

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

JEAN MAHER and
WAYNE BRATCHER,

Plaintiffs and Appellees,

v.

TANYA Y. LORENZ,

Defendant and Appellant,

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

THE HONORABLE MICHAEL W. DAY
Retired Judge

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CONSIDERED ON BRIEFS
AUGUST 25, 2026
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JENSEN, Chief Justice

[¶1.] Jean Maher and Wayne Bratcher (Plaintiffs) brought this action to extinguish the express easement providing ingress and egress to Tanya Lorenz’s real property and for damages for her share of the costs to maintain the easement. Plaintiffs also alleged a claim for nuisance. The court granted summary judgment in favor of Plaintiffs on all the claims, except for any maintenance costs owed by Tanya. At trial, the court calculated the maintenance costs owed by Tanya over the prior nine years and assessed those as damages against her. Tanya appeals the court’s grant of summary judgment and the award of damages. We affirm in part, reverse in part, and remand.

Factual and Procedural History

[¶2.] Bruce and Kim Crago (the Cragos) owned real estate in Butte County, South Dakota, described as Government Lots 3 and 4 in the southeast quarter of the southwest quarter of section 19 and the northeast quarter of the northwest quarter of section 20, township 8 north, range 2 east BHM. The Cragos divided the property into separate parcels and sold the parcels to three different parties: Randy and Becky Gropper (the Groppers); James and Jean Maher (the Mahers); and Wayne and Ann Bratcher (the Bratchers).

[¶3.] As a part of the sale, the Cragos and the three parties purchasing the real estate parcels entered into an Easement Agreement (the Agreement) in which the Cragos granted “and convey[ed] a permanent access easement for ingress and egress” to the parcels owned by the Groppers, Mahers, and Bratchers. The property subject to the Agreement became known as “Canyon Creek Lane.” The easement

provided access to Highway 34 for each parcel and required each owner to contribute a proportionate share (1/3 at the time) for repair and maintenance costs of the easement. The Agreement also provided that the easement “shall run with the land, and shall be for the benefit, burden and use of [the three property owners], their heirs, executors, administrators and assigns.” The Agreement was recorded with the Butte County Register of Deeds.

[¶4.] The property purchased by the Groppers from the Cragos consisted of two lots, referred to as the “south 40 acres” and the “north 40 acres.” Both lots were benefited by the easement. William and Barbara Moldenhauer (the Moldenhauers) purchased the “south 40 acres” in 2000, and the Nixons purchased the “north 40 acres” in 2002. On August 4, 2017, the Nixons conveyed the “north 40 acres” to Troy and Tanya Lorenz. During the Lorenzs’ marriage they collectively owned 80 acres, which included the “north 40 acres” purchased from the Nixons and an additional 40 acres immediately north of the “north 40 acres” which abuts Highway 34. The latter parcel was not a part of the original Agreement. After purchasing the “north 40 acres” from the Nixons, Tanya and Troy constructed a driveway across their property which created direct access to Highway 34.

[¶5.] Tanya and Troy divorced in 2021. Tanya now owns and lives on the “north 40 acres,” and Troy owns the 40 acres immediately to the north, which abuts Highway 34. The current owners of the properties that were part of the original Agreement include Jean Maher, who lives with her daughter and son-in-law—Clint Swallow, Wayne Bratcher, the Moldenhauers, and Tanya.

[¶6.] Plaintiffs commenced this action against Tanya, alleging the easement for her property was extinguished by lack of necessity after Tanya and Troy constructed a driveway with direct access to Highway 34. They also alleged that Tanya abandoned the easement through nonuse because she shut a gate on her property abutting the easement from 2017 until October 2021 and allowed “overgrowth and waste to occur” on the easement. Plaintiffs also alleged abandonment based on Tanya’s noncompliance with the Agreement by failing to pay proportionate easement maintenance costs and based on her creation of an alternate access road to Highway 34. Plaintiffs sought damages for Tanya’s share (now 1/4) of easement maintenance costs. In addition, Plaintiffs brought a nuisance claim alleging Tanya had on multiple occasions spotlighted Maher’s property with a high-beam flashlight.

