IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27223

RED ACRE, LLC, a South Dakota limited liability Company,

Plaintiff/Appellant (27227, dismissed)

vs.

HUTTERVILLE HUTTERIAN BRETHREN, INC., a South Dakota corporation, GEORGE WALDNER, SR., KENNETH WALDNER, SAMUEL WALDNER, and THOMAS WALDNER,

Defendants/Appellees

and

HUTTERVILLE HUTTERIAN BRETHREN, INC.,

Counterclaim and Third-Party Plaintiff/Appellee

vs.

RED ACRE, LLC, a South Dakota limited liability Company,

Counterclaim Defendant/Appellant (27227, dismissed)

and

ROBERT RONAYNE,

Third-Party Defendant/Appellant (27227, dismissed)

and

JOHNNY WIPF, SR.,

Third-Party Defendant/Appellant

Appeal from the Circuit Court
Fifth Judicial Circuit
Brown County, South Dakota

The Honorable Eugene E. Dobberpuhl, Presiding Judge

BRIEF OF APPELLANT

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Notice of Appeal filed October 9, 2014 and
Amended Notice of Appeal filed November 11, 2014

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PRELIMINARY STATEMENT

Citations to the Certified Record of the Brown County Circuit Court shall be "CR" followed by the applicable page number(s). References to Appellant's Appendix shall be "AA" followed by the applicable page number(s).

STATEMENT OF JURISDICTION

On September 8, 2014, the Brown County Fifth Judicial Circuit Court, the Honorable Eugene E. Dobberpuhl, signed an Order including Findings of Fact and Conclusions of Law. AA 68-71 (CR 2391-2394). The Order was filed on September 8, 2014. *Id.* Notice of Entry of the September 8, 2014 Order was served by mail on September 11, 2014. CR 2395-2401. On September 24, 2014, Third-Party Defendant/Appellant Johnny Wipf Sr. filed a Motion for Reconsideration and Request for Emergency Hearing. AA 72-75 (CR 2402-2405). On October 1, 2014, the Circuit Court issued a Memorandum Decision of the Court Clarifying the Previous Court's Ruling and Denying the Motion for Reconsideration. AA 112-114 (CR 2534-2536). On October 9, 2014, the Circuit Court signed an Order denying Third-Party Defendant/Appellant Johnny Wipf Sr.'s Motion for Reconsideration and incorporating the Court's October 1, 2014 Memorandum Decision. AA 118-119 (CR 2557-2558). The Order was filed on October 10, 2014. *Id.* Notice of Entry of the October 9, 2014 Order was served by mail on October 14, 2014. CR 2585-2587.

Third-Party Defendant/Appellant Johnny Wipf Sr. filed a Notice of Appeal and Docketing Statement on October 9, 2014, seeking an appeal from the Order of the Circuit Court dated September 8, 2014, and the Memorandum

Decision of the Court Clarifying the Previous Court's Ruling and Denying the Motion for Reconsideration dated October 1, 2014. AA 115-117 (CR 2537-2539). Appellees filed a Notice of Review and Docketing Statement on October 29, 2014. Pursuant to SDCL § 15-26A-4.1, Third-Party Defendant/Appellant Johnny Wipf Sr. filed an Amended Notice of Appeal and Amended Docketing Statement on November 11, 2014, clarifying his intent to seek an appeal from the Order of the Circuit Court dated October 9, 2014, that was filed after Appellant's Notice of Appeal was served. AA 120-122.

STATEMENT OF ISSUES

I. **Whether the Circuit Court had subject matter jurisdiction to enter orders ruling that the members of the Waldner group (Group 1) at Hutterville Colony are members of Hutterville Hutterian Brethren, Inc. and that all actions concerning Hutterville Colony are invalid without the consent of both groups at Hutterville, the Waldner group and the Wipf group (Group 2).**

On September 8, 2014, the Circuit Court signed an Order, including Findings of Fact and Conclusions of Law, that ruled, *inter alia,* that the warranty deeds executed by Johnny Wipf Sr. as Trustee of Hutterville Hutterian Brethren, Inc. "were executed and recorded without full consent of all [Hutterville Hutterian Brethren, Inc.'s] members."

The Circuit Court's October 9, 2014 Order, through incorporation of its Memorandum Decision dated October 1, 2014, ordered that all "actions[,] deeds, contracts or any instrument executed by either group [at Hutterville Colony] are invalid without the consent of both groups."

- *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 SD 86, 791 N.W.2d 169.
- *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2012 SD 4, 808 N.W.2d 678.
- *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2013 SD 49, 834 N.W.2d 324.
- *Hutterville Hutterian Brethren, Inc. v. Sveen*, CIV 12-1010, 2013 WL 4679489 (D.S.D. Aug. 30, 2013).

II. Whether the Circuit Court had subject matter jurisdiction to enter an order invalidating the warranty deeds executed by Johnny Wipf, Sr. as Trustee of Hutterville Hutterian Brethren, Inc.

The Circuit Court's September 8, 2014 Order ruled that the warranty deeds executed on February 14, 2012 by Johnny Wipf Sr. as Trustee of Hutterville Hutterian Brethren, Inc. are not valid or enforceable.

- *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 SD 86, 791 N.W.2d 169.
- *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2012 SD 4, 808 N.W.2d 678.
- *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2013 SD 49, 834 N.W.2d 324.
- *Hutterville Hutterian Brethren, Inc. v. Sveen*, CIV 12-1010, 2013 WL 4679489 (D.S.D. Aug. 30, 2013).

III. Whether the Circuit Court was barred by principles of *res judicata* from entering an order determining the identity of Hutterville Hutterian Brethren Inc.'s members and corporate leaders.

The Circuit Court's September 8, 2014 Order ruled, *inter alia,* that the deeds executed by Third-Party Defendant/Appellant Johnny Wipf Sr. as Trustee of Hutterville Hutterian Brethren, Inc. "were executed and recorded without full consent of all [Hutterville Hutterian Brethren, Inc.'s] members."

The Circuit Court's October 9, 2014 Order, through incorporation of its Memorandum Decision dated October 1, 2014, ordered that all "actions[,] deeds, contracts or any instrument executed by either group [at Hutterville Colony] are invalid without the consent of both groups."

- *Wells v. Wells*, 2005 SD 67, 698 N.W.2d 504.
- *Flugge v. Flugge*, 2004 SD 76, 681 N.W.2d 837.
- *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 SD 86, 791 N.W.2d 169.
- *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2012 SD 4, 808 N.W.2d 678.

STATEMENT OF CASE

On February 14, 2012, Third-Party Defendant/Appellant Johnny Wipf, Sr. ("Wipf"), the duly elected President of Hutterville Hutterian Brethren, Inc. ("Hutterville"), deeded by warranty deed to "Johnny Wipf, Trustee" real property owned by Hutterville in Brown and Spink Counties in South Dakota ("the Wipf Deeds"). AA 13-24 (CR 6-17). This transfer of land to Wipf as Trustee for Hutterville was made pursuant to a Corporate Resolution and Trust Agreement executed by Hutterville's Board of Directors. AA 29 (CR 2084); AA 25-28 (CR 1750-1753). On or about March 9, 2014, Wipf entered into a Cash Rent Farm Lease agreement ("the Lease") in which some 9,800 acres of land transferred to Wipf pursuant to the Wipf Deeds were leased to Red Acre, LLC ("Red Acre"). AA 5-12 (CR 18-25). Shortly thereafter, Red Acre commenced suit against Appellees Hutterville and George Waldner, Kenneth Waldner, Samuel Waldner and Thomas Waldner (collectively "the Waldner group"), seeking injunctive relief that would preclude the Waldner group from interfering with Red Acre's rights under the Lease. AA 1-4 (CR 29-26).

In response to Red Acre's Complaint, the Waldner group, purportedly acting on behalf of Hutterville, served a Counterclaim against Red Acre and a Third-Party Complaint against Wipf and an individual member of Red Acre, Robert Ronayne ("Ronayne"). CR 1875-1900. On June 13, 2014, Wipf filed a motion to dismiss the Waldner group's Third-Party Complaint on the grounds that the Waldner group lacked legal standing to assert claims on Hutterville's behalf and that the Circuit Court lacked subject matter jurisdiction over the claims

asserted in the Third-Party Complaint. AA 35-37 (CR 2081-2083). A similar motion to dismiss was filed on behalf of Red Acre and Ronayne. CR 1957-1959.

On August 25, 2014, a hearing on Wipf and Red Acre/Ronayne's motions to dismiss was held before the Brown County Fifth Judicial Circuit Court, the Honorable Eugene E. Dobberpuhl. AA 38-61 (CR 2350-2373). During the hearing, counsel for the Waldner group made an oral motion to dismiss Red Acre's Complaint. AA 60 (CR 2351). The Circuit Court granted the Waldner group's oral motion to dismiss and also granted dismissal of the Waldner group's Counterclaim and Third-Party Complaint against Red Acre/Ronayne and Wipf. *Id.*

Despite objections by Red Acre/Ronayne and Wipf, *see* AA 62-67 (CR 2382-2387); CR 2374-2381, the Circuit Court entered an Order including Findings of Fact and Conclusions of Law on September 8, 2014. AA 68-71 (CR 2391-2394). Notice of Entry of this Order was served by mail on September 11, 2014. CR 2395-2401. On September 24, 2014, Wipf filed a Motion for Reconsideration and Request for Emergency Hearing. AA 72-75 (CR 2402-2405). On October 1, 2014, the Circuit Court issued a Memorandum Decision of the Court Clarifying the Previous Court's Ruling and Denying the Motion for Reconsideration. AA 112-114 (CR 2534-2536). On October 9, 2014, Wipf timely filed a Notice of Appeal. AA 115-117 (CR 2537-2539). On that same date, the Circuit Court signed an Order denying Wipf's Motion for Reconsideration and incorporating its October 1, 2014 Memorandum Decision. AA 118-119 (CR 2557-2258). Notice of Entry of this Order was served on

October 14, 2014. CR 2585-2587. Wipf filed an Amended Notice of Appeal on November 11, 2014, adding specific reference to the October 9, 2014 Order that was entered after his Notice of Appeal had been served. AA 120-122.

In this appeal, Wipf is not seeking to revisit the question of subject matter jurisdiction addressed by this Court in its prior decisions involving these parties. Rather, the relief sought by Wipf is an order vacating the Circuit Court's Orders, Findings of Fact and Conclusions of Law which improperly adjudicated elements of the Waldner/Wipf dispute at Hutterville in violation of this Court's prior rulings.

STATEMENT OF FACTS[1]

The Hutterville Hutterite Colony is located southeast of Aberdeen, South Dakota. In 1983, Hutterville Colony was legally organized under the laws of the State of South Dakota as a non-profit religious corporation, Hutterville Hutterian Brethren, Inc. ("Hutterville"). *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 SD 86, ¶ 2, 191 N.W.2d 169, 170. According to its corporate documents, Hutterville's corporate purpose is to promote the Hutterian religious faith and

[1] Wipf recognizes this Court's familiarity with the factual background of the dispute between the Wipf group and the Waldner group at Hutterville Colony. Accordingly, Wipf moves this Honorable Court to take judicial notice of the facts as recited by the Court in *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 SD 86, 791 N.W.2d 169, *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2012 SD 4, 308 N.W.2d 678 and *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2013 SD 49, 834 N.W.2d 324.

church through communal living. *Wipf v. Hutterville Hutterian Brethren, Inc*, 2012 SD 4, ¶ 2, 808 N.W.2d 678, 680. In accordance with the core principles of the Hutterite faith, Hutterville's By-Laws provide that members must live a communal life and follow the teachings and tenets of the Hutterian Church. *Id.*

The membership of the Hutterite Church in North American consists of three groups or conferences: the Dariusleut Conference, the Lehrerleut Conference and the Schmiedeleut Conference. AA 31 (CR 1092). The Hutterite colonies in South Dakota are members of the Schmiedeleut Conference. *Wipf,* 2012 SD 4, ¶ 2, 808 N.W.2d at 680. In 1951, the Hutterite Church determined that it needed a constitution and therefore adopted the Constitution of the Hutterian Church and Rules as to Community Property. AA 31 (CR 1092). This Constitution called for a Board of Managers, which consists of three members from each conference to oversee general matters of the conferences and work together. *Id.*

In 1992, a schism occurred within the Hutterite Church when ministers of various Hutterite colonies repudiated Rev. Jacob Kleinsasser's leadership as Senior Elder and opted instead to follow Rev. Joseph Wipf. *Hutterville*, 2010 SD 86, ¶ 4, 791 N.W.2d at 171; *Wipf,* 2012 SD 4, ¶ 3, 808 N.W.2d at 680. A meeting was held in December 1992 in which 173 Ministers of the Hutterian Brethren Church, Schmiedeleut Conference were present. *Hutterville*, 2010 SD 86, ¶ 4, 791 N.W.2d at 171; AA 31 (CR 1092). At that meeting, 95 Ministers opposed Rev. Kleinsasser as an Elder of the Church and 78 Ministers supported him. *Id.* Although Rev. Kleinsasser refused to accept the vote, the then president of the

Board of Managers of the entire Church, Rev. John M. Wipf, issued a document to all members of the Schmiedeleut Conference indicating that the Board of Managers accepted as valid the vote repudiating Rev. Kleinsasser. AA 31 (CR 1092); CR 1074-1076.

In July 1993, a Resolution of the Board of Managers was adopted which set forth the Board of Managers' position and their desire to have a Reaffirmation of Membership among all of the Hutterian Brethren Church Colonies. *Id.* This reaffirmation was to involve all Canadian and United States Hutterite Colonies of the Schmiedeleut, Dariusleut, and Lehrerleut conferences. *Id.* A Reaffirmation of Membership of the Members of the Hutterian Brethren Church was submitted and returned by all Colonies desiring to reaffirm their membership in the Church. *Id.* At that time, the then minister of Hutterville Colony, George Waldner, Sr., chose to remain loyal to the leadership of Rev. Kleinsasser and refused to sign and return the Reaffirmation of Membership. *Hutterville*, 2010 SD 86, ¶ 6, 791 N.W.2d at 171.

As a result, Hutterville Colony was one of only five colonies in South Dakota that remained loyal to Rev. Kleinsasser and did not reaffirm its faith under Rev. Wipf. *Hutterville*, 2010 SD 86, ¶ 6, 791 N.W.2d at 171. Other individuals within Hutterville Colony, however, chose to follow Rev. Wipf and remained in the Colony. *Id.* Since that time, these differing groups at Hutterville have developed into two separate and competing factions: the Waldner group, led by George Waldner, Sr., and the Wipf group, led by Johnny Wipf, Sr. *Wipf,* 2012 SD 4, ¶ 4, 808 N.W.2d at 680.

Hutterville v. Wipf

In 2008 and 2009, the Wipf group attempted to replace George Waldner Sr. and his followers as leaders of Hutterville. *Hutterville*, 2010 SD 86, ¶ 8, 791 N.W.2d at 171. In response, the Waldner group sought to remove members of the Wipf group from officer and director positions in the corporation. *Id.* Eventually, after several meetings and elections, the Wipf group obtained control of Hutterville. *Id.* ¶ 9. Specifically, on February 22, 2009, a Special Meeting of Hutterville's members was noticed and held. CR 1044-1046; CR 2085-2090. During that meeting, George Waldner, Sr., was removed as President and director, Tom Waldner was removed as Vice President and Secretary/Treasurer, and John G. Waldner was elected Secretary/Treasurer. *Id.* Thereafter, a Special Meeting of the Board of Directors was noticed and held and Wipf was elected President. CR 2085-2090. On March 19, 2009, Wipf and his group submitted a formal Application for Membership of the Schmiedeleut Conference of the Hutterian Brethren Church, which was accepted by the Elders of the Schmiedeleut Conference. CR 2085; CR 1089.

Despite the aforementioned elections, the Waldner group refused to recognize the new Wipf group leaders or surrender control of the corporation. *Hutterville*, 2010 SD 86, ¶ 9, 791 N.W.2d at 172. As a result, members of the Wipf group were forced to commence suit against members of the Waldner group in South Dakota Circuit Court, seeking a determination of the true identities of the duly elected officers and directors of Hutterville and a temporary restraining order and injunction preventing members of the Waldner group from holding

themselves out as officers and directors. *Id.* Fifth Judicial Circuit Court Judge Jack R. Von Wald ruled in favor of the Wipf group and granted their application for a temporary restraining order. *Id.* ¶ 10.

Following the August 2009 hearing on the Wipf group's motion for an injunction, members of the Waldner group purported to ex-communicate several Wipf group members, including Johnny Wipf Sr., and moved the Circuit Court for an order of dismissal on the grounds that the court lacked subject-matter jurisdiction. *Id.* ¶ 11. Concluding that the matter had evolved from a question of corporate governance into a religious dispute, Judge Von Wald granted the motion to dismiss on the grounds that the court was deprived of jurisdiction by the First Amendment to the United States Constitution. *Id.* ¶ 17.

On appeal, this Court affirmed that dismissal, holding that since there was a religious dispute as to who comprised the "true" church and church elders, and because voting memberships, directorships and officerships of Hutterville were "inseparable from Hutterite religious principles," the First Amendment to the United States Constitution and Article VI, Section 3 of the South Dakota Constitution prohibited civil courts from adjudicating the dispute. *Id.* ¶ 34.

In November 2009, the Elders of the Schmiedeleut Conference met and passed a Resolution requesting that the Colonies work together for a division of the assets pro-rata and further requesting that a Court-appointed Receiver be put in place to control the situation at Hutterville Colony. CR 1091-1092. In this Resolution, the Elders reaffirmed that Johnny Wipf and his group were accepted and were members of the Hutterian Brethren Church. CR 1089-1090.

