IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

JEREMY COYLE AND ABBEY COYLE,

Plaintiffs/Appellees,

vs.

KENNETH MCFARLAND AND KELLI MCFARLAND,

Defendants/Appellants.

Appeal No. 30868

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

The Honorable Michael Day
Circuit Court Judge

Notice of Appeal filed on October 9, 2024

APPELLANTS' BRIEF

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Preliminary Statement

Jeremy and Abbey Coyle ("Coyle") initiated this trespass action in June of 2023 against Kenny and Kelli McFarland ("McFarland"). Less than 3 months later, and before any discovery was conducted, Coyle moved for partial summary judgment on the issue of liability. McFarland's attorney, Kent Hagg, did not timely respond to the motion. Immediately upon realizing this, Hagg filed a *Motion for Continuance*, invoking Rule 56(f) and seeking an extension on his time to respond to the motion. Hagg also notified the circuit court and opposing counsel that significant personal trauma caused him to miss the filing deadline. The circuit court denied the continuance, found that McFarland's failure to timely respond to the motion resulted in all of Coyle's material facts being deemed "admitted," and granted Coyle's motion for summary judgment.

In this appeal, McFarland maintains the circuit court abused its discretion by denying the continuance in light of 1) the circumstances surrounding Hagg missing the motion response deadline, 2) the parties' sharp factual and legal dispute over the boundaries in question, 3) no discovery being conducted whatsoever, and 4) the final result being a decision not based on the merits.

References to the record are designated as "SR" followed by the appropriate page number. References to McFarland's Appendix are designated as "App." followed by the appropriate page number. References to transcripts are designated

as HT or TT followed by the appropriate page and line numbers and the hearing date.

Jurisdictional Statement

On October 2, 2023, the circuit court entered its *Order for Partial Summary Judgment*. App. 1-2; SR 149-150. On December 19, 2023, the circuit court entered its *Order Denying Motion for Relief from Order Pursuant to SDCL §15-6-60(b) and/or for Reconsideration*. App. 3; SR 195. On September 9, 2024, the circuit court entered its *Final Judgment and Order* and *Findings of Fact and Conclusions of Law*. App. 4, 5-6; SR 503, 501-502. Notice of Entry of the *Final Judgment and Order* and *Findings of Fact and Conclusions of Law* was served on September 10, 2024. SR 508. McFarland's *Notice of Appeal* was filed on October 9, 2024. SR 510-511. This Court has jurisdiction pursuant to SDCL §15-26A-3.

Statement of the Issues

1a. Did the Circuit Court Abuse its Discretion in Denying McFarland's Motion for Continuance Under Rule 56(f)?

The circuit court denied McFarland's motion for continuance without conducting a Rule 56(f) analysis.

Most Relevant Authority:

Betty Jean Strom Trust v. SCS Carbon Transport, LLC, 2024 SD 48, 11 N.W.3d 71.
Davies v. GPHC, LLC, 2022 SD 55, 980 N.W.2d 251.
Stern Oil Co. v. Border States Paving, Inc., 2014 SD 28, 848 N.W.2d 273.
SDCL §15-6-56(f).

1b. Did the Circuit Court Abuse its Discretion by Not Conducting an Excusable Neglect Analysis Under Rule 6(b)?

The circuit court denied the request for continuance without assessing whether Hagg engaged in excusable neglect.

Most Relevant Authority:

South Dakota Public Assurance Alliance v. McGuire, 2018 SD 75, 919 N.W.2d 745.
Donald Bucklin Const. v. McCormick Const. Co., 2013 SD 57, 835 N.W.2d 862.
Leighton v. Bennett, 2019 SD 19, 926 N.W.2d 465.
SDCL §15-6-6(b).

1c. Did the Circuit Court Err in Granting Summary Judgment to Coyle Based Solely on McFarland's Untimely Response?

The circuit court deemed "admitted" all of Coyle's Statement of Material Facts and granted summary judgment on that basis.

Most Relevant Authority:

Velocity Investments, LLC v. Dybvig Installations, Inc., 2013 SD 41, 833 N.W.2d 41.

Upper Plains Contracting Inc. v. Pepsi Americas, 2003 SD 3, 656 N.W.2d 323.

1d. Did the Circuit Court Err in Denying McFarland's Motion for Reconsideration?

The circuit court denied the motion for reconsideration, reasoning that "rules are rules."

Most Relevant Authority:

Gold Pan Partners, Inc. v. Madsen, 469 N.W.2d 387 (S.D. 1991).

2. Did the Circuit Court Err in Determining that McFarland was Trespassing upon Coyle's Property?

The circuit court found McFarland was trespassing based solely on Coyle's Statement of Material Facts being deemed admitted.

Most Relevant Authority:

Donald Bucklin Const. v. McCormick Const. Co., 2013 SD 57, 835 N.W.2d 862.

Statement of the Case

This is an appeal from the Fourth Judicial Circuit, Butte County, South Dakota, the Honorable Michael Day. Coyle initiated this action on June 7, 2023 by filing a Summons and Complaint. SR 1, 2-10. Coyle's complaint alleged that a portion of McFarland's driveway was situated on Coyle's property and, therefore, trespassing. SR 3-4.

On August 24, 2023 – before any discovery was conducted – Coyle moved for summary judgment. SR 21-22. On August 28, 2023, Coyle filed a *Notice of*

Hearing reflecting a hearing on the motion would be held on September 28, 2023. SR 92. McFarland did not file a responsive brief prior to September 14, 2023, which was their deadline to do so under Rule 56(c). SDCL §15-6-56(c).

On September 18, 2023, McFarland filed a motion for continuance, requesting the hearing be continued "for approximately 30 days" because "counsel for Defendants, due to personal reasons, is unable to timely answer Plaintiffs pleadings adequately and has several prior obligations within said time period." SR 96. Coyle objected to the motion. SR 98-99. On September 20, 2023, McFarland's counsel filed an *Affidavit in Support of Motion for Continuance and Initial Response to Plaintiffs' Motion for Partial Summary Judgment and in Response to Plaintiffs Objection* ("Hagg Affidavit"), seeking relief under SDCL §15-6-56(f). App. 23-32; SR 104-113. In the Affidavit, counsel referenced Rule 56(f) and requested a continuance of "at least" 60 days to "conduct further discovery to support the facts of the matter and which will most likely uncover additional facts which will rebut Plaintiff's Motion for Partial Summary Judgment." App. 24 at ¶3; SR 105.

The circuit court denied the *Motion for Continuance* in an email dated September 21, 2023. SR 118-119. On September 25, 2023, McFarland filed a response to the summary judgment motion and a response to the Statement of Undisputed Material Facts. App. 12-15, 37-47; SR 120-130, 131-134.

At the hearing on September 28, 2023, the Court granted Coyle's motion for summary judgment, finding that the "facts set forth in Plaintiff's Statement of Material Facts dated August 24, 2023, have been admitted by the Defendants" by virtue of McFarlands' failure to timely respond to the same. HT at 3:2-4 (9/28/23); SR 153. The Court entered its *Order for Partial Summary Judgment* on October 2, 2023. App 1-2; SR 149-150.

On September 9, 2024, after holding a court trial wherein no testimony or evidence was submitted, the circuit court entered a final order consistent with the terms of the *Order for Partial Summary Judgment.* App. 4; SR 503. *Notice of Entry* was served on September 10, 2024. SR 508. This appeal followed.

Statement of the Facts

In 2015, McFarland purchased Lot 25A on Willow Creek Estates Subdivision, Belle Fourche, South Dakota. SR 100. Lot 25A is depicted in the 2015 Plat and it consists of the previously-platted Lot 25 and a portion of Lot Q. App. 17 at ¶4; SR 6-7. When McFarland bought the property, there was a home, garage, and driveway on the lot, which had been built in 2013 by the previous owners. SR 484. In 2019, Coyle purchased Lot Q1 of Willow Creek Estates. SR 3 at ¶10 . Lot Q1 is not depicted on the 2015 plat (App. 16-17), but is depicted in the 2019 plat. App 18-19; SR 88-89. Lot Q1 is essentially the remaining portion of Lot Q, which

was never further developed or subdivided by the original developer. *Id.* This resulted in a final plat of the subdivision being issued in 2019. *Id.*

Walworth Street, a dedicated 60-foot public right of way, originally ran along the southeast boundary of Lot 25. In a 2007 plat, Walworth Street is shown as terminating at the southeast border of then-proposed Lot 25. SR 71-73.

In 2015, when Lot 25A was created, the new plat did not extend Walworth Street through the entire southeast border of Lot 25A. However, on August 14, 2015, a *Subdivision Improvements Agreement* ("2015 SIA") was entered into between the City of Belle Fourche and Dacar, Inc. and Todd and Julie Leach as owners/developers of Willow Creek Estates Subdivision. App. 20-22; SR 8-10. The 2015 SIA states, in relevant part:

> Subdivider, or its successor, must complete the improvements detailed in plans prepared by NJS Engineering dated July, 2002 within the full length of the right-of-way adjacent to the *southeast boundary of Lots 24 & 25A*, Block 1, Willow Creek Estates No. 4 ... prior to or as a condition of approval of *any subdivision plat of Lot Q* of Valley View Addition, City of Belle Fourche ....

Id. at pg. 2 (¶4) (emphasis added). The 2015 SIA was recorded against Lot 25A but not against Q. Thus, when Coyle purchased Lot Q1 in 2019, they did not have record notice of the 2015 SIA. SR 49 at ¶23.

McFarland understood the 2015 SIA to mean that Lot Q could not be replatted or sold until certain improvements would be made to Walworth Street along the

southeast boundary of Lot 25A. As noted on the 2015 plat, the street does not run along any boundary of Lot 24, and only covers a portion of the southeast boundary of Lot 25A. App. 16-17; SR 6-7. In other words, the language of the 2015 SIA is at best, confusing. Nonetheless, McFarland understood it to mean that the right-of-way would run along the entire boundary of Lot 25A. However, Lot Q was replatted into Lot Q1 and sold to Coyle without any further improvements to Walworth Street.

McFarland's driveway is situated, in part, within the setback to the Walworth Street right-of-way. The portion in dispute in this appeal sits just northeast of what Coyle alleges is the termination of the Walworth Street right-of-way. If the right-of-way terminates where Coyle alleges, then a portion of McFarland's driveway is within Lot Q1. If, however, the Walworth Street right-of-way extends through the entire southeast boundary of Lot 25A, then there is no encroachment or trespass.

Coyle initiated this action by filing a *Complaint* on June 6, 2023. SR 2-10. Attorney Kent Hagg entered an appearance on behalf of McFarland on July 28, 2023 and filed an *Answer* on August 9, 2023. SR 15, 17-20. The Answer asserts, inter alia, that the Walworth Street right-of-way extends, or should extend, along the entire border of McFarland's lot, meaning that the portion of the driveway in question is part of the setback to the right-of-way. SR 17-18.

Less than one month later, and before any discovery was conducted, Coyle moved for summary judgment. SR 21-22. On August 28, 2023, Coyle filed a *Notice of Hearing* reflecting a hearing on the motion would be held on September 28, 2023. SR 92. Pursuant to SDCL §15-6-56(c), McFarland's response to the motion, "including any response to the movant's statement of undisputed material facts," was due to be served no later than September 14, 2023. McFarland did not timely file or serve a responsive brief, or a response to the statement of material facts.

On September 15, 2023, Coyle filed a *Protective Objection to Submission of Evidence by Defendants*. SR 94-95. In this filing, Coyle sought to prohibit McFarland from submitting any opposition to their motion for summary judgment and argued that Coyle's *Statement of Material Facts* should be deemed admitted. *Id.*

On September 18, 2023, Hagg filed a *Motion for Continuance*, requesting the hearing be continued "for approximately 30 days" because "counsel for Defendants, due to personal reasons, is unable to timely answer Plaintiffs pleadings adequately and has several prior obligations within said time period." SR 96. The Motion further explained that it was "not made for the purposes of delay and [is] made only to adequately represent Defendants in this matter." *Id.* That same day, Coyle filed an objection to the continuance request, claiming they were restricted

from "accessing and utilizing a portion of their own property" (presumably referring to the portion of McFarland's driveway that Coyle alleged is a trespass). SR 98-99. Coyle did not articulate how or why they would utilize said property, nor did they explain the existence of any urgency in that regard. *Id.* The remainder of Coyle's resistance to the continuance related to their desire to have this matter heard - apparently as a matter of principle - on the original date of the hearing and to prevent McFarland from being able to substantively respond to the motion because their statutory deadline to do so had passed. *Id.*

On September 20, 2023, Hagg submitted an *Affidavit in Support of Motion for Continuance and Initial Response to Plaintiffs' Motion for Partial Summary Judgment and in Response to Plaintiffs Objection* ("Hagg Affidavit"). App. 23-32; SR 104-113. In the affidavit, Hagg unambiguously invoked SDCL §15-6-56(f) and sought a continuance of "at least" 60 days to "conduct further discovery to support the facts of the matter and which will most likely uncover additional facts which will rebut Plaintiff's Motion for Partial Summary Judgment." App. 23-24; SR 104-105. The Hagg Affidavit maintained that a trespass action was not the proper way to resolve a boundary dispute, but that a quiet title or declaratory judgment action would be a more appropriate mechanism. The Hagg Affidavit also specifically identified that the following information, at a minimum, needed to be obtained via discovery:

- Depositions of public officials and others to demonstrate that the plat application and recording processes were not followed. App. 24 at ¶4; SR 105.
- A transcript of a protection order hearing held with Judge Foral in the matter of Kelli McFarland v. Abbey Coyle, 09TPO23-27. App. 24-25 at ¶5; SR 105-106.
- Information to be obtained by Stewart Title Guaranty Company in connection with a claim being filed by McFarland. App. 25 at ¶6; SR 106.
- Affidavits and depositions to "demonstrate irregularities in the process of platting of Lot Q1 and provide additional basis upon which Defendants' good faith belief is reasonable." App. 25 at ¶7; SR 106.

In addition, McFarland submitted the *Affidavit of Defendant [Kenneth McFarland] in Support of Motion for Continuance*, which explained McFarland's position that 1) Coyle's lot (Lot Q1) was not properly platted, 2) the Subdivision Improvement Agreement mandating the extension of the Walworth Street right-of-way prior to further plats being approved was not filed against Lot Q1 when it should have been, and 3) additional evidence needed to be obtained from Stewart Title Guaranty Company for the "resolution of this matter." App. 33-36; SR 100-103.

In an email dated September 21, 2023, the Court denied McFarland's *Motion to Continue* for "all the reasons set forth by Plaintiffs in their objections." SR 118-119. On September 25, 2023, Hagg sent an email to the Court and counsel to "provide some context to what appears to be my disregard for the required filing"

deadlines. SR 173. Attorney Hagg explained that "in 33 years of practice, I have not missed a filing deadline. Last June, my wife of 30 years and mother of my four grown children asked for a divorce. In July, I discovered that she has been and is having an affair with a man who has been a trusted friend of me and my family for 23 years. ... My life has been turned upside-down. ... This is no excuse but only a reason for falling behind." *Id.*

On September 25, 2023, McFarland filed a *Response to Plaintiffs' Brief in Support of Motion for Partial Summary Judgment and Motion to Reconsider Motion for Continuance and Motion to Deny Plaintiffs' Request for Protective Objection to Submission of Evidence by Defendants* ("Response Brief") and a *Response to Plaintiffs' Statement of Material Facts*, disputing a number of the asserted facts and explaining the nature and extent of the legal and factual dispute concerning this boundary. App. 1-15, 37-47; SR 120-130, 131-134. Among other things, McFarland's Response Brief noted the following:

> James Dacar, an owner of development company Dacar, Inc. and member of the Building Committee at the time of approval of [the] placement of driveway and home, will testify that a portion of the driveway was located in the set-back of the future right-of-way and would not have been approved if the Committee believed any part of the driveway was on the private property of another. James Dacar will also testify that at the time of [the] sale of Lot 25A to McFarlands, it was the intent of Dacar, Inc. to proceed with Walworth St. through Lot Q1. In anticipation of the same, public utility easements had already been granted and City sewer is already installed in the *anticipated* Walworth Street right-of-way.

App. 38; SR 121 (emphasis added). The brief further noted that "a significant amount of discovery has yet to be conducted." *Id.* Also on September 25, McFarland issued subpoenas to James Dacar (Dacar, Inc.) and Travis Martin (Black Hills Title) to testify at the summary judgment hearing. SR 135, 136. Coyle filed a motion to quash the subpoenas. SR 140-141.

At the hearing on September 28, 2023, the circuit court granted Coyle's motion to quash the subpoenas. HT at 4:8-11 (9/28/23); SR 154. The circuit court also granted the motion for partial summary judgment, finding that the "facts set forth in Plaintiff's Statement of Material Facts dated August 24, 2023, have been admitted by the Defendants" by virtue of McFarlands' failure to timely respond to the same. HT at 3:2-4 (9/28/23); SR 153. The circuit court entered its *Order for Partial Summary Judgment* on October 2, 2023. App. 1-2; SR 149-150.

McFarland subsequently retained new counsel who, on November 2, 2023, filed a *Motion for Relief from Order Pursuant to SDCL §15-6-60(b) and/or Motion for Reconsideration* and an *Affidavit of Kent Hagg*. SR 162-175, 192-194. At a hearing on December 11, 2023, the circuit court denied the motion. TT at 12:4-9 (12/11/23); SR 568. It entered an *Order Denying Motion for Relief from Order Pursuant to SDCL §15-6-60(b) and/or For Reconsideration* on December 19, 2023. App. 3; SR 195. Notice of Entry was served on December 20, 2023. SR 196.

McFarland sought permission to take an interlocutory appeal, which this Court denied on February 2, 2024. *See* SR 200; SDSC File No. 30573.

On September 3, 2024, the circuit court held a court trial. At the trial, Coyle's attorney advised the court that they would not be seeking any damages because they had only sustained nominal damages from the trespass. TT at 2:12-3:11 (9/3/24); SR 536-537. There was no testimony taken or evidence submitted. On September 9, 2024, the circuit court entered a final order consistent with the terms of the Order for Partial Summary Judgment. App 4; SR 503.

Standard of Review

This Court reviews a "circuit court's decision on a motion for summary judgment under the de novo standard of review." *Geidel v. De Smet Farm Mut. Ins. Co. of S.D.*, 2019 SD 20, ¶7, 926 N.W.2d 478, 481. "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.'" *Id.* (quoting SDCL §15-6-56(c)).

"Summary judgment is an extreme remedy and should be awarded only when the truth is clear and reasonable doubts touching the existence of a genuine issue as to material fact should be resolved against the movant." *Est. of Ducheneaux*, 2018 SD 26, ¶ 22, 909 N.W.2d 730, 739 (citations omitted). Evidence is to be viewed

"most favorably to the nonmoving party and resolve reasonable doubts against the moving party." *Id.*

A circuit court's decision to grant or deny a request for continuance under Rule 56(f) or an enlargement of time under Rule 6(b) is reviewed for an abuse of discretion. *Davies v. GPHC, LLC*, 2022 SD 55, ¶51, 980 N.W.2d 251, 265; *South Dakota Public Assurance Alliance v. McGuire*, 2018 SD 75, ¶8, 919 N.W.2d 745, 746. The trial court's exercise of discretion "must have a sound basis in the evidence presented." *Miller v. Jacobsen*, 2006 SD 33, ¶18, 714 N.W.2d 69, 76 (citations omitted). "An abuse of discretion occurs when discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Id.* An abuse of discretion is "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 SD 20, ¶ 57, 764 N.W.2d 474, 490.

Argument

1. The Circuit Court Erred in Granting Coyle's Motion for Partial Summary Judgment.

a. The Circuit Court Abused its Discretion in Denying McFarland's Motion for Continuance Under Rule 56(f).

Under Rule 56(f), "a party opposing a motion for summary judgment is entitled to conduct discovery when necessary to oppose the motion." *Davies*, at ¶50, 980 N.W.2d at 264–65 (citations omitted). SDCL §15-6-56(f) states:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Id. The rule does not specify a timeline or deadline for filing such a request.

A party seeking a continuance under Rule 56(f) must "show how further discovery will defeat the motion for summary judgment." *Davies*, at ¶51, 980 N.W.2d at 265. To make this showing, an affidavit must identify

> the probable facts not available and what steps have been taken to obtain those facts, how additional time will enable the nonmovant to rebut the movant's allegations of no genuine issue of material fact, and why facts precluding summary judgment cannot be presented at the time of the affidavit.

Id. (cleaned up and citations omitted). In denying McFarland's continuance request, the circuit court did not engage in this analysis. Instead, it simply stated in an e-mail: "For all the reasons set forth by Plaintiffs in their objections, I am

denying the Defendants' Motion to Continue." SR 118. Had it conducted a Rule 56(f) analysis, it would have been compelled to grant a continuance.

In *Davies*, the defendant landlord moved for summary judgment on the plaintiff's dog bite claim, arguing it was not liable as a matter of law because of facts relating to the landlord's knowledge of, and relationship to, the dog in question. A few days before the summary judgment hearing, the plaintiff filed a Rule 56(f) affidavit, which the Court described as "cursory" and "non-particularized." The affidavit stated, in full:

> 1. Plaintiff would like to depose third party defendants
>
> 1) Michelle L. Wilson; and
>
> 2) Jay M. Black
>
> 2. As yet, the Third-Party Defendants have not had the [sic] depositions Noticed, nor have they been subpoenaed for their testimony.
>
> 3. The [c]ourt should have this information available to the [c]ourt prior to ruling on GPHC, LLC's *Motion for Summary Judgment.*

Id. at ¶53, 980 N.W.2d at 265. The Court found this affidavit fell far short of what is required to obtain a continuance under Rule 56(f), noting that the affidavit identified "no facts to be discovered, what prior steps had been taken to seek them, or how additional time to take the depositions of Black and Wilson would have allowed him to contest the undisputed material facts contained in GPHC's motion for summary judgment." *Id.* at ¶54, 980 N.W.2d at 265.

In *Stern Oil Co. v. Border States Paving, Inc.*, 2014 SD 28, 848 N.W.2d 273, the plaintiff filed an affidavit on the day of the summary judgment hearing, stating that it had only recently received the opposing party's discovery responses and it wanted to conduct "additional discovery" to "shed further light" on its claim for equitable tolling of the statute of limitations. *Id.* at ¶25, 848 N.W.2d at 281. However, the affidavit did not explain how the information sought would bear upon the issue of equitable tolling, nor could it identify any "probable fact relevant to tolling that could have been developed with additional discovery." *Id.* at ¶28, 848 N.W.2d at 282. *See also Dakota Industries, Inc. v. Cabela's Com., Inc.*, 2009 SD 39, 766 N.W.2d 510 (information sought in further discovery was not relevant to legal issue presented in summary judgment motion); *Harvieux v. Progressive Northern Ins. Co.*, 2018 SD 52, 915 N.W.2d 697 (plaintiff had several years to conduct discovery, and the discovery allegedly sought was not relevant to legal issues presented in summary judgment motion); *Gores v. Miller*, 2016 SD 9, 875 N.W.2d 34 (information about subjective intent of parties and witnesses was not relevant to legal question of contract interpretation).

In *Betty Jean Strom Trust v. SCS Carbon Transport, LLC*, 2024 SD 48, 11 N.W.3d 71, the plaintiff landowners refused to grant consent to the defendant carbon pipeline company to conduct pre-condemnation surveys on their properties. A crucial issue in the litigation was whether SCS was a "common

carrier" under South Dakota law, and thus entitled to utilize eminent domain powers. When ruling upon a discovery dispute, the circuit court *sua sponte* found that SCS was a "common carrier," which led to SCS subsequently moving for summary judgment. In response to the motion, the landowners sought a continuance under Rule 56(f), indicating that they wished to conduct a 30(b)(6) deposition of SCS. The landowners' counsel explained in an affidavit how the deposition topics in the 30(b)(6) notice would bear upon the summary judgment issues:

- Deposition Topics #1, 2, 3, 4 and 8 would uncover specific facts about SCS's pricing scheme, whether their service or operation is available for the public to freely use or is exclusively meant to serve private entities, how their operation conducts business with the public, how carbon is being used, for what purpose it is being transported, who is benefiting from the use of SCS's service or operation, and who owns the carbon dioxide at every stage of its use. I believe these facts would refute SCS's Motion for Summary Judgment on the claims of whether SCS qualifies as a common carrier and whether carbon dioxide qualifies as a commodity.

- Deposition Topics #5, 6, and 7 would uncover specific facts about SCS's intentions with land owned by Landowners, what extent SCS's surveys and related activities will damage the Landowners' property, why these activities are needed, why SCS wants to conduct these activities when they are not required for permitting, why SCS does not want to comply with SDCL Chapter 21-35 in their pursuit to condemn Landowners' lands, whether there is a means reasonably and rationally calculated to determining the appropriate compensation for SCS's damage to Landowner's property, whether SCS's survey bond is sufficient to compensate all of the Landowners who experience damage to their land, whether this process is fair, how Landowners can appeal SCS's

> assessed damage value, and when Landowners can expect compensation for their [assessed] damage to their land. I believe these facts would refute SCS's Motion for Summary Judgment on the claims of whether SCS has performed a taking and if SCS's compensation scheme appropriately aligns with due process requirements, whether their survey actions exceed that which is statutorily authorized, whether SCS is violating Landowners' constitutional rights, and whether SCS qualifies as a common carrier.
>
> - Deposition Topics #9 and 10 would uncover specific facts about whether SCS has meritorious arguments and evidence supporting their counter claims and their Motion for Summary Judgment....

