
[3] App 001-011 (memorandum decision).

II. Did the Trial Court Err When it Ruled that the Provision in the 1964 Bylaws Requiring that Alteration of the Bylaws be "*Proposed* and *Adopted*" at Two Different Meanings Equates to the Board Being Presented an Unaltered Final Draft of the Proposed Amendments at that Prior Meeting?

Yes, the trial court erred. The trial court arrived at its decision by adding new requirements into the 1964 bylaws. The 1964 bylaws state that the "alteration of these by-laws shall be proposed at one meeting of the Board of Directors but shall not be voted upon and adopted at the same meeting." R. 480. The trial court interpreted that provision to mean that the Board had to be presented with a final written version of the bylaws at the February 2014 board of directors meeting. The word "proposed," however, does not contemplate that a final, unaltered, version of those amendments be presented. Likewise, the law recognizes that "trivial" modifications, like the ones that were verbally introduced in February of 2014, should not impact the notice requirement in the 1964 bylaws. The trial court erred in finding that such trivial modifications were dispositive.

- *Mahan v. Avera St. Luke's*, 2001 S.D. 9, 621 N.W.2d 150
- *Coffey v. Coffey*, 2016 S.D. 96, 888 N.W.2d 805
- American Heritage (3rd ed.)
- *Fenske Printing v. Brinkman*, 349 N.W.2d 47 (S.D. 1984)

III. Did the Trial Court Err When it Failed to Meaningfully Consider the Issue of Waiver?

Yes, the trial court erred. The trial court ignored or discounted evidence showing that Defendants knew their rights but adopted the 2014 bylaws despite that knowledge. As a matter of law, Defendants knew or should have known the notice provisions in the 1964 bylaws. In particular, Defendants unanimously voted for these changes, and then unanimously signed a resolution stating that the 2014 bylaws were adopted "consistent with" the law and the 1964 bylaws. Such a waiver was knowing and voluntary and should be held against Defendants. The trial court erred by failing to recognize Defendants' waiver.

- *Schraft v. Leis*, 236 Kan. 28, 686 P.2d 865 (1984)
- 8 Fletcher, Cyclopedia of the law of Private Corporations § 4200, (rev. perm. ed. 1982)

IV. Did the Trial Court Err When it Failed to Meaningfully Consider the Issue of Estoppel?

Yes., the trial court erred. Immediately after its unanimous adoption of the new Bylaws, the Board executed a resolution regarding the adoption of those bylaws, which expressly affirmed that they were properly adopted. The Nonprofit Corporation then operated under the 2014 Bylaws for several months. The trial court refused to consider that conduct as evidence of estoppel. This is reversible error.

- *L.R. Foy Constr. Co. v. Spearfish Sch. Dist*., 341 N.W.2d 383 (S.D. 1983)
- *Schraft v. Leis*, 236 Kan. 28, 686 P.2d 865 (1984)

V. Did the Trial Court Err When it Ruled that South Dakota's Writing In Lieu Statute was Inapplicable?

Yes, the trial court erred. SDCL § 47-23-6 allows a corporate board to bind itself unanimously, without the need for a meeting, by collecting the signatures of each board member. The statute's broad scope includes the ability to undertake "any action which may be taken at a meeting of the members or directors." Such a statute, by definition, gives the board notice of its actions and ratifies their occurrence. The trial court erred by concluding that the writing-in-lieu statute precluded the Board from adopting its new Bylaws by unanimous written agreement. That statute cured any notice or procedural requirements, and allowed the Board to bind itself without further action.

- SDCL § 47-23-6
- *Solstice Capital II, Ltd. P'shp v. Ritz*, 2004 Del. Ch. LEXIS 39 (Ch. Apr. 6, 2004)

INTRODUCTION

In 2012, as part of its leadership succession plan, Lowell Lundstrom Ministries created a committee to propose a comprehensive amendment to its 1964 Articles and Bylaws. This corporate work occurred in conjunction with a plan first proposed in 2010, for Londa Lundstrom Ramsey (its founder's daughter) to take over leadership of the corporation. The Board reviewed the fruit of the committee's labor in February of 2014. The Board suggested a few non-material revisions, and the final version of the proposed bylaws were read at that February meeting. The minutes of that meeting reflect that the Board intended to adopt the changes at its Spring meeting. The Board then adopted those changes in May of 2014 by unanimously voting for them, as well as by independently signing a writing-in-lieu resolution that confirmed their unanimous adoption.

Some members of the Board later tried to undo that adoption by claiming that they did not receive adequate notice of the changes. This lawsuit ensued, and the trial court ruled that the 2014 Bylaws were not properly adopted because the Board did not receive a written, verbatim, version of the 2014 Bylaws at least two weeks prior to their adoption.

STATEMENT OF THE FACTS

This appeal arises out of a set of disputes related to a non-profit corporation founded in 1957 by Lowell Lundstrom, Sr., and based in Sisseton, South Dakota.

For several decades, Lowell Lundstrom Ministries ("the Nonprofit Corporation") operated under a set of bylaws that it adopted in 1964. From the very beginning, Pastor

Lundstrom envisioned that the Board would serve in an advisory role, and that the Corporation's vision and leadership would derive from its President. Under Lowell's vision, "the board of director's role was to fulfill the *functional* requirements and obligations set forth by the bylaws and nothing else." R. 1009. Any other matters "were reserved for Lowell, as the President." *Id*. Pastor Lundstrom "did not want his board of directors to exercise day-to-day control" of the Nonprofit Corporation. *Id*.

Pastor Lundstrom began making succession plans when his health started failing in 2012. His preference was that his daughter, Londa Lundstrom Ramsey, ("Londa") would take over the Nonprofit Corporation, which he communicated to the Board and staff. R. 1143; R. 1118 ("Lowell was **always** clear he wanted to have the [Nonprofit Corporation] led by a family member. This was a very clear understanding by our family, the Board, and the staff."); R. 1144 ("I met in the home of Pastors Lowell and Connie at least 20 times to hear their vision casting sessions, where Pastor Lowell specifically spoke from his heart about his desire of the outreach to continue to stay in the family by appointing Pastor Londa Lundstrom-Ramsey as the **sole** leader, Director, CEO, and CFO of both of his organizations: the Nonprofit Corporation and separately Celebration Church.").

Pastor Lundstrom's vision for Londa was for her to wield the same authority he exercised as President: with "autonomy and complete discretion with direction, vision, preaching, and all things concerned with both the Nonprofit Corporation and Celebration Church." R. 1143. For the first 50 years of the Nonprofit Corporation's existence, "the board was **never** involved with making decisions regarding moral

indiscretions of employees or team members." R. 1008. Likewise, the board was "**never** involved with making decisions regarding misconduct or discipline regarding the [Nonprofit Corporation's] employees or team members. R. 1007.

Initially, there was a group of people "whose feathers were ruffled at the idea of having a 'Woman Pastor' as head of the Nonprofit Corporation and Celebration Church." R. 1143. Those concerns, however, were "silenced with all of the success and growth Pastor Londa brought to the Nonprofit and Celebration Church." *Id*. Londa "brought the Nonprofit Corporation and the church to new places of growth where there had been stagnation." *Id*. For example, more people came to church services. *Id*. Londa also had to make tough choices to keep the church afloat, financially. R. 1153. The secretary treasurer of the Nonprofit Corporation described those decisions:

> When Londa Lundstrom Ramsey took over as President of Lowell Lundstrom Ministries, she directed we control expenses, reduce all staff salaries across the board, she had to make some hard decisions and let some part-time staff go, and she added a finance committee that met regularly to help her deal with the challenges of recovering from the recession and her father's failing health.

Id. "Dozens of people would want to spend time with Brent [Londa's husband] and Londa because of the contagious love and positivity surrounding their lives. People would always call, email, and request to come over to their house. People literally begged Londa to come over and to do things for her, paperwork, help with addressing cards, etc…." R. 1146.

As part of the succession planning for Londa's new role as President, the Board of Directors started working to revise and restate the original 1964 bylaws. R. 507-10.

The Board created a committee for this purpose, which worked between 2012 and 2014 to that end.

On January 8, 2014, (following the committee's 2-year review and drafting process), the Nonprofit Corporation's General Secretary (Frank Masserano) sent the Board a copy of the committee's work-product: a complete draft of the proposed restated articles and bylaws, which was almost thirty pages in length. R. 512-40.

Six weeks after circulating the proposal to the Board, Mr. Messerano presented the document during the February 2014 meeting of the Board of Directors. R. 208, 714. The Board considered and discussed the document, and the Board made some verbal changes, which Frank Masserano integrated and restated to the Board. *Id*. The Board then took those revisions home to review, in advance of a final vote at the Spring board meeting. As stated in the Minutes of the February 2014 meeting of the Board, the Directors' unanimous intent was that the Restated Articles and By-Laws would be "considered for action at the next board meeting." As the Minutes indicate:

> **Restated Articles of Incorporation & Restated By-Laws:**
> Frank handed out a Restated Articles of Incorporation & Restated By-laws for Lowell Lundstrom Ministries. The committee members that helped go through the changes consisted of Lisa Lundstrom, Jeff Wagner, Jim Olson, Jan Hawkins and Frank Masserano.
>
> Frank read through the proposed Articles of Incorporation & By-laws as presented. There were some suggestions given and corrections made. Frank recommended the board read through the Articles of Incorporation and By-Laws and email any questions to him before the next board meeting. He would then answer the questions and bring back to the committee before the next meeting.
>
> Resolved, that the proposed Restated Articles of Incorporation and the Restated By-Laws of Lowell Lundstrom Ministries, Inc. (LLM) be recommended to the full Board of Directors of LLM for review and considered for action at the next board meeting.

Id.

The next board meeting was held in May 2014, with all Directors present. During this meeting, the Directors again took up the issue of the Restated Articles and By-Laws. After their discussion, the Board unanimously voted to approve the restated articles and bylaws. R. 1178.

The versions of the Articles and Bylaws adopted at the May 2014 meeting were substantively the same as those proposed and approved at their February 2014 meeting. App. 043. In the lead-up to this meeting, the Corporation's General Secretary sent an email on May 6, 2014, in which he observed that he didn't "see any 'substantial changes' from what the committee approved previously." R. 1178.

In addition to their unanimous vote at the meeting, every member of the Board also signed a resolution for the adoption of those articles and bylaws. *Id*. (the "Resolution").[4] In this writing, the Board of Directors confirmed that the spring meeting was "duly called" in accord with the Nonprofit Corporation's operating procedures and State Law. *Id*. The Board of Directors also declared those restated bylaws as "duly adopted" and consistent with the Nonprofit Corporation's established procedures. *Id*.

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[4] In technical terms, when all Directors sign a document agreeing to corporate action, it can be referred to as a "writing in lieu of meeting."

In South Dakota's non-profit statutes, this provision is codified as SDCL 47-23-6: "***any action*** which may be taken at a meeting of the members or directors" may be accomplished "without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all the members entitled to vote with respect to the subject matter thereof…." SDCL § 47-23-6

This type of provision has been a fixture of South Dakota law for at least a century. *See,* South Dakota Revised Code of 1919, § 8794 ("when all the stockholders or members of a corporation…sign a written consent thereto…the doings of such meeting are as valid as if had at a meeting legally called and noticed.")

Following the May 2014 meeting, it appears that the Board of Directors began using the restated bylaws as the document governing the Nonprofit Corporation. In the summer of 2014, no members of the Board of Directors raised a concern with the newly-amended and restated Articles and Bylaws. Nor did anyone question their enforceability or validity or lack of notice. The Nonprofit Corporation and its related Celebration Church carried on their efforts and ministries, under Londa's ongoing leadership.

In fact, in the months following the unanimous approval of the new Bylaws, there was only one thing that changed in the summer of 2014: some members of the Board of Directors began publicly discussing Londa's shocking discovery that her husband had been having an improper relationship with another employee of the Ministry.

Or, in other words, Londa *herself* did not engage in wrongful conduct; instead, Londa discovered that her *husband* had been doing so, and certain Board members began talking about the issue.

Londa had been understandably devastated by the revelation, which her husband had confessed to in the prior year (in late summer of 2013). Londa confronted him and his paramour; she demanded honesty; they apologized; he promised it would stop; and she forgave him. Yet, within weeks her husband admitted that he had re-started the same improper conduct. Londa's husband eventually resigned his position with the Church, and his paramour left the Church.

All of this had transpired in 2013 (the year prior), and it had all been dealt with. Her husband's resignation was handled by another executive in the Church. Nonetheless, the public revelation in 2014 of Londa's husband's 2013 affair set off a firestorm of activity, which ultimately culminated in angry accusations directed at Londa herself, as well as calls for her immediate resignation.[5]

In the interests of candor, but without intending to give credence or merit to any of the meritless allegations, Londa offers the following summary of *material* facts, in a light most favorable to her as a non-moving party.[6]

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[5] Many of these salacious accusations have found their way into the pleadings in this lawsuit. At all stages, Londa has strenuously objected to the Appellees' attempts to offer their scandalous, unsubstantiated version of the background facts. In her final brief to the Circuit Court, below, she urged the Court to recognize that the Defendants/Appellees "are peddling a false narrative," and that "repeating a false narrative does not make it more true." R. 1603. Londa also reminded the Circuit Court that "few of [these 'facts'] are even documented in the Record, other than via vague accusations; and, most of them are immaterial to the resolution of the basic legal questions facing this Court." *Id.*

[6] The trial court observed that "[i]n the weeks following the May 16, 2014 meeting, members of the board received accusations of **misconduct on the part of Londa Lundstrom Ramsey** and Brent Ramsey." App. 003. The Record does not support such misconduct. For example, Defendants have contended that, unrelated to Londa's husband's sexual tryst, Londa herself committed financial misconduct. But the secretary treasurer of the Nonprofit Corporation testified that he was the officer who bore responsibility for investigating those allegations, and, he testified they were "false and untrue." R. 1157. *See also* R. 1153 (detailing the lack of any financial misconduct allegations prior to Defendants' final efforts to oust Londa from the Nonprofit Corporation). It is worth noting that Defendants have not asserted a single legal claim against Londa for reimbursement related to her alleged financial misconduct. While the trial court is correct that accusations were made, the trial court is wrong in concluding that the accusations occurred in the "weeks" following the May 16 meeting. And in fairness, these should be characterized as "baseless allegations. This error is not material, but, as noted elsewhere in this brief and throughout the Settled Record, Defendants have infused this case with salacious claims about Londa and her family in

In the late summer or early fall of 2013, Londa discovered that her husband, Brent, had been engaged in "inappropriate sexual conduct with someone [she treated] as '[her] adopted daughter,' Julianne Alfiere." R. 1041. In response, Londa "demanded every single detail of every single aspect" of their affair. *Id*. "This took many hours and [Londa] fell in bed exhausted emotionally and physically about 2 a.m." *Id*.

"Julianne contacted [Londa] the next morning and wanted to meet ASAP." R. 1042. "Both [Brent and Julianne] confirmed repeatedly, their sin was touching only. No nudity or [sex]." *Id*.

Londa met with Brent and Julianne the next day at Londa's office. *Id*. Londa "executed what was the first step plan with both Brent and Julianne confessing their sin." *Id*. Both Brent and Julianne "were truly broken, humble and repentant." *Id*. Londa "told them to forgive one another and [to] keep moving forward in [their] lives and callings." *Id*. Londa "offered [her]forgiveness to both [of them] and they offered each other their forgiveness and [they] agreed to new guidelines and boundaries to ensure this would never have the opportunity to happen again." *Id*.

Approximately three weeks later, Brent and Julianne confessed that they had engaged in inappropriate conduct again. *Id*. Londa called her personal spiritual advisor, Pastor Frank Masserano (who was also the General Secretary for the Nonprofit

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an apparent attempt to prejudice the forum about the underlying corporate governance questions. *See e.g.*, R. 828 ("Ultimately, Defendants resort to the very kind of mudslinging that is prohibited by Rule 403. Defendants cannot provide facts to defeat the merits of Plaintiffs' motion for summary judgment, so they try to dredge up and fling as much mud as possible at Plaintiffs. Such tactics are prohibited by Rule 403 because their salacious claims have no bearing on the legal issues and exist only to prejudice the Court and the eventual jury.")

Corporation), and Londa advised Julianne and Brent to discuss it over with other spiritual advisors. *Id*. Londa told Brent and Julianne that their actions "would now affect their ministry and roles at the church." *Id*.

Londa and Brent met with Mr. Masserano, "and Brent offered the relinquishment of his ministry credentials." R. 1043. Mr. Masserano, however, outlined a multi-year program for Brent to recover the credentials that he voluntarily gave up. *Id*. "Brent fully submitted and expressed his desire to be restored through all the measures IMF set forth." *Id*.

Brent then "resigned his position at the church." *Id*. At the coaching of Londa's own spiritual advisor, Londa advised the congregation that the reason Brent was stepping down was due to his diabetes. *Id*. That decision was consistent with how the Nonprofit Corporation had handled matters of "personal weakness" since its inception. R. 1007-08. The Board did not exist to police the personal lives of the preachers. *Id*. That was for the preachers, themselves, to regulate and address. *Id*.

By July of 2014, several members of the Board started talking publicly about Brent's and Julianne's actions. R. 1044. At that time, the discussion was one of compassion, with the idea that Londa could take a brief sabbatical to regroup and to heal the strain in her marriage with Brent. *Id*.

Despite the bylaw requirement that the Chair/Pastor call and preside all meetings of the Nonprofit Corporation, the Board attempted to hold a meeting outside of Londa's presence. R. 1045-46. Over the following weeks, Londa attempted to talk

with the Board about their corporate actions and how those actions did not conform to the bylaws. R. 1046-48. The Board responded by retaliating.

On September 3, 2014, the Board deleted the computer access privileges for the various staff members that had been supporting Londa. R. 1048. *See also* R. 1151-57 (Affidavit of John Poore), R. 1115-16 (Affidavit of Austin Miller), R. 1124-28 (Affidavit of Nate Prazuch). Later that afternoon, Londa's bank alerted Londa that a group of people (her sister, Defendants' current attorneys and Defendant Jim Olson) were at Londa's bank. They had been transferring Londa's personal funds to a different account without Londa's "approval or knowledge." R. 1049.

Londa took the matter straight to her parishioners and held a meeting that evening with the whole church. After addressing the issues, she called for a vote of "those members who wanted Pastor Londa to remain as the Pastor to stand. Those numbers were very carefully counted." R. 1134.

"It was obvious [from the vote] that Pastor Londa would remain the lead Pastor of the church." *Id*. A member of the church's Board of Elders described what happened next:

> During the time the second count was happening, those opposed to [Londa] remaining as Pastor started yelling out. Some were approaching the stage. Some were shouting profanities. I was shocked to see some, who just two nights before, forgave Pastor Londa in our Elders meeting that was adjourned in agreement were now yelling and screaming. Pastor Londa kept calling for order and saying they were out of line.

Id.

Cal Hedlund and John Poore came to the platform and announced the results. "[W]ell over two-thirds were in agreement that Pastor Londa [would] remain the Lead

Pastor." *Id*. According to one of the attendees, "[t]hose opposed to [Londa] began yelling and screaming accusations at her. It was completely appalling and out of order." *Id*. Pastor Londa then exercised her powers under the bylaws and dismissed the then-current Board (including the Defendants). R. 1135.

On September 4, 2014, the dismissed Board attempted to "meet". R. 1049. A church elder had attempted to join the meeting but was blocked by Sheila Engelmeier. R. 1135. According to Londa's sister, Ms. Engelmeier claimed to have found "'a legal loophole'" which would allow the Board to take over the Nonprofit Corporation without Londa's consent. R. 1049. Other parishioners tried to find out what the Board was doing, but the Board silenced them by threatening lawsuits. R. 1139.

A portion of the Board later met with Londa, but not at a duly noticed meeting. "In the first 60 seconds of the meeting, Jim Olson pushed a pile of legal documents in front of [Londa] and said 'Read these and sign these or we will begin legal action tomorrow.'" R. 1084-85. The participants would not let Londa review the papers with an attorney. *Id*. They also would not let Londa take the time to actually read the documents. *Id*. Instead, the meeting participants forced Londa to sign the documents (which included Defendants' claimed Settlement Agreement) almost immediately. *Id*.

Five hours later, Londa rescinded her signature. R. 1088.