Wipf v. Hutterville

During the pendency of the appeal in *Hutterville*, the Wipf group filed another separate action in South Dakota Circuit Court, alleging that the members of Hutterville were deadlocked over the management and control of corporate affairs, and requesting judicial dissolution of the corporation. *Wipf,* 2012 SD 4, ¶ 7, 808 N.W.2d at 681. The impetus for this second suit was the allegation that the Waldner group was continuing to disrupt the function of Hutterville by asserting authority over the corporation, its finances, its property and its members. *Id.* The Waldner group again moved to dismiss the dissolution suit on the grounds that the religion clauses of the United States and South Dakota Constitutions prohibited the court from adjudicating the dispute. *Id.* ¶ 8. This time, however, the Circuit Court denied the motion to dismiss, and attempted to resolve the dispute while avoiding the religious issues. *Id.* ¶ 9. Following a trial, the Circuit Court held that the Waldner group's conduct was oppressive, and ordered Hutterville to be dissolved and appointed a receiver to divide the corporate property among all corporate "members." *Id.*

The Waldner group appealed the Circuit Court's order of dissolution and, on January 25, 2012, this Court reversed. *Id.* ¶ 27. As in *Hutterville,* this Court found that the underlying religious controversies over church leadership and membership so pervaded the dissolution of the religious corporation that the dissolution was beyond a secular court's jurisdiction. *Id.* As such, the case was remanded back to the Circuit Court with instructions to dismiss the case for lack of subject-matter jurisdiction. *Id.* ¶ 28.

Execution of the Wipf Deeds

On February 10, 2012, the Board of Directors of Hutterville met and elected Wipf to act as Trustee for the benefit of the members of Hutterville. AA 29 (CR 2084). The Board further resolved that Wipf would hold legal title to all of the real estate then owned or later acquired by Hutterville. *Id.* The Board executed a Trust Agreement in which Wipf was appointed as Trustee and given the power to hold legal title to all of the real estate owned by Hutterville. AA 25-28 (CR 1750-1753.) Pursuant to this authority, on February 14, 2012, Wipf deeded by warranty deed to "Johnny Wipf, Trustee" the real property owned by Hutterville in Brown and Spink Counties in South Dakota ("the Wipf Deeds"). AA 13-24 (CR 6-17). The Wipf Deeds were thereafter recorded by the Brown County Register of Deeds and Spink County Register of Deeds. *Id.*

The September 2012 Brown County Action

In September 2012, members of the Waldner group, purportedly acting on behalf of Hutterville, commenced an action against Wipf in the Fifth Judicial Circuit Court, Brown County, seeking damages for various tort claims and seeking declaratory and injunctive relief related to Wipf's alleged possession and use of equipment owned by Hutterville. *Hutterville Hutterian Brethren, Inc. v. Johnny Wipf, Sr.,* CIV 12-716, State of South Dakota, Fifth Judicial Circuit Court, Brown County. CR 2118-2129. Wipf immediately filed a motion to dismiss the Waldner group's suit on the grounds that any resolution of the claims asserted against him would violate the express rulings by this Court in *Hutterville* and *Wipf.* CR 2117.

Following a hearing on October 26, 2012, Fifth Judicial Circuit Court Judge Tony L. Portra granted Wipf's motion to dismiss the Waldner group's Complaint for lack of subject matter jurisdiction. CR 2116. According to the Circuit Court, because the Waldner group's claims related to Wipf's right to control Hutterville property, the suit was, at its core, a legal challenge seeking an order as to who has a right to control the corporation. *Id.* Thus, because the existence of either group's authority was a matter of theological dispute, the Circuit Court held that the same underlying religious controversy that deprived the court of jurisdiction in *Hutterville* and *Wipf* pervaded the issues raised in the Complaint:

> The Court finds that plaintiff is not able to establish standing to bring this suit. I don't think that the defendant would be able to show that certain people are not members. I don't think the plaintiff can show that certain people are members. The fact of the matter is is the Court simply can't decide, and the South Dakota Supreme Court, on two different occasions, has made that clear that the Court can't decide. So the Court then is left in a position of not being able to determine who is able to bring action on behalf of the corporation.
>
> The suit is purportedly brought against Johnny Wipf, Sr. on behalf of the corporation by certain of its members, however the Court isn't able to determine who the members of the corporation are because that involves a religious question that is beyond the Court's subject-matter jurisdiction.

CR 358. A Judgment of Dismissal was entered by the Circuit Court on November 8, 2012. CR 2116. The Waldner group did not appeal this judgment.

Wipf v. Hutterville II

Before the case in *Wipf* was remitted to the Circuit Court, Harvey Jewett, as the receiver for Hutterville appointed by Judge Von Wald in that action, moved

for approval of his accounting and for payment of his fees and expenses. *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2013 SD 49, ¶ 12, 834 N.W.2d 324, 329 ("*Wipf II*"). The Circuit Court approved Jewett's actions and accounting, terminated the receivership and discharged Jewett on October 25, 2012. *Id.* ¶ 18. Both the Waldner and Wipf groups appealed this action. The Waldner group argued that, on remand, the Circuit Court was without jurisdiction over the subject-matter and that by continuing to act, issue orders, and control Hutterville's property, the court acted in excess of its jurisdiction and authority. *Id.* ¶ 19. They further contended that all orders entered adverse to Hutterville were void *ab initio* and, as a result, the Circuit Court had a legal and equitable obligation to restore to Hutterville what was taken from it when the court acted without jurisdiction and that the court erred when it ruled that the receiver's actions were consistent with South Dakota law. *Id.* By Notice of Review, the Wipf group argued that the Circuit Court had erred when it ordered the receiver to issue the check representing the receivership funds to the mailing address known by the court to be controlled by the Waldner group. *Id.*

On July 3, 2013, this Court affirmed the Circuit Court's exercise of control over the Hutterville property after the remand and affirmed the court's order that Jewett, his staff and counsel were released and discharged from any liability to Hutterville and/or their respective members related to the administration of the receivership. *Id.* ¶ 36. In doing so, this Court noted that the Waldner group's continued insistence that the Circuit Court could not act while at the same time demanding that the Court order the Circuit Court to act "highlights the

paradoxical positions taken by the Waldner group," and "[t]o compel the circuit court to act on behalf of the Waldner group's interests enmeshes us in the very controversy we declared off limits." *Id.* ¶ 38. With respect to the Wipf group's Notice of Review issue, this Court affirmed the Circuit Court's action, finding that it was consistent with the Court's prior prohibition against involvement in the Hutterville dispute.

The Federal RICO Action – Hutterville v. Sveen

Following the decision in *Wipf,* the Waldner group, as individuals and purportedly on behalf of the corporation, Hutterville, commenced an action in the United States District Court for the District of South Dakota against attorneys Jeffrey T. Sveen, Rodrick L. Tobin, and Harvey C. Jewett, as well as Siegel, Barnett & Schutz, LLP., an Aberdeen, South Dakota law firm. *Hutterville Hutterian Brethren, Inc. v. Sveen*, CIV 12-1010, 2013 WL 4679489 (D.S.D. Aug. 30, 2013). The initial complaint alleged a RICO cause of action under 18 U.S.C. § 1962(c), a cause of action under 18 U.S.C. § 1962(d) for conspiracy to violate RICO, and claims for breach of fiduciary duty, common law fraud and statutory deceit. *Id.* at *1. An Amended Complaint was later filed withdrawing certain claims brought under 18 U.S.C. § 1962(c) and (d) and adding claims based upon 18 U.S.C. § 1962(a). *Id.*

In this suit, the Waldner group alleged numerous acts of wrongdoing by the defendants related to an alleged unlawful and fraudulent scheme to overthrow the Waldner group as officers and directors of Hutterville and to place control of Hutterville with the other group. *Id.* at *7-8. Relying upon the holdings in

Hutterville and *Wipf*, the defendants in *Sveen* moved to dismiss the Amended Complaint on the grounds that the Waldner group did not have legal standing to assert claims either on behalf of Hutterville or as individuals. *Id.* at *1.

On August 30, 2013, United States District Court Judge Lawrence Piersol issued an Order granting the defendants' motion to dismiss the Amended Complaint. According to Judge Piersol's Memorandum Opinion, the Waldner group's claims presented the same religious entanglement challenges recognized in *Hutterville* and *Wipf*. *Id.* at *9. In particular, Judge Piersol focused upon the issue of the Waldner group's legal standing as "it entail[ed] the fundamental question of whether the parties Plaintiff, the Kleinsasser–Waldner group, [could] bring claims on behalf of the Hutterville Hutterian Brethren, Inc., the corporate entity that holds the property of the colony but which is also controlled to at least a great extent by religious principles." *Id.* Accordingly, the United States District Court held that the claims filed on behalf of Hutterville were properly dismissed for lack of Article III standing and that the Waldner group's individual claims were also subject to dismissal on the grounds that the members lacked property rights due to their individual renunciation of individual property. *Id.* at *9-10.

The Current Controversy

On or about March 12, 2014, Wipf, as Trustee for Hutterville, entered into a Cash Rent Farm Lease agreement ("the Lease") in which some 9,800 acres of land transferred to Wipf pursuant to the Wipf Deeds were leased to Red Acre, LLC ("Red Acre"). AA 5-12 (CR 18-25). Shortly thereafter, Red Acre commenced an action against Hutterville and four individual members of the

Waldner group seeking injunctive relief that would preclude the Waldner group from interfering with Red Acre's rights under the Lease. AA 1-4 (CR 26-29). Red Acre also filed motions for a temporary restraining order and a preliminary injunction. CR 30-38.

In response to Red Acre's Complaint and motions for injunctive relief, the Waldner group, purportedly acting on behalf of Hutterville, served a Counterclaim against Red Acre and a Third-Party Complaint against Wipf and a member of Red Acre, Robert Ronayne ("Ronayne"). CR 1875-1900. In the Third-Party Complaint, the Waldner group sought a declaratory judgment regarding the validity and enforceability of the Lease, the validity and enforceability of the Wipf Deeds, and a finding by the Circuit Court that neither Red Acre nor Wipf had any interest in the subject property. *Id.* The Third-Party Complaint also asserted various causes of action against Wipf and Ronayne, including slander to title, slander to trade or business, tortious interference with contractual relations, tortious interference with prospective economic advantage, unfair competition and civil conspiracy. *Id.* Finally, the Third-Party Complaint requested injunctive relief precluding Red Acre, Wipf or Ronayne from claiming any interest in the subject property. *Id.*

On June 13, 2014, Wipf filed a motion to dismiss the Waldner group's Third-Party Complaint against him on the grounds that the individuals initiating the third-party action on behalf of Hutterville lacked legal standing and that, pursuant to this Court's holdings in *Hutterville, Wipf* and *Wipf II,* the Circuit Court lacked subject-matter jurisdiction over their claims. AA 35-37 (CR 2081-

2083). While the Waldner group filed pleadings in opposition to Wipf's motion to dismiss, they did not request any affirmative relief from the Circuit Court prior to hearing. AA 41-42 (CR 2369-2370).

On August 25, 2014, the Honorable Eugene E. Dobberpuhl heard oral argument on Wipf's motion and a similar motion to dismiss filed by Red Acre and Ronayne. AA 38-61 (CR 2350-2373). During that hearing, the Circuit Court made reference to the constitutional prohibition against judicial involvement in religious affairs described in this Court's prior holdings, stating as follows:

> THE COURT: And I'm asking you, there is no real -- *I mean, the court can't figure out who really owns the property. They're not supposed to.* The church is supposed to in their hierarchy, right?
>
> MR. OLSEN: It's our position that that issue has been decided, number one, by the church --
>
> THE COURT: *But basically the courts are supposed to stay away from it.*

AA 58-59 (CR 2352-2353) (emphasis added). Despite this acknowledgement, the Circuit Court concluded that it did not see a "legal status" for the Wipf Deeds, and therefore, it invited counsel for the Waldner group to make an oral motion to dismiss Red Acre's Complaint:

> THE COURT: Anything that happens, the court does not have to sit in a vacuum, it can review it, but here's the problem we get into. One way or another these deeds have to be resolved. I can see no legal status for these deeds. I really can't. And you can argue this all you want to, but I'm going to entertain a motion by you to dismiss their claim. Will you make such a motion?

AA 59-60 (CR 2351-2352). Upon counsel for the Waldner's group's oral motion to dismiss, the Circuit Court issued a ruling from the bench dismissing Red Acre's Complaint and the Waldner group's Counterclaim and Third-Party Complaint. *Id.*

Following the August 25, 2014 hearing, counsel for the parties presented separate proposed orders to the Circuit Court regarding its bench ruling. Despite the fact that findings of fact and conclusions of law were not required under SDCL § 15-6-52(a) and that no such findings were announced by the Circuit Court on the record, the Waldner group's proposed Order contained a set of self-serving Findings of Fact and Conclusions of Law that declared the Wipf Deeds to be invalid, the Waldner group to be members of Hutterville and Wipf to be a "former member" of Hutterville who lacked authority to act in any capacity on the corporation's behalf. CR 2374-2381.

On September 4, 2014, Wipf filed an objection to the Waldner group's proposed Order for the reasons that, *inter alia,* all of the motions noticed to be heard before the Circuit Court at the August 25, 2014 hearing were brought pursuant to SDCL § 15-6-12(b)(1) and adoption of the Waldner group's proposed Findings of Fact and Conclusions of Law would violate well-settled law as set forth in *Hutterville, Wipf* and *Wipf II.* AA 62-67 (CR 2382-2387). Wipf also filed a proposed Order and Judgment of Dismissal which, if executed, would have dismissed all claims on the basis of the Circuit Court's lack of subject matter jurisdiction. CR 2388-2390.

On September 8, 2014, the Circuit Court entered a written Order which included several Findings of Fact and Conclusions of Law. AA 68-71 (CR 2391 – 2394). In its Findings of Fact, the Circuit Court stated that Hutterville had been split into two groups, "Group Church 1 of which the defendants are members and Group Church 2 to which Johnny Wipf belongs." *Id.* Furthermore, despite

evidence in the record establishing Wipf as the duly elected President of Hutterville, the Circuit Court also entered a finding concerning Wipf's status within Hutterville's corporate leadership, stating that "[i]n 2009, Johnny Wipf was elected president *of Group 2*."[2] *Id.* (emphasis added.)

The Conclusions of Law entered by the Circuit Court in its September 8, 2014 Order also contained legal conclusions concerning Hutterville's membership and corporate leadership, stating as follows:

1. Hutterville is a religious corporation with its property owned by all of its members.

2. The Wipf Deeds were executed and recorded without full consent of all its members.

3. The Wipf Brown and Spink County Deeds are not valid or enforceable.

4. All of Red Acre's rights under the Lease derive from the Wipf Brown and Spink County Deeds.

5. Hutterville's Counter and Third Party Claims are moot because no injury was incurred

AA 68-71 (CR 2391-2394).

Following entry of the Circuit Court's September 8, 2014 Order, the leader of the Waldner group, George Waldner Sr., in an effort to further prejudice the Wipf group, filed an Affidavit with the Brown County Register of Deeds,

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[2] Because Wipf's motion to dismiss was based upon the Circuit Court's lack of subject matter jurisdiction and the Waldner group did not move for any affirmative relief prior to the August 25, 2014 hearing, Wipf was not provided with sufficient notice that the Circuit Court would be entering Findings of Fact and Conclusions of Law as to the merits of any non-jurisdictional issue. SDCL § 15-6-52(a) ("Findings of fact and conclusions of law are unnecessary on decisions of motions under § 15-6-12[.]").

dated on September 16, 2014. AA 99-111 (CR 2406-2418). In this Affidavit, Waldner proclaimed himself to be the President of Hutterville and attached a copy of the Circuit Court's September 8, 2014 Order. *Id.* Approximately a week later, members of the Waldner group filed additional documents with the Brown County Register of Deeds and the South Dakota Secretary of State. These documents, including a purported "Trustee's Deed," various affidavits and an Articles of Merger, purported to, *inter alia,* merge Hutterville with a new corporation the Waldner group had formed in the State of Minnesota. AA 123-207.[3]

In response to the Waldner group's attempts to use the Circuit Court's Order to exercise control over Hutterville to the Wipf group's detriment, on September 24, 2014, Wipf filed a Motion for Reconsideration and Request for Emergency Hearing. AA 72-5 (CR 2402-2405). In this motion, Wipf requested the Circuit Court to vacate its September 8, 2014 Order on the grounds that it was violative of the holdings of this Court in *Hutterville, Wipf* and *Wipf II. Id.* In response to Wipf's motion, the Circuit Court, on October 1, 2014, issued a Memorandum Decision of the Court Clarifying the Previous Court's Ruling and Denying the Motion for Reconsideration. AA 112-114 (CR 2534-2536).

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[3] The Wipf group moves this Honorable Court to take judicial notice of the documents that the Waldner group has filed with the Brown County Register of Deeds and South Dakota Secretary of State. AA 123-207. *See Nelson v. WEB Water Development Ass'n, Inc.,* 507 N.W.2d 691, 693 (S.D. 1993) (holding that courts are permitted to take judicial notice of public or official records).

In its Memorandum Decision, the Circuit Court again acknowledged that "secular courts lack subject matter jurisdiction over the various determinations which are the True Church." AA 113 (CR 2535). Nevertheless, the Circuit Court denied Wipf's motion for reconsideration and attempted to clarify its previous Order, stating, in part, as follows:

> This Court previously ruled that certain deeds recorded to be invalid because there was no consent by all of the members, as all of the members own the property.
>
> This Court is denying the motion to reconsider my ruling. It is clear that there has been no consensus of how the property should be handled. This Court's decision, to be clear, applies to both groups.
>
> It has been brought to this Court's attention that one group is now filing and executing new instruments in an effort to control all of the assets. *It is my decision that actions deeds, contracts, or any instrument executed by either group, are invalid without the consent of both groups.* In order to function, the groups must come to a mutual accommodation. This Court lacks jurisdiction to help the parties reach an agreement.

AA 113-114 (CR 2534-2535) (emphasis added). An Order denying Wipf's motion for reconsideration and incorporating the Circuit Court's October 1, 2014 Memorandum Decision was signed on October 9, 2014 and filed on October 10, 2014. AA 118-119 (CR 2557-2558).

STANDARD OF REVIEW

The standard of review for jurisdictional issues is *de novo. Hutterville Hutterian Brethren, Inc. v. Waldner,* 2010 SD 86, ¶ 18, 791 N.W.2d 169, 174. "A trial court's findings of fact are examined under the clearly erroneous standard" and "conclusions of law are reviewed *de novo.*" *Wipf v. Hutterville Hutterian*

Brethren, Inc., 2012 SD 4, ¶ 11 n.4, 808 N.W.2d 678, 681 (citing *Lien v. Lien*, 2004 SD 8, ¶ 14, 674 N.W.2d 816, 822).

ARGUMENT

I. South Dakota courts lack subject matter jurisdiction to resolve the religious dispute between the Wipf group and the Waldner group at Hutterville Colony.