[¶7.] Plaintiffs moved for summary judgment on their claims. In support of the motion, Plaintiffs filed a statement of undisputed material facts setting forth the history of the Agreement and alleged the following material facts as undisputed:

Sometime after Troy and Tanya purchased their property, they built a driveway connecting their residence to Highway 34;

[From] about 2017 for a period of four years, Tanya shut the gate at the end of their property which abutted the easement road;

Tanya allowed overgrowth and waste to occur on her property adjoining the easement;

On or about October 2021, Tanya started using the easement road again;

Tanya has not paid anything to the other Easement holders for road maintenance (gravel/grading/snow removal) since 2017;

Plaintiffs have continuously maintained the easement by paying for upkeep and graveling each year;

On or about 2021 Tanya would spotlight the Maher property from her residence with a hi-beam flashlight on multiple occasions for no valid purpose;

Clint Swallow was present multiple times when this happened.

[¶8.] Plaintiffs submitted affidavits in support of their statement of undisputed material facts. Plaintiffs additionally referenced and attached Tanya's discovery responses, including Tanya's answers to interrogatories, as an exhibit to their statement of undisputed material facts.

[¶9.] Tanya's untimely response to the motion included a brief, an affidavit from Tanya, a response to Plaintiffs' statement of undisputed material facts, and her own statement of material facts in dispute.¹ Tanya admitted most of Plaintiffs' statements of undisputed facts. For each denial, Tanya stated: "Deny. Affidavit of Tanya Lorenz." The circuit court concluded Tanya's responses failed to comply with SDCL 15-6-56(c)(2), which requires the opposing party to "respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record." As a result, the circuit court found Tanya's responses insufficient to dispute any of the facts presented by

1. Tanya submitted a response less than 14 days before the hearing. *See*, SDCL 15-6-56(c), "[A]ny response or reply thereto, including any response to the movant's statement of undisputed material facts, *shall be served not later than fourteen calendar days before the hearing[.]*" (emphasis added). Tanya's counsel informed the court at the summary judgment hearing he had made a calendar error but did not request a continuance or seek permission for the late filings based on excusable neglect. Nonetheless, the court accepted the calendaring error as excusable neglect and permitted the late response from Tanya.

Plaintiffs and applied SDCL 15-6-56(e) to find that summary judgment was appropriate based upon Plaintiffs' statement of undisputed facts.

[¶10.] In granting Plaintiffs' motion for summary judgment, the circuit court concluded that Tanya had abandoned the easement as a matter of law. The circuit court also concluded that the easement was extinguished due to a lack of necessity because Tanya constructed another driveway which allowed access to Highway 34 from the property. The court relied on Tanya's "joint ownership at one-time" of the driveway to find extinguishment, reasoning that there was no longer a necessity for her to use the easement. The court further determined that Tanya's conduct constituted a nuisance, but the court did not award damages or any other relief. Finally, the court concluded that questions of fact existed as to the maintenance costs owed by Tanya for the easement.

[¶11.] Tanya subsequently filed a motion for reconsideration. Based upon a newly submitted affidavit from an employee of the South Dakota Department of Transportation, Tanya argued Canyon Creek Lane is a public highway. The circuit court denied the motions and refused to consider Tanya's new arguments.²

[¶12.] At the trial on the issue of maintenance costs for the easement, Plaintiffs offered exhibits of bids and receipts showing expenses for maintaining the

2. The court noted that Tanya did not provide any reason for her failure to raise these issues during the initial summary judgment proceedings. The circuit court was well within its discretion to disregard the new arguments and evidence. See *Matter of Shirley A. Hickey Living Tr.*, 2022 S.D. 53, ¶ 15, 979 N.W.2d 558, 563 (citation omitted) (describing a motion to reconsider as "an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment").

easement.³ The court found that Clint had performed maintenance on the easement and provided testimony concerning the cost of this maintenance. The court also found when the easement maintenance was not contracted out, the Mahers, Bratchers, and Moldenhauers worked together to maintain the easement through combined efforts and resources.