STATEMENT OF THE CASE

Arising out of these corporate disputes, Londa brought this lawsuit on October 7, 2016. She sought a declaration of rights under the Restated Articles and Bylaws, along with other relief. R. 3-28. Londa was joined in the lawsuit by her brother, Lowell

Lundstrom, Jr. ("LJ"), as co-Plaintiff. (LJ later conceded that he lacked standing, and his claims were dismissed.)

After approximately two years of litigation, the Defendants moved to dismiss the Complaint. R. 312-323, 401-412. In return, Londa and LJ moved for partial summary judgment on June 6, 2018. R. 442-43.

The trial court heard argument on those motions on September 17, 2018. R. 946-1006. Nearly a year later, the Circuit Court issued a memorandum decision on the cross-motions. R. 1491-1501 (August 19, 2019). The Court denied both motions. *Id.* Londa petitioned for permission to bring an intermediate appeal, which this Court denied. R. 1537.

On March 20, 2020, Defendants then moved for summary judgment. R. 1538-39. At that same time, Londa and LJ asked the Circuit Court to reconsider its earlier order denying their own motion for partial summary judgment. R. 1567-68.

A hearing regarding those cross-motions was held on July 21, 2020. App. 012-042. The trial court orally granted Defendants' motion for summary judgment, and it denied Londa and LJ's motion to reconsider. App. 039. Londa filed her notice of appeal on August 11, 2020. R. 1643-45.

She assigns four errors of law. In summary, Londa asserts that the bylaws were validly amended based on four, independent legal doctrines: the definition of "propose;" waiver; equitable estoppel; and the writing-in-lieu-of-meeting statute (SDCL 47-23-6).

STANDARD OF REVIEW

"Summary judgment is a drastic remedy, and should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy." *Morgan v. Baldwin*, 450 N.W.2d 783, 785 (S.D. 1990) (citations omitted). This Court "review[s] a circuit court's entry of summary judgment under the *de novo* standard of review." *Larimer v. Am. Family Mut. Ins. Co*., 2019 SD 21, ¶ 6, 926 N.W.2d 472, 475. It "give[s] no deference to the circuit's decision…." *Id* (citations omitted) (ellipses in original). That is because "[s]ummary judgment 'should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy.'" *Hanson v. Big Stone Therapies, Inc.*, 2018 SD 60, ¶ 38, 916 N.W.2d 151, 161 (citations omitted). "If there are genuine issues of material fact, then summary judgment is improper." *Fisher v. Kahler*, 2002 S.D. 30, ¶ 5, 641 N.W.2d 122, 125 (citations omitted).

ARGUMENT

I. In Granting Defendants' Motion for Summary Judgment, the Trial Court Made Improper Inferences in Defendants' Favor

"On summary judgment, '[a]ll reasonable inferences drawn from the facts must be viewed in favor of the non-moving party.'" *In re Estate of Tank*, 2020 S.D. 2, ¶ 43, 938 N.W.2d 449, 461 (*quoting St. Onge Livestock Co., Ltd. v. Curtis*, 2002 S.D. 102, ¶ 10, 650 N.W.2d 537, 540-41). A grant of summary judgment may be reversed in cases where disputes of material fact remain. *Id*., ¶ 48.

The trial court overlooked or ignored several factual disputes. These factual disputes form the basis by which a Jury could side with Londa on four issues: the definition of 'propose'; waiver; estoppel; and the statutory consent in lieu of meeting.

For example, the trial court concluded that "it is undisputed" that "the first time the final version of the proposed amended bylaws was made available to the entire board was at the quarterly board meeting on May 16, 2014." APP. 007. The source of this conclusion is a series of self-serving, conclusory affidavits filed by Jim Olson and Jan Hawkins. But those affidavits are flatly contradicted by the Board Minutes from the prior board meeting (on February 20, 2014) and the recording of that meeting. R. 208, 714.

The February board minutes indicate that the proposed bylaws were distributed at the meeting and presented for discussion, which then resulted in minor corrections being made ***at that February meeting***. *Id*. *See also* Physical Exhibit List, Exhibit D, filed September 14, 2018. Further, those corrections were so minor and well-understood during that discussion that the Board agreed that these proposed bylaws (with the corrections that had already been made) would then be "considered for action at the next board meeting."

Here is the verbatim language adopted by the Board in its minutes:

Restated Articles of Incorporation & Restated By-Laws:
Frank handed out a Restated Articles of Incorporation & Restated By-laws for Lowell Lundstrom Ministries. The committee members that helped go through the changes consisted of Lisa Lundstrom, Jeff Wagner, Jim Olson, Jan Hawkins and Frank Masserano.

Frank read through the proposed Articles of Incorporation & By-laws as presented. There were some suggestions given and corrections made. Frank recommended the board read through the Articles of Incorporation and By-Laws and email any questions to him before the next board meeting. He would then answer the questions and bring back to the committee before the next meeting.

Resolved, that the proposed Restated Articles of Incorporation and the Restated By-Laws of Lowell Lundstrom Ministries, Inc. (LLM) be recommended to the full Board of Directors of LLM for review and considered for action at the next board meeting.

R. 208. (These February board minutes were approved, unanimously, by the Board at its May 2014, meeting.)

The Court also found it "undisputed" that "the two-week waiting period was not observed" between "the meeting at which a proposal on the change of the Bylaws was presented and the meeting adopting the changes." APP. 007. For this, the Court cites to Londa Lundstrom Ramsey's testimony that the proposal was not presented in an "untweaked form" until May 16, 2014. Yet the Court's conclusion on this, too, is contradicted by the Record. Pastor Frank Masserano's contemporaneous email on May 6, 2014, observed that he didn't "see any 'substantial changes' from what the committee approved previously." R. 1178. The inference from these facts is that the *proposal* to change the by-laws made at the February 2014 meeting was, thus, substantively unchanged from the by-laws approved at the May 2016 meeting. If Plaintiffs are not entitled to summary judgment, then Defendants do not automatically

win. Instead, it is an issue of fact whether this "proposal" process complied with the meaning of the word "proposed" within the by-laws.

The trial court also observed that no board member "raised an objection to the procedure followed at the time of the meeting when the proposed Bylaws were voted on at the quarterly board meeting on May 16, 2014." APP. 007. Yet the Court then concludes without analysis or authority that this "does not cure the failure to follow the appropriate procedure." R. 1498. The undisputed facts, however, suggest, at a minimum, that the Board *waived* the underlying procedural requirement. That is reversible error because the trial court failed to make the inference of waiver in Londa's favor. By definition, if the board members *waived* the notice requirements, then this would "cure" the notice problem.

II. The Trial Court Erred by Misinterpreting the Definition of "Propose"

By-laws are construed in the same manner as contractual provisions, and "we apply the normal principles for construction and interpretation of a contract." *Mahan v. Avera St. Luke's*, 2001 S.D. 9, 621 N.W.2d 150, 154. *See, also, Schraft v. Leis*, 236 Kan. 28, 34-35, 686 P.2d 865, 872 (1984) ("Bylaws are self-imposed rules, resulting from an agreement or contract between the corporation and its members to conduct the corporate business in a particular way.").

The trial court erred by failing to subject the notice provision to the "normal principles for construction and interpretation." The trial court also did not define the word *propose*. Had it done so, the trial court would have found that the May 2014 bylaws were properly adopted.

"[I]n determining the proper interpretation of a contract, the court must seek to ascertain and give effect to the intention of the parties." *Read v. McKennan Hosp*., 2000 S.D. 66, ¶ 23, 610 N.W.2d 782, 786. To interpret contractual language, the trial court must "examine the contract as a whole and give words their 'plain and ordinary meaning," which includes using definitions found in the American Heritage Dictionary. *Coffey v. Coffey*, 2016 S.D. 96, ¶ 8 and fn.1, 888 N.W.2d 805, 809.

The 1964 Bylaws laid out the procedure for how amended and restated bylaws could be adopted:

> The Board of Directors shall have the power, by vote of a majority of the members present and voting at any meeting at which there is a quorum, to make, alter, amend or rescend the by-laws of this corporation. ***The alteration of these by-laws shall be proposed at one meeting of the Board of Directors but shall not be voted upon and adopted at the same meeting. A waiting period of not less than two weeks shall exist between the meetings proposing a change in the by-laws and the meeting adopting the changes in the by-laws.*** Ten days notice of the meeting for the adoption of any changes in the by-laws shall be given to each member in writing and mailed to his home address.

R. 480 (emphasis added).

The structural interpretation at issue in this case is what constitutes "proposed" and the substance of what must be spelled out in those *proposals*. The by-laws are silent as to how much detail must be proposed; it merely states that the alteration of these by-laws must be proposed at one meeting and adopted at another. The trial court erred by finding that the *verbatim* changes had to be in their final form at least two weeks before those changes are adopted. The by-laws, themselves, include no such requirement. The trial court added and imposed that requirement.

To *propose* means "to put forward for consideration, discussion, or adoption….to make known as one's intention." American Heritage (3rd ed.). "SYNONYMS: *propose, pose, propound, submit*. The central meaning behind these verbs is to 'present something for consideration or discussion.'" *Id.*[7] It appears undisputed that *all* of the substantive bylaw changes were presented for consideration in January and February of 2014, including an extensive discussion at the February 2014 meeting. R. 208, 714.

Further, Pastor Frank Masserano's contemporaneous email on May 6, 2014, observed that he didn't "see any 'substantial changes' from what the committee approved previously." R. 1178. Thus, using the ordinary definition of the word *propose,* the intended changes to the by-laws were made known at the February 2016 meeting was, thus, substantively unchanged from the one approved at the May 2016 meeting. In other words, the final version of the new bylaws were proposed in February and adopted in May, which was consistent with the original bylaws.

The trial court's ruling also fails to consider the legal doctrine of *de minimis non curat lex*. "[T]he venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wis. Dep't of Revenue v. William Wrigley, Jr., Co*., 505 U.S. 214, 231, 112 S. Ct. 2447, 2457-58 (1992). Under this doctrine, "[s]light and insignificant imperfections or deviations may be 'overlooked….'" *Fenske Printing v. Brinkman*, 349

[7] *C.f.,* Black's Law Dictionary, (7th ed.) (a *proposed regulation* is one which is "circulated among interested parties for comment").

N.W.2d 47, 48-49 (S.D. 1984) (Henderson, J., concurring). *See also State v. McCann*, 354 N.W.2d 202, 204 (S.D. 1984) ("'The law does not care for, or take notice of, very small or trifling matters.' Black's Law Dictionary 482 (Rev. 4th ed. 1968)….We are inclined to agree.").

Here, even if there were minor changes to the bylaws, neither party has been able to identify how those modifications deprived anyone of notice or process. The Board knew that changes were coming for over two years (indeed, the Board had asked for these changes by forming a committee). The Board knew what the final form of those amendments would look like at its February meeting. The Board has never claimed that it lacked notice of what content was proposed. Instead, a handful of members claimed that the *de minimus* modifications made in February of 2014 invalidated the entire process.

The Appellees' vision of the law has implications beyond this case. For example, if this Court were to adopt the trial court's reasoning, entire agreements or contracts could be discarded because the offer or acceptance contained minor grammatical errors. That would shift the focus from enforcing the contractual intent of the parties to enforcing compliance with grammatical rules.

That is why "[a]nother test to be applied in determining the meaning of a contract is the construction actually placed on the contract by the parties as evidenced by their subsequent behavior. If the intention of the parties is not clear from the writing, then it is necessary and proper for the court to consider all the circumstances surrounding the execution of the writing and the subsequent acts of the parties. The

construction given by the parties themselves to the contract as shown by their acts, if reasonable, will be accorded great weight and usually will be adopted by the court." *Malcolm v. Malcolm*, 365 N.W.2d 863, 865 (S.D. 1985) (*quoting and citing*: 17 Am.Jur.2d Contracts § 274 (1964); Restatement (Second) of Contracts § 202 (1981); *Janssen v. Muller*, 38 S.D. 611, 162 N.W. 393). The behavior of the Board, including the Minutes of the February 2014 board meeting tell the story here. The Board believed that the proposal had been sufficiently placed in front of it at the February 2014; the Board believed this because it announced that a vote on the proposal could be taken at the May 2014 meeting. The Board's own interpretation of its provisions indicates that the new by-laws were validly adopted, *i.e*., that a valid proposal was later followed by a valid adoption.

The trial court erred in its interpretation of the 1964 bylaws. The bylaws only required that "the alteration of these by-laws shall be proposed at one meeting of the Board of Directors but shall not be voted upon and adopted at the same meeting." R. 480. This was not a surprise for anyone. By May of 2014, the alteration of those bylaws had been "proposed" for several years. The first proposal to alter the 1964 bylaws was discussed in 2012. R. 507-10. The Board then constituted a committee to carry out its intention. The committee's final version of those amended and restated bylaws were proposed in February of 2014, which led to minor, verbal modifications that were integrated into the version ultimately voted on in May. R. 208, 714, Physical Exhibit List, Exhibit D, filed September 14, 2018.

The trial court failed to utilize the plain language of the 1964 bylaws. It, instead, imposed new and additional requirements. In doing so, it erred. Summary judgment should be reversed and Londa's motion for partial summary judgment should be granted, instead.

III. The Trial Court Erred by Failing to Even Consider Defendants' Waiver

The trial court's rulings ignore the legal possibility that parties can waive rights otherwise afforded to them by a company's charter or bylaws. By failing to consider waiver, the trial court erred.

It is well-settled that "corporations have power to waive provisions of their bylaws introduced for the protection of the company, and they may do so expressly or impliedly." *Schraft v. Leis*, 236 Kan. 28, 35, 686 P.2d 865, 872 (1984) (*quoting* 18 Am. Jur. 2d, Corporations § 173, pp. 703-04; *citing* 8 Fletcher, Cyclopedia of the law of Private Corporations § 4200, pp. 730-31 (rev. perm. ed. 1982); and *holding* that the use of the bylaws was waived by the parties) (emphasis added). "Individual provisions of the bylaws may be waived by the conduct of parties just as provisions of a contract." *Golasa v. Struse*, 9 Pa. D. & C.3d 48, 53 (C.P. 1978) (citing *Elliott v. Lindquist*, 52 A. 2d 180 (Penn. 1947).

The pertinent facts here are undisputed. At the beginning of its May 2014 meeting, the Board unanimously approved the minutes from its February 2014 board meeting, and those minutes expressly announced that the re-stated bylaws had been considered, and would come before the Board "for action" at the next board meeting. At the May 2014 board meeting, the Board then took action by adopting them. Further,

the Board did not just vote unanimously for the new by-laws, but, indeed each member of the Board inscribed their names upon a separate, written resolution. Even if some further "advance notice" was required to be given here, there is no other set of facts which would better exhibit an example of a Board waiving that requirement. The Nonprofit Corporation then conducted itself for several months under those new bylaws. By its conduct, the Nonprofit Corporation and its Board waived any procedural requirements of the 1964 Bylaws. Summary judgment should be reversed and Londa's motion for partial summary judgment should be granted, instead.

IV. The Trial Court Erred by Failing to Consider Estoppel

For several months after the May 2014 meeting, the Board acted as if it had adopted the 2014 bylaws. The Board, therefore, should have been estopped from arguing that those bylaws were null and void. The trial court erred by not considering Londa's estoppel arguments against the Board.

As the Supreme Court of Kansas recognized, "an assertion of rights inconsistent with past conduct, silence by those who ought to speak, or situations where it would be unconscionable to permit persons to maintain a position inconsistent with one in which they have already acquiesced." *Schraft v. Leis*, 236 Kan. 28, 36, 686 P.2d 865, 873 (1984).

Thus, in the alternative, if the conduct described above is not a waiver, such conduct constitutes an *estoppel*. A Board cannot take all of the above-described actions, adopt a new set of bylaws by unanimous consent, inscribe each of their names upon the resolution, and then surprise a minority group of board members four months

later by announcing that this was all a farce. "To create an estoppel [in South Dakota], there must have been some act or conduct by the party estopped which has in some manner misled the party in whose favor estoppel is sought and has caused such party to do some act relying upon the conduct of the party to be estopped, thus creating a condition that would make it inequitable to allow the guilty party to claim what would otherwise be his legal rights." *L.R. Foy Constr. Co. v. Spearfish Sch. Dist*., 341 N.W.2d 383, 386 (S.D. 1983). In short, if there was a problem with notice, the parties who sought to raise the issue were duty-bound to raise it at the May 2014 meeting. Their silence bound them.[8] Summary judgment should be reversed and Londa's motion for partial summary judgment should be granted, because the Board members waived further procedural requirements, or, are estopped from denying the adoption of the Restated Articles and Bylaws.

V. The Trial Court Erred by Dismissing the Significance of South Dakota's "Writing in Lieu" Statute

The trial court disregarded SDCL § 47-23-6 (i.e., the 'writing in lieu' statute). The trial court ruled that SDCL § 47-23-6 was inapplicable because the Nonprofit

[8] In addition to their silence, their lack of specificity is dispositive. At all stages of these proceedings, the Record is silent as to any substantive "change" that was made between February 2014 and May 2014 for which the Appellees raise their protest. The pertinent maxim here is that "the law disregards trifles." *C.f.*, *Fenske Printing v. Brinkman*, 349 N.W.2d 47, 48-49 (S.D. 1984) ("Any noncompliance here was, at most, minimal. Slight and insignificant imperfections or deviations may be overlooked, on the principle of *de minimis non curat lex,* which means that the law will not concern itself with trifles.") (Henderson, J., concurring) (internal citation omitted)

Corporation's 1964 Bylaws did not "make any provision to permit the two-week waiting period to be waived." App. 007. That ruling is inconsistent with this Court's longstanding jurisprudence regarding corporate governance statutes.

As discussed above, corporate bylaws are contracts; and as a rule, "contracts cannot change statutory law." *Farmland Ins. Cos. v. Heitmann*, 498 N.W.2d 620, 623 (S.D. 1993). Instead, the statutory provisions governing corporations are presumed to be written into their bylaws, as if those statutes had been drafted their expressly.

The pertinent statute here says, quite broadly, that "***any action*** which may be taken at a meeting of the members or directors" may be accomplished by consent, by setting forth the action taken writing, which is then signed by all of the directors. SDCL § 47-23-6. Amending the bylaws is one of the types of "any action" which may be taken at a meeting of the directors.

The trial court, however, examined this statute from the wrong approach. Rather than look to the Board's actions, the trial court sought out a provision within the 1964 bylaws which would have permitted the Board to utilize the writing-in-lieu statute. The bylaws, however, cannot constrain this statute. For example, the statute here does not say "any action can be taken by consent, *except* those for which notice was not given." *C.f., Farmland Ins. Cos.*, 487 N.W.2d at 623.

The trial court's analysis ignored the point of this statute: the Legislature intended for this Board, or any board of directors, to dispense with the formalities of meetings and notice by unanimously adopting board actions in writing. SDCL § 47-23-6; App. 043. The entire premise of the writing-in-lieu statute is that further notice is

unnecessary, because, by definition, the signatories have notice of the proposal within the document they are signing, and, they are expressly agreeing that no further notice or process is needed. *Solstice Capital II, Ltd. P'shp v. Ritz*, 2004 Del. Ch. LEXIS 39, at *5 n.10 (Ch. Apr. 6, 2004) (quoting Folk, "The Delaware Corporation Law," p. 61 (1964) ("unanimous written consent *ipso facto* proves notice actually received").

Affirming the trial court's ruling would overturn how corporations conduct their everyday business. Writing-in-lieu documents could no longer be taken at face value. Instead, careful corporations would need to hold additional meetings, just to make sure that the writing-in-lieu was binding. And they would always be looking over their shoulders, wondering which unanimously agreed-to resolutions would be subject to later attack. This is the opposite of what the Legislature intends. And this is no way to run a corporation.

Summary judgment should be reversed, and Londa's motion for partial summary judgment should be granted because the Board followed South Dakota's statutory, corporate formalities to adopt its Restated Bylaws and Articles.

CONCLUSION

The trial court misinterpreted the evidence and the law in this matter. It interpreted facts in Defendants' favor, and it ignored several legal concepts in granting Defendants' motion for summary judgment. The 2014 bylaws were adopted consistent with the 1964 bylaws, based on the plain language of the 1964 bylaws or by the authority granted the board by SDCL § 47-23-6. Even if they were not properly adopted,

the Board waived its ability to object to the 2014 bylaws or were estopped from asserting those same objections. Summary judgment should be reversed and Londa's motion for partial summary judgment should be granted.