It is well-settled that both Article VI, Section 3 of the South Dakota Constitution and the First Amendment to the United States Constitution "preclude civil courts from entertaining religious disputes over doctrine, leaving adjudication of those issues to ecclesiastical tribunals of the appropriate church." *Decker v. Tschetter Hutterian Brethren, Inc.*, 1999 SD 62, ¶ 16, 594 N.W.2d 357, 362. On three separate occasions, this Court has applied this constitutional principle within the context of the Waldner/Wipf controversy by declaring that South Dakota courts have no subject matter jurisdiction to resolve the religious dispute between the Waldner and Wipf groups at Hutterville Colony. *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 SD 86, 191 N.W.2d 169, *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2012 SD 4, 808 N.W.2d 678, *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2013 SD 49, 834 N.W.2d 324.

Beginning in *Hutterville Hutterian Brethren, Inc. v. Waldner*, this Court was faced with the question of whether a secular court could, without entangling itself in matters of the Hutterite faith, adjudicate a dispute between the Waldner and Wipf groups regarding the true identities of the duly elected officers and directors of Hutterville. 2010 SD 86, ¶ 18, 791 N.W.2d 169, 174. Arguing in favor of jurisdiction, the appellants in *Hutterville* argued that the Circuit Court

could adjudicate the dispute under the "neutral principles of law" doctrine because the relevant corporate documents regarding membership, meeting requirements, and removal of members, directors and officers did not incorporate religious doctrine, and thus, no tenet or rule of the Hutterian Church was implicated. *Id.* ¶ 23.

This Court, however, refused application of the "neutral principles of law" approach and affirmed the Circuit Court's dismissal on the grounds that "Hutterville's articles of incorporation and bylaws reflect that governance of the corporation is inseparable from membership in the Hutterian Church and compliance with its religious principles." *Id.* ¶ 28. This Court recognized that in order for a secular court to determine the corporate governance issue, it would first be required to determine the status of each group's *membership* in the Hutterian Church. *Id.* ¶ 29 ("[T]o determine Appellants' corporate governance issue . . . , the circuit court would have to determine the status of the Appellants' membership in the Church."). To reach such a finding, the Court would be forced to rule on the validity of the purported excommunications by the Waldner group, and ultimately, the religious questions of what is the true Hutterian Church at Hutterville Colony and who are its "true" elders:

> After the excommunications and the October 2009 election, a resolution of the governance question became dependent upon resolution of a dispute regarding membership in and expulsion from the "true" Hutterian Church by the "true" church elders of the local church at Hutterville Colony. Such matters of membership are shielded from judicial scrutiny under the First Amendment.

Id. ¶ 34.

Two years later in *Wipf v. Hutterville Hutterian Brethren, Inc.*, this Court was again asked to resolve the ongoing dispute between the Waldner and Wipf groups following an order by the Circuit Court ordering dissolution of Hutterville. 2012 SD 4, 808 N.W.2d 678. Once again, this Court rejected the invitation to adjudicate an element of the Rev. Kleinsasser/Wipf controversy within Hutterville Colony. Specifically, the Court evaluated the Circuit Court's attempt to order dissolution pursuant to SDCL § 47-26-22 and concluded that:

> On the surface, the circuit court's ruling seems a welcome resolution to this ongoing dispute. Yet an examination of the statutory language and the corporate documents demonstrate that the dissolution of Hutterville cannot be separated from church membership, corporate leadership, and the underlying religious controversies.

Id. ¶ 16.

In particular, the Court found that because SDCL § 47-26-22 permits only a member or director of a corporation to request the dissolution of the corporation, dissolution could not be ordered without determining "whether the Wipf group's participants were directors or members of the corporation." *Id.* Therefore, although the appellants in *Wipf* did not expressly request the Circuit Court to identify Hutterville's members, "[b]oth the statutory language and Hutterville's corporate documents make membership and local leadership relevant to the involuntary dissolution of the corporation." *Id.* ¶ 21. For that reason, the Circuit Court's attempt to avoid the religious controversy and dissolve the corporation was held to be improper:

> When Hutterville made following the Hutterian religion a condition of corporate membership and weaved religious doctrine throughout its corporate documents, it limited a secular court's

> ability to adjudicate any corporate disputes. We cannot uphold the circuit court's order, findings, and conclusions without also endorsing its decision on the identity of corporate leaders and members. "Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."

Id. ¶ 27 (citing *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC et al.*, 132 S.Ct. 694, 697, 181 L.Ed.2d 650 (2012)).

This clear and unambiguous holding was reaffirmed yet again in *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2013 SD 49, 834 N.W.2d 324, wherein this Court stated that South Dakota courts "have no subject matter jurisdiction to resolve the religious dispute between these rival groups." *Id.* ¶ 37.

II. The Circuit Court lacked subject matter jurisdiction to determine the identity of Hutterville Hutterian Brethren Inc.'s members and corporate leaders.

Pursuant to the request of the Waldner group, the Circuit Court in its September 8, 2014 Order issued several Findings of Fact and Conclusions of Law which violated this Court's mandate in *Hutterville, Wipf* and *Wipf II* by endorsing the conclusion that the members of the Waldner group are members of Hutterville. AA 68-71 (CR 2391-2394). These include Finding of Fact No. 3, which states that "[i]n 2009, Johnny Wipf was elected president of *Group* 2" and Conclusion of Law No. 2, which provides that "[t]he Wipf Deeds were executed and recorded without full consent of all its *members*." *Id.* (emphasis added).

By concluding as a matter of law that "Hutterville is a religious corporation with its property owned by all of its members" and "[t]he Wipf Deeds were executed and recorded without full consent of all its members," the Circuit Court effectively held, as a matter of law, that the members of the Waldner group

are members of Hutterville whose consent was required in order for Wipf's execution of the Wipf Deeds to be deemed valid. Such a ruling constitutes an endorsement as to the identity of Hutterville's members and, therefore, is precisely the type of adjudication of a religious dispute that secular courts in South Dakota are prohibiting from making. *Hutterville,* 2010 SD 86, ¶ 34, 791 N.W.2d at 179 ("[M]atters of membership are shielded from judicial scrutiny under the First Amendment."); *Wipf*, 2012 SD 4, ¶ 20, 808 N.W.2d 678, 685 ("Determining whether Hutterville members were in good standing requires an investigation into religious eligibility.").

While the Circuit Court unquestionably understood that "secular courts lack subject matter jurisdiction over the various determinations which are the True Church," the Court ignored this constitutional principle by affirming the Waldner group's membership in Hutterville and by declaring in its October 1, 2014 Memorandum Decision that any "actions[,] deeds, contracts, or any instrument executed by either group, are invalid without the consent of both groups." AA 112-114 (CR 2534-2536). For the Circuit Court to institute such a rule, it first would have been required to conclude that both the Waldner group and the Wipf group are in fact members of Hutterville in good standing. A secular court's orders, findings, and conclusions of law, however, cannot be upheld where doing so would act as a decision on the identity of Hutterville's corporate leaders and members. *Wipf,* 2012 SD 4, ¶ 27, 808 N.W.2d at 686.

As with Judge Von Wald's attempt in *Wipf* to order dissolution of Hutterville, on the surface, the Circuit Court's order compelling "mutual

accommodation" may seem to be a welcome resolution to the ongoing dispute at Hutterville. AA 112-114 (CR 2534-2536). Like in *Wipf,* however, this rule cannot be implemented without violating the provisions of the South Dakota and United States Constitutions that forbid judicial adjudication of theological disputes. For this reason, the Circuit Court's September 8, 2014 Order and October 9, 2014 Order should be vacated and this case should be remanded back to the Circuit Court with instructions to dismiss all claims for lack of subject-matter jurisdiction.

III. The Circuit Court lacked subject matter jurisdiction to adjudicate the validity of the Wipf Deeds

On the basis of its improper finding that the Wipf Deeds were executed and recorded without full consent of all Hutterville's members, the Circuit Court ruled in its Conclusion of Law No. 3 that "[t]he Wipf Brown and Spink County Deeds are not valid and enforceable."[4] AA 68-71 (CR 2391-2394). Because this finding was based upon a determination of Hutterville's membership, however, the Circuit Court's attempt to adjudicate the validity of the Wipf Deeds necessarily violated this Court's prior rulings in *Hutterville, Wipf* and *Wipf II.*

[4] According to the Circuit Court, the lack of consent and approval by the Waldner group was dispositive on the issue of the validity of the Wipf Deeds. The "consent" of both groups, however, has not been the basis for any decision at Hutterville Colony since the *Hutterville* and *Wipf* decisions. To the contrary, the oppressive conduct of the Waldner group against the Wipf group has only escalated in its severity and scope, resulting in severe hardship to the Wipf group and all of its members. AA 76-111 (CR 2406-2431).

It is undisputed that the transfer of land to Wipf as Trustee for Hutterville through execution and filing of the Wipf Deeds was made pursuant to a Corporate Resolution and Trust Agreement executed by Hutterville's Board of Directors. AA 25-28 (CR 17450 - 1753); AA 29 (CR 2084). Thus, in order for the Circuit Court or any secular court to address the validity of the Wipf Deeds, it would first be required to determine whether Wipf had the necessary corporate authority to execute the Wipf Deeds. Here, that would require an examination of and a ruling on the validity of the Corporate Resolution and Trust Agreement executed by Hutterville's Board of Directors.

As this Court has made clear, directorships and officerships of Hutterville are "inseparable from religious principles" and therefore "cannot be decided without 'extensive inquiry into religious doctrine and beliefs' of the Hutterian faith." *Hutterville,* 2010 SD 86, ¶ 34, 791 N.W.2d at 179-80. Just as the Circuit Court in *Wipf* would have been required to determine "whether the Wipf group's participants were directors or members of the corporation" in order to authorize a dissolution of Hutterville pursuant to SDCL § 47-26-22, so to was the Circuit Court in this case required to make a determination as to the identity of Hutterville's true Board of Directors in order to address the validity of the Corporate Resolution and Trust Agreement. As a result, the validity of the Wipf Deeds and the Corporate Resolution and Trust Agreement that authorized Wipf to execute those deeds cannot be adjudicated by a secular court, and the Circuit Court's Orders that purported to do should be vacated. *Hutterville*, 2010 SD 86, ¶ 34, 791 N.W.2d at 179-80; *Wipf,* 2012 SD 4, ¶ 27, 808 N.W.2d at 686.

IV. The Circuit Court's orders violated principles of *res judicata* as the issue of a secular court's ability to determine the identity of Hutterville Hutterian Brethren Inc.'s members and corporate leaders has been fully litigated.

In addition to violating the prior holdings of this Court concerning the Hutterville dispute, the Circuit Court's September 8, 2014 Order and October 9, 2014 Order also violated principles of *res judicata.* As this Court recognized in *Wells v. Wells,* "when a party appears and contests jurisdiction, a judgment rendered on jurisdiction is final for the purposes of res judicata." 2005 SD 67, ¶ 17, 698 N.W.2d 504, 509 (citing *Baldwin v. Iowa State Traveling Men's Ass'n,* 283 U.S. 522, 525–26, 51 S.Ct. 517, 518, 75 L.Ed. 1244 (1931); *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 378, 60 S.Ct. 317, 320, 84 L.Ed. 329 (1940)). "After a jurisdictional ruling, 'the determination is res judicata between the parties and can only be attacked directly by an appeal therefrom.'" *Id.* "Even though an earlier determination of jurisdiction may be erroneous on the facts and law, the doctrine of res judicata will still apply, precluding further litigation on the judgment." *Id. See also Sandy Lake Band of Mississippi Chippewa v. U.S.*, 714 F.3d 1098, 1102 (8th Cir. 2013) ("The principles of *res judicata* apply to questions of jurisdiction as well as to other issues.") (citing *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 166, 53 S.Ct. 98, 77 L.Ed. 231 (1932)).

"*Res judicata* consists of two preclusion concepts: issue preclusion and claim preclusion." *Am. Family Ins. Grp. v. Robnik*, 2010 SD 69, ¶ 15, 787 N.W.2d 768, 774 (citations omitted).

> Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect also is referred to as direct or collateral estoppel. Claim

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

Id. (citations omitted). To establish the applicability of *res judicata*, a party must show four elements "(1) whether the issue decided in the former adjudication is identical with the present issue; (2) whether there was a final judgment on the merits; (3) whether the parties are identical; and (4) whether there was a full and fair opportunity to litigate the issues in the prior adjudication." *Flugge v. Flugge*, 2004 S.D. 76, ¶ 14, 681 N.W.2d 837, 841.

Here, the issue of a secular court's subject matter jurisdiction to adjudicate any claims concerning membership in or corporate control over Hutterville has been fully and fairly litigated and decided. In *Hutterville*, this Court discussed and considered the detailed history of the schism within the North American Hutterian Church, as well as the effect of the schism locally at Hutterville Colony. *Hutterville* , 2010 SD 86, ¶ 4-5, 191 N.W.2d at 171. The Court also reviewed the same local church and corporate history cited in the Waldner group's Third-Party Complaint as the basis for their claim to membership in and control of Hutterville. *Id.* ¶¶ 6-10. This review included the purported ex-communication of Wipf and the Waldner group's flawed claim that Wipf and his group are not members of Hutterville because they are members of a separate church. *Id.* ¶¶ 11-16.

Thus, it cannot be reasonably disputed that (1) the issue of whether a secular court has jurisdiction or authority to decide the identity of Hutterville's corporate leaders and/or members is the same issue raised in prior litigations; (2) these prior decisions constitute valid and final judgments sufficient to bar the

Waldner group from re-litigating these issues; (3) Hutterville, George Waldner and members of the Waldner group were parties in the prior litigations; and (4) the issue of a secular court's subject-matter jurisdiction to adjudicate the Wipf/Waldner corporate governance dispute – including the arguments related to Wipf's purported excommunication – were fully and fairly litigated by the Waldner group in prior litigations.

This Court's prior consideration of the evidence and arguments concerning the identity of Hutterville's corporate leaders and members establishes that the issue of a secular court's jurisdiction to decide which group properly controls Hutterville has been conclusive litigated. Similarly, both Judge Portra in the September 2012 Brown County litigation and Judge Piersol in *Sveen* definitively held that the members of the Waldner group lacked legal standing to institute litigation on behalf of Hutterville as a result of this Court's rulings in *Hutterville* and *Wipf*. CR 358; *Sveen*, 2013 WL 4679489 at *10. As such, the Circuit Court in this case was prohibited by principles of *res judicata* from allowing the Waldner group to re-litigate the merits of their flawed claim of authority over the corporate governance of Hutterville by way of their Third-Party Complaint against Wipf and their proposed Findings of Fact and Conclusion of Law.

CONCLUSION

For the foregoing reasons, Appellant Johnny Wipf Sr. respectfully submits that the Circuit Court's September 8, 2014 Order, including Findings of Fact and Conclusions of Law, and the Circuit Court's October 9, 2014 Order and the

October 1, 2014 Memorandum Decision incorporated therein should be vacated and this case should be remanded back to the Circuit Court with instructions to dismiss all claims for lack of subject matter jurisdiction.

Dated at Sioux Falls, South Dakota, this 21st day of November, 2014.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument.

/s/ Shane E. Eden

Shane E. Eden

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

NO. 27223

RED ACRE, LLC., a South Dakota limited liability Company,

Plaintiff and Appellant (27227, dismissed)

vs.

HUTTERVILLE HUTTERIAN BRETHREN, INC., a South Dakota corporation, GEORGE WALDNER, SR., KENNETH WALDNER, SAMUEL WALDNER, and THOMAS WALDNER,

Defendants and Appellees

and

HUTTERVILLE HUTTERIAN BRETHREN, INC.,

Counterclaim, Third-Party Plaintiff and Appellees

vs.

RED ACRE, LLC, a South Dakota limited liability Company,

Counterclaim Defendant and Appellant (27227, dismissed)

and

ROBERT RONAYNE,

Third-Party Defendants and Appellant (27227, dismissed)

and

JOHNNY WIPF, SR.,

Third-Party Defendant and Appellant

BRIEF OF APPELLEES

Appeal from the Circuit Court
Fifth Judicial District
Brown County, South Dakota
The Honorable Eugene E. Dobberpuhl, Presiding Judge

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Notice of Appeal filed October 9, 2014 and
Amended Notice of Appeal filed November 11, 2014

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PRELIMINARY STATEMENT

Appellees Hutterville Hutterian Brethren, Inc., George Waldner, Sr., Kenneth Waldner, Samuel Waldner, and Thomas Waldner are collectively referred to as "Hutterville" or the "Waldners."[1] Appellant Johnny Wipf, Sr. is referred to as "Wipf." Dismissed Appellant (No. 27227) Red Acre, LLC is referred to as "Red Acre." Its principal, Robert Ronyane, is referred to as "Ronyane."

Citations to Appellant's Appendix are abbreviated "AA," with a corresponding Appendix page number. Citations to Hutterville's separate Appellee Appendix are abbreviated "HA," with a corresponding Appendix page number. Citations to the Brown County Circuit Court Clerk's Index are abbreviated "CI," with a corresponding Clerk's Index page number.

JURISDICTIONAL STATEMENT

On September 8, 2014, the Brown County Fifth Judicial Circuit Court, the Honorable Eugene E. Dobberpuhl, entered its Order declaring a purported Hutterville Farm Lease between Red Acre, as "Tenant," and Wipf, as "Landlord," to be invalid and unenforceable; dismissing Red Acre's Complaint to enforce the Lease with prejudice; and dismissing Hutterville's counter and third-party claims

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[1] Appellee Hutterville Hutterian Brethren, Inc. ceased to exist by operation of law on September 24, 2014, when it was merged into HHBI, Inc., which was then merged into Hutterville South Dakota, Inc., a Minnesota nonprofit corporation. Pursuant to SDCL § 47-26-39, Hutterville Hutterian Brethren, Inc. continues to defend its rights in this action under its pre-existing name.

with prejudice. (AA 68-71, CI 2391-94). Notice of Entry of the Order was served on September 11, 2014. (CI 2395-2401).

On September 24, 2014, Wipf filed a Motion for Reconsideration. (AA 72-75, CI 2402-2405). On October 1, 2014, Judge Dobberpuhl issued a memorandum decision "Clarifying the Previous Court's Ruling and Denying the Motion for Reconsideration" (AA 112-114, CI 2534-36), and on October 10, 2014, entered an Order denying Wipf's motion. (AA 118-19, CI 2557-58). Notice of Entry of the Order was served on October 14, 2014. (CI 2585-89).

