IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27476

MICHAEL GIBSON

Plaintiff/Appellant,

vs.

GIBSON FAMILY LIMITED PARTNERSHIP, a South Dakota Limited Partnership; and DELORES GIBSON in her capacity as general partner

Defendants/Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Deuel County, South Dakota

The Honorable Robert S. Timm, Presiding Judge

PRINCIPAL BRIEF OF APPELLANT MICHAEL GIBSON

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PRELIMINARY STATEMENT

Plaintiff Michael Gibson ("Mike") seeks an exit from the Defendant Gibson Family Limited Partnership ("GFLP"). His reasons are simple: Delores Gibson, his mother and the general partner, is dead-set on diverting GFLP assets for the sole benefit of her other son, Greg, and denying Mike all material benefits of partnership status. Delores has anointed Greg as the chosen son and Mike as the scapegoat. As the Circuit Court observed in its April 8, 2014 Memorandum Decision: "Greg has been able to prosper with land deals and loans from the partnership, while Michael appears to be getting the current tax burden sans any dividends." APP.0004.

Despite this conclusion, the Circuit Court denied Mike's request to dissociate from the limited partnership for value, as provided under South Dakota law. The Circuit Court agreed that Mike could obtain such relief, but denied his request under the "unclean hands" doctrine based on misdeeds that occurred years before and that had been previously adjudicated. The Circuit Court's invocation of "unclean hands" to deny Mike equitable relief was an abuse of discretion and should be reversed.

The Circuit Court also erred in rulings as to admissibility of evidence. It precluded Mike from introducing evidence of loans made to Greg, but permitted Delores to call attorney Rob Ronayne to tell the jury that her actions were legal. The Circuit Court also refused to consider post-trial evidence showing that Delores had continued to put Greg's interest over that of the GFLP. Those evidentiary rulings constitute reversible error.

Mike requests oral argument on these issues.

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REQUEST FOR ORAL ARGUMENT

Mike respectfully requests the privilege of being heard at oral argument on all of the issues raised in this appeal.

STATEMENT REGARDING CITATION CONVENTIONS

Appellant Michael Gibson adopts the following citation conventions: Citations to the settled record of the Clerk's Record Index will be denoted "R. _____". Citations to the Trial Transcript will be denoted "(TT_____)." Citations to Exhibits offered and admitted at trial will be denoted "Ex.____."

JURISDICTIONAL STATEMENT

After a four-day jury trial, the jury returned a defense verdict. Judgment on the jury verdict was entered on November 13, 2013. (R-633). Based on the Court's prior ruling, Mike filed the Amended Complaint on December 18, 2013, adding a claim under which Mike would dissociate from the Gibson Family Limited Partnership. (R-637). On August 18, 2014, the trial court signed and dated Findings of Fact and Conclusions of Law and Judgment on Claims in Equity. Both documents were filed on August 23, 2014. (R-660; R-712). Counsel for the parties were not aware that these documents were filed until May 2015. Notice of entry of the order was served by the Defendants upon the Plaintiff on May 15, 2015. (R-724).

STATEMENT OF THE ISSUES

I. Whether the Circuit Court erred as a matter of law in concluding that Mike could not dissociate from the limited partnership?

In its April 8, 2014 Memorandum Decision, the Circuit Court concluded that Mike could dissociate from the limited partnership under the linking provision, SDCL § 48-7-1105. But in the Findings of Fact and Conclusions of Law that the Circuit Court adopted, it reversed this holding and reached the contrary result.

Authority: SDCL § 48-7-1105

SDCL § 48-7A-601 et al.

SDCL § 48-7A-104

Welch v. Via Christi Health Partners, Inc., 133 P.3d 122 (Kan. 2006)

II. Whether the Circuit Court abused its discretion by invoking the unclean hands doctrine to deny Mike's request for dissociation?

Although the Circuit Court concluded that dissociation was permissible, it denied Mike's claim for dissociation on equitable grounds after concluding that Mike came to the Court with unclean hands based on past misconduct stemming from the mid-2000s.

Authority: *Henderson v. U.S.*, 135 S. Ct. 1780 (2015)

Adrian v. McKinnie, 2002 SD 10, 639 N.W.2d 529

Halls v. White, 2006 SD 47, 715 N.W.2d 577

III. Whether the Court committed reversible error by (i) excluding or refusing to consider evidence of one-sided transactions where Delores put Greg's interests ahead of the interests of the GFLP and (ii) overruling Mike's objection to testimony from Delores's lawyer as to the ultimate issue of the legality of her actions?

The Circuit Court concluded that the evidence of outstanding loans that GFLP made to Greg was inadmissible on grounds of *res judicata* and granted Defendants' motion in limine. When Mike sought to introduce the evidence at trial on grounds Defendants had "opened the door" to its admission, the Circuit Court denied his Motion. The Circuit Court overruled Mike's objection to testimony from Delores's lawyer and paid expert, Rob Ronayne, vouching for the legality of her decisions. Finally, the Circuit Court declined to consider post-trial evidence offered by Mike showing that GFLP had waived Greg's indemnity obligation to pay its attorney's fees, which exceeded $100,000.00, and made capital improvements to the feedlot for Greg's benefit.

Authority: SDCL § 19-12-3 (Rule 403)[1]

SDCL §19-15-2 (Rule 702)

Southern Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc., 320 F.3d 838 (8th Cir. 2003)

State v. Moran, 2003 SD 14, 657 N.W.2d 319

STATEMENT OF THE CASE

Mike filed the Complaint on June 30, 2011, seeking a declaratory judgment, cancellation of instrument, breach of fiduciary duty, dissociation of general partner, appointment of a receiver, and dissolution. (R-2). Defendants moved for summary

[1] This statute is now codified as SDCL § 19-19-403. Because the recent changes to Chapter 19 came after the relevant decisions in this case, Appellant will cite to the versions of the SD Rules of Evidence in place at the time of trial.

judgment on Counts I and II of the Complaint (R-214). The Circuit Court granted the motion and those counts were dismissed. (R-506).

The parties tried the case to a jury in Deuel County in November 2013. At the close of evidence, Mike sought and was granted leave to amend the Complaint to add an equitable count for relief under which Mike sought to dissociate for value (Count IV). The parties agreed that the Court would decide this issue after the trial.

The jury returned a defense verdict on Count III, the breach of fiduciary claim. (R-626). The Court entered Judgment on Count III, and the parties stipulated to dismissal of Counts V (receiver) and VI (dissolution). (R-633).

On December 17, 2013, Mike filed the Amended Complaint. (R-637). After briefing from the parties, the Circuit Court issued a memorandum decision dated April 8, 2014. The Circuit Court concluded that Mike had the right to dissociate from the limited partnership for value, but denied his claim on the grounds that Mike did not come into the litigation with clean hands.

Mike filed Motion to Enlarge the Record and Motion for Reconsideration. (R-657). With the Motion, he submitted new evidence of additional acts by GFLP authorized by Delores: (1) paying $25,000.00 for improvements to a feedlot leased to Greg; and (2) waiving a contractual provision requiring that Greg indemnify GFLP for attorneys' fees and expenses incurred by the GFLP and voluntarily paying $100,000.00 in attorneys' fees, for which Greg was otherwise contractually obligated. (R-653). The Circuit Court denied the Motion to Enlarge the Record and for Reconsideration. (R-662).

Thereafter, both parties submitted proposed Findings of Fact and Conclusions of Law. (R-666; R-684). The Circuit Court rejected Plaintiff's proposed Findings of Fact and Conclusions of Law and adopted Defendants' proposed Findings of Fact and Conclusions of Law. (R-684; R-700). On August 23, 2014, the Circuit Court issued its Findings of Fact and Conclusions of Law and the Judgment on Claims in Equity on Counts IV, V, and VI of the Amended Complaint. (R-712; R-723). Defendants served Notice of Entry of Findings of Fact and Conclusions of Law and Judgment on Claims in Equity on May 15, 2015 (R-724).[2] Mike timely filed and served notice of appeal on June 10, 2015 (R-738).

STATEMENT OF FACTS

A. The Background to GFLP and the Present Dispute

The Gibson Family Partnership consists of three limited partners: Mike Gibson, his brother Greg Gibson, and their mother, Delores Gibson.[3] (Ex. 1). Their respective interests are as follows: (1) Mike = 45.802%; (2) Greg = 45.802%; and (3) Delores = 8.266%. Delores Gibson also serves as the sole general partner of the partnership agreement and owns 0.13% interest in that capacity. Income and loss of the partnership is taxed on a pass-through basis. (TT 99:20-100:13).

[2] The Court filed the Findings of Fact and Conclusions of Law and the Judgment with the Clerk, but the parties were not served with these documents or notified that they had been filed until May 2015.

[3] The GFLP was created in 2003 and originally included Delores as general partner and Greg, Mike, and their sister LeeAnn Swenson as limited partners. LeeAnn was bought out in 2003.

Delores, Greg, and Mike were involved in prior litigation that commenced in 2007 and that went to trial in 2009.[4] In one of the actions, CIV 07-31, Mike brought various claims against Delores in her capacity as general partner, including a breach-of-fiduciary claim, and sought to dissolve the GFLP. After the civil trial, Mike was charged with a felony based on false testimony given during the litigation. This resulted in a suspended imposition of sentence. Delores wrote a letter to the judge advocating that Mike receive a harsher sentence than he had requested. (TT558:21-559:2).

B. Land Transactions at the Center of the Litigation.

The GFLP's primary assets consist of 2,060 acres in Deuel County, including a feedlot of approximately 40 acres with sheds, bunks, pens, and other capital improvements commonly used in a confined animal feeding operation.

On December 1, 2010, Delores and Greg executed a lease agreement drafted by attorney Rob Ronayne under which GFLP would lease the bulk of GFLP land to Champaygn Ranch Inc. (the "Original Lease"). (Ex. 6). Champaygn Ranch, Inc. is a family farm corporation owned by Greg and his wife Joan. (TT191:14-16). Under the Original Lease, Greg and Champaygn Ranch would rent 1585 acres at $35 per acre and 475 tillable acres at $100 per acre, for a period of 20 years. (Ex. 6, at ¶ 2). The pricing scheme included an escalator clause based on the average per-acre rental price in Deuel and Codington Counties, as reported by South Dakota State

[4] *See, e.g.,* Exs. 102, 103, 107, 108, 110 (Amended Complaint CIV 07-31, Delores's Answer and Counterclaim CIV 07-31, GFLP Amended Complaint CIV 07-44, Mike's Answer to Amended Complaint CIV 07-44, and Stipulated Judgment, CIV 07-44).

University. If the average per-acre rental price exceeded the prices listed in the lease, the average per-acre rental price would control. *Id.* at ¶ 3.

Delores and Greg met with attorney Ronayne on March 30, 2011, to execute an amendment (the "Amended Lease"). (Ex. 7). The Amended Lease retained the per-acre pricing scheme but diminished the amount of land involved, such that Greg and Champaygn Ranch would rent 1040 pasture acres at $35 per acre and 190 tillable acres at $100 per acre. *Id.* at ¶¶ 2-3.

On the same date, attorney Ronayne drew up a contract for deed under which Champaygn Ranch would purchase the remaining 830-acre parcel for $1.1 million over 20 years, with interest accruing at 4.15%. (Ex. 2, at ¶ 2). The contract for deed included an indemnification provision requiring that Champaygn Ranch indemnify GFLP for attorneys' fees and costs of litigation relating to the transaction. *Id.* at ¶8.

C. The Flawed Appraisal

A month before amending the lease and drafting the contract for deed, Greg approached Troy Engstrom, an appraiser out of Watertown, and asked that he appraise a 671-acre parcel that was subject of the Original Lease. Once Greg saw the results that Engstrom produced, he asked Engstrom to appraise another quarter. Together, the appraisals valued the 830-acre parcel Greg later bought from GFLP. (TT296:10-20).

Engstrom had never done on appraisal on a property that was subject of a 20-year lease and had to ask his father, a senior appraiser, how to approach that novel feature. (TT310:20-311:12). Engstrom's appraisal purported to value the 830 acres at

the highest and best use and assuming that it would be purchased in an open, competitive market. But he also needed to account for the fact that Champaygn Ranch had a 20-year lease on the entire parcel he was appraising. In his appraisal, he described this contradiction as "an unusual condition." That puts it mildly, as Engstrom's testimony at trial made clear.

Enstrom's testimony included the following admissions:

- Engstrom assumed that the below-market rates of $35 an acre for pasture land and $100 acre for tillable crop land would remain in place for 20 years, without any increase, and admitted the rates were below market in 2011. (TT317:12-318:7).
- Engstrom testified that the only individual who might be interested in purchasing a parcel subject to such a long lease was a passive investor, but admitted the below-market lease rates would deter a passive investor from having any interest in the parcel. (TT318:17-319:16).
- Engstrom simply accepted Greg's classification of what land was cropland and what land was pasture and accepted that 34% of the total land was tillable cropland. (TT353:21-354:2) He did not consider whether pasture land was of a high enough quality to be converted into tillable land, as would be required to evaluate the parcel at its highest and best use. Had he done so, he admitted, the tillable ratio would be closer to 50% based on the soil ratings and past use. (TT348:3-6, Demonstrative Exhibit 2)
- Engstrom assumed that every acre of cropland would have the same value, regardless of soil type or quality, and that every acre of pasture would have the same value, regardless of soil type or quality. (TT331:17-21). Yet he admitted under cross-examination that this assumption was wrong and that the soil maps showed that certain portions of cropland were better than others and therefore more valuable than others. (TT349:9-16)

- Engstrom admitted that although his report claimed that he had estimated the value of the land at the highest and best use, that wasn't really true. He valued it based solely on the description given by Greg Gibson as to its present use, not on its highest and best use. (TT348:7-12, 21-22).

Engstrom arrived at a final valuation of $1.1 million for the 830-acre parcel. But over the course of his deposition and cross-examination, he declined to endorse that number as a reflection of the actual market value of the property.

At the close of his cross-examination, Engstrom – the individual designated as GFLP's expert – made the following series of admissions:

Q: Greg got it for less than market value?

A: Correct.

Q: And it wasn't even really close, was it?

A: Correct.

Q: And the Gibson Family Limited Partnership, this 830 acre parcel, gave up title to this property for less than market value, didn't they?

A: They did.

Q: It wasn't even really close, was it Troy?

A: Correct.

(TT357:14-23).

Mike's expert, senior appraiser Bradley Johnson, agreed with Engstrom that the $1.1 million appraisal wasn't even close to market value for the 830-acre parcel. Unlike Engstrom, Johnson did not reduce the value of the land based on the assumption that it would be encumbered by a 20-year lease. (TT403:25-404:5).

Johnson understood that this was a false assumption because Greg (the putative lessee) was purchasing the same parcel of land under the contract for deed.

Unlike Engstrom, Johnson did not simply accept the word of Greg Gibson as to the attributes and historic use of the individual parcels comprising the 830 acres subject of the contract for deed. Johnson looked at the soil maps and concluded that much of the land that had previously been used as farmland would be used as farmland again and that the highest and best use of most of the 830 acres was as farmland. Johnson concluded that a conservative estimate of the market value of the farm ground, based on highest and best use in a truly competitive market, would be $3.088 million.[5]

Where was Delores during this process? Engstrom undertook the engagement with the belief that Greg was the only other partner in the GFLP and initially believed that Greg, not the GFLP, owned the property and was ordering the appraisal. (TT338:14-15). Engstrom even sent the original invoice to Greg, thinking he was the party that had ordered and was responsible for paying the appraisal. (TT322:16-19).

Greg called the shots with respect to the appraisal. Engstrom never spoke with Delores or laid eyes on her – he didn't even know her name. (TT321:10-18). Delores hedged on that issue, saying the lease idea was hers and Greg's. (TT558:1-5). But she also suggested that it did not matter, given (in her view) the limited

[5] Johnson also appraised the value of the feedlot that Delores had rented to Greg at $2,096 annually. He concluded that the market value of the feedlot was $1.4 million (TT 958:25), with the 44-acre parcel on which it sat appraised at $327,000.00 (TT 959:23).

accountability she had as a general partner. She testified that she "owned" the GFLP and that Mike had no ownership interest. (TT 520:5) She went so far as to deny owing any obligation to a limited partner. (TT 520:19-20). That outlook was reflected in the structure and ultimate effect of the GFLP's land deals with Greg, which Delores had orchestrated to benefit Greg over and above the interests of the GFLP.

D. Evidence of GFLP Loans to Greg Excluded at Trial

The land transactions were not the only one-sided transactions between GFLP and Greg. In 2007, Delores and Greg executed a note relating to loans made to Greg or his LLC totaling $350,000.00. *See* R-73 (Affidavit of Delores Gibson, Ex. C).[6] Before trial, Defendants moved to exclude evidence relating to the loans on grounds of *res judicata*, arguing that because the loan was at issue in the previous litigation, it could not be considered as part of Mike's breach-of-fiduciary claim. Mike argued that Delores's refusal to demand payment from Greg was probative as to her intent and willingness to put Greg's interests over the GFLP's interests. In addition, Mike noted that the loan no longer qualified as "short-term" under IRS regulations and it was not being correctly classified for tax purposes.

The Circuit Court granted Defendants' motion to exclude the evidence. *See* APP.002, ¶3. The Circuit Court also denied Mike's motion during trial to reconsider its ruling on grounds that Defendants had opened the door to its admission by

[6] The note papered up previous payments of GFLP funds that had been disbursed to Greg in 2006.

eliciting testimony regarding GFLP's illiquidity and by showing the jury profit-and-loss statements that included the loan. *See infra*, at Part III.A.

E. The Land Transactions in Perspective

The convoluted process by which the GFLP structured the lease and contract for deed was clearly intended to confer a return of investment on Greg that no market participant could reasonably expect to realize. Upon consummation of the contract for deed, Greg will own nearly 1,000 acres of prime South Dakota agricultural land by paying less than what any other market participant would expect to pay to ***rent*** a parcel of equivalent value. Indeed, Greg paid higher per-acre rates to rent the 1060 parcel than he paid under the contract for deed. (TT220:13-19) (lease rate for land was $84,696, whereas rate under contract for deed for same land was $81,230).

The below-market purchase price was secured because the land was appraised as being subject to a lease that was no more than a pretext. The entire transaction was designed to reduce the value of Engstrom's appraisal and give Greg a windfall. Furthermore, the payments that Greg made while wearing his "tenant" hat constituted income when he was wearing his "limited partner" hat. (TT120:21-121:4). Greg is effectively paying himself to rent high-quality land at the county-wide average prices and to pay on a contract for deed at even lower prices.

The evidence demonstrated that Delores's *modus operandi* as general partner was to take income the GFLP might use to pay distributions and earmark it for low-interest loans available only to Greg or capital expenditures that benefited only Greg.

Mike was then left to carry the sizable tax burdens that resulted from annual income that came into the partnership but was never paid out. The contract for deed will result in a capital gain of $849,533 over its 20-year term, *see* Ex. 16, at 12, and Mike will pay in excess of 45% of that amount with little hope that any of the GFLP income will ever be distributed. In view of these facts, Mike petitioned the Court to grant him equitable relief in the form of judicial dissociation for value.

F. The Circuit Court denies Mike's equitable claim.

At trial and his post-trial submissions, Mike did not contend that Delores needed to rent him GFLP land or do business with him in her capacity as general partner. Instead, Mike established undisputed evidence that the foundation of trust and cooperation no longer existed, made the case that his presence in the partnership was no longer tenable, and identified equitable and statutory bases upon which the Court would order judicial dissociation. This claim sounded in equity and was not predicated in any way on claims that were submitted to the jury, although much of the evidence relating to the land transactions and Delores's motivations would bear on the issue presented to the Circuit Court.

In its Memorandum Decision dated April 8, 2014, the Circuit Court first addressed whether a legal basis existed upon which Mike might seek judicial dissociation. APP.003. Relying heavily on *Welch v. Via Christi Health Partners, Inc.*, 133 P.3d 122 (Kan. 2006), the Circuit Court agreed with Mike's statutory interpretation and contention that the concepts of "withdrawal" and "dissociation" are legally distinct. APP.0008. The Circuit Court concluded that because SDCL Chapter 48-7

does not address "dissociation," the issue "is properly decided under SDCL Chapter 48-7A (RUPA) via the 'linking' provision of SDCL § 48-7-1105." APP.0011. Accordingly, dissociation was available to a limited partner under South Dakota's statutory scheme as an equitable remedy and pursuant to SDCL § 48-7A-601.

The Circuit Court ruled, however, that Mike was barred from obtaining equitable relief under the unclean hands doctrine. The Circuit Court reasoned that Mike's prior conduct precluded it from considering his equitable claim on the merits. APP.0009.

G. Circuit Court denies Mike's Motion for Reconsideration and to Enlarge the Record

Mike moved for reconsideration of the Circuit Court's decision, arguing that the Court reached back to conduct that preceded the litigation and was unrelated to the central claims in applying "unclean hands" as a bar against Mike's claim. Mike also asked that the Court consider additional evidence that came to light after the jury's verdict, pursuant to SDCL § 15-6-60(b). The evidence showed that Delores had voluntarily paid for attorney fees incurred by the GFLP in the course of litigation, rather than hold Greg to an indemnification clause in the contract for deed obligating that he pay for GFLP's fees. Delores also paid for improvements to the feedlot rented to Greg. Together, these expenses exceeded $125,000.00 and demonstrated that Delores would continue to marshal GFLP assets for Greg's benefit even when doing so was clearly contrary to its interests. The Circuit Court rejected Mike's Motion for Reconsideration and Motion to Enlarge the Record. APP.0012.

H. The Circuit Court adopts Defendants' Findings of Fact and Conclusions of Law, which directly controvert its April Memorandum Decision.

The Circuit Court adopted verbatim the Defendants' proposed Findings of Fact and Conclusions of Law. *Compare* APP.0023 *with* APP.0035. Finding of Fact #17 purports to identify evidence presented at trial "demonstrating Michael's inequitable and wrongful conduct" and enumerates twenty individual bullet points. APP.0037-38. Sixteen of the bullet points refer to events before 2007. Two bullet points refer to trial testimony in 2009. The final two bullet points identify the date Mike filed the second suit, June 30, 2011, and the date the jury returned its defense verdict, November 8, 2013. In sum, none of the evidence of "inequitable conduct" had any connection to the land transactions at the heart of the lawsuit and 80% of the identified evidence was over seven years old.

The Circuit Court also abandoned the central holding of the April 8, 2014 Memorandum Decision, which held that disassociation applied in the limited partnership context. Defendants sought to undo this holding with the proposed Conclusions of Law ¶¶13 and 14, which stated that the linking provision did not apply and Mike had no cognizable claim for dissociation. APP.0042. The Circuit Court signed on to these conclusions, over Mike's objections and without any explanation or commentary.

STANDARDS OF REVIEW

This Court reviews the equitable claim for abuse of discretion, with the findings of fact reviewed for clear error and the conclusions of law subject to a *de novo*

standard. *Gartner v. Temple,* 2014 SD 74, ¶7, 855 N.W.2d 846, 850. Whether dissociation applies to limited partnerships raises matters of statutory interpretation and is reviewed *de novo.* The alternative holding – that Mike was barred from relief under "unclean cleans" – is reviewed for an abuse of discretion.