[¶13.] Tanya did not offer any evidence of her own but made an oral motion to dismiss based on insufficient evidence. The circuit court denied the motion and found that Tanya owed her portion of nine years of maintenance costs from the time she purchased the property until trial. The court also rejected Tanya's argument that she should not have to pay for the years she did not use the easement. In the court's view, Tanya had taken a contrary position in the summary judgment proceedings concerning abandonment and was judicially estopped from claiming she should not have to pay maintenance costs for the years she did not use the easement. Tanya has not challenged this ruling on appeal.

[¶14.] The court entered a final judgment concluding the easement was extinguished as to Tanya's property, she had created a nuisance on the Plaintiffs' property, and awarded Plaintiffs damages of \$6,750 for maintenance costs for the easement. Tanya appeals, raising several issues which we restate as follows:

1. Whether the circuit court erred in granting summary judgment on Plaintiffs' claim that the express easement was extinguished by abandonment and/or lack of necessity.
2. Whether the circuit court erred in granting Plaintiffs' motion for summary judgment on the nuisance claim.

3. The trial exhibits are included in the record, but the transcript of the trial is not included.

3. Whether the circuit court erred in awarding damages for maintenance of the easement.

Standard of Review

[¶15.] Summary judgment is reviewed “under the de novo standard of review.” *Rowe v. Rowe*, 2025 S.D. 40, ¶ 10, 24 N.W.3d 746, 751 (citation omitted).

Summary judgment is proper where, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. We will affirm only when no genuine issues of material fact exist and the law was applied correctly. We make all reasonable inferences drawn from the facts in the light most favorable to the non-moving party. In addition, *the moving party has the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.*

Groves v. Goodsell Oviatt, LLP, 2026 S.D. 33, ¶ 20, 36 N.W.3d 589, 595–96 (emphasis added) (citation omitted).

Analysis

Summary Judgment

[¶16.] Tanya argues summary judgment was inappropriate because there are genuine issues of material fact on the question of whether she intentionally abandoned the express easement. Tanya does not reference or challenge the circuit court’s decision to disregard her responses to Plaintiffs’ statements of material facts as insufficient under SDCL 15-6-56(c).⁴ Plaintiffs maintain the court properly

4. Since Tanya has not challenged the circuit court’s ruling on appeal, we only consider Plaintiffs’ submissions to determine whether Plaintiffs satisfied their burden of proving that there were no genuine disputes of material fact and that they were entitled to judgment as a matter of law.

determined there was no genuine issue of material fact concerning Tanya’s intent to abandon the easement or the lack of necessity for the easement.

[¶17.] As the moving party, Plaintiffs bear the initial burden “of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.” *Groves*, 2026 S.D. 33, ¶ 20, 36 N.W.3d at 596 (citation omitted). In addition to proving that there are no material facts in dispute, Plaintiffs must make a showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Dakota Indus., Inc. v. Cabela’s.Com, Inc.*, 2009 S.D. 39, ¶ 11, 766 N.W.2d 510, 513 (citation omitted).

Abandonment

[¶18.] Easements run with the land. *See* SDCL 43-25-30 (“A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred[.]”).

Accordingly, where

[t]here is no limitation set out in the terms of the easement or grant, either in years, or upon a happening of a particular event as a contingency . . . it has generally been held to be permanent in nature and would continue in operation forever, unless abandoned by non-use. This is particularly true where words of inheritance are used.

Brown v. Hanson, 2007 S.D. 134, ¶ 11, 743 N.W.2d 677, 680 (internal citation omitted).

[¶19.] A party seeking to extinguish an express easement must prove the owner of the property benefited by the easement intended to abandon the easement. *See Boyer v. Dennis*, 2007 S.D. 121, ¶ 9, 742 N.W.2d 518, 520 (“Intent to abandon

the easement is also required.”). An express easement can be extinguished by “any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise.” SDCL 43-13-12. There must be “an affirmative act of abandonment on the part of the owner of the easement to extinguish the easement.” *Boyer*, 2007 S.D. 121, ¶ 9, 742 N.W.2d at 520 (citation omitted).