Id. at ¶41, 11 N.W.3d at 87. This Court held that the circuit court erred by denying the landowners' Rule 56(f) motion, because this affidavit was sufficient to warrant a continuance.

Here, two affidavits were submitted in support of the continuance request – an affidavit of Kent Hagg and an affidavit of Kenneth McFarland. While they are somewhat less detailed than the *Strom* affidavit, they nevertheless exceed what was rejected in *Davies*, *Stern Oil*, *Dakota Industries*, *Harvieux*, and *Gores*. Specifically, the affidavits maintain that the boundaries upon which Coyle's summary judgment motion was premised are erroneous due to irregularities in platting and the failure to file the 2015 SIA against Lot Q; that information would be sought from Stewart Title Company, who was going to be conducting an investigation into the issue of failure to file the 2015 SIA; that McFarland was acting in good faith, to disprove the intent element of trespass, the reasonableness of which would be supported by

evidence showing why Walworth Street should be deemed extended; and the defective nature of the 2019 plat, which would render the boundaries contained therein unreliable. App. 23-36; SR 100-107. Then, after the continuance was denied via email, McFarland's Response Brief included additional assertions that James Dacar would offer testimony regarding the developer's intent to extend the Walworth Street right-of-way. App. 37-38; SR 120-121.

When Coyle filed the motion for summary judgment, no discovery had been conducted at all in this case. *See Donald Bucklin Const. v. McCormick Const. Co.*, 2013 SD 57, 835 N.W.2d 862 (reversing grant of summary judgment when "the parties had not begun discovery" and the parties had filed competing affidavits that established a dispute over the facts). Considering all of the circumstances, the continuance should have been granted and the circuit court abused its discretion in denying the motion, as there was an obvious need for discovery to be conducted on factual issues that would be critical to the legal issues presented in the motion. *Id.* at ¶34, 835 N.W.2d at 870 (trial court "clearly" erred in granting summary judgment to defendant, even though plaintiff's response to the summary judgment motion was filed just one day before the hearing).

b. Alternatively, the Circuit Court Abused its Discretion by Not Conducting an Excusable Neglect Analysis Under Rule 6(b).

Rule 56(c) identifies the timelines for filing and responding to a motion for summary judgment. But nothing in the Rule states the consequence of failing to comply with a responsive deadline, nor does it indicate that failure to meet a response deadline is jurisdictional. If it is determined that Rule 56(f) is inapplicable, McFarland submits that Rule 6(b) is applicable:

> When by this chapter or by a notice given thereunder or by an order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:
>
> (1) With or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or
>
> (2) Upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect
>
> but it may not extend the time for taking any action under §§ 15-6-50(b), 15-6-59(b) and (d), and 15-6-60(b), except to the extent and under the conditions stated in them.

SDCL §15-6-6(b).

Here, McFarland's continuance motion was filed after the expiration of his deadline to respond to the summary judgment motion, rendering Rule 6(b)(2) applicable. Even if it did not conduct a Rule 56(f) analysis, the circuit court should

have analyzed whether McFarland's failure to act was the result of "excusable neglect."

Excusable neglect under Rule 6(b) "is closely analogous to the excusable neglect which must be shown to set aside a default judgment or other final judgment under SDCL 15-6-55(c) and SDCL 15-6-60(b)." *Donald Bucklin Const. v. McCormick Const. Co.*, 2013 SD 57, ¶ 21, 835 N.W.2d 862, 867. "Excusable neglect must be neglect of a nature that would cause a reasonably prudent person under similar circumstances to act similarly." *Upper Plains Contracting Inc. v. Pepsi Americas*, 2003 SD 3, ¶ 13, 656 N.W.2d 323, 327 (citations omitted) (applying Rule 60(b)). "The term excusable neglect has no fixed meaning and is to be interpreted liberally to insure that cases *are heard and tried on the merits.*" *Id.* (emphasis added). Another factor to consider is "whether there is prejudice to the party opposing the enlargement of time." *Bucklin*, at ¶21, 835 N.W.2d at 867.

In *Bucklin*, the plaintiff subcontractor, Bucklin, sued general contractor, McCormick, for unjust enrichment. McCormick filed an answer and counterclaim alleging breach of contract, negligence, and several other claims. *Id.* at ¶7, 835 N.W.2d at 864. Bucklin did not file a reply to the counterclaim, but the parties continued litigating over other matters. In addition, McCormick stipulated to Bucklin filing an amended complaint, and the circuit court allowed McCormick to

rely on its previously-filed answer, even though the amended complaint brought new and different claims. *Id.* at ¶10, 835 N.W.2d at 865. McCormick moved for summary judgment on Bucklin's claims and it moved for a default judgment on its counterclaims due to Bucklin's failure to file a reply to the same. In response, Bucklin immediately filed a reply to the counterclaim. The day before the hearing, Bucklin also filed a brief and affidavit in opposition to the summary judgment motion. *Id.* at ¶11, 835 N.W.2d at 865. At the hearing, the trial court denied Bucklin's request to enlarge its time to file a reply to the counterclaim, granted McCormick's motion for default judgment on the counterclaims, and granted McCormick's motion for summary judgment on Bucklin's claims. *Id.*

On appeal, this Court reversed. Bucklin's original attorney had inadvertently failed to reply to the counterclaims, but was actively litigating mechanic's liens in two pending lawsuits and was responsive to other motions. Immediately upon receiving the motion for default judgment and realizing his error, the attorney filed a Reply to the counterclaims and the Court found he acted reasonably to rectify his error. Moreover, there was no prejudice to McCormick by giving Bucklin additional time to reply to the counterclaim. Both parties were actively engaged in the lawsuit and litigating other issues. Importantly, "[a]t the time that the default judgment motions were granted, the lawsuits were a little over a year old. The parties had not begun discovery." *Id.* at ¶28, 835 N.W.2d at 869. Indeed, the fact

that the parties had not begun discovery was so important that the Court noted it again in reversing the grant of summary judgment. *Id.* at ¶32, 835 N.W.2d at 870. In sum, the circuit court abused its discretion in denying the motion for additional time and in granting the default judgment.

In *Leighton v. Bennett*, 2019 SD 19, 926 N.W.2d 465, Leighton filed a personal injury suit against Bennett, seeking damages for injuries she sustained in a car accident. During the pendency of the suit, Bennett died and his counsel served a suggestion of death pursuant to SDCL §15-6-25(a). Leighton did not file a motion for substitution within 90 days of the suggestion being filed, and Bennett's counsel moved to dismiss the action. In response, Leighton sought an enlargement of the 90-day substitution period, arguing she had "excusable neglect" because Bennett did not serve the suggestion upon Bennett's estate, thus depriving her of any information about the estate.[1] *Id.* at ¶4, 926 N.W.2d at 467. The circuit court denied her motion to enlarge time, and this Court affirmed. In so holding, the Court noted that, in stark comparison to other cases involving Rule 6(b), Leighton's attorney did not submit an affidavit or articulate any reason whatsoever to explain why she failed to comply with the statutory 90-day period. *Id.* at ¶19, 926 N.W.2d at 471. Instead, she simply argued that that Bennett's counsel acted improperly by not advising her of Bennett's estate, which was an argument the

[1] This argument was rejected by the circuit court and this Court.

Court rejected in connection with Leighton's primary argument on appeal. *Id.* at ¶21, 926 N.W.2d at 471 ("Here, though, without any action by Leighton during the 90-day period to confirm or dispel her understanding of the rule and no other factual showing of excusable neglect, the circuit court acted within its discretion when it denied Leighton's motion for an enlargement of time.").

In *South Dakota Public Assurance Alliance v. McGuire*, 2018 SD 75, 919 N.W.2d 745, the plaintiffs instituted suit against the defendant via service of the summons without a complaint to preserve the statute of limitations while the parties continued negotiations for resolution of the personal injury claims. Nonetheless, McGuire's counsel served a *Notice of Appearance* on the plaintiffs, the body of which included a demand for service of a complaint under Rule 4(b). *Id.* at ¶4, 919 N.W.2d at 746. Plaintiffs' counsel stated they did not see the complaint demand in the *Notice of Appearance*, and thus they did not serve a complaint within 20 days as required by Rule 4(b). McGuire thereafter moved to dismiss the suit. In response, the plaintiffs sought an enlargement of time to serve their complaints. *Id.* at ¶5, 919 N.W2d at 746-47. The circuit court granted the motion to dismiss and denied the motion for enlargement of time. On appeal, this Court reversed, finding the plaintiffs' attorneys had engaged in excusable neglect because they readily admitted their mistakes in their affidavits, were still negotiating with the defendant when the motion to dismiss was filed, filed complaints immediately

upon realizing their mistake, and were not engaging in dilatory tactics. *Id.* at ¶17, 919 N.W.2d at 750. Also persuasive to the Court was that *both* attorneys separately failed to see the written demand for complaint, which supported a finding that their neglect was reasonable and excusable. Finally, the Court found there would be no prejudice to McGuire if the enlargement were granted – there was no showing that he would not be able to fully litigate and defend the claims.[2] *Id.* at ¶15, 919 N.W.2d at 749.

Here, Hagg's neglect in missing the filing deadline was excusable upon consideration of the personal trauma he was experiencing, as detailed in his September 25 email to counsel and the circuit court. SR 173. Hagg was trying to manage his law practice and development company in the face of two significant life events – divorce and the discovery of adultery – and with only the assistance of one part-time paralegal. He had not missed a filing deadline in 30+ years of practicing law, and this mistake was clearly the byproduct of significant upheaval in his personal life. This turmoil would cause a reasonably prudent person to experience substantial distress. Like the attorneys in *McGuire* and *Bucklin*, he

[2] This case also involved an assessment of the "interests of justice" since dismissal would result in the plaintiffs' claims being time-barred, pursuant to *Mahoney v. Mahoney*, 430 N.W.2d 64 (S.D. 1988).

explained his mistake to the court and acted quickly to file the continuance request and, later, a response to the motion and statement of material facts.

Furthermore, there would be no prejudice to Coyle if the matter were delayed to allow the parties to conduct discovery and take the normal course of any litigation. The portion of the property in question is largely on or near McFarland's driveway and Coyle did not provide any specificity as to how they were prejudiced from being unable to immediately use that property.

Hagg's excusable neglect coupled with Coyle's lack of prejudice justifies a finding that the circuit court abused its discretion by not enlarging McFarland's time to respond to the summary judgment motion.

c. The Circuit Court Erred in Granting Summary Judgment to Coyle Based Solely on McFarland's Untimely Response.

The trial court's ruling resulted in a substantive liability determination that was not made on the merits – a result this Court decidedly eschews and warrants reversal. "[C]ases should ordinarily be decided on their merits, and elementary fairness demands of courts a tolerant exercise of discretion in evaluating excusable neglect. Moreover, courts must insure that justice be done in light of all the facts." *Upper Plains Contracting Inc. v. Pepsi Americas*, 2003 SD 3, ¶ 22, 656 N.W.2d 323, 330 (cleaned up and citations omitted).

Rule 56(c) states that "any response" to the motion shall be served "not later than fourteen calendar days before the hearing." SDCL §15-6-56(c). The Rule requires a party opposing summary judgment to, *inter alia*, "respond to each numbered paragraph in the moving party's statement [of material facts] with a separately numbered response and appropriate citations to the record." SDCL §15-6-56(c)(2). However, the Rule does not mandate any particular sanction or consequence for a non-moving party's failure to timely file a brief or response to the statement of material facts.[3] The only consequence mentioned is that the moving party's statement of material facts "shall be admitted unless controverted by the statement required to be served by the opposing party." SDCL §15-6-56(c)(3). It does not, however, mandate granting of the motion.

In *Velocity Investments, LLC v. Dybvig Installations, Inc.*, 2013 SD 41, 833 N.W.2d 41, Velocity filed suit to collect on a debt purportedly owed by Dybvig Installations and its owners and personal guarantors, Jill and David Dybvig, who were acting *pro se*. In discovery, the Dybvigs failed to respond to Velocity's Requests for Admission. Thereafter, Velocity moved for summary judgment, and the Dybvigs failed to respond to Velocity's Statement of Material Facts. The trial

[3] *See McGuire*, at ¶11, 919 N.W.2d at 749 ("The circuit court found that the plain language of SDCL 15-6-4(b) controlled the case and that the statute mandates dismissal. But the statute does not mention any sanctions or specifically require dismissal. The court's decision to dismiss was therefore a matter of discretion.").

court granted summary judgment. *Id.* at ¶1, 833 N.W.2d at 42. Thereafter, the Dybvigs retained counsel, who filed a motion for relief under Rule 60(b) and sought leave to amend the Dybvig's responses to the Requests for Admission. *Id.* at ¶8, 833 N.W.2d at 43. The trial court denied both motions, finding that "because the Dybvigs failed to respond to the statement of undisputed material facts, they no longer had a basis to seek relief from discovery matters that preceded the motion for summary judgment." *Id.* The trial court also found "the Dybvigs did not show that exceptional circumstances existed and did not meet their burden to show excusable neglect for relief from judgment." *Id.* On appeal, this Court reversed. As it concerns the discovery responses, the Court stated:

> We have previously expressed our preference that matters be resolved on their merits and not on technical violations of the discovery rules. Provision is made for withdrawal or amendment of an admission. This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice.

Id. at ¶12, 833 N.W.2d at 44. Because the circuit court "did not reach the merits of the case," and Velocity did not demonstrate prejudice, it abused its discretion in prohibiting Dybvigs from amending their responses to the Requests for Admission.

Similarly, as to the grant of summary judgment, this Court noted the record revealed numerous "actual questions and unresolved legal issues related to the key document in this litigation." *Id.* at ¶15, 833 N.W.2d at 45. This Court also noted

there were genuine issues of "material fact and law" regarding the amount of the alleged debt, what the Dybvigs agreed to in signing the key document, and the capacity in which the Dybvigs signed it. *Id.* Thus, even though the Dybvigs had not responded to the Statement of Material Facts, the existence of factual legal issues was sufficient to overcome their failure to observe this non-jurisdictional, procedural technicality. *Id.* at ¶16, 833 N.W.2d at 45.

Here, the case is equally compelling. McFarland's *Answer* and the Hagg Affidavit identify multiple legal and factual issues that are in dispute. Unlike Dybvig, however, there was *no discovery at all* conducted in this case, and McFarland has been wholly prohibited from seeking, uncovering, or presenting evidence, documents, and testimony that bear upon these legal and factual disputes. Instead, the circuit court has determined that McFarland committed the intentional tort of trespass based *solely* on their failure to respond to the Statement of Material Facts, which the circuit court found were thus "deemed admitted."

But there are legitimate legal and factual questions concerning the boundaries of Lot 25A and the Walworth Street right-of-way that mandate this matter be heard on the merits. As in *Velocity*, the grant of summary judgment was improper and should be reversed.

d. The Circuit Court Erred in Denying McFarland's Motion for Reconsideration.

A "trial court has the inherent power to reconsider and modify an order any time prior to entry of judgment." *SBS Fin. Servs., Inc. v. Plouf Family Trust*, 2012 SD 67, ¶13, 821 N.W.2d 842, 845 (cleaned up and citations omitted). "This inherent authority allows a trial court to depart from an earlier holding if it is convinced that the holding is incorrect." *Id.* (cleaned up and citations omitted).

When presented with the *Motion for Reconsideration*, and the accompanying affidavit of Attorney Hagg, the circuit court denied the motion, stating that "rules are rules. [H]e could have moved to extend the deadlines. He didn't do it until after the fact. After." HT at 11:21-25 (12/11/23); SR 567. This was clear error.

Even though Rule 60(b) would not apply because the *Order for Partial Summary Judgment* was not a final order, the principles underlying a Rule 60(b) analysis are relevant and helpful to this analysis. Relief under Rule 60(b) can be granted for attorney neglect "only if the client can affirmatively show either (1) that the attorney's negligence was excusable or (2) that the client herself was not negligent." *Gold Pan Partners, Inc. v. Madsen*, 469 N.W.2d 387, 392 (S.D. 1991) (citations omitted). Here, McFarland can show both.

First, as discussed above, Attorney Hagg's neglect was excusable. Second, there is no evidence that McFarland was negligent. They followed the advice of

their counsel. Upon receipt of the adverse decision, they promptly retained new counsel to attempt to remedy the adverse ruling. There is no indication whatsoever that McFarland engaged in neglect. McFarland's failure to timely respond to the summary judgment motion and Statement of Material Facts was due to excusable neglect of their attorney, and not by any negligence of their own.

Should the Court determine that Hagg's conduct was not excusable, the McFarlands should nevertheless not be deprived of relief. In *Gold Pan Partners*, an estate attorney gave inadequate and defective advice to the Personal Representative of the Estate, made inaccurate representations to the estate's beneficiaries, effectively coerced the beneficiaries into signing waivers, and failed to provide critical information to the PR and the Court. *Id.* at 390-91. In holding that the PR was not entitled to relief under Rule 60(b)(2), but was entitled to relief under Rule 60(b)(6), the Supreme Court stated:

> [W]e will not attribute the actions of the estate attorney to the executrix so as to deny her equitable relief. The executrix had a right to place her faith in her attorney and follow his advice. She was not adequately counseled on her fiduciary duty to the estate, the estate beneficiaries, and the court, and was not advised of South Dakota probate procedures. Although she should not have signed documents she did not read or understand, she did not act unreasonably in relying upon the advice of her attorney. Under the circumstances of this case, she was not negligent.

Id. at 392.

Here, the circuit court had an opportunity to correct the injustice cause by its initial summary judgment ruling. Yes, rules are rules, but attorneys also make mistakes. This is why we have the mechanisms found in Rule 6(b), which specifically contemplates seeking a continuance/enlargement of time *after* the deadline in question has passed. The circuit court's comments that Hagg did not seek a continuance until "after the fact" are telling, inasmuch as the court clearly felt this to be dispositive. But, clearly, it is not - either under Rule 56(f) or Rule 6(b).

The circuit court erred in denying the motion for reconsideration.

2. The Circuit Court Erred in Determining that McFarland was Trespassing upon Coyle's Property.

The circuit court issued a final ruling, determining that the Walworth Street "right of way ends at the southeast corner of what was proposed to be Lot 25 on Plat Doc #2007-1835." App. 5 at ¶3; SR 501. The court also found that McFarland "intentionally and without a consensual or other privilege entered onto Lot Q1." *Id.* at ¶6. Based on these findings, the court determined that McFarland's driveway, vehicles, and other assets were trespassing onto Coyle's Lot Q1. App. 6 at ¶3; SR 502.

These factual findings are premised upon the circuit court's erroneous grant of partial summary judgment to Coyle. App. 1 at ¶1; SR 149. Thus, at the final trial

in September of 2024, McFarland had been deprived of any opportunity to discover facts that would tend to disprove *any* of the material facts that were deemed admitted. However, McFarland maintains that they have always acted in good faith and on a reasonable belief that Walworth Street extended, or was intended to be extended, along their entire Lot 25A; that their driveway and other areas in question were situated within the Walworth Street right-of-way, or the setback areas adjacent thereto; and that irregularities in the platting process and/or the filing of the 2015 SIA resulted in Coyle purchasing Lot Q1 without notice of the extended nature of Walworth Street. *See, e.g.*, App. 12-15, 23-26, 33-47; SR 17-19, 100-107, 120-134.

As in *Bucklin*, when the circuit court granted summary judgment, the parties had not even started discovery. Yet, the record contains affidavits filed by the parties in support of their respective positions and they are conflicting. At the least, the affidavits submitted by Kenneth McFarland and Attorney Hagg in connection with the motion for continuance (App. 23-36; SR 100-108) establish that there is a genuine issue of material fact as to the location of the Walworth Street boundary. Moreover, as indicated in McFarland's *Response*, James Dacar would testify that "a portion of the driveway was located in the setback of the future right-of-way and *would not have been approved if the Committee believed any part of the driveway was on the private property of another.*" App. 38; SR 121

(emphasis added). Dacar would also testify that when McFarland purchased Lot 25A, "it was the intent of Dacar, Inc. to proceed with Walworth St. through Lot Q1," and that utility easements had been granted and sewer already installed in anticipation of the same. *Id.*

The circuit court's grant of summary judgment was premature, improper, and erroneously based on the "finding" that there were no genuine issues of material fact. Several genuine issues exist, or are believed to exist, and this case was not ripe for summary judgment. The grant of summary judgment should be reversed.

Conclusion

The circuit court abused its discretion in denying McFarland's requested continuance in the face of a clear need for additional discovery, significant personal upheaval in counsel's life leading to a missed deadline, and the dearth of any actual showing of prejudice or a need for an irregularly accelerated timetable. It was tantamount to a "gotcha" game, without any regard for counsel as a human being or the pursuit of truth and a merit-based resolution of claims. The circuit court erred yet again when it was presented with an opportunity to rectify that error, but instead denied the motion for reconsideration.

The Final Judgment and Order, and the faulty Order for Partial Summary Judgment upon which it is based, should be vacated and this case remanded to the

circuit court to allow the parties an opportunity to conduct discovery and otherwise try this case in the manner contemplated by the rules of civil procedure.

Respectfully submitted this 30th day of December, 2024.

BANGS, MCCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

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Certificate of Compliance

Pursuant to SDCL § 15-26A-66(b)(4), Appellants' counsel states that the foregoing brief is typed in proportionally spaced typeface in Equity A Tab 13 point. The word processor used to prepare this brief indicated that there are a total of 8,230 words in the body of the brief.

/s/ Sarah Baron Houy
Sarah Baron Houy

Certificate of Service

The undersigned hereby certifies that December 30, 2024, the foregoing *Appellants' Brief* was filed electronically with the South Dakota Supreme Court and that the original of the same was filed by mailing the same to:

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

and a true and correct copy of *Appellants' Brief* was provided by Odyssey File & Serve as follows, to:

Eric John Nies
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Spearfish, SD 57783
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ATTORNEYS FOR PLAINTIFFS/APPELLEES

/s/ Sarah Baron Houy
Sarah Baron Houy

Appendix

STATE OF SOUTH DAKOTA COUNTY OF BUTTE	SS.	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
JEREMY COYLE and ABBEY COYLE, Plaintiffs, v. **KENNETH MCFARLAND and KELLY MCFARLAND,** Defendants.		09CIV23-000061 **ORDER FOR PARTIAL SUMMARY JUDGMENT**

THE COURT held a hearing on Plaintiffs' *Motion For Partial Summary Judgment* dated August 24, 2023, which hearing occurred on September 28, 2023, in the courtroom at the Butte County Courthouse, Belle Fourche, South Dakota.

Plaintiffs appeared at the hearing personally and by and through Eric John Nies, Nies Karras & Skjoldal, P.C. Defendants appeared at the hearing by and through Kent R. Hagg, Hagg & Hagg, LLP.

The Court having considered the evidence of record and arguments of counsel, the Court having taken judicial notice of Butte County TPO File No. 09TPO23-000037, and good cause appearing, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

1. All facts set forth in Plaintiff's *Statement of Material Facts* dated August 24, 2023, have been admitted by the Defendants.

2. Plaintiff's *Motion For Partial Summary Judgment* dated August 24, 2023, is granted in its entirety.

3. The Walworth Street, Belle Fourche, right of way ends at the southeast corner of what was Lot 25.

4. The boundaries of Lot Q1 are as set forth on the 2019 Plat (Butte County Doc#2019-1050).

5. Any asset of Defendants which is located on Lot Q1 is trespassing on Lot Q1.

6. Defendants shall immediately remove from Lot Q1 any asset of Defendants which is currently trespassing onto Lot Q1, including but not limited to any portion of the driveway which is located on Lot Q1, any vehicle, and any other personal property.

7. Defendants shall not trespass onto Lot Q1, or to allow any object or vehicle to trespass onto Lot Q1 in the future.

Filed on: 10-02-23 Butte County, South Dakota 09CIV23-000061

8. The *Permanent Order For Protection* dated August 4, 2023, in Butte County TPO File No. 09TPO23-000037 be immediately terminated.