Mike's evidentiary challenges are also reviewed for an abuse of discretion. "An abuse of discretion refers to a discretion exercised to an 'end or purpose not justified by, and clearly against, reason and evidence.'" *St. John v. Peterson*, 2011 SD 58, ¶18, 804 N.W.2d 71, 76 (quoting *Kostel v. Schwartz*, 2008 SD 85, ¶12, 756 N.W.2d 363, 370). A lower court may abuse its discretion by committing an error of law or by exercising discretion to an unjustified purpose, against reason and evidence. *Id.* "With regard to the rules of evidence, abuse of discretion occurs when a trial court misapplies a rule of evidence, not when it merely allows or refuses questionable evidence." *State v. Asmussen*, 2006 SD 37, ¶ 13, 713 N.W.2d 580, 586. To establish that an evidentiary ruling constitutes prejudicial error, a party must establish that it is possible that the exclusion of the evidence in all probability affected the outcome. *Peterson,* 2011 SD 58, ¶18, 804 N.W.2d at 76.

ARGUMENT

I. The Circuit Court erred as a matter of law in concluding that Mike could not seek judicial dissociation in the limited partnership context.

The Circuit Court got it right the first time when it concluded that Mike, as a limited partner, could lawfully dissociate from GFLP in accordance with governing

law. A careful reading of the Court's analysis, persuasive authority from other jurisdictions, and South Dakota's statutory scheme shows why.

A. Mike may lawfully dissociate from the family limited partnership under South Dakota law.

The Family Limited Partnership is governed by SDCL Chapter 48-7 (ULPA). Under SDCL § 48-7-1105(ULPA), "in any case not provided for in this chapter, the provisions of the Uniform Partnership Act governs." ULPA was last amended by the Legislature in 1996. The Uniform Partnership Act was revived in 2001, so that chapter 48-7A, RUPA, codifies the law of partnerships in South Dakota.

The linking provision of SDCL § 48-7-1105 expressly contemplates that provisions from chapter 48-7A play a gap-filling function in the law of limited partnerships. One result of that gap-filling function is to incorporate the concept of dissociation into the law of limited partnerships.

Chapter 48-7 does not expressly mention dissociation, but it does address "withdrawal," another concept within partnership law. Under SDCL § 48-7-603, a limited partner "has no right of *withdrawal* from a limited partnership except as otherwise specified in writing in the partnership agreement." (emphasis provided). The concept of "withdrawal" is "provided for" in Chapter 48-7 and therefore the linking provision does not apply. But the prohibition on withdrawal cannot be construed to imply a prohibition on the separate concept of "dissociation."

"Dissociation" reflects the emergent understanding of partnerships as entities, akin to limited liability companies. One consequence of this understanding is a departure from a strict notion that withdrawal of one partner means dissolution of

the partnership itself. As recently recognized by the Nebraska Supreme Court:

> RUPA's [2001 revisions to UPA] underlying philosophy differs radically from UPA's, thus laying the foundation for many of its innovative measures. RUPA adopts the entity theory of the partnership. As opposed to the aggregate theory that the UPA espouses. Under the aggregate theory, a partnership is characterized by the collection of its individual members, with the result being that if one of the partners dies or withdraws, the partnership ceases to exist. On the other hand, RUPA's entity theory allows for the partnership to continue even with the departure of a member because it views the partnership as an entity distinct from its partners.

Shoemaker v. Shoemaker, 745 NW2d 299, 309 (Neb. 2008).

RUPA expressly recognizes a right of dissociation: "[a] partner has the power to dissociate at any time, rightfully or wrongfully, by express will pursuant to subsection 48-7A-601(1)." SDCL 48-7A-602.[7] Consequently, by virtue of the linking provision, dissociation is incorporated into the law of limited partnerships.

In arguing before the Circuit Court, the Defendants sought to avoid this conclusion by contending that "withdrawal" and "dissociation" meant the same thing. The ban on a limited partnership's "withdrawal," according to Defendants, should be read as tacitly prohibiting "dissociation." The Circuit Court correctly rejected this analysis. It concluded that as a matter of statutory interpretation, dissociation is distinct from withdrawal.

Among other things, a partner can dissociate without causing a dissolution and the grounds upon which dissociation may occur are more varied than voluntary

[7] Dissociation is also permitted as a matter of equity under SDCL § 48-7A-104, which provides: "unless displaced by particular provisions of this chapter, the principals of law and equity supplement this chapter."

or involuntary withdrawal. This reflects the paradigm shift from an "aggregate theory" of the partnership into an "entity" theory of the partnership.

In view of that paradigm shift, the express prohibition on withdrawal from a limited partnership cannot be read to imply a prohibition on dissociation. The Circuit Court adhered to this analysis and concluded that

> [withdrawal] is simply one way in which a partner "dissociates." Because "dissociation" is not addressed in South Dakota's version of ULPA, the linking provision found in SDCL § 48-7-1105, which provides "[i]n any case not provided for in this chapter the provisions of the Uniform Partnership Act [SDCL ch 48-7A] govern," applies and the issues will be addressed accordingly.

Memorandum Decision, APP.0008.

The Circuit Court's statutory interpretation was correct. The Legislature, in adopting RUPA in 2001, is presumed to be aware of the linking statute in ULPA that it passed in 1996. *South Dakota Subsequent Injury Fund v. Casualty Reciprocal Exchange*, 1999 SD 2, ¶ 18, 589 N.W.2d 206, 209 ("[W]hen an amendment is passed, it is presumed the legislature intended to change existing law.") (quoting *In re Dwyer*, 49 S.D. 350, 207 N.W. 210, 212 (1926)). Consequently, the Legislature is presumed to understand and intend that the concept of "dissociation" that was not included in Chapter 48-7 would be incorporated into the law of limited partnerships pursuant to the linking statute.

Other states have subsequently passed revised limited partnership statutes that "de-link" the law of limited partnerships from the law of partnerships. South Dakota has not done so. Our Legislature has adhered to the "entity" theory of partnerships,

which holds true regardless of whether the partnership is a general partnership or a limited partnership.

This result adheres to the doctrine of *in pari materia*, which holds that several statutes addressing the same subject matter are governed by one spirit and policy and are intended to be consistent and harmonious in their several parts and provisions. *MB v. Konenkamp*, 523 N.W.2d 94, 97–98 (S.D.1994) (citing *State v. Chaney*, 261 N.W.2d 674, 676 (S.D.1978)). Statutes must be construed *in pari materia* when "they relate to the same person or thing, to the same class of person or things, or have the same purpose or object." *Goetz v. State*, 2001 SD 138, ¶ 26, 636 N.W.2d 675, 683 (citation omitted). The linking provision is express textual evidence that Chapters 48-7 and 48-7A must be read together and in harmony with one another. So understood, the "disassociation" provisions under RUPA are incorporated into the law of limited partnerships.

This is the same conclusion reached in *Welch v. Via Christi Health Partners, Inc.*, 133 P.3d 122 (Kan. 2006) and re-affirmed in *CR Holding Company, LLC, et. al v. Campbell*, No. 11-2051-JWL, 2011 WL 2357649 (D. Kan. June 9, 2011). These decisions faced the identical issue: whether the linking provision in Kansas's limited partnership act incorporated the concept of "dissociation" from the applicable provision of Kansas's Revised Uniform Partnership Act (KRUPA). The Kansas courts concluded that the express prohibition on withdrawal could not be read as an implied prohibition on dissociation. Rather, the provisions in the partnership statutes

addressing "dissociation" were made part of the law of limited partnerships by virtue of the linking provision.[8]

The Circuit Court agreed with this analysis in its April 8, 2014 letter decision, then adopted Findings of Fact and Conclusions of Law that contradict its decision. That reversal constitutes error as a matter of law. Reviewing *de novo*, this Court should hold that withdrawal and dissociation are separate legal concepts, that the express prohibition on withdrawal of a limited partner does not imply a prohibition on dissociation, and that the linking provision under SDCL § 48-7-1105 incorporates dissociation into the law of limited partnerships in South Dakota. In short, Circuit Court's reasoned analysis in its April Memorandum should carry the day over its unexplained and inexplicable reversal in the Findings of Fact and Conclusions of Law.

B. Mike may dissociate on equitable grounds under the catch-all provision of SDCL § 48-7A-104 and under SDCL § 48-7A-601.

Pursuant to the linking provision, a limited partner may dissociate as a matter of equity under 48-7A-104 and as an express statutory right under SDCL 48-7A-601. Section SDCL 48-7A-103(a) provides: "to the extent the partnership agreement does not otherwise provide, this chapter governs relations among the partners and between the partners and the partnership." Section SDCL 48-7A-104(a) further

[8] *See also Bedolla v. Logan & Frazer,* 52 Cal App. 3d 118, 128 (Cal. Ct. App. 1975) (holding that § 15529 [linking provision with same language] incorporated pertinent provision of the Uniform Partnership Act into the Uniform Limited Partnership Act).

provides, "unless displaced by particular provisions of this chapter, the principals of law and equity supplement this chapter."

No provision within Chapter 48-7A precludes equitable dissociation, and consequently a Court may order a limited partner be dissociated for value on equitable grounds. *See, e.g., Landstrom v. Shaver*, 1997 SD 25, ¶41, 561 N.W.2d 1, 9 (holding that, in context of closely held corporation, the trial court has discretion, within its broad powers of equity, to create an appropriate remedy based on the evidence presented . . . ."); *Mundhenke v. Holm*, 2010 SD 67, 787 N.W.2d 302 (dissolution and dissociation sound in equity); *Park Regency LLC v. R&D Development of the Carolinas, LLC*, 741 S.E.2d 428 (S.C. 2012) (holding that an act to dissociate a member of an LLC is equitable in nature).

Mike may also disassociate under SDCL § 48-7A-601, *et seq*. SDCL 48-7A-601 contains ten enumerated events that may trigger dissociation of a partner as a matter of law. Subsection 7 allows disassociation based on "a judicial determination that the partner has otherwise become incapable of performing the partner's duties under the partnership agreement." Neither Delores nor Mike are able to carry out their duties under the partnership in view of the lingering animus that exists. Delores and Mike no longer share the basis of trust and mutual interests on which the partnership was based. More importantly, Delores's pattern of decisions show that she is no longer capable of treating Mike on equal terms with Greg.

II. The Circuit Court abused its discretion in denying Mike equitable relief by invoking the "unclean hands" doctrine.

This action relates to the Amended Lease and contract for deed executed in late 2010 and early 2011. Yet the Circuit Court ruled that Mike could not ask for equitable relief in this case because of past misconduct unconnected to these land transactions. Specifically, the Circuit Court stated:

> There is a significant history behind the current issues between the two parties; too much history to get into detail today. That being said, there is sufficient evidence of Michael's past dealings to determine he has a history of conducting partnership business outside the scope of the agreement and without the knowledge of the other partners. This past behavior has indeed led to many of the problems between Michael and the other partners. Michael has not come into this litigation with clean hands and as far as an equitable remedy goes, the Court is inclined to leave him 'in the position in which the court [found him].'"

Memorandum Opinion, APP.0009. That history relates to acts that occurred in the mid-2000s and primarily concerned Mike's role as shareholder in Gibson Livestock Co., which he owned and operated with Greg. All of those issues had already been adjudicated in the 2009 civil litigation and subsequent criminal action against Mike. In short, the Circuit Court invoked the "unclean hands" doctrine based on events that were remote in time, previously adjudicated, and causally unrelated to the land transactions that gave rise to Mike's claim for equitable relief.

"The unclean hands doctrine proscribes equitable relief when, but only when, an individual's misconduct has 'immediate and necessary relation to the equity that he seeks.'" *Henderson v. U.S.*, 135 S. Ct. 1780, 1783 n.1 (2015) (quoting *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933)) (holding that unclean hands does not bar a convicted felon from asking a court to exercise its equitable powers and

order law enforcement to transfer his firearms to third parties in accordance with felon's wishes).

To invoke the unclean hands doctrine, there must exist a direct nexus between the claimant's misconduct and the underlying basis for relief.[9] Were it otherwise, individuals with a checkered past would be denied redress for present inequities and the very basis for equity would be turned on its head. That notion contradicts the animating purpose behind the doctrine of "unclean hands" and contradicts South Dakota law.

This Court's holding in *Adrian v. McKinnie*, 2002 SD 10, 639 N.W.2d 529, provides the rule of decision here. In *McKinnie,* the trial court concluded that defendants took excess timber off land subject to lease, and that such inequitable conduct barred equitable relief in recognizing that an agreement characterized as a lease was in substance and effect an equitable mortgage. *Id.* This Court reversed the trial court and found that it abused its discretion by invoking the "unclean hands" doctrine and in not declaring the agreement to be an equitable mortgage. *Id.* at 2002 SD 10, ¶17, 639 N.W.2d at 535.

McKinnie emphasized that "[w]hen claimants seek equitable relief in an instance where they would ordinarily be permitted such relief, they will nonetheless be denied

[9] "The equitable doctrine of clean hands expresses the principle that where a party comes into equity for relief he or she must show that his or her conduct has been fair, equitable, and honest *as to the particular controversy in issue*." 27A AM. JUR. 2D EQUITY § 98 (citing *Fenn v. Yale University*, 283 F. Supp. 2d 615 (D. Conn. 2003); *Monetary Funding Group, Inc. v. Pluchino*, 87 Conn. App. 401, 867 A.2d 841 (2005); *Opperman v. M. & I. Dehy, Inc.*, 644 N.W.2d 1 (Iowa 2002)). *Accord* Restatement (Third) of Restitution and Unjust Enrichment, § 63.

the relief if they acted improperly or unethically in relation to the relief they seek." *Id.* "What is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts." *Id.* (quoting *Republic Molding Corp. v. B.W. Photo Utilities*, 319 F.2d 347, 349 (9th Cir. 1963)). The same principles control the analysis here.

In 2010 and 2011, Mike was a virtual stranger to GFLP business and had no communication with either the general partner or limited partners, except through letters sent to or from attorney Ronayne. Mike took no action within the GFLP framework apart from paying the annual tax bill that result from Delores's strategic decisions to use partnership income for loans or capital expenditures benefitting Greg.

The evidence Defendants presented at trial and to the Court in post-trial briefing did not detail any wrongful act that Mike committed during the relevant time period of 2010 and 2011. Similarly, the Findings of Fact and Conclusions of Law entered by the Court is devoid of any wrongful conduct by Mike that bears any "immediate and necessary relation to the equity that he seeks." *Henderson*, 135 S. Ct. 1780, n.1. The absence of any evidence of inequitable conduct from December 2010 forward demonstrates why the "unclean hands" doctrine should not have applied to Mike's claim.

Even if the Circuit Court could permissibly look back to 2007 or earlier as part of its analysis, Mike had "purged himself of the taint" of such misconduct when he paid the civil judgment and served the criminal sentence he was given. This Court

has recognized that "[i]f a person guilty of unconscionable or wrongful conduct purges himself or herself by adequate or effective renunciation and repudiation, the right to relief will be restored." *Halls v. White*, 2006 SD 47, ¶18, 715 N.W.2d 577, 585 (quoting 27A Am. Jur. 2d Equity, §135). In *Halls*, this Court upheld the Circuit Court's conclusion that plaintiff's "offensive act was committed and remedied long before the issue in this case arose" and did not trigger the unclean hands doctrine, so as to bar him from equitable relief in the case at bar. The same principle applies to this case.

Considered on the merits, the evidence supporting Mike's claim for equitable relief is overwhelming. Delores uses her powers as general partner as an instrument to settle old scores, to do Greg's bidding, and to take every conceivable action to assure that Mike will not derive any benefit from the GFLP. The land transactions were a contrivance to unload partnership assets at a pittance based on an appraisal that wasn't worth the paper it was printed on.

As the Circuit Court observed, "Greg has been able to prosper with land deals and loans from the partnership, while Michael appears to be getting the current tax burden sans any dividends." Memorandum Decision, APP.0004. These facts were established again and again at trial, and Delores's post-trial conduct shows that Mike can expect more of the same. The cycle of recrimination and acrimony must stop, and dissociation is the only exit route available. On appeal, this Court should reverse the Circuit Court's determination that Mike is not entitled to equitable relief under

the "unclean hands" doctrine and grant him the relief he requested by ordering that he be permitted to dissociate for value.

III. The Court committed reversible error in excluding evidence that should have been admitted and admitting evidence that should have been excluded.

The evidentiary grounds for reversal concern three issues: (1) the exclusion of evidence concerning extremely favorable loans the GFLP made to Greg; (2) the admission of testimony from attorney Rob Ronayne as to the legality of Delores's authorization of the land transactions; and (3) the refusal to consider post-trial evidence showing that Delores released Greg from contractual indemnity obligations to cover GFLP's attorneys' fees in excess of $100,000.00. Taken in isolation and cumulatively, these evidentiary errors prejudiced Mike and justify a new trial if the Court denies his requested relief on the equitable claim.

A. Mike should have been permitted to present evidence relating to loans GFLP made to Greg or, at minimum, use such evidence to impeach Delores's claims of the GFLP's illiquidity.

The Circuit Court erred in granting Defendants' motion to exclude evidence pertaining to Greg's loan and doubled down on that error in refusing to permit Mike to elicit that evidence after the Defendants opened the door. Because of these errors, Mike was denied the right to impeach Delores and Greg and prevented from showing the jury a true picture of GFLP's finances.

As of the date of trial, Greg had not paid any of the principal on the underlying loan and Delores, acting on behalf of GFLP, had declined to call the loan or require that payments be regularly made. That evidence alone supported the

underlying theory that Delores exercised her authority to line Greg's pockets and distribute assets in a way that assured Mike would receive no distributions to offset his sizeable annual tax bill.

Worse, the Defendants took advantage of the gap in the evidence to produce a misleading picture of the GFLP's overall solvency. At trial, the Defendants repeatedly referred to GFLP's finances and implied that the partnership was cash-poor and lacking in resources. Delores admitted that she had never paid out a distribution to Mike or Greg, contending that no distributions were made "because the money's not there." (TT531:4-6). In addition, Defendants showed balance sheets to the jury from 2009 through 2012, each of which included a line time classifying the loan as "advance to Greg $350,000.00" and as a liability of GFLP for each respective year. *See* Exs. 22-25 (GFLP Balance Sheets for 2009-2012))

Mike contended that this testimony and related evidence opened the door and should permit him to address the loan. In argument heard outside the jury, Mike maintained that he needed to be able to address the loans to show the jury the *reason* why the GFLP might be cash-poor and to demonstrate how Delores's strategic decisions created a situation where Mike was saddled with annual tax burdens and no cash payouts. (TT604-606). Mike sought to impeach and rebut Delores's testimony and to demonstrate that any liquidity issues the GFLP faced was a direct result of her decision to favor Greg and permit him access to loans on extremely favorable terms. *Id.* The Circuit Court rejected Mike's argument and, consequently, the jury did not

hear evidence of the favorable loan Delores made available to Greg, in addition to the lease and the contract for deed.

Even if the loans were not admissible on grounds of *res judicata*, testimony from Delores and Greg opened the door to its admissibility and the Circuit Court erred in deciding otherwise. *Mousseau v. Schwartz*, 2008 SD 86, ¶ 38, 756 N.W.2d 345, 361.

The wrongful exclusion of this evidence was prejudicial. Evidence related to the loans would have that Delores consciously strategized to deplete GFLP funds by making loans to Greg so there would be nothing left to distribute. The below-market appraisal of GFLP land was orchestrated by Greg and the jury may have determined that Delores did not understand the ramifications of her decision or was simply negligent. But the evidence as to loans would have also removed any doubt in the jury's minds as to her intent to marshal all of the GFLP's resources to favor Greg and to assure that the partnership is cash-poor, leaving Mike with a tax burden and no cash distributions.

Furthermore, the ability to impeach Delores on this issue was critical, as it would cast a shadow on her credibility and further undermine the shifting, unpersuasive rationales she gave for why the land transactions were in the interest of the GFLP. The excluded evidence might and probably would have resulted in a different verdict, which is all that is required to establish Mike's right to a new trial.

B. Defendants should have been prohibited from eliciting testimony on the ultimate issue from Delores's lawyer, testifying as a lawyer-expert witness and opining on pure issues of law.

Rob Ronayne, GFLP's attorney, drew up the contract for deed and lease agreements between GFLP and Champaygn Ranch. He was at the center of the transactions the jury was being asked to consider. Defendants were permitted to call him as an expert on Delores's behalf and to elicit testimony that impermissibly invaded the province of the jury.[10]

Mike filed a motion in limine to exclude Ronayne's testimony, which the Circuit Court denied. APP.0001. At trial, attorney Ronayne was repeatedly asked to testify to the ultimate *legal* issue, i.e., whether Delores's actions were lawful. Mike timely objected to the testimony and was again overruled by the Circuit Court.

Ronayne's testimony included the following exchanges:

Q. Did any of the leases, the lease that you drafted, Exhibit 6, the amended lease, 20 year lease, Exhibit 7, and the addendums, Exhibit 8 and 9 did any of those violate any terms of the Gibson Family Limited Partnership?
A. It did not.
Q. Did any of them violate South Dakota law?
MR. NICHOLS: Objection, your Honor.
THE COURT: Overruled.
A. They did not violate South Dakota law.

(TT156:25-157:9).

Q. Is the contract for deed legal under the Gibson Family Limited Partnership?
A. Of course.
MR. NICHOLS: Objection, ultimate issue.
THE COURT: Overruled.

[10] Attorney Tom Linngren was also an expert retained by Delores and identified on Defendants' witness list. Linngren did not testify at trial.

Q. Is the contract for deed legal under South Dakota law?
A. Yes.

(TT167:1-7)

Q. If Delores's actions as a general partner in leasing the land for 20 years with the rent adjustment and the escalator was legal under South Dakota law – or strike that. If her actions in the 20 year lease and the terms and the rent adjustment and the contract for deed and the length of that, its terms, the interest rate is legal under South Dakota law, within her authority under the limited partnership agreement, and in compliance with the IRS regulations of what's required between family members when they do business together, are her actions reasonable?
MR NICHOLS: Objection, ultimate issues, compound.
THE COURT: Overruled.
A. Absolutely, that who you look at, you look at those three things, does the partnership agreement permit this, is it consistent with state law, and have we run afoul any of the internal revenue regulations, and these two documents were both consistent with all three of those standards.

(TT188:5-22).

The facts surrounding Ronayne's testimony are distinguishable from instances where this Court has upheld the admission of expert testimony as to undue influence in a will contest, *see Matter of Estate of Jones*, 370 N.W.2d 201, 201 (S.D. 1985) or whether Defendant's action violated a standard of care in a negligence action, *Nickles v. Shild,* 2000 SD 131, ¶12, 617 N.W.2d 659, 662. Ronayne's testimony was an altogether different character: he testified as a lawyer about transactions on which he had advised his client and offered opinions on purely legal issues. That testimony impermissibly usurped the jury's basic fact-finding function.

Expert testimony is admissible, among other things, if it "will assist the trier of fact to understand the evidence or a fact at issue." SDCL § 19-15-2. Expert testimony may reach the ultimate issue, *see* SDCL § 19-15-4, but not all expert

opinion on the ultimate issue is admissible. *State v. Buchholtz*, 2013 SD 96, 841 N.W.2d 449. Testimony from an expert does not assist the finder of fact when it entails "merely telling a jury what result to reach." *Id.* (citing and quoting *State v. Guthrie*, 2001 SD 51, ¶33, 627 N.W.2d 401, 415). This limitation is particularly salient here, where a lawyer directly involved in the challenged transaction purports to testify as to what the law is and whether his client's actions complied with the law. The first issue is for the judge to decide, and the second for the jury.

Ronayne's testimony constituted expert opinion on purely legal matters, which is an improper subject for expert testimony. "Expert testimony on legal matters is not admissible." *Southern Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003). Questions that ask an expert attorney to opine on whether his client's actions were legal tread on prohibited grounds. Such testimony is tantamount to an expert testimony as to whether a defendant in a criminal matter is innocent or guilty – a line of questioning that this Court has long prohibited. *See, e.g., State v. Moran*, 2003 SD 14, ¶43, 657 N.W.2d 319, 329.