Dated this 30th day of November, 2020.

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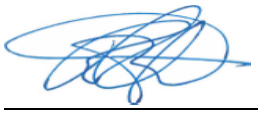
CERTIFICATE OF COMPLIANCE

I certify that this brief does not exceed the word limit described by SDCL § 15-26A-66. This brief contains 6,863 words, excluding the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.



One of the attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2020, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

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and via email attachment to the following address: scclerkbriefs@ujs.state.sd.us.

I also hereby certify that on this same day, I sent copies of the foregoing by email to Appellees' counsel, as follows:

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STATE OF SOUTH DAKOTA IN CIRCUIT COURT

COUNTY OF ROBERTS FIFTH JUDICIAL CIRCUIT

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#54CIV16-88

LONDA LUNDSTROM RAMSEY and
LOWELL LUNDSTROM, JR.,

Plaintiffs,

v. MEMORANDUM DECISION

LOWELL LUNDSTROM MINISTRIES, INC., JAN HAWKINS, SI LIECHTY, JIM OLSON, PAUL ANDERSON, RANDY DIRKS, DERRICK ROSS, KURT RINGLEY, LYNDA BORDREAU, JASON HEATH, JEFF JOHNSON and DARNELL JONES,

Defendants.

****

The above-entitled matter is currently before this Court following a motion hearing on September 17, 2018, in the courtroom of the Roberts County Courthouse, Sisseton, South Dakota. At the time of that hearing, Plaintiffs appeared in person and with counsel, Robert D. Trzynka. Defendants were represented at the hearing by counsel, Sheila Engelmeier and Patrick K. Burns. Four motions were scheduled to be heard. In order of their filing dates, those motions were: Defendants' Motion For Dismissal For Lack Of Subject Matter Jurisdiction Or, Alternatively, Summary Judgment; Plaintiffs' Motion For Partial Summary Judgment; Plaintiffs' Motion To Strike and Plaintiffs' Motion To Compel.

Due to the volume of material filed in support of the four motions, the Court advised the parties that a decision would not be issued from the Bench at the conclusion of the hearing as the Court would have to take the matter under advisement to review all of the material. This included Plaintiffs' Exhibit D, a partial audio recording of a board meeting held on May 16, 2014, that was presented for the first time at the hearing. Neither the Court nor Defendants' counsel had had an opportunity to review the recording. The Court granted Defendants additional time to review the DVD and provide any response that they felt was necessary.

Plaintiffs had also asserted that they were prejudiced by the late filing of some of Defendants' responses to Plaintiffs' motions. The Court also extended an additional opportunity for Plaintiffs' counsel to respond to any information that he believed caused prejudice to Plaintiffs by being filed at a time closer to the hearing than allowed by

statute. Additionally, both parties were then given time to reply to the other party's responses.

In addition to the affidavits already on file, following the hearing, the Court received fourteen additional affidavits from Plaintiffs and nine additional affidavits from Defendants. The Court also received Defendants' Supplemental Memorandum dated October 1, 2018; Plaintiffs' Response To Defendants' Supplemental Memorandum dated October 9, 2018 and Defendants' Supplemental Reply Memorandum In Support Of Its Motion To Dismiss dated October 9, 2018. The Court has now had an opportunity to carefully review all documents contained in the Court's file, including all pleadings, briefs, exhibits, affidavits and arguments of counsel presented to the Court and hereby issues this Memorandum Decision.

FACTUAL AND PROCEDURAL BACKGROUND

Lowell Lundstrom Ministries, Inc., is a non-profit corporation originally incorporated under the name of Message For America Evangelistic Association by virtue of Articles of Incorporation adopted September 4, 1964, and filed with the State of South Dakota Department of State on September 9, 1964. Lowell Lundstrom, Carl Johnson and Robert Hanson were the original members of the non-profit corporation whose purpose, among other things, was to further the dissemination of religious and moral instruction and spread the gospel by all proper and legitimate agencies and means. The non-profit corporation was organized under the "South Dakota Nonprofit Corporation Act" now codified at SDCL 47-22, with its registered and principle office in Sisseton, South Dakota. Although the non-profit corporation was not incorporated until 1964, Lowell Lundstrom and his wife, Connie Lundstrom, immediately began traveling to offer music centered evangelism and outreach in South Dakota, the upper Midwest and Canada following their marriage in 1957.

By virtue of an amendment to the Articles of Incorporation on April 7, 1979, the non-profit corporation became known as Lowell Lundstrom Ministries, Inc. Reverend Lowell Lundstrom, one of the founders and initial members of the non-profit corporation served as president and chairman of the board of directors of the non-profit corporation until his health began to fail and his daughter, Plaintiff Londa Lundstrom Ramsey, took over as chairwoman in 2010.

In 1996, Reverend Lundstrom began spending most of his time in Lakeville, Minnesota where Lowell Lundstrom Ministries, Inc., hereinafter referred to as LLM, had started Celebration Church. Celebration Church filed an application and officially became affiliated with the General Council of the Assemblies of God and the Minnesota District Council in 1996. By 2014, virtually all operations of LLM were in Minnesota. LLM is registered as a foreign corporation in the state of Minnesota and operates Celebration Church in Lakeville, Minnesota.

In 2008, due to his battle with the symptoms of Parkinson's disease, Reverend Lundstrom appointed his daughter, Londa Lundstrom Ramsey, to take his place as minister and evangelist of the interdenominational church and ministry. Connie Lundstrom passed away on December 13, 2011, following a battle with cancer. Lowell Lundstrom died on July 20, 2012, following a long battle with Parkinson's disease. After Reverend Lundstrom passed away, Londa Lundstrom Ramsey gave her husband, Brent Ramsey, an active role in the Celebration Church ministry.

From its inception through 2010, LLM had grown rapidly, supported by songs and records that the Lundstroms released. The entire Lundstrom family played a role in this success. However, after Reverend Lundstrom's death, some members of the board began to question actions taken by Londa Lundstrom Ramsey.

In 2014, Londa Lundstrom Ramsey brought to the quarterly board meeting proposed amendments to the Bylaws that had been talked about since 2010. Although the amended Bylaws had been talked about at the February, 2014 quarterly board meeting, they were not officially presented to the board until the May, 2014 quarterly board meeting. According to the testimony of Londa Lundstrom Ramsey at a hearing before this Court on Plaintiffs' Motion For Temporary Restraining Order on July 31, 2017, the proposed amendments to the Bylaws were presented to the board at the May quarterly board meeting on May 16, 2014, and after a few "tweaks" were adopted by the board at that meeting.

In the weeks following the May 16, 2014 meeting, members of the board received accusations of misconduct on the part of Londa Lundstrom Ramsey and Brent Ramsey. A board meeting was scheduled for September 2, 2014. Londa Lundstrom Ramsey did not attend the September 2, 2014 meeting. At that meeting, she was removed as board chair and replaced by Jim Olson. She was further removed as president and CEO and given a period of time to gracefully exit. Further action and negotiations occurred in connection with any future involvement of Londa Lundstrom Ramsey with the non-profit and Celebration Church and on September 10, 2014, she signed a settlement agreement in which she agreed to have no further involvement. Thereafter, this action was filed, leading to the motions hearing on September 17, 2018.

DEFENDANTS' MOTION FOR DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION OR, ALTERNATIVELY, SUMMARY JUDGMENT

Defendants move for an order for dismissal for lack of subject matter jurisdiction pursuant to SDCL 15-6-12(b)(1). In the alternative they are seeking summary judgment pursuant to SDCL 15-6-56(c). Defendants' Motion For Dismissal alleges that the Court lacks subject matter jurisdiction in this action pursuant to SDCL 15-6-12(b)(1). Defendants' argument is initially based upon several decisions of the South Dakota Supreme Court involving disputes between members of Hutterite colonies in South Dakota, Decker v. Tschetter Hutterian Brethern, Inc. 594 N.W.2d 357(SD 1999); Hutterville Hutterian Brethern, Inc., v. Waldner, 791 N.W.2d 169 (SD 2010) and Wipf v. Hutterville Hutterian Brethern, Inc., 808 N.W.2d 678 (SD 2012). Defendants also cite to

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) to support their position that this Court lacks jurisdiction to proceed.

In the Hutterite cases, the South Dakota Supreme Court found that state civil courts did not have jurisdiction to resolve disputes among members of the Hutterian brethren and colonies, because the communal life adopted by the Hutterites provides no separation of religious life from a secular life in a Hutterite colony because there is no separate secular life. Plaintiffs argue that the facts in this case and the organization of LLM distinguish this case from the series of Hutterite cases.

When a Court must evaluate a motion to dismiss, that Court must accept material allegations of the pleadings as true and interpret them in a light most favorable to the pleading party to determine if the allegations allow relief. Wells Fargo Bank, N.A. v. Fonder, 868 N.W. 2d 409 (S.D. 2015). The motion tests only the legal sufficiency of the pleading. Id. "The First Amendment to the United States Constitution and Article Six Section Three of the South Dakota Constitution preclude civil courts from entertaining religious disputes over doctrine, leaving adjudication of those issues to ecclesiastical tribunals of the appropriate church." Wipf v. Hutterville Hutterian Brethren, Inc., 808 N.W. 2d 678.

The United States Supreme Court has recognized an alternative method by which civil courts may resolve church property disputes. That method is known as the "neutral principles of law" approach. Jones v. Wolf, 443 U.S. 595 (1979). The "neutral principles of law" approach was adopted by the South Dakota Supreme Court in Foss v. Dykstra, 319 N.W. 2d 499 (S.D. 1982). The neutral principles approach calls for a completely secular examination by civil courts into church documents, deeds to the property in question, state statutes and other relevant evidence to determine ownership. The key to this approach is that such determination is to be made "exclusively on objective, well established concepts of trust and property law familiar to lawyers and judges." Jones, supra at 604. "A civil court may only adjudicate a church controversy if it can do so without resolving underlying controversies over religious doctrine." Hutterville, supra, quoting Milivojevich, supra.

The dispute presented by the pleadings in this case will require the Court to resolve claims for declaratory relief, breach of articles of incorporation and bylaws, breach of charitable trust, breach of fiduciary duty, misuse of Plaintiff's surname, claim for conversion, claim for unjust enrichment and claim for injunctive relief. None of these claims appear to be based upon religious doctrine, nor has the Court received for review any religious doctrine documents.

LLM is incorporated under the laws of the State of South Dakota and the Articles of Incorporation were filed with the South Dakota Secretary of State. Clearly, LLM submitted itself to the supervision and jurisdiction of the State at that time for purposes of review of Articles of Incorporation and Bylaws. The current motions before this Court require no review of religious doctrine, nor does it appear that the claims made in the Plaintiffs' complaint are based upon religious doctrine. The Court will be required to

determine which set of Bylaws are in effect and whether those Bylaws were properly followed in actions alleged to have been taken by Defendants. The Articles of Incorporation and Bylaws do not contain any language that could be considered to be religious doctrine.

It appears that by applying the neutral principles approach in this case the Court will be able to make determinations exclusively on objective, well established concepts of law familiar to lawyers and judges. Therefore, although LLM was incorporated as a nonprofit corporation to, among other things, promote religion, the Court will not need to review religious doctrine to rule on the issues raised by the current pleadings. Defendants' Motion For Dismissal For Lack Of Subject Matter Jurisdiction is hereby denied.

DEFENDANTS' ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

As an alternative to the Motion For Dismissal, Defendants also seek relief by way of summary judgment. A motion for summary judgment is authorized under SDCL 15-6-56(a). Under SDCL 15-6-56(b) a defending party moving for a summary judgment may do so with or without supporting affidavits. In this case, Defendants have filed numerous affidavits. Plaintiffs have filed several responsive affidavits, including an affidavit by Londa Lundstrom Ramsey filed on October 1, 2018.

At the time of hearing, Plaintiffs objected to information contained in the affidavits filed by Defendants as being irrelevant. Since the hearing, the Court has had an opportunity to review all affidavits on file. In ruling on these motions, the Court has considered the contents of the affidavits executed by Jim Olson, Greg Hickle, the supplemental affidavit of Jim Olson, Jillyn Nelson, Jan Hawkins, Derrick Ross, Clarence St. John, the supplemental affidavit of Jan Hawkins and the two affidavits of Lona Lundstrom Ramsey. All other affidavits that were filed with the Court, other than the affidavits of counsel, do not appear to contain information relevant to the determination of the motions currently before the Court and were not considered by the Court in ruling on these motions.

Under SDCL 15-6-56(c)(1) a party moving for summary judgment is required to attach to the motion a separate, short and concise statement of the material facts as to which moving party contends there is no genuine issue to be tried. Plaintiffs did not attach such a statement to their motion which sought in the alternative summary judgment. Under SDCL 15-6-56(c)(2) an opposing party is required to respond to the numbered paragraphs in the moving party's statement. Obviously, since no statement was filed by Defendants, Plaintiffs could not respond.

Although the affidavits filed by the parties contain numerous factual statements, without compliance with the statutory requirements, the court is unable to consider Defendants' Alternative Motion For Summary Judgment. Therefore, Defendants' Alternative Motion For Summary Judgment is hereby denied for failure to comply with the statutory requirements.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs have filed a Motion For Partial Judgment against Defendants regarding Plaintiffs' claim for declaratory judgment on the validity on the May 16, 2014 bylaws. On August 31, 2018, Plaintiffs filed a Statement Of Undisputed Material Facts In Support Of Plaintiffs Motion For Partial Summary Judgment as required by SDCL 15-6-56(c)(1). On September 12, 2018, Defendants filed a Statement Of Undisputed And Disputed Facts. Thereafter, on September 14, 2018, Plaintiffs also filed Plaintiffs' Response To Defendants' Additional Statement Of Undisputed Material Facts.

At hearing and through Plaintiffs' Motion To Strike, Plaintiff seeks to have the Court strike Defendants' Opposition To Plaintiff's Partial Motion For Summary Judgment. This is because Defendants filed their response two days late. Defendants concede that the response was untimely, but that this was due to neglect, not any intentional act on their part. It was for this reason that the Court gave Plaintiffs additional time to respond following the hearing, since the Court had already indicated it was not going to rule from the Bench. This extension of time for Plaintiffs to respond was intended to remove any prejudice caused by the late filing by Defendants and therefore Defendants' Opposition To Plaintiffs' Partial Motion for Summary Judgment was considered by the Court.

Plaintiffs' motion seeks summary judgment on the validity of the May 16, 2014 Bylaws as set forth in Count One of Plaintiffs' Complaint seeking declaratory relief under paragraph 87a. As previously stated, at the quarterly board meeting on May 16, 2014, the board was presented with proposed changes to the Bylaws for LLM. After a few minor changes or "tweaks" were made, the board adopted the proposed Bylaws at that meeting.

In Article 5, Section One of the Bylaws originally adopted by Message For America Evangelistic Association on September 22, 1964, a procedure was set forth to give the board of directors the power by a vote of a majority of the members present and voting to make, alter, amend or rescind the Bylaws of the corporation. Article 5 specifically states that the alteration of the Bylaws shall be proposed at one meeting of the board of directors but shall not be voted upon and adopted at the same meeting. A waiting period of not less than two weeks must exist between the meeting proposing a change in the Bylaws and the meeting adopting the change in the Bylaws. Ten days' notice of the meeting for the adoption of the changes in the Bylaws must be given to each member in writing and mailed to the member's home address.

The Bylaws were amended on several occasions between 1964 and May 16, 2014. However, the contents of Article 5 do not appear to have been changed from the original version requiring the two-week waiting period between proposing a change in the Bylaws and the meeting adopting the change in the Bylaws.

It is undisputed from the facts presented to the Court that the first time the final version of the proposed amended Bylaws was made available to the entire board of directors was at the quarterly board meeting on May 16, 2014. Whether there were minor changes or "tweaks" made at that meeting or not, that was the first meeting at which the proposals were formally presented to the board for consideration. The affidavits of Jim Olson and Jan Hawkins, as well as the supplemental affidavits of Jim Olson and Jan Hawkins indicate that the proposals were submitted to the board on May 16, 2014 and voted on at that same meeting. Testimony provided by Plaintiff Londa Lundstrom Ramsey at a hearing before this Court regarding the Temporary Restraining Order on July 31, 2017, verified that the first time that the proposed amendments to the Bylaws were presented in "untweaked form," with "everything [was] done decently in order" was the May 16, 2014 meeting. That is the meeting at which the board of directors voted to adopt the Bylaws. This is in direct violation of Article 5, Section 1 of the September 22, 1964 Bylaws that would have been in effect on May 16, 2014.

Plaintiffs refer in their Statement Of Undisputed Material Facts to SDCL 47-23-6. This statute allows the members or directors of a corporation to take certain actions which may be taken at a meeting, without a meeting, if they consent in writing, setting forth the action so taken and signed by all the members entitled to vote with respect to the subject matter thereof. While the resolution adopted at the May 16, 2014 board meeting may have been signed by all the members of the board of directors who were present, it does not appear that the Bylaws and Articles of Incorporation in existence at that time made any provision to permit the two-week waiting period to be waived.

Even if the meeting was properly noticed and the members of the board were aware that amendment of the Bylaws was going to be discussed, the Bylaws in effect at that meeting required the board to wait two weeks between the meeting at which a proposal on the change of the Bylaws was presented and the meeting adopting the changes. It is undisputed from the evidence presented to the Court that the two-week waiting period was not observed. Therefore, the May 16, 2014 Bylaws were improperly adopted and are null and void. St. John Hospital Medical Staff, et al., v. St. John Regional Medical Center, Inc., 245 N.W. 2d 472 (S.D. 1976). Plaintiffs' Partial Motion For Summary Judgment is hereby denied.

It should be noted that had the Court granted Plaintiffs' Motion and determined that the May 16, 2014 proposed Bylaws were properly adopted, Article 9-Arbitration, Section 9.1, of those Bylaws would then specifically require that all disputes which may arise between any member of the church and the church itself or between any member of the church and any pastor, officer, director, employee, volunteer or other member of the church be resolved by final and binding arbitration, not in civil courts. Therefore, if the May 16, 2014 Bylaws had been determined to be in effect, this Court would have no jurisdiction to proceed with this action.

It does not appear that any member of the board or member of the church raised an objection to the procedure followed at the time of the meeting when the proposed Bylaws were voted on at the quarterly board meeting on May 16, 2014. That does not

cure the failure to follow the appropriate procedure that was set forth in the original Bylaws in order to amend those Bylaws.

The Court hereby determines that the May 16, 2014 proposed Bylaws are null and void due to the failure to follow the appropriate procedure to amend the Bylaws. Those Bylaws in effect prior to the May 16, 2014 quarterly board meeting are therefore still in full force and effect.

PLAINTIFFS' MOTION TO STRIKE

Plaintiffs have also moved to strike Defendants' Opposition To Plaintiffs' Partial Motion For Summary Judgment and Defendants' Opposition To Plaintiffs' Motion To Compel because they were not timely served and filed. In their response and at hearing Defendants admitted that counsel had failed to properly follow the statute which required Defendants to file their responses at least five days before the hearing pursuant to SDCL 15-6-6(b). Defendants admit that they failed to comply with this statute because they included weekends in calculating their five days. To alleviate any prejudice that might be caused by this mistake, the Court granted additional time for Plaintiffs to file any response they felt was necessary to Defendants' filings.

Plaintiffs had also produced at the time of hearing a DVD containing an audio recording of a portion of the May 16, 2014 meeting. Neither the Court nor Defendants had previously had an opportunity to review this recording. Therefore, to allow the Court time to listen to the DVD and to give Defendants an opportunity to review and respond to the recording, additional time was granted to both parties for those purposes. While the Court had not intended to take so long in issuing a decision in this case, clearly sufficient time was granted to both parties to respond to each other's late filings and any prejudice caused thereby has been cured. Granting the Motion To Strike and removing the opportunity for Defendants to oppose the Motion For Partial Summary Judgment and the Motion To Compel would seem to be an extreme remedy under these circumstances where the response was only two days late and additional response time has been granted to Plaintiffs.