10/2/2023 11:36:40 AM

Attest:
Adams, Denise
Clerk/Deputy

Michael W. Day,
Circuit Court Judge

STATE OF SOUTH DAKOTA COUNTY OF BUTTE	SS.	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
JEREMY COYLE and ABBEY COYLE, Plaintiffs, v. **KENNETH MCFARLAND and KELLY MCFARLAND,** Defendants.		09CIV23-000061 **ORDER DENYING MOTION FOR RELIEF FROM ORDER PURSUANT TO SDCL § 15-6-60(b) MOTION AND/OR FOR RECONSIDERATION**

THE COURT held a hearing on Defendants' *Motion For Relief From Order Pursuant to SDCL § 15-6-60(b) and/or Motion For Reconsideration* dated November 2, 2023, which hearing occurred on December 11, 2023, in the Courtroom of the Butte County Courthouse. Plaintiffs appeared personally and by and through Eric John Nies, Nies Karras & Skjoldal, P.C., and Defendants appeared by and through Sarah Baron Houy, Bangs, McCullen, Butler, Foye & Simmons, L.L.P. The Court, having reviewed the file, heard the evidence and the arguments of counsel, and good cause appearing, it is hereby **ORDERED, ADJUDGED, and DECREED** that the *Motion For Relief From Order Pursuant to SDCL § 15-6-60(b) and/or Motion For Reconsideration* dated November 2, 2023, is hereby denied.

Dated this December 19, 2023.

12/19/2023 10:19:35 AM

BY THE COURT:

Circuit Court Judge

Attest:
Adams, Denise
Clerk/Deputy

STATE OF SOUTH DAKOTA COUNTY OF BUTTE	SS.	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
JEREMY COYLE and ABBEY COYLE, Plaintiffs, v. **KENNETH MCFARLAND and KELLY MCFARLAND,** Defendants.		09CIV23-000061 **FINAL JUDGMENT AND ORDER**

THE COURT, having held a trial on Plaintiffs' *Complaint* dated June 7, 2023, which trial occurred on September 3, 2024, in the Courtroom of the Butte County Courthouse, Plaintiffs being represented by Eric John Nies, Nies Karras & Skjoldal, P.C., and Defendants being represented by Matthew Lucklum, Bangs McCullen, Butler, Foye & Simmons, LLP, and the Court having heard the evidence and the arguments of counsel and good cause appearing, and having entered its Findings of Fact and Conclusions of Law which are incorporated herein by this reference, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** as follows:

1. The Walworth Street, Belle Fourche, right of way ends at the southeast corner of what was proposed to be Lot 25 on Plat Doc#2007-1835.

2. The boundaries of Lot Q1 are as set forth on the 2019 Plat (Butte County Doc#2019-1050).

3. Any asset of Defendants which is located on Lot Q1 is trespassing on Lot Q1.

4. Defendants shall immediately remove from Lot Q1 any asset of Defendants which is currently trespassing onto Lot Q1, including but not limited to any portion of the driveway which is located on Lot Q1, any vehicle, and any other personal property.

5. Defendants shall not trespass onto Lot Q1, or to allow any object or vehicle to trespass onto Lot Q1 in the future.

9/9/2024 2:32:58 PM

Michael W. Day,
Circuit Court Judge

Attest:
Jensen, Alana
Clerk/Deputy

STATE OF SOUTH DAKOTA COUNTY OF BUTTE	SS.	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
JEREMY COYLE and ABBEY COYLE, Plaintiffs, v. **KENNETH MCFARLAND and KELLY MCFARLAND,** Defendants.		09CIV23-000061 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

THE COURT, having held a trial on Plaintiffs' *Complaint* dated June 7, 2023, which trial occurred on September 3, 2024, in the Courtroom of the Butte County Courthouse, Plaintiffs being represented by Eric John Nies, Nies Karras & Skjoldal, P.C., and Defendants being represented by Matthew Lucklum, Bangs McCullen, Butler, Foye & Simmons, LLP, and the Court having heard the evidence and the arguments of counsel and good cause appearing, hereby enters the following:

FINDINGS OF FACT

1. On October 2, 2023, the Court entered an *Order For Partial Summary Judgment* in this matter.

2. Pursuant to such *Order For Partial Summary Judgment*, all facts set forth in Plaintiffs' *Statement of Material Facts* dated August 24, 2023, and filed herein, are hereby found by the Court as though fully set forth *in extenso*.

3. The Walworth Street, Belle Fourche, right of way ends at the southeast corner of what was proposed to be Lot 25 on Plat Doc#2007-1835.

4. The boundaries of Lot Q1 are as set forth on the 2019 Plat (Butte County Doc#2019-1050).

5. Any asset of Defendants which is or was located on Lot Q1 is or was trespassing on Lot Q1.

6. Defendants intentionally and without a consensual or other privilege entered onto Lot Q1.

7. The Plaintiffs have suffered damages as a result of Defendants' trespass onto Lot Q1, but such damages are nominal.

8. Any Finding of Fact deemed a Conclusion of Law or any Conclusion of Law deemed a Finding of Fact is incorporated therein respectively.

Filed on:09/09/2024 Butte County, South Dakota 09CIV23-000061

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this case.

2. The boundaries of Lot Q1 are as set forth on the 2019 Plat (Butte County Doc#2019-1050).

3. Defendants' driveway, vehicles, and other assets trespassed onto Lot Q1.

4. The portion of the driveway located on Lot Q1 and any vehicle or other items of personal property belonging to Defendants which are or were located on Lot Q1 are or were located on Plaintiffs' real estate without Plaintiffs' consent or other privilege.

5. Plaintiffs do not have any obligation to demonstrate harm as a result of the trespass.

6. Defendants shall immediately remove from Lot Q1 any asset of Defendants which is currently trespassing onto Lot Q1, including but not limited to any portion of the driveway which is located on Lot Q1, any vehicle, and any other personal property.

7. Defendants shall not trespass onto Lot Q1, or to allow any object or vehicle to trespass onto Lot Q1 in the future.

8. Per SDCL § 15-6-54(d), Plaintiffs as the prevailing party are entitled to costs other than attorneys' fees.

9. Any Finding of Fact deemed a Conclusion of Law or any Conclusion of Law deemed a Finding of Fact is incorporated therein respectively. **9/9/2024 2:33:17 PM**

Attest:
Jensen, Alana
Clerk/Deputy

Michael W. Day,
Circuit Court Judge

STATE OF SOUTH DAKOTA COUNTY OF BUTTE	SS.	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
JEREMY COYLE and ABBEY COYLE, Plaintiffs, v. **KENNETH MCFARLAND and KELLY MCFARLAND,** Defendants.		09CIV23-000061 **STATEMENT OF MATERIAL FACTS**

COME NOW Plaintiffs, by and through Eric John Nies, Nies Karras & Skjoldal, P.C., Spearfish, South Dakota, and, pursuant to SDCL 15-6-56(c) submit this statement of the material facts as to which Plaintiffs contend there is no genuine issue to be tried:

Plaintiffs are the owners of the following real estate in Butte County, South Dakota (hereinafter, "Lot Q1"):

> Lot Q1 of Willow Creek Estates No. 4, formerly a portion of Lot Q of Valley View Addition and a portion of Block 1 of Willow Creek Estates No. 4, City of Belle Fourche, Butte County, South Dakota, located at the S1/2 of Section 14, T8N, R2E, BHM, and as show by Plat recorded as document #2019-1050.

2. Defendants are the owners of the following real estate in Butte County, South Dakota (hereinafter, "Lot 25A"):

> Lot 25A of Block 1, Willow Creek Estates No. 4, a subdivision of Lot 25 of Willow Creek Estates No. 4 and part of Lots P & Q of Valley View Addition and a portion of Lot Q of Valley View Addition to the City of Belle Fourche, Butte County, South Dakota, located in the S½ of Section 14, T8N, R2E, BHM.

Defendants also own Lot 24 of Block 1, Willow Creek Estates No. 4, which borders Lot 25A along its entire northwest boundary.

3. As of 2002, Dacar, Inc., owned Lot P and Lot Q of Valley View Addition, the real estate later subdivided into the undeveloped Lot Q1 and Lot 25A. Dacar, Inc., intended the develop the area as Willow Creek Estates No. 4.

4. On behalf of Dacar, Inc., NJS Engineering prepared an unofficial preliminary plat of the planned Willow Creek Estates No. 4. As an example, a copy of the preliminary plat is attached to Abbey Coyles's *Affidavit* as **Exhibit A**.

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5. The preliminary plat provided for several lots in the northeast corner of the area, which were to be accessed by Walworth Street. Per the plans, Walworth Street was to end in a cul-de-sac. Such cul-de-sac was never developed.

6. On December 5, 2003, Dacar, Inc., recorded against Lots P and Q (including the real estate later subdivided into Lot Q1 and Lot 25A) the *Willow Creek Estates # 4 – Declaration of Covenants, Conditions, Limitations and Restrictions* (the "Covenants") as Doc# 2003-0372. A copy of the Covenants is attached to Abbey's Affidavit as **Exhibit B**.

7. The Covenants provided, *inter alia*, that a total of 166 lots in five (5) phases were anticipated. Such Covenants also provided that only Dacar, Inc., had the right to replat any lot, and subdivision by any other party was prohibited.

8. On December 17, 2002, a *Subdivision Improvements Agreement* by and between Dacar, Inc., and the City of Belle Fourche (the "2003 Improvements Agreement") was recorded as Doc# 2003-3162. A copy of the 2003 Improvements Agreement is attached to Abbey Coyles's *Affidavit* as **Exhibit C**.

9. The 2003 Improvements Agreement did not refer to what was later subdivided into Lot 25A, but was recorded against what was later subdivided into Lot Q1. The 2003 Improvements Agreement provided that the Subdivider (Dacar, Inc.) would install certain improvements pursuant to the 2002 NJS specifications on or before a date in 2004.

10. The development progressed and on July 27, 2007, Dacar, Inc., by Plat Doc# 2007-1835 (the "2007 Plat"), platted Blocks 1, 2, and 5 of the development out of Lots P and Q. Such plat is attached to Abbey Coyles's *Affidavit* as **Exhibit D.**

11. The 2007 Plat proposed Lots 24 and 25 for platting; **Exhibit E** attached to Abbey Coyles's *Affidavit* is the 2007 Plat with Lot 25 notated. The 2007 Plat dedicated 60'-wide rights of way for Birnam Wood Street, Walworth Street, and Dacar Street. The dedicated right of way for Walworth Street ran along the southeast boundary of proposed Lot 25, but ended at a line drawn between the east corner of proposed Lot 25, and the east corner of proposed Lot 1.

12. As of 2007, the dedicated Walworth Street right of way did not proceed beyond the east corner of proposed Lot 25.

13. Lot 25 was not actually platted out of Lot Q until the recording of Doc# 2013-938 on May 13, 2013 (the "2013 Plat"), a copy of which is attached to Abbey Coyles's *Affidavit* as **Exhibit F**.

14. The 2013 Plat shows the dedicated Walworth Street right of way (which is notated as 60.0' R.O.W) ending at the east corner of proposed Lot 25, but because the actual platted Lot 25 was larger than original proposed, the dedicated Walworth Street right of way actually ended before the east corner of platted Lot 25.

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15. On May 29, 2013, a new *Subdivision Improvements Agreement* by and between Dacar, Inc., and the City of Belle Fourche (the "2013 Improvements Agreement") was recorded as Doc# 2013-995. A copy of the 2013 Improvements Agreement is attached to Abbey Coyles's *Affidavit* as **Exhibit G**.

16. The 2013 Improvements Agreement provides, *inter alia*, that the Subdivider (Dacar, Inc.) was obligated to install certain improvements pursuant to the 2002 NJS specifications "within the full length of the right-of-way adjacent to the southeast boundary of Lot 25, Block 1 . . ."

17. The language of the 2013 Improvements Agreement did not state the right-of-way was the full length of Lot 25, just that the improvements must be installed the full length of the existing right of way adjacent to Lot 25.

18. Walworth Street was duly improved along the southeast boundary of Lot 25 within the right-of-way as dedicated by the 2007 Plats.

19. Lot 25 was replatted by Doc# 2015-1490 (the "2015 Plat"), which added some neighboring land from what was then Lot Q, resulting in Lot 25A. A copy of the 2015 Plat is attached to Abbey Coyles's *Affidavit* as **Exhibit H**.

20. The 2015 plat shows the Walworth Street right of way ending at the east corner of what was proposed as Lot 25 in 2007.

21. The 2015 plat did not extend the Walworth Street right of way any further than east corner of what was proposed as Lot 25 in 2007.

22. Immediately after the recording of the 2015 Plat, yet another *Subdivision Improvements Agreement* by and between Dacar, Inc., Todd and Julie Leach (the owners of Lot 25), and the City of Belle Fourche (the "2015 Improvements Agreement") was recorded as Doc# 2015-1491. A copy of the 2015 Improvements Agreement is attached to Abbey Coyles's *Affidavit* as **Exhibit I**.

23. The 2015 Improvements Agreement was not recorded against Lot Q1 at the time Plaintiffs purchased Lot Q1.

24. The 2015 Improvements Agreement provides, *inter alia*, that the Subdivider (Dacar, Inc., and Todd and Julie Leach) was obligated to install certain improvements pursuant to the 2002 NJS specifications "within the full length of the right-of-way adjacent to the southeast boundary of Lots 24 and 25A, Block 1, Willow Creek Estates No. 4, City of Belle Fourche, Butte County, South Dakota prior to or as a condition of approval of any subdivision plat of **Lot Q of Valley View Addition, City of Belle Fourche, Butte County, South Dakota**."

25. As of the date of recording of the 2015 Improvements Agreement, the right-of-way adjacent to the southeast boundary of Lot 25A stopped at the east corner of what was proposed as Lot 25 in 2007.

26. The 2015 Improvements Agreement does not state that the right-of-way adjacent to the southeast boundary of Lot 25A runs along the entirety of Lot 25A; rather it says, that improvements were to be installed along the entire length of the right-of-way. The right of way stopped at the east corner of what was proposed as Lot 25 in 2007.

27. After the recording of the 2015 Plat and the 2015 Improvements Agreement, Defendants purchased Lot 25A. The deed vesting Defendants with title was recorded as Doc# 2015-1525 and is attached to Abbey Coyles's *Affidavit* as **Exhibit J.**

28. Defendants purchased Lot 25A even though the 2015 plat did not extend the Walworth Street right of way any further than east corner of what was proposed as Lot 25 in 2007.

29. Dacar, Inc., elected not to finish the development of the lots in the northeast corner of the area, which were to be accessed by Walworth Street cul-de-sac.

30. Instead of subdividing the rest of Lot Q, in 2019, Dacar, Inc., replatted what was left of Lot Q into Lot Q1 by Doc# 2019-1050 (the "2019 Plat"). A copy of the 2019 Plat is attached to Abbey Coyles's *Affidavit* as **Exhibit K.**

31. The 2019 Plat did not subdivide the remainder of Lot Q; it merely renamed it to be Lot Q1 for ease of description.

32. The 2019 Plat specifically states that "Lot Q1 is the remaining portion of Lot Q, Willow Creek Estates No. 4 . . ."

33. Plaintiffs purchased Lot Q1 after it was platted. As noted, the 2015 Improvements Agreement was not recorded against Lot Q1 at the time Plaintiffs purchased Lot Q1.

34. Lot Q1 has not been subdivided since the 2015 Improvements Agreement was recorded.

35. The plain language of the 2015 Improvements Agreement provides that no party has any obligation to install any improvements along the entire southeast boundary of Lot 25A until and unless what was Lot Q has been subdivided.

36. No right-of-way has been dedicated beyond the east corner of what was proposed as Lot 25 in 2007.

37. In 2020, Dacar, Inc., dedicated a different portion of Walworth Drive by specific reference in Doc.# 2020-451, which is attached to Abbey Coyles's *Affidavit* as **Exhibit L**; such plat specifically outlined the portion of Walworth Drive in bold lines and notated the right of way as follows: "60' DEDICATED R.O.W."

38. The portion of the driveway apron located on Lot Q1 and any vehicle or other items of personal property belonging to Defendants which are located on Lot Q1 are located on Plaintiffs' real estate without Plaintiffs' consent or other privilege, and have been located

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on Plaintiffs' real estate without Plaintiffs' consent or other privilege for years.

39. Plaintiffs have addressed with Defendants the fact Defendants' assets are located on Lot Q1 on several occasions since 2019.

40. Plaintiffs have asked Defendants to remove Defendants' assets off Lot Q1 on several occasions. Defendants would cooperate temporarily, but then replace assets on Lot Q1.

41. Around Thanksgiving 2019, Defendant Kenneth McFarland told Plaintiffs he had to right to park vehicles and store dirt on Lot Q1 because he had an oral agreement with the owner of Dacar, Inc., to do so. He never mentioned any right of way.

42. In the summer of 2022, Defendants offered to trade other land for the part of Lot Q1 they now claim to be a public right of way.

43. Defendants never claimed any portion of Lot Q1 was a public right of way until March 2023.

44. Plaintiffs obtained a new boundary survey in 2023, and the surveyor set a new corner pin in what Defendants claim is their driveway; since then, neither Plaintiff has entered Lot 25A.

Dated August 21, 2023.

NIES KARRAS & SKJOLDAL, P.C.
Attorneys for Plaintiffs

By: _____
Eric John Nies
PO Box 759
Spearfish, SD 57783
(605) 642-2757

Filed: 8/28/2023 4:20 PM CST Butte County, South Dakota 09CIV23-000061

STATE OF SOUTH DAKOTA	)	**IN CIRCUIT COURT**
	) SS.	
COUNTY OF BUTTE	)	**FOURTH JUDICIAL CIRCUIT**
JEREMY COYLE and ABBEY COYLE,	)	**09CIV23-000061**
	)	
Plaintiffs,	)	
v.	)	**DEFENDANTS' RESPONSE TO PLAINTIFFS STATEMENT OF MATERIAL FACTS**
KENNETH MCFARLAND and KELLI MCFARLAND,	)	
	)	
Defendants.	)	

Comes Now, Defendants Kenneth McFarland and Kelli McFarland, by and through their attorney of record, Kent R. Hagg, and submit this response to Plaintiffs Statement of Material Facts.

1.) Defendants admit Statement 1.

2.) Defendants admit Statement 2.

3.) Defendants admit Statement 3.

4.) Defendants admit, in part, Statement 4. Specifically, NJS Engineering prepared a preliminary plat of the plan Willow Creek Estates. However, Defendants deny that said preliminary plat only has been used as an example, specifically, it is the official exhibit to the Subdivision Improvement Agreement recorded with every platted lot of said subdivision. *See* Exhibit 1, NJS Plat Layout. Per City ordinance, said preliminary plat is required to be filed with each lot as it is platted whereby making known to all parties where future dedicated right-of-way will exist, pursuant to Belle Fourche City Ordinance 16.16.

5.) Defendants admit Statement 5.

6.) Defendants admit Statement 6

7.) Defendants admit, in part, Statement 7. Specifically, that the Covenants show 166 lots in five phases. However, Defendants deny that the *Covenants, General Conditions* (6) provides for consolidation of lots (replat) if approved by the Building Committee. The Building Committee may allow the consolidation of two or more contiguous lots to make up one building site which is the scenario of Lot 25A which combines original Lot 25 and that Portion of Lot Q to make Lot 25A. Lt Q1 is the product of the platting of Lot 25A.

8.) Defendants admit Statement 8.

9.) Defendants admit Statement 9.

10.) Defendants admit Statement 10.

11.) Defendants admit Statement 11.

12.) Defendants admit Statement 12.

13.) Defendants admit Statement 13.

14.) Defendants admit Statement 14.

15.) Defendants admit Statement 15.

16.) Defendants admit Statement 16.

17.) Defendants deny Plaintiffs interpretation of 2013 Improvements Agreement and that they are parsing words saying that "improvements within the road do not mean established for the future right-of-way.

18.) Defendants admit Statement 18.

19.) Defendants admit Statement 19.

20.) Defendants admit Statement 20.

21.) Defendants deny Statement 21.

22.) Defendants admit Statement 22.

23.) Defendants qualifiedly admit Statement 23. Specifically, the evidence will show that the Subdivision Improvement Agreement should have been filed but was mistakenly not filed at the time of recording the final plat of Lot Q1.

24.) Defendants admit Statement 24.

25.) Defendants deny Statement 25.

26.) Defendants deny Statement 26. The right-of-way, as the term has been historically used in the Subdivision Improvement Agreement, references that area described and illustrated as Right-of-Way in the 2002 NJS Engineering Specifications.

27.) Defendants admit Statement 27.

28.) Defendants deny Statement 28. The approval of the plat was subject to the Subdivision Improvement Agreement being filed with the final plat of the Walworth street right-of-way depicting the future area to be designated Right-of-Way which have an installed City sewer main and easements for other public utilities.

29.) Defendants admit Statement 29 with qualification.

30.) Defendants admit Statement 30 with qualification.

31.) Defendants deny Statement 31.

32.) Defendants admit Statement 32.

33.) Defendants admit Statement 33 with qualification that the Subdivision Improvement Agreement was mistakenly not filed. However, the Agreement, as a corrective measure on Lot Q1, was filed in May of 2023.

34.) Defendants admit Statement 34.

35.) Defendants deny Statement 35.

36.) Defendants deny Statement 36.

37.) Defendants deny Statement 37.

38.) Defendants deny Statement 38.

39.) Defendants deny Statement 39.

40.) Defendants deny Statement 40. The boundaries of Lot Q1 are in dispute.

41.) Defendants deny Statement 41.

42.) Defendants deny Statement 42. The offer had nothing to do with, nor was close in location to the subject's right-of-way.

43.) Defendants deny Statement 43. Both developer and Defendants have always held that the subject area was intended to be right-of-way.

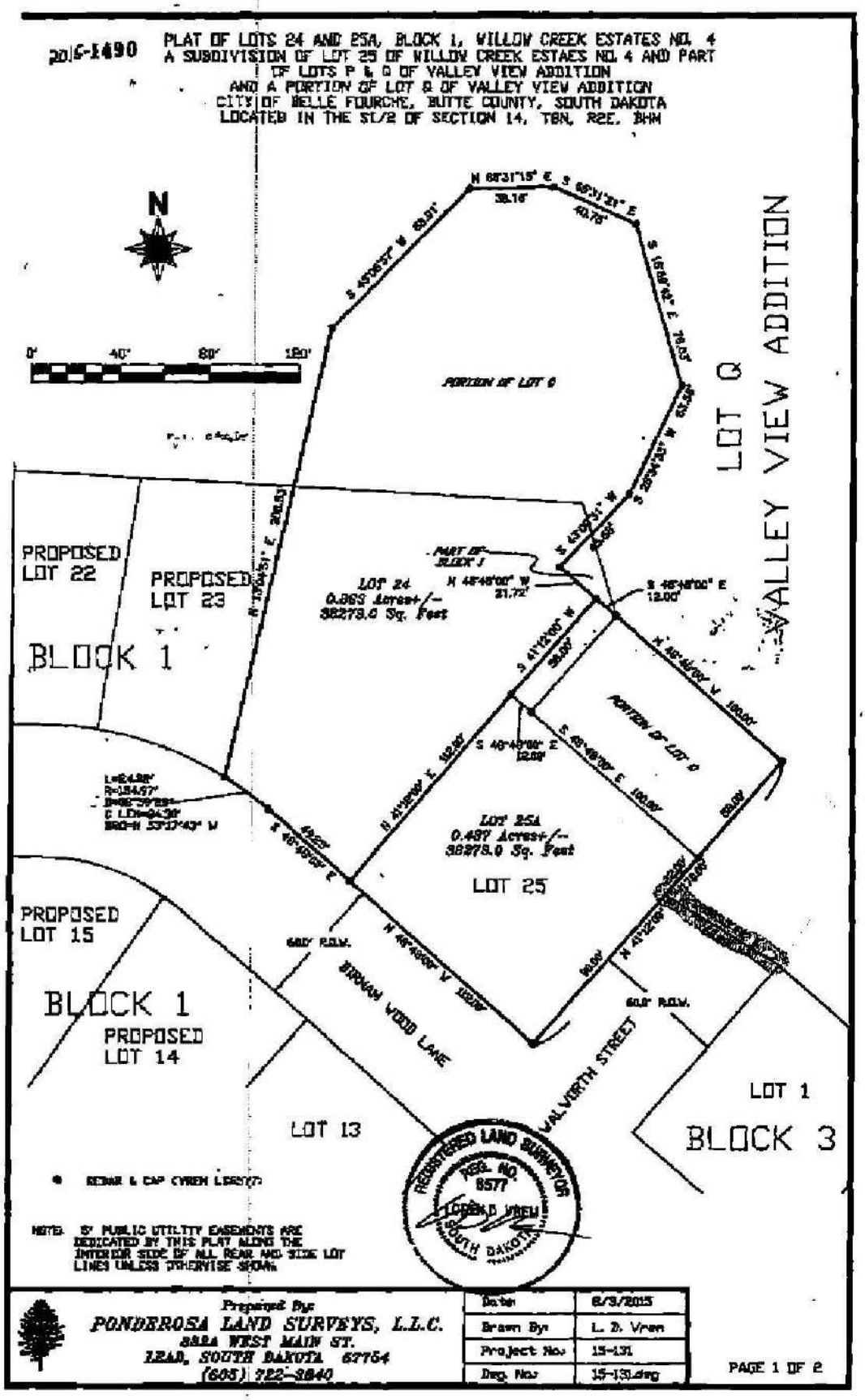
44.) Defendants admit in part Statement 44. The driveway existed at least four years before Lot Q1 was platted. Plaintiffs have been ordered by the Honorable Francy Foral not to come within 50 feet of Defendants home.