On October 9, 2014, Wipf filed his Notice of Appeal and Docketing Statement. (AA 115-17, CI 2537-39). On October 10, 2014, Red Acre filed its separate Notice of Appeal. (CI 2559-61). On October 29, 2014, Hutterville filed its Notice of Review and Docketing Statement.

By Order of October 31, 2014, Red Acre's appeal was dismissed. On November 11, 2014, Wipf filed an Amended Notice of Appeal and Amended Docketing Statement, clarifying that the October 9, 2014 Order is a subject of appeal. (AA 120-22).

STATEMENT OF THE ISSUES

I. SHOULD WIPF'S APPEAL BE DISMISSED BECAUSE HE IS NOT AN AGGRIEVED PARTY WITH STANDING TO APPEAL FROM THE TRIAL COURT'S JUDGMENT DISMISSING THE THIRD-PARTY COMPLAINT AGAINST HIM?

Wipf was a party to this action only because Hutterville sued him as a Third-Party Defendant. Wipf did not Answer Hutterville's Third-Party

Complaint, and did not bring any claims against any party. On September 8, 2014, the Circuit Court granted Wipf's motion to dismiss the Third-Party Complaint against him with prejudice.

RELEVANT CASES

Smith v. Rustic Home Builders, LLC, 2013 S.D. 9, 826 N.W.2d 357.

Jones v. Dappen, 359 N.W.2d 894 (S.D. 1984).

Miller v. Scholten, 273 N.W.2d 757 (S.D. 1979).

II. SHOULD WIPF'S APPEAL BE DISMISSED AS MOOT BECAUSE THERE IS NO REMAINING CONTROVERSY BETWEEN THE LITIGATING PARTIES OR, ALTERNATIVELY, BECAUSE THIS COURT CANNOT GRANT THE REQUESTED RELIEF DUE TO THE OCCURRENCE OF INTERVENING EVENTS?

On September 8, 2014, the Circuit Court declared a purported Farm Lease for Hutterville's property between Red Acre, as "Tenant," and Wipf, as "Landlord," invalid and unenforceable, and dismissed Red Acre's Complaint to enforce the Lease with prejudice. After the Circuit Court entered judgment, Hutterville Hutterian Brethren, Inc., ceased to exist as a result of its merger into HHBI Farms, Inc., and HHBI Farms' merger into Hutterville South Dakota, Inc., a Minnesota nonprofit corporation. The subject real property is currently owned by the surviving entity of the mergers, Hutterville South Dakota, Inc., which is not and never was a party to this proceeding. Red Acre dismissed its appeal from the adverse decision.

RELEVANT CASES

Anderson v. Kennedy, 264 N.W.2d 714 (S.D. 1978).

First Fed. Sav. Bank of S.D. v. Hamblet, 481 N.W.2d 274 (S.D. 1992).

Rohm & Hass Texas, Inc. v. Ortiz Bros. Insulation, Inc., 32 F.3d 205 (5th Cir. 1994).

Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209 (9th Cir. 1987), *cert. Dismissed*, 488 U.S. 935 (1988).

III. SHOULD WIPF'S APPEAL BE DISMISSED ON ITS MERITS BECAUSE THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION TO DECLARE THE LEASE INVALID AND UNENFORCEABLE?

The Circuit Court's September 8, 2014, Order included Findings of Fact and Conclusions of Law determining on the undisputed facts that all of Red Acre's claimed rights under the Farm Lease derive from two deeds executed by Wipf in 2012, neither of which are valid or enforceable because he lacked authority to convey interests in Hutterville's property.

RELEVANT CASES

Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich, 426 U.S. 696 (1979).

Hutterville v. Waldner, 2010 S.D. 86, 791 N.W.2d 169.

Wipf v. Hutterville, 2012 S.D. 4, 808 N.W.2d 678.

IV. DID ENTRY OF FINAL JUDGMENT DIVEST THE TRIAL COURT OF JURISDICTION TO SUBSEQUENTLY "RECONSIDER," "CLARIFY," OR "MODIFY" IT?

On September 8, 2014, the Circuit Court entered its Order and Judgment dismissing Red Acre's Complaint and Hutterville's Counterclaim and Third-Party Complaint with prejudice. Weeks later the Circuit Court issued a Memorandum

Decision "clarifying" its prior judgment, and an Order denying Wipf's Motion for Reconsideration which Order incorporated the Memorandum Decision by reference.

RELEVANT CASES

Janssen v. Tusha, 68 S.D. 639, 5 N.W.2d 684 (1942).

Rabo Agrifinance, Inc. v. Rock Creek Farms, 2013 S.D. 64, 836 N.W.2d 631.

Moore v. Michelin Tire Co., Inc., 1999 S.D. 152, 603 N.W.2d 513.

STATEMENT OF THE CASE

Red Acre brought this action in the Brown County Fifth Judicial Circuit Court, the Honorable Eugene E. Dobberpuhl, presiding, seeking to enjoin Hutterville and the Waldners from interfering with its claimed rights under a purported Farm Lease between it, as "Tenant," and Wipf, as "Landlord." (AA 1-24, CI 6-29). Hutterville responded by filing Counter and Third-Party Claims against Red Acre, its principal, Ronayne, and Wipf. (CI 1875-1900).

On September 8, 2014, the Circuit Court entered an Order which included Findings of Fact and Conclusions of Law: determining that all of Red Acre's claimed rights under the Lease derive from two deeds recorded by Wipf in 2012 that purport to transfer all of Hutterville's farm property from himself, as "president," to himself, as "trustee," for no consideration (AA 13-24 and 68-71, CI 18-29 and 2391-94); and declaring that neither the deeds nor Lease are valid or enforceable. (AA 68-71, CI 2391-94). Having determined that the Lease was

unenforceable, the Circuit Court dismissed Red Acre's Complaint, and then dismissed Hutterville's Counter and Third-Party Claims as moot. Red Acre dismissed its appeal from the adverse decision.

Wipf did not Answer Hutterville's Third-Party Complaint against him, and he did not bring any claims against any party -- instead opting to file a motion to dismiss. (CI 2081-83). Although the Circuit Court granted Wipf's motion and dismissed Hutterville's Third-Party Complaint, he is asking on this appeal to have the claims against him dismissed on other grounds. Hutterville timely filed a Notice of Review, seeking review of the Circuit Court's October 1, 2014, Memorandum Decision and October 9, 2014, Order purporting to "clarify" the September 8, 2014 Order and Judgment.

STATEMENT OF THE FACTS[2]

The facts before the trial court were not in dispute. (AA 53, CI 2365). Only those facts relevant to the issues on this appeal are summarized below. A more complete statement of the facts can be found in Hutterville's Memorandum in Opposition to Motion to Dismiss. (CI 2152-2208).

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[2] Wipf's Statement of Facts does not include any reference to the Affidavits and voluminous documents and records that Hutterville put before the trial court, and on which its decision was based. Instead, Wipf's factual statement includes: at pages 3-16 an argumentative recitation of the litigation history involving the parties; at pages 16-20 a cursory summary of the pleadings and trial court orders up to the date of judgment; and at pages 20-22 a brief summary of Wipf's post-judgment motion to reconsider.

A. WIPF'S ADMITTED LACK OF AUTHORITY TO ACT FOR HUTTERVILLE.

1. Hutterville's Non-Profit Status and Governance.

Hutterville is a South Dakota non-profit religious corporation, originally incorporated on January 17, 1983. (HA 64-64, 66-67, CI 200-756; HA 104-11, 112, 113-25, CI 1042-1859). Its principal officers and directors are the Waldners. (HA 8-9, CI 60-61).[3]

To be a member of Hutterville, one must be a member in good standing of the church to which Hutterville belongs; and to be an officer or director of Hutterville, or to otherwise hold any position of authority over Hutterville's corporate affairs, one must be a "witness brother" in that church. (HA 61-62, 75-76, CI 200-756; HA 235-38, 271-72, CI 1042-1859). *See also Hutterville v. Waldner*, 2010 S.D. 86, ¶ 31, 791 N.W.2d 169, 178 (explaining that Hutterville's bylaws require "each and all of the members [to] agree to abide by the rules, regulations, directives, and authority of the presiding bishop or bishops of the Hutterian Church to which all members of this corporation, *through its local church*, belong," and that "*the articles and bylaws tie Hutterville membership to the local Church*") (emphasis added); *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2012 S.D. 4, ¶ 11, 808 N.W.2d 678, 682 ("[V]oting memberships, directorships,

[3] *See* note 1, *supra*.

and *officerships* of Hutterville are inseparable from religious principles and *contemplate local Church membership.*") (emphasis added).

Throughout the more than 500-year history of the Hutterite religion, Hutterite colonies have always been led by a Minister. (HA 64, CI 200-756; HA 267, CI 1042-1859). Hutterville's members are led by Rev. George Waldner (HA 252-53, CI 1042-1859) who has continuously served as Hutterville's Minister since 1982. (HA 66, CI 200-756; HA 250-51, CI 1042-1859). Wipf has never been a Minister in Hutterville's church or any other church. (HA 267, CI 1042-1859).

Wipf concedes that, prior to the present dispute, Hutterville's Minster has always been its president, and that the leader of every other Hutterite colony has always been a Minister. (HA 71-72, CI 200-756). Wipf cannot identify any Hutterite colony that is not led by a Minster, and cannot think of a single example throughout the history of the church where a colony was not led by a Minister. (*Id.*).

2. Hutterville's Church Affiliation and the 1992 "Schism."

In 1992, the North American Schmeidenleut Hutterite Church split in two, with some Hutterite colony Ministers choosing to remain loyal to the leadership of Rev. Kleinsasser ("Group 1"), and Ministers for other colonies choosing to follow Rev. Joseph Wipf ("Group 2"). (HA 65-66, 67, CI 200-756). The decision whether a colony will be a member of the Group 1 or Group 2 church is made by the colony's Minister. (HA 267, CI 1042-1859). Hutterville, through its Minister,

Rev. Waldner, chose to remain a Group 1 colony. (HA 65-66, 67-69, CI 200-756 (Wipf explaining that "[i]t was George's decision"); Brief in Supp. of Third-Party Def. Johnny Wipf Sr.'s Mot. to Dismiss at 4 (Wipf conceding that, "the then minister of Hutterville Colony, George Waldner, Sr., chose to remain loyal to the leadership of Rev. Kleinsasser . . . ."); HA 267-68, CI 1042-1859).

3. Wipf's Post-"Schism" Affirmation of Loyalty to and Continuing Individual Membership in Hutterville's Church.

Several years after the 1992 Group 1–Group 2 church split, Wipf, along with all of Hutterville's other members at the time, signed an Affirmation of their loyalty to the original Group 1 Church to which Hutterville has always belonged. (HA 59-60, CI 200-756; HA 126-28, CI 1042-1859). Wipf testified as follows:

Q. Do you recognize this document that's titled, "Affirmation"?

A. Yes.

Q. [D]o you see your signature?

A. Yes.

Q. And you signed the document on January 10th, 1995?

A. Yes.

Q. And that was a few years after the 1992 Schmeid-Leut split?

A. Yes.

Q. All right. And this is where Hutterville members affirmed their loyalty to the Schmeid-Leut church led by Kleinsasser?

A. Yes.

(HA 69-70, CI 200-756).

Up to and including 2008 Wipf was and remained a "witness brother" in Hutterville's Group 1 Church, and he held various positions of authority at Hutterville, including vice president of the corporation and "farm boss." (HA 14-18, CI 200-756). Wipf agrees that there was no religious dispute prior to 2008:

> Q. There was no dispute prior to 2008 regarding who was in charge of Hutterville, correct?
>
> A. Not – no, not who was in charge of Hutterville. No.
>
> Q. Everybody knew George Waldner was the minister and in charge of Hutterville, correct, prior to 2008?
>
> A. Yes.
>
> Q. And prior to 2008, there was no dispute that Hutterville was a Group 1 Schmeid-Leut church colony, prior to 2008?
>
> A. No. No.

(HA 71, CI 200-756).

4. The Ecclesiastical Tribunal's 2008 Termination of Wipf's Authority.

On January 10, 2008 – and while admittedly still a member of Hutterville's Church -- Wipf voluntarily appeared before and submitted to the authority of an ecclesiastical tribunal of 55 Group 1 Ministers (which tribunal Wipf acknowledges to be the highest ecclesiastical authority in Hutterville's Church). After deliberating, the tribunal announced its decision to discipline Wipf by stripping him of his "witness brother" status in the Group 1 Church. (HA 27-36, 72-74, 76, CI 200-756; HA 129-31, 269-272, CI 1042-1859). In the presence of the 55-minister council, Wipf agreed to accept the discipline handed down to him. (HA

30-31, 73-75, CI 200-756). It was a "big deal" for Wipf to lose his "witness brother" status because it is a leadership position, and only witness brothers are permitted to hold any position of authority in a Hutterite colony. (HA 75-76, CI 200-756; HA 270-71, CI 1042-1859).

Wipf's testimony speaks for itself:

Q. January 10, 2008, do you remember a church meeting at Crystal Springs up in Canada?

A. Yes.

Q. And those 55 ministers are listed on – on the first page of Exhibit 8?

A. Yes.

* * *

Q. And there was discussion regarding church discipline at this January 10, 2008 meeting?

A. I'm sure, yes.

* * *

Q. And you were there?

A. Yes.

Q. All right. And then at that meeting . . . it states that "Johnny Wipf, farm manager, should help as farm manager, but not to take part as a witness brother."

A. I don't –

Q. That happened –

A. Yes.

* * *

Q. Then the three brothers that were concerned, including you, were called in to the church meeting, "and asked if they will accept what was decided by the church meeting. They all said, yes, they will try."

A. We will try, yes.

* * *

Q. And they did take –

A. Yes.

Q. – away that witness –

A. Yes.

Q. – brother status?

A. If they did, they did, yes.

(HA 72-74, CI 200-756).

On August 29, 2008, Wipf voluntarily attended a Church meeting at Hutterville, at which the Group 1 Ministers who had been at the August 6, 2008, Church meeting confirmed that his discipline was made permanent. (HA 37-39, 78, CI 200-756; HA 132-33, 134, 235-38, 273-75, CI 1042-1859 (explaining that a council of 55 Group 1 Ministers was convened in January 2008, and it was agreed that Wipf could no longer be a "witness brother" in the Church and could not hold any position of authority in Hutterville Colony)). Wipf accepted the Church's announced August 29, 2008, decision. (HA 79-80, CI 200-756). He was never reinstated as a witness brother by Group 1. (HA 77, CI 200-756; HA 272, CI 1042-1859).

5. Wipf's 2008 Voluntary Termination of Membership in Hutterville's Church.

After the ecclesiastical tribunal stripped him of his witness brother status, in 2008 Wipf and his followers decided to leave the Group 1 Church to which Hutterville belongs, and they sought to join the Group 2 church—which Wipf acknowledges to be a separate and different church. (HA 77, 81-82, 86-87, CI 200-756). Wipf readily admits that there are two Hutterian churches, Group 1 and Group 2, and that only he and his 11 followers joined Group 2. (HA 85-87, 90, CI 200-756). Wipf testified as follows:

> Q. And you were never reinstated by—as a witness brother by Group 1, by Jacob Kleinsasser?
>
> A. Not by Group 1, but by Group 2, yes.
>
> Q. Right. And Group 1 and Group 2, those are different churches, aren't they?
>
> A. They're different churches, yes.
>
> Q. All right. And when you're talking about this 2008 transition, you're talking about your group joining Group 2, right?
>
> A. Yes. Yes.
>
> * * *
>
> Q. When you say that you joined a new church in 2009, Mr. Wipf, do you mean that you voluntarily left Kleinsasser' church?
>
> A. Definitely. How else—we voluntarily voted to join the Group 2 Hutterian Brethren Church.
>
> Q. An you joined Group 2, which is a church not affiliated with Kleinsasser?

A. It is not—it's not affiliated with Kleinsasser.

(HA 77, 86-87, CI 1042-1859; *see also* HA 82-83, CI 200-756 (Wipf, "[W]e was already out of Jacob Kleinsasser's church."); HA 135, 136, 137-40, 235-38 (Elder Minister Samuel Kleinsasser explaining that, "*Wipf is not and cannot be a member of Hutterville Colony* . . . only the Elder Minister of a Colony can serve as its President, and only Elder Colony Church members in good standing can serve in any other positions of authority . . . [and that *Wipf] has no right to direct Hutterville's affairs, make contracts in its name, or to transfer, sell or convey any interests in any of its communally-owned property*") (emphasis added), 276-78, CI 1042-1859).

B. THE 2012 WIPF TRUST AND DEEDS.

On February 10, 2012, and without Hutterville's knowledge, Wipf and his 11 followers --all of whom had previously voluntarily left and were not members of Hutterville's Church -- purported to "elect" Wipf as "trustee" for Hutterville's property. (HA 94-95, CI 200-756; HA 149-52, CI 1042-1859). Neither Hutterville nor the Church to which it belongs approved Wipf's trust agreement. (HA 86-87, 88-89, CI 200-756; HA 266, CI 1042-1859).

Using the purported authority of the "trust," Wipf executed and recorded a Spink County Warranty Deed on February 22, 2012, and a Brown County Deed on February 28, 2012, both of which purported to transfer Hutterville's farm property from himself, as "president," to himself, as "trustee," for no consideration. (HA 153-57, 158-62, CI 1042-1859).

C. THE USDA LITIGATION AND NATIONAL APPEALS DIVISION FINAL RULING DECLARING WIPF'S 2012 DEEDS TO BE OF NO EFFECT.

Based on his "trust" and 2012 purported deeds, Wipf sought to divert Hutterville's FSA Farm Program payments to himself. (HA 285-89, 290-91, CI 1042-1859). In February 2014, following an evidentiary hearing at which Wipf was represented by counsel, the United States Department of Agriculture, Office of the Secretary, National Appeals Division, conclusively determined that:

> *[Wipf's] filing of warranty deeds with the register of deeds,* ostensibly granting the Corporation's real property to himself as trustee of the Corporation . . . *do not affect ownership of the Corporation's farmland; [Wipf] in his purported capacity as trustee is not an owner* . . . Rather, the record shows that *the Corporation is the legal owner of the farmland* . . . .

(HA 285-89, CI 1042-1859).