[¶20.] The determination of whether one has the requisite intent to abandon an express easement “is ordinarily a matter of fact for the determination of the jury, although occasion may arise where the evidence of abandonment is clear and uncontradicted, and the court may be justified in determining abandonment as a matter of law.” 75A Am. Jur. 2d Trial § 642 (2026). “In particular, whether there has been an abandonment of an easement is a question of intention to be determined from all the surrounding circumstances and thus is a question of fact and not of law.” 28A C.J.S. Easements § 190 (2026).

[¶21.] Further, we have stated that “[m]ere nonuse of an easement, created by grant, is insufficient” to satisfy the affirmative act requirement for abandonment. *Boyer*, 2007 S.D. 121, ¶ 9, 742 N.W.2d at 520 (citation omitted). Even slight use has been sufficient to overcome a claim of abandonment. *See Id.* ¶ 10, 742 N.W.2d at 521 (finding that pedestrian, bicycle, and sporadic vehicular use did not reflect an intent to abandon an easement). This Court in *Graves v. Dennis* emphasized that nonuse is normally insufficient to find abandonment, stating:

Failure to take advantage of a servitude benefit, *even for a lengthy period*, is seldom sufficient to persuade a court that

abandonment has occurred. Some additional action on the part of the beneficiary inconsistent with continued existence of the servitude is normally required, although the amount of additional evidence required tends to diminish as the period of nonuse grows longer. In cases where a very long period of time has passed, abandonment may be found even without other evidence of intent.

2004 S.D. 137, ¶ 12, 691 N.W.2d 315, 318 (emphasis added) (citation omitted).

[¶22.] Even “an unintentional or a partial blocking is insufficient to disclose abandonment and so long as the purpose of ingress and egress is not substantially interfered with, no rights of the owners are lost[.]” *Boyer*, 2007 S.D. 121, ¶ 12, 742 N.W.2d at 521 (citing *Harrington v. Kessler*, 77 N.W.2d 633, 635 (Iowa 1956)). “[A] mere neglect of the condition of a way is not enough in addition to nonuser to show abandonment.” *Id.*

[¶23.] The circuit court identified the following undisputed facts to support its finding of Tanya’s intent to abandon the easement: that she built and used an alternative route to Highway 34; she placed a gate across the easement and allowed waste and overgrowth to accumulate on her entrance to the easement for a period of four years; and she failed to contribute to the maintenance costs of the easement. Each of these facts may create inferences as to Tanya’s intent to abandon the easement. However, under our case law, these facts and the inferences to be drawn therefrom, are insufficient to establish Tanya’s intent to abandon the easement as a matter of law.

[¶24.] Additionally, Plaintiffs’ submissions in support of their motion for summary judgment leave unresolved questions of fact for trial. For instance, Plaintiffs asserted that, “On or about October, 2021 Tanya Lorenz started using the

easement road *again*.” (Emphasis added.) This statement suggests Tanya may have been able to use the easement at any time and that she began using it *again* nearly nine months before litigation ensued. Plaintiffs presented no evidence regarding whether the conditions Tanya created prevented her use of the easement, when she last used the easement, or the frequency of her use from 2017 until October 2021.

[¶25.] Tanya’s answers to interrogatories, attached to Plaintiffs’ statement of undisputed material facts, also contradict several of Plaintiffs’ statements regarding the nature of the gate and waste purportedly preventing use of the easement from 2017 to 2021. In support of their claim that a gate/fence obstructed Tanya’s use of the easement for four years, Plaintiffs cited, among other portions of the record, Tanya’s answer to an interrogatory asking her to “provide information on the specific dates [Tanya] fenced across [her] ingress/egress access to Canyon Creek Lane and why [she] took that action.” Tanya’s answer stated:

Never. A temporary wire gate installed for less than a year that did not prevent access by myself or any authorized person. The temporary gate was for animal control purposes.

[¶26.] Plaintiffs also submitted the following statement as undisputed:

On or about 2017 and for a period of four (4) years after Tanya shut the gate at the end of their property which abutted the easement road and allowed for overgrowth and waste to occur on their property immediately up to the easement road.

However, Tanya’s interrogatory answer, attached by Plaintiffs to support their motion, disputed that overgrowth or non-maintenance prevented access to the easement. Tanya’s interrogatory answer stated:

Animals graze the pasture around the gate. Neither the pasture nor the area at the gate are directly maintained in any manner other than driving through the gate or animals grazing.