Dated this 25th of September, 2023.

HAGG & HAGG, LLP

By */s/ Kent R. Hagg*
Kent R. Hagg
Attorneys for Defendants
P. O. Box 750
Rapid City, SD 57709
(605) 348-6521

EXHIBIT A


2015-1490
PLAT OF LOTS 24 AND 25A, BLOCK 1, WILLOW CREEK ESTATES NO. 4
A SUBDIVISION OF LOT 25 OF WILLOW CREEK ESTAES NO. 4 AND PART
OF LOTS P & Q OF VALLEY VIEW ADDITION
AND A PORTION OF LOT Q OF VALLEY VIEW ADDITION
CITY OF BELLE FOURCHE, BUTTE COUNTY, SOUTH DAKOTA
LOCATED IN THE S1/2 OF SECTION 14, T8N, R2E, BHM
N
0' 40' 80' 160'
PORTION OF LOT Q
LOT Q
VALLEY VIEW ADDITION
PROPOSED LOT 22
PROPOSED LOT 23
BLOCK 1
PART OF BLOCK 1
LOT 24
0.393 Acres+/-
38273.0 Sq. Feet
N 48°48'00" W 21.72'
S 48°48'00" E 12.00'
S 41°12'00" W 38.00'
N 41°12'00" E 38.00'
S 48°48'00" E 12.00'
N 48°48'00" W 100.00'
S 48°48'00" E 100.00'
PORTION OF LOT Q
LOT 25A
0.487 Acres+/-
38278.0 Sq. Feet
LOT 25
PROPOSED LOT 15
BLOCK 1
PROPOSED LOT 14
LOT 13
LOT 1
BLOCK 3
60' R.O.W.
BIRCH WOOD LANE
WALWORTH STREET
REGISTERED LAND SURVEYOR
REG. NO. 8577
LORNE D. VREN
SOUTH DAKOTA
NOTE: 5' PUBLIC UTILITY EASEMENTS ARE DEDICATED BY THIS PLAT ALONG THE INTERIOR SIDE OF ALL REAR AND SIDE LOT LINES UNLESS OTHERWISE SHOWN.
Prepared By:
PONDEROSA LAND SURVEYS, L.L.C.
3888 WEST MAIN ST.
LEAD, SOUTH DAKOTA 57754
(605) 722-3840
Date 6/3/2015
Drawn By L. D. Vren
Project No. 15-131
Dwg. No. 15-131.dwg
PAGE 1 OF 2

PLAT OF LOTS 24 AND 25A, BLOCK 1, WILLOW CREEK ESTATES NO. 4
A SUBDIVISION OF LOT 25 OF WILLOW CREEK ESTAES NO 4 AND PART OF LOTS P & Q OF VALLEY VIEW ADDITION
AND A PORTION OF LOT Q OF VALLEY VIEW ADDITION
CITY OF BELLE FOURCHE, BUTTE COUNTY, SOUTH DAKOTA
LOCATED IN THE S1/2 OF SECTION 14, T8N, R2E, BHM

2015-1490

I, LOREN D. VREM, 322A WEST MAIN ST., LEAD, SOUTH DAKOTA, DO HEREBY CERTIFY THAT I AM A REGISTERED LAND SURVEYOR IN THE STATE OF SOUTH DAKOTA, THAT AT THE REQUEST OF THE OWNER AND UNDER MY SUPERVISION, I HAVE CAUSED TO BE SURVEYED AND PLATTED THE PROPERTY SHOWN HEREON. TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF, THE PROPERTY WAS SURVEYED IN GENERAL CONFORMANCE WITH THE LAWS OF THE STATE OF SOUTH DAKOTA AND ACCEPTED METHODS AND PROCEDURES OF SURVEYING. DATED THIS [illegible] DAY OF AUGUST, 2015.

LOREN D. VREM, R.L.S. 6577

REGISTERED LAND SURVEYOR REG. NO. 6577 LOREN D. VREM SOUTH DAKOTA

OWNERS CERTIFICATE
STATE OF SOUTH DAKOTA COUNTY OF BUTTE

Oscar Inc. DO HEREBY CERTIFY THAT I/WE ARE THE OWNERS OF THE PROPERTY SHOWN AND DESCRIBED HEREON, THAT WE DO APPROVE THIS PLAT AS HEREON SHOWN AND THAT DEVELOPMENT OF THIS PROPERTY SHALL CONFORM TO ALL EXISTING APPLICABLE ZONING, SUBDIVISION, EROSION AND SEDIMENT CONTROL REGULATIONS.

OWNER Oscar Inc. ADDRESS 305 Francis Cir Belle Fourche SD 57717

OWNER ____ ADDRESS ____

ACKNOWLEDGEMENT OF OWNER
STATE OF SOUTH DAKOTA COUNTY OF BUTTE

ON THIS [illegible] DAY OF Aug [illegible] BEFORE ME THE UNDERSIGNED NOTARY PUBLIC, PERSONALLY APPEARED [illegible] KNOWN TO ME TO BE THE PERSON DESCRIBED IN AND WHO EXECUTED THE FOREGOING CERTIFICATE.
MY COMMISSION EXPIRES [illegible] NOTARY PUBLIC [signature]

SEAL KRYSTI WEED NOTARY PUBLIC State of South Dakota SEAL

OWNERS CERTIFICATE
STATE OF SOUTH DAKOTA COUNTY OF BUTTE

[illegible] DO HEREBY CERTIFY THAT I/WE ARE THE OWNERS OF THE PROPERTY SHOWN AND DESCRIBED HEREON, THAT WE DO APPROVE THIS PLAT AS HEREON SHOWN AND THAT DEVELOPMENT OF THIS PROPERTY SHALL CONFORM TO ALL EXISTING APPLICABLE ZONING, SUBDIVISION, EROSION AND SEDIMENT CONTROL REGULATIONS.

OWNER [signature] ADDRESS 1449 [illegible] Lane Belle Fourche, SD 57717

OWNER [signature] ADDRESS ____

ACKNOWLEDGEMENT OF OWNER
STATE OF SOUTH DAKOTA COUNTY OF BUTTE

ON THIS [illegible] DAY OF Aug [illegible] BEFORE ME THE UNDERSIGNED NOTARY PUBLIC, PERSONALLY APPEARED [illegible] KNOWN TO ME TO BE THE PERSON DESCRIBED IN AND WHO EXECUTED THE FOREGOING CERTIFICATE.
MY COMMISSION EXPIRES [illegible] NOTARY PUBLIC [signature]

SEAL KRYSTI WEED NOTARY PUBLIC State of South Dakota SEAL

STATE OF SOUTH DAKOTA COUNTY OF BUTTE CITY OF BELLE FOURCHE
RECOMMENDATION OF THE CITY OF BELLE FOURCHE PLANNING COMMISSION
RECOMMENDED FOR APPROVAL BY THE CITY OF BELLE FOURCHE COMMON COUNCIL THIS [illegible] DAY OF Aug [illegible]
CHAIRMAN [signature]
JAMES [illegible]

RESOLUTION OF THE CITY OF BELLE FOURCHE COMMON COUNCIL
STATE OF SOUTH DAKOTA COUNTY OF BUTTE CITY OF BELLE FOURCHE
WHEREAS, THE BELLE FOURCHE PLANNING COMMISSION HAS RECOMMENDED APPROVAL OF THE PLAT SHOWN AND IT HAS BEEN VIEWED BY THE CITY OF BELLE FOURCHE COMMON COUNCIL, NOW THEREFORE BE IT RESOLVED, THAT THE PLAT SHOWN BE HEREBY APPROVED THIS [illegible] DAY OF [illegible]

ATTEST [signature] [signature]
MAYOR FINANCE OFFICER

CITY OF BELLE FOURCHE INCORPORATED [illegible] CORPORATE SEAL BUTTE COUNTY, SOUTH DAKOTA

APPROVAL OF STREET AUTHORITY
STATE OF SOUTH DAKOTA COUNTY OF BUTTE
THE LOCATION OF THE PROPOSED ACCESS POINTS [illegible] THE COUNTY OR STATE HIGHWAY AS SHOWN HEREON, IS HEREBY APPROVED. ANY CHANGE IN THE PROPOSED ACCESS SHALL REQUIRE ADDITIONAL APPROVAL.
HIGHWAY OR STREET AUTHORITY [signature] 8/19/15
RYAN E. [illegible], CITY ENGINEER DATE

OFFICE OF CITY ENGINEER
STATE OF SOUTH DAKOTA COUNTY OF BUTTE CITY OF BELLE FOURCHE
I, RYAN E. [illegible], CITY ENGINEER FOR THE CITY OF BELLE FOURCHE, DO HEREBY CERTIFY THAT I HAVE APPROVED THIS PLAT WITH RESPECT TO THE DUTIES OF MY OFFICE, AND THAT I HAVE RECEIVED A COPY OF THIS PLAT FOR THE CITY FILES.
ENGINEER [signature] 8/19/15
RYAN E. [illegible] DATE

CERTIFICATE OF COUNTY TREASURER
STATE OF SOUTH DAKOTA COUNTY OF BUTTE
I, Debbie Lensegrav, BUTTE COUNTY TREASURER, DO HEREBY CERTIFY THAT [illegible] TAXES WHICH ARE LIENS UPON THE HEREIN PLATTED PROPERTY HAVE BEEN PAID. DATED THIS [illegible] DAY OF [illegible]
BUTTE COUNTY TREASURER [signature]
DEB LENSEGRAV

SEAL

Prepared By: PONDEROSA LAND SURVEYS, L.L.C. 322A WEST MAIN ST. LEAD, SOUTH DAKOTA 57754 (605) 722-3840	Date:	8/3/2015
	Drawn By:	L. D. Vrem
	Project No:	15-131
	Dwg. No:	15-131.dwg

PAGE 2 OF 2

Filed: 6/7/2023 10:04 AM CST Butte County, South Dakota 09CIV23-000061

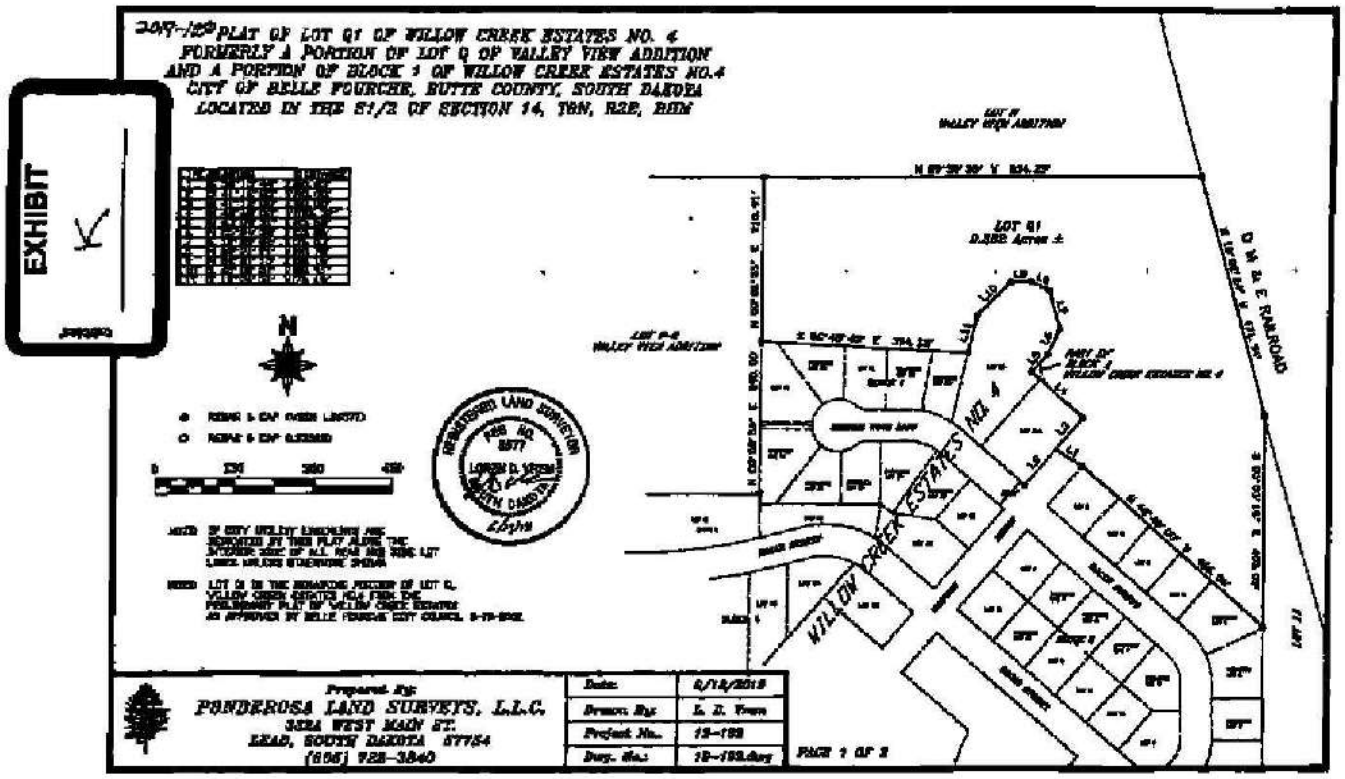
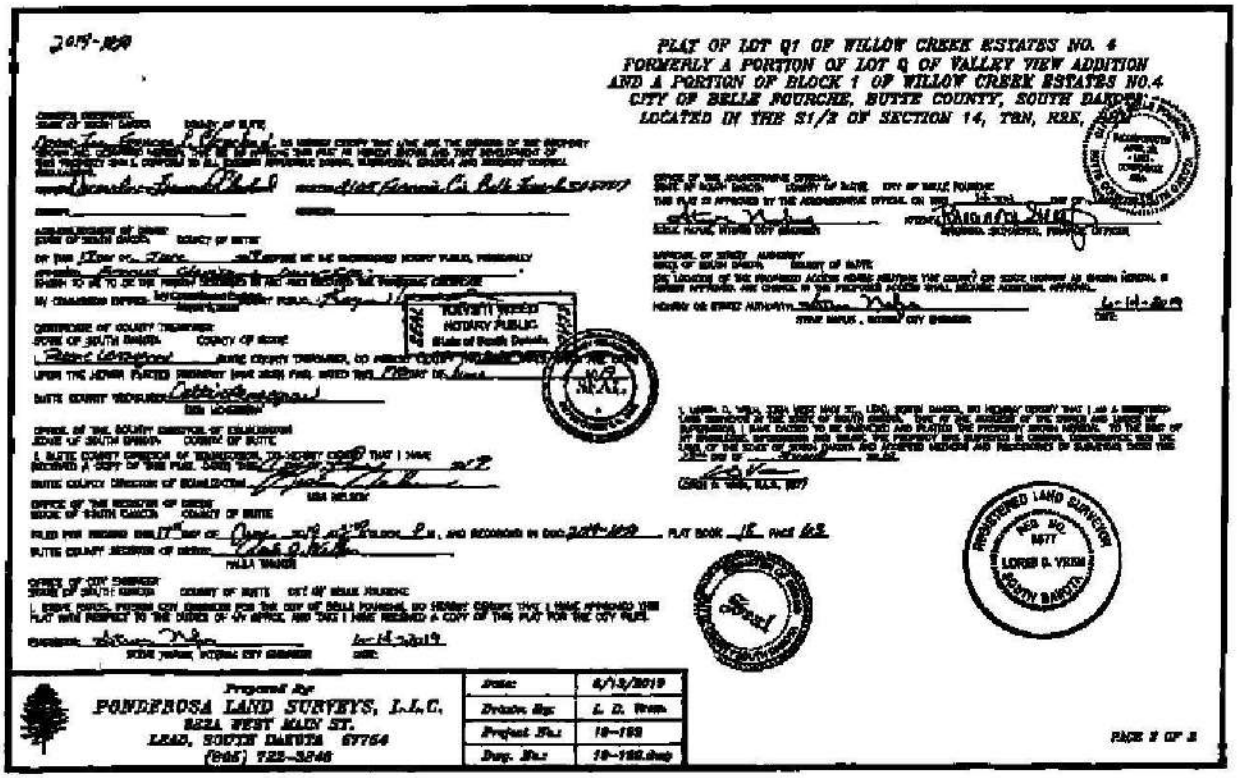


EXHIBIT
2017-129 PLAT OF LOT Q1 OF WILLOW CREEK ESTATES NO. 4
FORMERLY A PORTION OF LOT Q OF VALLEY VIEW ADDITION
AND A PORTION OF BLOCK 1 OF WILLOW CREEK ESTATES NO.4
CITY OF BELLE FOURCHE, BUTTE COUNTY, SOUTH DAKOTA
LOCATED IN THE S1/2 OF SECTION 14, T6N, R2E, BHM
N
LOT Q1
D.S.B.B. Action ±
WILLOW CREEK ESTATES NO. 4
D M & E RAILROAD
Prepared By:
PONDEROSA LAND SURVEYS, L.L.C.
3626 WEST MAIN ST.
LEAD, SOUTH DAKOTA 57754
(605) 920-3840
Date: 8/18/2018
Drawn By: L. D. Vrem
Project No.: 18-198
Dwg. No.: 18-198.dwg
PAGE 1 OF 2



2019-109

PLAT OF LOT Q1 OF WILLOW CREEK ESTATES NO. 4
FORMERLY A PORTION OF LOT Q OF VALLEY VIEW ADDITION
AND A PORTION OF BLOCK 1 OF WILLOW CREEK ESTATES NO.4
CITY OF BELLE FOURCHE, BUTTE COUNTY, SOUTH DAKOTA
LOCATED IN THE S1/2 OF SECTION 14, T5N, R5E, BHM

Prepared By
PONDEROSA LAND SURVEYS, L.L.C.
822A WEST MAIN ST.
LEAD, SOUTH DAKOTA 57754
(605) 722-3246

Date:	6/13/2019
Drawn By:	L. D. Vrem
Project No.:	19-109
Dwg. No.:	19-109.dwg

PAGE 2 OF 2

EXHIBIT
B

2015-1491

BOOK 456 PAGE 400

Prepared by:
City of Belle Fourche
511 6th Avenue
Belle Fourche, SD 57717
Phone: 605-892-3006

Register of Deeds
Butte County, South Dakota
Recorded Aug 19, 2015
At 2:25 PM
Doc# 2015-1491
Book 456 Page 400 - 404
Fee 30.00
By Julie Brunner Deputy
Register of Deeds

REGISTER OF DEEDS SEAL BUTTE COUNTY, SOUTH DAKOTA

RECORDED ✓
GRANTOR ✓
GRANTEE ✓
NUMERICAL ✓
TRANSFER
SATISFACTION

SUBDIVISION IMPROVEMENTS AGREEMENT

This Agreement is made and entered into effective the 14 day of Aug, 2015 by and between the City of Belle Fourche, a municipal corporation, with its address at 511 6th Avenue, Belle Fourche, South Dakota, herein referred to as **City**, and Shawn Lee, Frances C Cleveland Trust, being partial owner and developer of the subdivision and whose mailing address is 205 Jeannie Cir Belle Fourche, SD 57717, and

Todd & Julie Leach, being partial owner and developer of the subdivision and whose mailing address is 1449 Birman West Loop Belle Fourche SD 57717, combined representing full ownership, herein referred to as **SUBDIVIDER.**

WITNESSETH

1. Name and Description

The subdivision to be developed has the following legal description: Lots 24 & 25A, Block 1, Willow Creek Estates No. 4, A Subdivision of Part of Lots P & Q of Valley View Addition, and A Portion of Lot Q of Valley View Addition, City of Belle Fourche, Butte County, South Dakota, Located in the S1/2 of Section 14, T8N, R2E, BHM.

The Parties Agree To The Following Terms and Conditions:

1

2. Nature of Improvements

The **SUBDIVIDER** agrees to install improvements as detailed on the plans by NJS Engineering dated July, 2002. These plans are on file in the City Engineer's Office and are hereby incorporated by reference. Final plans and specifications must be submitted to the CITY ENGINEER's Office for approval prior to commencing work on the improvements.

3. Revision of Plan

The **SUBDIVIDER** agrees that if, during the course of construction and installation of improvements it shall be determined by the CITY ENGINEER that revision of the Plans is reasonable and necessary and in the public's interest, **SUBDIVIDER** shall be required to undertake such design and construction changes and submit them to the CITY ENGINEER for approval, and when approved by the City's Common Council, **SUBDIVIDER**, their successors or assigns must implement said changes.

4. Completion of Improvements

SUBDIVIDER, or its successor, must complete the improvements detailed in the plans prepared by NJS Engineering dated July, 2002 within the full length of the right-of-way adjacent to the southeast boundary of Lots 24 & 25A, Block 1, Willow Creek Estates No. 4, City of Belle Fourche, Butte County, South Dakota prior to or as a condition of approval of any subdivision plat of Lot Q of Valley View Addition, City of Belle Fourche, Butte County, South Dakota.

5. Utility Installation

The **SUBDIVIDER** agrees that all utilities shall be installed underground.

6. Indemnification

SUBDIVIDER, its successors and assigns, agrees to indemnify and hold the City harmless from and against all claims, suits, damages, costs, losses and expenses, including attorney's fees, in any manner arising out of or connected with this Subdivision Improvements Agreement, development of this property and constructing improvements thereon.

7. City Inspection of Improvements

The **SUBDIVIDER** agrees that all improvements shall be subject to inspection by the CITY ENGINEER or an authorized agent during the course of construction of such improvements.

8. Warranty of Improvements

The **SUBDIVIDER** warrants that the improvements will be installed in a good and workmanlike manner and shall be free from defects for a period of one (1) year from the date of completion. The **SUBDIVIDER** shall remedy any defects in the work and pay for any damage to the other work resulting therefrom, which shall appear within a period of one year from the date of final acceptance of work unless a longer period is specified. **City** will give notice of observed defects with reasonable promptness.

9. Transfer of Improvements upon Completion and Acceptance

SUBDIVIDER agrees to transfer ownership of the improvements to **City**, free of charge, and **City** agrees to accept the improvements upon completion and satisfactory inspection of the improvements by the CITY ENGINEER.

10. Connection to City Water Supply

SUBDIVIDER agrees to connect the water distribution system servicing the subdivision to the nearest available City-owned water main.

11. Binding Agreement

This Subdivision Improvements Agreement shall be binding upon the **SUBDIVIDER**, its successors and assigns, and the obligations referenced herein shall be covenants appurtenant to and running with the land. This Agreement shall be recorded in the Office of the Butte County Register of Deeds.

SUBDIVIDER:

[signature] ____________________ Dacar Inc. ____________________

Julie Leach ____________________ ____________________

ACKNOWLEDGMENT OF SUBDIVIDER

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF BUTTE)

On this 17 day of Aug, 2015, before me Krysti Wood / Frances Cleveland, a Notary Public, personally appeared Frances Cleveland known to me or satisfactorily proven to be the person whose name is subscribed to the above and foregoing instrument and who acknowledged to me that he executed the same for the purposes therein contained.

STATE OF SOUTH DAKOTA	)	**IN CIRCUIT COURT**
	) SS.	
COUNTY OF BUTTE	)	**FOURTH JUDICIAL CIRCUIT**
JEREMY COYLE and ABBEY COYLE,	)	**09CIV23-000061**
	)	
Plaintiffs,	)	**AFFIDAVIT IN SUPPORT OF MOTION FOR**
v.	)	**CONTINUANCE AND INITIAL RESPONSE TO**
KENNETH MCFARLAND and	)	**PLAINTIFF'S MOTION FOR PARTIAL**
KELLI MCFARLAND,	)	**SUMMARY JUDGMENT AND IN RESPONSE**
	)	**TO PLAINTIFFS OBJECTION**
Defendants.	)	

State of South Dakota	)
	)SS:
County of Pennington	)

Comes Now, Kent R. Hagg (hereinafter "Affiant"), being first duly sworn, deposes and states as follows:

1.) Affiant affirms that the following statements are true and has personal knowledge of the facts stated herein.

2.) I am the attorney of record for Defendants, Kenneth McFarland and Kelli McFarland, and through no fault of Defendants, your Affiant has not had sufficient time to permit affidavits, obtain depositions and complete discovery; consequently, certain deadlines have passed without your Affiant able to file responsive pleadings and exhibits before the hearing scheduled on this matter for September 28, 2023.

Said affidavits, depositions and discovery will establish that genuine issues of material fact exist; specifically, no intent to trespass exists in that Defendant's believes in good faith, that the plat of Lot Q1 is defective and therefore certain boundaries depicted in plat drawings are not valid, as same are based upon said erroneous procedure(s) and mistake.

3.) That pursuant to **SDCL §15-6-56(f). Opposing summary judgment when affidavits are unavailable.** Defendants respectfully request this Honorable Court to grant Defendants' Motion for Continuance for the reasons stated therein, and as more fully asserted in this Affidavit and

the Affidavit of Defendant Kenneth McFarland. Defendants request at least a 60 day continuance to conduct further discovery to support the facts of the matter and which most likely will uncover additional facts which will rebut Plaintiff's Motion for Partial Summary Judgment. *Stern Oil Co. V. Border States Paving, Inc.*, 848 NW 2d 273, 2014 S.D. 28. Further, Defendants request denial of Plaintiffs' Objection to Defendants' Motion for Continuance.