Ronayne's testimony vouching for the legality of his client's actions should have been excluded as improper expert testimony under Rule 704 or, alternatively, on grounds that its minimal probative value was substantially outweighed by the risk that it would prejudice Mike and mislead the jury. Testimony from a lawyer on the stand, under oath, as to what the law permits carries the "aura of reliability and trustworthiness" that risks putting to rest the very question that the fact-finder was charged with answering for itself in view of all of the evidence. The prejudice that

followed its admission is plain. The Circuit Court misapplied the rules governing admissibility of expert testimony and plainly prejudiced Mike. Mike should be granted a new trial.

C. The Circuit Court should have considered post-trial evidence, which further demonstrated Mike's entitlement to equitable relief.

After the jury trial and after the Circuit Court had rendered its decision, Mike obtained financial information from the GFLP showing that it incurred $25,000 in expenses for improvements to the feedlot Greg leased and voluntarily assumed responsibility for payment of over $100,000.00 in attorneys' fees incurred in the course of the litigation. Under the contract for deed, Greg was obligated to indemnify GFLP for these fees and Delores released him of the obligation:

> **In the event of any litigation or proceeding brought against Seller and arising out of, or in any way connected with Buyer's possession or use of the property, Buyer agrees to defend Seller and hold Seller harmless therefrom, including any attorneys' fees incurred by Seller**.

Ex. 2, at ¶ 8 (emphasis supplied).

As part of his Motion for Reconsideration, Mike moved to enlarge the record under SDCL § 15-6-60(b) so that the Circuit Court would consider evidence relating to the decision to release Greg from his obligation to pay the attorneys' fees and to payments made by GFLP to pour a concrete trough in the feedlot leased to Greg. The Court did not consider the evidence and denied the Motion for Reconsideration. APP.0012.

The evidence should have been considered and warranted reversal of the Circuit Court's initial denial of equitable relief. The Partnership, cognizant that the one-sided nature of the deal may expose it to litigation, negotiated a provision that makes Greg responsible for its attorneys' fees if and when Michael contests the land deals. Greg, cognizant that the benefits of the land deals are worth the risk of indemnifying the Partnership, agreed to such a provision. Greg was willing to pay attorneys' fees that would run into the six figures because the land deal was a seven-figure windfall.

Even so, after the trial concluded, the Partnership paid the fees anyway – meaning that Mike was made to foot the bill for his own attorneys and for 45.8% of the fees that Delores incurred on GFLP's behalf and that Greg, the favored son, agreed to pay in full. This evidence should have been considered and provides further support for reversal of the Circuit Court and granting Mike the equitable relief he seeks.

CONCLUSION

The Gibson family is embroiled in a long-standing feud with no end in sight. The GFLP has become an instrument to continue the feud and wage a renewed campaign of retribution against Mike. Here, the GFLP functions to redistribute assets to Greg's benefit and Mike's detriment. The law of limited partnership provides a remedy – dissociation for value – and that remedy should be granted here. Alternatively, the judgment should be reversed and remanded for a new trial, in view

of the Circuit Court's erroneous evidentiary rulings, which, when taken in isolation or together, affected Mike's substantial rights and unfairly prejudiced him.

Date: September 21, 2015.

CADWELL SANFORD DEIBERT & GARRY LLP

By /s/ Alex M. Hagen

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Principal Brief complies with the Type-Volume requirements of SDCL 15-26A-66 in the following manner: The Brief was prepared using Microsoft Word and uses proportionally spaced font [Garamond] in 13-point type. Based on the word-count feature of the MS Word processing system, the Brief contains 8,655 words.

/s/ Alex M. Hagen
Alex M. Hagen

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Appellant's Principal Brief, with attached Appendix, was sent by e-mail for electronic filing and service to:

Ms. Shirley Jameson-Fergel, South Dakota Supreme Court Clerk
E-mail: *scclerkbriefs@ujs.state.sd.us*

Messrs. Edwin Evans and Shane Eden
E-mail: *eevans@dehs.com* and *seden@dehs.com*

The original and two copies of the Principal Brief, with attached Appendix, were mailed, by U.S. mail, postage prepaid, to:

Ms. Shirley Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre SD 57501-5070

all on September 21, 2015.

/s/ Alex M. Hagen
Alex M. Hagen

APPENDIX

1. Order on Pretrial Motions dated and filed on October 29, 2013.

2. Trial Court's Memorandum Decision dated April 8, 2014.

3. Order Denying Plaintiff's Motion to Enlarge Record and for Reconsideration, dated June 16, 2014, and filed June 18, 2014.

4. Plaintiff's Proposed Findings of Fact Conclusions of Law, dated August 1, 2014.

5. Defendants' Proposed Findings of Fact and Conclusions of Law, dated August 8, 2014.

6. Findings of Fact and Conclusions of Law, dated August18, 2014, and filed August 23, 2014.

7. Judgment on Claims in Equity, dated August 18, 2014, and filed August 23, 2014.

8. Notice of Entry of Findings of Fact and Conclusions of Law and Judgment on Claims in Equity, dated May 15, 2015.

STATE OF SOUTH DAKOTA) : SS COUNTY OF DEUEL)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
MICHAEL A. GIBSON, Plaintiff, vs. GIBSON FAMILY LIMITED PARTNERSHIP and DELORES GIBSON, Defendants.	CIV. 11-66 **ORDER ON PRETRIAL MOTIONS**

Defendants' Motion for Partial Summary Judgment and Motions in Limine and Plaintiff's Motion to Strike Defendants' Motion for Partial Summary Judgment and Motions in Limine having come on for hearing before the Court, the Honorable Robert L. Timm presiding, in Watertown, Codington County, South Dakota, on October 21, 2013, with Plaintiff Michael A. Gibson appearing through his counsel of record, Shawn M. Nichols and Alex M. Hagen, and Defendants Gibson Family Limited Partnership and Delores Gibson appearing through their counsel of record, Edwin E. Evans and Eric R. Johnson, and the Court having considered all the pleadings and arguments of counsel, and all the pleadings, files, and records herein, including the Court's Letter decision dated February 13, 2012, and the Court having found there are no genuine issues of material fact precluding summary judgment on Counts I and II of Plaintiff's Complaint, and being in all things duly advised, good cause appearing, it is hereby:

ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiff's Motion to Strike Defendants' Motion for Partial Summary Judgment and Motions in Limine shall be, and hereby is, denied;

2. Defendants' Motion in Limine excluding evidence, testimony, or reference to claims that the feedlot has been leased for less than market value, shall be, and hereby is, denied;

3. Defendants' Motion in Limine excluding any and all evidence, testimony, or reference to the past loans made by Defendants shall be, and hereby is, granted;

4. Defendants' Motion in Limine regarding experts and expert opinions, shall be, and hereby is, granted, so that all parties are precluded from calling experts, or offering expert opinions, not previously disclosed;

5. Summary judgment is hereby entered in favor of Defendants as to Counts I and II of Plaintiff's Complaint, and only these Counts;

6. Counts I and II of Plaintiff's Complaint shall be, and hereby are, dismissed upon their merits, with prejudice; and

7. Counts IV, V, VI of Plaintiff's Complaint presenting claims in equity will be tried to the Court, and Count III of Plaintiff's Complaint will be tried to a jury.

Dated this 29th day of October, 2013.

BY THE COURT:

Honorable Robert L. Timm
Circuit Court Judge

ATTEST:
KARNA LINDNER, CLERK
By _____
(SEAL)

FILED
OCT 29 2013
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT
By _____ Deputy

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT
CODINGTON COUNTY COURTHOUSE
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Re: Michael A. Gibson v. Gibson Family Limited Partnership and Delores Gibson,
Civ. No. 11-66

Counselors:

FACTS

Michael Gibson is attempting to dissociate from the Gibson Family Limited Partnership of which he is a limited partner, along with his brother, Greg Gibson. The general partner is the family matriarch, Delores Gibson. Delores and her children entered into a limited partnership with the agreement being that Delores would have full control over the financial affairs of the partnership, but would also be solely liable for any

partnership debt and obligations. Without any personal investment, Michael, Greg, and a sister were given an interest in the partnership as limited partners, but with the understanding that they would have no control over the assets. Essentially, the partnership was formed as an estate planning tool. The sister has since been bought out as a partner.

After much infighting, some criminal activity, and some ill-advised business deals, the family no longer gets along. Michael is on one side of the aisle and Greg, Delores, and the partnership are on the other. With his relationship to the partnership, it appears as though Greg has been able to prosper with land deals and loans from the partnership, while Michael appears to be getting the current tax burden sans any dividends. It is because of this that Michael would like to "dissociate" from the partnership. The partnership, on the other hand, claims Michael is simply trying to get his inheritance early, contrary to the purpose of the partnership from the beginning and to what the parties had agreed.

The partnership agreement contains no express provision allowing a limited partner to withdrawal, dissociate, or dissolute the partnership, voluntarily or otherwise. One provision of the agreement states, "[f]or so long as the Partnership shall exist, each Partner waives the right to compel a dissolution of the Partnership or to compel to partition the property of the partnership." Partnership Agreement § 14, p. 6. Michael is not seeking dissolution of the partnership in his claim, but merely to "dissociate" from the partnership for value.

ANALYSIS

1. Does the Linking Provision Found under SDCL § 48-7-1105 Apply?

It appears to the Court as though this argument must begin with one "simple" determination: is the term "withdrawal" synonymous with the term "dissociate," or are they as Michael argues, "distinct legal concepts." This distinction is important because it determines whether the linking provision found in the Uniform Limited Partnership Act (1976) (ULPA), SDCL § 48-7-1105 applies. SDCL § 48-7-1105 provides, "[i]n any case not provided for in this chapter the provisions of the Uniform Partnership Act govern."

If Michael is correct, the ULPA provisions codified in SDCL ch. 48-7, et. seq. would not apply and this issue would transfer to the Revised Uniform Partnership Act (2001) (RUPA)

provisions[1], codified in SDCL ch. 48-7A, et. seq. The advantage to Michael, if that were the case, is a wholly different scheme regarding the ability of a limited partner to withdraw, or dissociate, from a partnership, regardless of the intent of the partnership agreement.

The partnership argues, on the other hand, that the terms are essentially interchangeable and that withdrawal is simply one way a partner dissociates. It claims the linking provision advocated by Michael, does not apply because "withdrawal," and thus "dissociation," is addressed in SDCL § 48-7-603 which provides, "[a] limited partner *has no right of withdrawal* from a limited partnership except as otherwise specified in writing in the partnership agreement." (Emphasis added).

While the text of SDCL § 48-7-603 is clear, the intent of the Legislature to remove the language regarding the term "withdrawal" under ULPA can be buttressed by the history of the statute in question. In 1986, the South Dakota Legislature adopted ULPA. The initial version of the statute, taken verbatim from the language in the model act, provided,

> A limited partner may withdraw from a limited partnership at the time or upon the happening of events specified in writing in the partnership agreement. If the agreement does not specify in writing the time or events upon the happening of which a limited partner may withdraw or a definite time for dissolution and winding up of the limited partnership, *a limited partner may withdraw upon not less than six months prior written notice to each general partner* at his address on the books of the limited partnership at its office in this state.

SDCL § 48-7-603 (1986) (emphasis added). The statute was amended to its current form, SDCL § 48-7-603, in 1996. The second version, the one currently on the books, is a 180 degree flip from the original. The intent of the Legislature, most likely, was to adhere to the general guidelines of partnership law and leave the decision of how to treat "withdrawal" to the individuals forming the partnership.

This treatment of a limited partner is a far cry from the statutory flexibility afforded a partner seeking to "dissociate" under RUPA, adopted by the South Dakota Legislature in 2001. Under RUPA, "[a] partner has the power to dissociate at any time, rightfully or wrongfully, by express will pursuant to subsection 48-7A-601(1)." SDCL § 48-7A-602. Without getting into too great a detail, there are many statutes under chapter 48-7A that

[1] The parties both refer to these provisions as UPA in their respective briefs. It is the Court's understanding that the actual scheme adopted by the Legislature was RUPA.

pertain to a partner's ability to dissociate from a partnership without the partnership having to enter into dissolution. What Michael is arguing is that because the term "dissociate" is not the same concept as "withdrawal," and because "dissociate" has never been provided for under ULPA, the Court should look to RUPA for guidance.

It should also be noted that the 2001 version of the ULPA (RULPA) adopts the RUPA treatment of a dissociating limited partner as described above, in that it allows a limited partner to dissociate "rightly or wrongly." Interestingly, following RULPA § 601 (Dissociation as Limited Partner), the comment for Subsection (b)(1) provides, "[t]his provision gives a person the power to dissociate as a limited partner even though the dissociation is wrongful under subsection (a). See, however, Section 110(b)(8) (*prohibiting the partnership agreement from eliminating the power of a person to dissociate as a general partner but imposing no comparable restriction with regard to a person's dissociation as a limited partner).*" (Emphasis added).

Whether intentional or not, the South Dakota Legislature has yet to adopt RULPA, or the newest version Re-RULPA. It could be assumed the failure to adopt the more current editions of ULPA is intentional and that the Legislature did not want the treatment of limited partners, under ULPA (or RULPA, or Re-RULPA), and partners under RUPA to receive the same treatment in terms of "withdrawal." One reason, purported by the partnership, is that adopting the same language into the limited partnership statutes would essentially eliminate the "estate planning purposes" of utilizing a limited partnership. Unfortunately, this revision speaks nothing to the argument regarding the use of the term "dissociate," or the lack thereof under ULPA.

Both parties cite Welch v. Via Christi Health Partners, Inc., 133 P.3d 122 (Kan. 2006) to support their respective arguments. In that case, the Kansas Supreme Court was asked to settle a question similar to the one posed before this Court. Several limited partners were essentially forced into an involuntary dissociation that accompanied a merger of the partnership with a limited liability company. Id. at 125. There were several issues before the court but the meat of the argument for purposes of this opinion was whether the provisions found in Kansas' version of ULPA (KRULPA) applied or whether the issue shifted, via the same linking provision at issue here, to Kansas' version of UPA (KUPA). Id. at 130. The plaintiffs argued, as does Michael here, that "dissociation" is not provided for in KRULPA and thus the linking provision applies. The defendants argued that "one does

not reach KUPA for dissociation resulting from withdrawal because withdrawal of a limited partner is specifically provided for in KRULPA." Id. at 130-131. To that, the court stated, "the defendants' argument is without merit." Id.

Michael urges the Court to read Welch as the Kansas Court's adoption of his theory of "withdrawal" and "dissociation" as separate legal concepts. He notes that the court concluded the "'linking' provision operated to incorporate the concept of disassociation into the limited partnership context, even though 'withdrawal' was also addressed in the limited partnership statute." Plaintiff's Reply Br., p. 9. The partnership, on the other hand, argues that the facts in Welch were distinguishable and that the limited issue in Welch was whether KRULPA "provided any appraisal or buyout rights to *involuntarily dissociated* limited partners of a limited partnership following a *merger* with a limited liability company." Defendant's Sur Reply Br., p. 7 (emphasis in original). The partnership further argues that the Welch Court specifically stated that the limited partners in that case were "not claim[ing] to be *dissociated by withdrawal* ... nor would they have the *right* to withdraw ...." Id. (emphasis added and in original).

Under the facts of this case, the partnership's emphasis is misplaced. In coming to its holding that the linking provision applied, the court first noted the plaintiffs "never sought to withdraw from the partnership, such withdrawal was not permitted ... and their claims were not based upon the right to withdraw...." Welch at 131. The court added, "the question to be resolved under this issue is whether KRULPA provides any appraisal or buyout rights to involuntarily *dissociated* limited partners of a limited partnership following a *merger* with a limited liability company " Id. (emphasis in original). By placing additional emphasis on the term "involuntary," the partnership missed the overall point the Welch Court was making. The Welch Court did not emphasize "involuntary," but chose to emphasize "dissociate," implying that the argument hinged on that word and whether it was included in KRULPA. Further support is found immediately following that statement when the court held, "KRULPA does not provide for the rights of a dissociated limited partner, nor does it provide for the merger of a limited partnership...." Id. The court finally concludes, "[t]he failure of RULPA to provide statutory authority regarding the dissociation and buyout rights of a limited partnership suggests that this court must examine the provisions of the KUPA." Id. at 132. Based upon the foregoing, the partnerships application of its narrow interpretation of Welch is untenable.

If any ambiguity regarding the Welch decision existed, the United States District Court for the District of Kansas cleared it up in its 2011 interpretation of Welch found in CR Holding Company, LLC, et. al v. Campbell, No. 11-2051-JWL, 2011 WL 2357649, (D.Kan June 9, 2011). In dealing with the issue of diversity of citizenship for purposes of jurisdiction, the court was asked to determine whether a partner, the defendant, had withdrawn from the partnership or, in the alternative, under the circumstances should be deemed dissociated under Kansas law. Id. at *1. The defendant relied on the KRULPA provisions which preclude a limited partner from withdrawing if the partnership agreement doesn't otherwise specify. The plaintiffs make the same type of argument as Michael does, that KRULPA does not apply and the analysis should fall under KRUPA.

The court quickly concludes that the defendant had no right to "withdraw" because KRULPA specifically addresses withdrawal, which is not permitted. Id. at *2. The court goes on to state, "[b]ecause KRULPA does not address involuntary dissociation of a limited partner ... the court looks to the provisions of KUPA." Id. The court then applies the relevant provisions of KUPA to determine whether the defendant had been involuntarily dissociated.

Finding the Kansas Courts' analysis of the issue convincing, "withdrawal" is not as broad a concept as the partnership contends. It is simply one way in which a partner "dissociates." Because "dissociation" is not addressed in South Dakota's version of ULPA, the linking provision found in SDCL § 48-7-1105 which provides, "[i]n any case not provided for in this chapter the provisions of the Uniform Partnership Act [SDCL ch. 48-7A] govern," applies and the issue will be addressed accordingly.

2. Relief Under the Revised Uniform Partnership Act

Under RUPA, Michael claims he is entitled to relief for two reasons: 1) the Court has the authority to fashion equitable remedies and 2) because the provisions allow a court to order dissociation whenever a partner is no longer capable of performing his duties under the partnership agreement.

SDCL § 48-7A-103(a) provides, "to the extent the partnership agreement does not otherwise provide, this chapter governs relations among the partners and between the partners and the partnership." SDCL § 48-7A-104(a) adds, "unless displaced by the particular provisions of this chapter, the principals of law and equity supplement this

chapter." Id. Michael first argues that it is this provision that allows the Court to grant him an equitable remedy because as he says, "this partnership is no longer a group of closely held partners and no longer exhibits the basic animating principles on which it was founded." Plaintiff's Brief in Support of Disassociation, p. 10. Michael claims the purpose of the trust has been frustrated and he has experienced a tax burden with no dividends to show for it. He argues that the equitable relief he seeks is appropriate. He also contends the "reasonable expectations" he had when forming the partnership no longer exist.

First, as the partnership notes, the doctrine of "reasonable expectations" is not found anywhere – statutorily or in case law – in the context of limited partnerships. The authorities Michael cites are all steeped in corporate law and deal primarily with minority shareholder interests. Therefore, the "reasonable expectations" doctrine advocated by Michael has no bearing on the issues before the Court.

The partnership asserts that Michael should not be entitled to equitable relief because "any distrust between the parties or estrangement results only from Michael's own lies and malfeasance." The partnership claims Michael misappropriated partnership funds and land and violated the trust and confidence of his partners. It was only then that Delores and the other limited partners ceased conducting business with him.

Those who seek equity must do equity and come into court with clean hands. Ferebee v. Hobart, 2009 S.D. 102, ¶ 19, 776 N.W.2d 58, 64 (citing Quick v. Samp, 2005 SD 60, ¶ 16, 697 N.W.2d 741, 747). Those who do not should be left in the position in which the court finds them. Id. A party seeking equity must act fairly and in good faith. Halls v. White, 2006 S.D. 47, ¶ 18 (citing Action Mech., Inc. v. Deadwood Historic Pres. Comm'n, 2002 SD 121, ¶ 26, 652 N.W.2d 742, 751).

There is a significant history behind the current issues between the two parties; too much history to get into detail today. That being said, there is sufficient evidence of Michael's past dealings to determine he has a history of conducting partnership business outside the scope of the agreement and without the knowledge of the other partners. This past behavior has indeed led to many of the problems between Michael and the other partners. Michael has not come into this litigation with clean hands and as far as an equitable remedy goes, the Court is inclined to leave him "in the position in which the court [found him]."

Finally, Michael contends the Court is well within its authority to grant relief pursuant to SDCL § 48-7A-601 which provides a list of events that upon occurrence cause a partner's dissociation. Of the events listed, there are a few that may be considered relevant in the current case. Those are:

> (1) The partnership's having notice of the partner's express will to withdraw as a partner or on a later date specified by the partner;
>
> * * *
>
> (2) An event agreed to in the partnership agreement as causing the partner's dissociation;
>
> * * *
>
> (7) In the case of a partner who is an individual:
>
> (i) The partner's death;
>
> (ii) The appointment of a guardian or general conservator for the partner; or
>
> (iii) A judicial determination that the partner has otherwise become incapable of performing the partner's duties under the partnership agreement;
>
> * * *

SDCL § 48-7A-601. To be fair, Michael does not seek relief under Subsections (1) or (2). Subsection (2) does not apply because the partnership agreement does address dissociation. Subsection (1) cannot possibly apply because it would contravene Michael's whole argument regarding the difference between "withdrawal" and "dissociation." Further, it would be absurd for this Court to determine that this issue falls under RUPA because Michael does not seek withdrawal and then grant dissociation on the basis of Michael's withdrawal.

What Michael asks the Court to apply is subsection (7)(iii) and asks the Court to determine that Michael is no longer able to perform his duties under the partnership agreement. Under the partnership agreement, Michael was not required to contribute financially for his 45.8% share. The limited partners were given no authority to participate or manage the partnership's finances. Delores, the general partner, was given that sole authority. She was also given the authority to distribute income at her sole discretion. Finally, she retained all authority in determining with whom the partnership would conduct its business. Simply put, to this date Michael has had no significant duties in the partnership under the partnership agreement. Therefore, he should not have a problem continuing to perform under the partnership agreement. The Court declines to grant

Michael equitable relief nor does the Court grant Michael relief under SDCL § 48-7A-601(7)(iii).

On one final note, SDCL § 48-7A-602(a) grants the power of a partner to dissociate at any time, whether rightfully or wrongfully. Subsection (b) of the same statute lists ways in which a partner can "wrongfully" dissociate. If the partner dissociates wrongfully, they remain liable to the partnership for any damages caused by their dissociation and any remaining obligations. SDCL § 48-7A-602(c).

CONCLUSION

While South Dakota is void of law regarding the difference between "withdrawal" and "dissociate," the Court finds the analysis of the Welch and CR Holding Company, LLC Courts convincing in that the two terms are in fact separate legal concepts. Based on that conclusion, because SDCL ch. 48-7 (ULPA) does not address "dissociation," this issue is properly decided under SDCL ch. 48-7A (RUPA) via the "linking" provision of SDCL § 48-7-1105.

With that in mind, the plaintiff Michael Gibson is not entitled to equitable relief pursuant to SDCL § 48-7A-104 as the "reasonable expectations" doctrine does not apply to limited partnerships and Michael has come into this case with "unclean hands" which preclude relief. Finally, Michael is not entitled to relief under SDCL § 48-7A-601 because he is still capable of performing his duties as a limited partner as set forth in the Gibson Family Limited Partnership Agreement. The plaintiff's request for judicially ordered dissociation is denied.