Denying Wipf's request for reconsideration, on February 26, 2014, the National Appeals Division reaffirmed its ruling that he had failed to prove he was the Corporation's "president" when he purported to execute the 2012 Warranty Deeds to himself; and reconfirmed that he is not an "owner" of the Property, that his Warranty Deeds did not transfer ownership of the Property, and that the Corporation is the legal owner. (HA 290-91, CI 1042-1859). Although the USDA Ruling was appealable to the United States District Court, Wipf did not timely appeal and the USDA Ruling therefore became final. *See* 7 C.F.R. § 11.13.

D. WIPF'S CURRENT STATUS AS A SQUATTER ON HUTTERVILLE'S PROPERTY WHO CONTRIBUTES NOTHING TO THE COMMUNITY.

1. Hutterville Finances, Manages, and Operates the Farm.

Hutterville farms approximately 10,000 acres on which it raises corn, soybeans, and wheat. (HA 252, CI 1042-1859). Hutterville purchased, paid for, owns, and has always farmed its own land. (HA 24-26, 46-47, CI 200-756).

Through its Group 1 Church affiliation, and led by Rev. Waldner, Hutterville pays all of the expenses associated with ownership and operation of Hutterville's farm. (HA 253-54, CI 1042-1859). As but some examples, Hutterville: provides all of the labor; plants the fields; harvests and sells the crops; buys the seed, fertilizer, equipment, fuel, and electricity; maintains the equipment; insures the crops; and manages all of the finances, including operating loans with Bremer and U.S. Banks secured by crops and real estate. (HA 91-92, CI 200-756; HA 239-41, 242-48, 254-259, CI 1042-1859). Hutterville also deals with all vendors and purchasers. (HA 163-202, 205-27, 253-54, CI 1042-1859).

All of the proceeds from the sale of Hutterville's crops are deposited into Hutterville's communal account at Bremer Bank, which was established in accordance with IRC Section 501(d). (HA 259-60, CI 1042-1859). All of the expenses associated with ownership and operation of Hutterville's farm are paid from Hutterville's IRC 501(d) communal treasury. (HA 91-92, CI 200-756; HA 242-48, 258-61, CI 1042-1859). At the time this litigation was commenced in May 2014, Hutterville had already paid nearly $1 million in farm-related expenses for the planting season. (CI 757-1041). In addition, Hutterville prepares and files Hutterville's federal income tax returns, for which Rev. Waldner is the authorized

signer, and pays all income, sales and use taxes. (HA 203-04, 260-61, CI 1042-1859).

2. Wipf is a Squatter Who Contributes Nothing to the Community.

For the past several years Wipf and his followers have not had any duties or responsibilities with regard to the operation of Hutterville's farm, and have not in any way participated in or exercised control over its operation. (HA 16-21, 40-43, 44-45, CI 200-756; HA 261-62, CI 1042-1859). He and his associates and followers pay no expenses associated with ownership or operation of Hutterville's farm, and they provide no labor, equipment, or capital for Hutterville's farm. (HA 254-55, CI 1042-1859). Nor do Wipf and his followers share in the proceeds of the sale of Hutterville's crops. (HA 260, CI 1042-1859).

Wipf and his followers played no role and were not involved in setting up Hutterville's financing with Bremer Bank (HA 265, CI 1042-1859), and they contribute no money to Hutterville's communal account. (HA 84, CI 200-756; HA 259-60, CI 1042-1859). Wipf keeps his own separate, personal bank account. (HA 22-23, 48-55, 56-57, 84, 93-94, CI 200-756; HA 280, CI 1042-1859). He and his associates and followers live separately from Group 1 Church members, and do not associate or work with them. (HA 83-84, CI 200-756; HA 279, CI 1042-1859). They live at Hutterville Colony only as uninvited guests, *i.e.*, squatters, and Hutterville, Group 1, shelters them as an act of charity. (HA 252, 262-63, 281-82, 283-84, CI 1042-1859).

E. THE RED ACRE LEASE AND THE PARTIES' RESPECTIVE CLAIMS.

On May 12, 2014, Red Acre purported to enter into a Cash Rent Farm Lease (the "Lease") for nearly 10,000 acres of Hutterville's farmland. (AA 5-12, CI 10-17). Red Acre's grantor and ostensible Landlord is Wipf. (*Id.*). Red Acre filed this action on the same day it signed the Lease, asking for an immediate injunction to prevent Hutterville and the Waldners "from interfering with or causing any party to interfere with its exclusive rights under the Lease for the 2014, 2015, and 2016 crop years." (CI 30). Attached to the Complaint as evidence of Wipf's authority to enter the Lease are the 2012 Warranty Deeds by which he purported to deed all of Hutterville's farmland from himself, in his purported capacity as "president," to himself, in his purported capacity as "trustee," *for no consideration*. (AA 13-24, CI 18-29).

Hutterville responded to the Complaint by filing Counterclaims against Red Acre, and a Third-Party Complaint against its principal, Ronayne, and their purported grantor, Wipf. (CI 1875-1900). Hutterville asked in its counter and third-party claims for a declaration that the Red Acre Lease is fraudulent and void, and for damages caused by slander to its title, slander to its trade or business, tortious interference with contractual relations, tortious interference with prospective economic advantage, unfair competition, and civil conspiracy. (*Id.*).

F. TRIAL COURT DISPOSITION OF THE PARTIES' CLAIMS.

On August 25, 2014, the Circuit Court held a hearing on Wipf's (and Red Acre's and Ronayne's) motion to dismiss the Third-Party Complaint. (AA 38-61, CI 2350-73). The trial court announced its ruling from the bench:

> Both of you have submitted a lot of material and . . . *the one thing I noticed is that there really isn't any dispute on the facts.* . . . but it still comes down to somebody has to decide whether there's valid deeds . . . Now the Department of Agriculture took the position that they were not valid. . . . One way or another these deeds have to be resolved. I can see no legal status for these deeds. I really can't. And you can argue this all you want to, but I'm going to entertain a motion by you [Hutterville] to dismiss [Red Acre's] claim.

(AA 53, 58-59, CI 2365, 2370-71). The invited motion was made, and the trial court dismissed Red Acre's Complaint, and then dismissed Hutterville's counterclaims against Red Acre, and its Third-Party Complaint against Wipf and Ronayne, as moot. (AA 60, CI 2372).

In accordance with its stated ruling from the bench, on September 8, 2014, the Circuit Court entered its Order and Judgment declaring that the Lease is not valid or enforceable; dismissing Red Acre's Complaint with prejudice; and dismissing Hutterville's counter and third-party claims with prejudice. (AA 68-71, CI 2391-94). The September 8, 2014, Order and Judgment disposed of all of the claims of all of the parties. (*Id.*).

Three weeks later, on September 24, 2014, Wipf filed a motion for reconsideration. (AA 72-75, CI 2402-05). In support of his motion to reconsider, Wipf submitted an affidavit in which he claimed to be "President of Hutterville," but inconsistently complained that he has no control of the corporation or its assets

and is not otherwise treated well by those in control. (AA 76-111, CI 2406-41). None of the complaints outlined in Wipf's affidavit had been before the court prior to entry of judgment. (*See id.*).

Wipf also submitted a supporting memorandum, in which he advised that, "[i]t has now come to [his] attention that the Waldner faction has [post-judgment] filed or is preparing to file additional documents with the Register of Deeds, including deeds, using the Court's Order as a basis for their purported authority to do so." (Brief in Supp. of Wipf's Mot. for Reconsideration at 3). On September 26, and as a "supplement" to the motion for reconsideration, Wipf provided the trial court with copies of documents Hutterville filed with the Brown County Register of Deeds on September 24, 2014 --nearly a month after the trial court had entered its judgment. (AA 123-199, CI 2450-2526).

On October 1, 2014, the trial court issued its Memorandum Decision of the Court Clarifying the Previous Court's Ruling and Denying [Wipf's] Motion for Reconsideration. (AA 112-14, CI 2534-36). First, the trial court denied Wipf's motion to reconsider. (AA 113, CI 2535). But then, after doing so, the trial court offered, by way of dicta, that:

> It has been brought to this Court's attention that one group is now filing and executing new instruments in an effort to control all of the assets. It is my decision that actions[,] deeds, contracts, or any instrument executed by either group, are invalid without the consent of both groups. . . . This Court lacks jurisdiction to help the parties reach an agreement.

(AA 114, CI 2536). On October 9, 2014, the trial court entered a third Order: (1) again denying Wipf's motion for reconsideration; and (2) incorporating by reference its Memorandum Decision of the Court Clarifying the Previous Court's Ruling. (AA 118-19, CI 2557-58).

At no time prior to entry of final judgment did Wipf assert any claims against any other party. And, effective August 25, 2014, the only claims made against Wipf were all dismissed with prejudice. (AA 60, CI 2373).

G. DISMISSAL OF RED ACRE'S APPEAL.

On October 10, 2014, Red Acre and Ronayne filed their Notice of Appeal from the trial court's September 8, 2014 Order and Judgment and October 1, 2014 Memorandum Decision. (CI 2559-61). On October 30, 2014, Red Acre and Ronayne filed a Motion to Dismiss Appeal. By Order of October 31, 2014, this Court granted the motion and dismissed Appeal No. 27227.

H. POST-JUDGMENT EVENTS.

Although judgment had been entered on September 8, 2014 (AA 68-71, CI 2391-94), neither Red Acre, Ronyane, nor Wipf ever sought to obtain a stay or to post a bond to secure one. *See* SDCL § 15-26A-25 (requiring Appellants to execute a supersedeas bond in order to stay enforcement of proceedings in the circuit court). In reliance on the trial court's September 8, 2014, judgment that the Lease and deeds upon it was based are invalid and unenforceable (AA 70-71, CI 2393-94), and in the absence of a stay or bond, on September 24, 2014, Hutterville:

(a) Filed the trial court's September 8, 2014 Order of record with the Brown and Spink County Registers of Deeds;

(b) Appointed a Successor Trustee to the purported Wipf Trust (to the extent it exists) in which the subject property was purportedly held (AA 145-46, 158-65, CI 2454-75);

(c) By action of the Successor Trustee, transferred and conveyed all of Hutterville's real property purportedly held in the Wipf Trust (to the extent it exists) back to its rightful owner, Hutterville Hutterian Brethren, Inc. (AA 166-67, 171-74, CI 2493-2501);

(d) Filed the Successor Trustee Deeds of record with the Brown and Spink County Registers of Deeds (*Id.*);

(e) Terminated the Wipf Trust (to the extent it ever existed) in accordance with its terms (AA 175-77, 183-99, CI 2502-26);

(f) Merged Hutterville Hutterian Brethren, Inc., a South Dakota nonprofit corporation, into HHBI Farms, Inc., a Minnesota nonprofit corporation, with HHBI Farms, Inc., being the surviving entity of the merger (AA 127-43, CI 2476-92); and

(g) On September 25, 2014, merged HHBI Farms, Inc. into Hutterville South Dakota, Inc., a Minnesota nonprofit corporation, with Hutterville South Dakota, Inc. being the surviving entity of the merger. *See* Minnesota Secretary of State File No. 783719200024.

On October 1, 2014 -- well after Hutterville had completed all of the above described transactions -- the trial court issued its Memorandum Decision of the Court Clarifying the Court's Ruling and Denying [Wipf's] Motion for Reconsideration (AA 112-14, CI 2534-36), and on October 10, 2014, issued its Order confirming the same. (AA 118-19, CI 2557-58).

STANDARD OF REVIEW

SDCL 15-6-12(b)(1) provides that the defense of lack of jurisdiction of the subject matter can be made by motion. If Wipf's motion is construed as a facial

attack on jurisdiction, the Court must accept all of the allegations of the Third-Party Complaint as true. If, however, it is construed as a factual attack on jurisdiction, the Court may examine the evidence and satisfy itself as to the existence of its power to hear the case. *See Hutterville v. Waldner*, 2010 S.D. 86, ¶ 20, 791 N.W.2d 169, 174-75 (citing *Decker ex rel. Decker v. Tschetter Hutterian Brethren, Inc.*, 1999 S.D. 62, ¶ 14, 594 N.W.2d 357, 362; *Osborn v. United States*, 175 F.2d 724 (8th Cir. 1990)).

A motion to dismiss can be converted to a motion for summary judgment when the parties submit and the circuit court accepts matters outside the pleadings, and the parties do not object to the circuit court's consideration of those matters. *Cable v. Union Cnty. Bd. of Cnty. Comm'rs*, 2009 S.D. 59, ¶ 19, 769 N.W.2d 817, 825 (citing *Flandreau Pub. Sch. Dist. No. 50-3 v. G.A. Johnson Constr., Inc.*, 2005 S.D. 87, ¶ 6, 701 N.W.2d 430, 433-34). When a motion to dismiss that has been converted into a motion for summary judgment is appealed, this Court reviews the matter as a motion for summary judgment. *Id.*

"Our well-settled standard of review for a motion for summary judgment requires this Court to determine 'whether the record before us discloses any genuine issue of material fact and, if not, whether the court committed any error of law.'" *Cable*, 2009 S.D. 59, ¶ 19 (citing *Flandreau,* 205 S.D. 87, ¶ 7). On review, jurisdictional issues are treated as matters of law to be reviewed under the de novo standard of review. *Id.* (citing *State ex rel. LeCompte v. Keckler*, 2001 S.D. 68, ¶ 6, 628 N.W.2d 749, 752).

ARGUMENT

Wipf's position is that Hutterville's corporate governance matters will forever be under the cloud of a now 22-year-old "schism" in the Hutterite Church, and that no secular court will ever have subject matter jurisdiction to say otherwise. But since *Hutterville I* and *II* were decided, Wipf has twice been deposed under oath. His sworn admissions prove that: (1) the Church has conclusively decided Hutterville's membership and governance issues, as is its right; and (2) there is no genuine internal governance dispute at Hutterville, religious or otherwise, that precludes courts from exercising jurisdiction over disputes concerning its property rights and business affairs.

The Court need not even consider whether the trial court had subject matter jurisdiction to act, however, if it determines that Wipf's appeal should be dismissed because he is not an aggrieved party with standing to appeal, or because his appeal has been mooted by intervening developments such that there is no remaining controversy or the requested relief cannot be granted. Because the latter issues are potentially dispositive, they will be addressed first, and the issue of subject matter jurisdiction will be addressed last.

I. WIPF'S APPEAL SHOULD BE DISMISSED BECAUSE HE IS NOT AN AGGRIEVED PARTY WITH STANDING TO APPEAL FROM THE TRIAL COURT'S ORDER DISMISSING THE THIRD-PARTY COMPLAINT AGAINST HIM.

A. CONTROLLING LAW.

"As a general rule, an appellant must not only have an interest in the subject matter in controversy, but must also be prejudiced or aggrieved by the decision from which he appeals." *Smith v. Rustic Home Builders, LLC*, 2013 S.D. 9, ¶ 9, 826 N.W.2d 357, 360 (citing *In re Estate of Bartholow*, 2006 S.D. 107, ¶ 5, 725 N.W.2d 259, 261). "In the absence of an aggrieved party it is appropriate to dismiss the attempted appeal." *Id.*

B. WIPF IS NOT AN AGGRIEVED PARTY WITH STANDING TO APPEAL.

The facts relevant to whether Wipf is an aggrieved party are few and undisputed. On September 8, 2014, the trial court entered its Order and Judgment dismissing Hutterville's Third-Party Complaint against Wipf with prejudice. There were no other claims against him, and he did not bring any claims against any party.

"This court has stated that when a judgment is entered in a defendant's favor, that person cannot be an aggrieved party." *Jones v. Dappen*, 359 N.W.2d 894, 895 (S.D. 1984) (citing *Bottum v. Herr*, 83 S.D. 542, 162 N.W.2d 880 (1968); *Gustafson v. Gate City Co-op. Creamery*, 80 S.D. 430, 126 N.W.2d 121 (1964)). Because judgment was entered in defendant Wipf's favor, and "because all the claims against [Wipf] were dismissed, he is not an aggrieved party and cannot appeal the September [2014] . . . judgment [or] order." *Smith*, 2013 S.D. 9 at ¶ 10, 826 N.W.2d at 360. Wipf's appeal, therefore, should be dismissed.

II. WIPF'S APPEAL SHOULD BE DISMISSED AS MOOT BECAUSE THERE IS NO REMAINING CONTROVERSY BETWEEN THE

LITIGATING PARTIES OR, ALTERNATIVELY, BECAUSE THIS COURT CANNOT GRANT THE REQUESTED RELIEF DUE TO THE OCCURRENCE OF INTERVENING EVENTS.

A. CONTROLLING LAW.

"According to general rules of mootness adopted by this court, absence of an actual controversy between the litigating parties is reason for an appellate court to dismiss an appeal for mootness." *Anderson v. Kennedy*, 264 N.W.2d 714, 716 (S.D. 1978). "An appeal will [also] be dismissed as moot if, pending the appeal, an event occurs which makes a determination of it unnecessary or renders it clearly impossible for the appellate court to grant effectual relief." *Id.* (citing *Dodds v. Bickle*, 77 S.D. 54, 85 N.W.2d 284 (1957)). "Only under exceptional circumstances that implicate the public interest will this court retain and decide a moot question on appeal." *Wheeldon v. Madison*, 374 N.W.2d 367, 378 (S.D. 1985).

B. THE APPEAL SHOULD BE DISMISSED BECAUSE THERE IS NO REMAINING CONTROVERSY BETWEEN THE LITIGATING PARTIES.

The pleadings framed the dispute below. Red Acre sued Hutterville and the Waldners alleging that it had obtained exclusive rights to farm Hutterville's property by virtue of the purported Lease with Wipf. Hutterville countersued, and brought a Third-Party Complaint against Wipf and Ronayne, alleging that the Lease was not valid or enforceable. Wipf did not Answer the Third-Party Complaint or bring any claims against any other party, but instead exercised his option to file a motion to dismiss.

The trial court declared the Lease invalid, and then dismissed the Complaint, and Hutterville's Third-Party Complaint against Wipf and Ronayne, with prejudice. When Red Acre -- the party that sued to enforce the Lease—voluntarily dismissed its appeal, the controversy between the litigating parties ceased.