4.) That Plaintiffs have wrongly brought an action for Trespass against Defendants which requires intent by the tortfeasor. Defendants, in good faith, assert and believe that the area subject to the alleged trespass is future dedicated right-of-way as described in the Subdivision Improvements Agreement relative to the Willow Creek subdivision as required by Belle Fourche City Ordinance, Chapter 16.16 - Improvements. (*See* Exhibit 1). Defendants believe the plat to Lot Q1 is erroneous, therefore the location of the alleged trespass is actually future, dedicated, public right-of-way. Defendants intend to depose certain public officials and others associated with and/or familiar with the requirements of the plat application and recording process to demonstrate that said processes were not followed.

5.) That during a Protection Order hearing on August 4, 2023, the Honorable Francy Foral, in her issuance of a Permanent Protection Order (File No. 09TPO23-000037) against Plaintiff Abbey Coyle, the Judge rejected Abbey Coyle's defense that she was on her own land. Judge Foral further made the conclusion that this matter concerns a dispute over land boundaries, so much so, that the Protection Order is set for two years or "upon the decision of the Circuit Court in the civil matter." Among other reasons, including placement of a video camera to surveil Defendants' home, Judge Foral was especially concerned that Plaintiffs had ordered a survey which resulted in a property pin being driven into Defendants concrete driveway. (*See* Exhibit 2, Order for Protection against Abbey Coyle). The resolution of a land boundary dispute requires a Quiet Title action or other declaratory judgment NOT an

action for the intentional tort of Trespass. Defendant requests that this Honorable Court take judicial notice of Judge Foral's findings. A transcript of said proceedings will be provided as soon as possible and is just one of several reasons for this Motion for Continuance.

6.) That Defendants have been instructed by Black Hills Title, Inc. to file a claim with its underwriter, Stewart Title Guaranty Company, to obtain a determination with regard to the failure, mistake, or improper filing of the Subdivision Improvement Agreement at the time of platting of Lot Q1, as required by City ordinance. Defendants, by and through this attorney, are in the process of filing a claim with said underwriter which may take several weeks.

7.) That at the time of Plaintiffs accepting title to Lot Q1 in 2019, Black Hills Title, Inc., issuer of the title insurance policy, did not discover that the Subdivision Improvements Agreement dated August 14, 2015, recorded August 19, 2015 in Book 456 on Page 400 as document 2015-1491, was missing; even though, all lots in the development up to that time, including Defendants' Lot 25A, were subject to said Agreement. Your Affiant and Defendant Kenneth McFarland have had discussions with Black Hills Title, Inc. and the Butte County Register of Deeds which confirm that the Subdivision Improvements Agreement should have been filed with the recording of the final plat of Lot Q1 and that said document was subsequently filed on or about May 23, 2023. Affidavits and/or depositions will be sought to demonstrate irregularities in process of the platting of Lot Q1 and provide additional basis upon which Defendants good faith belief is reasonable.

8.) That the City of Belle Fourche's failure to properly record the above-referenced Subdivision Improvements Agreement has resulted in a defective plat being issued and thereby, boundaries not to be relied upon. Defendants have directed your Affiant to file a complaint with Stewart Title Guaranty Company, Black Hill Title, Inc.'s underwriter, and said process is now underway.

9.) That it is Defendants intent to also seek to resolve the matter directly with the City of Belle Fourche and other parties involved, which will then render Plaintiffs allegations of trespass moot, specifically, that no trespass exists without Defendants' intent to commit said trespass. Lot Q1 boundaries are subject to dispute as has been acknowledged by Magistrate Court Judge Francy Foral who issued a Permanent Protection Order in File No. 09TPO23-37.

10.) That a postponement of the subject hearing does not deprive Plaintiffs of their due process or prejudice Plaintiffs in any way and Plaintiffs will not be damaged, in that nothing will change with regard to the current plat status (erroneous or not) of Lot Q1 as asserted by the parties.

11.) That Defendants would be greatly prejudiced and deprived their due process if denied the opportunity, through no fault of their own, to provide material facts to be considered by this Honorable Court.

Dated this 20th day of September, 2023.

HAGG & HAGG, LLP

By */s/ Kent R. Hagg*
Kent R. Hagg
Attorneys for Defendants
P. O. Box 750
Rapid City, SD 57709
(605) 348-6521

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 20, 2023 he caused a true and correct copy of the Affidavit in Support of Motion for Continuance and in Response to Plaintiffs' Objection attached to be served upon the persons identified below as follows:

[ ] First Class Mail	[ ] Overnight Mail
[ ] Hand Delivery	[ ] Facsimile
[ ] Electronic Mail	[X] Odyssey File and Serve

Eric J. Nies, Esq.
Nies Karras & Skjodal, P.C.
PO Box 759
Spearfish, SD 57783

which address is the last address known to the subscriber.

HAGG & HAGG, LLP

By: */s/ Kent R. Hagg*
Kent R. Hagg
Attorneys for Defendants
P.O. Box 750
Rapid City, SD 57709
(605) 348-6521

B. That the owner/subdivider agrees to make and install the improvements provided for in Section 16.16.020 and that the... accordance with the plans and specifications accompanying the final plat; and, further agreeing that all such improvem... inspection and approval by the City Engineer or his designee during the course of construction of such improvements... written, recordable form and shall be a covenant running with the land;

C. The City may require the owner/subdivider to furnish a bond executed by an acceptable surety company authorized to do business in South Dakota. If City requires a bond it shall be for an amount not less than twenty (20) percent nor for more than one hundred (100) percent of the cost of the improvements.

(Ords. 1-2003 (part), 7-2006 (part))

16.16.020 - Other requirements.

No final plat for a subdivision of any tract or parcel of land may be approved by the Common Council without having first received a signed statement from the City Engineer stating and certifying that to his or her best knowledge, information and belief, the improvements as described in the owner/subdivider's submitted plans and specifications, meet the requirements of the applicable ordinances of the City and standards established by the Council; and, furthermore, that such plans and specifications fully comply with the following requirements:

A. The owner/subdivider shall install sanitary sewers that shall meet the following requirements:

1. A central sewer system shall serve all properties within the proposed subdivision.
2. The central system shall connect to a public sewer system if available. For the purposes of this section a public sewer system is available if a public sewer main is located within one-half (½) mile of a proposed subdivision. Annexation will be required prior to connection to the City public sewer system.
3. The design and specifications for the sewer system shall be approved by the City Engineer prior to commencing installation.
4. The design of all sewer systems shall be signed and sealed by a Professional Engineer registered in the State of South Dakota.
5. Sewer service lines shall be stubbed out to every lot abutting a street prior to surfacing the streets.
6. In low and medium density subdivisions, the requirement to install a central sewer system may be waived and individual disposal systems may be proposed if a public sewer system is not available. Where individual disposal systems are proposed, the owner/subdivider shall submit a septic tank plan prepared by a Professional Engineer registered in the State of South Dakota that contains the following:
   a. Location of all areas acceptable for septic tanks and drainfields proposed within the subdivision;
   b. Soil types;
   c. Profile of the soil to the depth of bedrock, impervious material and/or groundwater;
   d. Locations of percolation test holes and results of percolation tests. Soil percolation tests shall be conducted at a frequency of at least one test per lot
   e. Location and depth of all wells located within two hundred (200) feet of the proposed subdivision;
   f. A statement by the Professional Engineer certifying the adequacy and safety of individual disposal systems within the proposed subdivision.

B. Storm sewers, drainage structures and culverts shall be designed and installed as required by the City Engineer in accordance with accepted engineering practices. The design of all storm sewer systems shall be signed and sealed by a Professional Engineer registered in the State of South Dakota.

C. The owner/subdivider shall install a water distribution system that meets the following requirements:

1. All properties in the proposed subdivision shall be served by a central water system.
2. The central water system shall connect to a public water system if available. For the purposes of this section a public water system is available if a public water system is located within one-half (½) mile of a proposed subdivision. Annexation will be required prior to connection to the City public water system.
3. The size, type, design and specifications for the water distribution system shall be approved by the City Engineer prior to commencing installation. The water distribution system shall provide for adequate fire protection.
4. The design of all water distribution systems shall be signed and sealed by a professional engineer registered in the State of South Dakota.
5. Service lines shall be stubbed out to every lot abutting a street prior to the surfacing of the street.

D. The owner/subdivider shall install street improvements that meet the following requirements:

1. Maximum grades of streets shall not exceed ten (10) percent. All streets shall have a minimum grade of five-tenths (0.5) of a percent.
2. Minimum cross slopes on streets shall be two (2) percent.
3. Street jogs with centerline offsets of less than one hundred twenty-five (125) feet shall not be permitted.
4. All curb and gutters shall meet the standard South Dakota Department of Transportation design for Type B66, D46, and F6 concrete curb and gutter.

A certification by a registered land surveyor to the effect that the plat represents a survey made by him and the monuments and markers shown thereon exist as located and that all dimensional and geodetic details are correct;

J. A notarized certification by the owner of the adoption of the plat and the dedication of streets, alleys and other public areas;

K. A certification showing that all taxes and special assessments due on the property to be subdivided have been paid for in full;

L. A proper form for approval by the Planning Commission, City Engineer, and Common Council with space for signatures;

M. The approval of the final plat shall not be deemed to constitute or effect an acceptance by the public of the dedication of any street or other proposed public way or space shown on the plat.

(Ords. 1-2003 (part), 7-2006 (part))

16.12.070 - Plat approval.

The final plat shall be approved or disapproved by the Common Council within ninety (90) days after submission thereof. If no action is taken within ninety (90) days of submission, said plat shall be deemed to have been approved and a certificate to that effect shall be issued by the City on demand; provided, however, that the owner/subdivider for the approval may waive this requirement and consent to the extension of such period. The ground for disapproval of any plat shall be stated upon the record by the Common Council.

(Ords. 1-2003 (part), 7-2006 (part))

16.12.075 - Plat recordation.

Within thirty (30) days after approval of the final plat by the Common Council, the City Engineer shall record the final plat in the office of the register of deeds.

(Ord. 1-2003 (part))

(Ord. No. 7-2018, 8-6-2018)

16.12.080 - Assurances for subdivisions required.

No plats of any subdivision shall be approved unless the improvements required by this chapter have been installed prior to such approval or unless the owner/subdivider shall have signed a subdivision improvements agreement as prescribed by Chapter 16.16 to establish the responsibility for the construction of improvements in a satisfactory manner and within a period specified by the City Engineer, such period not to exceed three (3) years. An extension to that three (3) year period may be granted at the discretion of the Common Council. This assurance agreement shall be recorded with the register of deeds at the time of filing the plat.

(Ords. 1-2003 (part), 7-2006 (part))

16.12.090 - Variances.

A. Hardship. An owner/subdivider who is able to show an extraordinary hardship arising from the location, topography, or other geologic characteristic, which would make it difficult or impossible to conform strictly to these regulations, may apply for a variance from these regulations. The Common Council, upon finding that such conditions exist, that the public interest shall be secured, that such project will be beneficial to the community and will not defeat the intent and purposes of the Comprehensive Plan or these regulations, may vary the regulations upon a two-thirds (⅔) majority vote, so that substantial justice may be done.

B. Conditions. In granting variances and modifications, the Common Council may require such conditions as will substantially secure the objectives of the standards or requirements so varied or modified.

C. Procedure. Application for a variance shall be made on the form provided by the City Engineer concurrently with the submission of the preliminary plan. The City Engineer shall present the application to the Planning Commission with the preliminary plan. The Planning Commission shall then forward a recommendation on the application to the Council with the preliminary plan.

(Ords. 1-2003 (part), 7-2006 (part))

Chapter 16.16 - IMPROVEMENTS

Sections:

16.16.010 - Agreement concerning improvements.

Before the final plat of any subdivision can be approved by the Common Council, an agreement which has been signed by the owner/subdivider of the land in the subdivision and approved by the City Engineer and City Attorney must be provided to the Common Council. The subdivision improvements agreement must contain the following:

A. Plans and specifications for improvements in the subdivision which have been approved by the Common Council and clearly describing the same;

STATE OF SOUTH DAKOTA)
)
COUNTY OF BUTTE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

☐DOMESTIC ☑STALKING
☐EX PARTE TEMPORARY ☑PERMANENT
☐MODIFICATION

ORDER FOR PROTECTION

TPO NO. 09TPO23-000037

EXHIBIT
Exhibit 2

PETITIONER

KELLI J MCFARLAND
First Middle Last

PETITIONER IDENTIFIERS:

08/14/1961
Date of Birth of Petitioner

By (name and DOB):

On behalf of a minor child by parent/guardian.

Other Protected Persons (name and DOB):

(See also 2B Additional Orders.)

V.

RESPONDENT

ABBY COYLE
First Middle Last

Relationship to Petitioner:

Respondent's Address:
1909 13TH AVE
BELLE FOURCHE, SD 57717

RESPONDENT IDENTIFIERS:

SEX	RACE	HEIGHT	WEIGHT
EYES	**HAIR**	**DATE OF BIRTH**	
		08/29/1986	
DRIVERS LICENSE #		**STATE**	**EXPDATE**
00959681		SD	

Distinguishing Features:

CAUTION: ☐Weapon Involved

THE COURT FINDS:

That it has jurisdiction over the parties and subject matter, and the Respondent has been provided with reasonable notice and opportunity to be heard, and that in the case of an ex parte order, the Respondent will be provided with reasonable notice and opportunity to be heard sufficient to protect the Respondent's due process rights.

THE COURT ORDERS:

That the Respondent is restrained from acts of abuse and physical harm, making threats of abuse, stalking or harassment.

That the Respondent is restrained from contact with the Petitioner by any direct or indirect means to the extent stated in the following pages.

Additional findings and orders are on the following pages.

This order shall be effective 08/04 (Month/Day) 2023 (Year) through 08/04 (Month/Day) 2025 (Year)

Or if a permanent order is issued, until that order is served.

Only this Court can change this order.
VIOLATION OF THIS PROTECTION ORDER IS A CRIMINAL OFFENSE.

WARNING TO RESPONDENT: This order shall be enforced, even without registration, by courts of any state, the District of Columbia, any U.S. Territory, and may be enforced by Tribal Lands (18 U.S.C.§2265). Crossing state, territorial, or tribal boundaries to violate this order may result in federal imprisonment (18 U.S.C. §2262).

FILED

Form UCS-[illegible]alking Permanent Order) Rev. 7/21

AUG 04 2023

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By

ADDITIONAL FINDINGS

This matter came before this Court on this day and the following parties appeared personally:

☑ Petitioner ☑ Petitioner's Attorney HAGG, KENT ☐ Other
☑ Respondent ☑ Respondent's Attorney NIES, ERIC JOHN ☐ Other

☐ 1. This **Court FINDS** that, without admitting to the allegations in the Petition, the Respondent waives further hearing, findings of fact, and conclusions of law, and stipulates to the entry of an Order of Protection on the terms specified below.

☑ 2. Having considered the evidence presented and any affidavits and pleadings on file, this **Court FINDS:**

1. That jurisdiction and venue are properly before this Court; and
2. By a preponderance of the evidence that:
   - ☑ a) "stalking" as defined by SDCL 22-19A-1 has taken place;
   - ☐ b) that the Petitioner has suffered physical injury resulting from an assault or a crime of violence, as defined by SDCL 22-1-2(9).

THEREFORE, THIS COURT ORDERS THAT:

1. The Respondent is restrained from:

☑ a) following or harassing the Petitioner, or making any credible threat with the intent to place the Petitioner in reasonable fear of death or great bodily injury, SDCL 22-19A-1;

☑ b) harassing the Petitioner by means of any verbal, electronic, digital media, mechanical, telegraphic, or written communication, SDCL 22-19A-1;

☑ c) causing any injury as a result of an assault or crime of violence, SDCL 22-1-2-(9).

ADDITIONAL ORDERS:

☑ 1) That the Respondent is excluded from the Petitioner's residence listed in 2C.

☑ 2) That the Respondent shall not come within a distance of 50 Feet from the following persons and places:

☑ A. The Petitioner personally

☐ B. The following minor children named as other protected persons:

Name	Date of birth	Relationship

☑ C. The Petitioner's residence

1449 BIRNAM WOOD LN
BELLE FOURCHE SD 57717

☐ D. The Petitioner's place of employment

☐ E. Other places

This distance restriction applies unless otherwise specified in this order.

☑ 3) Phone calls, emails, third party contact, including correspondence, direct or indirect, are not permitted, to a protected person, except as follows:

NO EXCEPTIONS

☐ 4) Respondent is ordered to immediately turn over all weapons and ammunition to local sheriff.

☑ 5) Other relief as follows:

RESPONDENT IS AUTHORIZED INGRESS AND EGRESS ON THE PUBLIC RIGHT OF WAY TO HER PROPERTY BUT NO STOPPING OR STANDING WITH IN 50 FEET OF PETITIONER'S HOME. RESPONDENT IS NOT AUTHORIZED TO PUT UP CAMERAS TO MONITOR PETITIONER'S PROPERTY. THIS PROTECTION ORDER MAY EXPIRE UPON THE DECISION OF THE CIRCUIT COURT IN THE CIVIL MATTER.

WARNING TO RESPONDENT: You can be arrested for violating this protection order even if any person protected by the order initiates the contact or invites you to violate the order's prohibitions. Only the court can change the order; the protected person cannot waive any of its provisions. You may also be held in contempt for ignoring the terms of this protection order.

AND IT IS FURTHER ORDERED THAT: the Petitioner shall, immediately upon the granting of this Order, deliver two copies of this Order to the sheriff of this county. One copy shall be personally served by the sheriff upon the Respondent, unless personal service has been acknowledged below.

DATED: 08/04/2023

Service of this order is authorized on any day including Sunday.

JUDGE FRANCY FORAL

/S/ ALANA JENSEN , Clerk of Courts

By: JSSF10201 , Deputy

NOTICE OF ENTRY OF ORDER AND ACKNOWLEDGMENT OF PERSONAL SERVICE

I acknowledge receipt of a copy of this Order of Protection.

Kelli McFarland 8-4-23
KELLI J MCFARLAND, Petitioner Date

Abby Coyle 8-4-23
ABBY COYLE, Respondent Date

UNDER A PERMANENT PROTECTION ORDER: You may be subject to the following federal laws: (1) Effective immediately, you may not possess, carry, ship or transport any firearm or ammunition that has been transported in interstate or foreign commerce while this Protection Order is in effect. Title 18 United States Code Section 922(g)(8). (2) If you violate this Protection Order and are convicted of an offense of domestic violence, you may be forbidden for life from possessing, carrying, shipping or transporting, any firearm or ammunition that has been transported in interstate or foreign commerce. Title 18 United States Code Section 922(g)(9). Violation of these federal laws carries a maximum penalty of ten years in prison, a $250,000 fine, or both.

STATE OF SOUTH DAKOTA	)	**IN CIRCUIT COURT**
	) SS.	
COUNTY OF BUTTE	)	**FOURTH JUDICIAL CIRCUIT**
JEREMY COYLE and ABBEY COYLE,	)	**09CIV23-000061**
Plaintiffs,	)	
v.	)	**AFFIDAVIT OF DEFENDANT IN SUPPORT OF MOTION FOR CONTINUANCE**
KENNETH MCFARLAND and KELLI MCFARLAND,	)	
Defendants.	)	

State of South Dakota)
)SS:
County of Pennington)

Comes Now, Kenneth McFarland, (hereinafter "Affiant") being first duly sworn, deposes and states as follows:

1.) I am competent to testify and have personal knowledge of the facts herein.

2.) Your Affiant and his wife, Kelli McFarland, are the Defendants in the subject matter.

3.) Defendants purchased the home and parcel, Lot 25A in Willow Creek Subdivision, Belle Fourche, South Dakota, in 2015 and have lived there since that time.

4.) That since Spring, 2023, your Affiant and his wife have had repeated encounters and confrontations with Plaintiffs regarding a small area of land, including a portion of your Affiant's driveway, which Plaintiffs claim to be part of their adjacent parcel, Lot Q1. Said confrontations have resulted in a Permanent Protection Order against Plaintiff Abbey Coyle issued by the Honorable Francy Foral.

5.) That it is your Affiant's position that Lot Q1, now owned by Plaintiffs, was not properly platted, including failure by the City of Belle Fourche to properly record the Subdivision Improvement Agreement duly executed by the City of Belle Fourche; developer, Dakar, Inc.; and

the previous owners, Todd and Julie Leach. Your Affiant accepted deed of Lot 25A (Defendants homestead) in good faith consistent with City Ordinance and supported by a title insurance policy from Black Hills Title, Inc. Pursuant to City Ordinance, Chapter 16.16 Improvements, the Subdivision Improvement Agreement is required to be executed and filed before the final plat of any subdivision can be approved by the Common Council. However, due to irregularities in the platting process and the mistake and failure of said Agreement to be filed at the time of platting of Lot Q1, it is Defendants' position that the current boundaries are erroneous.

6.) That upon review by Black Hills Title, Inc. and Butte County Register of Deeds the Subdivision Improvement Agreement has, as of May 2023, been duly recorded as part of the title of Lot Q1.

7.) Your Affiant has discussed this matter with Black Hills Title, Inc. regarding the failure to file the Subdivision Improvement Agreement at the time of platting as required by City ordinance. Black Hills Title, Inc. has advised your Affiant to file a claim with Stewart Title Guaranty Company, underwriter for Black Hills Title, Inc.

8.) That your Affiant has directed attorney Kent Hagg to pursue the filing of said claim with Stewart Title and that process has recently begun. Additional time is required to pursue this process. The determination by Stewart Guaranty Company will provide additional material evidence necessary for the resolution of this matter.

STATE OF SOUTH DAKOTA)
)SS:
COUNTY OF PENNINGTON)

Kenneth McFarland, being first duly sworn, states that he has read the foregoing document, and knows the contents thereof to be true to the best of his knowledge, information and belief.

KENNETH MCFARLAND, DEFENDANT

Subscribed and sworn to before me this 19th day of September, 2023.

Darla Olson
Notary Public

My Commission Expires: 12-13-2023
(SEAL)

SEAL DARLA OLSON NOTARY PUBLIC State of South Dakota SEAL
My Commission Expires December 13, 2023

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 20, 2023 he caused a true and correct copy of the Affidavit in Support of Motion for Continuance and in Response to Plaintiffs' Objection attached to be served upon the persons identified below as follows:

[ ] First Class Mail	[ ] Overnight Mail
[ ] Hand Delivery	[ ] Facsimile
[ ] Electronic Mail	[X] Odyssey File and Serve

Eric J. Nies, Esq.
Nies Karras & Skjodal, P.C.
PO Box 759
Spearfish, SD 57783

which address is the last address known to the subscriber.

HAGG & HAGG, LLP

By: */s/ Kent R. Hagg*
Kent R. Hagg
Attorneys for Defendants
P.O. Box 750
Rapid City, SD 57709
(605) 348-6521

STATE OF SOUTH DAKOTA	)	**IN CIRCUIT COURT**
	) SS.	
COUNTY OF BUTTE	)	**FOURTH JUDICIAL CIRCUIT**
JEREMY COYLE and ABBEY COYLE,	)	**09CIV23-000061**
	)	
Plaintiffs,	)	**RESPONSE TO PLAINTIFFS BRIEF IN**
v.	)	**SUPPORT OF MOTION FOR PARTIAL**
	)	**SUMMARY JUDGMENT AND MOTION TO**
KENNETH MCFARLAND and	)	**RECONSIDER MOTION FOR CONTINUANCE**
KELLI MCFARLAND,	)	**AND MOTION TO DENY PLAINTIFFS**
	)	**REQUEST FOR PROTECTIVE OBJECTION**
Defendants.	)	**TO SUBMISSION OF EVIDENCE BY DEFENDANTS**

Comes now, Defendants Kenneth McFarland and Kelli McFarland, by and through their attorney records, Kent R. Hagg, and respectfully refer the Court to Defendants' Answer to Statement of Material Facts, and Affidavits of Kenneth McFarland and Kent R. Hagg.

The evidence and testimony at the scheduled hearing will establish there are genuine issues of material fact in this matter and Plaintiffs Motion for Partial Summary Judgment should be denied, as well as Plaintiffs Objection to Submission of Evidence by Defendants. Further, Defendants move this Honorable Court to reconsider Defendants Motion to Continue this matter as significant material facts continue to be uncovered and require additional discovery, including Affidavits and Depositions as more fully set forth in the above-referenced Affidavits.

This action for the intentional tort of trespass should not be a substitute for a quiet title action or other declaratory judgment regarding the boundaries in dispute and should be dismissed. Further, as found by Judge Francy Foral in the Protection Order granted on August 4, 2023, the Court found that the boundaries are in dispute and could not be used as a defense against stalking Defendants. Existence of said Protection Order is prima facie evidence by Abbey Coyle that in fact a boundary dispute exists.