Counsel for the Plaintiffs shall prepare Findings of Fact, Conclusions of Law, and a Judgment in accord with the forgoing for the Court's consideration.

Respectfully,

Hon. Robert L. Timm

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF DEUEL)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

MICHAEL A. GIBSON,

Plaintiff,

vs.

GIBSON FAMILY LIMITED PARTNERSHIP and DELORES GIBSON,

Defendants.

CIV. 11-66

ORDER DENYING PLAINTIFF'S MOTION TO ENLARGE THE RECORD AND MOTION FOR RECONSIDERATION

Plaintiff Michael A. Gibson's Motion to Enlarge the Record and Motion for Reconsideration were submitted to the Court on May 6, 2014, along with a supporting brief and affidavit. By and through their counsel of record, Defendants Gibson Family Limited Partnership and Delores Gibson submitted to the Court a brief in opposition to Plaintiff's Motion to Enlarge the Record and Motion for Reconsideration on May 21, 2014. The Court having considered the matter on the briefs and other pleadings submitted by the parties, and being in all things duly advised, good cause appearing, it is hereby:

ORDERED, ADJUDGED AND DECREED as follows:

1. That Plaintiff's Motion to Enlarge the Record is DENIED; and

2. That Plaintiff's Motion for Reconsideration is DENIED.

Dated this 16th day of June, 2014.

BY THE COURT:

/s/ Robert L. Timm
Honorable Robert L. Timm
Circuit Court Judge

ATTEST:
KARNA LINDNER, CLERK

By /s/ Karna K. Lindner
(SEAL)

FILED

JUN 18 2014

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT
By _____ Clerk / Deputy

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF DEUEL)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

MICHAEL A. GIBSON,

Plaintiff,

v.

GIBSON FAMILY LIMITED PARTNERSHIP, a South Dakota Limited Partnership; and DELORES GIBSON in her capacity as general partner,

Defendants.

CIV. 11 - 66

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having been tried simultaneously to the Court and the Jury commencing on November 5, 2013 in Deuel County, South Dakota, with the jury returning their verdict in favor of the Defendants on November 8, 2013, and the Court having received briefing submitted by both parties on Plaintiff's equitable claim to disassociate for value, and having received Plaintiff's Motion to Enlarge the Record and Motion to Reconsider the Court's Letter Decision of April 8, 2014, and having considered the testimony at trial, the arguments raised, and the pleadings on record, the Court hereby reaches the following.

FINDINGS OF FACT

1. Michael Gibson is the Plaintiff in this case. He is asking the Court to allow him to disassociate from the Gibson Family Limited Partnership in which he is a limited partner. Michael's basis for requesting the equitable right to disassociate for value, is based on on-going disagreements between members of the Gibson Family Limited Partnership.

2. Currently the Partnership consists of Michael (45.8%), his brother Greg Gibson (45.8%), and Delores Gibson (8.4%), Michael and Greg's mother. Greg and Michael own most of the partnership interests, but are limited partners. Delores Gibson is the general partner with

broad control and risk exposure under the partnership agreement.

3. Delores entered into a limited partnership arrangement with all of her children, with the agreement that Delores would have full control over the financial affairs of the partnership, but would also be solely liable for any partnership debt obligations.

4. The partnership was formed primarily as an estate planning tool.

5. After much in-fighting, some criminal activity, and some ill-advised business deals, the family no longer gets along. Michael is adverse to Greg, Delores and the partnership. With his relationship to the partnership, it appears as though Greg has been able to prosper with land deals and loans from the partnership, while Michael appears to be getting the current tax burdens sans any dividends.

6. It is because of the transactions between the partnership and Greg, and Michael's non-communication with his family that he would like to disassociate from the partnership. Of particular moment is a 20-year lease that Greg has entered into with the partnership related to partnership farm ground. In addition, Greg entered into a 20-year contract for deed to purchase a little over 800 acres of partnership farm land. Lastly, the partnership has loaned Greg over $300,000 over the years on a short-term demand note, and no effort has been made to call the loan due or otherwise rework the terms to provide for a maturity date.

7. The partnership contends that Michael is simply trying to accelerate his inheritance contrary to the purpose of the partnership agreement, and that Michael's own actions have resulted in the disconnect between family members. Further, the partnership contends the transactions with Greg were appropriate and at arm's length. The jury further heard testimony regarding the contract for deed and the long-term lease, and rendered a verdict in favor of Delores Gibson in regard to the claims by Michael that these transactions constituted a breach of her fiduciary duty.

8. The partnership agreement contains no express provision allowing a limited partner to withdraw, disassociate or dissolve the partnership, voluntary or otherwise.

9. Section 14 of the partnership agreement provides "for so long as the partnership shall exist, each partner waive the right to compel a dissolution of the partnership or to compel to partition the property of the partnership."

10. Michael is not seeking dissolution of the partnership in his claim, but merely seeking the right to disassociate from the partnership for value. Michael argues that disassociation is authorized under the relevant partnership statutes, or alternatively in equity. The partnership denies Michael has a right to disassociate for value under the relevant statutes, and further asserts that Michael's unclean hands preclude him from obtaining equitable relief in this action.

11. If any of the above findings of fact are deemed as conclusions of law, such findings of fact shall be deemed as a conclusion of law.

CONCLUSION OF LAW

1. The first task for the Court is to determine whether withdrawal for a limited partnership is synonymous with disassociate from a limited partnership, or whether these two terms constitute distinct legal concepts. This distraction is important because it determines whether the linking provision found in the Uniform Limited Partnership Act (1976) (ULPA), SDCL § 48-7-1105 applies. SDCL § 48-7-1105 provides, "[i]n any case not provided for in this chapter the provisions of the Uniform Partnership Act Govern."

Governing Partnership Statute

2. The partnership argues that the terms are essentially interchangeable and that withdrawal is simply one way a partner dissociates. It claims the linking provision advocated by Michael, does not apply because "withdrawal," and thus "dissociation," is addressed in SDCL §

48-7-603 which provides, "[a] limited partner *has no right of withdrawal* from a limited partnership except as otherwise specified in writing in the partnership agreement."

3. While the text of SDCL § 48-7-603 is clear, the intent of the Legislature to remove the language regarding the term "withdrawal" under ULPA can be buttressed by the history of the statue in question.

4. The statute was amended to its current form. The second version, the one currently on the books, is a 180 degree flip from the original. The intent of the Legislature, most likely, was to adhere to the general guidelines of partnership law and leave the decision of how to treat "withdrawal" to the individuals forming the partnership.

5. Under URPA, "[a] partner has the power to dissociate at any time, rightfully or wrongfully, by express will pursuant to subsection 48-7A-601(1)." SDCL § 48-7A-602.

6. What Michael is arguing is that because the term "dissociate" is not the same concept as "withdrawal", and because "dissociate" has never been provided for under ULPA, the Court should look to RUPA for guidance.

7. The comment to subsection (b)(1) of § 601 to RULPA provides, "[t]his provision gives a person the power to dissociate as a limited partner even though the dissociation is wrongful under subsection 9a). See, however, Section 110(b)(8) (*prohibiting the partnership agreement from eliminating the power of a person to dissociate as a general partner but imposing no comparable restriction with regard to a person's dissociation as a limited partner).*" (Emphasis added).

8. Whether intentional or not, the South Dakota Legislature has yet to adopt RULPA, or the newest version Re-RULPA. It could be assumed the failure to adopt the more current editions of ULPA is intentional and that the Legislature did not want the treatment of limited partners, under ULPA (RULPA, or Re-RULPA), and partners under RUPA to receive the

same treatment in terms of "withdrawal." One reason purported by the partnership, is that adopting the same language into the limited partnership statutes would essentially eliminate the "estate planning purposes" of utilizing a limited partnership. This revision does not speak to the argument regarding the use of the term "disassociate," or the lack thereof under ULPA.

9. *Welch v. Christi Health Partners, Inc.*, 133 P.3d 122 (Kan. 2006) is instructive on the issues before the Court. In this case the Kansas Supreme Court was asked to settle a question similar to the one posed before this Court. In *Welch,* several limited partners were essentially forced into an involuntary disassociation that accompanied a merger of the partnership with a limited liability company.

10. *Welch* involves several issues, but for purposes of the action before the Court, the instructive issue is whether the provisions found in the Kansas version of ULPA applied or whether the issue was to be resolved under the UPA via the same linking provision at issue in this case.

11. In *Welch,* the plaintiffs argued, as Michael does here, that disassociation is not provided for under Kansas' version of the ULPA and thus the linking provision applied. The Defendants, on the other hand, argued that the court did not need to reach the Kansas version of the ULPA for disassociation resulting from withdrawal because withdrawal of a limited partner specifically covered under ULPA. The Court rejected the Defendant's argument.

12. In reaching its decision, the *Welch* Court found that in holding that the linking provision applied, the *Welsh* Court first noted the plaintiffs "never sought to withdraw from the partnership, such withdrawal was not permitted… and their claims were not based upon the right to withdraw…" *Welch* at 131. The court added, "the question to be resolved under this issue is whether KRULPA provides any appraisal or buyout rights to involuntarily *dissociated* limited partners of a limited partnership following a *merger* with a limited liability company." *Id.* The

Welch Court did not emphasize "involuntary" but chose to emphasize "dissociate," implying that the argument hinged on that word and whether it was included in KRULPA. Further support is found immediately following that statement when the court held, "KRUMPA" does not provide for the rights of a dissociated limited partner, nor does it provide for the merger of a limited partnership...."The Court finally concluded, "[t]he failure of RULPA to provide statutory authority regarding the dissociation and buyout rights of a limited partnership suggests that this court must examine the provisions of the KUPA."

13. The court went on to state, "[b]ecause KRUPA does not address involuntary dissociation of a limited partner ...the court looks to the provisions of KUPA." *Id.*

14. Finding the *Welsh* analysis of the issue convincing, I hold that "withdrawal" is not as broad of a concept as the partnership contends. It is simply one way in which a partner "dissociates." Because "dissociation" is not addressed in South Dakota's version of ULPA, the linking provision found in SDCL § 48-7-1105 which provides, "[i] any case not provided for in this chapter the provisions of the Uniform Partnership Act [SDCL ch. 48-7A] govern," applies and the issue will be addressed accordingly.

15. Under RUPA, Michael claims he is entitled to relief for two reasons: 1) the Court has the authority to fashion equitable remedies and 2) alternatively, SDCL§ 48-7A-601 provides the basis for the Court to order the right of dissociation for value.

Equitable Claims

16. SDCL § 48-7A-103(a) provides, "to the extent the partnership agreement does not otherwise provide, this chapter governs relations among the partners and between the partners and the partnership." SDCL § 48-7A-104(a) adds, "unless displaced by the particular provisions of this chapter, the principals of law and equity supplement this chapter."

17. Michael first argues that it is this provision that allows the Court to grant him an

equitable remedy because as he says, "this partnership is no longer a group of closely held partners and no longer exhibits the basic animating principles on which it was founded."

18. Michael claims the purpose of the partnership has been frustrated and he has experienced a tax burden with no dividends to show for it. He argues that the equitable relief he seeks is appropriate. He further points to the "reasonable expectations" that existed when forming the partnership are no longer applicable.

19. The doctrine of "reasonable expectations" is not found anywhere – statutorily or in case law – in the context of limited partnerships. The authorities Michael cites are all steeped in corporate law and deal primarily with minority shareholder interests.

20. The partnership asserts that Michael should not be entitled to equitable relief because "any distrust between the parties or estrangement results only from Michael's own lies and malfeasance." The partnership claims Michael misappropriated partnership funds and land and violated the trust and confidence of this partners. It was only then that Delores and the other limited partners ceased conducting business with him.

21. Those who seek equity must do equity and come into court with clean hands. *Ferebee v. Hobart,* 2009 S.D. 102, ¶ 19, 776 N.W.2d 58, 64 (citing *Quick v. Samp,* 2005 SD 60, ¶ 16, 697 N.W.2d 741, 747). Those who do not should be left in the position in which the court finds them. *Id.* A party seeking equity must act fairly and in good faith. *Halls v. White,* 2006 S.D., 47, ¶ 18 (citing *Action Mech. Inc. v. Deadwood Historic Pres. Comm'n,* 2002 SD 121, ¶ 26, 652 N.W. 2d 742, 751).

22. There is a significant history behind the current issues between the two parties. The jury heard extensive evidence of the conduct which Michael engaged in which caused distrust in the partnership. Also, the Court is also mindful of the record contain the record and the judgment in *Greg Gibson v. Michael Gibson, et al,* Civ. 07-11, 07-31 and 07-43, as well as

state felony criminal proceedings against Michael in 2009, all of which was discussed at length during trial.

23. There is sufficient evidence of Michael's past dealing to determine he has a history of conducting partnership business outside the scope of the agreement and without the knowledge of the other partners. This past behavior has indeed led to many of the problems between Michael and the other partners. Michael has not come into this litigation with clean hands and as far as an equitable remedy goes, the Court is included to have him "in the position in which the court [found him]."

Statutory Disassociation

24. Alternatively, Michael contends that the Court is within its statutory authority to grant relief pursuant to SDCL § 48-7A-601 which provides a list of events that upon occurrence cause a partner's disassociation. Michael specifically argues under subpart (7)(iii) that there should be "a judicial determination that the partner has otherwise become incapable of performing the partner's duties under the partnership agreement."

25. Michael contends the Court is well within its authority to grant relief pursuant to SDCL § 48-7A-601 which provides a list of events that upon occurrence cause a partner's dissociation. Of the events listed, there are a few that may be considered relevant in the current case. Those are:

(1) The partnership's having notice of the partner's express will to withdraw as a partner or on a later date specified by the partner;

***

(2) An event agreed to in the partnership agreement as causing the partner's dissociation;

***

(7) In the case of a partner who is an individual:

(i) The partner's death;

(ii) The appointment of a guardian or general conservator for the partner; or

(iii) A judicial determination that the partner has otherwise become incapable of performing the partner's duties under the partnership agreement;

***

SDCL § 48-7A-601.

26. Under the partnership agreement, Michael was not required to contribute financially for his 45.8% share. The limited partners were given no authority to participate or manage the partnership's finances. Delores, the general partner, was given that sole authority. She was also given the authority to distribute income at her sole discretion. Finally, she retained all authority in determining with whom the partnership would conduct its business.

27. The Court finds that Michael has no significant duties to the partnership under the partnership agreement. Therefore, he should not have a problem continuing to perform under the partnership agreement and SDCL 48-7A-601(7)(iii) does not support a write of withdrawal under the facts of this case.

28. Michael's declaratory cause of action seeking the right to disassociate for value is denied. Michael's motion to enlarge the record and motion to reconsider the court's letter decision of April 8, 2014, is denied. The Court's letter decision of April 8, 2014 is hereby incorporated herein by this reference. The Court's letter decision of June 6, 2014 is also incorporated herein by this reference. Judgment should be entered in favor of the Defendants on this issue.

29. If any of the above conclusions of law are deemed to be a finding of fact, such conclusion of law shall be deemed as a finding of fact.

Dated at Sioux Falls, South Dakota, this 13 day of August, 2014.

CADWELL SANFORD DEIBERT & GARRY LLP

By _____

Shawn Nichols
200 East 10th Street, Suite 200
PO Box 2498
Sioux Falls SD 57101-2498
(605) 336-0828
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Plaintiff, hereby certifies that a true and correct copy of the foregoing was mailed by first-class United States mail, postage prepaid, to:

Ed Evans
Shane Eden
Davenport Evans Hurwitz & Smith
PO Box 1030
Sioux Falls SD 57101-1030

this 13 day of August, 2014.

_____
Shawn M. Nichols

STATE OF SOUTH DAKOTA) : SS COUNTY OF DEUEL)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
MICHAEL A. GIBSON, Plaintiff, vs. GIBSON FAMILY LIMITED PARTNERSHIP and DELORES GIBSON, Defendants.	CIV. 11-66 **DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Defendants Gibson Family Limited Partnership and Delores Gibson, by and through their counsel of record, submit the following Proposed Findings of Fact and Conclusions of Law:

This matter having been tried simultaneously to the Court and the Jury commencing on November 5, 2013, in Deuel County, South Dakota, with the jury returning a verdict in favor of Defendants on November 8, 2013, and the Court having receiving briefing submitted by both parties on Plaintiff's equitable claim to dissociate for value, and having received Plaintiff's Motion to Enlarge the Record and Motion to Reconsider, and having considered the testimony at trial, the arguments raised and the pleadings on record, the Court hereby reaches the following:

FINDINGS OF FACT

1. The Plaintiff in this case is Michael Gibson ("Michael"). The Defendants are the Gibson Family Limited Partnership ("GFLP") and Delores Gibson ("Delores").

2. Delores and her two sons, Michael and Greg Gibson ("Greg"), are partners in the GFLP. which was formed in 2002.

3. The GFLP was formed by a written agreement entitled The Gibson Family Limited Partnership Agreement ("GFLP Agreement").

4. Delores is the general partner of the GFLP and has been the sole general partner since the GFLP was formed.

5. Neither Michael nor Greg paid anything for their interest in the GFLP.

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8. Currently, Delores owns an 8.4% interest in the GFLP. Michael and Greg are limited partners and they each own a 45.8% interest in the GFLP.

9. After the GFLP was formed in 2002, Delores deeded 2,060 acres of land to the limited partnership that she previously owned free and clear.

10. Michael executed the GFLP Agreement accepting his role as a limited partner, and the limitations imposed on the limited partners under the partnership agreement.

11. There is no mandate under the GFLP Agreement that the limited partnership conduct business equally amongst the limited partners or with the limited partners at all. The authority to decide who does business with the GFLP rests solely with the general partner, Delores. Neither Michael nor Greg has any right to manage the GFLP.

12. Up until 2006, Michael and Greg worked together in the family farming and ranching operation. In 2006, the brothers split their joint farming and cattle operation and each started his own farming and cattle business.

13. After their split, Delores, as general partner, decided to lease the GFLP land only to Greg. In September of 2008, Delores entered into a lease agreement with Greg pursuant to

which the GFLP agreed to lease to Greg all of the 2,060 acres of limited partnership land for a period of five years. In December 2010, Delores agreed to enter into a new lease with Greg on new terms. Under this new lease, Greg leased all 2,060 acres for a term of 20 years, at an annual lease rate that would be equal to the average county lease rates for farmland.

14. In March of 2011, the GFLP, acting through Delores, and Greg entered into a contract for deed. Greg agreed to buy 830 acres from the GFLP for a purchase price of $1,100,000. The parties amended the farm lease and Greg continues to lease the remaining 1,230 acres of limited partnership property.

15. In this lawsuit brought by Michael against the GFLP and Delores, he claimed that Delores breached a duty that she owed to him in her capacity as the general partner of the GFLP.

16. This matter came on for trial before the Court and Jury on November 5, 2013, through November 8, 2013.

17. During the trial, evidence was presented demonstrating Michael's inequitable and wrongful conduct since the formation of the GFLP, including evidence related to the following events:

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- October 5, 2005 – Michael's unauthorized investment of $100,000 of GFLP funds with Wachovia Securities;

- October 2006 - Michael turns over Gibson Livestock forged checks and bank statements to Greg;

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- Christmas 2006 – Michael returns his Christmas gift to Delores stating that he did not want anything from Delores and that she could give it all to a charity of her choice;

- February 2007 – Michael attempts to cover up his forged checks;

- Spring 2007 – Michael misappropriates limited partnership land and refuses to vacate and surrender possession to the limited partnership;

- April 2007 – Michael commences his first suit against the limited partnership and Delores asserting eight causes of action including: intentional interference with contract, enforcement of oral lease agreements, slander, negligence, breach of fiduciary duty, fraud and deceit, an accounting and valuation of the limited partnership, and for judicial dissolution of the limited partnership;

- May 2007 – Limited partnership forced to commence forcible entry and detainer action against Michael to recover possession of GFLP;

- June 14, 2007 – Michael testifies under oath denying forging and altering checks;

- December 2009 – Michael admits at trial under oath that he forged and altered checks and that he lied about those acts during his deposition;

- December 2009 – Michael admits at trial under oath that his action breached the GFLP Agreement and violated the fiduciary duties he owed the partnership;

- December 14, 2009 – The jury in the first lawsuit by Michael against Delores and GFLP returns a verdict finding Delores did not breach her fiduciary duties;

- June 30, 2011 – Michael brings this second lawsuit against Delores and GFLP; and

- November 8, 2013 – Jury returns verdict finding Delores did not breach her fiduciary duties.

18. After Michael misappropriated partnership funds, partnership land and violated the trust and confidence of his partners, Delores decided not to conduct anymore business with him.

19. The jury in this matter found that Delores acted within the scope of her fiduciary duties as the general partner of the GFLP and ratified her decisions to enter into the contract for deed and the farm lease, her management of the feedlot, and her decisions to spend partnership funds for capital improvements and maintenance related expenses.

20. At the close of evidence, the Court granted Michael's motion to amend the Complaint to add an equitable claim for his dissociation from the GFLP.

21. Michael submitted his Amended Complaint, dated December 17, 2013, and later conceded that the only issue that remained was his equitable claim for dissociation from the GFLP under Count IV of the Amended Complaint.

22. Section 14 of the GFLP Agreement states that "[f]or so long as the Partnership shall exist, each Partner waives the right to compel a dissolution of the Partnership or to compel a partition of the property of the Partnership."

23. The GFLP Agreement contains no provision allowing a limited partner to withdraw, disassociate or dissolve the partnership, voluntarily or otherwise.

24. Any of the above Findings of Fact which are properly deemed to be Conclusions of Law should be construed as such. To the extent any of the foregoing are improperly designated Findings of Fact and are actually Conclusions of Law or mixed questions of law and fact, the same are hereby incorporated by reference in the Conclusions of Law that appear herein.

25. Any of the following Conclusions of Law that contain a Finding of Fact or are a mixture of fact and law are by this reference incorporated herein.

CONCLUSIONS OF LAW

1. Any of the foregoing Findings of Fact that contain Conclusions of Law or are a mixture of fact and law are by this reference incorporated herein. To the extent any of these Conclusions of Law should be designated as Findings of Fact or a mixture of fact and law, they should be deemed as such and incorporated as appropriate in the foregoing Findings of Fact.

2. In 1986, South Dakota enacted the Uniform Limited Partnership Act (1976) ("ULPA"). Session Law 1986, Chapter 391, Section 603 enacted verbatim the model act's Section 603 addressing the right of a limited partner to withdraw. That initial statute adopted in South Dakota read as follows:

> A limited partner may withdraw from a limited partnership at the time or upon the happening of events specified in writing in the partnership agreement. If the agreement does not specify in writing the time or the events upon the happening of which a limited partner may withdraw or a definite time for dissolution and winding up of the limited partnership, a limited partner may withdraw upon not less than six months prior written notice to each general partner at his address on the books of the limited partnership at its office in this state.

3. In 1996, the Legislature chose to amend Section 603 to remove a limited partner's right to withdraw from the statutory framework for limited partnerships. In doing so, the Legislature chose to leave it up to the contracting parties to negotiate whether they would provide a limited partner with a right of withdrawal in the parties' partnership agreement.

4. SDCL § 48-7-603, as amended in 1996, is clear and unambiguous. It provides that "[a] limited partner has no right of withdrawal from a limited partnership except as otherwise specified in writing in the partnership agreement." *Id.*

5. The GFLP Agreement does not contain any type of a provision providing Michael or any other limited partner the right to voluntarily withdraw or seek withdrawal from the GFLP.

6. The Revised Uniform Partnership Act ("RUPA") was adopted by the South Dakota Legislature in 2001. *See* SDCL Chap. 48-7A.