There is no controversy between Hutterville, on the one hand, and Red Acre and Ronayne, on the other hand, because the latter have conceded by dismissing their appeal that the trial court's judgment is final and the Lease is not enforceable. And there is no controversy between any of Hutterville, Red Acre, or Ronayne, on the one hand, and Wipf, on the other hand, because: (1) Hutterville's Third-Party Complaint against Wipf was dismissed with prejudice; (2) Wipf did not join with Red Acre as a plaintiff to establish or enforce any rights he may have under the purported Lease; (3) Red Acre did not name Wipf as a defendant to compel performance of the Lease or to recover damages for its breach; and (4) Wipf did not bring any claims against any other party. Because no remaining party has any claim for relief against any other remaining party, there is no controversy to litigate.

Wipf's argument that he should be permitted to appeal because Hutterville's judgment against Red Acre indirectly affects his rights does not change the analysis. Wipf cannot directly appeal the trial court's judgment declaring the Lease invalid because, as explained above, he is not the aggrieved party. Nor can he indirectly appeal the judgment by stepping into Red Acre's

shoes, because "a party generally may not appeal a district court's order to champion the rights of another, and even '[a]n indirect financial stake in another party's claims is insufficient to create standing on appeal.'" *Rohm & Hass Texas, Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 208 (5th Cir. 1994) (citing *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1214 (9th Cir. 1987) (noting that a party may appeal to protect only its own interests), *cert. dismissed*, 488 U.S. 935 (1988)).

Having failed to bring any claims to establish, protect, or enforce any rights he may have under the purported Lease, Wipf cannot for the first time on appeal claim that his rights have somehow been prejudiced by the trial court's judgment declaring the Red Acre Lease to be invalid. *See, e.g., Hall v. State ex rel. S.D. Dept. of Transp.*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 26-27 ("We have repeatedly stated that we will not address for the first time on appeal issues not raised below."). By Wipf's own choice, the validity of the Lease was litigated solely between Hutterville and Red Acre, and the Circuit Court ruled in Hutterville's favor. That decision is final because Red Acre dismissed its appeal.

As it now stands, Hutterville has no claims against Wipf, he has no claims against any party, and Red Acre does not contest the dismissal of its Complaint. Because Wipf cannot assert any other parties' rights on appeal, and because there is no existing controversy between the litigating parties, Wipf's attempted appeal should be dismissed as moot. *See, e.g., Estate of Bartholow*, 2006 S.D. 107 at ¶ 7, 725 N.W.2d at 261 ("There having been no appeal from a party aggrieved by that

decision, this Court has no jurisdiction to proceed on the merits in a review of the Circuit Court's decision."); *Morrison-Knudsen Co.*, 811 F.2d at 1214 (an "indirect financial stake in another party's claims is insufficient to create standing on appeal"); *Hamblet*, 481 N.W.2d at 275 (appeal is moot and should be dismissed if it "appear[s] clearly and convincingly that the actual controversy has ceased [and that] the only judgment which could be entered would be ineffectual for any purpose and would be an idle act concerning rights involved in the action").

C. THE APPEAL SHOULD BE DISMISSED BECAUSE POST-JUDGMENT EVENTS MAKE IT UNNECESSARY OR IMPOSSIBLE TO GRANT THE REQUESTED RELIEF.

Having successfully obtained a dismissal of all claims against him, Wipf now asks this Court to reinstate those very claims so that they may be dismissed on other grounds. This Court should decline to do so, and should dismiss Wipf's appeal, because it is not necessary or even possible to grant the requested relief. Although not directly expressed, it appears to be Wipf's view that, if this Court were to reinstate the Third-Party Complaint against him, and then remand for a dismissal on jurisdictional grounds, he would somehow be returned to the status quo. But that is not the case. Even were this Court to do as Wipf requests, the judgment against Red Acre would still stand, and the Lease would still be invalid and unenforceable, because Red Acre dismissed its appeal. And, in any event, neither the corporation of which Wipf claims to be president, nor the trust of which he claims to be trustee, still exist.

With regard to the latter point, after judgment was entered invalidating the Red Acre Lease and the purported deeds on which it was premised, Hutterville undertook a series of lawful corporate actions. First, to the extent the "Wipf Trust" ever existed, a Successor Trustee was appointed in accordance with the trust's terms. Second, the Successor Trustee conveyed all of the property purportedly held in the "Wipf Trust," to the extent it ever existed, back to its rightful owner, Hutterville Hutterian Brethren, Inc. Then Hutterville Hutterian Brethren, Inc. was merged into its wholly-owned subsidiary corporation, HHBI Farms, Inc., a Minnesota nonprofit corporation, with HHBI Farms, Inc. being the surviving entity of the merger; and HHBI Farms, Inc. was merged into Hutterville South Dakota, Inc., a Minnesota nonprofit corporation, with Hutterville South Dakota, Inc. being the surviving entity of the merger.

As a result of the lawful post-judgment corporate actions – none of which are dependent on the Circuit Court's judgment -- Hutterville South Dakota, Inc., a Minnesota nonprofit corporation that was never a party to this action, owns all of the subject property; and the "Wipf Trust" and the original defendant, Hutterville Hutterian Brethren, Inc., no longer exist. Wipf is, of course, free to object and to complain about the post-judgment corporate transactions. But his remedy, if any, is to challenge them in a new lawsuit because this Court is not a fact-finding court, and it cannot consider for the first time on appeal post-judgment events that were never litigated below involving entities that were not parties. *City of Watertown v. Dakota, Minn. & E. R.R. Co.*, 1996 S.D. 82, ¶ 26, 551 N.W.2d 571, 577 ("We

have long held that issues not addressed or ruled upon by the trial court will not be addressed by this Court for the first time on appeal.").

The bottom line is that the world, as Wipf knew it before judgment was entered, has changed. Because it has, even were this Court to remand and dismiss the Third-Party Complaint for lack of jurisdiction, it would be a hollow act that serves no purpose. Consequently, and because the intervening events make it both unnecessary and impossible to grant the relief Wipf requests, Wipf's appeal should be dismissed.

III. WIPF'S APPEAL SHOULD BE DISMISSED ON THE MERITS BECAUSE THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION TO DECLARE THE LEASE INVALID AND UNENFORCEABLE.

Wipf has, for years, been interfering with Hutterville's governance, property and businesses, and has done so without fear of consequence because it is a religious corporation.[4] On this appeal, Wipf again argues that his claimed

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[4] *See, e.g., Hutterville Hutterian Brethren, Inc. v. Waldner,* 2010 S.D. 86, 791 N.W.2d 169 (Wipf's failed attempt to have court declare him president and director); *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2012 S.D. 4, 808 N.W.2d, 678 (Wipf's failed attempt to have court dissolve corporation and distribute assets); *In the Matter of the Impoundment of Hogs of the Hutterville Hutterian Brethren, Inc.*, Civ. 10-260, Circuit Court, Brown County, South Dakota (Wipf's failed attempt to sell Hutterville's hogs and keep the proceeds for himself); *Hofer et al v. Paddock et al*, TPO Nos. 12-328 thru 12-337, Circuit Court, Brown County, South Dakota (Wipf's failed 2012 attempt to use protection orders as means to coerce a civil settlement); *Hutterville v. Wipf*, Civ. 12-716, Circuit Court, Brown County, South Dakota (civil action to recover more than $1 million of equipment taken by Wipf); *In the Matter of Hutterville Hutterian Brethren, Inc. and Farm Service Agency and Johnny Wipf, Third Party, United States*

-- Footnote continued on next page --

authority to exercise control over Hutterville and its property, and therefore the validity of the Red Acre Lease, is the subject of a "religious dispute" in which the trial court has impermissibly entangled itself in violation of First Amendment principles. Because the undisputed facts, including Wipf's own admissions, conclusively prove that there is no real "religious dispute," however, the trial court had jurisdiction of the subject matter and Wipf's appeal should be denied.

A. CONTROLLING LAW.

This Court has ruled that the First Amendment leaves adjudication of religious doctrine to the ecclesiastical tribunals of the appropriate church, and that the question of determining who is and who is not a member of the church is a matter of ecclesiastical cognizance. *Hutterville v. Waldner,* 2010 S.D. 86, ¶ 22 ("*Hutterville I*"). It has also ruled that, because"[t]he First Amendment to the United States Constitution . . . preclude[s] civil courts from entertaining religious disputes over doctrine, leaving adjudication of those issues to ecclesiastical tribunals of the appropriate church," courts have no power to deprive "the church

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Department of Agriculture, Office of the Secretary, National Appeals Division, Director Review Determination, Case No. 2013W000426 (Wipf's failed attempt to divert Hutterville FSA Farm Program payments to himself); *C&C Farms, L.L.C. v. Hutterville Hutterian Brethren, Inc. et al*, Civ. 13-184, Circuit Court, Fifth Judicial Circuit, Brown County, South Dakota (Wipf's failed 2013 attempt to lease Hutterville's property to third party); and *Hutterville Hutterian Brethren, Inc., et al v. Sveen et al*, CIV 12-1010 (describing series of related unlawful acts intended to deliver control of Hutterville and its property to Wipf and alleged co-conspirators) (currently before the United States Court of Appeals for the Eight Circuit).

of control over the selection of those who will personify its beliefs." *Wipf v. Hutterville,* 2012 S.D. 4, ¶¶ 11 and 27 ("*Hutterville II*").

Both *Hutterville I and II* cited to *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 708-09 (1976). In that case, the United States Supreme Court reaffirmed the long standing rule that "the First and Fourteenth Amendments mandate that *civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchal polity, but must accept such decisions as binding upon them, in their application to the religious issues of doctrine or polity before them.*" *Id.* (emphasis added). The rule articulated by the Supreme Court is referred to as the Ecclesiastical Deference Doctrine.

Three prior, and one subsequent, United States Supreme Court decisions have established the contours of the Ecclesiastical Deference Doctrine, and have all consistently held that, with respect to matters of religious doctrine, a decision of the highest ecclesiastical tribunal is conclusive and binding on the courts in civil litigation. *See Watson v. Jones*, 80 U.S. 679, 727, 730-32 (1871) (establishing the rule that a decision of the highest church tribunal is binding on courts); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) (absent fraud a decision of a religious tribunal is conclusive in civil litigation); *Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 369 (1970) (reaffirming the ecclesiastical

deference doctrine); *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (reaffirming the ecclesiastical deference doctrine).

B. THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION TO ENTER ITS DECLARATORY JUDGMENT.

When *Hutterville I and II* were before this Court Wipf raised an issue as to whether he was a member of Hutterville's Church, and therefore an issue as to whether the trial court could hear any dispute over Hutterville's governance without running afoul of First Amendment prohibitions on excessive entanglement with religion. 2010 S.D. 86, ¶¶ 22, 28, 31, 34; 2012 S.D. 4, ¶¶ 11, 18, 27. Wipf has recently admitted, however, that the issue of his membership has been conclusive decided by the Church, and that he has not since 2008 been a member.

Wipf was deposed under oath in mid-2012, after *Hutterville II* was decided, and again in 2013. He testified that from 1983 to 2008 he was a member of Hutterville's Church and that, as a member, the Church had authority over him. He further testified that, while a member of Hutterville's Church, and in full recognition of its authority over him, he voluntarily submitted himself to Church discipline before a council of 55 Group 1 Ministers. Wipf admitted that the tribunal before which he appeared is the highest ecclesiastical authority in Hutterville's Church, and he admitted that the ecclesiastical tribunal stripped him of his "witness brother" status—meaning that he was no longer eligible to serve in any position of leadership in the Church or at Hutterville. Wipf also admitted that, after having been stripped by the tribunal of whatever authority he may ever have

had, he voluntarily left Hutterville's Church and joined a new and different one.[5]

Consistent with this Court's prior decisions, and the undisputed facts, there is no issue as to Wipf's status with respect to Hutterville. This Court has unequivocally ruled that, if Wipf is not a member of Hutterville's Church, he cannot be a member, officer, or director of Hutterville. 2010 S.D. 86, ¶¶ 22, 28, 31, 34. It has also unequivocally ruled that only the Church can decide who are and are not its members. 2010 S.D. 86, ¶ 22; 2012 S.D. 4, ¶¶ 11, 27. By Wipf's own admission, the highest ecclesiastical tribunal in Hutterville's Church has ruled that he has not, since 2008, been a member, and that he has not since that time had any authority to act for the Church or Hutterville. The ecclesiastical tribunal's decision, which is not in dispute, is binding on this Court—just as it was binding on the trial court. 2012 S.D. 4, ¶¶ 11, 27 (courts have no power to deprive "the church of control over the selection of those who will personify its beliefs").

Because Wipf's non-membership in Hutterville has been conclusively established by the Church, the First Amendment's religion clauses do no preclude subject matter jurisdiction. This Court, accordingly, should no longer permit Wipf's charade to continue, and should no longer allow him to continue disrupting

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[5] In addition to transcripts of Wipf's testimony, Hutterville put before the trial court the Affidavit of Samuel Kleinsasser, authenticating the ecclesiastical tribunal's final decision that Wipf has not been a member of the Church since 2008 and has no authority to act on Hutterville's behalf; along with documents that establish Wipf's voluntary submission to Church authority, his voluntary decision to leave the Church, and his formal excommunication.

Hutterville's businesses under the pretext that his claimed authority is the subject of a "religious dispute." Rather, and because Wipf admits that he recognized the authority of Hutterville's Church, voluntarily appeared before its highest tribunal, and that he was disciplined and stripped of all authority to act for it or Hutterville, this Court must accept and rule that Wipf has no right to claim he is a member, officer, or director of Hutterville, or that he has any right to speak for it, exercise control over its property or affairs, or otherwise purport to act on its behalf in any capacity.

Because he cannot avoid the effect of his admissions, Wipf repeatedly refers to the 22-year-old "schism" in the Hutterite Church in an attempt to confuse the issues and create the illusion of an ongoing internal governance battle. But the 22-year-old "schism" has nothing to do with whether Wipf has any authority to act for Hutterville, or is or is not a member of its Church. By his own admission, in 1995 -- three years after the oft-referenced "schism" -- Wipf and all of Hutterville's other members at the time reaffirmed their loyalty to and membership in the original, "Group 1," Church. And, from 1995 through 2008 -- another 13 years -- Wipf admittedly remained a Group 1 Church member in good standing. It was only after the Church tribunal passed judgment on him, and ruled him unfit to remain as a member in good standing, that Wipf claimed there to be any dispute about who may control Hutterville. But, by that time, he was already an outsider looking in, and by his own admission had no right to act for Hutterville or its Church.

To avoid any confusion, Hutterville is not, as Wipf claims, attempting to re-litigate issues involving a 1992 split in the Hutterite church. Nor is it asking this Court to decide whether the Group 1 or 2 churches represent the "true" Hutterite religion. This Court has ruled that Wipf must be a member of the Church to which Hutterville belongs in order to be an officer or director of the corporation, and that only the Church can decide its own membership. Based on his own, sworn testimony, and long before he created and executed the 2012 "Trust Agreement" and Warranty Deeds on which he relies for his authority to enter the Red Acre Lease, the highest ecclesiastical tribunal of Hutterville's Church ruled that Wipf was not a member and had no authority to act on its behalf or Hutterville's behalf. He was not happy with that decision, so he quit the Church and later decided to join a different one. The 22-year-old "schism" to which Wipf often refers is, therefore, nothing more than an historical footnote, and it has no relevance to the issue before this Court.

Having nowhere else to turn, Wipf asks this Court to accept that "the exact claim alleged in support of the Third-Party Complaint -- that Johnny Wipf and his group are not members of Hutterville because they are members of a separate church"—has already been litigated and decided.[6] It has not. To the contrary, the decision Wipf cites specifically notes that "a person cannot be a member, director

[6] Wipf brief at 27 (quoting *Hutterville v. Waldner*, 2010 S.D. 86, ¶ 11-16).

or officer of Hutterville unless that person is a member of the Hutterian Church." *Hutterville v. Waldner*, 2010 S.D. 86, ¶ 29. But, rejecting the argument Wipf offers here—that membership in any "Hutterian church" will suffice -- *Hutterville I* specifically held that Hutterville's corporate governance document "ties members' adherence to the authority of the presiding bishop or bishops of the Hutterian Church to which all members of the corporation belong through the *local church*." *Id.* at ¶ 31 (emphasis in original). The "local church" is, of course, the same Church to which Wipf and all of Hutterville's members belonged before Wipf voluntarily left in 2008.

Wipf's related argument, that principles of issue or claim preclusion bar any argument that subject matter jurisdiction exists, fares no better. In none of the prior cases involving the parties was there a final judgment on the merits regarding who controls or has the right to control Hutterville. Instead, every one of the past cases Wipf cites was dismissed on jurisdictional grounds, and therefore the merits of the competing claims were never reached and reduced to a final judgment. *See* SDCL § 15-6-41(b) ("[A] dismissal under this section and any dismissal not provided for in § 15-6-41, *other than a dismissal for lack of jurisdiction* . . . operates as an adjudication upon the merits.") (emphasis added); *see also Johnson v. Boyd-Richardson Co.*, 650 F.2d 147, 148 (8th Cir. 1981) ("[W]hen a dismissal is for 'lack of jurisdiction,' the effect is not an adjudication on the merits, and therefore the res judicata bar does not arise."). Without a final judgment on the merits, claim preclusion simply does not apply.

Likewise, issue preclusion does not apply to a dismissal on jurisdictional grounds where "*subsequent events occur which create a new legal situation or alter the legal rights or relations of the litigants.*" 49 A.L.R.2d 1036 (citing various cases) (emphasis added). The reason for this rule is, of course, that jurisdiction depends on the facts before the Court now, not on facts that were before some other court at some time in the past. *See* 47 Am. Jur. 2d Judgments § 510 ("[T]he doctrine of res judicata extends only to facts and conditions as they existed at the time the judgment was rendered and not to rights which were not in existence then."); *Rolls-Royce Corp. v. Heros, Inc.*, 576 F. Supp. 2d 765, 777 (N.D. Tex. 2008) ("Dismissals for lack of jurisdiction 'are not considered adjudications on the merits and ordinarily do not, and should not, preclude a party from later litigating the same claim, provided that the specific defect has been corrected.'") (quoting *Baris v. Sulpicio Lines, Inc.*, 74 F.3d 567, 571 (5th Cir. 1996)).