After listening to the DVD, it does not appear to the Court to be very helpful to either side, since it does not specifically identify what meeting is taking place or who is speaking at that meeting. However, the contents of the DVD are in evidence and have been reviewed by the Court. Also, the Court has now had an opportunity to review the affidavits and has previously indicated which of those affidavits were considered in connection with the decision on these motions. Obviously, much of the information was deemed to be irrelevant by the Court to the current issues. Therefore, it appears that any prejudice caused to Plaintiffs by Defendants missing the filing deadline by two days has been remedied. Defendants' Motion To Strike is hereby denied.

PLAINTIFFS' MOTION TO COMPEL

Pursuant to their Motion To Compel dated June 6, 2018, Plaintiffs seek an order compelling Defendants to disclose full and complete responses to Interrogatory Numbers 40, 41, 42 and 43 from Plaintiffs' Discovery Requests (Second Set) and an order compelling Defendants to disclose full and complete responses to Requests For Production Numbers 14, 15, 16, 17, 18, 19, 20, 21 and 22 from Plaintiffs' Discovery Requests (Second Set). Plaintiffs also seek an award of attorney's fees for their efforts to enforce compliance.

Defendants' Response To Plaintiffs' Discovery Requests (Second Set) dated June 6, 2018, were filed with the Court as an exhibit on August 31, 2018. A review of that document indicates that Interrogatory Numbers 42 and 43 and Request For Production Numbers 16, 17, 18, 19, 20, 21 and 22 have been complied with to the best ability of the Defendants. Based upon that review and arguments presented at the time of the hearing, it appears that the issues remaining to be resolved involve Interrogatory Numbers 40 and 41 and Request For Production numbers 14 and 15.

As a response to Interrogatory Numbers 40b, 40c, 40d and 40e, Defendants claim attorney/client privilege. In response to Interrogatory Numbers 41i and 41j, the Defendants also claim attorney/client privilege. Defendants have also claimed attorney/client privilege with respect to their responses to Request For Production Number 14 and Number 15. Interrogatory Number 41 refers to a document Bates stamped LLM000535-61. Although Defendants claim attorney/client privilege as to Interrogatory Numbers 41i and 41j, they also indicate that they have no information as to communications when the document in question was created aside from that already produced. Therefore, it appears that they have complied to the best of their ability with Interrogatory Number 41.

Interrogatory Number 40 and Request For Production Numbers 14 and 15 refer to a document Bates stamped as LLM000621-23. This is a three-page memorandum prepared by one of the attorneys for Defendants for distribution to the members of the board of directors of LLM. This document was distributed to the board at one of the directors' meetings after May 16, 2014. It does not appear that the document was intended to be confidential because the document was distributed to a multimember board of directors at an open meeting.

Plaintiffs argue that the attorney/client privilege does not apply in connection with this document because Defendants relied upon the advice of counsel as an essential element for their defense. Plaintiffs allege that Defendants inserted advice of counsel into the case by producing the memorandum in response to discovery requests and by the attendance of one of Defendants' attorneys at some of the board of directors' meetings. In Andrews v. Ridco and Twin City Fire Insurance Company, 2015 S.D. 24, the South Dakota Supreme Court continued to follow the Hearn test from Hearn v. Rhay, 68 F.R.D.574 (E.D. Wash. 1975) that had been adopted and supplemented by

the South Dakota Supreme Court in Bertelsen v. All State Insurance Co., 796 N.W. 2d 685. Three criteria are to be considered in determining whether a party impliedly waived the attorney/client privilege; (1) was assertion of the privilege a result of some affirmative act, such as filing suit or raising an affirmative defense by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.

The analysis of this issue is to begin with the presumption in favor of preserving the privilege and a client only waives the privilege by expressly or impliedly injecting his attorney's advice into the case. Hearn, supra. A review of the pleadings in this case does not indicate that Defendants have raised an affirmative defense of advice of counsel. While Defendants' Answer leaves open the opportunity to assert further affirmative defenses, that has not been done at this point. Defendants obviously did not initiate this litigation, they are only responding to it. The information at issue in this case is the memorandum. It is clear that the memorandum was not intended to be protected information as it was distributed to members of the board at a meeting open to other members of the nonprofit corporation.

The memorandum addresses the issue of the validity of the May 16, 2014 restated Bylaws and restated Articles of Incorporation. The Court has already ruled on this issue as part of Plaintiffs' Motion For Partial Summary Judgment. The memorandum would appear to have required the author to review the same information that the Court had available in ruling on the motion.

It is not clear from the record what information Plaintiffs would be denied by application of the privilege. The memorandum itself has been produced as part of discovery. The author of the document is known also based upon discovery. Any preliminary drafts of the document would be attorney work product and not discoverable. The information that was provided to the board is set forth in the memorandum. Defendants did not inject, by an affirmative act, a privileged communication into the litigation. The memorandum was not presented as privileged information when it was provided to the board of directors. Therefore, Defendants have not waived their attorney/client privilege by the act of the board being provided with this memorandum and providing it to Plaintiffs as part of discovery. Attendance of legal counsel at some of the board meetings also does not waive the privilege. Plaintiffs' Motion To Compel is therefore hereby denied. Plaintiffs' request for attorney fees is also hereby denied.

CONCLUSION

Defendants' Motion For Dismissal For Lack Of Subject Matter Jurisdiction Or, Alternatively, Summary Judgment is hereby denied. Counsel for Plaintiffs is directed to draft an appropriate order denying the motion and, unless waived by Defendants, to draft proposed Findings Of Fact And Conclusions Of Law incorporating this Memorandum Decision by reference.

Plaintiffs' Motion For Partial Summary Judgment, Plaintiffs' Motion To Strike and Plaintiffs' Motion To Compel and their request for attorney's fees are each also hereby denied. Counsel for Defendants is directed to draft an appropriate order denying those motions and, unless waived by Plaintiffs, to prepare findings of Fact and Conclusions of Law incorporating this Memorandum Decision by reference.

Dated this 16th day of August, 2019.

BY THE COURT:

Circuit Judge

Clerk of Courts by Claudette Opp Deputy

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF ROBERTS — FIFTH JUDICIAL CIRCUIT

LONDA LUNDSTROM RAMSEY and LOWELL LUNDSTROM, JR.,

Plaintiffs,

v.

LOWELL LUNDSTROM MINISTRIES, INC., JAN HAWKINS, SI LIECHTY, JIM OLSON, PAUL ANDERSON, RANDY DIRKS, DERRICK ROSS, KURT RINGLEY, LYNDA BORDREAU, JASON HEATH, JEFF JOHNSON and DARNELL JONES,

Defendants.

54CIV16-88

TRANSCRIPT OF PLAINTIFF'S MOTION TO RECONSIDER & DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BEFORE: THE HONORABLE JON FLEMMER, Circuit Judge, at Sisseton, South Dakota, July 9, 2020 at 1:40 p.m.

APPEARANCES: For the Plaintiffs:

Mr. Robert Trzynka
Attorney at Law
P.O. Box 2583
Sioux Falls, South Dakota

For the Defendants:

Mr. Thomas E. Marshall
Attorney at Law
706 2nd Ave. S, Ste. 1100
Minneapolis, Minnesota

THE COURT: Hello. Okay. This is Judge Flemmer in the courtroom in Sisseton, Mr. Marshall, and we have you on speaker phone. Also present at counsel table is Robert Trzynka. And is this Mr. Lundstrom?

MR. TRZYNKA: That is correct, Judge.

THE COURT: Lowell Lundstrom, Jr. is also present at counsel table. And this is the time that's been set for hearing in connection with a couple of motions that have been filed in this case. I believe there was initially filed Defendant's Motion for Summary Judgment and then also Plaintiff's Motion to Reconsider Partial Summary Judgment. There were a number of briefs and replies that were filed, the Court's had an opportunity to review those. But, Mr. Marshall, are you prepared to proceed on the matters at this time?

MR. MARSHALL: Yes, Your Honor.

THE COURT: And, Mr. Trzynka, are you prepared to proceed?

MR. TRZYNKA: Yes, Judge.

THE COURT: And I believe through the pleadings it's been determined that the claim being made by Lowell Lundstrom, Jr. is no longer going to go forward, is that correct, Mr. Trzynka?

MR. TRZYNKA: That is correct, Judge.

THE COURT: And that's your understanding, as well, Mr. Lundstrom?

MR. LUNDSTROM: Yes, Your Honor.

THE COURT: And so the Court will be granting the summary judgment in connection with that claim. As far as the other matters, although the partial summary judgment was filed first it may perhaps be more efficient to address the Plaintiff's Motion to Reconsider Partial Summary Judgment and then proceed with the Defendant's Motion for Summary Judgment. Is that satisfactory with you, Mr. Marshall?

MR. MARSHALL: That's fine with me, Your Honor, thank you.

THE COURT: And is that -- are you prepared to do that, Mr. Trzynka?

MR. TRZYNKA: Yes, Judge.

THE COURT: And you may proceed on your Motion to Reconsider at this point.

MR. TRZYNKA: Thank you, Judge. Normally, I -- I'm a loud speaker so I tend to blow out these microphones anyway but I will bring it forward nonetheless. I'd like to start sort of at the end of where our argument was specifically regarding the writing in lieu statute. I think the Court overlooked a couple of provisions regarding the writing in lieu

statute. Under SDCL 47-23-6 it allows the board of directors of a nonprofit corporation to take any action that would-- that may be taken at a meeting of the members or directors by universal consent. And the Court's ruling on this was, primarily, that it didn't have that provision in the bylaws. Well, first, you don't have to incorporate specifically SDCL 47-23-6 into the bylaws due to the statutory requirements of SDCL 47-22-6 which states that it is not necessary to set forth in the articles of incorporation any of the corporate powers enumerated in chapters 47-22 to 47-28, inclusive. As a result, the powers laid out or described by SDCL 47-23-6 are automatically incorporated into the powers that a nonprofit corporation has. And that includes the powers laid out by the writing in lieu statute. Because it allows the board to take any action via universal consent when it passed the resolution by unanimous consent adopting the 2014 bylaws, it utilized the powers inherent to the board under the writing in lieu statute. And so those bylaws were, as a matter of law, properly adopted by the nonprofit corporation. I'd like to next talk about sort of estoppel and waiver. And they are to a certain extent flip sides of the same coin. I'd like to talk a little

bit about estoppel because I think there is a couple of elements of estoppel that we're looking at here. Number one, there is an estoppel by virtue of the resolution that they passed. Number two, there's estoppel by virtue of the fact that they continued to operate -- that the nonprofit corporation actually operated under these bylaws. And so if we look to the doctrine of partial performance here because the bylaws are little more than a contract governing the operation of a nonprofit corporation, we have estoppel by partial performance because they did perform under this -- under these bylaws for a number of months. And so, as a matter of law, they are estopped from doing so. The next bit that I would like to talk about is the waiver issue. And waiver, as we indicated under the **Hammerquist** decision which is 458 NW2d 773, it's applicable "where one in possession of any right, whether conferred by law or by contract, and with full knowledge of the material facts does or forebears the doing of something inconsistent with the exercise of the right. To support the defense of waiver there must be a showing of clear, unequivocal and decisive act or acts showing an intention to relinquish the existing right." And, as we noted, bylaws are a little more than a contract governing -- governing how a

nonprofit is to be governed. Likewise, Judge, the -- the board, because of their position, they are presumed as a matter of law to understand what the bylaws are and that they exist. And so lack of knowledge regarding the notice provision isn't controlling or isn't dispositive because they're presumed to know it. And so by--even under Defendant's argument, by taking the actions that they took to adopt the 2014 bylaws, by passing the resolution saying that they were duly adopted, by operating under those bylaws for a series of months, they waived their ability to object, to say that they weren't properly adopted. Finally, Judge, even-- the last thing that I would like to talk about is that under the bylaws, under the 1964 bylaws, those procedures, the new bylaws were properly adopted. And the Court's ruling hinged on this idea that the full set, the complete written set or final version of the bylaws, weren't given in written form to the board or presented at a board meeting until the May of 2014 board meeting. Well, that's not what the bylaws required. All that the bylaws required was that the -- was that the modifications be proposed. And we gave the Court several different ways that other courts and dictionaries have defined and revaluated the phrase

"proposed". Now Defendants object to our use of the word or the definition "propose". And I don't quite understand that objection simply from the standpoint that the bylaws contain the word "proposed" which is little more than the past tense of the word "propose" and I didn't see a competing definition of "proposed" as a past tense having a significantly or any different definition than the word "propose" itself. Nonetheless, under the word "propose" you don't have to lay everything out in writing. You just have to make it known what changes and what modifications are going to be made. And those changes and modifications in broad strokes have been known by the board since 2012. They had been working on it for a number of years. And at the February meeting they had presented a nearly final version of the bylaws. Now under the recordings that we presented and the evidence that we presented to the Court there were some non-material changes that were discussed that were added for voting at the May of 2014 meeting. But, again, one, those changes were not material. Number two, those changes were proposed at the February meeting, meaning that they were proffered, discussed, debated and then included in the version that was voted on in the May of 2014 meeting. And so under the-- under the--how the

bylaws are worded, I think with the larger picture of-- in light of the word "proposed", I think the Court should reconsider its decision on the partial summary judgment. You know. Or, in the alternative, if the Court wants to view this from the standpoint of disputed material facts over what was and was not proposed leading up to the May of 2014 meeting, I don't believe that there's a disputed material fact over it but, certainly, I don't think that the Court's factual finding that these modifications were not proposed consistent with the 1964 bylaws, I don't think that that was correct and so I would ask the Court to reconsider, number one, its decision denying Plaintiff's Motion for -- to Reconsider its decision denying Plaintiff's Motion for Partial Summary Judgment and then, number two, if it does not reconsider that, to reconsider its factual findings regarding the items that were proposed or whether or not there was a disputed material fact over it.

THE COURT: Mr. Marshall?

MR. MARSHALL: Thank you, Judge, I'll go in the same order. Starting with the 47-23-6, he would have an issue with the existing bylaws from 1964 that says his procedure of consideration before voting is mandated. There's the word "shall" in the-- in the

bylaws. I mean, you would have to -- they're saying this can be waived. No, it can't be waived. It's mandatory in the bylaws and whatever. When you look at other laws, I was looking at other statutes right around 47-23, I think 24, 23, and, for example, 47-23 talks about appointment of members. It says unless the articles of incorporation of the bylaws so subscribed -- and it talks about being directors and, for example, 23 it says articles of bylaws and governing board of directors. The provision of the articles and the formation of the corporation or bylaws shall control. I mean, the statute would seem to infer that you will apply the bylaws as written. And I covered this in the brief already, as well, and the Court's Findings as written. Now it's one thing if they came up and said, okay, here's the proposal. I'm going to make a proposal to adopt these bylaws, I'm moving for that. Okay. We're having a meeting on that. Okay. Two weeks later you have a meeting to vote on it. But the procedure must be followed and it was not followed here, there's no dispute about that. And I want to point that out because everyone agrees, even Miss Ramsey, that this bylaw was not proposed for its adoption until May 16 of 2014. That's not in dispute. They were discussed, certainly, earlier that year but

they weren't moved for adoption. A committee was appointed to review it, take suggestions and then we'll even tweak it on the day it was offered on May 16, 2014. There's no dispute they used the word "proposed". So if the procedure means something in the existing bylaws, the two week consideration period--it should be followed. And the Court probably found that as it was going through it. On the strength of the estoppel issue for a moment, the argument is that because we passed these bylaws or these amendments and -- and they stayed in existence for three or four months, we can't change them. We're stuck with them. Even if they're adopted legally you're stuck with them. I don't think the law requires that. I think about insurance contracts. You can't create insurance by estoppel, for example, nor can you create an illegal bylaw by estoppel, just because something is passed doesn't make it right. And the fact is you need-- what's that term? Oh, one thing I wanted to emphasize again it's in our brief but, you know, if you're going to ask the equitable remedy as estoppel you have to show that you've acted in good faith. Frankly, the facts weren't known to the board when they made this decision because the underlying circumstances of all the situation that had happened

earlier in 2013 and 2014 regarding the issues regarding the pastor and other things were never disclosed. And, to me, that equitable argument if you go on--- you must have good hands yourself, that would block that argument. With regard for waiver, their argument is that the board member should be presumed to know-- I'm sorry, did I -- the board should be presumed to know the existing bylaws. In other words, they're saying there should be a waiver. As I understand it, they're saying there should be a waiver by implication. Well, the law requires a clear, unequivocal action to relinquish that right. A waiver by implication certainly would be a clear, unequivocal release of any kind of right. The waiver argument does not apply here. Finally, just turning to the word "proposed" for a minute. The word is "propose". The bylaws are clear that when this is proposed you have to take two weeks before you decide it. These were proposed on May 16, 2014. There's no dispute about that. And they weren't decided --there weren't two weeks in July before they were decided, they were decided at that meeting. The procedure was not followed, it's as simple as that. We don't have to take apart the word "propose" and everything to do that. The procedure makes perfect sense, that's why

it's proposed, an action that has occurred. So, to me, every time someone has an idea in the board meeting, that starts the two week clock running, that's not according to the way these bylaws are written. With that, I don't have anything further to add.

THE COURT: Your response, Mr. Trzynka?

MR. TRZYNKA: Yes, Judge. You know, first, I--the Defendants keep on repeating that this was never proposed, was never proposed. There was no dispute that this was never proposed before the May meeting. But, curiously, they can't identify a single provision in the bylaws that were voted on in May of 2014 that weren't proposed in February. Not a single one. Can't identify any. Their brief doesn't say anything about it other than just to repeat ad nauseam that it was proposed. The recordings show that they discussed everything that was gonna be in the May meeting. The writing that was presented in February had, essentially, everything except for some non-material modifications. Their argument would be to say this is similar to as if a city council had that kind of requirement and a comma was in the wrong place or there was missing a comma. And the resolution that the city council passes is null and void because they forgot to include a comma. That's just not how the

resolutions work or how statutory construction works. Non-material modifications, when we're looking at interpretations of statutes or interpretations of legislative changes, aren't dispositive. And if there are clerical errors in a contract or in a judgment you can go back and correct those clerical errors and judgment without it affecting the judgment. Here there are no material changes between what was discussed and proposed in February and there are no changes between what was proposed in February and what was voted on in May. And I think the word that defense counsel utilized as a substitute for "proposed" is meaningful because they kept -- they would say, well, it wasn't proposed but then they finally said what they really meant which was that the bylaws that were proposed or that were discussed or talked about or any of the things that the definition of proposed includes, they say that it wasn't moved for adoption until May. Well, "moved" and "proposed" have significantly different meanings. The word "proposed" doesn't require the concrete, written, specific, unequivocal language that moved would. "Proposed" simply requires that they discuss it, that they have knowledge of it, that it be -- that the material terms be discussed or looked at. And that, undisputedly, occurred in February. So I

think that they are confusing the word "proposed" with the word "moved" in their analysis of the 1964 bylaws. So I would suggest that the Court reconsider it because of that confusion over "moved" with "proposed". I'd like to talk about the waiver issue a little bit, as well, because, you know, the defense counsel suggested that you can't have an unequivocal waiver of rights that you don't even know about. But it's black-letter law, it's black-letter law in South Dakota that the board is presumed, like they can't dispute that they didn't know what the bylaws meant and that is **Erickson v. Ladies of the Maccabees**, 25 SD 183 at 187, 126 NW at 259 at 260. This has been longstanding law here in South Dakota. This dates back to 1910. It's been good law since 1910. They can't come back and say that this law doesn't exist, that this black-letter law that they know what the bylaws say, that they don't-- that they're not bound by it. That's a ridiculous legal argument. And the Court should not be swayed by it. The -- the talk about clean and unclean hands. Now, first, they've never talked about unclean hands in any of their -- unclean hands isn't in any of their affirmative defenses as a preliminary matter. Second of all, Judge, the factual matters show that this ministry, the ministry aspect

of this, the ministerial aspects of this nonprofit corporation which is ministering to the congregation, ministering to the fellow pastors, that was never in the board's control, that supervision wasn't in their control, it was never in their control. And Defendants don't show or don't cite to a single provision of the bylaws that give them that control to discipline, supervise or govern the specific operations of the ministerial staff. So that argument is precluded by two reasons. Number one, the ecclesiastical exclusion. And, number two, the operation of the nonprofit corporation or the ministerial side of the nonprofit corporation since 1964 and then -- and that shows why you don't even have the unclean hands issue. Finally, Judge, they talk about -- they say that the word "shall" in the bylaws controls and you cannot have a waiver by unanimous consent because the '64--1964 procedures say "shall". That, however, Judge, is defeated as a matter of law by SDCL 47-22-6(7) and SDCL 47-22-33 which says that bylaws cannot adopt a provision that is inconsistent with the provisions of the nonprofit statutes. And so if they are using the "shall" language in the 1964 bylaws to trump the writing in lieu statute, that provision is void ab initio under the relevant nonprofit statutes

which says that you cannot get rid of the powers that are specified by the statute. And so, Judge, I think the writing in lieu statute still governs. I think the estoppel and waiver arguments suggest that the Court should reconsider its motion and then, finally, that the procedure was followed. Like I said, they can't give you a single change that's new in May that they didn't discuss in February. And that's all that we have.