7. Under RUPA, a partner has the power to withdraw from a partnership by expressing his or her will to withdraw, even in contravention of the partnership agreement. SDCL §§ 48-7A-601, 48-7A-602.

8. South Dakota has elected not to adopt the Revised Uniform Limited Partnership Act (2001), which incorporated RUPA's approach to dissociation.

9. The concept of dissociation reflects how the withdrawal of the partner affects the remaining partnership. *See* RUPA § 601, comment (1). Under RUPA, it is the withdrawal of a partner that causes that partner's dissociation. *Id. See* 59A *Am. Jur. 2d Partnership* § 520 (2d Ed.) (Updated February 2014) ("A partner is dissociated from a partnership upon the partnership having notice of the partner's express will to ***withdraw*** as a partner or on a later date specified by the partner.).

10. The concept of dissociation, however, does not represent a separate and distinct right or power of a partner to voluntarily effectuate his or her release from a partnership.

11. ULPA's linking or gap-filling provision, SDCL § 48-7-1105, provides that "[i]n any case not provided for in this chapter the provisions of the Uniform Partnership Act govern." *Id.*

12. The right of a limited partner to withdraw and the effect thereof on the limited partnership are issues that are exclusively covered by ULPA under SDCL § 48-7-603.

13. ULPA's linking or gap-filling provision, SDCL § 48-7-1105, does not provide a basis for a claim of dissociation under RUPA in the context of a limited partnership as ULPA already "provides for" a limited partner's right to withdraw under SDCL § 48-7-603.

14. As a result, there is no legally recognized basis under South Dakota law or the GFLP Agreement to grant Michael's claim to dissociate from the GFLP and Michael's claim is therefore denied.

15. SDCL § 48-7-802 provides that a partner may apply for judicial dissolution "whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement."

16. Michael agreed to waive his rights under SDCL § 48-7-802 when the GFLP was formed. Section 14 of the GFLP Agreement states that "[f]or so long as the Partnership shall exist, each Partner waives the right to compel a dissolution of the Partnership or to compel to partition the property of the Partnership." This waiver is binding and effective on Michael.

17. Michael argues that he is entitled to equitable relief because the purpose of the GFLP has been frustrated and the "reasonable expectations" that existed when forming the partnership are no longer applicable.

18. Application of the doctrine of reasonable expectations is not found anywhere – statutorily or in case law – in the context of limited partnerships.

19. Therefore, the doctrine of reasonable expectations has no bearing on the issues before the Court concerning Michael's claim to dissociate for value from the GFLP.

20. The GFLP Agreement is clear that a limited partner cannot participate in the management and operation of the limited partnership's investment activities. Furthermore, the GFLP Agreement provides that the general partner is not required to make distributions and has the right to retain distributable income in the general partner's sole discretion. As such, Michael's reasonable expectations could not have included participation in the management of the limited partnership's affairs, nor could Michael have reasonably expected any ongoing stream of income from the GFLP.

21. Any distrust or estrangement between the members of the GFLP results from Michael own wrongful and inequitable actions toward the GFLP and its partners.

22. The doctrine of unclean hands gives expression to the equitable principle that a court should not grant relief to a wrongdoer with respect to the subject matter in suit. *See Shedd v. Lamb*, 1996 SD 117, ¶ 26, 553 N.W.2d 241, 245 (quoting *Kane v. Schnitzler*, 376 N.W.2d 337, 341 (S.D. 1985)).

23. "When parties seek equity in the court, they must do equity, which includes entering the court with clean hands. 'A [person] who does not come into equity with clean hands is not entitled to any relief [therein], but should be left in the position in which the court finds him.'" *Id.*

24. As the party seeking relief pursuant to the Court's equitable powers, the law requires that Michael must have "acted fairly and in good faith as to the controversy in issue." *Miiller v. County of Davison*, 452 N.W.2d 119, 121 (S.D. 1990).

25. Application of the unclean hands doctrine does not require a showing that a party's inequitable conduct was contemporaneous with the subject matter in dispute. In considering whether a party has come into equity court with clean hands, the Court may consider a party's prior history of inequitable conduct concerning the opposing party or subject matter of the suit. *Ferebee v. Hobart*, 2009 S.D. 102, ¶¶ 17-19, 776 N.W.2d 58 63-64.

26. The controversy at issue in this case relates to Michael's claim that Delores, as general partner of the GLFP, breached her fiduciary duties to him as a limited partner.

27. Therefore, Michael's own conduct relative to his role as a limited partner in the GLFP is relevant to the issue of whether he entered the Court with clean hands.

28. There is sufficient evidence of Michael's past dealings to determine he has a history of conducting partnership business outside the scope of the agreement and without the knowledge of the other partners.

29. This past behavior had led to many problems between Michael and the other partners of the GFLP.

30. Michael has not come into this litigation with clean hands and therefore, the Court therefore leaves him in the position in which the Court found him by denying Michael's request for equitable relief.

31. Michael argues that his request for dissociation may be granted pursuant to SDCL § 48-7A-601(7)(iii). Pursuant to that statute, a partner is dissociated from a partnership upon "[a] judicial determination that the partner has [ ] become incapable of performing the partner's duties under the partnership agreement." *Id.*

32. Under the GFLP Agreement, Michael was not required to contribute financially for his interest in the GFLP.

33. The limited partners of the GFLP were given no authority to participate or manage the partnership's finances. Delores, the general partner, was given that sole authority. She was also given the authority to distribute income at her sole discretion. She also retained all authority in determining with whom the partnership would conduct its business.

34. Michael has no significant duties in the GFLP or under the GFLP Agreement.

35. Therefore, even if applicable, Michael is not entitled to relief under SDCL § 48-7A-601(7)(iii) as he is still capable of performing his duties as a limited partner as set forth in the GFLP Agreement.

Dated at Sioux Falls, South Dakota, this 8 day of August, 2014.

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

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Shane E. Eden
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendants, hereby certifies that a true and correct copy of the foregoing **"Defendants' Proposed Findings of Fact and Conclusions of Law"** was served by US mail and e-mail upon:

Mr. Shawn M. Nichols
Mr. Alex M. Hagen
Cadwell Sanford Deibert & Garry LLP
PO Box 2498
Sioux Falls, SD 57101
Attorneys for Plaintiff

on this 8 day of August, 2014.

STATE OF SOUTH DAKOTA) : SS COUNTY OF DEUEL)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
MICHAEL A. GIBSON, Plaintiff, vs. GIBSON FAMILY LIMITED PARTNERSHIP and DELORES GIBSON, Defendants.	CIV. 11-66 FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants Gibson Family Limited Partnership and Delores Gibson, by and through their counsel of record, submit the following Proposed Findings of Fact and Conclusions of Law:

This matter having been tried simultaneously to the Court and the Jury commencing on November 5, 2013, in Deuel County, South Dakota, with the jury returning a verdict in favor of Defendants on November 8, 2013, and the Court having receiving briefing submitted by both parties on Plaintiff's equitable claim to dissociate for value, and having received Plaintiff's Motion to Enlarge the Record and Motion to Reconsider, and having considered the testimony at trial, the arguments raised and the pleadings on record, the Court hereby reaches the following:

FINDINGS OF FACT

1. The Plaintiff in this case is Michael Gibson ("Michael"). The Defendants are the Gibson Family Limited Partnership ("GFLP") and Delores Gibson ("Delores").

2. Delores and her two sons, Michael and Greg Gibson ("Greg"), are partners in the GFLP, which was formed in 2002.

3. The GFLP was formed by a written agreement entitled The Gibson Family Limited Partnership Agreement ("GFLP Agreement").

4. Delores is the general partner of the GFLP and has been the sole general partner since the GFLP was formed.

5. Neither Michael nor Greg paid anything for their interest in the GFLP.

6. At the time of the GFLP's formation, all parties shared a clear understanding that the primary reason for forming the limited partnership was for estate planning purposes.

7. At the time of the GFLP's formation, all parties understood that the formation of the limited partnership would enable them to reduce inheritance taxes in a manner acceptable to the IRS.

8. Currently, Delores owns an 8.4% interest in the GFLP. Michael and Greg are limited partners and they each own a 45.8% interest in the GFLP.

9. After the GFLP was formed in 2002, Delores deeded 2,060 acres of land to the limited partnership that she previously owned free and clear.

10. Michael executed the GFLP Agreement accepting his role as a limited partner, and the limitations imposed on the limited partners under the partnership agreement.

11. There is no mandate under the GFLP Agreement that the limited partnership conduct business equally amongst the limited partners or with the limited partners at all. The authority to decide who does business with the GFLP rests solely with the general partner, Delores. Neither Michael nor Greg has any right to manage the GFLP.

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21. Michael submitted his Amended Complaint, dated December 17, 2013, and later conceded that the only issue that remained was his equitable claim for dissociation from the GFLP under Count IV of the Amended Complaint.

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25. Any of the following Conclusions of Law that contain a Finding of Fact or are a mixture of fact and law are by this reference incorporated herein.

CONCLUSIONS OF LAW

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3. In 1996, the Legislature chose to amend Section 603 to remove a limited partner's right to withdraw from the statutory framework for limited partnerships. In doing so, the Legislature chose to leave it up to the contracting parties to negotiate whether they would provide a limited partner with a right of withdrawal in the parties' partnership agreement.

4. SDCL § 48-7-603, as amended in 1996, is clear and unambiguous. It provides that "[a] limited partner has no right of withdrawal from a limited partnership except as otherwise specified in writing in the partnership agreement." *Id.*

5. The GFLP Agreement does not contain any type of a provision providing Michael or any other limited partner the right to voluntarily withdraw or seek withdrawal from the GFLP.

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14. As a result, there is no legally recognized basis under South Dakota law or the GFLP Agreement to grant Michael's claim to dissociate from the GFLP and Michael's claim is therefore denied.

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17. Michael argues that he is entitled to equitable relief because the purpose of the GFLP has been frustrated and the "reasonable expectations" that existed when forming the partnership are no longer applicable.

18. Application of the doctrine of reasonable expectations is not found anywhere – statutorily or in case law – in the context of limited partnerships.

19. Therefore, the doctrine of reasonable expectations has no bearing on the issues before the Court concerning Michael's claim to dissociate for value from the GFLP.

20. The GFLP Agreement is clear that a limited partner cannot participate in the management and operation of the limited partnership's investment activities. Furthermore, the GFLP Agreement provides that the general partner is not required to make distributions and has the right to retain distributable income in the general partner's sole discretion. As such, Michael's reasonable expectations could not have included participation in the management of the limited partnership's affairs, nor could Michael have reasonably expected any ongoing stream of income from the GFLP.

21. Any distrust or estrangement between the members of the GFLP results from Michael own wrongful and inequitable actions toward the GFLP and its partners.

22. The doctrine of unclean hands gives expression to the equitable principle that a court should not grant relief to a wrongdoer with respect to the subject matter in suit. *See Shedd v. Lamb*, 1996 SD 117, ¶ 26, 553 N.W.2d 241, 245 (quoting *Kane v. Schnitzler*, 376 N.W.2d 337, 341 (S.D. 1985)).

23. "When parties seek equity in the court, they must do equity, which includes entering the court with clean hands. 'A [person] who does not come into equity with clean hands is not entitled to any relief [therein], but should be left in the position in which the court finds him.'" *Id.*

24. As the party seeking relief pursuant to the Court's equitable powers, the law requires that Michael must have "acted fairly and in good faith as to the controversy in issue." *Miller v. County of Davison*, 452 N.W.2d 119, 121 (S.D. 1990).

25. Application of the unclean hands doctrine does not require a showing that a party's inequitable conduct was contemporaneous with the subject matter in dispute. In considering whether a party has come into equity court with clean hands, the Court may consider a party's prior history of inequitable conduct concerning the opposing party or subject matter of the suit. *Ferebee v. Hobart*, 2009 S.D. 102, ¶¶ 17-19, 776 N.W.2d 58 63-64.

26. The controversy at issue in this case relates to Michael's claim that Delores, as general partner of the GLFP, breached her fiduciary duties to him as a limited partner.

27. Therefore, Michael's own conduct relative to his role as a limited partner in the GLFP is relevant to the issue of whether he entered the Court with clean hands.

28. There is sufficient evidence of Michael's past dealings to determine he has a history of conducting partnership business outside the scope of the agreement and without the knowledge of the other partners.

29. This past behavior had led to many problems between Michael and the other partners of the GFLP.

30. Michael has not come into this litigation with clean hands and therefore, the Court therefore leaves him in the position in which the Court found him by denying Michael's request for equitable relief.

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32. Under the GFLP Agreement, Michael was not required to contribute financially for his interest in the GFLP.

33. The limited partners of the GFLP were given no authority to participate or manage the partnership's finances. Delores, the general partner, was given that sole authority. She was also given the authority to distribute income at her sole discretion. She also retained all authority in determining with whom the partnership would conduct its business.

34. Michael has no significant duties in the GFLP or under the GFLP Agreement.

35. Therefore, even if applicable, Michael is not entitled to relief under SDCL § 48-7A-601(7)(iii) as he is still capable of performing his duties as a limited partner as set forth in the GFLP Agreement.

Dated this 18th day of August, 2014.

ATTEST:

CLERK OF COURTS/DEPUTY
DEUEL COUNTY
STATE OF SOUTH DAKOTA

BY THE COURT:

HON. ROBERT L. TIMM

FILED
AUG 23 2014
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT
By: Deputy

STATE OF SOUTH DAKOTA) : SS COUNTY OF DEUEL)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
MICHAEL A. GIBSON, Plaintiff, vs. GIBSON FAMILY LIMITED PARTNERSHIP and DELORES GIBSON, Defendants.	CIV. 11-66 JUDGMENT ON CLAIMS IN EQUITY

This action came on for trial before the Court and Jury, the Honorable Robert L. Timm, Circuit Court Judge presiding, on November 5, 2013, through November 8, 2013, and the issues having been duly tried and the Court having received briefing submitted by both parties on Plaintiff's equitable claim for dissociation, and having considered the testimony at trial, the arguments raised and all of the files and records herein, and the Court being in all things duly advised, for good cause appearing, it is hereby:

ORDERED, ADJUDGED, AND DECREED that Judgment is hereby entered in favor of Defendants Gibson Family Limited Partnership and Delores Gibson on Counts IV, V and VI of Plaintiff s Amended Complaint, that the Plaintiff take nothing, and Counts IV, V and VI of Plaintiff s Amended Complaint shall be, and hereby are, dismissed upon its merits, with prejudice and that Defendants Gibson Family Limited Partnership and Delores Gibson shall be awarded their disbursements in the sum of $ _____, said sum to be inserted herein by the Clerk of Court after Defendants' application therefore.

Dated this 18th day of August, 2014.

BY THE COURT:

Honorable Robert L. Timm
Circuit Court Judge

ATTEST:
KARNA LINDNER, CLERK
By _____
(SEAL)

FILED
AUG 23 2014
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

STATE OF SOUTH DAKOTA) : SS COUNTY OF DEUEL)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
MICHAEL A. GIBSON, Plaintiff, vs. GIBSON FAMILY LIMITED PARTNERSHIP and DELORES GIBSON, Defendants.	CIV. 11-66 **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT ON CLAIMS IN EQUITY**

TO: PLAINTIFF MICHAEL A. GIBSON AND HIS COUNSEL OF RECORD, SHAWN M. NICHOLS AND ALEX M. HAGEN

You are hereby notified and advised that the Circuit Court of Deuel County, South Dakota, Third Judicial Circuit, has entered Findings of Fact and Conclusions of Law and a Judgment on Claims in Equity in the above-entitled matter, the same having been signed and dated by the Court on the 18th day of August, 2014, a true and correct copy of which is attached hereto, the original having been filed with the Clerk of Courts for Deuel County, South Dakota on August 23, 2014.

Dated at Sioux Falls, South Dakota, this 15th day of May, 2015.

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

/s/ Shane E. Eden

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for *Defendants*, hereby certifies that a true and correct copy of the foregoing "Notice of Entry of Findings of Fact and Conclusions of Law and Judgment on Claims in Equity" with attached "Findings of Fact and Conclusions of Law" and "Judgment on Claims in Equity" was served via Odyssey File & Serve upon:

Shawn M. Nichols
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on this 15th day of May, 2015.

/s/ Shane E. Eden
Shane E. Eden

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27476

MICHAEL GIBSON,

Plaintiff/Appellant,

vs.

GIBSON FAMILY LIMITED PARTNERSHIP, a South Dakota Limited Partnership; and DELORES GIBSON in her capacity as general partner,

Defendants/Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Deuel County, South Dakota

The Honorable Robert L. Timm, Presiding Judge

APPELLEES' BRIEF

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Notice of Appeal filed June 10, 2015

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PRELIMINARY STATEMENT

Citations to the Certified Record of the Deuel County Circuit Court shall be "R" followed by the applicable page number(s). Citations to the Trial Transcript shall be "TT" followed by the applicable page number(s). Citations to exhibits received at trial shall be "EX" followed by the applicable exhibit number(s). Citations to the Hearing Transcript from the October 21, 2013 hearing shall be "HT" followed by the applicable page number(s). References to Appellant's Appendix shall be "AA" followed by the applicable page number(s). Plaintiff/Appellant Michael Gibson shall be referred to as "Michael." Defendant/Appellee Gibson Family Limited Partnership shall be referred to as "the GFLP." Defendant/Appellee Delores Gibson shall be referred to as "Delores." Together, the GFLP and Delores shall be referred to as "Defendants."

STATEMENT OF JURISDICTION

Following a four day jury trial and verdict for the defense, a Judgment on Jury Verdict was entered by the Circuit Court on November 13, 2013. R 633. Notice of Entry of the Judgment on Jury Verdict was served on November 15, 2013. R 634. Michael filed an Amended Complaint on December 18, 2013, adding an equitable claim for dissociation. R 637-643.

On August 18, 2014, the Circuit Court signed a Judgment on Claims in Equity and Findings of Fact and Conclusions of Law. R 660, 712. Notice of Entry of the Judgment on Claims in Equity and Findings of Fact and Conclusions of Law was served on May 15, 2015. R 724. Michael filed a Notice of Appeal on June 10, 2015. R 738. This Court has jurisdiction pursuant to SDCL 15-26A-3(1).

STATEMENT OF THE ISSUES

I. Whether the Circuit Court erred in holding that Michael was not entitled to the equitable relief of dissociation from the GFLP

The Circuit Court issued a Memorandum Decision dated April 8, 2014, which ruled that Michael was not entitled to the equitable relief of dissociation for value sought in his Amended Complaint. AA 3-11. The Circuit Court later entered Findings of Fact and Conclusions of Law that held there was no legally recognized basis under South Dakota law to grant Michael's claim for dissociation. R 712-722; AA 35-45.

Authority: SDCL 48-7-603; SDCL 48-7A-601

II. Whether the Circuit Court abused its discretion by denying Michael equitable relief on the grounds that he did not come into the litigation with clean hands

The Circuit Court issued a Memorandum Decision dated April 8, 2014, which ruled that Michael had not come into the litigation with clean hands and

therefore, was not entitled to equitable relief. AA 3-11. The Circuit Court later entered Findings of Fact and Conclusions of Law confirming the same. R 712-722; AA 35-45.

Authority: *Ferebee v. Hobart*, 2009 S.D. 102, 776 N.W.2d 58; *Talley v. Talley*, 1997 S.D. 88, 566 N.W.2d 846; *Shedd v. Lamb*, 1996 S.D. 117, 553 N.W.2d 241

III. Whether the Circuit Court abused its discretion and committed reversible error by (1) precluding evidence concerning past loans made by the GFLP to Greg, (2) allowing certain testimony from the GFLP's attorney, Robert Ronayne, or (3) denying Michael's post-trial motion to enlarge the record to include additional evidence Michael contended supported his claim for dissociation

The Circuit Court granted a motion in limine filed by Defendants to preclude evidence, testimony, or reference to past loans made by the GFLP to Greg. R 506-507; AA 1-2. The Circuit Court also denied Michael's request during trial to introduce such evidence. TT 604-607. The Circuit Court permitted the GFLP's attorney, Robert Ronayne, to testify as to certain issues related to South Dakota law and the GFLP Agreement. R 392; TT 156-190. The Circuit Court denied Michael's post-trial Motion to Enlarge Record and for Reconsideration requesting to introduce additional evidence into the record concerning GFLP activities. R 662.

Authority: *Dakota, Minnesota & E. R.R. Corp. v. Acuity*, 2006 S.D. 72, 720 N.W.2d 655; *Am. Family Ins. Grp. v. Robnik*, 2010 S.D. 69, 787 N.W.2d 768; *Matter of Estate of Jones*, 370 N.W.2d 201 (S.D. 1985); *Nickles* v. *Shild*, 2000 S.D. 131, 617 N.W.2d 659; SDCL 19-15-2; SDCL 19-15-4.

STATEMENT OF THE CASE

Michael commenced this action against Defendants in July 2011. R 2-8. In his Complaint, Michael sought relief on six counts: (1) declaratory judgment, (2) cancellation of instrument, (3) breach of fiduciary duty, (4) dissociation of the general partner, (5) appointment of a receiver and (6) dissolution of the GFLP. *Id.* On October 8, 2013, Defendants moved for summary judgment as to Counts I and II of Michael's Complaint. R 214. The Circuit Court granted summary judgment as to those counts and entered an order to that effect on October 29, 2013. R 506-507; AA 1-2.

A four day jury trial was held in the Third Judicial Circuit, Deuel County, beginning on November 5, 2013. At the close of evidence, Michael sought and was granted leave to amend his Complaint to include an equitable claim for dissociation for value from the GFLP. TT 84-845. The parties agreed that the Circuit Court would decide this claim after the jury trial. On November 8, 2013, the jury returned a verdict in favor of Defendants on Michael's claim for breach of fiduciary duty. R 626. The parties thereafter stipulated to the dismissal of Michael's receivership and dissolution claims. R 633, 723. The Circuit Court entered a Judgment on Jury Verdict on November 13, 2013, and Notice of Entry of that judgment was served two days later on November 15, 2013. R 633, 634.

On December 18, 2013, Michael served and filed an Amended Complaint containing his additional claim for dissociation. R 637-643. The Circuit Court issued a Memorandum Decision on April 8, 2014, ruling that Michael was not entitled to dissociate. AA 3-11. On May 6, 2014, Michael filed a Motion to Enlarge the Record and for Reconsideration. R 657. The Circuit Court denied that motion on June 16, 2104. R 662; AA 12. On August 23, 2014, the Circuit Court issued its Findings of Fact and Conclusions of Law and entered a Judgment on Claims of Equity pertaining to the equitable counts of Michael's Amended Complaint. R 712-722, 723; AA 35-45, 46. Notice of Entry of the Judgment on Claims of Equity and the Court's Findings of Fact and Conclusions of Law was served on May 15, 2015. R 724; AA 47. Michael filed a Notice of Appeal on June 10, 2015. R 738.

STATEMENT OF FACTS

Delores and her two sons, Michael and Greg, are partners in the GFLP, which was formed in 2002. R 637; EX 1. The GFLP was formed by a written agreement entitled "The Gibson Family Limited Partnership" ("the GFLP Agreement"). EX 1. After the GFLP was formed in 2002, Delores deeded 2,060 acres of land to the limited partnership that she previously owned free and clear. TT 242-243, 651, 656-57.

