IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28780

MICHAEL J. KNECHT,

Plaintiff / Appellee,

v.

GAYLE EVRIDGE AND LINDA EVRIDGE,

Defendant / Appellants.

Appeal from the Circuit Court,
Fourth Judicial Circuit
Perkins County, South Dakota
The Honorable Eric J. Strawn, Presiding

BRIEF OF APPELLANTS

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NOTICE OF APPEAL FILED SEPTEMBER 20, 2018

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JURISDICTIONAL STATEMENT

Appellants, Gayle Evridge and Linda Evridge, appeal from the circuit court's evidentiary rulings during trial, from the circuit court's refusal of their proposed jury instruction, from the jury's verdict, and from circuit court's denial of their Motion for New Trial. Judgment on the jury's verdict was entered on August 22, 2018, and Notice of Entry of Judgment was filed that same day. The circuit court did not issue a ruling on the Motion for New Trial, and the Motion for New Trial was deemed denied pursuant to SDCL § 15-6-59(b). Evridges timely filed their Notice of Appeal on September 20, 2018.

LEGAL ISSUES

I. Whether the circuit court erred in admitting evidence regarding the Supplemental Lease and in excluding evidence of the Intensified Grazing Program.

Bad Wound v. Lakota Cmty. Homes, Inc., 1999 S.D. 165, 603 N.W.2d 723
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II. Whether the circuit court erred in refusing Evridges' proposed jury instruction incorporating the previous Declaratory Orders.

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In re Pooled Advocate Tr., 2012 S.D. 24, 813 N.W.2d 130
In re Estate of Siebrasse, 2006 S.D. 83, 722 N.W.2d 86

III. Whether the jury's verdict for Knecht is supported by the evidence.

Table Steaks v. First Premier Bank, N.A., 2002 S.D. 105, 650 N.W.2d 829
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IV. Whether the jury's determination that Evridges' ranch suffered no damages is supported by the evidence.

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STATEMENT OF THE CASE

Plaintiff/Appellee, Michael Knecht ("Knecht"), brought this action, asserting a breach of contract claim against Defendants/Appellants, Gayle Evridge and Linda Evridge (collectively "Evridges"), who counterclaimed for breach of contract. The circuit court bifurcated the trial, with the legal issues being tried to the court, and the damages being tried to the jury. The court trial was conducted on August 24, August 31, and September 23, 2015. The court entered Findings of Fact, Conclusions of Law and Declaratory Orders on January 11, 2016. The only issues remaining for the jury's determination were damages for breach of contract asserted by Knecht against Evridges and asserted by Evridges against Knecht.

Prior to and throughout the trial, Evridges objected to inquiry and argument that was contrary to, in derogation of, or in regard to matters resolved by the Conclusions of Law and Declaratory Orders. Prior to submission to the jury, Evridges submitted a proposed jury instruction that incorporated the circuit court's relevant Conclusions of Law as stated in the Declaratory Orders, which the circuit court rejected.

Ultimately, the jury awarded Knecht damages totaling $103,730.62, and awarded Evridges damages for their fencing in the amount of $20,000, and the undisputed unpaid rent payments in the amount of $43,824.25. Evridges moved for a new trial on several grounds, which the circuit court denied.

Evridges now appeal from the circuit court's refusal to instruct the jury on the trial court's previous Conclusions of Law and Declaratory Orders, from the

circuit court's evidentiary rulings, from the court's refusal of their proposed jury instruction, from the jury's verdict, and from the circuit court's denial of their Motion for New Trial. Knecht also filed Notice of Appeal, raising several issues, and the two appeals have now been consolidated.

STATEMENT OF THE FACTS

The following facts are taken in large part from the circuit court's Findings of Facts issued after the court trial. While some of the facts may be disputed by the parties, there has been no appeal from the court trial or from the circuit court's Findings of Fact, Conclusions of Law and Declaratory Orders.

Knecht and Evridges are Perkins County residents. CR 2209. Evridges own 3,070 acres of property used for ranching and farming (the "Ranch") along twelve miles of the North Grand River. CR 2209. The Ranch is adjacent to the Grand River National Grassland, and a portion of the Ranch has grazing rights with the Grand River Cooperative Grazing Association ("Grazing Association"), a non-governmental entity tasked with controlling grazing of governmentowned property within the national grassland. CR 2209-2210.

In 2012, Knecht ran an advertisement in a local paper seeking to lease ranchland for his herd of cattle. CR 2210. Knecht needed to lease land especially for summer and fall grazing, but preferably year-round. CR 2201. Linda Evridge called Knecht and said that she and her husband Gayle wanted to retire and rent the Ranch through a long-term lease. CR 2210. Knecht told Evridges that is what he had been looking for – a long-term lease to increase his cattle numbers over

several years. CR 2210. Evridges informed Knecht that the Ranch was tied to the Grazing Association on the National Grasslands where they had over 200 summer grazing units currently, in addition to the cattle that could be kept year round on the Ranch. CR 2210.