If, as Wipf argues, Hutterville was barred from introducing evidence and arguing that an ecclesiastical tribunal has determined its membership, this Court's prior decisions would make no sense. This Court could not have intended, on the one hand, to say that only the Church can decide whether Wipf is or is not a member; and at the same time have intended that its pronouncement should be interpreted to mean that Hutterville is forever barred from producing evidence that the Church has, in fact, decided. If that were the case, the Court may just as well have ruled that Wipf may have perpetual veto power over all of Hutterville's

business transactions so long as he chooses to tell all who will listen that he is in charge—which is exactly what he has been doing since 2008.

The governing law is clear: the Church's decision that Wipf has not since 2008 been a member is final and conclusive. Because it is, the trial court was bound by law to conclude that, when Wipf executed documents purporting to grant to himself all of Hutterville's real property in 2012, and then leased that property to Red Acre in 2014, he had no authority to do so. There is no "religious dispute" that precludes jurisdiction, because the final arbiter—the Church—has definitively ruled. And there is no genuine issue of material fact as to the Church's ruling, because Wipf admits that he was disciplined and stripped of authority by, and then voluntarily left, Hutterville's Church. Any other ruling would be in direct violation of Hutterville's and its Church's First Amendment rights, and would needlessly prolong a dispute that does not, in fact, exist. *See, e.g., Hosana-Tabor Evangelical Lutheran Church & Sch. v. EEOC et al,* 132 S.Ct. 694 (2012) (reaffirming that the Church is entitled to "control over the selection of who will personify its beliefs").

This Court cannot repeatedly counsel that only the Church may determine its own membership, then disregard the fact that it has. And Wipf cannot forever continue to claim that he represents Hutterville, when the Church has conclusively decided that he does not. Consistent with its prior rulings, and based on the undisputed facts, this Court is bound by law to conclude that the trial court had

jurisdiction to invalidate Wipf's deeds and Lease. Because it is so bound, Wipf's appeal should be dismissed on the merits.

IV. ENTRY OF FINAL JUDGMENT DIVESTED THE TRIAL COURT OF JURISDICTION TO "RECONSIDER," "CLARIFY," OR "MODIFY" IT. (NOTICE OF REVIEW).

A. CONTROLLING LAW.

A motion for relief from judgment should not be utilized as a vehicle to circumvent any default concerning appellate rights. *Rabo Agrifinance, Inc. v. Rock Creek Farms*, 836 N.W.2d 631, 2013 S.D. 64. Consequently, a "circuit court may not review, modify, or otherwise disturb its judgments regularly entered." *Janssen v. Tusha*, 68 S.D. 639, 642, 5 N.W.2d 684, 685 (1942). "That a judgment is erroneous as a matter of law is ground for appeal . . . [not] ground for setting aside the judgment on motion." *Id.* ("A motion to set aside a judgment cannot be made to perform the office of an appeal.") (quoting *Jennings v. Des Moines Mutual Hail & Cyclone Ins. Ass'n*, 33 S.D. 385, 146 N.W. 564, 565 (1914)); *see also Boshart v. Nat'l Benefit Ass'n, Inc., of Mitchell*, 65 S.D. 260, 273 N.W. 7 (1937) (holding that the trial court has not the power, after having once made its decision when case was regularly submitted, to set aside a judgment or order for judicial error). *Compare, SBS Financial Services, Inc. v. Plouf Family Trust*, 2012 S.D. 67, ¶ 13, 821 N.W.2d 842, 845 ("[S]ince the February 24 order was *not a final order disposing of all remaining issues in the case* . . . the trial court had inherent authority to revisit its decision.") (emphasis added).

B. THE TRIAL COURT'S ORDERS PURPORTING TO CLARIFY, MODIFY OR AMEND ITS JUDGMENT ARE VOID AND OF NO FORCE OR EFFECT.

On September 8, 2014, the Court entered its Order and Judgment: (1) declaring that Wipf's purported Brown and Spink County Deeds are not valid or enforceable; and (2) dismissing Red Acre's Complaint and Hutterville's counter and third-party claims with prejudice. On September 24, 2014—nearly three weeks after entry of judgment—Wipf filed his motion asking the Court to reconsider its Order and to vacate its judgment on the ground that it "conflicts with the holdings of the South Dakota Supreme Court."

Although the trial court properly refused to reconsider its judgment, it improperly issued two subsequent orders. The first, on October 1, 2014, denied Wipf's motion to reconsider, but purported to "clarify" the judgment. The second, on October 9, 2014, reaffirmed the denial of Wipf's motion to reconsider, but incorporated the October 1 "clarification" by reference. Among other things, the "clarification" Orders were based on argument and evidence that were not of record when the judgment was entered, and included by way of dicta an advisory opinion effectively nullifying future contracts and corporate authority by prospectively ruling that all "actions, deeds, contracts, or any instrument executed by either group [1 or 2 at Hutterville], are invalid without the consent of both groups." Because the Orders were issued after the trial court's jurisdiction had terminated, they cannot stand. *Janssen*, 5 N.W.2d at 685.

The rationale for terminating a trial court's authority to revisit its orders after entry of judgment was explained in *Moore v. Michelin Tire Co., Inc.*, as follows:

> "Orders are required to be in writing because the trial court may change its ruling before the order is signed and entered." . . . [Where]the trial court issued an oral ruling, not an order reduced to writing, signed, attested by the clerk and properly filed . . . the trial court's final ruling was still pending and the trial court retained the discretion to hear additional evidence it considered appropriate prior to making a final determination.

1999 S.D. 152, ¶ 46-47, 603 N.W.2d 513, 525 ("As there was no final order entered before Moore filed his motion for reconsideration, the trial court had the option of changing its opinion based on the newly presented evidence.").

Unlike *Moore*, the trial court's final judgment here had been "reduced to writing, signed, attested by the clerk and properly filed," and it was not "still pending" when Wipf moved to reconsider. Because the judgment was not still "pending," the trial court's power to reconsider had terminated before the "clarification" orders were issued. *See id.* And, because the trial court's power to reconsider had terminated, its October 1 and 9, 2014, Orders purporting to clarify, modify, or amend the judgment are void and of no effect.

CONCLUSION

Because Wipf, as a third-party defendant with no affirmative claims for relief, lacks standing to appeal an order dismissing all claims against him, and because his appeal is otherwise moot, the Court should deny his appeal without reaching the merits of his argument. However, even if the Court chooses to

address the merits of Wipf argument, his appeal should still be dismissed because his own sworn testimony establishes that the highest ecclesiastic tribunal of Hutterville's Church stripped him of all authority to act on Hutterville's behalf, and therefore the First Amendment's religion clauses do not preclude subject matter jurisdiction. Finally, because the trial court's power to reconsider its September 8, 2014 Order terminated when that judgment was entered, the Court should declare the trial court's October 1, 2014 Memorandum Decision and October 9, 2014 Order to be void and of no effect.

Respectfully Submitted,

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Dated: January 8, 2015

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REQUEST FOR ORAL ARGUMENT

Appellees respectfully request oral argument.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 8th day of January, 2015, a true and correct copy of the foregoing Brief of Appellees was mailed by first-class mail to:

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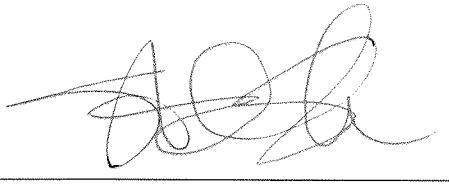

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CERTIFICATE OF COMPLIANCE WITH SDCL 15-26A-66

I hereby certify that the foregoing brief complies with the type-volume limitation of SDCL 15-26A-66(B)(2). The brief contains a proportional-spaced typeface in 13 point Times New Roman font, and a Microsoft 2010 Word Count of 9,965 words.

CERTIFICATE OF MAILING

I hereby certify that I mailed by first class United States mail, postage prepaid, the original and 15 copies of the foregoing Brief of Appellees to which this certificate is attached and the Appendix attached hereto, to the South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota, 57501-5070, on the 8th day of January, 2015.

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January 8, 2015

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27223

RED ACRE, LLC, a South Dakota limited liability Company,

Plaintiff/Appellant (27227, dismissed)

vs.

HUTTERVILLE HUTTERIAN BRETHREN, INC., a South Dakota corporation, GEORGE WALDNER, SR., KENNETH WALDNER, SAMUEL WALDNER, and THOMAS WALDNER,

Defendants/Appellees

and

HUTTERVILLE HUTTERIAN BRETHREN, INC.,

Counterclaim and Third-Party Plaintiff/Appellee

vs.

RED ACRE, LLC, a South Dakota limited liability Company,

Counterclaim Defendant/Appellant (27227, dismissed)

and

ROBERT RONAYNE,

Third-Party Defendant/Appellant (27227, dismissed)

and

JOHNNY WIPF, SR.,

Third-Party Defendant/Appellant

Appeal from the Circuit Court
Fifth Judicial Circuit
Brown County, South Dakota

The Honorable Eugene E. Dobberpuhl, Presiding Judge

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Notice of Appeal filed October 9, 2014 and
Amended Notice of Appeal filed November 11, 2014

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ARGUMENT

I. Wipf is an Aggrieved Party with Standing to Appeal the Circuit Court's Orders

Appellees Hutterville Hutterian Brethren Inc. ("Hutterville"), George Waldner, Sr., Kenneth Waldner, Samuel Waldner and Thomas Waldner (collectively "the Waldner group") first attempt to argue that the appeal of Johnny Wipf, Sr. ("Wipf") should be dismissed because Wipf is not an "aggrieved party" with standing to appeal the Circuit Court's September 8, 2014 and October 9, 2014 orders.[1] Appellees' Brief at 24-29. This issue, however, has already been resolved through the Court's denial of the Waldner group's motion to dismiss Wipf's appeal, dated December 9, 2014. Nevertheless, to the extent the Court chooses to revisit this issue, the Waldner group's position remains unfounded.

According to the Waldner group, Wipf cannot be an "aggrieved party" with standing to appeal because "all of the claims against [Wipf] were dismissed" by the Circuit Court. Appellees' Brief at 25. This analysis, however, completely ignores the affirmative relief that the Waldner group obtained through entry of the Circuit Court's orders and the significant prejudice caused to Wipf as a result. AA 68-71 (CR 2391-2394); AA 118-119 (CR 2557-2258). While this Court has held that an appellant must "be prejudiced or aggrieved by the decision from which he appeals," the concept of an "aggrieved party" is not so limited as to preclude an appeal from a prejudicial order merely because other aspects of the judgment are entered in a

[1] References to the Brief of Appellees shall be "Appellees' Brief" followed by the applicable page number(s). References to Appellees' Appendix shall be "HA" followed by the applicable page number(s).

party's favor. *In re Estate of Bartholow*, 2006 SD 107, ¶ 5, 725 N.W.2d 259, 261 (citing *Carlson v. West River Oil Co.,* 75 SD 333, 335, 64 N.W.2d 294, 295 (1954)).

As recognized in *Miller v. Scholten*, "[t]he prevailing party in a lower court adjudication may be a 'party aggrieved' if the adjudication is prejudicial to him." 273 N.W.2d 757, 761-62 (S.D. 1979) (citing *Peters v. Peters*, 214 N.W.2d 151 (Iowa 1974)). In the decision cited by this Court as support for this principle, *Peters v. Peters,* the Supreme Court of Iowa held that "[t]he mere fact a party has prevailed on the immediate issue decided by the decree does not preclude his right of appeal if it also adjudicates his rights in a manner prejudicial to him." *Peters*, 214 N.W.2d at 154. Since *Miller,* this Court has consistently restated its view that a party has standing to appeal where an "adjudication is, in some way, prejudicial to that party." *Estate of Bartholow*, 2006 SD 107, ¶ 5, 725 N.W.2d at 261. *See also Quinn v. Mouw-Quinn,* 1996 SD 103, ¶ 20, 552 N.W.2d 843, 847; *Jones v. Dappen*, 359 N.W.2d 894, 895 (S.D. 1984).

This interpretation of the prejudice requirement is consistent with authority from other jurisdictions that holds that even a party who has fully prevailed in the court below may appeal from a judgment in his favor for the purpose of attacking an adverse finding which, in the absence of an appeal, would operate as *res judicata* in a subsequent action. *See Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 520 (9th Cir. 1999) ("If the adverse ruling can serve as the basis for collateral estoppel in subsequent litigation, the prevailing party has standing to appeal."); *Simpson v. Kimbell Mill. Co.,* 164 So. 2d 637, 639 (La. Ct. App. 1964) ("Where a finding of fact

or law is placed in the judgment itself, it may become the basis for res judicata or estoppel, and, if the finding is shown to be prejudicial to appellant's interest, the appellant has the right to appeal even though the judgment itself be in his favor.").

Here, pursuant to the request of the Waldner group, the Circuit Court entered Findings of Fact and Conclusions of Law which effectively hold that the members of the Waldner group are members of Hutterville whose consent was required in order for Wipf's execution of the Wipf Deeds to be deemed valid.[2] AA 68-71 (CR 2391-2394). On the basis of this improper finding, the Circuit Court ruled that "[t]he Wipf Brown and Spink County Deeds are not valid and enforceable," thereby overruling the authority of Hutterville's Board of Directors who authorized the execution and filing of those deeds pursuant to a Corporate Resolution and Trust Agreement. AA 68-71 (CR 2391-2394); AA 25-28 (CR 17450-1753); AA 29 (CR 2084). These rulings by the Circuit Court are unquestionably prejudicial to Wipf and have already been cited by the Waldner group as a basis for their filing of additional corporate

[2] In their response brief, the Waldner group asserts that "[t]he facts before the trial court were not in dispute." Appellees' Brief at 6. This contention is simply not true. Before the Circuit Court, Wipf made absolutely clear that the facts underlying the ongoing religious dispute at Hutterville Colony were in dispute and that, contrary to the Waldner group's claims, Wipf is – and has been since February 2009 – the duly elected President of Hutterville and a member in good standing with the Hutterian Church at Hutterville. CR 2084-2093; CR 1089-1093. This dispute was acknowledged by both the Circuit Court and counsel for the Waldner group during the August 25, 2014 hearing. AA 57 (CR 2354). Because Wipf's motion to dismiss was based upon lack of subject-matter jurisdiction and well-settled principles of *res judicata*, resolution of Wipf's motion did not require consideration of the inaccurate and self-serving recitation of facts submitted by the Waldner group concerning Hutterville's history.

documents that purported to merge Hutterville with a new corporation that the Waldner group formed in the State of Minnesota. Appellees' Brief at 21-22.

II. Wipf's Appeal is Necessary to Prevent the Circuit Court's Prejudicial Findings of Fact and Conclusions of Law from Becoming *Res Judicata* in Future Proceedings

The Waldner group next argues that Wipf's appeal should be denied as moot because there is "no remaining controversy" between the parties as a result of Red Acre LLC's decision to dismiss its separate appeal. Appellees' Brief at 26-29. This assertion, however, again fails to acknowledge the significant prejudice caused to Wipf by the Circuit Court's actions. Simply stated, Wipf's appeal is necessary to prevent the Circuit Court's erroneous Findings of Fact and Conclusions of Law from becoming *res judicata* in future legal proceedings.

There is little doubt that had Wipf not appealed to this Court, the Waldner group would have used the Circuit Court's order – as they already have in their attempts to erase Hutterville's corporate existence through a fraudulent merger – as a sword to continue exercising unauthorized control over Hutterville and its property. Similarly, if Wipf's appeal were to be dismissed as moot, in all future legal proceedings, the Waldner group would cite to the Circuit Court's conclusion that "[t]he Wipf Deeds were executed and recorded without full consent of all [Hutterville's] members" as a final ruling as to the issue of their membership in Hutterville. AA 68-71 (CR 2391-2394).

Contrary to the Waldner group's contention, Wipf is not seeking to step into the shoes of another party to protect some "indirect financial stake in another party's claims." Appellees' Brief at 28. By submitting a proposed Order to the Circuit

Court containing a set of self-serving and erroneous Findings of Fact and Conclusions of Law that declared the Wipf Deeds to be invalid, the Waldner group to be members of Hutterville and Wipf to be a "former member" of Hutterville who lacked authority to act in any capacity for the corporation, the Waldner group asked the Circuit Court to grant them affirmative relief as to these issues and created a controversy against Wipf, the adjudication of which is subject to this Court's review.[3] CR 2374-2381.

The Waldner group also misconstrues the basis for Wipf's appeal by arguing that because "the validity of the Lease was litigated solely between Hutterville and Red Acre" and Red Acre dismissed its appeal, Wipf's ability to seek judicial review is somehow defeated. Appellees' Brief at 28. This argument is nothing more than a red herring. As made clear from his filings with this Court, Wipf is not appealing the Circuit Court's ruling as the validity of the Lease between Wipf and Red Acre, but rather, the Circuit Court's attempt to adjudicate the validity of the Wipf Deeds and the status of the Waldner group's membership in Hutterville. The Circuit Court's rulings on those issues adversely affected Wipf's rights and an order by this Court vacating the Circuit Court's Orders, Findings of Fact and Conclusions of Law and remanding the case back with instructions to dismiss all claims for lack of subject matter jurisdiction would cure the Circuit Court's error.

[3] The Waldner group submitted proposed Findings of Fact and Conclusions of Law despite the fact that they were not required under SDCL § 15-6-52(a) and no such findings were announced by the Circuit Court on the record at the August 25, 2014 hearing. AA 38-61 (CR 2350-2373).

III. Wipf's Appeal is Not Rendered Moot By the Waldner Group's Fraudulent Attempt to Merge Hutterville with Another Corporation

In their recitation of facts, the Waldner group insultingly describes Wipf and the members of his group as "squatters" whose presence at Hutterville Colony is tolerated by the Waldner group solely as "an act of charity." Appellees' Brief at 15-17. Since this Court's decisions in *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 SD 86, 791 N.W.2d 169 ("*Hutterville*") and *Wipf v. Hutterville Hutterian Brethren, Inc.,* 2012 SD 4, 808 N.W.2d 678 ("*Wipf*"), the Waldner group's so-called "charity" has consisted of an escalating pattern of cruel and oppressive conduct, including various efforts to deprive the members of the Wipf group (including its women and children) of food, garden space, use of Colony buildings for work, school and worship, healthcare and even running water and electricity.[4] AA 76-111 (CR 2406-2431).