The record indicates questions of fact remain regarding whether the gate/waste “substantially” interfered with ingress/egress of the easement. *See Boyer*, 2007 S.D. 121, ¶ 12, 742 N.W.2d at 521.

[¶27.] Plaintiffs also point to Tanya’s nonpayment of maintenance fees to support Tanya’s intent to abandon the easement. While this evidence may be relevant to Tanya’s intent, the failure to pay maintenance fees was a failure to act, rather than an affirmative act demonstrating a clear intention to abandon the easement. Plaintiffs presented no facts showing that Tanya refused to contribute toward maintenance or that a demand for contribution was ever made. Instead, Plaintiffs merely assert that she did not contribute toward maintenance costs.

[¶28.] Plaintiffs additionally highlight Tanya’s installation of an alternative route to Highway 34 to support a showing of abandonment as a matter of law. However, we have stated that substituted access “may be evidence of abandonment,” but “that factor alone is not dispositive.” *Hofmeister v. Sparks*, 2003 S.D. 35, ¶ 13, 660 N.W.2d 637, 641.

[¶29.] Plaintiffs’ submissions in support of their motion for summary judgment demonstrate there are disputes regarding whether Tanya had been using the easement between 2017 and 2021 and whether the installation of a gate/fence and alleged non-maintenance prevented ingress/egress to the easement during this time. These facts are all material to the question of whether Tanya intended to

abandon the easement. We reverse the circuit court's order granting summary judgment on this claim and remand for further proceedings.

Necessity

[¶30.] In addition to determining that the easement was abandoned, the circuit court concluded the easement was extinguished by lack of necessity.

However, absent a contrary provision in an easement agreement, an express easement is not conditioned upon necessity. When an easement is created by an express grant, the terms of the easement “are controlled by the words of that grant, its physical size and nature of use.” *Kokesh v. Running*, 2002 S.D. 126, ¶ 12, 652 N.W.2d 790, 793. In contrast, an easement by necessity is a type of implied easement that is “implied in circumstances where a conveyance *without an express easement* leaves a property owner ‘landlocked[.]’” *Heumiller v. Hansen*, 2020 S.D. 56, ¶ 24, 950 N.W.2d 426, 432 n.4 (emphasis added) (internal citations omitted).

[¶31.] This case involves an express easement. The language of the Agreement controls. The Agreement did not make Tanya's right to use the easement conditional on her parcel being landlocked or that the easement would be extinguished by the creation of an alternative access to Highway 34. As such, we reverse the circuit court's order granting summary judgment on extinguishment by lack of necessity and direct the circuit court on remand to dismiss Plaintiffs' claim for extinguishment of the easement based upon lack of necessity.

Nuisance

[¶32.] In moving for summary judgment on their nuisance claim, Plaintiffs presented facts that, “On or about 2021 [Tanya] in her field adjacent to the Maher

property would ‘spotlight’ the residence with a hi-beam flashlight on multiple occasions for no valid purpose.” Plaintiffs also presented facts stating, “Clint Swallow was present multiple times when this happened.” After concluding that Tanya had failed to properly dispute these facts in her resistance, the court granted summary judgment on the nuisance claim.

[¶33.] In granting summary judgment on the nuisance claim as a matter of law, the court primarily relied on SDCL 21-10-1, which provides:

A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:

- (1) Annoys, injures, or endangers the comfort, repose, health, or safety of others;
- (2) Offends decency;
- (3) Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake or navigable river, bay, stream, canal, or basin, or any public park, square, street, or highway;
- (4) In any way renders other persons insecure in life, or in the use of property.

The circuit court held the undisputed facts established that Tanya’s actions were done to “annoy the comfort of others,” and “offends the decency of a normal society and affected Plaintiffs’ enjoyment of property.” The court also found that there was “no valid purpose” for her actions.