As limited partners in the GFLP, Michael and Greg each have a 45.802% interest while Delores retains the remaining 8.266% interest. R 637; EX 1. Delores also serves as

the sole general partner of the GFLP and holds a 0.13% interest in that capacity. *Id.* Neither Michael nor Greg paid anything for their interest in the GFLP. At the time of its formation, all parties shared a clear understanding that the GFLP was being created for estate planning purposes in order to reduce inheritance taxes in a manner acceptable to the IRS. TT 90-96, 137-143, 242-243, 572-575, 644, 656-657, 755.

For years, Delores allowed Michael and Greg's cattle operation, Gibson Livestock, Inc., to use the partnership's land and assets. TT 196, 239-241, 531. In 2006, however, Michael and Greg decided to part ways and Gibson Livestock was quasi-dissolved, with each brother starting his own farming and cattle business. R 244-246, 762-766. After this split, it was discovered that, without proper authority to do so, Michael had taken significant funds from Gibson Livestock ($634,000) and invested the same in the stock market in his personal account. EX 149, 150; TT 209, 772, 793-805; R 192-201. Michael had also taken funds from the GFLP without Delores' permission for the same purpose.[1] TT 811-815; R 201.

During the split of Gibson Livestock in 2006, Greg requested from Michael certain financial documentation. TT 795. In his production of these documents to Greg, Michael deliberately removed and withheld the checks showing his unauthorized investments. TT 795. Instead, Michael forged different checks, changing the check numbers and the names of the payees, and provided those forged checks to Greg. TT 796-797. Michael then

[1] In 2004, the property the GFLP owned was mortgaged. R 188-190, 201; TT 659-665, 806. The purpose of these loans was not for Michael to have access to funds for investing in the stock market. *Id.* Nevertheless, Michael utilized these mortgages to gain access to GFLP funds that he used for his personal investment in the stock market unbeknownst to Greg and Delores. *Id.*

attempted to cover up his forgery by requesting the documents back from Greg. TT 800. Once returned, Michael removed the forged checks and replaced them with the original checks he had made out to himself. TT 800-801. He then destroyed the forged checks. *Id.* Unbeknownst to Michael, however, the existence of his forged checks had already been discovered by Greg's representatives. *Id.*

After Michael had misappropriated partnership funds and violated the trust and confidence of his partners, Delores decided to no longer conduct business with him. TT 529, 539-540, 667, 814-815. Thereafter, in 2007, the GFLP made two loans to Greg evidenced by promissory notes, one dated April 7, 2007, in the sum of $200,000, and the other dated April 26, 2007, in the sum of $150,000. R 243-245, 321-341. These loans were later consolidated and refinanced as evidenced by a promissory note dated March 26, 2008, in the sum of $350,000. *Id.*

In April 2007, Michael commenced suit against the GFLP, Greg, and Delores, both in her personal capacity and as general partner. EX 101. The litigation was entitled *Michael A. Gibson et al. v. Gregory J. Gibson et al.*, Civ. 07-31, Third Judicial Circuit, Deuel County, South Dakota ("the Prior Litigation"). *Id.* In that action, Michael asserted eight different counts including intentional interference with contract, enforcement of oral lease agreements, slander, negligence, breach of fiduciary duty, fraud and deceit, an accounting and valuation of the limited partnership, and judicial dissolution of the GFLP. *Id.* TT 815-816.

In June 2007, Michael gave deposition testimony regarding the Gibson Livestock split. TT 802-803; R 198-201. In that deposition, Michael testified under oath that there was nothing false about the income and expense reports he had prepared and provided to

Greg. *Id.* Later, in his trial testimony in December 2009, however, Michael admitted that he had in fact forged and altered the checks that he provided to Greg and that he lied about those forgeries during his June 2007 deposition. TT 802-803. As a result of this admission, the judge presiding over that trial reported Michael to local law enforcement officials. TT 792-793, 803-804. Michael was ultimately charged with a class five felony in Deuel County on or about May 4, 2010. *Id.* He pled guilty to the felony forgery charge, was fined and sentenced to 90 days in jail. R 203-206; TT 775.

In September of 2008, the GFLP leased 2,060 acres of agricultural land to Greg and his wife Joan and their cattle business, Champaygn Ranch, Inc., pursuant to a written lease agreement (the "Farm Lease"). EX 5; TT 673-677. The Farm Lease was for a five year term and was set to expire on April 1, 2014. *Id.* The rent due under the Farm Lease was $35 per acre on 1,585 pasture acres and $100 per acre on 475 tillable acres. *Id.*

The Prior Litigation went to trial in December 2009 on Michael's claim against Delores for her alleged breach of her fiduciary duty as general partner.[2] The primary basis for Michael's claim was Delores's decisions regarding partnership assets, including her choice to loan funds and lease partnership lands to Greg. R 232-242. With regard to the 2007 loans specifically, Michael argued that Delores had failed to uphold her duty to the GFLP and its partners by making inappropriate, below market rate loans from partnership assets. *Id.* At trial, the financial advisor for the GFLP, Sarathi Giridhar, testified that the interest rates for these loans were the Applicable Federal Rates set and required by the IRS.

[2] The GFLP was also forced to bring an eviction action against Michael in 2007 because he was wrongfully occupying real property owned by the GFLP. *Gibson Family Limited Partnership v. Michael A. Gibson et al.*, Civ. 07-44, Third Judicial Circuit, Deuel County, South Dakota; TT 193, 257-258, 669-672, 819-820; EX 110.

R 320-332. Despite ample opportunity to do so, Michael did not offer any evidence at trial to refute this testimony. Furthermore, Michael admitted under oath that his own conduct in taking money from the GFLP and investing the funds into high risk stocks violated the GFLP Agreement. TT 815. The jury in the Prior Litigation returned a verdict in Defendants' favor on all of Michael's claims against them, thereby ratifying the loans made to Greg and the Farm Lease. TT 827.

In October 2010, Delores consulted with the GFLP's attorney Robert Ronayne and financial advisor Sarathi Giridhar regarding planning for the future. TT 519, 535. After consulting with these advisors, Delores – seeking some peace, quiet and stability regarding the situation – decided to enter into a longer term lease with Greg ("the Amended Farm Lease") instead of continuing on with the five year Farm Lease. EX 6, 7; TT 669-678. Under the Amended Farm Lease, the GFLP agreed to lease 1,230 acres to Greg for a 20 year term. *Id.* Furthermore, pursuant to a Contract for Deed, the GFLP agreed to sell 830 acres to Greg for the sum of $1,100,000 payable in annual installments over a 20 year term, with interest at the rate of 4.15% on the deferred payments. EX 2, 3; TT 669-682. Prior to entering the Contract for Deed, the GFLP obtained an appraisal of the property from property appraiser Troy Engstrom.[3] R 246-247, 269-270. As of February 9, 2011, Engstrom concluded the property had an appraised value of $1,100,000.[4] *Id.*

[3] Michael devotes several pages of his brief to criticizing Engstrom's appraisal. These critiques, however, have nothing to do with the merits of Michael's appeal. All of Michael's criticisms of Engstrom's appraisal and Delores' allegedly improper reliance upon the same were presented to the jury at trial. The jury, however, rejected Michael's criticisms as evidence of any breach of duty by Delores and, through their verdict, ratified Delores' decision to enter into the Contract for Deed.

On June 30, 2011, Michael commenced this action against Defendants, asserting six counts: (1) declaratory judgment, (2) cancellation of instrument, (3) breach of fiduciary duty, (4) dissociation of general partner, (5) appointment of a receiver, and (6) dissolution of the GFLP. R 2-8. As in the Prior Litigation, part of Michael's claim regarding Delores' alleged breach of fiduciary duty concerned his contention that the GFLP had leased land to Greg at less than market value and had mishandled the 2007 loans. *Id.* Because those issues had already been fully litigated in the Prior Litigation, Defendants filed a Motion for Summary Judgment, or in the Alternative, Motion in Limine, to preclude evidence of those issues at trial. R 214-215. After hearing the parties' arguments at a pre-trial hearing on October 21, 2013, the Circuit Court granted Defendants' motion in part, ruling that evidence related to the past loans to Greg would be excluded. HT at 28-29; R 506-507; AA 1-2.[5]

This matter came on for trial before the Circuit Court and a jury on November 5, 2013, through November 8, 2013. During trial, considerable evidence was presented regarding Michael's wrongful and dishonest conduct toward the GFLP and his limited partners since the GFLP's formation. TT 789-842. Michael himself admitted under oath

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[4] Unlike Michael's appraiser, Bradley Johnson, Engstrom's appraisal accounted for the effect of the Amended Farm Lease on the value of the property. Johnson chose to simply ignore this fact entirely. TT 403-404.

[5] Defendants also moved for and obtained summary judgment on Counts I and II of Michael's Complaint. R 506-507; AA 1-2. Under these counts, Michael was seeking to void the Contract for Deed and Amended Farm Lease on the grounds that the two transactions collectively constituted a sale of substantially all of the GFLP's assets and, therefore, required a vote of the limited partners. The Circuit Court rejected this argument and granted Defendants summary judgment as to these counts. *Id.*

that his conduct had violated both his mother's trust and the terms of the GFLP Agreement. TT 815. At the close of evidence, Michael sought and was granted leave to amend his Complaint to include an equitable claim for dissociation for value from the GFLP. TT 844-845. The parties agreed that the Court would decide this issue after the jury trial was completed. On November 8, 2013, the jury returned a verdict in favor of Defendants on Michael's claim for breach of fiduciary duty, thereby ratifying Delores's decisions as general partner. R 626, 633. Following the verdict, Michael stipulated to dismissal of his receivership and dissolution claims and the Circuit Court entered a Judgment on Jury Verdict on November 13, 2013. R 633, 723.

On December 18, 2013, Michael filed his Amended Complaint containing the additional claim for dissociation. R 637-643. After briefing by the parties, the Circuit Court issued a Memorandum Decision on April 8, 2014, holding that Michael was not entitled to the equitable remedy of dissociation because (1) Michael had failed to come into the litigation with clean hands and (2) Michael had not established the occurrence of any event causing dissociation under SDCL § 48-7A-601. AA 3-11. On May 6, 2014, Michael filed a Motion to Enlarge the Record and for Reconsideration. R 657-658. In this motion, Michael requested the Circuit Court to consider what Michael deemed "newly available" evidence concerning the alleged pattern of favoritism exhibited by Delores that had been rejected by the jury. *Id.* The Circuit Court denied that motion on June 16, 2014. R 662; AA 12.

The parties thereafter submitted separate proposed Findings of Fact and Conclusions of Law. R 684, 666; AA 13-34. On August 23, 2014, the Circuit Court issued its Findings of Fact and Conclusions of Law consistent with the proposal submitted by Defendants. R

712-722; AA 35-45. The Circuit Court also entered a Judgment on Claims of Equity. R 723; AA 46.

ARGUMENT

I. The Circuit Court Correctly Ruled that Michael Was Not Entitled to Dissociate from the GFLP

The evidence at trial established that all parties shared a clear understanding that the primary reason for forming the GFLP was for estate planning purposes. TT 90-96, 137-143, 242-243, 572-575, 644, 656-657, 755. It was not for pure financial gain. Michael freely executed the GFLP Agreement accepting his role as a limited partner and the limitations imposed on the limited partners under the terms of that agreement. EX 1. In November 2013, for the second time in a four year period, a jury found that Delores has acted within the scope of her fiduciary duties as the general partner of the GFLP. Michael, however, refuses to accept this result and is now attempting to rewrite South Dakota law in order to force a buyout of his interest in the GFLP through the remedy of "dissociation for value." Stated more bluntly, Michael wants his inheritance early.

At its base, Michael's argument is that whenever a son or daughter is a member of a limited family partnership established for the purpose of estate planning and wants his or her share of the inheritance early, he or she may simply seek dissociation alleging a lack of a close relationship or trust. Neither the provisions of South Dakota's Uniform Limited Partnership Act nor the broad equitable powers of the Court support Michael's argument.

The Uniform Limited Partnership Act ("ULPA"), as adopted in South Dakota in SDCL Chapter 48-7, stands in direct opposition to Michael's claim for dissociation. SDCL 48-7-603 provides "[a] limited partner has no right of withdrawal from a limited partnership

except as otherwise specified in writing in the partnership agreement." *Id.* It is undisputed that the GFLP Agreement does not contain any provision giving Michael the right to voluntarily withdraw or seek his withdrawal from the GFLP. EX 1. Therefore, SDCL 48-7-603 controls and prevents Michael from seeking the same result through an equitable request for "judicial dissociation."

In 1986, South Dakota enacted the Uniform Limited Partnership Act (1976). The Legislature's intent can be deduced by comparing the current version of SDCL 48-7-603 to the original statute that was adopted in 1986. The Court does not need to engage in a tortured analysis of ULPA and the Revised Uniform Partnership Act codified in Chapter 48-7A to decide this issue. Session Law 1986, Chapter 391, Section 603 enacted verbatim the model act's Section 603 addressing the right of a limited partner to withdraw. SDCL 48-7-603 (1986). In 1996, the Legislature chose to amend Section 603 to remove a limited partner's right to withdraw from the statutory framework for limited partnerships. Instead, the Legislature chose to leave it up to the contracting parties to negotiate whether they would provide a limited partner with a right of withdrawal in the parties' partnership agreement. If parties choose not to include a provision for withdrawal in their agreement, then there is no right to voluntarily withdraw.

The above-described framework makes limited partnerships attractive when used as an estate planning tool because the parties can determine what rights to give to the limited partners. This feature of South Dakota's ULPA is particularly important to a senior family member who wants to convey a family business or real estate through a limited partnership to members of the family. That senior family member may not want the other family members to be able to withdraw their interest from the family business or their ownership of

the family real estate. Equally important, a limited partnership can be formed to allow the senior family member the ability to maintain full control of his or her estate inside the limited partnership.

In this case, Michael seeks to defeat the purpose of the GFLP by withdrawing the value of his interest in the limited partnership through what he describes as an equitable request for judicial dissociation. Michael's argument, however, undermines one of the express benefits of limited partnerships, *i.e.*, control of the assets by the general partner. Of course, if the senior family member so desires, a limited partnership agreement could permit withdrawal. But that decision is governed by the terms of the partnership agreement, not by the limited partners *after* they are bound by the contract they signed. In this case, Delores did not include a provision in the GFLP Agreement for a limited partner to be able to withdraw. EX 1.

Recognizing this limitation, Michael attempts to use ULPA's linking provision, SDCL 48-7-1105, to invoke the dissociation provisions enacted under South Dakota's Revised Uniform Partnership Act ("RUPA"), SDCL Chap. 48-7A. SDCL 48-7-1105 provides "[i]n any case not provided for in this chapter the provisions of the Uniform Partnership Act govern." *Id.* There is, however, no gap in ULPA with respect to the mechanism that Michael seeks to use in order to accomplish this result, *i.e.* voluntarily withdrawal. As a result, linking is not necessary and there is no need to refer to RUPA's provisions.

In 2001, South Dakota enacted RUPA, which lists specific events for the dissociation of a partner from a general partnership. *See* SDCL 48-7A-601 through 603. SDCL 48-7A-602 expressly vests the power to dissociate in a partner, either rightfully or wrongfully, even

in contravention of a general partnership agreement. As summarized above, the same is not true under ULPA. SDCL 48-7-603. Moreover, South Dakota has elected not to adopt the Revised Uniform Limited Partnership Act (2001) ("RULPA"), which incorporated RUPA's approach to dissociation essentially verbatim. In other words, the South Dakota Legislature could have adopted the amended version of the ULPA providing for the dissolution of a partner, but has chosen not to do so.

The Legislature's decision not to adopt RULPA is especially significant in view of the difference in the rights of a limited partner compared to those of a partner in a general partnership. For example, partners in a general partnership have equal rights in the management and the conduct of partnership business, and they are jointly and severally liable for all obligations of the partnership. *See* SDCL 48-7A-306 and 48-7A-401. Traditionally, when a general partner withdraws from a general partnership, the entire partnership is required to dissolve. RUPA fixes that result by providing that the removal of a partner does not result in automatic dissolution.

Limited partnerships operate differently, however. This is primarily because the limited partner and general partner are not in the same class. They do not share the same rights. The general partner of a limited partnership has the right to manage the limited partnership, is liable for the obligations of the limited partnership, and has the right to withdraw from the limited partnership. *See* SDCL 48-7-602. In comparison, a limited partner has no right to participate in the management of the limited partnership, bears no liability of limited partnership obligations, and the statutory right to withdraw has been eliminated. The limited partner is a silent partner. Based upon this fundamental distinction between general partnership and limited partnership law, the two chapters are not to be read

in pari materia. *City of Rapid City v. Estes*, 2011 S.D. 75, ¶ 12, 805 N.W.2d 714, 718 (statutes are construed to be *in pari materia* when they "relate to the same person or thing, to the same class of person or things, or have the same purpose or object").

It is undisputed that Michael gave nothing in exchange for his 45.8% interest as a limited partner of the GFLP. He has no personal liability for the debts and obligations of the partnership. EX 1. He has no duties or entitlement with respect to the management and business of the limited partnership. *Id*; TT 522, 529. He is a silent partner. For this reason, it cannot be said that the current status of the parties' relationship is affecting his ability to manage the business or his personal liability. *See* AA 10 ("Simply put, to this date Michael has had no significant duties in the partnership under the partnership agreement. Therefore, he should not have a problem continuing to perform under the partnership agreement").

Delores on the other hand, as the general partner, agreed to be held personally liable for the debts and obligations of the partnership. EX 1. She accepted the responsibilities for the day to day management of the limited partnership, and the fiduciary duties imposed upon her for such management. According to two juries, she has fulfilled those duties. And, under both South Dakota law and the GFLP Agreement, she alone has the right to control the partnership. EX 1.

In his brief, Michael attempts to draw a distinction between the withdrawal of a partner causing dissolution under ULPA and the withdrawal of a partner causing dissociation under RUPA. His argument, however, grossly overstates the applicable scope of ULPA's linking provision, SDCL 48-7-1105, and fails to provide the Court with any relevant legal authority to support his interpretation of South Dakota law. Contrary to Michael's contention, dissociation under RUPA does not represent a new concept *as it*

relates to the power or right of a partner to withdraw from a partnership. Rather, the concept of "dissociation" merely reflects how the withdrawal of the partner under RUPA affects the remaining partnership. *See* Rev. Unif. Partnership Act of 1997, § 601, comment (1) ("An entirely new concept, 'dissociation,' is used in lieu of the UPA term 'dissolution' to denote the change in the relationship caused by a partner's ceasing to be associated in the carrying on of the business.").

Michael's preference to apply the provisions of RUPA is not surprising. Unlike ULPA, RUPA provides that a partner has the power to withdraw from the partnership simply by expressing his or her will to withdraw, even in contravention of the partnership agreement. SDCL 48-7A-601(1), 48-7A-602. Withdrawal of a partner therefore causes that partner's dissociation. *Id*. *See* Rev. Unif. Partnership Act of 1997, § 601, comment (1). The concept of dissociation under SDCL 48-7A-601(1), however, does not offer some form of separate and distinct right or power for a partner to effectuate his or her release from a partnership.

Michael argues that the prohibition on withdrawal under ULPA "cannot be construed to imply a prohibition on the separate concept of 'dissociation.'" Appellant's Brief at 17. Michael's reference to the broad concept of "dissociation" under RUPA, however, ignores the salient point raised through his specific request for relief. While he emphasizes that "the grounds upon which dissociation may occur are more varied than voluntary or involuntary withdrawal," *see* Appellant's Brief at 19, Michael's reliance on ULPA's linking or gap-filling provision, SDCL 48-7-1105, is premised upon the assertion that the right to withdraw causing dissolution under ULPA – a right Michael concedes that he does not possess – is

somehow legally or practically distinct from the right to withdraw causing dissociation under RUPA. It is not.

Michael's request for equitable dissociation in this case is the equivalent of a request for permission to withdraw. Thus, while the ground upon which dissociation may occur under SDCL 48-7A-601 varies, Michael's request for dissociation here is based upon his desire to withdraw from the GFLP. Appellant's Brief at 18 ("RUPA expressly recognizes a right of dissociation: "[a] partner has the power to dissociate at any time, rightfully or wrongfully, *by express will pursuant to subsection 48-7A-601(1)*." SDCL 48-7A-602. Consequently, by virtue of the linking provision, dissociation is incorporated into the law of limited partnerships.") (emphasis added). The relevant issue in evaluating the applicability of ULPA's linking or gap-filling provision to Michael's request to dissociate is whether ULPA "provides for" his ability, as a limited partner, to withdraw.

The withdrawal of a limited partner is unquestionably "provided for" by ULPA under SDCL 48-7-603. ULPA's provisions addressing withdrawal of a limited partner and the effect thereof on a limited partnership fully occupy that subject area and leave no room for linkage with RUPA. For this reason, Michael's contention that the requirements of RUPA are necessary to fill a "gap" as to his claim for dissociation is erroneous. To hold otherwise would directly undermine the provisions of ULPA by granting limited partners the ability to effectuate their withdrawal through a request for judicial dissociation, regardless of the terms of the partnership agreement. This result would cripple the value of limited partnerships as estate planning tools.

Michael's reliance on the decision by the Kanas Supreme Court in *Welch v. Via Christi Health Partners, Inc.*, 133 P.3d 122, 131 (Kan. 2006), is misplaced. In *Welch*, the

court was asked to evaluate the impact of a merger of a limited partnership with a limited liability company. *Id.* at 128. Unlike here, the claims of the plaintiffs in *Welch* were not based upon the rights available to a limited partner who simply wishes to withdraw from a limited partnership. *Id.* at 131. Rather, according to the court, the question in *Welch* was specifically limited to whether Kansas's Revised Uniform Limited Partnership Act "provide[d] any appraisal or buyout rights to involuntarily *dissociated* limited partners of a limited partnership following a *merger* with a limited liability company." *Id.* (emphasis in original). Thus, the *Welch* court's discussion of involuntary dissociation caused by a merger does not help Michael's position.

Michael contends that his dissociation from the GFLP is permitted as a matter of equity under SDCL 48-7A-104 and pursuant to SDCL 48-7A-601. Appellant Brief at 21-22. Neither of these provisions, however, authorizes dissociation in this case. First, Michael argues that because "[n]o provision within Chapter 48-7A precludes equitable dissociation," "a Court may order a limited partner be dissociated for value on equitable grounds." Appellant's Brief at 22. This claim, however, does not comport with the applicable statute. SDCL 48-7A-601 provides a list of specific events upon which a partner's dissociation from a general partnership will occur. In this sense, SDCL 48-7A-601 is similar in approach to SDCL 48-7-402, which lists the specific events resulting in a general partner's withdrawal from a limited partnership. *See* Rev. Uniform Partnership Act Section § 601, comment 1 ("Section 601 enumerates *all* of the events that cause a partner's dissociation.") (emphasis added). *See also Welch,* 133 P.3d at 134 ("It makes sense, as set forth by the plain language of Official Comment to § 601, that *all of the events* causing a partner's dissociation under RUPA would be found under Article 6 of RUPA.") (emphasis in original).

In an effort to overcome this point, Michael cites to this Court's decision in *Landstrom v. Shaver*, for the proposition that "a trial court has discretion, within its broad powers of equity, to create an appropriate remedy based on the evidence presented." 1997 S.D. 25, ¶ 41, 561 N.W.2d 1, 9. In *Landstrom*, however, this Court was applying SDCL 47-7-34's corporate dissolution provision which was intentionally broad and "[did] not actually mandate liquidation . . . but rather provide[d] that the court has this ultimate power to liquidate." *Longwell v. Custom Benefit Programs Midwest, Inc.*, 2001 S.D. 60, ¶ 14, 627 N.W.2d 396, 399. In contrast, SDCL 48-7A-601 does not simply confer a broad, ultimate power to grant equitable dissociation, but rather, it provides a list of specific events causing dissociation.