The Waldner group admits that following the Circuit Court's September 8, 2014 Order, it filed numerous documents with the offices of the Register of Deeds for Brown and Spink Counties and the South Dakota Secretary of State which (1) hold members of the Waldner group out as the corporate officers of Hutterville and (2) purport to terminate the Trust established by Hutterville's Board of Directors and

[4] As a result of this conduct, several members of the Waldner group have been charged with criminal offenses under SDCL § 22-34-28. *See State v. William Waldner,* CRI 14-944, Fifth Judicial Circuit Court, Brown County; *State v. Lenny Waldner,* CRI 14-1247, Fifth Judicial Circuit Court, Brown County; *State v. Timothy Waldner,* CRI 14-1184, Fifth Judicial Circuit Court, Brown County; *State v. Edward Waldner,* CRI 14-1186, Fifth Judicial Circuit Court, Brown County; *State v. Simon Waldner,* CRI 14-945, Fifth Judicial Circuit Court, Brown County.

merge Hutterville into a newly formed Minnesota corporation that the Waldner group controls. Appellees' Brief at 21-22. Relying on these actions, the Waldner group asks this Court to dismiss Wipf's appeal on grounds of mootness because "neither the corporation of which Wipf claims to be president, nor the trust of which he claims to be trustee, still exist." Appellees' Brief at 29. This flawed argument is without merit and merely underscores the prejudice caused by the Circuit Court's decision and the extreme lengths the Waldner group will go to in order to impair the Wipf group's ability to live peacefully at Hutterville Colony.

While the Waldner group claims that its post-judgment corporate actions were made "[i]n reliance on the trial court's September 8, 2014 judgment," they offer no explanation whatsoever as to *how* the Circuit Court's decision granted them the necessary corporate authority to accomplish such actions. Appellees' Brief at 21. Indeed, the language of the Circuit Court's September 8, 2014 Order does not, in any way, declare that the members of the Waldner group are the duly elected corporate officers of Hutterville. AA 68-71 (CR 2391 – 2394). Nevertheless, the Waldner group urges this Court to uphold the legal effect of their illegal actions in evaluating their claim that Wipf's appeal is now moot.

This Court, however, has three times declared that it cannot sustain any action that would endorse a decision on the identity of Hutterville's corporate leaders and members. *Wipf,* 2012 SD 4, ¶ 27, 808 N.W.2d at 686. *See also Hutterville,* 2010 S.D. 86, ¶ 34, 791 N.W.2d at 179; *Wipf v. Hutterville Hutterian Brethren, Inc.,* 2013 S.D. 49, ¶ 37, 834 N.W.2d 324, 336. Accordingly, because the Waldner

group's purported merger of Hutterville cannot be recognized as having any legal effect without first confirming the Waldner group's authority to approve such corporate actions, any consideration of the effect of the purported merger by this Court would violate the holdings in *Hutterville* and *Wipf.* Stated another way, the "intervening events" that the Waldner group cites as an impediment to this Court's ability to grant Wipf relief are, under this Court's prior holding, of no legal significance because they are contingent upon the existence of corporate authority that no secular court is permitted to recognize.

Not surprisingly, the Waldner group fails to cite a single legal authority to support their position on this issue. Instead, they simply argue that because they were able to file fraudulent merger documents with the Secretary of State before Wipf filed his appeal, Hutterville no longer exists and this Court is without the authority to review the Circuit Court's rulings as to that entity.[5] As described by one court, such an argument is "nonsense" as it ignores the principle that, even in the absence of a stay or injunction, a party who acts during the pendency of an appeal does so "at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided." *Nat'l Forest Pres. Grp. v. Butz,* 485 F.2d 408, 411 (9th Cir. 1973) (rejecting the claim that a party's sale of land during the pendency of an appeal placed the legality of those transfers

[5] Because the Circuit Court's order provides no authority for the Waldner group's actions, Wipf's decision not to request a stay in the proceedings of the Circuit Court is not relevant to whether the Waldner group's actions have any legal effect.

beyond the jurisdiction of the court). *See also Garcia v. Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986) (holding that a mootness argument fails "if the court has the 'ability to undo the effects of conduct that was not prevented by the time of the decision") (quoting 13A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3533.3, at 278–79 (1984)).

Therefore, even if the Court were able to consider the effect of the Waldner group's post-judgment actions without recognizing either faction's authority to control the corporation, this would not render Wipf's appeal moot. Where "there has not been a change of circumstances or an occurrence of an event by which the actual controversy has ceased nor is it impossible for [the] Court to grant effectual relief," the "issue is not moot." *In re Estate of Howe*, 2004 SD 118, ¶ 53, 689 N.W.2d 22, 34. Here, the Waldner group contends that its post-judgment actions were taken "[i]n reliance on the trial court's September 8, 2014, judgment that the Lease and deeds upon it was based are invalid and unenforceable." Appellees' Brief at 21. While acknowledging that Wipf has a basis to object to these post-judgment transactions, the Waldner group then asserts that his only available remedy is "to challenge them in a new lawsuit." Appellees' Brief at 30. Thus, because the Waldner group has demonstrated its intent to use the Circuit Court's order as a basis for its claimed authority over Hutterville, Wipf's appeal of that purported basis cannot be deemed a "hollow act that serves no purpose." Appellees' Brief at 31. Another lawsuit would be redundant and should be unnecessary to vacate the Circuit Court's Findings of Fact and Conclusions of Law.

IV. The Circuit Court Lacked Subject Matter Jurisdiction to Adjudicate the Hutterville Dispute and Should Have Dismissed the Waldner Group's Claims on Grounds of Res Judicata

Although they fiercely opposed judicial review on the merits in both *Hutterville* and *Wipf*, the Waldner group now seeks to avoid those rulings by arguing that because Wipf was deposed in 2012 and 2013, this later testimony regarding events predating the decisions in *Hutterville* and *Wipf* somehow defeats the preclusive effects of *res judicata*. This argument fails in several respects and should be rejected.

It is beyond dispute that in *Hutterville,* this Court reviewed and considered the history of the schism within the North American Hutterian Church, as well as the effect of the schism locally at Hutterville Colony. 2010 SD 86, ¶¶ 4-16, 191 N.W.2d at 171-74. In particular, the Court considered evidence pertaining to the purported ex-communication of Wipf and the Waldner group's erroneous claim that Wipf voluntarily left the Hutterville church and joined a different church. *Id.* ¶ 15 ("At his deposition, George Waldner, Sr. explained that the Appellants belonged to a different Church than the Church at Hutterville Colony."). Despite this claim, the Court definitively held that no secular court can adjudicate the true membership of the Church at Hutterville or the corporation itself:

> [A] resolution of the governance question became dependent upon resolution of a dispute regarding membership in and expulsion from the "true" Hutterian Church by the "true" church elders of the local church at Hutterville Colony. Such matters of membership are shielded from judicial scrutiny under the First Amendment.

Id ¶ 34. *See also Wipf,* 2012 SD 4, ¶ 27, 808 N.W.2d at 686.

Without acknowledging their prior attempts to establish Wipf's purported expulsion from the Church at Hutterville, the Waldner group repackages the same argument in this appeal as a request to apply the Ecclesiastical Deference Doctrine. Appellees' Brief at 32-34. As demonstrated in its earlier opinions, however, this Court was certainly aware of the principles of that doctrine. *Hutterville*, 2010 SD 86, ¶ 22, 791 N.W.2d at 175; *Wipf,* 2012 S.D. 4, ¶ 11, 808 N.W.2d at 682. In both *Hutterville* and *Wipf*, the Court recognized that *in order to adhere* to the decision of the highest ecclesiastical authority of the Hutterian Brethren Church, the Court would first be required to answer the religious questions of what is the "true" Hutterian Church at Hutterville Colony and who are its "true" elders? *Hutterville,* 2010 S.D. 86, ¶ 29 791 N.W.2d at 178 ("And that necessarily leads to the religious questions of what is the true Hutterian Church at Hutterville Colony and who are its "true" elders?"). *See Wipf,* 2012 S.D. 4, ¶ 27, 808 N.W.2d at 686. Instead of addressing this point, the Waldner group simply ignores it by assuming that the answers to these theological questions are in their favor and offering the Court more testimony from the Waldner group's chosen elder, Rev. Kleinsasser. Appellees' Brief at 14, 35 n. 5.

Even if the Court had not already considered the Waldner group's above arguments during the *Hutterville* and *Wipf* litigations – which it did – that still would not negate the preclusive effects of *res judicata* in this case. As set forth in the Waldner group's brief, all of the events purportedly testified about by Wipf in his

2012 and 2013 depositions occurred in 2008 and 2009 – before the decisions in *Hutterville* and *Wipf*. Appellees' Brief at 8-14, 34-35. Whether actually presented or not, the Waldner group had a full and fair opportunity to present evidence concerning Wipf and his relationship with the Hutterville Church while those cases were being litigated. The fact that Wipf provided deposition testimony in 2012 and 2013 concerning past events does not constitute "new evidence" that allow the Waldner group to avoid the preclusive effect of these prior decisions. *Liberty Mut. Ins. Co. v. FAG Bearing Corp.,* 335 F.3d 752, 761 (8th Cir. 2003) ("Where the first and second actions are both based on an evaluation of the same historical facts, a litigant seeking to introduce newly discovered evidence otherwise *in existence at the time of the first suit* may not argue that the facts have changed in the time period between the two actions in order to avoid the preclusive effect of the first decision.") (emphasis added). *See also Burdette v. Carrier Corp.*, 71 Cal. Rptr. 3d 185, 191 (Cal. Ct. App. 2008); 49 Corpus Juris Secundum, *Judgments* § 1061.

Moreover, there can be absolutely no dispute that all of the evidence and arguments that the Waldner group cites to the Court in this appeal concerning Wipf's membership in the Hutterville Church was presented to, considered and rejected by Judge Piersol in *Hutterville Hutterian Brethren, Inc. v. Sveen*, CIV 12-1010, 2013 WL 4679489 (D.S.D. Aug. 30, 2013). CR 2271-2290. On appeal, the Eighth Circuit Court of Appeals affirmed Judge Piersol's dismissal of the Waldner group's claims and recognized that "[t]he Waldners' current arguments contradict the position they took before the South Dakota Supreme Court." *Hutterville Hutterian Brethren, Inc. v. Sveen*, No. 13-3160, 2015 WL 149307 (8th Cir. Jan. 13, 2015). As such, the

Waldner group's attempt to re-litigate the issue was held to be barred by the doctrine of judicial estoppel:

> Having twice succeeded in foreclosing judicial determination and recognition of the proper directors and officers of Hutterville, the Waldners bring this federal action questioning the legitimacy of the Wipf faction's claim to Hutterville and asserting the legitimacy of their own offices. We will not permit the Waldners now to claim the religious questions are a "sham" or that these issues have been resolved all along. Nor will we permit the Waldners "the opportunity to prove ... that they are, in fact, Hutterville's officers and directors or were unlawfully removed."
>
> . . .
>
> The Waldners successively convinced the South Dakota Supreme Court that (1) the question of which faction has authority to direct Hutterville required determinations of church membership, the validity of excommunications, and the proper designation of the "true" Schmiedeleut, and (2) inquiry into these questions were impermissible for secular courts.
>
> The Waldners do not contend these questions have been resolved since that time. When questioned at oral argument in this case, the Waldners could not identify any intervening ecclesiastical decisions which might have settled the questions. Nor do they identify newly discovered evidence resolving the governance issues in a way that permits the court to circumvent religious inquiries. At most, the Waldners argue the attorneys "invented, orchestrated and engineered a sham and fraudulent 'religious dispute' to conceal their scheme and to shield themselves from scrutiny and liability." The Waldners fail to explain what it means to have a "fraudulent" religious dispute, and even if correct that the attorneys orchestrated the dispute between Hutterville's factions, this does not negate the religious questions they previously highlighted—i.e., which excommunications were valid and which is the true church. These issues, the Waldners once argued, are both unavoidable and unanswerable, and we fail to see how the origin of the dispute makes these inquiries now any less necessary or any less controlled by religious matters.

Id. at *9. Like the Eighth Circuit, this Court should reject the Waldner group's attempt to argue that the legitimacy of their claim to Hutterville has "been resolved all along." *Id.*

The Waldner group also attempts to avoid application of *res judicata* by claiming that "every one of the past cases Wipf cites was dismissed on jurisdictional grounds, and therefore the merits of the competing claims were never reached and reduced to a final judgment." Appellees' Brief at 38. In offering this argument, however, the Waldner group overlooks the fact that in order to reach the merits of a claim regarding who has the right to control Hutterville, they must first establish that a court possesses subject-matter jurisdiction over that claim. "When a party appears and contests jurisdiction, a judgment rendered on jurisdiction is final for the purposes of res judicata." *Wells v. Wells,* 2005 SD 67, ¶ 17, 698 N.W.2d 504, 509 (citations omitted). Thus, "[a]fter a jurisdictional ruling, 'the determination is res judicata between the parties and can only be attacked directly by an appeal therefrom.'" *Id.* *See also Sandy Lake Band of Mississippi Chippewa v. U.S.*, 714 F.3d 1098, 1102 (8th Cir. 2013) ("The principles of *res judicata* apply to questions of jurisdiction as well as to other issues.").

The Waldner group's claim that "subsequent events" have occurred which have created "a new legal situation or alter[ed] the legal rights or relations of the litigants" is likewise completely unfounded. Appellees' Brief at 39. All of the arguments arising out of the so-called "subsequent events" cited by the Waldner group were known and considered by courts in prior litigations. It is undisputed that all of these events actually occurred in either 2008 or 2009 – well before the

conclusion of the cases in *Hutterville* and *Wipf*. Thus, the Waldner group's confusing claim that these events should be deemed "subsequent" to those decisions is without merit and only reinforces the significant public policy basis for the doctrine of *res judicata*. *See Sveen,* No. 13-3160, 2015 WL 149307, at *9 ("[T]he Waldners could not identify any intervening ecclesiastical decisions which might have settled the questions. Nor do they identify newly discovered evidence resolving the governance issues in a way that permits the court to circumvent religious inquiries.").

The issue of a secular court's jurisdiction to adjudicate claims concerning membership in or corporate control over Hutterville has been fully and fairly litigated by the Waldner group on several previous occasions. No amount of "new" or different evidence regarding Johnny Wipf's "witness brother" status in 2008 or 2009 can change this conclusion.[6] Similarly, the fact that the underlying claim regarding the identity of Hutterville's true members and corporate leaders is unable to be addressed due to a lack of jurisdiction does not constitute legal grounds for the Waldner group to mount unlimited challenges to the exact same jurisdictional issue.

[6] The contention that Wipf accepted discipline in January 2008 that removed him as a "witness brother" is simply erroneous. As explained by Wipf in his May 2, 2013 deposition, the arrangement referred to by the Waldner group's counsel was conditional upon George Waldner's acceptance of overseers at Hutterville, a condition that George Waldner refused. CR 322-324. Because Waldner refused the overseers, the condition was not met, and therefore, the purported discipline was not accepted. *Id.*

V. Wipf is a Member in Good Standing with the Church at Hutterville

Even if this Court were inclined to entertain the religious questions raised by the Waldner group, the record nevertheless reflects that Wipf is a member in good standing of the "true" Hutterian Brethren Church at Hutterville. As outlined in Wipf's initial brief, it is undisputed that in December 1992, a meeting was held in which 173 Ministers of the Hutterian Brethren Church, Schmiedeleut Conference were present. *Hutterville*, 2010 SD 86, ¶ 4, 791 N.W.2d at 171; AA 31 (CR 1092). At that meeting, 95 Ministers opposed Rev. Kleinsasser as an Elder of the Church and only 78 Ministers supported him. *Id.* After this vote, the then president of the Board of Managers of the entire Hutterite Church, Rev. John M. Wipf, issued a document to all members of the Schmiedeleut Conference indicating that the Board of Managers accepted the vote repudiating Rev. Kleinsasser as valid. AA 31 (CR 1092); CR 1074-1076. On March 19, 2009, Wipf and his group submitted a formal Application for Membership of the Schmiedeleut Conference of the Hutterian Brethren Church, which was accepted by the Elders of the Schmiedeleut Conference. CR 2085; CR 1089.

In his sworn testimony before the USDA Hearing Officer, Timothy Waldner conceded that the President of the Board of Managers who expelled Rev. Kleinsasser was the top authority for entire Hutterite Church in North America. CR 1275-1277. Thus, even the Waldner group admits the decision by the President of the Board of Managers removing Rev. Kleinsasser's as Senior Elder constitutes a binding decision by the highest ecclesiastical tribunal within the Hutterian Brethren Church.

VI. If the Circuit Court's September 8, 2014 Order is Not Vacated, the Circuit Court's October 9, 2014 Order of Clarification Should Stand

For the reasons set forth in Wipf's initial brief and this reply, the Circuit Court erred in entering both the September 8, 2014 Order and the October 9, 2014 Order. AA 68-71 (CR 2391-2394); AA 118-119 (CR 2557-2558). However, should the Court for some reason hold that the Circuit Court's September 8, 2014 Order should not be vacated, Wipf opposes the Waldner group's Notice of Review request to have the October 9, 2014 Order set aside as void or of no legal effect. Appellees' Brief at 41-43. Contrary to the Waldner group's suggestion, the Circuit Court did not modify, amend or otherwise disturb its September 8, 2014 Order. Rather, the Circuit Court's October 1, 2014 Memorandum Decision and October 9, 2014 Order denied Wipf's motion for reconsideration while correcting an ambiguity in the language of the Circuit Court's September 8, 2014 Order. Because "[c]ourts have power to rectify inaccuracies in mere matters of form," the Circuit Court's order clarifying the intended scope of the Court's ruling was proper. *Janssen v. Tusha*, 68 SD 639, 643, 5 N.W.2d 684, 685 (1942).

CONCLUSION

The intent of this appeal is not to reopen issues that this Court and the Eighth Circuit Court of Appeals have already resolved. Rather, the sole purpose of this appeal is to vacate the erroneous and unnecessary Orders, Findings of Fact and Conclusions of Law entered by the Circuit Court on substantive issues related to the dispute at Hutterville. Thus, for the foregoing reasons, Wipf respectfully submits that the Circuit Court's September 8, 2014 Order, including Findings of Fact and

Conclusions of Law, and the Circuit Court's October 9, 2014 Order and the October 1, 2014 Memorandum Decision incorporated therein should be vacated and this case should be remanded back to the Circuit Court with instructions to dismiss all claims for lack of subject matter jurisdiction.

Dated at Sioux Falls, South Dakota, this 23rd day of January, 2015.

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