MR. MARSHALL: Brief response, Your Honor?

THE COURT: Briefly.

MR. MARSHALL: All right. First, as to the estoppel argument where -- actually, the Plaintiff has -- the clean or unclean hands, the unclean hands, the response to the estoppel argument equity the Plaintiff is making to us. Secondly, even Plaintiff acknowledged that there were non-material changes, whatever those are, but they're changes, nonetheless, to the -- to the existing bylaws don't distinguish between material and non-material changes. Nor should the Court. I would point out that in her testimony even the-- this is at the TRO hearing back, I think 2017, page 11, I asked Miss Ramsey: So once the tweaks were ironed out did you present it to the board on May 16, 2014, correct? She said, yes, I'll go with correct with

that. And I asked and the board voted on it at the same meeting, correct? Answer: Yes. That's why we say these facts are not disputed on this issue. I'll go on to the other issue, I think. From my standpoint.

THE COURT: Well, I guess the Court can rule on this motion first and then we can move on to the other issue. In connection with the Plaintiff's Motion to Reconsider Partial Summary Judgment, this is a request from the Plaintiffs for the Court to reconsider the order that was previously entered following the issuance of the memorandum decision in this case and in that decision the Court determined that the amendment to the bylaws which was acted upon at the May 16, 2014 meeting were not effective and were, in fact, null and void. While the Plaintiffs argue here today and in their pleadings that the Court should reconsider the decision because of SDCL 47-23-6, that statute allows a corporation or nonprofit corporation to take any action required at a meeting of the members or directors and can do so without a meeting. But it has to be an action that is permitted to be taken and under the bylaws adopted in 1964, there can't be action on--to adopt an amendment that would be -- that would have been proposed for the first time

at that meeting. In this case, while there was discussion about amendments to the bylaws at prior meetings and other gatherings, even Plaintiff Londa Lundstrom Ramsey had testified that May 16, 2014 was the first time that the amendments had been put before the board in an untweaked version and it is that determination then by the Court that they were proposed at that time. Therefore, under the 1964 bylaws there would have been a two-week delay before they could be considered or acted upon. That even if the board had intended to act upon them in writing instead of through action at a meeting, that action couldn't have been taken within two weeks of that proposed document or proposed bylaws and amendments that were made on May 16 of 2014. So the Court doesn't-- still doesn't believe that the statute SDCL 47-23-6 takes the matter out of the two week requirement. Nowhere in the proposed document or in the action taken or the resolution adopted does it indicate that the directors were intending to waive any notification requirements and so the two week notice was in effect. The Court also previously had determined that the-- due to the testimony of the Plaintiff, Londa Lundstrom Ramsey, that the proposal was made at the May 16th meeting, therefore it

couldn't be acted upon at that time and would not be effective if adopted. The additional issues raised in the memorandum filed by the Plaintiff concerning waiver, again, the Court doesn't believe that the issue of the improper or illegal adoption of the amendment to the bylaws was waived simply because the parties went forward operating under the new bylaws for several months. It appears that once the notice requirement was determined to be in effect and had not been complied with, the-- this matter was brought to the attention of the board and the board didn't waive the adoption or waive the notice requirement. There was never any evidence to indicate that the board intended to waive the notice requirement, nor did the board do so. As far as the estoppel argument, the Court again finds that that does not prohibit the actions taken to bring the matter before the Court. That, again, the -- the discovery of the non-compliance with the prior bylaws was brought to the attention of the board and the board action was taken to bring the matter before the Court. The -- this wasn't a situation where the -- the board ignored the issue. This is not unlike the operation of many municipal corporations or other corporations where an error is discovered and has to be corrected so that

those boards don't go forward operating under illegal actions. Here the notice requirement wasn't complied with and, therefore, the action taken wasn't legal and appropriate. And so the Court has made that determination previously and the Court having reviewed the arguments presented here is not inclined to change its opinion and so the Motion to Reconsider the Partial Summary Judgment would be denied at this time and Mr. Marshall can draft an appropriate order to that effect. The other issue for the Court at this time then is the Motion for Summary Judgment that was brought by the Defendants. And, Mr. Marshall, you can address that motion.

MR. MARSHALL: All right. Thank you, Your Honor. Would the existing situation and decision that the Court just made, just briefly, the first issue is, you know, the extent that they're-- the Plaintiff is relying on and Miss Ramsey is relying on these amended bylaws, they provide her no rights based on the Court's decision and findings. And any claims based on those rights should be dismissed. And I bring something else up along with that because under the existing bylaws, we have 64 bylaws that were there, the -- the full Lundstrom Ministries had the right to dismiss its employees. Article II, Section VII,

Article III, Section I of the bylaws. The bylaws and articles provide that the--the senior pastor Ramsey's board share would serve at the will of the board of directors. And as a person she's employed at will under South Dakota law, South Dakota statute 60-4-4. She has no terms of employment, could be let go at any time. There's plenty of case law on that, that has been cited in our brief, as well. And the board took the action of ending her employment and they're personally entitled to do that. She has no claim to say that she should be installed ---as requested in her Complaint, that she should be reinstalled as board chair, her employment has ended and the Lowell Lundstrom Ministries has the right to do that under South Dakota law. Her claim should be dismissed for that reason. Bring up a couple of other issues. There's issues claiming that there should be a charitable trust created. Accusations that the church is not heeding its---and misusing its funds, etc., etc. There's been nothing put forth to support these allegations. We provided the Court the with affidavits of Pastor Guavis, two of them, showing how well the church is doing and to any case of the court that, you know, here's the situation. The Plaintiff is moving for summary judgment, they've got to propose some

facts and support their claim. They can't just deny the other side's response. And here the response is is that it's a rogue church and that's evidence enough. And that's not like it's enough. There's no evidence to show that anybody is misusing or anything has gone on at all in the six years that Ramsey has been gone and for that reason her claim should be dismissed. We also brought up the settlement agreement that the parties entered in September of 2014, hopefully, that everybody would just go their separate way. They did for two years until this action was brought. Ramsey, of course, claims it was under duress. But there's nothing illegal in anything anybody did except saying you go your way and we'll go ours, we don't want to have to enforce our rights in court. And that's what happened. Or give up their rights in exchange for mutual promises all the time, that's not duress, it's a tough argument but it's not duress. There's nothing illegal in any of the actions that went down there. Finally, I want to say one thing. In the response to the summary judgment at page 12 I mentioned this before but Ramsey argues that, as a matter of law, all that can be said about the current board is that they are operating a rogue church. That they are doing so in a manner contrary to neutral principles of law,

etc., etc. And this is in response to the fact that we argued, well, you know, this is a-- not an un-counseled church of the Assemblies of God, as well as it joined back in '96 but it now became a counseled church five years ago and that, A, Ramsey isn't even ordained in the Assemblies of God and couldn't hold this position. Their argument is that, well, she could get a position there maybe. But, you know, that's not the Court's job. The Court's job is to decide if she can be ordained in the Church of the Assemblies of God or she should be the head pastor of this church. On page 12 the Plaintiffs make one other comment that really struck me, especially with what happened yesterday, it said: Defendants cannot obtain summary judgment on the theory that they are suitable evangelists. What Plaintiff is really trying to have the Court do is decide that she's the suitable evangelist. Yesterday the Supreme Court in **Our Lady of Guadeloupe School v. Morrisey** just entered July 8th. Looking at the slip opinion, page 11, and I can't remember who wrote this opinion. I think it was -- it was a-- I might be wrong. He writes: They talk about the ministerial exception rule. And then he writes "under this rule Courts are bound to stay out of employment disputes of those holding certain important

positions of churches and other religious institutions." The bottom of this paragraph at page 11: "Without that power, a wayward minister's preaching, teaching and counseling could contradict the church's tenets and lead the congregation away from the faith." Ultimately, that's what this case was about and the Court should not be a part of it. We've made that argument before but I think it even makes more sense. The board has the right to end her employment. They did under the bylaws that were properly in place. And this case should end. Thank you.

THE COURT: Mr. Trzynka?

MR. TRZYNKA: I'd like to start, Judge, with the **Our Lady of Guadeloupe School v. Morrisey**. First, the-- they weren't dealing with the **Our Lady of Guadeloupe School** case, they weren't dealing with where there was a written or inferred employment contract. Here, Judge, that's not the case here, Judge. South Dakota has provided that the Court can infer a written contract based off of the conduct, the statements and the writings of the employer. Here, when they discussed the 19 -- when they proposed the--2014 bylaws and when they voted those bylaws into effect, even if-- if you consider those to be and the

Court has considered them to be void or not to be in force or non-compliant with the 1964 bylaws which the Plaintiffs disagree with. It can, it did create a -- it did create detrimental reliance in Miss Lundstrom that she was -- she had additional safeguards that your average at will employee would not have. And so-- and so the board could not just fire her as an at will employee. She was afforded certain due process rights without having to go into the ecclesiastical aspects of this. Because of the fact that she--they did pass resolutions and did make statements that would have given your -- the reasonable person the impression that they had more than a simple at will employment agreement. They can -- That they are bound to follow the procedures that would give Miss Lundstrom the -- the rights that a contracted employee would. And so from that standpoint, they-- summary judgment should be denied because Miss Lundstrom had a reasonable expectation that she was not an at will employee. One, due to the statements of the board since 2012 regarding the actions that were voted on in May of 2014. Number two, the bylaws that the board unanimously voted to adopt in 2014 and, three, the actions of the board immediately thereafter. Which would indicate that she-- up until they decided that

they didn't like the 2014 bylaws which is something that defense counsel came up and was an active participant in, that defense counsel, not Mr. Marshall, but Miss Engelmeier, that she was the person, she was the key player in determining or key player in forcing Londa out. And so the issue then becomes what was Londa's reasonable expectations after the May of 2014 meeting? And those were that she was not an at will employee. And so summary judgment should be denied.

THE COURT: Any response, Mr. Marshall?

MR. MARSHALL: My only response, Your Honor, is that, basically, they're arguing the estoppel argument again. And the bylaws provide what they provide. Bylaws of 1964 provides that the person serves at the will of the board and they can take the action, it was not reasonable for her to rely on because to create an issue where the courts could have to determine who's going to be the head of this church, that would be inappropriate.

THE COURT: The court reporter had a hard time hearing you there at the end, you were indicating that the Court would have to determine who was--.

MR. MARSHALL: The Court would have to determine who would be the leader of this church. It's

something we have argued before and it is something that is not appropriate for the Court to do. And, with that, I'll leave it at that.

THE COURT: Well, the Court again has had an opportunity to review the pleadings and memorandums that were filed together with the Defendant's Motion for Summary Judgment, the Statement of Undisputed Facts and the resistance to those facts filed by the Plaintiffs. The Court previously had the issue before it of summary judgment as an alternative to one of the prior motions made by the Defendants but the Court did indicate at that time that the appropriate procedure hadn't been followed to give the Court authorization to make a determination as to summary judgment at that time. Now, Defendant has made the motion and complied with the statutes and given the necessary statement of facts and other matters. And the Court again has determined that the May 16, 2014 bylaws amendments are null and void. It would appear from reviewing the claims made by the Plaintiff in the Complaint that those claims that are made personal to her such as the request that the governing documents adopted on May 16 be operative, that she be declared to be the chairman of the board would be individual to her. That, based upon the Court's determination that the May 16

amendments are null and void going back to the 1964 bylaws then the employees of the nonprofit corporation are employees at will. And the board chose to terminate that employment. If this Court and this Court has previously indicated that it, under the precedent set by the South Dakota Supreme Court, that this Court is not to be involved in religious or ecclesiastical determinations. Obviously, determining who the head of the church is or should be isn't a decision for this Court. But, obviously, the effect of and legality of bylaws and other matters that are filed with public offices in the state of South Dakota are an issue that the Court can address and the Court has determined that the 1964 bylaws are those that were in effect in connection with the time period involved in this lawsuit. And, therefore, those claims brought by the Plaintiff, Londa Lundstrom Ramsey, are subject to the Court's determination and it does not appear to the Court that there are any disputed facts where those are concerned and the Court has previously determined that the 2014 bylaws are not in effect. Therefore, those claims or on those claims the Plaintiff's Motion for Summary Judgment should be granted. That there are additional claims made in the Complaint which, again, it does not appear to the

Court that are -- or can survive the determination of the Court that the 2014 bylaw amendments are null and void. And so the Court would grant the Motion for Summary Judgment brought on by the Defendant dismissing all claims. That the parties have already agreed that those claims brought by Lowell Lundstrom, Jr. are not appropriate to go forward and should be dismissed. That as far as the argument on detrimental reliance, the Court would simply point out that any reliance that the Plaintiff may have felt she had on the action of the board was done, in part, in connection with representations that she made or didn't make to the board concerning her involvement in certain things that, obviously, were not divulged to the board at the time of the May 2014 meeting. So any reliance she may have had would certainly have been very tentative, at best. But the Court would grant the Motion for Summary Judgment and Mr. Marshall can draft an appropriate order in that regard. Did you have anything further, Mr. Marshall?

MR. MARSHALL: No, Your Honor. I think earlier I think you misspoke on one thing. Plaintiff's motion would be granted, you meant Defendant's motion, I think, when you made that statement earlier.

THE COURT: And the motion that I'm ruling on

is Defendant's Motion for Summary Judgment.

MR. MARSHALL: Correct.

THE COURT: And that is the motion that I am granting.

MR. MARSHALL: I will prepare an order.

THE COURT: If I at some point said plaintiff instead of defendant I stand corrected.

MR. MARSHALL: I understand that.

THE COURT: Anything further, Mr. Trzynka?

MR. TRZYNKA: No, Judge.

THE COURT: Then we'll go ahead and recess at this point and we'll terminate the phone call. And we'll be in recess.

MR. MARSHALL: Thank you, Your Honor.

THE COURT: You're welcome.

(End of proceedings.)

STATE OF SOUTH DAKOTA)
SS CERTIFICATE
COUNTY OF ROBERTS)

I, Calleen Thorn Misterek, am an Official Court Reporter within and for the Fifth Judicial Circuit of the State of South Dakota and I do hereby certify that I acted as such reporter for this hearing and that the preceding 31 pages constitute a full, true and correct transcript of all of the proceedings held thereon.

Dated at Sisseton, South Dakota, this 30th day of September, 2020.

_____RPR
Official Court Reporter

RESOLUTIONS REGARDING ADOPTION OF RESTATED ARTICLES OF INCORPORATION AND RESTATED BYLAWS OF LOWELL LUNDSTROM MINISTRIES, INC.

WHEREAS, the Directors of the corporation have reviewed the Proposed Restated Articles of Incorporation, which are attached as Exhibit A, and the Proposed Restated Bylaws, which are attached as Exhibit B;

NOW, THEREFORE, BE IT RESOLVED that at a duly called meeting of the Directors which was held on May 16, 2014, with a quorum present, the Directors approved by more than a majority vote the Proposed Restated Articles of Incorporation and Proposed Restated Bylaws and direct that the Proposed Restated Articles of Incorporation and Proposed Restated Bylaws be submitted to a member vote, with a recommendation from the Directors that they be adopted by the members; AND IT IS FURTHER

RESOLVED, that the Proposed Restated Articles of Incorporation and Proposed Restated Bylaws of the Corporation were duly adopted by more than a majority of the members of the corporation at a duly called meeting held on May 16, 2014, with a quorum present.

agreed & approved this May 16, 2014

attached to these resolutions & made a part of these resolutions.

LLM 000410

STATE OF SOUTH DAKOTA	)	**IN CIRCUIT COURT**
	: SS	
COUNTY OF ROBERTS	)	**FIFTH JUDICIAL CIRCUIT**

Londa Lundstrom Ramsey and
Lowell Lundstrom, Jr.,

Plaintiffs,

v.

Lowell Lundstrom Ministries, Inc.,
Jan Hawkins, Si Liechty, Jim Olson,
Paul Anderson, Randy Dirks, Derrick Ross,
Kurt Ringley, Lynda Bordreau,
Jason Heath, Jeff Johnson, and
Darnell Jones,

Defendants.

Court File No. 54CIV16-000088

[PROPOSED] ORDER REGARDING MOTIONS FROM JULY 9, 2020, HEARING

On July 9, 2020, this Court heard arguments on two pending motions: Defendants' Motion for Summary Judgment; and Plaintiffs' Motion to Reconsider Partial Summary Judgment. Plainitffs were represented by their counsel, Robert D. Trzynka. Defendants were represented by their counsel, Thomas E. Marshall.

Plaintiff, Lowell Lundstrom, Jr., was present and confirmed to the Court that all claims brought by him should be dismissed for lack of standing.

The Court heard arguments from counsel and, based upon all the files and proceedings herein, denied Plaintiffs' Motion to Reconsider Partial Summary Judgment and granted Defendants' Motion for Summary Judgment in all respects for reasons stated on the record on July 9, 2020.

Accordingly, it is therefore ORDERED:

1. Plaintiffs' Motion to Reconsider Partial Summary Judgment is **DENIED**;

2. Defendants' Motion for Summary Judgment is **GRANTED**; and

3. Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ORDERED ACCDORDINGLY.

Dated this ____ day of July, 2020.

By the Court:

Signed: 7/20/2020 10:07:51 AM

Circuit Judge

Attest:

Attest:

Guy, Brenda

Clerk/Deputy

Clerk of Courts

State of South Dakota

In Supreme Court

No. 29385

LONDA LUNDSTROM RAMSEY,

Plaintiff/Appellant,

AND LOWELL LUNDSTROM, JR.,

Plaintiff,

vs.

LOWELL LUNDSTROM MINISTRIES, INC., JAN HAWKINS, SI LIECHTY, JIM OLSON, PAUL ANDERSON, RANDY DIRKS, DERRICK ROSS, KURT RINGLEY, LYNDA BORDREAU, JASON HEATH, JEFF JOHNSON, AND DARNELL JONES,

Defendants/Appellees.

An Appeal from the Circuit Court, Fifth Judicial Circuit
Roberts County, South Dakota
The Honorable Jon S. Flemmer, Circuit Court Judge

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Notice of Appeal filed on August 11, 2020

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JURISDICTIONAL STATEMENT

Plaintiff/Appellant Londa Ramsey appeals the final order entered by the Hon. Jon S. Flemmer on July 21, 2020, following the Circuit Court's Memorandum Decision entered on November 4, 2019. This Court has jurisdiction under SDCL § 15-26A-3. Appellant filed her Notice of Appeal on August 11, 2020.

REQUEST FOR ORAL ARGUMENT

Appellees request the privilege of appearing before this Court for Oral Argument.

STATEMENT OF THE ISSUES

1. **Whether the Circuit Court clearly abused its discretion when it denied Appellant's Motion for Reconsideration.**

   No, the Circuit Court properly exercised its discretion to deny Appellant's motion to reconsider.

   Most Appositive Law: *Jenco, Inc. v. United Fire Group*, 666 N.W.2d 763, 768 (S.D. 2003)

2. **Whether the Circuit Court properly granted Appellees summary judgment when Appellant failed to present genuine issues of material fact precluding summary judgment.**

   Yes, the Circuit Court properly granted Appellees summary judgment based upon the undisputed material facts and the direct precedent under the law of the State of South Dakota.

   Most Appositive Law: SDCL § 15-6-56(c)

INTRODUCTION

This case concerns the leadership of a Christian church in Minnesota. Appellant Londa Ramsey (hereinafter "Ramsey" or "Appellant") attempted to change the bylaws and articles of the nonprofit corporation Appellee, Lowell Lundstrom Ministries, Inc. (hereinafter "LLM" or "Appellee") to have her installed as pastor for life. She failed to follow the specific procedures stated in the existing

bylaws and articles and the Circuit Court found her attempt to change the bylaws and articles "null and void." Ramsey sought reconsideration of that decision which was denied, and Appellees were then granted summary judgment.