Defendants purchased the property in 2015 in good faith and with a title insurance policy issued by Black Hills Title, Inc. Plaintiffs purchased Lot Q1 in 2019, four years after improvements had been made on Lot 25A, specifically Defendants' home and driveway. Now, four years after Defendants purchased Lot Q1, they assert boundaries which Defendants, in good faith, believe are different than the current survey demonstrates. The boundaries asserted by Plaintiffs actually extend into a significant portion of Defendants concrete driveway, which has been in place since 2013. (*See* Exhibit 1, pictures of Defendants' driveway).

In May, 2023, Plaintiffs ordered a surveyor to mark the disputed corner boundaries of Lot Q1. This resulted in the surveyor driving a corner pin into and through Defendants concrete driveway. Never have Defendants believed they were on private property as Plaintiffs assert. Defendants maintain the subject disputed location is future dedicated right-of-way as per the Subdivision Improvement Agreement, as was the rest of the plats in the subdivision pursuant to specific Subdivision Improvements Agreements. Regardless, Defendants have a vehicle and trailer in what they believe to be right-of-way set-back and also that the area in dispute includes their driveway, which also was the Building Committee's belief to be right-of-way set-back.

James Dacar, an owner of development company Dacar, Inc. and member of the Building Committee at the time of approval of placement of driveway and home, will testify that a portion of the driveway was located in the set-back of the future right-of-way and would not have been approved if the Committee believed any part of the driveway was on the private property of another. James Dacar will also testify that at the time of sale of Lot 25A to McFerlands, it was the intent of Dacar, Inc. to proceed with Walworth St. through Lot Q1. In anticipation of the same, public utility easements had already been granted and City sewer is already installed in the anticipated Walworth Street right-of-way.

Defendants respectfully move this Honorable Court to deny Plaintiffs Motion for Partial Summary Judgment in that as set forth in the above-referenced Affidavits, a significant amount of discovery has yet to be conducted. The same is contemplated by SDCL §15-6-56(c) in that the burden is on the moving party to establish that there is no genuine issue as to a material fact.

Further, we pray this Honorable Court to give leave to deadline schedule for which Defendants were to respond in that Defendants attorney, for personal reasons, was unable to meet the deadlines set forth in the rigorous timeline for proper response and further, had inadequate time to conduct additional discovery. Defendants have clean hands in this matter. They purchased the land and home in good faith only be to be confronted by Plaintiffs eight years after the purchase of their home that a boundary dispute exists. A summary judgment on the intentional tort of trespass is not the proper action for a quiet title action or resolution of this boundary dispute.

> "Summary Judgment is an extreme remedy, is not intended as a substitute for a trial and should be awarded only when the truth is clear and reasonable doubts touching upon the existence of a genuine issue of a material fact should be resolved against the movant. *Toben v. Jeske*, 718 N.W.2d 32, 2006 S.D. 57.
>
> Summary Judgment is extreme remedy, not intended as substitute for trial; it is appropriate to dispose of legal, not factual issues and, therefore, it is authorized only when movant is entitled to judgment as matter of law because there are no genuine issues of material fact. *Continental Grain Co. v. Heritage Bank*, 548 N.W.2d 507, 1996 S.D. 61."

It is well settled that summary judgment is not the proper remedy for resolution of a matter so factually based as a boundary dispute.

WHEREFORE, Defendants pray this Honorable Court to deny Plaintiffs Motion for Partial Summary Judgment and for further relief as requested herein.

Dated this 25th day of September, 2023.

HAGG & HAGG, LLP

By: */s/ Kent R. Hagg*
Kent R. Hagg
Attorneys for Defendants
P. O. Box 750
Rapid City, SD 57709
(605) 348-6521

Filed: 9/25/2023 6:00 PM CST Butte County, South Dakota 09CIV23-000061

EXHIBIT
1

Pictures

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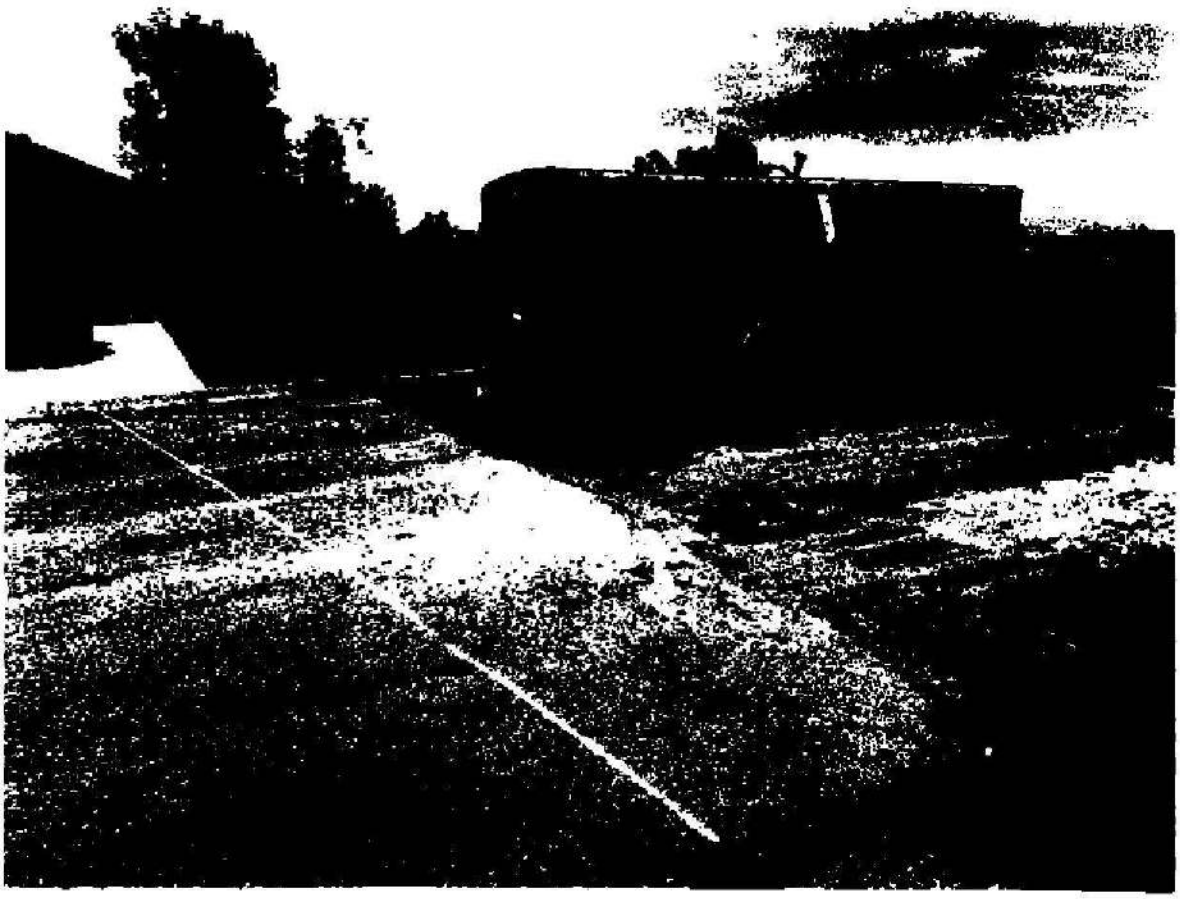

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SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By_____

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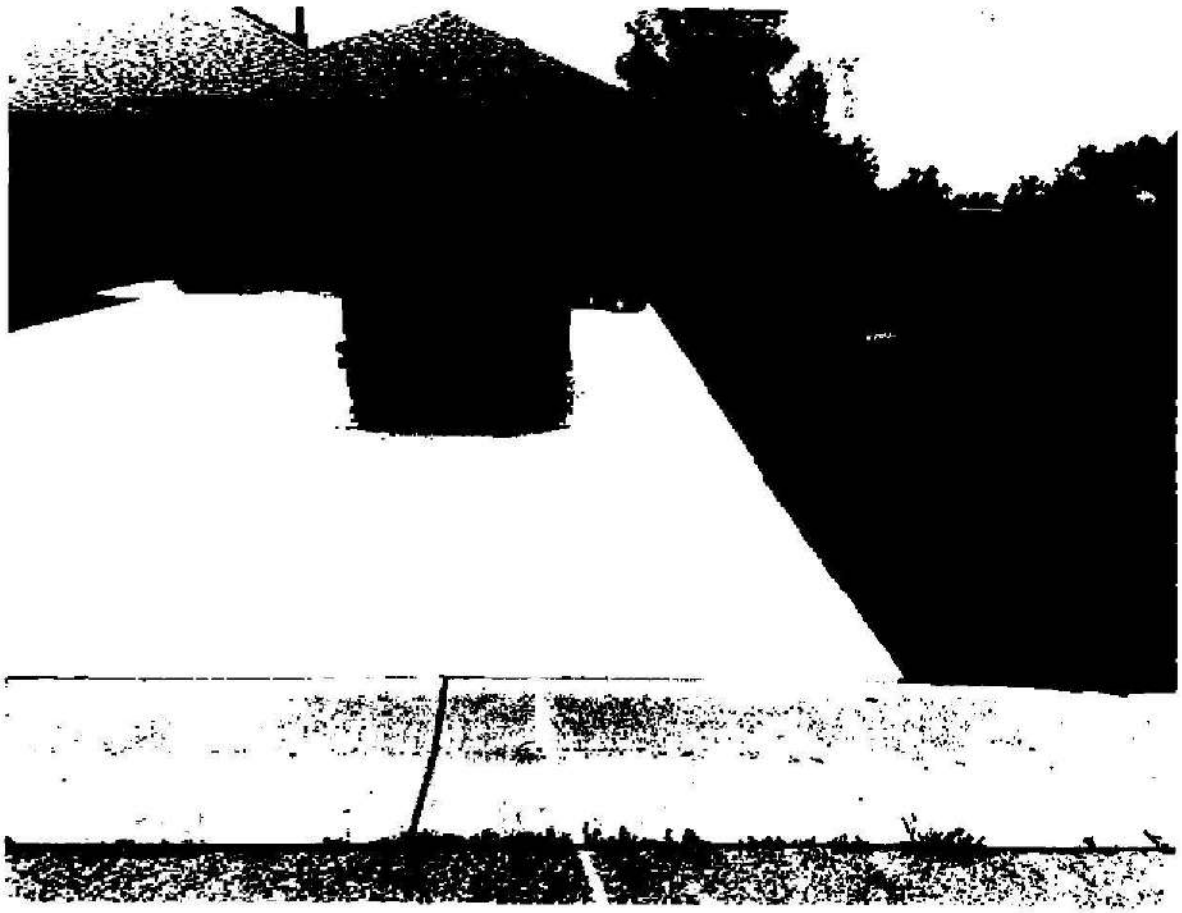

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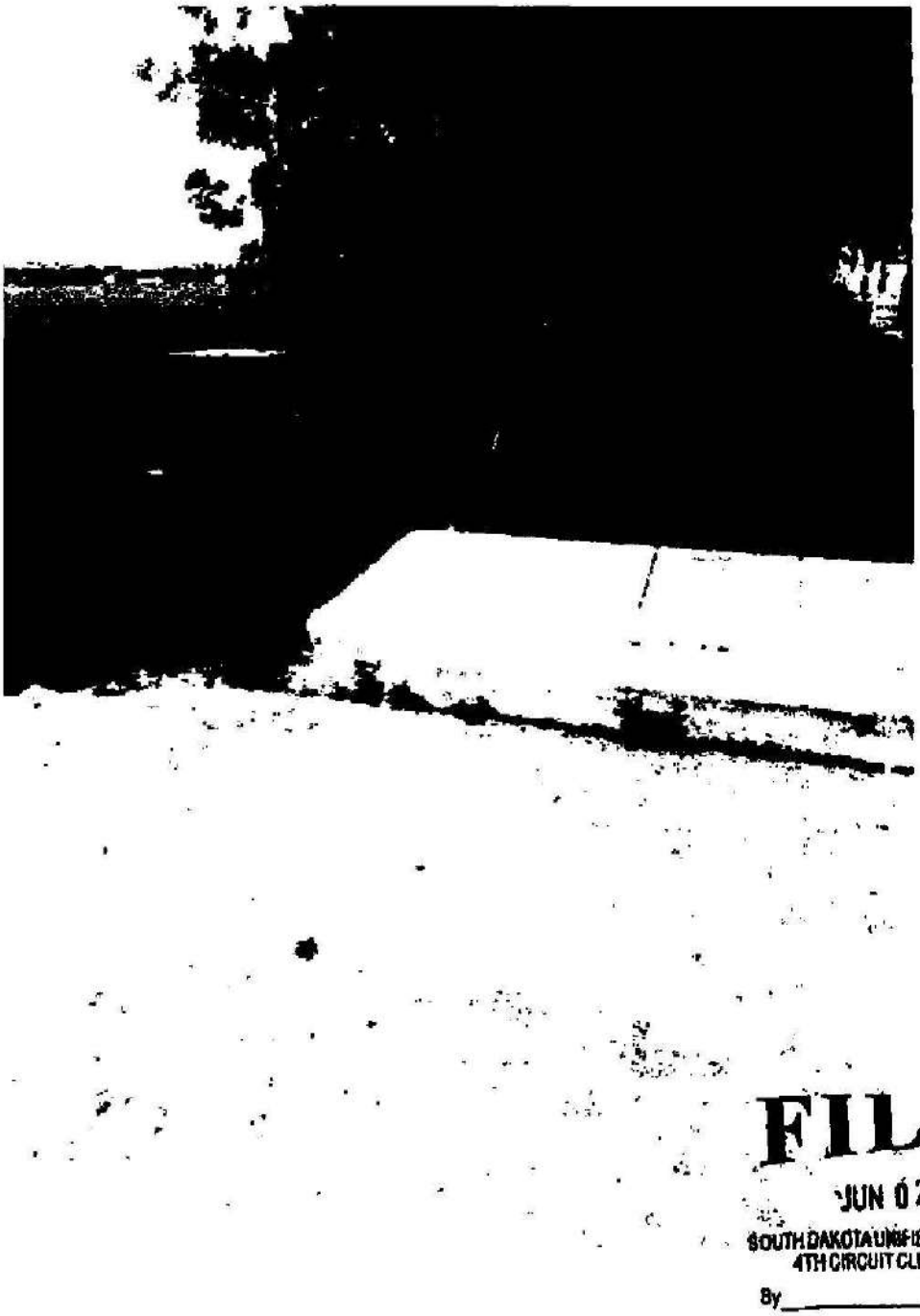

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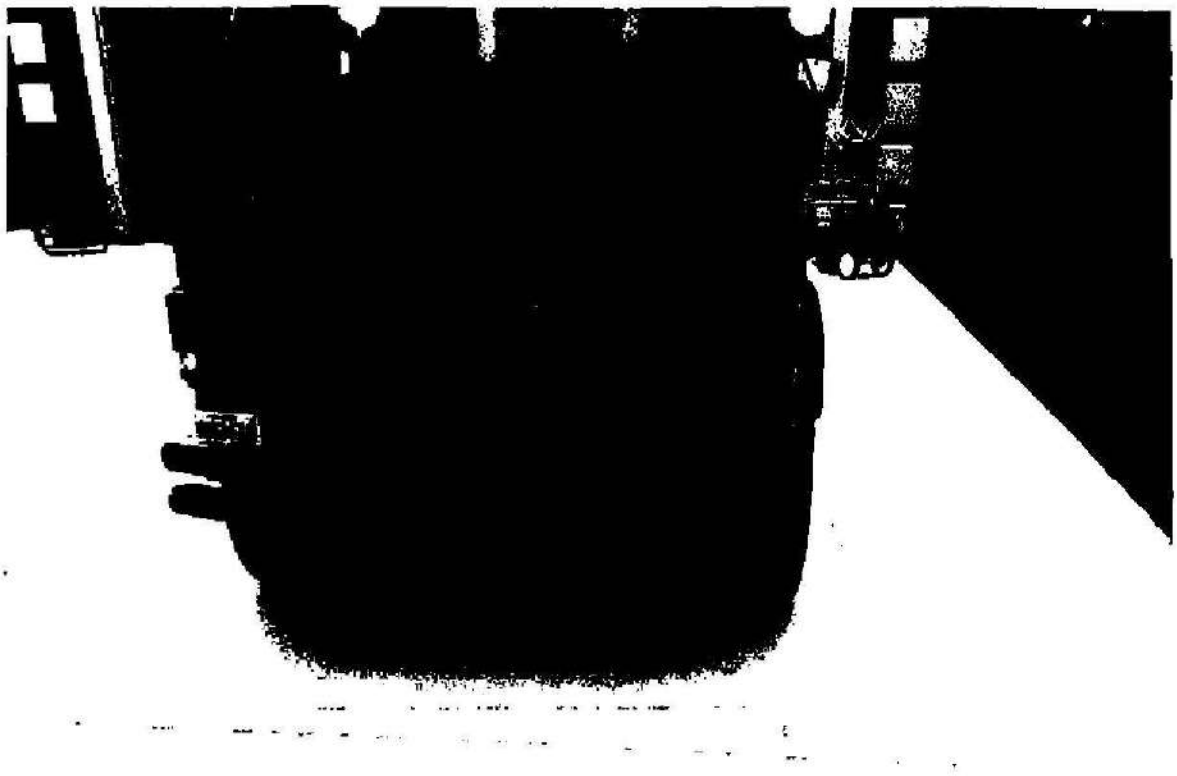

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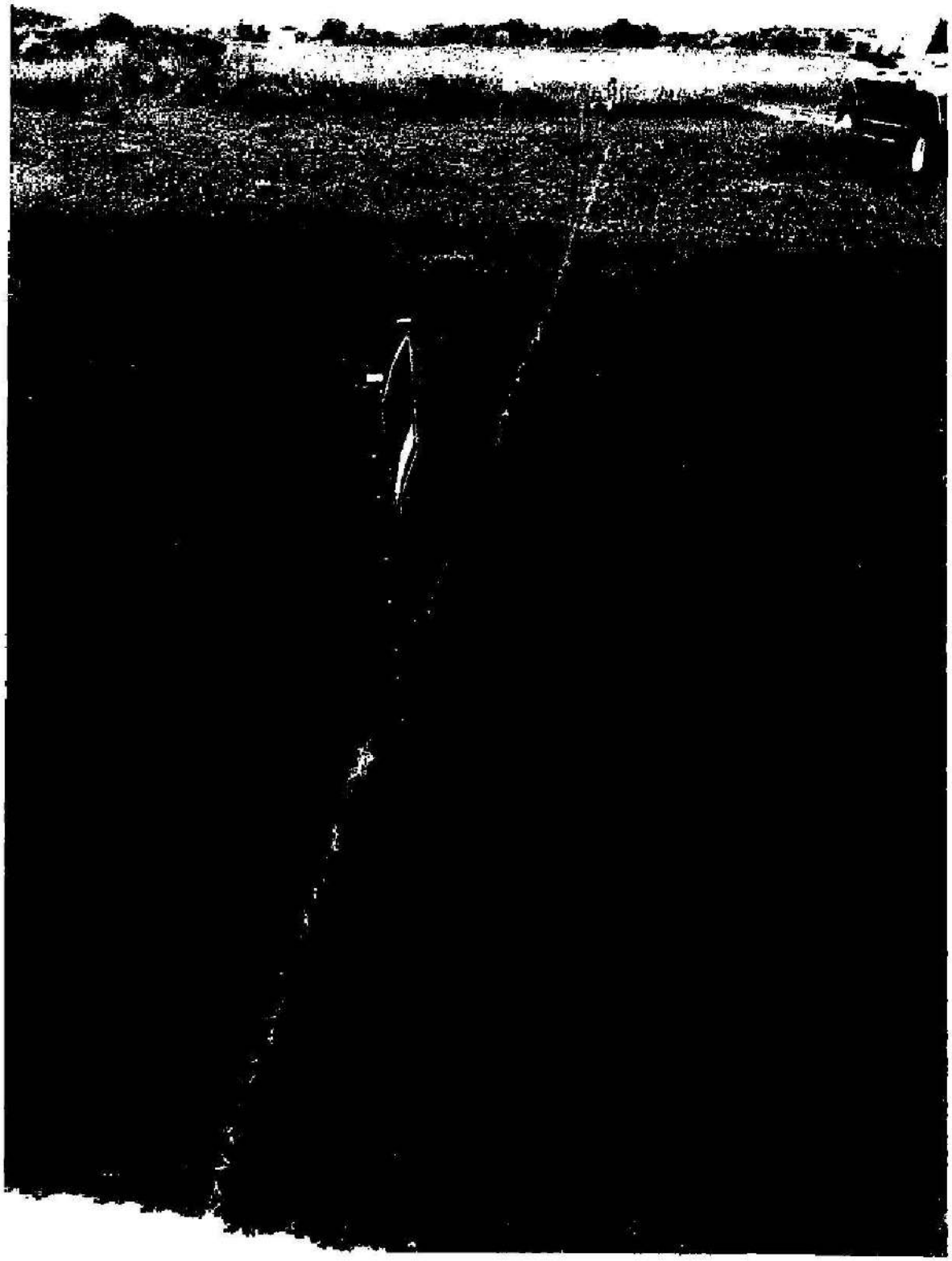

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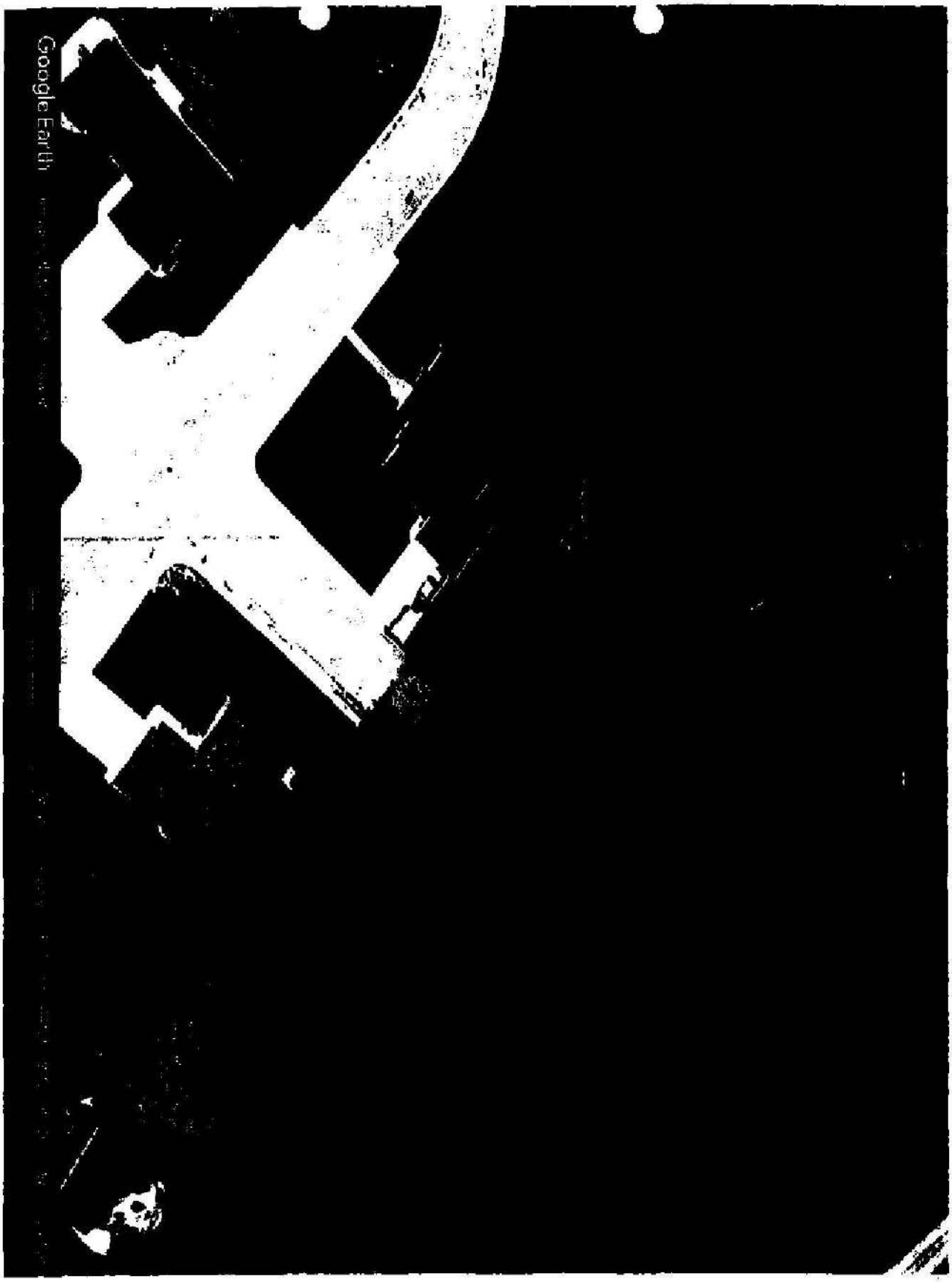
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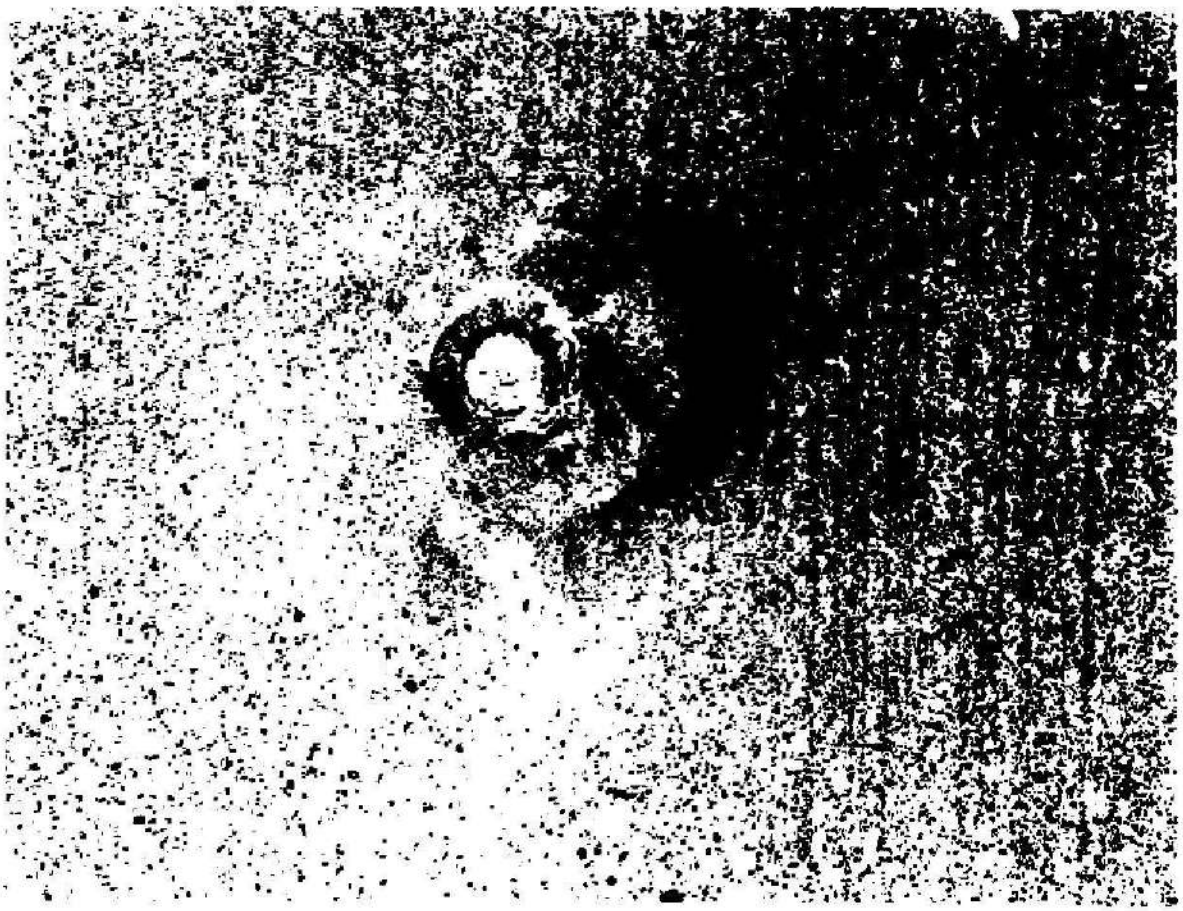

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

JEREMY COYLE AND ABBEY COYLE,

Plaintiffs/Appellees,

vs.