Michael's claim that he is entitled to dissociate under SDCL 48-7A-601(7) must also fail. Under that subsection, dissociation may be ordered based on "a judicial determination that the partner has otherwise become incapable of performing the partner's duties under the partnership agreement." *Id.* In this case, the evidence at trial established that Michael has no authority to participate or manage the GFLP's finances, has no authority to determine who the partnership will conduct its business with and has no significant duties in the GFLP or under the GFLP Agreement. EX 1; TT 90-96, 574, 603, AA 45. As such, the Circuit Court concluded that SDCL 48-7A-601(7) did not apply. Michael fails to identify any evidence in the record to demonstrate that this finding was clearly erroneous. *Dowling Family P'ship v. Midland Farms*, 2015 S.D. 50, ¶ 10, 865 N.W.2d 854, 860 ("Under an abuse of discretion standard of review, the circuit court's 'factual determinations are subject to a clearly erroneous standard[.]'").

II. The Circuit Court Correctly Ruled that Michael Did Not Come Into the Litigation with Clean Hands

Throughout the course of the four day jury trial, evidence was presented regarding the numerous acts of inequitable, wrongful and illegal conduct by Michael toward the GFLP and his limited partners. In its Findings of Fact, the Circuit Court identified a number of these acts, including (1) Michael's unauthorized investments of GFLP funds, (2) his decision to use mortgages on GFLP property in order to obtain unauthorized loans, (3) his forging of checks and bank statements to Greg, (4) his subsequent attempts to cover up his forged checks, (5) his admission under oath that he forged and altered checks and that he lied about performing these acts while under oath during a deposition, (6) his misappropriation of partnership land and his refusal to vacate and surrender possession of such land to the partnership, and (7) his admission under oath that his actions had breached the GFLP Agreement and violated the fiduciary duties he owed the partnership. AA 37-39.

Despite these significant transgressions, Michael entered this litigation seeking equitable relief from the Circuit Court. In practical terms, Michael wanted the Circuit Court to ignore his prior behavior toward the GFLP and reward him with an early inheritance through a judicial dissociation for value. The Circuit Court, however, properly denied Michael's request, concluding that (1) Michael's own conduct as a limited partner in the GFLP was relevant to the issue of whether he entered the Court with clean hands and (2) that there was sufficient evidence presented at trial of Michael's past conduct to determine that "he has a history of conducting partnership business outside the scope of the agreement and without the knowledge of the other partners." AA 9, 43-44.

The law in South Dakota is clear that those with unclean hands are not entitled to prevail on equitable claims. "When parties seek equity in the court, they must do equity, which includes entering the court with clean hands. 'A [person] who does not come into equity with clean hands is not entitled to any relief herein, but should be left in the position in which the court finds him.'" *Shedd v. Lamb*, 1996 S.D. 117, ¶ 26, 553 N.W.2d 241, 245

(quoting *Kane v. Schnitzler*, 376 N.W.2d 337, 341 (S.D. 1985)). *See also Action Mech., Inc. v. Deadwood Historic Pres. Comm'n*, 2002 S.D. 121, ¶ 26, 652 N.W.2d 742, 751 ("A party seeking equity must act fairly and in good faith."); *Talley v. Talley*, 1997 S.D. 88, 566 N.W.2d 846 (holding that where a party does not come into equity court with clean hands, the Court can refuse to assist that party).

As an equitable concept, the Circuit Court's decision to deny relief under the unclean hands doctrine is reviewed for an abuse of discretion. *Dowling*, 2015 S.D. 50, ¶ 10, 865 N.W.2d at 860. In this case, after Michael misappropriated partnership funds/land and violated the trust and confidence of his partners, Delores lost trust in him and decided not to conduct anymore business with him. TT 529, 539-540, 667, 814-815. By Michael's own admission, this lack of trust was created by his improper actions. TT 812-815. Nevertheless, Michael argues that the Circuit Court abused its discretion because its decision was "based on events that were remote in time, previously adjudicated, and causally unrelated to the land transactions that gave rise to Mike's claim for equitable relief." Appellant's Brief at 23. This position is untenable.

While Michael's claim for breach of fiduciary duty tried to the jury in 2013 focused primarily upon the Amended Farm Lease and Contract for Deed executed in 2010 and early 2011, Michael's equitable claim for dissociation was based upon his assertion that there is a lack of trust or a close relationship between the partners of the GFLP. R 642 ("Mike requests equitable relief in the form of his disassociation from the Family Limited Partnership, on the grounds that the partnership was founded on the principle of mutual trust . . ."); Appellant's Brief at 13 ("Mike established undisputed evidence that the foundation of trust and cooperation no longer existed, made the case that his presence in the partnership

was no longer tenable, and identified equitable and statutory bases upon which the Court would order judicial dissociation."). As such, Michael's own responsibility for cultivating this environment of mistrust unquestionably has an "immediate and necessary relation" to his request for equitable relief in the form of dissociation.

The evidence adduced at trial convincingly established that any distrust or estrangement between the members of the GFLP is the direct result of Michael's own wrongful and inequitable actions toward the GFLP and its partners. TT 685-686, 708, 726-728, 812-815. The fact that much of Michael's inequitable conduct predates the commencement of his most recent lawsuit does not diminish this fact. The doctrine of unclean hands gives expression to the equitable principle that a court should not grant relief to a wrongdoer with respect to the subject matter in suit. *Shedd*, 1996 S.D. 117, ¶ 26, 553 N.W.2d at 245. As the party seeking relief pursuant to the Court's equitable powers, the law required Michael to have "acted fairly and in good faith as to the controversy in issue." *Miiller v. County of Davison*, 452 N.W.2d 119, 121 (S.D. 1990). Here, the basis for Michael's equitable claim – *i.e.* an allegedly intolerable environment of mistrust within the GFLP – was not rooted solely in any one agreement or transaction, but in Michael's overall conduct as a limited partner in the GFLP since its formation.

In considering whether a party has come into equity court with clean hands, this Court has previously held that a trial court may consider that party's prior history of inequitable conduct concerning the opposing party or the overall subject matter of the dispute. In *Ferebee v. Hobart*, 2009 S.D. 102, 776 N.W.2d 58, two warring neighbors, Ferebee and Hobart, filed competing motions related to Ferebee's request for a protective order against Hobart. *Id.* ¶¶ 2-10. The feud between the parties had been ongoing for nearly two decades

and had been the subject of numerous previous lawsuits and legal proceedings. *Id.* At the trial court level, Hobert moved in limine to exclude evidence of his alleged acts of harassment against Ferebee occurring prior to a particular date. *Id.* ¶ 7. The trial court granted this motion, finding that the prior acts of alleged harassment either had been raised or could have been raised in prior protection order proceedings. *Id.* ¶ 13. In limiting the scope of testimony, however, the trial court refused to ignore the significant history between the parties when rendering its decision that Ferebee was not entitled to equitable relief due to his own unclean hands. To the contrary, the trial court took judicial notice of the prior protection order proceedings for purposes of background information. *Id.* ¶ 16.

As noted in this Court's opinion, the trial court in *Ferebee* "made clear numerous times that, despite granting Hobart's motion in limine, it was taking judicial notice of all of the prior protection order proceedings between Ferebee and Hobart and that it had carefully reviewed the records in those cases consisting of hundreds of pages of material." *Id.* "Thus, the trial court's order in limine did not exclude *all* evidence of the prior claims between Ferebee and Hobart, but simply excluded the introduction of new or additional evidence relevant to those claims." *Id.* (emphasis in original). In reviewing the issue of prejudice to Ferebee, this Court further noted that "[b]ased upon its review of the extensive records in the prior cases and the record and evidentiary hearing in the present case, the trial court was well aware of the status of the parties and their posture toward one another," and therefore, it was not required to hear additional evidence as to those incidents. *Id.* ¶ 17. *See also id.* ¶ 18 ("The court was well aware that *both* parties had been at fault in their hostile relationship. The court specifically found that they had *both* engaged in a "neighbors' war" for as long as they had known each other . . ."). "These findings *and* the court's other findings in a similar

vein demonstrate that it was not so much an insufficiency of evidence of misconduct on the part of Hobart that led to the denial of Ferebee's protection order, but that Ferebee was himself guilty of so much misconduct between the parties." *Id.* ¶ 19 (emphasis added).

Contrary to Michael's position, the Circuit Court was not required to divorce itself of all knowledge of Michael's past conduct toward the GFLP in evaluating his equitable claims. Like the trial court in *Ferebee,* the Circuit Court properly took into consideration the overall relationship between the parties and the past actions by Michael that led to the deterioration of trust between him and his partners.

Michael's alternative claim that the unclean hands doctrine should not have been applied because he "purged himself of the taint" of his misconduct is also unpersuasive. Appellant's Brief at 25. The only evidence of Michael's so-called purging is his decision to pay his civil judgment and serve his criminal sentence.[6] Appellant Brief at 25. Being forced by the rule of law to suffer the consequences of one's own wrongdoing does not equate to a renunciation or repudiation of that wrongdoing. Stated differently, Michael's choice to comply with his legal obligations rather than violate them does not somehow remedy his past wrongdoings toward the GFLP.

III. The Circuit Court's Evidentiary Rulings Did Not Constitute an Abuse of Discretion and Did Not Violate Michael's Substantial Rights

A trial court's evidentiary rulings are only reversible when error is demonstrated *and* shown to be prejudicial error. *Ruschenberg v. Eliason*, 2014

[6] This argument ignores the fact that Greg was forced to obtain a court order to require Michael to pay back $231,000 to Gibson Livestock that Michael had refused to pay. TT 805-806.

S.D. 42, ¶ 23, 850 N.W.2d 810, 817. Accordingly, this Court must "first 'determine whether the trial court abused its discretion in making an evidentiary ruling[.]'" *Id.* "With regard to the rules of evidence, abuse of discretion occurs when a trial court misapplies a rule of evidence, not when it merely allows or refuses questionable evidence." *Id*. *See also Arneson v. Arneson*, 2003 S.D. 125, ¶ 14, 670 N.W.2d 904, 910 (defining an abuse of discretion as "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable").

If an error is demonstrated, the Court must then determine "whether this error was a prejudicial error that 'in all probability' affected the jury's conclusion." *Ruschenberg*, 2014 S.D. 42, ¶ 23, 850 N.W.2d at 817. *See also* SDCL § 15-6-61. The rulings of the trial court are presumptively correct and the Court has no duty to seek reasons to reverse. *Ruschenberg*, 2014 S.D. 42, ¶ 23, 850 N.W.2d at 817. The party alleging error must show prejudicial error. *Id.* "To show such prejudicial error[,] an appellant must establish affirmatively from the record that under the evidence the jury might and probably would have returned a different verdict if the alleged error had not occurred." *Id.*

a. Evidence related to the GFLP's loans to Greg was properly excluded on grounds of res judicata

The doctrine of res judicata "prevents the relitigation of a claim or issue that was 'actually litigated or which could have been properly raised.'" *Dakota, Minnesota & E. R.R. Corp. v. Acuity*, 2006 S.D. 72, ¶ 15, 720 N.W.2d 655, 660. "Res judicata is founded upon two premises: 'A person should not be twice vexed for the same cause and public policy is best served when litigation has a repose.'" *Id*. There are two concepts that make up this doctrine: issue preclusion and claim preclusion. "Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Am. Family Ins. Grp. v. Robnik*, 2010 S.D. 69, ¶15, 787 N.W.2d 768, 774. "Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." *Id.*

Michael contends that the Circuit Court abused its discretion by granting Defendants' motion in limine to exclude evidence of the loans made by the GFLP to Greg in 2007. It is undisputed, however, that this exact issue – *i.e.* whether the loans made to Greg constituted a breach of fiduciary duty – was argued as part of Michael's claim in the Prior Litigation. R 232-42. In that case, Michael challenged the loans made to Greg as being unreasonable, "below market," violative of the duty to appropriately manage partnership

assets and "to the gain of one partner and the detriment of the other." *Id.* In response, Defendants offered evidence at trial establishing that the loans to Greg were not "below market" and were wholly proper under the law and terms of the GFLP Agreement. The jury in the Prior Litigation agreed with this evidence and found in favor of Defendants. Because the issue was previously litigated, and nothing had changed with the loans since the Prior Litigation, the Circuit Court ruled that evidence concerning the loans would be excluded. HT at 28; AA 1-2.

While not directly disputing the Circuit Court's application of res judicata, Michael argues that because Greg had not paid any of the principal on the underlying loan as of the date of the 2013 trial, evidence of the 2007 loans supported Michael's theory regarding Delores's motivation to favor Greg. Appellant's Brief at 27-28. This assertion, however, simply overlooks the fact that the *terms* of the 2007 loans were known to Michael and were presented as part of Michael's claim during the first trial. R 321-341. The claim tried in the 2009 trial was for breach of fiduciary duty. The claim tried in the 2013 trial was for breach of fiduciary duty. The terms of the promissory notes made clear that the principle of the loans to Greg were payable on demand. R 243-245, 323. The terms of the loan did not change. The only difference was the passage of time, which was foreseeable at the time of the 2009 trial since the

loans do not have a maturity date and require interest only payments. Michael offers no evidence to support the claim that the GFLP was somehow required to take action on the note, or demand principal payment prior to the 2013 trial.

The test for whether claim preclusion applies is "whether the wrong sought to be redressed is the same in both actions." *Nemec v. Goeman*, 2012 S.D. 14, ¶ 16, 810 N.W.2d 443, 447. The court also looks to whether the litigant had a "full and fair opportunity to litigate the issue in the prior proceeding." *Link v. L.S.I., Inc.*, 2010 S.D. 103, ¶ 39, 793 N.W.2d 44, 55. Here, Michael was given a full and fair opportunity during the Prior Litigation to challenge the terms of the 2007 loans, including the fact that they were payable on demand. A jury determined that those loans were legal and appropriate. As a result, res judicata prevents Michael from getting a second bite at the apple simply because additional time has passed.

Michael also contends that he should have been permitted to introduce evidence of the loans to Greg because "Defendants took advantage of the gap in the evidence to produce a misleading picture of the GFLP's overall solvency." Appellant's Brief at 28. In support of this claim, however, Michael cites to only two pieces of evidence: (1) Delores's response to a question by Michael's counsel regarding whether the GFLP had made distributions to any of the limited partners and (2) the introduction of GFLP balance sheets from

2009 through 2012, which included a line classifying the loans as an "advance to Greg $350,000.00" and as a liability of GFLP for each respective year. Appellant Brief at 28.

As general partner of the GFLP, Delores is under no obligation to make distributions to the limited partners. EX 1; TT 275-276, 598. To the extent Michael contends that a lack of available funds for potential distribution to the limited partners was *caused* by the loans made to Greg, that issue was decided in Delores's favor in 2009. Indeed, there is no discernable distinction between Michael's claim that "[e]vidence related to the loans would have [sic] that Delores consciously strategized to deplete GFLP funds by making loans to Greg so there would be nothing left to distribute," *see* Appellant's Brief at 29, and the claim litigated by him during the Prior Litigation that Delores breached a fiduciary duty to him by "failing to maximize profits through appropriate management of the Partnership's assets and liabilities, made inappropriate loans from Partnership assets, and favored Gregory Gibson over Michael Gibson, to the gain of one partner and the detriment of the other." R 232-242.

As to the admission of the GFLP balance sheets, it is undisputed these exhibits were offered *by* Michael and do not contain any specific reference to the loans at issue. EX 22-25; TT 89. The only information on these exhibits related to the loans is a line item which identifies the amount of the loans under

the "Other Assets" section. *Id.* No questions were asked of any witness related to the loans or this aspect of the balance sheets. Thus, any reference to the 2007 loans contained in these exhibits was incidental and did not open the door to a full on discussion of the propriety of and motivation behind the previously litigated loans.

Finally, Michael's desire to explore the financial condition of the partnership did not constitute proper impeachment evidence. Rather than attempting to impeach some factual claim by Delores about the financial condition of the GFLP, Michael instead sought to introduce evidence that he believed would further his substantive claim that Delores was favoring Greg to his detriment. The Circuit Court correctly recognized that this was a collateral issue that, due to res judicata, could not be presented as evidence for the breach of fiduciary duty claim. TT 604-606. As such, Michael's in-trial motion to present evidence regarding the loans was properly denied.

b. The testimony of Robert Ronayne was consistent with the South Dakota Rules of Evidence and did not invade the province of the jury

Michael next challenges the Circuit Court's denial of his motion in limine and in-trial objections concerning the testimony of the GFLP's attorney, Robert Ronayne ("Ronayne"). Michael's characterization of Ronayne's testimony as touching on the "ultimate *legal* issue," however, is inaccurate. Appellant's Brief at 30 (emphasis in original).

Ronayne was a fact witness due to his role as legal counsel for the GFLP and drafter of the Contract for Deed and Amended Farm Lease. Because of his knowledge, skill, experience, and education, he was also identified as an expert witness who could assist the jury in understanding the complexities of a limited partnership created under South Dakota law, the operations of GFLP and the applicable standard of care. In this capacity, Ronayne testified without objection that as general partner, Delores was authorized under South Dakota law to enter into a 20 year lease agreement. TT 153. When asked similar questions as to whether any of the leases he had drafted for the GFLP violated either the GFLP Agreement or South Dakota law, Ronayne again testified that they did not, this time prompting objection from Michael's counsel. TT 156.

In his brief, Michael argues that the Circuit abused its discretion by allowing this testimony because it "constituted expert opinion on purely legal matters." Appellant's Brief at 32. It is not unusual, however, for courts to admit expert opinions where the subject is the application of a legal standard to a specific factual background. *Speckels v. Baldwin,* 512 N.W.2d 171, 177 (S.D. 1994) ("A trial court may, in its discretion, permit expert testimony to assist it with difficult questions of law."); *Matter of Estate of Jones,* 370 N.W.2d 201, 204 (S.D. 1985) (holding that opinion testimony by an attorney concerning the provisions of a will "no doubt assisted the trier of fact in understanding the relationship of the various will provisions and their effect upon one another"). *See also United States v. Van Dyke*, 14 F.3d 415, 422 (8th Cir. 1994) (trial court committed reversible error in precluding a defense expert from testifying as to the meaning of certain banking regulations in view of the prosecution's claim that the defendant violated such regulations); *Fiataruolo v. United States*, 8 F.3d 930, 941-42 (2d Cir. 1993) (trial court did not err in permitting a taxpayer's

expert to testify that taxpayer was not responsible under the tax law for unpaid withholding taxes; the testimony gave the jury helpful information beyond a simple statement on how its verdict should read); *U.S. v. Gold*, 743 F.2d 800, 817 (11th Cir. 1984) (trial court did not err in admitting expert testimony concerning whether claims were eligible for Medicare reimbursement); *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 340 (4th Cir. 1983) (trial court had discretion to permit expert to testify as to application and interpretation of state environmental statutes and regulations); *Crom Corp. v. Crom*, 677 F.2d 48, 50 (9th Cir. 1982) (in action over disputed patent rights, trial court properly permitted patent-law expert to testify about interpretation and application of patent claims).

Furthermore, Michael omits the fact that he himself testified without objection that there was nothing in the GFLP agreement to prevent a 20 year lease and that the Amended Farm Lease was valid under both the GFLP Agreement and South Dakota law. TT 822-823. Michael's counsel also asked Ronayne legal questions concerning South Dakota law, and, in his closing argument, conceded the legality of the 20 year Amended Farm Lease under South Dakota law. TT 96, 857, 885. Simply stated, Ronayne's testimony regarding certain features of South Dakota law relevant to the GFLP did not encroach upon the province of the jury because the legality of the Contract for Deed or the Amended Farm Lease under South Dakota law was not in dispute. As evinced by the pleadings, the instructions given to the jury and Michael's counsel's closing statement, the ultimate issue was not whether the Amended Farm Lease or Contract for Deed were permissible under South Dakota law, but rather, whether Delores's decision to enter into these agreements constituted a breach of her fiduciary duties. TT 857, 885. That was the ultimate issue the jury was asked to decide.

Accordingly, Ronayne's testimony did not adversely affect Michael's substantial rights in any way.

Ronayne's testimony as to whether Delores's conduct as general partner was reasonable was also properly admitted. Appellant's Brief at 31. "The law permits expert opinion testimony because the expert can draw inferences beyond the capability of lay jurors." *Zens v. Harrison*, 538 N.W.2d 794, 795-96 (S.D. 1995). Under SDCL 19-19-704, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Id.* As such, courts generally allow experts to state an opinion as to whether the conduct at issue fell below an accepted standard of care. *Nickles* v. *Shild*, 2000 S.D. 131, ¶ 12, 617 N.W.2d 659, 662; *Bland v. Davison Cnty*., 1997 S.D. 92, ¶ 65, 566 N.W.2d 452, 468.

Here, the testimony of Ronayne was helpful to the jury in understanding the complexities of a limited partnership arrangement and the duties and standard of care that flow between partners. These issues are not within the common understanding of a lay juror. Thus, under South Dakota law, Ronayne was properly permitted to apply his specialized knowledge to the facts of this case and offer his opinion as to whether Delores violated the applicable standard of care, while leaving the jury to decide the ultimate issue of whether a breach occurred and if there was any liability. *Nickles*, 2000 S.D. 131, ¶ 12, 617 N.W.2d at 662 (upholding admission of an expert's opinion on "what happened in this case" and that the defendant's action did not violate any standard of care concerning the game of golf since he did not testify as to the ultimate issue of negligence).

c. Michael's post-trial Motion to Enlarge the Record and for Reconsideration was properly denied

In his post-trial Motion to Enlarge the Record and for Reconsideration, Michael requested the Circuit Court to enlarge the record to consider what he described as "newly available" evidence related to (1) the installation of a swath of concrete in the feed lot leased by the GFLP to Greg and (2) payment by the GFLP of attorneys' fees incurred in the course of litigation. R 657-658. As to the first issue, it is undisputed that testimony was offered at trial regarding the installation of concrete at the feed lot.[7] TT 196-198, 203-205, 229-232, 431-454, 530, 555, 625, 781, 826-827, 853-854, At that time, the exact final cost was not yet known, but the nature of the project was known to all parties. Indeed, Michael's counsel spent time during the trial delving into the details of the project and the fact that Greg is permitted to use the feed lot land. *Id.* Thus, the use of partnership funds to complete this feed lot project was known to Michael during the trial and did not constitute "newly discovered evidence" under SDCL § 15-6-60(b). Furthermore, the specific amount of the concrete payments made by the GFLP would have no effect on the basis of the Circuit Court's denial of Michael's equitable claim.

[7] Installing concrete at the feed lot was intended to preserve the property and enhance its overall value. TT 203-205.

As to the evidence of the GFLP's payment of attorneys' fees, this issue amounts to nothing more than yet another self-serving declaration of alleged inequity by Michael. Pursuant to the GFLP Agreement, the general partner is entitled to reimbursement for payment of all reasonable and necessary business expenses incurred in the administration of the partnership. EX 1. It is beyond dispute that this litigation involves claims against Delores in her capacity as general partner arising out of her activities as general partner. Accordingly, the expenses incurred as a result of this litigation were properly reimbursed by the GFLP in accordance with the express terms of the GFLP Agreement. This Court has made clear that SDCL § 15-6-60(b) "provides for extraordinary relief upon a showing of exceptional circumstances." *Estate of Nelson*, 1996 S.D. 27, ¶ 14, 544 N.W.2d 882, 886. Nothing about the GFLP's payment of attorneys' fees pursuant to the provisions of the GFLP Agreement constitutes "exceptional circumstances."