[¶34.] SDCL 21-10-1 establishes the conditions or conduct that may create a nuisance, but for a private nuisance the condition or conduct must be:

[T]he legal cause of an invasion of another’s interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for

negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Est. of Olsen v. Agtegra Coop., 2024 S.D. 39, ¶ 29, 9 N.W.3d 763, 771–72 (citation omitted). An invasion is considered “intentional if the actor (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct.” *Atkinson v. City of Pierre*, 2005 S.D. 114, ¶ 13, 706 N.W.2d 791, 796 (quoting Restatement (Second) of Torts § 825 (1979)). Additionally, a condition must “substantially invade[] and *unreasonably* interfere[] with another’s use, possession, or enjoyment of his land.” *Prairie Hills Water & Dev. Co. v. Gross*, 2002 S.D. 133, ¶ 31, 653 N.W.2d 745, 753 (citation omitted).

[¶35.] The limited facts presented by the Plaintiffs fail to establish as a matter of law that Tanya’s conduct was intentional and a “substantial invasion” or an “unreasonable interference” with the Plaintiffs’ use of their property. Aside from a general claim that Tanya flashed her “hi-beams” toward the residence on “multiple occasions,” Plaintiffs presented no evidence of the number of times this occurred, when it occurred, the frequency, or the length of time the high beams were flashed toward the house. There were also no facts showing how often homeowners observed the lights. Given the general nature of this evidence, the court erred in determining as a matter of law that Tanya’s conduct was a nuisance.⁵

5. Without citing any authority, Tanya also argues that a nuisance claim requires damages and so Plaintiffs’ claim must fail. Contrary to Tanya’s position, it is well established that a nuisance claim does not require damages. See *Est. of Olsen v. Agtegra Coop.*, 2024 S.D. 39, ¶ 28, 9 N.W.3d 763, 771 (“Claims for statutory or common law nuisance also do not require a showing of damage as a necessary element of the claims.”).

[¶36.] We reverse the circuit court’s entry of summary judgment on the Plaintiffs’ nuisance claim and remand for further proceedings.

Award of damages

[¶37.] Tanya argues the circuit court erred in determining she was responsible for contributing toward maintenance of the easement and in calculating the amount of damages. At the outset, however, the plain terms of the Agreement obligated Tanya to share in the maintenance cost for the easement. Contrary to Tanya’s assertion, the Agreement did not require Tanya to use the easement or for her maintenance fees to be calculated based on use. The Agreement simply required her to pay her portion of the cost to maintain the road.

[¶38.] Tanya’s sole argument on appeal is that there was insufficient evidence to prove Plaintiffs suffered actual harm or quantifiable loss and that the circuit court improperly “extrapolated” an estimated cost of maintenance over the years.⁶ However, the trial transcript is not in the record, and as such we assume the circuit court’s findings were proper in the absence of some other showing in the record. “A basic tenet of appellate procedure assigns to the appellant ‘the ultimate responsibility for presenting an adequate record on appeal[.]’” *Graff v. Children’s Care Hosp. & Sch.*, 2020 S.D. 26, ¶ 16, 943 N.W.2d 484, 489 (internal citations omitted). When the record is incomplete, “our presumption is that the circuit court acted properly.” *Id.*

6. Tanya has not argued that the circuit court erred in awarding maintenance costs to Plaintiffs after determining that the easement had been extinguished, nor does the record reflect that she made such an argument to the circuit court.

[¶39.] The record does not show there was insufficient evidence to support the court's calculation of maintenance costs. We affirm the circuit court's award of damages.

Conclusion

[¶40.] We reverse the circuit court's determination on summary judgment that the easement benefiting Tanya's property was extinguished and that Tanya committed a nuisance. We affirm the court's award of damages for maintenance costs. We remand the case to the court to dismiss the Plaintiffs' claim for extinguishment of the easement by lack of necessity. We remand Plaintiffs' claims for abandonment of the easement and nuisance for further proceedings.

[¶41.] Lastly, Plaintiffs have moved the Court for appellate attorney's fees pursuant to SDCL 15-17-51. Given our disposition, this appeal was not "frivolous or brought for malicious purposes." *Id.* The motion for attorney's fees is denied.

[¶42.] SALTER, DEVANEY, MYREN, and GUSINSKY, Justices, concur.