KENNETH MCFARLAND AND KELLI MCFARLAND,

Defendants/Appellants.

Appeal No. 30868

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

The Honorable Michael Day
Circuit Court Judge

Notice of Appeal filed on October 9, 2024

APPELLEES' BRIEF

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Filed: 2/13/2025 12:57 PM CST Supreme Court, State of South Dakota #30868

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PRELIMINARY STATEMENT

Respondents Jeremy and Abbey Coyle (the "Coyles") initiated a trespass action against Kenny and Kelly McFarland (the "McFarlands") in June 2023. The Coyles subsequently filed a *Motion for Partial Summary Judgment* along a *Statement of Material Facts*, *Brief*, other pleadings, all pursuant to Rule 56. The Coyles' attorney scheduled a hearing on the *Motion for Partial Summary Judgment* with the office of Kent Hagg, the McFarlands' attorney, and served a *Notice of Hearing* on Mr. Hagg. The McFarlands did not timely file or serve a responsive brief, or a response to the Statement of Material Facts, and on September 15, 2023, Coyles filed a *Protective Objection to Submission of Evidence by Defendants* which asserted that, pursuant to SDCL § 15-6-56(c)(2), all facts set forth in the *Statement of Material Facts* should be deemed admitted.

JURISDICTIONAL STATEMENT

On October 2, 2023, the circuit court entered its *Order for Partial Summary Judgment*. App. 1-2; SR 149-150. On December 19, 2023, the circuit court entered its *Order Denying Motion for Relief from Order Pursuant to SDCL §15-6-60(b) and/or for Reconsideration*. App. 3; SR 195. On September 9, 2024, the circuit court entered its *Final Judgment and Order* and *Findings of Fact and Conclusions of Law*. App. 4, 5-6; SR 503, 501-502. Notice of Entry of the *Final Judgment and Order* and *Findings of Fact and Conclusions of Law* was served on September 10, 2024. SR 508. McFarland's *Notice of Appeal* was filed on October 9, 2024. SR 510-511. This Court has jurisdiction pursuant to SDCL §15-26A-3.

STATEMENT OF THE ISSUES

1a. Did the Circuit Court Abuse its Discretion in Denying McFarland's Motion for Continuance Under Rule 56(f)?

The Circuit Court Did Not Abuse its Discretion in Denying McFarland's Motion for Continuance.

Most Relevant Authority:

Supreme Pork, Inc. v. Master Blaster, Inc., 2009 SD 20
South Dakota Public Assurance Alliance v. McGuire, 2018 SD 75
Benson v. State, 2006 S.D. 8
SDCL §15-6-56(f).
Restatement (Second) of Torts

1b. Did the Circuit Court Abuse its Discretion by Not Conducting an Excusable Neglect Analysis Under Rule 6(b)?

The Circuit Court Did Not Abuse its Discretion by Not Conducting an Excusable Neglect Analysis Under Rule 6(b).

Most Relevant Authority:

SDCL §15-6-6(b).

1c. Did the Circuit Court Err in Granting Summary Judgment to Coyle Due to McFarland's Untimely Response?

The Circuit Court Did Not Err in Granting Summary Judgment to Coyle Due to McFarland's Untimely Response.

Most Relevant Authority:

SDCL §15-6-56(c).

1d. Did the Circuit Court Err in Denying McFarland's Motion for Reconsideration?

The Circuit Court Did Not Err in Denying McFarland's Motion for Reconsideration.

Most Relevant Authority:

Matter of M.A.C., 512 N.W.2d 152 (S.D. 1994)
Rabo Agrifinance, Inc. v. Rock Creek Farms, 2013 S.D. 64
Hrachovec v. Kaarup, 516 N.W.2d 309, 311 (S.D. 1994)
SDCL §15-6-60(b)

2. Did the Circuit Court Err in Determining that McFarland was Trespassing upon Coyle's Property?

The Circuit Court Did Not Err in Determining that McFarland was Trespassing upon Coyle's Property.

Most Relevant Authority:

Benson v. State, 2006 S.D. 8
SDCL §15-6-56(c)
Restatement (Second) of Torts

STATEMENT OF THE CASE AND FACTS

After months of attempting to resolve the issue informally, the Coyles initiated a trespass action against the McFarlands in June 2023. SR 1 and 2-10. The Coyles' *Complaint* alleged a portion of the McFarlands' driveway apron and other of the McFarlands' assets were located on the Coyles' real estate. SR 2-10. Such *Complaint* stated that, as was set forth in all the applicable plats, the right-of-way for Walworth Street ended near where the improved road ended, which was only part of the way along the southeast boundary of the McFarland's lot; as a result such driveway apron and other assets were trespassing onto the Coyle's real estate. SR 2-10. The McFarlands filed an *Answer* denying the allegations. SR 17-20. Such *Answer* claimed that the Walworth Street right-of-way continued along the entire southeast boundary of the McFarland's lot and claimed the action for trespass could not be asserted due to an alleged "boundary… dispute". SR 18. The McFarlands did not dispute that the actual surveyed and pinned boundary lines were incorrect, just that the Walworth Street right-of-way continued past where the plat showed it ending. SR 17-20.

Meanwhile, in Butte County TPO File No. 09TPO23-000037, the Magistrate Judge had granted a protection order to Defendant/Appellant Kelli McFarland which restricted how Plaintiff/Appellee Abbey Coyle accessed her property.

The Coyles, asserting that as a matter of law they were entitled to a judgment in their favor because the applicable plats, contracts, and other

instruments demonstrated the Walworth Street right-of-way did not continue along the entire southeast boundary of the McFarland's lot, filed a *Motion for Partial Summary Judgment* which requested the Court order that the McFarlands were trespassing onto the Coyles' real estate. SR 21-22; 28-34. The *Motion for Partial Summary Judgment* was accompanied by a *Statement of Material Facts* (SR 23-27) a *Brief* (SR 28-34) and four *Affidavits* (SR 35-91) all pursuant to Rule 56.

On or about August 28, 2023, Coyles' attorney scheduled a hearing on the *Motion for Partial Summary Judgment* with the office of Kent Hagg, the McFarlands' attorney. Such hearing was set for September 28, 2023 (the "September 28 hearing"). The *Notice of Hearing* setting for the time, date, and location of such hearing was filed on August 28, 2023, and served on Mr. Hagg. SR 92.

The McFarlands did not timely file or serve a responsive brief, or a response to the *Statement of Material Facts*, and on September 15, 2023, Coyles filed a *Protective Objection to Submission of Evidence by Defendants* which asserted that, pursuant to SDCL § 15-6-56(c)(2), all facts set forth in the *Statement of Material Facts* should be deemed admitted. SR 94-95.

Between August 28, 2023 (the date the hearing on the *Motion for Partial Summary Judgment* was scheduled with Mr. Hagg) and September 15, 2023 (the date the *Protective Objection to Submission of Evidence by Defendants* was filed), neither the McFarlands nor Mr. Hagg indicated there was the need for discovery, or that there was insufficient time to prepare for the September 28 hearing, or that

"personal reasons" were getting in the way of timely response, or that for any other reason the September 28 hearing was inappropriate, inconvenient, or unreasonable.

On September 18, 2023, three days after all facts set forth in the *Statement of Material Facts* were be deemed admitted pursuant to SDCL § 15-6-56(c)(2), Mr. Hagg filed a *Motion for Continuance* which requested the September 28 hearing (which, again, Mr. Hagg had jointly scheduled) be continued for a month. SR 96-97. The *Motion for Continuance* vaguely noted "personal reasons" as the excuse for the untimely response.

In response, on the same day, the Coyles filed an *Objection to the Motion for Continuance* which stated that a hearing could only be continued for "good cause" pursuant to SDCL § 15-11-4 and argued that no good cause had been shown by the McFarlands. SR 98-99. The *Objection to the Motion for Continuance* informed the Circuit Court that, due to the protection order granted in Butte County TPO File No. 09TPO23-000037, "Plaintiffs are restricted from accessing and utilizing a portion of their own property pending the trial court's decision in this matter." SR 98. As a result, the Coyles' stressed, "[t]ime is therefore of the essence to address this matter…." Id. The *Objection to the Motion for Continuance* also reminded the Circuit Court the Coyles had specifically scheduled the September 28, 2023, hearing with the cooperation and consent of Mr. Hagg to "avoid just this kind of situation." SR 98-99. As a result, the McFarlands were given a "full calendar month to prepare for the hearing" and

yet only asked for a continuance after the SDCL § 15-6-56(c)(2) deadline had passed. SR 98-99.

Two days later, on September 20, 2023, Mr. Hagg submitted an *Affidavit in Support of Motion for Continuance and Initial Response to Plaintiffs' Motion for Partial Summary Judgment and in Response to Plaintiffs Objection*. SR 104-110. Such supporting *Affidavit* referenced SDCL § 15-6-56(f) and extended the continuance request to at least sixty days for discovery. SR 104-105. This *Affidavit* was filed nearly a week after the SDCL § 15-6-56(c)(2) deadline and no SDCL § 15-6-56(f) motion was made prior to the § 15-6-56(c)(2) deadline. In fact, no SDCL § 15-6-56(f) motion was made at all; it was merely mentioned in an *Affidavit* and was never noticed for hearing. As the Circuit Court was informed at the Rule 60(b) hearing, if a SDCL § 15-6-56(f) motion had been properly submitted, the Coyles would have contested it on the grounds that all the necessary facts were already in the record.

Also filed on September 20, 2023, was a supporting *Affidavit* of Kenneth McFarland which alleged various factual questions were at issue. SR 101-103. Again, Mr. McFarland's supporting *Affidavit* was filed nearly a week after the SDCL § 15-6-56(c)(2) deadline had passed.

Later on September 20, 2023, the Coyles filed an *Objection to Defendants' Affidavits in Support of Motion for Continuance*. SR 114-117. Such *Objection to Defendants' Affidavits in Support of Motion for Continuance* reminded the court the "clear statutory deadline has passed" and alleged the "Defendants appear to be

concocting after the fact reasons for continuing a hearing when in fact Defendants simply missed the clear filing deadline." SR 114-115. The *Objection to Defendants' Affidavits in Support of Motion for Continuance* also argued the doctrine of laches precluded a continuance because "Defendants have engaged in unreasonable delay and did not seek any relief until after the deadline had passed." SR 116. The *Objection to Defendants' Affidavits in Support of Motion for Continuance* also addressed the SDCL § 15-6-56(f) reference and substantive allegations made in Mr. Hagg's *Affidavit in Support of Motion for Continuance and Initial Response to Plaintiffs' Motion for Partial Summary Judgment and in Response to Plaintiffs Objection* by stressing that none of the facts Mr. Hagg alleged to need to investigate would affect the outcome of the Summary Judgment in any case. SR 115.

Having considered all the pleadings and the arguments advanced therein (i.e., the original *Motion for Continuance*, the Coyle's *Objection* thereto, Mr. Hagg's and Mr. McFarland's *Affidavits*, and the Coyle's *Objection* thereto), the Circuit Court denied the *Motion for Continuance* in an email dated September 21, 2023, for "all the reasons set forth by Plaintiffs in their objections." SR 118. As noted, such reasons included the need to resolve the protection order against Plaintiff/Appellee Abbey Coyle and the fact that the facts allegedly sought by Mr. Hagg would not affect the outcome of the Summary Judgment.

Prior to making its decision, the Circuit Court gave each party the opportunity to brief the matter before making a decision on the *Motion for Continuance*.

Four days later, on September 25, 2023 – eleven days after the SDCL § 15-6-56(c)(2) deadline had passed – the McFarlands finally filed an untimely response to the *Statement of Material Facts* (SR 131-134) along with a supporting *Response to Plaintiff's Brief in Support of Motion for Partial Summary Judgment and Motion to Reconsider Motion for Continuance and Motion to Deny Plaintiffs Request For Protective Objection to Submission of Evidence by Defendants* (SR 120-130). Concurrently, Mr. Hagg also served Subpoenas on two individuals which directed them to appear at the September 28, 2023, hearing, even though the hearing was on a summary judgment motion. SR 135-136.

On September 26, 2023, the Coyles filed an *Objection to Defendants' Response to Plaintiff's Brief . . . and Motion to Reconsider* which again noted all the facts in the *Statement of Material Facts* had already been admitted and argued that any type of 60(b) relief was inappropriate. SR 142-143. The Coyles also filed a *Motion* asking the Court to quash Mr. Hagg's Subpoenas on the grounds they were improper. SR 140-141. Lastly, the Coyles filed a *Renewed Protective Objection to Submission of Evidence by Defendants* which reviewed for the Circuit Court in detail why they were entitled to all the relief requested in the *Motion for Partial Summary Judgment*. SR 137-139.

At the hearing on September 28, 2023, the attorneys for the Coyles and the McFarlands each presented arguments. Among other things, the Coyles' attorney stressed the need to resolve the protection order against Plaintiff/Appellee Abbey Coyle. SR 578. Mr. Hagg argued that the remedy sought should not be granted because the Coyles failed to "establish that intent of the McFarlands to trespass existed." SR 582. After quashing Mr. Hagg's Subpoenas (SR 148), the Court granted the *Motion for Partial Summary Judgment* because all "facts set forth in Plaintiff's *Statement of Material Facts* dated August 24, 2023, have been admitted by the Defendants." SR 149-150.

After retaining new counsel, the McFarlands filed a *Motion for Relief from Order Pursuant to SDCL §15-6-60(b) and/or Motion for Reconsideration*. SR 162-175. On November 16, 2023, the Coyles filed a *Brief in Objection* thereto, which argued that the McFarlands were not entitled to the "extraordinary remedy" requested because the required elements had not been demonstrated. SR 178-181. The *Brief in Objection* also noted the Circuit Court had carefully reviewed the various pleadings submitted in favor of and in opposition to a continuance and was "fully aware of the situation at the time." SR 178. Further, no request for continuance or Rule 56(f) was made until after the SDCL § 15-6-56(c)(2) deadline had passed, and all the facts set forth in Plaintiff's *Statement of Material Facts* had been admitted. SR 179.

At the hearing on December 11, 2023, the Circuit Court denied the *Motion for Relief from Order Pursuant to SDCL §15-6-60(b) and/or Motion for*

Reconsideration. SR 195, 593-597. In denying the *Motion for Relief from Order Pursuant to SDCL §15-6-60(b) and/or Motion for Reconsideration*, Judge Day noted the fact Mr. Hagg attempted to subpoena witnesses for a hearing on a summary judgment motion was of concern to him. SR 577.

Following a September 9, 2024, court trial, the Circuit Court entered *Findings of Fact and Conclusions of Law* and a *Final Judgment and Order* on September 9, 2024. SR 501-503. The Notice of Entry thereof was served on September 10, 2024. SR 508.

STANDARD OF REVIEW

This Court reviews a "circuit court's decision on a motion for summary judgment under the de novo standard of review." *Geidel v. De Smet Farm Mut. Ins. Co. of S.D.*, 2019 SD 20, ¶7. "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.'" Id. (quoting SDCL §15-6-56(c)).

A circuit court's decision to grant or deny a request for continuance under Rule 56(f) or an enlargement of time under Rule 6(b) is reviewed for an abuse of discretion. *Davies v. GPHC, LLC*, 2022 SD 55, ¶51. The trial court's exercise of discretion "must have a sound basis in the evidence presented." *Miller v. Jacobsen*, 2006 SD 33, ¶18, 714 N.W.2d 69, 76 (citations omitted). "An abuse of discretion occurs when discretion is exercised to an end or purpose not justified by,

and clearly against, reason and evidence." *Id.* An abuse of discretion is "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 SD 20, ¶ 57, 764 N.W.2d 474, 490.

ARGUMENT

1. THE CIRCUIT COURT DID NOT ERR IN GRANTING COYLE'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

a. The Circuit Court Did Not Abuse its Discretion in Denying McFarland's Motion for Continuance Under Rule 56(f).

A circuit court's decision to grant or deny a request for continuance under Rule 56(f) or an enlargement of time under Rule 6(b) is reviewed for an abuse of discretion. *Davies v. GPHC, LLC, 2022 SD 55, ¶51, South Dakota Public Assurance Alliance v. McGuire, 2018 SD 75, ¶8, 919 N.W.2d 745, 746.* "An abuse of discretion occurs when discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Id.* An abuse of discretion is "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 SD 20, ¶ 57.

In the present case, in making its decision to deny the Motion for Continuance, the Circuit Court noted that it considered Appellee's *Protective Objection to Submission of Evidence by Defendants*, Appellants' *Defendants Motion for Continuance* along with two *Affidavits in Support of Moton for Continuance*, Appellees' *Objection to Defendants Motion for Continuance*, and

Appellees' *Objection to Defendants' Affidavits in Support of Motion for Continuance*. In total, these pleadings take up 23 pages of the Settled Record. In response to all of this, the Court stated in its September 21, 2023, email: "I have reviewed the pleadings including Defendant's Affidavit and the two objections by the Plaintiff. For all the reasons set forth by Plaintiffs in their objections I am denying the Defendants' Motion to Continue." SR 118. Therefore, although brief in its language denying the Motion to Continue, the Circuit Court made it clear that it had fully considered all arguments of counsel, including arguments by counsel related to the underlying facts and the proper application of Rule 56(f). Appellants argue that the Circuit Court failed to engage in an analysis of the application of Rule 56(f), but in fact, Appellants simply do not like the result of the Circuit Court's 56(f) analysis.

As Appellants note on page 16 of their Appellants' Brief, a party seeking a continuance under Rule 56(f) must "show how further discovery will defeat the motion for summary judgment." *Davies*, at ¶51. To make this showing, an affidavit must identify:

> the probable facts not available and what steps have been taken to obtain those facts, how additional time will enable the nonmovant to rebut the movant's allegations of no genuine issue of material fact, and why facts precluding summary judgment cannot be presented at the time of the affidavit.

Id. In their *Affidavits*, Appellants failed to meet this burden and requirement of Rule 56(f). The underlying dispute between the parties involves whether the Walworth Street right-of-way continued along the entire southeast boundary of the

McFarland's lot. In their *Affidavits in Support of Motion for Continuance*, Appellants mentioned that they needed more time to pursue a claim against Stewart Title Guaranty Company for apparently failing to inform Appellants of the correct location of the property boundary. SR 101, 106. However, even if the Circuit Court had granted the continuance to allow Appellant to pursue such proposed indemnification claim, the result of this claim would not have impacted the outcome of the trespass action. Meaning, the Circuit Court correctly found that no material facts would have been impacted by the outcome of such indemnification claim. Further, the pursuit of a claim against the Sewart Title Guaranty Company or anyone else was not a matter of Appellants' requesting to conduct additional discovery, and Appellants were (and presumably still are) free to pursue such claim at any time irrespective of the outcome of the present case.

Further, Appellants' arguments in claiming that the Circuit Court erred in refusing to grant a continuance in the trespass action demonstrate that the Appellants misunderstand and have misapplied the elements of civil trespass. As noted in their *Complaint*, Appellees brought a cause of action for civil trespass, which this Court has defined as:

> One who intentionally and without a consensual or other privilege
> (a) enters land in possession of another or any part thereof or causes a thing or third person so to do, or
> (b) remains thereon is liable as a trespasser to the other irrespective of whether harm is thereby caused to any of his legally protected interests.

Benson v. State, 2006 S.D. 8 ¶74 (citing Restatement (Second) of Torts § 158). Appellants have mistakenly interpreted the "intent" element of civil trespass to

mean that Appellants would be absolved of liability if they can show that they entered and remained upon Appellees' property under a mistaken belief that the that the Walworth Street right-of-way continued along the entire southeast boundary of the McFarland's lot.

However, pursuant to the Restatement (Second) of Torts (which has been cited and relied upon by this Court) intrusions under mistake do not absolve a tortfeasor of liability. Pursuant to the Restatement (Second) of Torts § 164:

> One who intentionally enters land in the possession of another is subject to liability to the possessor of the land as a trespasser, although he acts under a mistaken belief of law or fact, however reasonable, not induced by the conduct of the possessor, that he
> (a) is in possession of the land or entitled to it, or
> (b) has the consent of the possessor or of a third person who has the power to give consent on the possessor's behalf, or
> (c) has some other privilege to enter or remain on the land.

Further, in comment *a.* to § 164, the Restatement (Second) of Torts goes on to state:

> *a.* In order to be liable for a trespass on land under the rule stated in § 158, it is necessary only that the actor intentionally be upon any part of the land in question. It is not necessary that he intend to invade the possessor's interest in the exclusive possession of his land and, therefore, that he know his entry to be an intrusion. If the actor is and intends to be upon the particular piece of land in question, it is immaterial that he honestly and reasonably believes that he has the consent of the lawful possessor to enter, or, indeed, that he himself is its possessor.

Therefore, the information sought by Appellants to justify their Motion for Continuance was based upon an incorrect interpretation of civil trespass. The Circuit Court's denial of such Motion for Continuance was correct, and well within the Circuit Court's discretion. As stated above, Appellants must show that the

Circuit Court's decision to deny the Motion for Continuance was "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 SD 20, ¶ 57. Here, the Circuit Court's decision was reasonable and well-considered based on several pleadings, and should be upheld by this Court.

b. The Circuit Court Did Not Abuse its Discretion by Not Conducting an Excusable Neglect Analysis Under Rule 6(b).

Pursuant to SDCL § 15-6-6(b) (referred to as Rule 6(b) herein):

> When by this chapter or by a notice given thereunder or by an order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:
> (1) With or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or
> (2) Upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect
>
> but it may not extend the time for taking any action under §§ 15-6-50(b), 15-6-59(b) and (d), and 15-6-60(b), except to the extent and under the conditions stated in them.