CONCLUSION

For the reasons set forth above, Defendants/Appellees the Gibson Family Limited Partnership and Delores Gibson respectfully request this Court to affirm the Circuit Court's findings and judgments in their favor.

Dated at Sioux Falls, South Dakota, this 9th day of December, 2015.

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REQUEST FOR ORAL ARGUMENT

Defendants/Appellees Gibson Family Limited Partnership and Delores Gibson respectfully request oral argument on all issues raised in this appeal.

/s/ Shane E. Eden

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27476

MICHAEL GIBSON

Plaintiff/Appellant,

vs.

GIBSON FAMILY LIMITED PARTNERSHIP, a South Dakota Limited Partnership; and DELORES GIBSON in her capacity as general partner

Defendants/Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Deuel County, South Dakota

The Honorable Robert S. Timm, Presiding Judge

REPLY BRIEF OF APPELLANT MICHAEL GIBSON

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ARGUMENT

I. This Court should reverse the Circuit Court and order that Michael Gibson be dissociated and bought out from the GFLP.

In its April Memorandum Decision, the Circuit Court found that a legal basis existed to dissociate Mike as a limited partner of GFLP, but declined to grant that relief on grounds that Michael had unclean hands. Six months later, the Court signed Findings of Fact and Conclusions of Law proposed by Delores's counsel denying that a legal basis existed to dissociate a limited partner. Given the sequencing and absence of explanation for its abrupt shift, the Circuit Court's adoption of findings and conclusions that contradict its reasoned decision should be understood as an oversight, not an intentional departure from its previous ruling.

In her responsive brief, Delores makes no attempt to address this obvious oversight or explain the Circuit Court's self-reversal. Both are inexplicable. Instead, Delores repeats facile arguments previously rejected by the Circuit Court and invites this Court to uphold a result that is inherently flawed.

The Circuit Court's original decision is straightforward: the linking provision set out in SDCL § 48-7-1105 states that "[i]n any case not provided for in this chapter the provisions of the Uniform Partnership Act govern." With the passage of RUPA in 2001, the Legislature introduced a new concept into partnership law, "dissociation," that was not "provided for" in SDCL Chapter 48-7. Accordingly, dissociation has been incorporated into the law of limited partnerships pursuant to the linking provision. Delores attacks this straightforward interpretation on a number of fronts, all of which fail.

A. The statutory text and surrounding context show that the Legislature intended to incorporate "dissociation" into the law governing limited partnerships.

Delores first claims that Chapter 48-7 "provides for" dissociation – a concept that appears nowhere in the statute and that had not been conceived at the time this law was enacted. This contention falls flat. There is no question that Chapter 48-7 defines "withdrawal" within limited partnership law. *See, e.g.,* SDCL § 48-7-603. But SDCL Chapter 48-7 does not define or address the concept of dissociation and cannot be said to "provide for" the case or circumstances in which dissociation is in play.

Delores next claims that the statutory provision on "withdrawal" should be interpreted to occupy the field and preclude recognition of "dissociation." She maintains that there is "no gap in ULPA with respect to the mechanism that Michael seeks to use in order to accomplish this result, *i.e.* voluntarily [sic] withdrawal." Appellant's Brief, at 13. This preclusion analysis may have been appropriate under UPA's linking provision, which stated: "[T]his act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith." UPA, §6(2).

But the operative phrase in the linking statute, "any case not provided for," is broader in scope. It is not grounded on the absence of inconsistency, but applies to each scenario where the limited partnership statutes are silent on a specific subject. And Chapter 48-7 is without question silent on the subject of "dissociation."

The relevant chronology shows why this is necessarily the case. Dissociation was "an entirely new concept" of partnership law as of 2001. UPA 2001, Prefatory Note, 6 U.L.A. 164 (2001). The pre-existing statutory regime governing limited partnerships did not – and logically, could not – provide for this new concept. But the difference is also substantive: by definition, "dissociation" and "withdrawal" name different concepts in the realm of partnership law. And the GFLP, created in 2002, came into being after the Legislature had incorporated dissociation into the law governing partnerships in South Dakota.

Delores claims that the Legislature did not intend to modify the underlying substantive law of limited partnerships by passing RUPA in 2001. Her argument subsists largely on policy concerns, not the text of the statute. And to the extent she offers a textual interpretation, it flies in the face of the governing canons of statutory interpretation.

First, Delores ignores the presumption that the Legislature understands changes to existing law when it passes an amendment. *See South Dakota Subsequent Injury Fund v. Casualty Reciprocal Exchange*, 1999 SD 2, ¶ 18, 589 N.W.2d 206, 209. The Legislature obviously did not "de-link" the two statutes when it adopted RUPA in 2001. This Court must presume that (a) the Legislature made a knowing and informed choice to leave the linking provision intact and (b) the Legislature understood the consequences of linking Chapter 48-7 to the new conceptual foundations set down in Chapter 48-7A.

Indeed, contemporaneous evidence shows that the Legislature consciously determined which provisions of Chapter 48-7 should be modified and which should be left undisturbed. While in the process of adopting RUPA, for example, the Legislature repealed SDCL §§ 48-7-108 to 48-7-111, which addressed limited liability limited partnerships. *See* SL 2001, ch 249, § 1205. The Legislature did not repeal the linking provision or include any limitation on its function with respect to the newly-revised Chapter 48-7A. This evidence demonstrates that the Legislature was attuned to the different effects that adopting RUPA might foretell and consciously decided to leave the linking provision intact.

Delores goes so far as to assert that Chapters 48-7 and 48-7A should not be read *in pari materia*. But SDCL Chapter 48-7 is not a stand-alone act. By definition, it must be read and understood in relation to Chapter 48-7A. That was the case before the adoption of RUPA in 2001 and it remains the case today. Accordingly, the two statutes necessarily "relate to" the same subject matter and must be construed harmoniously. *See MB v. Konenkamp*, 523 N.W.2d 94, 97-98 (S.D. 1994).

Indeed, as this Court has recently confirmed, "it is inappropriate to select one statute on a topic and disregard another statute which may modify or limit the effective scope of the former statute." *In re Certification of a Question of Law from U.S. Dist. Court, Dist. Of South Dakota, Southern Div.*, 2014 SD 57, ¶8, 852 N.W.2d 924, 927 (quoting *In re Expungement of Oliver*, 2012 SD 9, ¶ 9, 810 N.W.2d 350, 352). By definition, the linking provision changes the scope of Chapter 48-7 by augmenting its express terms and covering "any case not provided for." The linking statute must be

given effect, or else the statutory language the Legislature left intact will be rendered mere surplusage.

Only one inference may be drawn from the Legislature's decision to leave SDCL § 48-7-1105 untouched at the time it passed RUPA: the Legislature intended that the new regime of concepts, including dissociation, would be incorporated into the law of limited partnerships. Because dissociation and withdrawal are distinct concepts, and because Chapter 48-7 does not provide for disassociation or set forth the right of a dissociated partner to a determination of a buyout price, Chapter 48-7A applies and provides the operative rule. This analysis compels the same conclusion reached by the Circuit Court in its Memorandum Decision: a limited partner is empowered to dissociate from the entity under the law governing limited partnerships in South Dakota.

Delores asks this Court to elevate her policy arguments over and above the statutory text. She urges that dissociation should not be recognized in the law of limited partnerships because it could "disrupt," "undermine," and even "cripple" the intended estate planning purpose of family limited partnerships. The inflated rhetoric does not match the reality.

Family limited partnerships are not imperiled by the prospect that a limited partner (often an adult child) would seek to dissociate from the limited partnership. First, in the event the dissociation was wrongful, the partnership may offset the buyout price in an amount equal to any damages it has suffered. §§ 48-7A-602(b) and 701(c). Second, a wrongfully dissociated partner is not entitled to any payout until

the end of the original partnership term "unless the partner establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business of the partnership." § 48-7A-701(h).

In sum, recognizing dissociation in the limited partnership context would not unleash a wave of dissociations from family limited partnerships, nor would it trigger a clamor for "early payouts" akin to the Chicken Little scenarios that Delores depicts in her briefing. What such recognition will do, however, is give effect to the intent of the Legislature and, in this instance, offer relief where the putative "estate planning tool" is being used to subject one limited partner to tax burdens and deny him all material benefits that GFLP might offer. And contrary to Delores's argument, that relief is available under statutory law and on equitable grounds.

It is well-established that within the context of unincorporated entities, including limited partnerships, a court has equitable power to order that a partner or member be dissociated.[1] One basis for doing so is a finding that it is no longer reasonably practicable for the entity to carry on because of animus and ill-will between or among its members or partners. *See, e.g., Brennan v. Brennan Assoc.*, 977 A.2d 107 (Conn. 2009) (holding that an "irreparable deterioration of a relationship between partners is a valid basis to order dissolution, and, therefore, is a valid basis for the alternative remedy of dissociation") *Giles v. Giles Land Co. L.P.*, 279 P.3d 139

[1] *See, e.g., Park Regency LLC v. R&D Development of the Carolinas, LLC,* 741 S.E.2d 428 (S.C. 2012) (judicial dissociation of member of LLC); *Robertson v. Jacobs Cattle Company*, 830 N.W.2d 191 (Neb. 2013) (trial court permissibly exercised discretion in ordering judicial expulsion and buyout of partners from family limited partnership).

(Kan. Ct. of App. 2012) (upholding dissociation of general partner from family limited partnership based in part on a finding of mutual mistrust, animosity, and inability to communicate directly).

The same rationale applies here. The record evidence shows that Delores's animus toward Michael is pervasive and controls the way in which she operates as general partner. This animus is borne out by the land deals in 2010 and 2011 and subsequent conduct by Delores demonstrating unalloyed favoritism of Greg. This pattern of conduct reflects the inherent general dysfunction of the GFLP and furnishes a basis for relief because it is no longer reasonably practicable for Mike to remain a limited partner.

A reviewing court may also order this relief on an equitable grounds. Chapter 48-7A expressly states that "[u]nless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter." SDCL § 48-7A-104(a). The statutory bases for dissociation do not tie a court's hands from fashioning an equitable remedy that is authorized by this statute. To hold otherwise would strip the Circuit Court of the very authority that § 104(a) arrogates to it.

B. The unclean hands doctrine does not bar dissociation.

In denying Michael the requested relief under the unclean hands doctrine, the Circuit Court impermissibly relied on stale evidence that lacked an immediate and direct connection to the basis for Mike's claim. Delores's appeal brief proves the point. The facts she marshals in defense of the Circuit Court's unclean hands determination (a) were subject of previous litigation; (b) took place four to eight years

before this action was commenced; and (c) were either subject of a civil judgment Michael has satisfied or the basis of a criminal sentence that Michael has completed. The dispute began with Michael and Greg as to the division of assets held by Gibson Livestock and did not originate with the GFLP.[2]

The "history of conduct" relied on by the Circuit Court was remote in time and had no connection to the land transactions that spurred this lawsuit. Delores attempts to slink past this fact with the conclusory dismissal that Michael's legal position is "untenable." But she ignores governing precedent, which shows why "unclean hands" has no application here.

In *Adrian v. McKinnie*, 2002 SD 10, 639 N.W.2d 529, this Court held that "unclean hands" doctrine does not bar relief when based on unrelated, past misconduct. *Accord Henderson v. U.S.*, 135 S. Ct. 1780 (2015). Delores does not discuss or distinguish this authority, but instead focuses on *Ferebee v. Hobart*, 2009 SD 102, 776 N.W.2d 882.

Ferebee addressed the trial court's decision to limit evidence of past acts or misconduct by a plaintiff seeking a protective order. This Court upheld the Circuit Court's evidentiary rulings excluding certain evidence and its ultimate conclusion that

[2] As evidence of misconduct relating to the GFLP, Delores maintains that checks were written from the GFLP account without her knowledge to make investments. This assertion is hotly disputed. Michael adduced evidence showing that she maintained the ledger and received all the statements and did not dispute any check that was written until after Michael and Greg's dispute began and she shifted her allegiance to Greg. TT 763-766. Moreover, as Delores conceded on the stand, the investments did not result in a loss, but a profit exceeding $100,000, none of which was ever distributed as dividends from the GFLP coffers. TT 697-98.

the plaintiff was barred from obtaining a protective order. But *Ferebee* emphasizes a number of salient facts that are absent here.

For example, the plaintiff insisted that the Court return to the origins of the 20-year old dispute with the defendant and filed voluminous pleadings and papers with the Court on his own behalf in an effort to retrace that historic path. The relevant history relating to past protective orders showed that the plaintiff was more insulting and vituperative and had a more violent temper than the defendant against whom he sought a protective order. *Id.* at ¶18, 776 N.W.2d at 64. The plaintiff took "actions indicative of a dangerous and threatening personality" and affirmatively flamed the underlying feud before filing the petition. *Id.* Finally, the petition itself was part of a "long line of frivolous and unnecessary multiple filings addressing issues previously litigated or without a sufficient legal basis." *Id.* at ¶25, 776 N.W.2d at 65.

The facts at issue in *Ferebee* do not bear a passing resemblance to the facts at issue here. Michael did not ask the Circuit Court to revisit the past, but filed motions in limine trying to limit such evidence that the Circuit Court rejected. Further, the parties in *Ferebee* were not partners and were not obligated to interact with one another in accordance with certain standards. They could walk away, an option the plaintiff in *Ferebee* seemed constitutionally incapable of taking. Further, the previous litigation concerned events from 2007 or before and ended long before the decisions from Delores in 2010 and thereafter that spawned the present controversy.

Finally, unlike the plaintiff in *Ferebee*, Michael had no interactions with Delores or Greg at the time the land transactions were being discussed or after they were

implemented. Mike did nothing to fan the flames of the dispute during the relevant time period.

Delores did not introduce any evidence at trial to suggest that Michael had done anything in late 2010 or thereafter that might constitute "inequitable conduct." Instead, at trial and in her appeal briefing, she seizes on past mistakes and misconduct that Michael deeply regrets, and for which he has atoned. This evidence of past misconduct does not have an "immediate and necessary relation" to the dissociation claim. Furthermore, under *Halls v. White*, 2006 SD 47, 715 N.W.2d 577, Mike had purged the taint of his misconduct long before the claim for dissociation arose.

Delores's excursions into the past cannot excuse her present zeal to freeze Michael out of the GFLP and leverage all of its assets to benefit Greg. Michael's desire to exit the partnership is not grounded solely on the fact that the relationship with his mother is broken, but because of specific actions Delores took as general partner in 2010 and thereafter. That pattern of conduct is what triggered "the controversy at issue," not previously adjudicated matters that took place years before. The issue, in other words, is not the reasoning or emotions that sparked Delores's decision to align with Greg and against Mike, but the effects on GFLP's operations that have followed from her uncompromising allegiance.

On that score, Delores does not muster much of a defense, in part because the land transactions at the heart of the case are indefensible on their own terms. Troy Engstrom, the appraiser hired by Delores and who testified as an expert at trial, repudiated his own work and admitted that the final appraisal value he established

was not even close to fair market value. Delores skirts this issue and, in a quiet footnote, claims that the below-market terms she offered to Greg in the 20-year lease and contract-for-deed are not part of the "merits of this appeal." Appellant's Brief, at 8 n.3. This is demonstrably false.

The lease and contract-for-deed, coupled with the loans that were excluded from evidence at trial, are the principal evidence of Delores's pattern of favoritism and the intractable dysfunction at the heart of the GFLP. As the Circuit Court observed: "Greg has been able to prosper with land deals and loans from the partnership, while Michael appears to be getting the current tax burden sans any dividends." APP.0004. Delores ignores this reality and maintains that there is no cause to intervene on Michael's behalf because he made no contributions to the limited partnership. This "no-harm, no-foul" defense finds no support in law or equity and is based on an erroneous factual premise.

Michael and Greg, as Gibson Livestock, paid for extensive improvements to the feedlot site, including concrete troughs, new buildings, and other enhancements. This work exceeded $1.5 million. (TT 760-762). Greg testified that the feedlot should attract annual rent of $75,000.00 and today, thanks to Delores, he uses it at the same below-market rate as he rents pastureland: $35 per acre. Michael and his family also made extensive improvements to the home place, which they lived in for nearly 18 years before Delores evicted them.

Delores maligns Michael as a johnny-come-lately who is simply seeking his inheritance early. But Michael isn't seeking anything different than what Delores

voluntarily offered his sister, LeAnn, who was bought out in 2004 and then formed another limited partnership with Delores. Michael continues to farm and work in the cattle business in Deuel County, just as he has his entire life.

At all times material to this claim Michael has had no role as a limited partner in the GFLP. Its sole impact, presently, is the financial toll that it exacts. Because the GLFP is profitable on paper, Michael has an annual tax bill that must be paid. He covers that tax bill with income earned through his own farming and other activities because Delores has consciously avoided making any distributions. Instead, she uses the partnership's incoming cash to fund capital expenditures for Greg (such as laying down new concrete in the feedlot), to continue to carry the loans the GLFP had made to him, and to release Greg from binding indemnity obligation and assume responsibility for legal expenses in excess of $100,000.00 that Greg should have paid for. *See, e.g.,* Ex. 16, at 19; TT 782-783.

This is not a case where one limited partner is doing relatively better than another or where an isolated decision is being taken out of context. Delores works in absolute terms, channeling all benefits of the GFLP to Greg and saddling Michael with tax liability and no distributions with which to pay them.

Having established why "unclean hands" does not bar the relief, the sole issue is what form relief should take. Dissolution of GFLP is impractical in view of the long-term property contracts Delores has put in place for Greg's benefit. Michael's request for dissociation is the most sensible resolution to this contentious dispute for which there is no end in sight. It also finds precedent in the prior buyout of LeAnn.

Absent this remedy, the GFLP will continue be used as a means to fan the acrimony and divisiveness that began over a decade ago.

Under governing law, Michael has the power to dissociate from the limited partnership. And, under the facts of this case, the Circuit Court abused its discretion by concluding that the unclean hands doctrine barred the requested relief and by declining to order that Michael be dissociated for value.

II. The evidentiary rulings at issue fatally undermine the legitimacy of the jury's verdict. Alternatively, a new trial should be granted.

If this Court declines to dissociate Michael, it should vacate the jury's verdict and remand for a new trial. The three evidentiary rulings at issue here, whether taken alone or cumulatively, prejudiced Michael and deprived him of a fair trial.

First, evidence of GFLP loans to Greg substantiated Michael's claims and, at minimum, was admissible to impeach Delores. Greg owes the partnership $350,000.00 and has since 2007. Delores has not paid out distributions to the limited partners. In trying to explain her actions, Delores testified to the jury that the partnership was illiquid and couldn't afford to pay distributions. In fact, she consciously structured GLFP's finances to assure that Michael would have tax liability and no monetary benefit from the GFLP. Because of the Circuit Court's erroneous ruling, Michael could not make use of this evidence to support his underlying claims of breach of fiduciary duty and could not confront Delores's account with evidence of the GFLP loans.

Even if *res judicata* precluded Michael from seeking relief on the basis of loans made to Greg, Michael had a right to present evidence relating to the loans to

impeach Delores's credibility.[3] Depriving him of that right made it impossible to rebut Delores's misleading depiction of the partnership's financial condition. Michael was also unable to attack Delores's misleading statement that she had no choice in the matter of whether dividends should be paid. The evidence should not have been excluded in the first place, given the picture of GFLP's finances Delores presented.

By contrast, attorney Robert Ronayne's testimony should have been excluded, as it was patently prejudicial in its substance and underlying purpose. As the extended excerpts quoted in Michael's principal brief make clear, Delores's counsel elicited testimony from Ronayne that tread onto prohibited ground and the Circuit Court admitted this line of testimony over Michael's timely objection. This testimony was improper on its face under the law governing expert testimony.

Alternatively, the probative value of Ronayne's testimony was *de minimis*, as Delores could have requested and obtained a jury instruction that addressed the same legal questions that Ronayne purported to answer. By contrast, the testimony was pregnant with prejudicial effect and the risk of misleading the jury.

Delores's efforts to explain this away fall flat. First, she suggests that Ronayne's testimony was necessary to help frame the parameters that govern the

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[3] Delores argues that she did not open the door to this evidence because GFLP balance sheets were introduced by Michael. But the testimony adduced from Delores's financial advisor, Sarathi Giridhar, made express reference to the cash flow statements that showed the loans (Ex. 140) and subsequent testimony related to the availability of cash for purpose of distributions. *See* TT 594-600. That testimony prompted Michael to move the Court to find that this line of testimony and exhibit, coupled with Delores's prior testimony, opened the door to permit him to address evidence relating to the loan. *See* TT 604-606.

family limited partnership form and explain what Delores's function was. Even if true, this supposition does not cure the most prejudicial statements from Ronayne, which went directly to the legality and reasonableness of Delores's conduct. And, in fact, Ronayne's testimony was not restricted to educating the jury about the limited partnership form or about specific features of the GFLP, as Delores suggests, but instead testified on purely legal issues.

Second, she maintains that Ronayne could permissibly testify as to the reasonableness of the conduct and cites to cases in which expert testimony on a standard of care was deemed admissible. *See, e.g., Nickles v. Shild*, 2000 SD 131, ¶12, 617 N.W.2d 659, 662 (admitting expert testimony on standards and practices in the game of golf and opinion that defendant did not violate standard of care).[4] None of the principles set out in those cases can cure the basic flaw that Ronayne's testimony introduced here: he vouched for the legality and reasonableness of his own work and his client's conduct and thereby improperly invaded the province of the jury.

Ronayne's testimony should have been excluded as improper expert testimony or, alternatively, because its minimal probative value was substantially outweighed by the risk the jury would be prejudiced and misled. Further, the prejudicial effect of Ronayne's testimony is plain. He did not function as an expert, but as an advocate,

[4] Delores also invokes *Bland v. Davison Cnty.*, 1997 SD 92, ¶65, 566 N.W.2d 452, 468, but the identified citation is to Justice Konenkamp's separate writing, joining the majority on four of the five issues but dissenting as to the trial court's decision to disallow expert opinion on industry standards for maintenance of icy roads and advising that he would reverse for a new trial. Justice Sabers, writing separately, also dissented on this issue and indicated he would reverse. The majority affirmed the result and concluded that the trial court did not commit reversible error that would justify a new trial.

testifying on pure legal issues and essentially telling the jury what result it should reach.

Finally, the Circuit Court erred in refusing to consider evidence of post-trial financial accommodations that Delores made on Greg's behalf as part of a motion for reconsideration of the dissociation claim. Delores's choice to pay over $100,000.00 in litigation-related fees for which Greg was responsible substantiates Michael's claim for relief and demonstrates how far her allegiance to Greg goes. That action unquestionably put Greg's personal interests over and above those of the GFLP, and the evidence was relevant and admissible for the Court's consideration before it entered any final order in the case. This post-trial evidence should have been considered and its exclusion was prejudicial error.

CONCLUSION

The Gibson family is embroiled in a long-standing feud with no end in sight. The GFLP has become an instrument to continue the feud and wage a renewed campaign of retribution against Michael. The law of limited partnership provides a remedy – dissociation for value – and that remedy should be granted here. Alternatively, the judgment should be reversed and remanded for a new trial, in view of the Circuit Court's erroneous evidentiary rulings, which, when taken in isolation or together, affected Michael's substantial rights and unfairly prejudiced him to a degree that but for the rulings, the jury, in all probability, would have reached a different result.

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Principal Brief complies with the Type-Volume requirements of SDCL 15-26A-66 in the following manner: The Brief was prepared using Microsoft Word and uses proportionally spaced font [Garamond] in 13-point type. Based on the word-count feature of the MS Word processing system, the Brief contains 4,425 words.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Reply Brief of Appellant Michael Gibson, was sent by e-mail for electronic filing and service to:

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