Appellant Ramsey seeks to revisit her reconsideration arguments before the Supreme Court. She has not shown that the Circuit Court abused its discretion in denying her motion to reconsider. The Circuit Court properly granted Appellees summary judgment and dismissed the case. This decision should be affirmed.

STATEMENT OF THE FACTS

LLM

LLM was founded as Message For Evangelistic Association on September 4, 1964. 1964 Articles Article Second. R. 161, 171, 372. Its purpose was to spread the Gospel and none of its property was to be used for personal gain. 1964 Articles Article Second. *Id*.

The Articles provided that, upon dissolution, all assets revert to the General Council of the Assemblies of God. R. 175-76, 225-26. The now deceased founder of the church, Lowell Lundstrom, Sr., held a strong view that no person was to have an ownership interest in the assets of the ministry. R. 161, 225-26, 272. The properties were to be used for the benefit of the corporation. R. 161, 232, 372.

In April 1979, Message For Evangelistic Association became known as Lowell Lundstrom Ministries, Inc. R. 161, 185, 372. The headquarters for the organization was located in Sisseton, South Dakota, for many years; but beginning in 1996, founder Lowell Lundstrom spent most of his time in Lakeville, Minnesota where LLM began Celebration Church. R. 161, 232, 372. In 1996, the church filed

an application as a new church with the Minnesota District Council of the Assemblies of God and became officially affiliated with the General Council of the Assemblies of God and the Minnesota District Council as a district affiliated church. R. 414. When Ramsey's father died in 2012, Ramsey ultimately became senior pastor and Chairman of the Board. R. 232, 373.

By 2014, virtually all LLM operations were in Minnesota. R. 232, 372, 379. The Church removed Ramsey as senior pastor and chairman of the Board after the disclosure of coverups, deception and malfeasance occurring in 2013 and 2014. A new senior pastor was hired in 2015.

In August 2016, a month before Ramsey's lawsuit, the church became officially affiliated with the General Council of the Assemblies of God and the Minnesota District Council as a General Council affiliated church. R. 414, 417.

Removal of Ramsey

After a series of events involving Ramsey which included her coverup of her husband's sexual improprieties in 2013 and 2014, abusive conduct and malfeasance, Ramsey and the LLM Board met in August of 2014 and agreed Ramsey would be relieved of all duties to spend time in a period of pastoral restoration and her husband would be banned from the church premises. R. 235, 376, 556-57. After Ramsey refused to honor the agreement she made with the Board on August 12 and engaged in further misconduct, the LLM Board removed Ramsey as senior pastor and terminated her employment on September 4, 2014. R. 112, 222-23, 225, 228-29, 232, 234-36, 239-40, 242-43, 245-51, 351-57, 359, 361-70, 374-78, 414-16.

After negotiation with LLM Board members and Clarence St. John, the Superintendent of the Minnesota District for the Assemblies of God, on September 10, 2014, Ramsey signed an agreement recognizing her improper conduct and agreeing she would have no further involvement with the church. R. 235, 240, 243, 377, 416.

The Bylaws and Articles and Amendment

The original 1964 Bylaws for the organization required a specific procedure of notice of the proposed change and a two-week waiting period before a change in the Bylaws could be adopted. 1964 Bylaws, Article V, Section 1; R. 161, 190, 372. The Bylaws stated:

> The Board of Directors shall have the power, by vote of a majority of the members present and voting at any meeting at which there is a quorum, to make, alter, amend or rescind the by-laws of this corporation. The alteration of these by-laws shall be proposed at one meeting of the Board of Directors but shall not be voted upon and adopted at the same meeting. A waiting period of not less than two weeks shall exist between the meetings proposing a change in the by-laws and the meeting adopting the changes in the by-laws. Ten days notice of the meeting for the adoption of any changes in the by-laws shall be given to each member in writing and mailed to his home address.

Id.

In April 1967, the Articles of Incorporation were amended to add a virtually identical process as found in the Bylaws. 1967 Articles, Article Twelfth; R. 161, 180, 372. The Articles stated:

> The members of this corporation shall have the additional power, by vote of a majority of the members present and voting at a meeting of which there is a quorum (a quorum is to be considered as two-thirds of the members voting in person or by proxy) to make, alter, or amend the Articles of Incorporation of this corporation. The alteration of these Articles of Incorporation shall be proposed at one meeting of the

> members of this corporation but shall not be voted upon and adopted at the same meeting. A waiting period of not less than two weeks shall exist between the meetings proposing a change in the Articles of Incorporation and the meeting adopting the changes in the Articles of Incorporation. Ten days notice of the meeting for the adoption of any changes in the Articles of Incorporation shall be given to each member in writing and mailed to his home address.
>
> *Id*.

Improper Attempt to Change the Articles and Bylaws

In February 2014, Appellant Ramsey and Frank Masserano discussed changing the Bylaws and Articles and presented a draft to the Board. R. 233-34, 374. The Board appointed a committee to review and suggest changes based on this draft. R. 208, 233-34, 374. These Bylaws and Articles provided a lifetime appointment for Ramsey. R. 32-33, 234. At the time the changes to the Bylaws and Articles were being discussed by the committee, Ramsey said nothing to the Board about her husband's inappropriate sexual conduct or Ramsey's coverup of her husband's conduct. R. 163, 234, 374.

The Ramsey presented amended articles and bylaws of the church, reiterated the religious nature of the church and confirmed it was to "operate exclusively as a Christian church… ." R. 327, Article 3.2(a). The May 16, 2014 Ramsey Bylaws even required a "Statement of Faith." R. 332, Bylaws, Article II. Paragraph 9.1 of the Ramsey Bylaws even proscribe the state courts from becoming involved in church disputes stating, "[i]nasmuch as the scriptures require Christians to take their disputes to the saints and not to the civil courts (I Corinthians 6:1-8)…" and provides an arbitration process. R. 339.[1]

[1] Judge Flemmer, in his 2019 Order, commented that had Ramsey received the relief she requested, the Court would have no jurisdiction over this matter. App. 007.

It is undisputed that on May 16, 2014, the Restated Articles of Incorporation and Bylaws were introduced to the full Board for the first time. R. 234, 294, 375. Prior to the meeting, Ramsey made "tweaks" to the proposals and the first time the Board saw the final version occurred at the actual May 16 Board meeting. R. 259, 265-67. Even though the existing Articles and Bylaws specifically required two-weeks of consideration before a vote, the Restated Articles and Bylaws were adopted at the same Board meeting. R. 234, 375. The Board believed the approval of the church membership was required as well. R. 375. Ramsey still kept the allegations about her husband quiet. R. 234, 375. Had the Board not been duped by Ramsey about her husband and coverup, the Restated Articles and Bylaws would have never passed the Board. R. 234.

Ramsey relied upon this 2014 amendment attempt as the foundation for her present lawsuit against Appellees. R. 12-15, 20-21. This Court found, on August 16, 2019, that this attempted amendment was "null and void" as a matter of law. App. 007-008. Under the existing bylaws at the time of Ramsey's termination in September 2014, Ramsey served at the will of the Board of Directors. R. 189.

LLM Post Ramsey.

After leaving LLM and Celebration Church in 2014, Ramsey started a new church in Burnsville, Minnesota. Members of this new church experienced the same misconduct by Ramsey experienced by LLM and Celebration Church, including questionable financial transactions, lack of honesty and coverups. R. 380-84, 418-26, 431-34. These members consider Ramsey inappropriate to lead any church. R. 382, 384, 426, 434.

Celebration Church, on the other hand, has moved on and continues to fulfill its mission. After Ramsey's termination, LLM hired Pastor Derrick Ross in July 2015. R. 111-12, 227, 379, 416. In August 2016, the church became a General Council affiliated church. R. 416-17. Ramsey, due to her lack of credentials from the General Council of the Assemblies of God and the Minnesota District Council, is not qualified and would not be permitted to serve as the pastor of the church by the Assemblies of God. R. 417. LLM's ministry and church is well run and successful and has recovered from the damage done by Ramsey. R. 112-13, 228-29, 237, 379, 1562-64. It has a vibrant congregation, active mission ministry, a multilingual education program, and a culture of Christian giving. *Id*.

There exists no reason for this case to continue. Appellees, accordingly, seek affirmance of the dismissal of this action.

STATEMENT OF THE CASE

Ramsey brought this lawsuit on October 7, 2016. R. 3. In 2017, Ramsey sought a temporary restraining order against Appellees which the trial court denied. As part of that decision, on August 21, 2017, the Circuit Court found that no change to the Bylaws or Articles could be voted upon unless it had been considered by the Board for two weeks. R. 294. Additionally, the Circuit Court found that the changes to the Bylaws and Articles were presented on May 16, 2014 and voted upon at the same meeting. R. 295.

Appellees moved to dismiss the Complaint. R. 312-23, 401-12. In return, Ramsey moved for partial summary judgment on June 6, 2018. R. 442-43.

The trial court heard argument on those motions on September 17, 2018. R. 946-1006. Nearly a year later, the Circuit Court issued a memorandum decision on the cross-motions denying both for summary judgment, albeit Appellees motion for

procedural reasons. R. 1491-1501 (August 19, 2019). The Court specifically observed that Article 5, Section One of the Bylaws contained the specific procedure for amendment and required that the alteration of the Bylaws "shall be proposed at one meeting…but shall not be voted upon and adopted at the same meeting." App. 006. The Court next observed a "waiting period of not less than two weeks must exist between the meeting proposing a change…and the meeting adopting the change in the Bylaws." *Id.* These requirements never changed. *Id.* The Court next wrote:

> It is undisputed from the facts presented to the Court that the first time the final version of the proposed amended Bylaws was made available to the entire board of directors was at the quarterly board meeting of May 16, 2014. Whether there were minor changes or 'tweaks' made at the meeting or not, that was the first meeting at which the proposals were formally presented to the board for consideration.
>
> App. 007.

These facts were corroborated by Appellees' witnesses as well as Ramsey herself. *Id.* This vote violated the Bylaws in effect on May 16, 2014. *Id.* In addition, the Bylaws did not make any provision "to permit the two week waiting period to be waived." *Id.*

The Court held:

> It is undisputed from the evidence presented to the Court that the two-week waiting period was not observed. Therefore, the May 16, 2014 Bylaws were improperly adopted and are null and void.

Id.; *citation omitted*. Ramsey petitioned for permission to bring an intermediate appeal, which this Court denied. R. 1537.

On March 20, 2020, Appellees moved for summary judgment. R. 1538-39. Several months later, on the eve of the deadline to file, Ramsey asked the court to reconsider its August 19, 2019 decision finding the 2014 amendments null and void. R.

1567-68.

A hearing regarding those motions occurred on July 21, 2020. App. 012-042. The Circuit Court granted Appellees' motion for summary judgment, and denied Ramsey's motion to reconsider. App. 039. Ramsey filed her notice of appeal on August 11, 2020. R. 1643-45.

STANDARD OF REVIEW

A. Motion for Reconsideration.

Appellant Ramsey, in her brief, emphasizes the standard of review for summary judgment. However, her brief really reasserts her arguments made in her reconsideration of the trial court's 2019 decision finding that Ramsey's attempted hijacking of the process to amend the bylaws and articles "null and void." Her appeal is from the trial court's denial of her motion to reconsider that decision. The standard of review in that instance is one of abuse of discretion, not *de novo* review. *See Jenco, Inc. v. United Fire Group*, 666 N.W.2d 763, 768 (S.D. 2003).

> A district court has wide discretion over whether to grant a motion for reconsideration of a prior order, *In re Charter Commc'ns, Inc., Sec. Litig.*, 443 F.3d 987, 993 (8th Cir. 2006), and "we will reverse a denial of a motion for reconsideration only for a clear abuse of discretion." *Paris Limousine of Okla., LLC v. Exec. Coach Builders, Inc.*, 867 F.3d 871, 873 (8th Cir. 2017). "An abuse of discretion will only be found if the district court's judgment was based on clearly erroneous factual findings or erroneous legal conclusions." *Mathenia v. Delo*, 99 F.3d 1476, 1480 (8th Cir. 1996).

SPV-LS, LLC v. Transamerica Life Insurance Company, 912 F.3d 1106, 1111 (2019). The Circuit Court certainly did not abuse its discretion in the denial of Appellant's Motion for Reconsideration.

B. Summary Judgment.

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 burden rests with the moving party to clearly demonstrate the absence of genuine issues of material fact and entitlement to judgment as a matter of law. *Titus v. Chapman*, 687 N.W.2d 918, 923 (S.D. 2004). "All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *De Smet Farm Mut. Ins. Co. of S.D. v. Gulbranson Dev. Co*., 779 N.W.2d 148, 155 (S.D. 2010).

Under South Dakota law, the party resisting summary judgment must present "sufficient probative evidence that would permit a finding in her favor on more than mere speculation, conjecture, or fantasy." *Schaefer v. Sioux Spine & Sport, Prof. LLC*, 2018 S.D. 5, ¶ 9, 906 N.W.2d 427, 431. "[M]ere general allegations and denials which do not set forth specific facts will not prevent the issuance of a judgment." *Bordeaux v. Shannon Cty. Schs.*, 2005 S.D. 117, ¶ 14, 707 N.W.2d 123, 127. Here, the Circuit Court properly granted summary judgment.

ARGUMENT

I. The Court Did Not Abuse its Discretion When it Denied Ramsey's Motion for Reconsideration.

The Court held the attempted May 16, 2014 Bylaws and Articles amendment null and void as a matter of law. It made that decision based upon the undisputed facts, including Appellant Ramsey's own testimony, and in reliance on South Dakota Supreme Court precedent directly on point with the issue.

Ramsey, in her appeal, again challenges the direct meaning of the existing Bylaws and Articles through a tortured analysis of the word "propose," which does not even appear in the existing Bylaws and Articles. She reasserts her waiver and SDCL § 47-23-6 arguments, and argues equity, without recognizing that to receive equity, one must do equity herself. The Circuit Court properly denied the motion to reconsider and granted summary judgment.

A. The Circuit Court Properly Denied Appellant's Tortured Use of the Word "Propose."

LLM's Bylaws and Articles required that amendments "shall be proposed at one meeting of the Board of Directors but shall not be voted upon and adopted at the same meeting." R. 179, 190. Two weeks must elapse "between the meetings proposing a change in the [Articles or By-laws] and the meeting adopting the changes." *Id*. There is no dispute that the amendments were "proposed" on May 16, 2014 and on no earlier date. Two weeks did not elapse between the meeting "proposing a change" and the vote. The purpose for this clause is obvious; to force serious, sober and thoughtful deliberation of an amendment and protect the corporation from an improvident act. Using the word "shall" mandates this process. There exists no ambiguity to challenge the language.

Appellant argues that rather than consider the simple and direct common sense procedure stated in the existing Bylaws and Articles, this Court must dissect the word "propose" and define it so broadly that barely the mention of an amendment at some earlier meeting, even though there was no attempt to move for the adoption of the amendment, sets the two week clock running. This interpretation certainly defeats the purpose of the existing Bylaws and Articles of requiring a two-week period of reflection

before committing the corporation to a significant change. This result could hardly have been intended by the founders of the corporation.

The existing Bylaws and Articles do not use the word "propose," rather they use the past tense, "proposed." This usage demonstrates the intent that there actually is a requested action of the Board to vote on amendment, not discuss an idea in its infancy. The existing Bylaws and Amendments further distinguish the meeting "proposing a change" versus the meeting where a vote will be taken. A meeting "proposing a change" certainly means that a specific action has been moved for a vote. There is no dispute that the proposal to change the Bylaws and Amendments and the meeting to vote on that proposal are two different events. It remains undisputed that the Amendments were not actually formally moved for adoption until May 16, 2014, the same day on which the Board voted.

Ramsey relies on *Read v. McKennan Hospital*, 2000 S.D. 66, 610 N.W.2d 782. This case concerns a specific employment relationship issue between medical staff and the hospital employing them as opposed to the procedures for amending bylaws and articles. *Malcolm v. Malcolm*, 265 N.W.2d 863 (S.D. 1985) involved the interpretation of a deed as to whether it was intended as a housing allowance or child support in a domestic situation. Since, unlike here, the intention was not clear from the deed, rules of construction were applied. *Coffey v. Coffey*, 2016 S.D. 96, 888 N.W2d 805 concerns the interpretation of a divorce stipulation. These cases really have no application here. In any event, Coffey states "[w]hen the meaning of contractual language is plain and unambiguous, construction is not necessary." *Id.*, 888 N.W.2d at 809, *citation omitted*. The tortured construction of the word "propose" is unnecessary. The Circuit Court read

and applied the existing Bylaws and Articles correctly and made the proper decision. It certainly did not abuse its discretion.

B. The Circuit Court Properly Denied Appellant's Waiver Argument.

The Circuit Court recognized in its August 2019 Order that "it does not appear that the Bylaws and Articles of Incorporation in existence at that time made any provision to permit the two-week waiting period to be waived." That observation is correct as they do not. In fact, the Bylaws and Articles require, by using the word "shall," that the two-week consideration be enforced and provide no room for waiver at all. Waiver has no application in this case.

Appellant avoids citing the standard for her burden of proof on waiver.

> The doctrine of waiver is applicable where one in possession of any right, whether conferred by law or by contract, and with a full knowledge of the material facts, does or forebears the doing of something inconsistent with the exercise of the right. To support the defense of waiver, there must be a showing of a clear, unequivocal and decisive act or acts showing an intention to relinquish the existing right.

Ducheneaux v. Miller, 488 N.W.2d 902, 911 (S.D. 1992). Appellant has shown no clear, unequivocal and decisive act showing an intention to abrogate the directives of the existing Bylaws and Articles. The existing documents were not mentioned or consulted at all. Appellant fails in her burden of proof and the Circuit Court certainly did not abuse its discretion denying her motion. Plaintiffs cannot meet their burden to present such an issue to a jury.

Appellant argues that merely because a vote was held, waiver occurred. In support she cites a minority shareholder case from the Pennsylvania Court of Common Pleas, *Golasa v. Struse*, 9 Pa. D. & C.3d 48 (Court of Common Pleas of Pennsylvania, Philadelphia County, 1978) which has no precedential value in South Dakota. She also

cites a Kansas Supreme Court case, *Schraft v. Leis*, 686 P.2d 865 (Ka. 1984), a dispute between two shareholders dissolving a corporation. LLM is not a corporation with shareholders, it is a nonprofit corporation. The case before this Court does not involve shareholder disputes. Rather it involves the governance of nonprofit Christian benevolent corporation in which its founders implemented protections to carefully consider changes to its mission.[2] Appellees could not waive those directives.[3]

Moreover, Appellees admittedly did not have "full knowledge of the material facts" as required by South Dakota's waiver requirements. *Ducheneaux, supra*. Appellant suppressed facts which she was required to disclose to the LLM Board about her management, the financial status of the church, and the sexual improprieties of a pastor. Appellant hid this information to advance her own personal interests and quickly have herself appointed as pastor for life. Waiver does not exist in this case and the Circuit Court properly denied the motion to reconsider.

---

[2] This issue is important because Appellant seeks to have LLM treated differently than other tax-exempt nonprofit corporations. To be tax-exempt under section 501(c)(3) of the Internal Revenue Code, an organization must be organized and operated exclusively for exempt purposes set forth in section 501(c)(3), and none of its earnings may inure to any private shareholder or individual. Appellant's argument for a "birthright" in the nonprofit and its property flies in the face of the Internal Revenue Code and South Dakota nonprofit law.

[3] Appellant and, primarily, her relatives, submitted a number of affidavits basically labeling the church a "Family non-profit." R. 1120. This report of "someone's" statement is completely unreliable as it is hearsay and hearsay cannot be used to defeat summary judgment. *See, Johnson v. Baptist Medical Center*, 97 F.3d 1070, 1073 (8th Cir. 1996); *Davidson & Schaaff, Inc. v. Liberty Nat. Fire Ins. Co*., 69 F.3d 868, 871 (8th Cir. 1995). Appellant said she considered LLM a family business. R. 1046. Ramsey cannot change her testimony to suit her whims to create fact issues as a party cannot contradict her own testimony to avoid summary judgment. *See Camfield Tire, Inc. v. Michelin Tire Corp*., 719 F.2d 1361, 1365 (8th Cir. 1983)(A self-serving affidavit contradicting earlier testimony is not sufficient to create a genuine issue of material fact).