Although the decision as to whether a Circuit Court should undergo analysis and make a decision pursuant to SDCL §15-6-6(b) is clearly discretionary, Appellants seem to claim that this analysis is mandatory (even when, as here, Appellant made no affirmative motion under Rule 6(b) prior to the Circuit Court's decision). The Circuit Court did not err by failing to perform an explicit analysis of Rule 6(b) on its own motion.

Even if the Circuit Court had performed an explicit analysis pursuant Rule 6(b), the Circuit Court would have come to the same conclusion. On Page 28 of their Appellants' Brief, Appellants incorrectly stated "[f]urthermore, there would be no prejudice to Coyle if the matter were delayed to allow the parties to conduct discovery and take the normal course of any litigation." However, Appellees would have been prejudiced by the delay of this matter. As shown in the record, there were protection order proceedings between the parties related to the real property at issue in TPO File No. 09TPO23000037. Appellant Kelli J. McFarland petitioned for a permanent protection order against Appellee Abbey Coyle, and was ultimately successful in obtaining a *Permanent Order for Protection* (SR 111-113). In essence, due to Appellants' allegation that the Walworth Street right-of-way continued along the entire southeast boundary of the McFarland's lot, Magistrate Judge Francy Foral entered a protection order against Plaintiff/Appellee Abbey Coyle, which partially prohibited Abbey from accessing and utilizing her own property. However, Judge Foral explicitly stated in her *Permanent Order for Protection* that "[t]his protection order may expire upon the decision of the circuit court in the civil matter" which was a reference to the trespass action at issue in this appeal. SR 113.

Therefore, Appellees were in need of a prompt resolution to the civil trespass action so that they would not be deprived of and barred from utilizing their own property. In its *Order for Partial Summary Judgment*, the Circuit Court took

Judicial Notice of the TPO file, and specifically Ordered that the *Permanent Order for Protection* be immediately terminated. SR 149-150.

c. The Circuit Court Did Not Err in Granting Summary Judgment to Coyle Due to McFarland's Untimely Response.

On page 31 of their Appellants' Brief, Appellants' state that "the circuit court has determined that McFarland committed the intentional tort of trespass based *solely* on their failure to respond to the Statement of Material Facts, which the circuit court found were thus 'deemed admitted.'" However, the Circuit Court did not state that Appellants' missed deadline pursuant to SDCL § 15-6-56(c)(2) was the sole reason for its decision. As discussed above, the Circuit Court carefully considered all of the Appellants' Rule 56(f) arguments as to further information they wished to gather, and Appellees' responses to those arguments showing that further information would not change the material facts at issue regarding the right-of-way. The Circuit Court allowed both parties to submit lengthy pleadings regarding both procedure and substance prior to making its decision.

Also, as is discussed above, Appellants' misapplication of the "intent" element of civil trespass led Appellants to seek information that wasn't material in the determination of the matter. At the motions hearing on September 28, 2023, counsel for Appellants frequently misstated the "intent" element of civil trespass. Mr. Hagg stated "I think we have two parties with clean hands. My clients certainly do. It was never their intent to try to trespass onto somebody else's land, use other people's land, anything like that." SR 592. Later, Mr. Hagg stated "[s]o

that is what will be resolved. And that is what creates a genuine issue as to material fact. That is what goes to the intent of the parties. My clients, again, have clean hands and no intent to trespass." SR 593. In closing, Mr. Hagg stated "[m]y clients, again, have clean hands and no intent to trespass." SR 593. As discussed in detail above, Appellants' specific intent and alleged mistaken belief that the Walworth Street right-of-way continued along the entire southeast boundary of the McFarland's lot issue is of no consequence in an action for civil trespass. It is clear from Appellants' counsel's arguments that Appellants believed that further discovery was needed to establish the parties' intent, and that Appellants' intent was a material fact in the trespass action. As discussed above, Appellants' intent as to the existence or non-existence of a right-of-way is irrelevant, and Appellants' mistake of law should be detrimental to their appeal and request for remand.

Further, at the motions hearing on September 28, 2023, the Circuit Court first dealt with two Subpoenas that Appellants had issued, which sought to require testimony of fact witnesses at a non-evidentiary hearing. SR 135, 136. Prior to the hearing, Appellees appropriately filed a *Motion for Order Quashing Subpoenas* (SR 140-141), which was granted by the Circuit Court's *Order Quashing Subpoenas* (SR 148). At the hearing, the Circuit Court noted that "[i]n all my years, I have never had testimony during any type of summary judgment hearing." SR 577. The Circuit Court clearly took into account the type of information that Appellants sought to introduce to defeat Appellees' *Motion for Partial Summary*

Judgment, and also the manner in which Appellants sought to produce such evidence.

The Circuit Court correctly followed the rules of civil procedure in granting Appellee's *Motion for Partial Summary Judgment* and exercised its available discretion appropriately.

d. The Circuit Court Did Not Err in Denying McFarland's Motion for Reconsideration.

Rule 60(b) is "an extraordinary remedy which should be granted only where there has been a showing of exceptional circumstances." *Matter of M.A.C.*, 512 N.W.2d 152, 154 (S.D. 1994). Thus, a motion under SDCL § 15-6-60(b) "is not a substitute for an appeal. It does not allow relitigation of issues that have been resolved by the judgment. Instead, it refers to some change in conditions that makes continued enforcement inequitable." *Rabo Agrifinance, Inc. v. Rock Creek Farms, 2013 S.D. 64*, ¶ 14 (internal citations and quotations omitted).

The decision "to grant or deny a Rule 60(b) motion rests within the sound discretion of the trial court and will not be disturbed on appeal except for abuse. The term abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence. The test when reviewing matters involving judicial discretion is whether we believe a judicial mind, in view of the law and the circumstances, could reasonably have reached the conclusion." *Hrachovec v. Kaarup*, 516 N.W.2d 309, 311 (S.D. 1994) (internal citations and quotations omitted).

In the present case, Appellants argue that the Circuit Court's decision was based entirely on Mr. Hagg's missed summary judgment deadline. In fact, in Appellants' *Reply in Support of Motion for Relief from Order Pursuant to SDCL § 15-6-60(b) and/or Motion for Consideration,* they sought to distinguish between Mr. Hagg's mistake of missing a filing deadline, and a mistake of law, which Appellants admit "can never constitute 'excusable neglect.'" SR 185. However, as discussed in detail above, Appellants *did* make a mistake of law as to the core elements of civil trespass and a primary argument in favor of the continuance was predicated on this mistake of law. Through all of their pleadings, affidavits, and other filings, Appellants insist that they should have been allowed to present evidence as to their good faith belief that the Walworth Street right-of-way continued along the entire southeast boundary of the McFarland's lot. However, such information is irrelevant in a determination of civil trespass, and the Circuit Court correctly disallowed such a meritless defense to continue.

In the present case, the Circuit Court acted well within its broad discretion to deny Appellants' *Motion for Relief from Order Pursuant to SDCL § 15-6-60(b) and/or Motion for Consideration.*

2. THE CIRCUIT COURT DID NOT ERR IN DETERMINING THAT MCFARLAND WAS TRESPASSING UPON COYLE'S PROPERTY.

Appellants argue that this case should be remanded back to the Circuit Court to allow Appellants an opportunity to conduct more discovery. However, the information that Appellants seek to produce in discovery will not change the

ultimate outcome of the present case. On page 35 of their Brief, Appellants state that

> . . . McFarland had been deprived of any opportunity to discover facts that would tend to disprove *any* of the material facts that were deemed admitted. However, McFarland maintains that they have always acted in good faith and on a reasonable belief that Walworth Street extended, or was intended to be extended, along their entire Lot 25A."

Appellants believe that if this case is remanded and they are allowed to produce evidence regarding their state of mind, the outcome of this case will change. However, Appellants state of mind while trespassing on Appellees land is irrelevant, and is not a material fact in an action for civil trespass.

The Circuit Court did not err in determining that McFarland was trespassing, and the Circuit Court's decision should be allowed to stand.

CONCLUSION

To succeed on appeal, Appellant must show that the Circuit Court abused its discretion in either failing to grant a continuance under Rule 56(f), failing to conduct an excusable neglect analysis under Rule 6(b), or failing to grant a Motion for Reconsideration under Rule 60(b). As shown in this Appellees' Brief, the Circuit Court acted well within its discretion, and its sound judgment should not be overturned. As discussed in this Appellees' Brief, Appellants' request for a remand is not warranted and is not in the interest of judicial economy, as Appellants misunderstand the intent element of civil trespass and will therefore be unsuccessful if this case is remanded back to the Circuit Court. Appellees respectfully ask this Court to Affirm the Circuit Court's decision.

Dated February 13, 2025

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ORAL ARGUMENT IS HEREBY RESPECTFULLY REQUESTED

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66, Eric John Nies, counsel for Appellees does hereby submit the following:

The foregoing brief is 24 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 13 point. The word processor used to prepare this brief indicates that there are 5,016 words in the body of the Brief (excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance). This brief complies with the length requirements of SDCL §15-26A-66.

/s/ Eric John Nies
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 13, 2025, he electronically filed the foregoing documents with the South Dakota Supreme Court, and further certifies that the foregoing document was emailed to:

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The undersigned further certifies that the original Appellees' Brief in the above-entitled action was mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class postage thereon prepaid, on the date written above.

/s/ Eric John Nies_____
Eric John Nies

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

JEREMY COYLE AND ABBEY COYLE,

Plaintiffs/Appellees,

vs.

KENNETH MCFARLAND AND KELLI MCFARLAND,

Defendants/Appellants.

Appeal No. 30868

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

The Honorable Michael Day
Circuit Court Judge

Notice of Appeal filed on October 9, 2024

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Argument

1. The Circuit Court Erred in Granting Coyle's Motion for Partial Summary Judgment.

a. The Circuit Court Abused its Discretion in Denying McFarland's Motion for Continuance Under Rule 56(f).

In defending the circuit court's ruling, Coyle argues that the circuit court's cursory statement in its September 21, 2023 e-mail ("For all the reasons set forth by Plaintiffs in their objections, I am denying the Defendants' Motion to Continue.") is sufficient to establish that the court engaged in the requisite 56(f) analysis. *Appellee's Brief* at 12-13. Even if this sentence was sufficient, Coyle's argument fails because the various objections they filed were not premised upon – and did not even include – a Rule 56(f) analysis.

Coyle filed three Objections prior to September 21, 2023. The first was filed on September 15 – one day after McFarland's response to the summary judgment motion was due. In this Objection, Coyle argued that because McFarland had not timely filed a response to the Statement of Material Facts, all of the facts contained therein "are deemed admitted" pursuant to SDCL §15-6-56(c)(3). SR 94 at ¶¶ 4-5, 7. This Objection contains no reference to, or analysis of, the Rule 56(f) factors set forth by the South Dakota Supreme Court. *Davies v. GPHC, LLC*, 2022 SD 55, 980 N.W.2d 251; *Stern Oil Co. v. Border States Paving, Inc.*, 2014 SD 28, 848 N.W.2d 273; *Betty Jean Strom Trust v. SCS Carbon Transport, LLC*, 2024 SD 48, 11 N.W.3d 71; *Dakota Industries, Inc. v. Cabela's Com., Inc.*, 2009 SD 39, 766

N.W.2d 510; *Harvieux v. Progressive Northern Ins. Co.*, 2018 SD 52, 915 N.W.2d 697; *Gores v. Miller*, 2016 SD 9, 875 N.W.2d 34.

The second was filed on September 18, after McFarland filed a Motion for Continuance. In this Objection, Coyle argued that "time is ... of the essence" because Coyle was "restricted from accessing and utilizing a portion of their own property" due to the Protection Order entered in another case by Judge Foral.[1] Coyle further argued that the hearing was scheduled on August 28 with the consent of Attorney Hagg, and he thus had three weeks[2] to request a continuance. Finally, Coyle maintained it would be "inequitable and unjust" for the hearing to be continued. SR 98 at ¶¶ 2-6. This Objection contains no reference to, or analysis of, the Rule 56(f) factors required under South Dakota law. *See Davies*, *Stern Oil*, *Strom*, *Dakota Industries*, *Harvieux*, and *Gores*, *supra*.

The third Objection was filed on September 20, after McFarland submitted several affidavits in support of the continuance request. In this filing, Coyle argued that McFarland had not demonstrated good cause under SDCL §15-11-4. Coyle accused McFarland of "concocting after the fact reasons for" seeking a

[1] As referenced in the opening brief, the property in question is a portion of McFarland's driveway. At no time has Coyle ever articulated how they would utilize that property, why there was an urgency with respect to their intended utilization, or how, specifically, they were being prejudiced by their inability to access it.

[2] In fact, Hagg's deadline to respond to the motion (Sept. 14, 2023) was two weeks and three days after the hearing was scheduled.

continuance. Coyle resisted McFarland's contention that they needed additional time to file a claim with Stewart Title, arguing that this was not "reasonable or good faith" because the claim could have been filed earlier, and that it would be irrelevant to the outcome of the litigation. Finally, Coyle also argued that "[i]n response to the SDCL §15-6-56(f) reference, the Court has the obligation to make an 'order as is just' in the circumstances."[3] Coyle argued that because the complaint had been filed more than 100 days prior and the summary judgment hearing was scheduled "over three weeks" earlier (which, as set forth above, is untrue), it was "unjust" to allow McFarland to "sit on their rights" and the doctrine of laches justified the granting of a continuance. SR 114-116. This Objection touches upon one – but only one – of the categories of information that Attorney Hagg's affidavit identified as being essential to justify McFarland's position. It did not respond to the several other categories of information noted by Attorney Hagg and Mr. McFarland in their affidavits. This Objection contains no reference to, or analysis of, the Rule 56(f) factors. *See Davies*, *Stern Oil*, *Strom*, *Dakota Industries*, *Harvieux*, and *Gores*.

Therefore, the circuit court's reference to Coyle's objections does not atone for its failure to conduct its own legal and factual analysis under Rule 56(f). As set forth in the opening brief, analysis of the applicable factors would have strongly

[3] The Objection contained no discussion of the Rule 56(f) factors.

favored McFarland and compelled a grant of the requested continuance. *See Strom*, at ¶42, 11 N.W.2d at 87-88 (circuit courts abused their discretion in denying motion to continue and prohibiting further discovery). McFarland was entitled to an opportunity to conduct discovery into the identified relevant areas, including taking depositions of public officials, and others, to establish irregularities in the plat application and recording processes with respect to Coyle's lot, obtaining sworn statements from (or deposing) James Dacar regarding the Walworth Street right of way, and obtaining evidence regarding the utilities that were already in place in the extended portion of Walworth Street.

Coyle also argues that to the extent McFarland was seeking to obtain evidence to dispel the "intent" element of trespass, such is irrelevant because it would not be a defense to the trespass action. *Appellee's Brief* at 14-15. Assuming *arguendo* Coyle is correct, this is hardly dispositive, as evidence concerning intent or good faith was but a small portion of McFarland's reasoning for seeking the continuance. As is seen in McFarland's various motions and affidavits, the primary substantive focus was establishing that Walworth Street was intended to be extended, that Lot Q1 should not have been platted without that extension, and irregularities in the recording and platting process are what allowed Lot Q1 to be sold without the Walworth Street extension. SR 100-103, 104-113, 120-130, 131-134; App. 12-15, 23-32, 33-36, 37-47.

Rule 56(f) contains no timeframe for seeking a continuance. Yet, the circuit court relied heavily on the fact that the request was not made within the 14-day response period. HT at 22:1-5 (9/28/23). *See Davies*, at ¶52-54, 980 N.W.2d at 265 (upholding denial of 56(f) continuance, but not mentioning timeliness as a concern, even though it was filed just "several days prior to" the hearing).

It was indeed an abuse of discretion for the circuit court to deny the 56(f) continuance, before *any* discovery had been conducted and less than four (4) months after the suit had been commenced. *Donald Bucklin Const. v. McCormick Const. Co.*, 2013 SD 57, 835 N.W.2d 862 (reversing grant of summary judgment when parties had not started discovery and affidavits established disputed facts).

b. Alternatively, the Circuit Court Abused its Discretion by Not Conducting an Excusable Neglect Analysis Under Rule 6(b).

Coyle's brief does not address the matter of excusable neglect. *Appellee's Brief* at 16-18. This is likely because it cannot be reasonably disputed that Hagg's neglect in missing the filing deadline was, indeed, excusable under well established case law. *Donald Bucklin Const.*, at ¶32, 835 N.W.2d at 870; *South Dakota Public Assurance Alliance v. McGuire*, 2018 SD 75, 919 N.W.2d 745.

Instead, Coyle only argues the issue of prejudice, claiming that the existence of the protection order that "partially prohibited Abbey from accessing and utilizing her own property" rendered Coyle in "need of a prompt resolution to the civil

trespass action." *Appellee's Brief* at 17. But again, Coyle did not – and has never – articulated what specific harm had befallen them due to their inability to access and utilize *a small portion of McFarland's driveway*. McFarland does not dispute that the general inability to access property is damaging, but nothing about this case is exceptional or extreme in terms of Coyle's lack of access to the property in question. In fact, this case is quite the opposite – the portion of McFarland's driveway was not even meaningfully usable to Coyle. Coyle has never alleged that the property in question was necessary for them to access their property, to reach their home, or to otherwise enjoy their property rights.

Coyle's threadbare assertion that they are prejudiced due to lack of access to, or utilization of, the property in question is insufficient to establish prejudice under Rule 6(b). Indeed, Coyle's admission at trial that they were not seeking damages because they had only sustained nominal damages from the trespass belies their strident claims of prejudice. TT at 2:12-3:11 (9/3/24); SR 536-37.

c. The Circuit Court Erred in Granting Summary Judgment to Coyle Based Solely on McFarland's Untimely Response.

Contrary to Coyle's argument, the circuit court's sole basis for granting the summary judgment was indeed because Coyle's Statement of Material Facts were deemed admitted. *Appellee's Brief* at 18. This much is clear from the court's Order for Partial Summary Judgment, Paragraph 1: "All facts set forth in

Plaintiff's *Statement of Material Facts* dated August 24, 2023 have been admitted by the Defendants." SR 149; App. 1.[4] It is also clear in reviewing the transcript from the hearing, wherein the Court recited all of the facts upon which it was issuing its ruling – and noting that each and every one of them was "deemed admitted." HT at 22:6-24:11 (9/28/23). Most importantly, however, was the following statement of the circuit court:

> So the Court finds that the -- there are -- *based upon the admission of the undisputed facts by the Defendants on their failure to comply with Rule 56(c)*, that there are no genuine issues of material fact, and that Plaintiffs are entitled to partial summary judgment as a matter of law, as pled in their motion.

HT 24:16-21 (9/28/23) (emphasis added).

Coyle's focus on Hagg's comments about the "intent" element of trespass at the hearing is misplaced. None of those statements about McFarland's "good faith" or "clean hands" were even part of the circuit court's decision, because it had already deemed the Statement of Material Facts to be "admitted." Indeed, at the hearing, when Hagg tried to comment on the substantive issues of the boundary dispute, the circuit court cut him off, stating, "Mr. Hagg, I guess, my question is talk to me about why partial summary judgment shouldn't be granted

[4] The circuit court's ruling that was based on "all the reasons set forth by Plaintiffs in their objections" was its ruling denying the continuance – *not* the ruling wherein it granted the Coyle's motion for summary judgment. SR at 118.

because of the procedural violations under the rule." HT at 8:3-5 (9/28/23) (emphasis added).

Thus, Hagg's comments about intent - or any other substantive matters - were not relevant. Even if they were, much of his focus was on the platting process, the SIA, and the fact that Walworth Street was to be extended. HT at 10:8-11:9, 17:1-20:9 (9/28/23). This was evident in Hagg's comments, and in his attempt to subpoena two witnesses to the summary judgment hearing, who would have testified about the intended extension of the Walworth Street right of way and the expectation that Lot Q1 would not have been platted without that extension. SR at 121; App. at 38.

The record is clear that there are legitimate factual and legal questions regarding the boundary of Lot 25A and the scope of the Walworth Street right-of-way. This matter should have been heard on the merits and not disposed of via a technical, non-jurisdictional mistake. *Velocity Investments, LLC v. Dybvig Installations, Inc.*, 2013 SD 41, 833 N.W.2d 41 (reiterating the Court's preference that "matters be resolved on their merits" and noting the multitude of "actual questions and resolved legal issues" when reversing circuit court).

d. The Circuit Court Erred in Denying McFarland's Motion for Reconsideration.

Coyle argues that Hagg's "mistake of law" as to the "core elements of civil trespass" justifies the circuit court's denial of the motion for reconsideration. This is nonsensical.

The mistake that resulted in the statement of facts being deemed admitted – which, in turn, led to the grant of summary judgment – was the missed deadline. The missed deadline was not a mistake of law, i.e., Hagg did not misunderstand or miscomprehend a statute or legal rule. Instead, due to significant stress in his personal life, he mistakenly missed a briefing and response deadline. *Action Carrier, Inc. v. United Nat. Ins. Co.*, 2005 S.D. 57, ¶ 14, 697 N.W.2d 387, 391 (citations omitted) (excusable neglect when attorney missed filing deadline by several months in the wake of 9/11).

Once the deadline was missed, McFarland was forced to try to correct the mistake by seeking a continuance and, later, by seeking reconsideration of the grant of summary judgment. Throughout that process, McFarland was obligated to explain what additional facts were needed through discovery, and how those facts impacted the legal issues in the case. One of *many* additional facts articulated by McFarland and his counsel, Hagg, was that concerning McFarland's "good faith." Even if McFarland's good faith is not relevant to the legal issues, however, this

does not render his continuance unwarranted. As discussed above, there are several other factual and legal issues that need to be explored in discovery.

Neither Rule 56(f) nor Rule 6(b) require a continuance request to be made *before* a filing deadline. And the law is clear that Hagg's conduct constitutes excusable neglect. The neglect at issue must be such that would cause a "reasonably prudent person under similar circumstances to act similarly." Being blindsided by a divorce action initiated by your wife, only to learn shortly thereafter that she has been having an affair with a long-time family friend, is undoubtedly one of the most psychologically and emotionally stressful events that a person can endure. It would be devastating to most people. It is not unreasonable to believe that most prudent people under similar circumstances would have acted similarly, in that the emotional upheaval plaguing their personal life would likely spill over into their professional obligations.

The circuit court's failure to recognize either of these is clearly erroneous and constitutes an abuse of discretion.

2. The Circuit Court Erred in Determining that McFarland was Trespassing upon Coyle's Property.

Again, Coyle focuses *only* on the "intent" issue, but ignores all of the other factual and legal issues that exist in this case concerning the boundaries of Lot 25A

and the Walworth Street right of way.[5] This is not surprising, because the existence of those issues is fatal to Coyle's position.

The circuit court erred when it prematurely granted summary judgment. This decision was improperly based on its determination that Coyle's statement of material facts should be "deemed admitted" due to Hagg's failure to timely respond to the summary judgment filings. This case was not ripe for summary judgment, and the final judgment was erroneously premised on the summary judgment ruling.

Conclusion

The circuit court abused its discretion in denying McFarland's requested continuance in the face of a clear need for additional discovery, significant personal upheaval in counsel's life leading to a missed deadline, and the dearth of any actual showing of prejudice or a need for an irregularly accelerated timetable. It was tantamount to a "gotcha" game, without any regard for counsel as a human being or the pursuit of truth and a merit-based resolution of claims. The circuit court

[5] McFarland maintains that "their driveway and other areas in question were situated within the Walworth Street right-of-way, or the setback areas adjacent thereto; and that irregularities in the platting process and/or the filing of the 2015 SIA resulted in Coyle purchasing Lot Q1 without notice of the extended nature of Walworth Street." *Appellant's Brief* at 35. McFarland maintains that there is a genuine issue of material fact as to the Walworth Street boundary.

erred yet again when it was presented with an opportunity to rectify that error, but instead denied the motion for reconsideration.

The Final Judgment and Order, and the faulty Order for Partial Summary Judgment upon which it is based, should be vacated and this case remanded to the circuit court to allow the parties an opportunity to conduct discovery and otherwise try this case in the manner contemplated by the rules of civil procedure.

Respectfully submitted this 1st day of April, 2025.

BANGS, MCCULLEN, BUTLER,
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Certificate of Compliance

Pursuant to SDCL § 15-26A-66(b)(4), Appellants' counsel states that the foregoing brief is typed in proportionally spaced typeface in Equity A Tab 13 point. The word processor used to prepare this brief indicated that there are a total of 2,654 words in the body of the brief.

/s/ Sarah Baron Houy
Sarah Baron Houy

Certificate of Service

The undersigned hereby certifies that April 1, 2025, the foregoing *Appellants' Reply Brief* was filed electronically with the South Dakota Supreme Court and that the original of the same was filed by mailing the same to:

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and a true and correct copy of *Appellants' Reply Brief* was provided by eFileSD as follows, to:

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