C. The Circuit Court Properly Denied Appellant's Motion to Reconsider on Estoppel.

Appellant argues argue that because the LLM Board voted on the amendment to the Bylaws and Articles on May 16, 2014, even though this occurred illegally under the existing Bylaws and Articles, the equitable doctrine of estoppel somehow applies. The doctrine does not apply here at all.

Appellant must demonstrate, "there must have been some act or conduct by the party estopped which has in some manner misled the party in whose favor estoppel is sought and has caused such party to do some act relying upon the conduct of the party to be estopped, thus creating a condition that would make it inequitable to allow the guilty party to claim what would otherwise be his legal rights. *L.R. Foy Construction Co. v. Spearfish School Dist*., 341 N.W.2d 383, 386 (S.D. 1983). Here Appellant is the one who acted inequitably, not Appellees.

In South Dakota, parties seeking equity in the court must do equity, which includes entering the Court with clean hands. *Shedd v. Lamb*, 553 N.W.2d 241, 245 (S.D. 1996). "A [person] who does not come into equity with clean hands is not entitled to any relief herein, but should be left in the position in which the court finds him." *Id*., *citation omitted*. Appellant does not come to this Court with clean hands.

Appellant Ramsey conducted herself improperly in numerous ways, from malfeasance to covering up sexual impropriety, at the same time she sought appointment as pastor for life. If anyone had a duty to speak, she did. Her silence mislead those who voted for the amendment. At the time Appellee responded to Appellant's first motion for partial summary judgment, Appellees identified Ramsey's violation of SDCL § 20-10-1 for willful deception. Even after she was asked to step down, she took actions to disrupt

the church, which included abrasive conduct to staff, changing the locks and even attempting to intercept church funds. She does not come to the Court with clean hands. The Circuit Court appropriately denied her motion.

Appellant adds that the changes proposed by her, even on the day of the vote on the Bylaws and Articles, were *de minimus*. That issue is a red herring and an end justifies the means approach. By using the word "shall" mandating a two week consideration period, the Bylaws and Articles methods for change don't permit themselves to be abrogated because someone may think the change wasn't that big of an issue. The Court should not abrogate them either.

D. The Court Properly Denied Appellant's Argument to Reconsider Under the "Writing in Lieu" Statute.

Appellant cites SDCL § 47-23-6, a statute allowing a board to act in lieu of a meeting, as authorizing the May 16, 2014 vote. The Circuit Court carefully considered this argument and observed that the existing Bylaws and Articles have no provision that permitted the specifically mandated two-week period to be waived. App. 007. Appellant accuses the Court of looking "in the wrong direction." R. 1579. Appellant is wrong, not the Court.

Appellant cites *Farmland Ins. Cos. v. Heitman*, 498 N.W.2d 620, 623 (S.D. 1993) for the proposition that bylaws, being mere contracts, "cannot change statutory law." This case had nothing to do with bylaws. In fact, it dealt in a claim between an insurer and an insured. The Court cited the applicable law, as follows, "[a]s a general rule, stipulations in a contract of insurance in conflict with, or repugnant to, statutory provisions which are applicable to, and consequently form a part of, the contract, must yield to the statute, and are invalid, since contracts cannot change existing statutory

laws." The present case before the Court has nothing to do with insurance contracts or insurance regulatory statutes. The case cited has no application here. In fact, South Dakota law takes the exact opposition position. In SDCL § 47-23-22, SDCL § 47-23-23, SDCL § 47-23-24 for example, the statutes provide that the articles and bylaws control.

SDCL § 47-23-6 does not permit the LLM Board to ignore the procedures to amend the Articles and Bylaws, especially the mandated two-week consideration period before voting on changes. The statute only permits that which could be done at a meeting, to take place outside a meeting.

Finally, the Court relied on direct precedent on the issue. In *St. John's Hospital Medical Staff v. St. John Regional Medical Center*, 245 N.W.2d 472 (S.D. 1976), in that case a board of directors implemented new bylaws without following the amendment procedures laid out years before. The new bylaws were invalid since the appropriate procedures went unfollowed. *Id*. at 475. The Circuit Court made the proper decision and Appellant has shown no abuse of discretion.

II. The Circuit Court Properly Granted Summary Judgment.

Appellees showed the history of the attempted Bylaw and Article changes. An initial draft was provided in February 2014 after review by a committee of the Board of Directors. R. 1168-70. After that review, the materials were revised several times before finally being provided to the Board on May 16, 2014 where they were revised yet again. R. 1170-71. In fact, the committee reviewing the materials did not even have the version presented to the Board more than two weeks before the May 16, 2014 Board meeting. R. 1170, 1177, 1179. Neither the committee nor the Board considered the requirements in the existing Articles and Bylaws concerning the two

week consideration period for the adoption of amendments. R. 1170-72. The original 1964 Bylaws and the 1967 Articles for the organization required a specific procedure of notice and a two week waiting period before a change could be adopted. R. 179, 190. Both documents specifically provide that the amendments "shall not be voted upon and adopted at the same meeting." *Id*.

There exists no dispute that the procedures required by the Articles and Bylaws were not followed. Accordingly, the May 16, 2014 attempted changes were invalid. *St. John's Hospital Medical Staff v. St. John Regional Medical Center*, 245 N.W. 2d 472, 475 (S.D. 1976). Since Appellant could not meet the essential element for the foundation of her claim, the Circuit Court appropriately entered judgment and dismissed the case.

These facts were present throughout the case. On July 31, 2017, the parties argued a motion for TRO before the Court at which Appellant Ramsey testified. Following the motion, and based on the admissions in her testimony, the Court made findings that demonstrate the futility of her lawsuit. The Court found, in part:

> 3. The primary purpose of Lowell Lundstrom Ministries, Inc. was religious and the corporation is affiliated with the Assemblies of God.
>
> 4. In 1964, the Lowell Lundstrom Ministries bylaws provided that any change to the bylaws must be presented to the full board and that no change can be voted on unless it has been considered by the board for two weeks. In 1967, the same requirement was placed upon the articles of incorporation for a change to the articles.
>
> 5. The headquarters building of Lowell Lundstrom Ministries was located in Sisseton, South Dakota for many years. The headquarters was directed closed and all employees terminated in July 2014 by Plaintiff Ramsey. The building has been empty for nearly three years. The property remains available for sale.

6. In 1996, Lowell Lundstrom Ministries began Celebration Church in Lakeville, Minnesota. Celebration Church has been the primary facility of Lowell Lundstrom Ministries since that time.

8. On May 16, 2014, changes to the articles and bylaws of Lowell Lundstrom Ministries were presented and a vote taken to adopt them at the same board meeting.

9. In the summer of 2014, the Lowell Lundstrom Ministries Board learned of conduct concerning Plaintiff Ramsey. Specifically, the Board learned that Plaintiff Ramsey attempted to cover up sexually inappropriate conduct of another pastor at Celebration Church, Plaintiff Ramsey's husband.

10. After review of this conduct, as well as other events and conduct considered detrimental to the operations of Lowell Lundstrom Ministries, Plaintiff Ramsey's duties were removed and, on September 4, 2014, Plaintiff Ramsey was terminated from Lowell Lundstrom Ministries in all respects.

11. On September 10, 2014, Plaintiff Ramsey signed an Agreement to resolve all issues with Lowell Lundstrom Ministries and Celebration Church.

14. Plaintiff Ramsey contends that she could not be removed as Chairman of the Board under the May 2014 bylaws and articles.

15. Lowell Lundstrom Ministries contends that the bylaws and articles from May 2014 are void because the proper procedures were not followed to adopt them as provided in *St. John's Hospital Medical Staff v. St. John Regional Medical Center*, 245 N.W. 2d 472 (S.D. 1976).

R. 293-95.

No matter how many times Appellant may request reconsideration, these facts will not change.

Ultimately, LLM is a church. Even Ramsey considers the "exclusive operation" of this business a "Christian church" according to the Ramsey Articles and Ramsey Bylaws, which she claims control the church. South Dakota Courts and the Eighth Circuit Court of Appeals, on several occasions, have determined that the

secular courtroom is not the place for determination of religious issues. The government certainly has no place determining who will be the lead pastor of a church.

In *Decker v. Tschetter Hutterian Brethren, Inc*., 594 N.W.2d 357 (S.D. 1999) the South Dakota Supreme Court dismissed a similar case for lack of jurisdiction. In that case, a Senior Elder, after being accused of financial improprieties, was repudiated by many ministers of the Hutterite church and his leadership was rejected by all but five of the 63 Hutterite colonies in the Dakotas and Minnesota. *Id*. at 360. The Court noted, "[a]ll of the causes of action alleged by the Plaintiffs appear to have occurred in the colony or concern its control and the contents of its membership." *Id*. at 361-62.

The Supreme Court dismissed the case for lack of jurisdiction. Article VI, § 3 of the South Dakota Constitution, as well as the First Amendment to the Constitution of the United States "preclude civil courts from entertaining religious disputes over doctrine, leaving those issues to ecclesiastical tribunals of the appropriate church." *Id*. at 362. "Even when possession of ownership of church property is disputed in a civil court, 'there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs.'" *Id*. (*citing Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976)). The United State Supreme Court noted that *Milivojevich*, which involved a dispute regarding which of two bishops could "control the church body, property and assets," required the abstention of the courts. *Id.* at 363. Again, in 2020, the United States Supreme Court reiterated the "ministerial

exception" that courts "are bound to stay out of employment disputes involving those including certain important positions with churches and other religious institutions." *Our Lady of Guadalupe School v. Morrissey-Berru*, —— U.S. ——, 140 S.Ct. 2049, 2060 (2020). The *Decker* Court wrote:

> We are not ecclesiastical jurists of the Hutterite faith and have no constitutional basis to interfere with this religious dispute. If there is an earthly forum for the adjudication of Plaintiffs' allegations, it is not the secular courts of this state.
>
> *Id*. at 365 (*citations omitted*).

Decker spawned related actions in state and federal court, which all resulted in dismissals for lack of subject matter jurisdiction. In *Hutterville Hutterian Brethren, Inc.*, 791 N.W.2d 169 (S.D. 2010), the South Dakota Supreme Court again visited this issue. While the challenging parties believed the Court could get involved in church governance issues arguing the bylaws and articles were neutral principles the Court would be permitted to address. The Court wrote, "[t]he neutral-principles approach does not apply in such cases as it 'has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be.'" *Id.* at 177, *citing Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986). Civil courts have no subject matter jurisdiction with regard to matters of "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Id*. at 178. The Court held that "[v]oting memberships, directorships and officerships of Hutterville are inseparable from religious principles…" and that the courts had 'no constitutional basis to interfere." *Id.* at 179.

Again, in *Wipf v. Hutterville Hutterian Brethren*, 808 N.W.2d 678 (S.D. 2012) *rehearing denied*, the South Dakota Supreme Court ultimately concluded:

> When Hutterville made following the Hutterian religion a condition of corporate membership and weaved religious doctrine throughout its corporate documents, it limited a secular court's ability to adjudicate any corporate disputes. We cannot uphold the circuit court's order, findings, and conclusions without also endorsing its decision on the identity of corporate leaders and members. "Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC et al.*, ––– U.S. ––––, ––––, 132 S.Ct. 694, 697, 181 L.Ed.2d 650 (2012). We conclude that the underlying religious controversies over church leadership so pervade the dissolution of the religious corporation that the dissolution is beyond a secular court's jurisdiction. Because we reverse on jurisdictional grounds, we need not address the remaining issues.

Id. at 686. *See also Hutterville Hutterian Brethren, Inc., v. Sveen*, 776 F.3d 547, 557-58 (8th Cir. 2015), *rehearing and rehearing en banc denied* (since the South Dakota Supreme Court had already foreclosed judicial determination of these issues, the federal court, via judicial estoppel, also dismissed the case).

The same result follows here. Both the state and federal constitution prohibit interference with the workings of religious entities, especially as to who will lead them. As the Affidavits provided in connection with the motion and those contained in this record demonstrate, after thoughtful consideration, LLM decided that the moral failings, malfeasance, and corruption of Appellant precluded her from being a leader and pastor of their flock. LLM has moved on with new pastoral leadership and this Court has no authority to undo these decisions. As Judge Flemmer stated:

> And the Court again has determined that the May 16, 2014 bylaws amendments are null and void. It would appear from reviewing the claims made by the Plaintiff in the Complaint that those claims that are made personal to her such as the request that the governing documents adopted

> on May 16 amendments are null and void going back to the 1964 bylaws then the employees of the nonprofit corporation are employees at will. And the board chose to terminate that employment. If this Court and this Court has previously indicated that it, under the precedent set by the South Dakota Supreme Court, that this Court is not to be involved in religious or ecclesiastical determinations. Obviously, determining who the head of the church is or should be isn't a decision for this Court. But, obviously, the effect of and legality of bylaws and other matters that are filed with public offices in the state of South Dakota are an issue that the Court can address and the Court has determined that the 1964 bylaws are those that were in effect in connection with the time period involved in this lawsuit. And, therefore, those claims brought by the Plaintiff, Londa Lundstrom Ramsey, are subject to the Court's determination and it does not appear to the Court that there are any disputed facts where those are concerned and the Court has previously determined that the 2014 bylaws are not in effect. Therefore, those claims or on those claims the [Defendants'] Motion for Summary Judgment should be granted. That there are additional claims made in the Complaint which, again, it does not appear to the Court that are -- or can survive the determination of the Court that the 2014 bylaw amendments are null and void. And so the Court would grant the Motion for Summary Judgment brought on by the Defendant dismissing all claims.

App. 038-40. The case has been appropriately dismissed.

CONCLUSION

This case concerns the leadership of a Christian church in Minnesota. Appellant Ramsey's primary goal was to "seek a declaration that Plaintiff Lundstrom Ramsey was improperly removed from the Lowell Lundstrom Ministries, Inc.[sic]." R. 624-25. However a church, not a Court, has the right to decide who will shepherd its flock. Appellee, LLM and its Board decided, after enduring months of Ramsey's sexual misconduct coverup, deceit and malfeasance, that she will no longer serve as senior pastor of this church. Accordingly, the South Dakota Supreme Court has no reason to become embroiled in or interfere with that decision. On August 21, 2017, in its Order denying Plaintiffs' motion for a temporary restraining order, the Circuit Court found:

> The public interest is not served by Plaintiffs' motion. Plaintiffs take the position that the public interest to be served is to "spread the word and teachings of Jesus Christ." The Courts cannot constitutionally accept Plaintiffs' argument and must abstain from such a position. *See Decker v. Tschetter Hutterian Brethren, Inc.*, 594 N.W.2d 357 (S.D. 1999).
>
> R. 296.

The Circuit Court appropriately denied Appellee's motion for reconsideration and granted summary judgment to Appellees. Accordingly, the correctly decided Order dismissing this case should be affirmed.

Dated this 29th day of January, 2021.

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CERTIFICATE OF COMPLIANCE

I certify that this brief does not exceed the word limit described by SDCL § 15-26A-66. This brief contains 6,806 words, excluding the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, any addendum materials, and any certificates of counsel.

One of the Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2021, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

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IN THE

Supreme Court

of the

State of South Dakota

No.

LONDA LUNDSTROM RAMSEY,
PLAINTIFF/APPELLANT
AND LOWELL LUNDSTROM, JR.,
PLAINTIFF

VS.

LOWELL LUNDSTROM MINISTRIES, INC.,
JAN HAWKINS, SI LIECHTY, JIM OLSON,
PAUL ANDERSON, RANDY DIRKS,
DERRICK ROSS, KURT RINGLEY, LYNDA BORDREAU,
JASON HEATH, JEFF JOHNSON, AND DARNELL JONES,
DEFENDANTS/APPELLEES

An appeal from the Circuit Court
Fifth Judicial Circuit
Roberts County, South Dakota
The Hon. Jon S. Flemmer
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. Londa's Interpretation of the 1964 Bylaws More Closely Tracks the "Normal Principles for Construction and Interpretation of a Contract"

For the Court's convenience, here is the clause from the 1964 bylaws[1] central to this appeal:

> The Board of Directors shall have the power, by vote of a majority of the members present and voting at any meeting at which there is a quorum, to make, alter, amend or rescend the by-laws of this corporation. ***The alteration of these by-laws shall be proposed at one meeting of the Board of Directors but shall not be voted upon and adopted at the same meeting. A waiting period of not less than two weeks shall exist between the meetings proposing a change in the by-laws and the meeting adopting the changes in the by-laws.*** Ten days notice of the meeting for the adoption of any changes in the by-laws shall be given to each member in writing and mailed to his home address.

R. 480 (emphasis added).

A. Defendants Waived their Argument Regarding the Word "Proposed" by Failing to Cite Applicable Authority

Defendants fail to give this Court guidance on what the verb "propose" means. Without any authority, Defendants merely assert that "proposed" means that the exact verbatim text of the new bylaws had to be presented in writing at one meeting and then voted on at another meeting. Defendants, however, are required to present authority to support their arguments. *Duffield Constr., Inc. v. Baldwin*, 2004 S.D. 51, ¶¶ 17-18, 679

[1] Defendants refer several times to the 1967 bylaws, but none of the parties have been able to find an accurate or admissible version of that document. The document the Defendants reference in their brief is a re-creation that Defendants themselves fashioned. Although the Circuit Court relied on that re-created document at an earlier stage, the simple fact remains: it is neither an original nor a legitimate duplicate, which is either inadmissible, *see,* SDCL 19-19-1002; SDCL 19-19-1003, or, a document subject to factual disputes, *see,* SDCL 19-19-1004.

N.W.2d 477, 483 (*citing Hart v. Miller*, 2000 S.D. 53, ¶ 45, 609 N.W.2d 138, 149; SDCL 44-9-42). By failing to cite *any* authority over what "proposed" or any of the other words in the alteration clause mean, Defendants waived the argument. *Id*. They are stuck with Londa's definition.

B. The Plain and Ordinary Meaning of "Proposed" in the Context of the Rest of the Relevant Sentence Favors Londa's Interpretation of the 1964 Bylaws

Defendants analysis is also problematic because their interpretation would ignore the word *alteration* in that same sentence of the bylaws (i.e., "[t]he alteration of these by-laws shall be proposed…").

We offer two observations: first, the original drafters did not use the word "amendment," but chose the word *alteration*, instead; and, second, the original drafters did not use the "alterations," *plural* but chose the singular "alteration" modified by the definite article "the." These choices by the drafter suggest that this sentence is a mechanism intended to give notice to board members that changes will be discussed and considered, rather than requiring an *a priori,* "exact prescribed list" of the modifications to be made.

Londa's interpretation is consistent with how "alteration" is defined,[2] and comports with common corporate practice. According to Black's Law Dictionary, the word "alteration" means "[a]n act done to an instrument, after its execution, whereby its meaning or language is changed." Black's Law Dictionary 97 (11th ed. 2019). *Alteration*

[2] Courts look to the "'plain and ordinary meaning," of words and language in contracts (or bylaws). *Coffey v. Coffey*, 2016 S.D. 96, ¶ 8 and fn.1, 888 N.W.2d 805, 809.

thus does not refer to the text itself (and not the *verbatim* text, as Defendants suggest). Instead, alteration merely refers to the "act" of changing the meaning or language of a written instrument.

The bylaws set forth a two-stage process: the intention to alter the bylaws must be "proposed" at a first meeting, followed by the formal act of amendment which takes place at a second meeting. As noted in Londa's original brief, to *propose* means "to put forward for consideration, discussion, or adoption….to make known as one's intention." American Heritage (3rd ed.). "SYNONYMS: *propose, pose, propound, submit*. The central meaning behind these verbs is to 'present something for consideration or discussion.'" *Id.*[3]

Joining *alteration* and *propose* thus leads to the following way to view the clause in the 1964 bylaws: "[t]he alteration [i.e., act of changing the meaning or language of a written instrument] of these by-laws shall be proposed [i.e., put forward for consideration, discussion, or adoption] at one meeting of the Board of Directors but shall not be voted upon and adopted at the same meeting." R. 480; Black's Law Dictionary 97 (11th ed. 2019); American Heritage (3rd ed.). Defendants' interpretation would leave no room for a productive discussion of amendment proposals, because even friendly suggestions for changes (large or small) would immediately trigger the need for another meeting.

Londa's interpretation also squares with common board practice. The purpose of this bylaws provision is to create a waiting and notice period to board members that

[3] *C.f.,* Black's Law Dictionary, (7th ed.) (a *proposed regulation* is one which is "circulated among interested parties for comment").

changes will be discussed and considered. During the board meetings, members can then discuss, consider, and propose changes to the amendments. This provision does not require a new waiting period for each minor or typographical change. Boards do not function that way (and, creating such a requirement would *discourage* board members from suggesting minor changes, for fear that they would then have to take up the matter yet again next time, solely to address trivial and non-material changes).

Londa's interpretation is also consistent with the *next* sentence in the bylaws, which uses ***both*** the singular ***and*** the plural forms of the noun "change."

> ***A waiting period of not less than two weeks shall exist between the meetings proposing a change in the by-laws and the meeting adopting the changes in the by-laws.***

This sentence envisions two board meetings, and it uses the word *change* distinctly for each of those meetings. The purpose of the *first* meeting is to propose "a change" in the bylaws. We would expect discussion to ensue at this first meeting, during which the board begins to consider the need for and the idea of "a change." Then, at a second meeting, the board can proceed to adopt "the changes" into the bylaws.

If all "changes" needed to be provided at the first meeting, the sentence would have used the plural, "changes," for both instances. It did not. Likewise, if the change discussed at the first meeting was intended to be verbatim to the change adopted at the second meeting, then the sentence would have used the singular "change" for both instances. It did not. The only reasonable way to read this sentence is that the initial meeting is intended to give notice to the board that "a change" will be considered, and,

that after their deliberation, the subsequent meeting will be used to adopt the necessary changes.

In summary, the *act* of changing the bylaws must be proposed at one board meeting and voted on at another board meeting. That is what occurred here. There is no dispute that the act of changing the language of the bylaws had been put forward for consideration by the board since 2010. In fact, *all* of the substantive bylaw changes were presented for consideration in January and February of 2014. R. 208, 714. These changes, in turn, were discussed *at length* at the February 2014 meeting. The changes were adopted in line with the meanings of the words *propose* and *alteration*.

C. Defendants Fail to Address the Doctrine of *de Minimis Non Curat Lex*

Defendants' brief is silent regarding the long-standing doctrine of *de minimis non curat lex* ('the law cares not for trifles'). In fact, Defendants' entire argument is based on disregarding this doctrine and requiring verbatim, unchanged, unaltered, written distribution of all changes to the bylaws before they can be voted on.

Defendants even concede that the only changes made between February and May of 2014 were "minor." Appellees' Brief, p. 8. As the physical evidence demonstrated, no material modifications were made between February and May. R. 1178. Such "[s]light and insignificant imperfections or deviations may be 'overlooked…'" under this Court's precedence and that of the United States Supreme Court. *Fenske Printing v. Brinkman*, 349 N.W.2d 47, 48-49 (S.D. 1984) (Henderson, J., concurring); *State v. McCann*, 354 N.W.2d 202, 204 (S.D. 1984) ("'The law does not care for, or take notice of, very small or trifling matters.' Black's Law Dictionary 482 (Rev. 4th ed. 1968)….We are inclined to

agree."); *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231, 112 S. Ct. 2447, 2457-58 (1992) ("the law cares not for trifles").

Ultimately, the trial court ignored the "plain and ordinary meaning" of the 1964 Bylaws and, instead, inserted its own language into those bylaws. Rather of ensuring that "the alteration" of the bylaws are "proposed" at one meeting and voted on at another, the trial court imposed the new requirement that the final, verbatim, written draft had to be delivered to each board member, reviewed, and considered at one meeting and then voted on at another. That is not what the 1964 Bylaws require, and the trial court erred when finding otherwise. Summary judgment should be reversed and Londa's motion for partial summary judgment should be granted.

II. Under South Dakota's "Writing in Lieu" Statute, the 2014 Bylaws were Properly Adopted

Defendants claim that South Dakota's "writing *in lieu*" statute is inapplicable to the 1964 Bylaws because the bylaws, not South Dakota statute, control. Defendants cite to SDCL § 47-23-22, -23, and -24 to support that proposition. Each of those statutes, however, grant the corporation permission to govern certain affairs, not the other way around. *See, e.g.*, SDCL § 47-23-22 ("If the … bylaws so provide, the board of directors *may*…) (emphasis added).

Defendants' argument is also inconsistent with the history of statutes governing corporate governance. Modern corporations and corporate charters can be traced back to medieval England, where "[c]orporations were a particular type of delegated jurisdiction within the King's exclusive prerogative." Mary Sarah Bilder, The Corporate Origins of Judicial Review, 116 YALE L.J. 502, 516 (2006) (internal quotations omitted). This

governmental oversight of corporate entities extended to "ecclesiastical bodies," like this case. *Id*. at 516. Because some of those corporations enacted "ordinances" that ran contrary to common law, Parliament prohibited "unlawful orders made by masters of guilds, fraternities, and other companies." *Id.* at 520, A Restraint of Unlawful Orders Made by Masters of Guilds, Fraternities, and Other Companies, 1437, 15 Hen. 6, c. 6, in 3 STATUTES AT LARGE 215, 215–16 (Danby Pickering ed., 1762). Or, as Sir William Blackstone observed, corporations have the ability "[t]o make by-laws or private statutes for the better government of the corporation; which are binding upon themselves, *unless contrary to the laws of the land*." 1 Blackstone, Commentaries 463.

Modern Courts have also upheld this view. As this Court declared, "SDCL 47-22-63 3 grants the corporation power to make or alter bylaws for the administration and regulation of corporate affairs, **so long as such bylaws are not inconsistent with … state laws."** *St. John's Hospital Medical Staff v. St. John Regional Medical Center*, 245 N.W.2d 472, 475 (S.D. 1976).

Contrary to Defendant's suggestion, the power to utilize SDCL § 47-23-6 flows from the statute itself, not the bylaws. Corporations utilize this statute daily to dispense with typically required formalities. *Solstice Capital II, Ltd. P'shp v. Ritz*, 2004 Del. Ch. LEXIS 39, at *5 n.10 (Ch. Apr. 6, 2004) (quoting Folk, "The Delaware Corporation Law," p. 61 (1964) ("unanimous written consent *ipso facto* proves notice actually received"). Here, the board of directors took advantage of the writing in lieu statute to ensure that the 2014 Bylaws were property adopted, or, as the board, wrote, the 2014 bylaws were "duly adopted" and consistent with the then-effective procedures. R. 1178.

The trial court's ruling would reverse over a century of common practice among corporations in this State. It invades the prerogative of the Legislature by disregarding this statutorily provided efficiency mechanism, and it would make it more costly for corporations (both for and non-profit) to do business in this State.

III. Defendants Misconstrue Waiver

Defendants argue that they could not waive the provisions in the bylaws regarding the two-week rule. Defendants even claim that the law *prohibits* such waivers. Defendants cite no law to support this precept. Instead, they try to cloak it in an argument about religious doctrine.

This Court, however, has repeatedly found than a corporation (even a nonprofit corporation) may waive provisions in bylaws. *See, e.g.*, *Stemler v. Stemler*, 31 S.D. 595, 598, 141 N.W. 780, 780 (1913) ("If the association waives a strict compliance with its own rules, and issues a new certificate pursuant to request made by the member, or if it pays the money into court and is discharged, the original beneficiary cannot be heard to complain of non-compliance with the by-laws, the rule being for the protection of the company."); *Sorrels v. Queen of Peace Hosp.*, 1998 S.D. 12, ¶ 11, 575 N.W.2d 240, 244 ("Section VIII of the Queen of Peace Medical Staff Bylaws grants physicians a right to due process before termination of staff privileges. On the other hand, Condition No. 4 and the voluntary relinquishment waived this right."); *Bolte & Jansen v. Equitable Fire Ass'n*, 23 S.D. 240, 246, 121 N.W. 773, 775 (1909) ("We need not discuss the authorities cited, for the reason that this provision for arbitration, contained in the by-laws offered in

evidence, had been waived by the failure of defendant to take the initiative step by appointing an arbitrator and requesting insured to do likewise.").

Defendants all signed a document affirming their knowledge, consent, and unambiguous approval and adoption of the 2014 Bylaws:

> WHEREAS, the Directors of the ***corporation*** have reviewed the Proposed Restated Articles of Incorporation, which are attached as Exhibit A, and the Proposed Restated Bylaws, which are attached as Exhibit B;
>
> NOW, THEREFORE, BE IT RESOLVED, that at a ***duly called*** meeting of the Directors which was held on May 16, 2014, with a quorum present, the Directors approved by more than a majority vote the Proposed Restated Articles of Incorporation and Proposed Restated Bylaws and direct that the Proposed Restated Articles of Incorporation and Proposed Restated Bylaws be submitted to a member vote, with a recommendation from the directors that they be adopted by the members; AND IT IS FURTHER
>
> RESOLVED, that the Proposed Restated Articles of Incorporation and Proposed Restated Bylaws of the Corporation ***were duly adopted*** by more than a majority of the members of the corporation at a duly called meeting held on May 16, 2014, with a quorum present.

R. 542 (emphasis added).

There is nothing equivocal about that declaration. Defendants agreed that the May meeting was "duly called." They also agreed that the 2014 Bylaws were "duly adopted," which would necessarily mean that Defendants knowingly and voluntarily agreed that either they followed the correct procedures or that they did not have to.

Defendants try to argue around this by claiming that they never would have signed the resolution if they had known about the alleged misconduct that Londa's husband committed. As a preliminary matter, what the Board knew and when they knew it is a disputed fact. If anything, Defendants arguments suggest that there was a disputed

material fact that the trial court failed to interpret in Londa's favor. If this Court were to accept Defendants' arguments on waiver, it would have to reverse the trial court's order granting summary judgment because disputed material facts were still unresolved.

IV. The Ecclesiastical Abstention Doctrine is Inapplicable

A. Defendants Failed to Cross-Appeal the Trial Court's Decision that the Ecclesiastical Abstention Doctrine was Inapplicable and are thus Bound by the Law of the Case

"SDCL 15-26A-22 provides [an] appellee with the right to obtain review of a judgment or order entered in the same action which may adversely affect him." *Deuchar v. Foland Ranch, Inc.*, 410 N.W.2d 177, 183 (S.D. 1987). A trial court's rulings become the law of the case subject to reversal *only* if the appellee presents that issue for cross appeal. *Id*. *See also Orr v. Kneip*, 287 N.W.2d 480, 484-85 (S.D. 1979) *("*"The court's instructions became the law of the case subject to reversal on appeal only if the record of objection, exception and the proposal of correct instructions is preserved. While counsel for plaintiffs assiduously made his record to preserve the issue, we must decline to address it since it has not been properly presented to us due to plaintiffs' failure to cross-appeal.").

The trial court made the following findings regarding the intersection of religion and this case:

> The dispute presented by the pleadings in this case will require the Court to resolve claims for declaratory relief, breach of articles of incorporation and bylaws, breach of charitable trust, breach of fiduciary duty, misuse of Plaintiff's surname, claim for conversion, claim for unjust enrichment and claim for injunctive relief. ***None of these claims appear to be based upon religious doctrine, nor has the court received for review any religious doctrine documents***.

> LLM is incorporated under the laws of the State of South Dakota and the Articles of Incorporation were filed with the South Dakota Secretary of State. ***Clearly, LLM submitted itself to the supervision and jurisdiction of the State at that time for purposes of review of Articles of Incorporation and Bylaws. The current motions before this Court require no review of religious doctrine, nor does it appear that the claims made in the Plaintiffs' complaint are based upon religious doctrine.*** The Court will be required to determine which set of Bylaws are in effect and whether those Bylaws were properly followed in actions alleged to have been taken by Defendants. ***The articles of Incorporation and Bylaws do not contain any language that could be considered to be religious doctrine***.
>
> It appears that by applying the neutral principles approach in this case the Court will be able to make determinations exclusively on objective, well established concepts of law familiar to lawyers and judges. T***herefore, although LLM was incorporated as a nonprofit corporation to, among other things, promote religion, the Court will not need to review religious doctrine to rule on the issues raised by the current pleadings.***

R. 1494-95 (emphasis added). This is now the law of the case. Defendants failed to provide a notice of review regarding these findings and conclusions. Their consideration is not before this Court.

B. The Ecclesiastical Abstention Doctrine Does not Apply to the Interpretation of Nonprofit Bylaws

Even if this Court were inclined to consider Defendants' arguments, this case does not involve the settling of religious disputes. As much as Defendants try to smear Londa and make this case about their slanderous allegations, this appeal is about the application of neutral principles of law to determine the meaning of bylaws governed by title 47 of South Dakota's written statutes.

"'The First Amendment to the United States Constitution and Article 6, Section 3, of the South Dakota Constitution preclude civil courts from entertaining religious disputes over doctrine, leaving adjudication of those issues to ecclesiastical tribunals of

the appropriate church.'" *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2012 SD 4, ¶ 11, 808 N.W.2d 678 (*quoting Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 SD 86, ¶ 20, 791 N.W.2d 169) (additional citations omitted). "[A] court may resolve church property disputes by applying neutral, secular principles of property, trust, and corporate law when the instruments upon which those principles operate are at hand." *Second Intern. Baha'I Council v. Chase*, 326 Mont. 41, ¶ 17, 106 P.3d 1168 (2005). In other words, "no First Amendment issue arises when a court resolves a church property dispute by relying on state statutes concerning the holding of religious property, the language in the relevant deeds, and the terms of corporate charters of religious organizations." *Id.* (*citing Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1249 (9th Cir. 1999)).

This "neutral-principles approach" has been universally affirmed by the Courts. *See Jones v. Wolf*, 443 U.S. 595, 602-03, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979) (discussing favorable references to the neutral-principles approach). *See also Foss v. Dykstra*, 319 N.W.2d 499 (S.D. 1982) (adopting the neutral-principles approach); *Wipf*, 2012 SD 4, ¶ 12 (reaffirming the neutral-principles approach). For example, "[a] church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court." *Minker v. Baltimore Annual Conf. of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990) (*citing Watson v. Jones*, 80 U.S. (13 Wall.) 679, 714, 20 L. Ed. 666 (1871)). Such contracts, including "the manner in which churches own property, hire employees, or purchase goods," are subject to review by civil courts. *Id.* (*citing Jones*, 443 U.S. at 606). Additionally, and notable to this case, a civil court may

determine whether a church followed its written policies and procedures when removing officers of the church or clergy.[4]

As the trial court observed, all of Londa's claims center around the interpretation of the Nonprofit Corporations bylaws. Likewise, all of the arguments that Londa has made regarding those bylaws focus on the neutral precepts of law that Courts have declared when interpreting the types of legal issues that are raised by this Appeal. That is because, whether a church follows the procedures set forth by its bylaws does not, as a matter of law, implicate ecclesiastical matters. *See, e.g.*, *People ex re. Muhammad*, 289 Ill.App.3d 740 ("In the case at bar, the court was not required to examine religious doctrine or practice to determine whether plaintiff had been properly removed as president and chairman of the board of directors of the corporation."); *Jackson*, 2016 IL App (1st) 143045, ¶ 53 ("Like the dispute in Ervin, plaintiff asserts that the church violated its own bylaws. Accordingly, we have jurisdiction to determine whether or not defendants followed the proper procedure for terminating plaintiff."); *Hemphill*, 447 So. 2d at 977 ("However, when the controversy turns on whether a minister's discharge was

[4] *See e.g., People ex re. Muhammad v. Muhammad-Rahmah*, 289 Ill.App.3d 740, 682 N.E.2d 336 (1997) ("In the case at bar, the court was not required to examine religious doctrine or practice to determine whether plaintiff had been properly removed as president and chairman of the board of directors of the corporation."); *Jackson v. Mount Pisgah Missionary Baptist Church Deacon Bd.*, 2016 IL App (1st) 143045, ¶ 53, 59 N.E.3d 76, 89 ("plaintiff asserts that the church violated its own bylaws. Accordingly, we have jurisdiction…."); *Hemphill v. Zion Hope Primitive Baptist Church of Pensacola, Inc.*, 447 So. 2d 976, 977 (Fla. Dist. Ct. App. 1984) ("when the controversy turns on whether a minister's discharge was accomplished in accordance with the corporate charter, ecclesiastic matters do not come into play…."); *Smith v. Mount Salem Missionary Baptist Church*, 289 Ga. App. 578, 579–80, 657 S.E.2d 642, 644 (2008) ("the trial court did not involve itself in ecclesiastical matters when it ordered [voting eligibility] pursuant to the Church bylaws.").

accomplished in accordance with the corporate charter, ecclesiastic matters do not come into play and the civil courts are an appropriate forum for the type of relief sought here."); *Smith*, 289 Ga. App. at 579–80 ("On this record, we find that the trial court did not involve itself in ecclesiastical matters when it ordered that persons eligible to participate in the majority vote on whether to retain or discharge Smith as pastor were limited to those who obtained membership in the Church pursuant to the Church bylaws. This was not an order deciding the criteria for Church membership or controlling a matter of Church governance, but merely an order requiring that the Church bylaws setting forth the procedure for obtaining membership be followed.").

Defendants rely almost exclusively on various cases involving the Hutterite sect. Defendants go so far as to claim that no church governance, order or discipline issues, could be decided by any civil court. Those claims, however, have been soundly rejected by Courts all over the country, including the United States Supreme Court. *See Jones*, 443 U.S. at 602("The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively."). *See also People ex re. Muhammad*, 289 Ill.App.3d 740 ("In the case at bar, the court was not required to examine religious doctrine or practice to determine whether plaintiff had been properly removed as president and chairman of the board of directors of the corporation."); *Jackson,* 2016 IL App (1st) 143045, ¶ 53 ("Like the dispute in Ervin, plaintiff asserts that the church violated its own bylaws. Accordingly, we have jurisdiction to determine whether or not defendants followed the proper procedure for terminating plaintiff."); *Hemphill*, 447 So.

2d at 977 ("However, when the controversy turns on whether a minister's discharge was accomplished in accordance with the corporate charter, ecclesiastic matters do not come into play and the civil courts are an appropriate forum for the type of relief sought here."); *Smith*, 289 Ga. App. at 579–80 ("On this record, we find that the trial court did not involve itself in ecclesiastical matters when it ordered that persons eligible to participate in the majority vote on whether to retain or discharge Smith as pastor were limited to those who obtained membership in the Church pursuant to the Church bylaws. This was not an order deciding the criteria for Church membership or controlling a matter of Church governance, but merely an order requiring that the Church bylaws setting forth the procedure for obtaining membership be followed.").

This discrepancy between Defendants' claims and the overwhelming case law on this issue can be explained by a critical omission by Defendants. All of the Hutterite decisions were hinged on one material fact: *there is no separation within the Hutterite religion between secular and ecclesiastical life*:

> The record indicates there is no separation of religious life from a secular life in a Hutterite colony because there is no separate secular life. The colony is run and its members, whether the followers of Rev. Kleinsasser or Rev. Wipf, all conduct their lives on religious absolutes based on the Bible and the Ten Commandments…. There are no separate secular shades of gray.

Decker ex rel. Decker v. Tschetter Hutterian Brethren, Inc., 1999 SD 62, ¶ 23, 594 N.W.2d 357.

Defendants have presented no evidence (nor did the Complaint or Answers assert) that religion *controls every aspect* of Plaintiffs' and Defendants' lives in the way that it does for the Hutterite sect. Unlike the Hutterites, these parishioners are free to make

separate secular choices. Unlike the Hutterites, these pastors do not control the daily lives of their parishioners. Unlike the Hutterites, these church members do not live communally under religious principles.

This case is about the application of secular law to secular documents that involve a church. This Court has the authority and jurisdiction to make such decisions.

Dated this 1th day of March, 2021.

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CERTIFICATE OF COMPLIANCE

I certify that this brief does not exceed the word limit described by SDCL § 15-26A-66. This brief contains 4,593 words, excluding the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

One of the attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2021, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

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I also hereby certify that on this same day, I sent copies of the foregoing by email to Appellees' counsel, as follows:

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