After phone calls between the parties, a viewing of the Ranch, and discussion of terms, the parties agreed to a lease. CR 2210. Gayle Evridge explained to Knecht that the rent would be based on AUMs (Animal Unit Month) and that the total yearly lease would be $157,000.00. CR 2201. Evridges requested the yearly payment up-front each year, but Knecht, based on the advice of his banker, wanted the yearly lease amount payable in two yearly payments. CR 2210.

Evridges were under the impression that the only way they could lease the Ranch was by having two leases. CR 2211. Accordingly, their attorney, Tim Parmley, prepared two written leases, which were presented to Knecht on December 3, 2013. CR 2211. One lease, the "Agricultural Lease," had a per acre price of $28.55 for 3,070 acres for the Ranch. CR 2211. The second lease, the "Supplemental Lease" contained the same real property description, but a set yearly rental to graze 200 head cow/calf pairs and 6 bulls. CR 2211.

Pursuant to the Grazing Association Rules, all leases had to be filed with the association by March 1, 2014. CR 2211. Gayle Evridge filed the Agricultural Lease with the Grazing Association to transfer the grazing permit to Knecht for

the three-year lease term. CR 2211. The Grazing Association transferred the permit to Knecht. CR 2211.

Knecht initially made the payments as required under the leases. CR 2211. In early 2014, Knecht moved his cattle onto the Evridge Ranch. CR 2211. Knecht used the Evridge Ranch and the Grazing Association permit to graze his cattle. CR 2212.

When Knecht took possession of the Ranch in 2014, Evridges had some horses and bulls on the property. CR 2212. Knecht did not object to the Evridges keeping the horses and bulls until the lawsuit was filed. CR 2212. Although not in the Agricultural Lease, Knecht agreed to allow Evridges to keep some horses and bulls in pastures around their home. CR 2212.

The Supplemental Lease provided, among other things, for shared-use of Section 36. CR 2216. Pursuant to the lease, Evridges retained the use of Section 36 for feeding heifers from the first part of October through the first part of December. CR 2012. In October of 2014, Gayle Evridge asked Knecht if he could move his 400 head of feeding heifers to another pasture on the Ranch. CR 2012. Knecht would not agree. CR 2012. Gayle Evridge told Knecht, "Maybe this is not the best lease for you." CR 2012. Evridges cut some fences and moved their heifers to other pastures on the Ranch without Knecht's permission. CR 2012.

Evridges had engaged in an intensive grazing management plan for several years prior to leasing to Knecht. CR 2212. The intensive grazing plan required

the Ranch to be divided into multiple pastures and the rotation of livestock on a regular basis. CR 2012. Evridges claim their intensive grazing management plan was incorporated into the contracts. CR 2012. There is no mention of the intensive grazing plan in the contracts. CR 2012. There is, however, a provision in the Agricultural Lease which provides Evridges have the ability to direct movement of cattle on the Ranch. CR 2012-2013.

Preceding the leases to Knecht, an April 2013 prairie fire damaged fences on the Ranch, and later that year, a winter storm further caused damages to the fencing. CR 2213. The fences were not in a condition to operate the intensive grazing plan without Knecht completing fencing, and the leases required Knecht to maintain the fences. CR 2213.

In 2015, Knecht tendered payment for the leases, but Evridges refused that payment based on rescission. CR 2213. The payment was deposited with the Perkins County Clerk of Courts. CR 2213. Knecht again made use of the Evridge Ranch and the Association Grazing permit in 2015. CR 2213.

In August of 2015, the Grazing Association became aware of the Supplemental Lease. CR 2213. The Grazing Association advised that the failure to notify the Association of the Supplemental Lease was a violation, and the grazing permit was suspended for 2016. CR 2213. This lawsuit ensued.

In his Amended Complaint, Knecht alleged breach of the Lease, alleging Evridges breached his right to quiet enjoyment of the property and the covenant of good faith and fair dealing. CR 1134. Knecht alleged he was damaged by way of

loss of grazing, loss of hay crop, loss of calves, loss of grain crop and loss of use of the leased property. CR 1134. Knecht requested a declaratory judgment regarding his rights under the Lease. CR 1135-1136. Knecht also alleged negligent misrepresentation, deceit, and fraud, based on his claim that Evridges made certain representations to him in order to entice him to lease their property. CR 1136-1142.

For their Counterclaim, Evridges alleged Knecht failed to pay all rent due and failed to utilized good husbandry or range management practices, resulting in overgrazing of and uncontrolled weeds on the Ranch. CR 3076. In addition, Evridges alleged Knecht failed to repair or maintain damaged fencing on their property. CR 3076. As a result, Evridges brought causes of action for breach of contract, breach of contract and waste, breach of implied obligation, negligence, holdover tenancy, trespass, and intentional damage. CR 3076-3078.

A court trial was held on August 24, August 31, and September 23, 2015, Judge Randall L. Macy presiding. CR 1203, 1512, 1825. Following the court trial, the circuit court entered Findings of Fact, Conclusions of Law, and Declaratory Orders. CR 2209-2217. The circuit court found that the parties entered into two valid contracts, with the Agricultural Lease being binding and the Supplemental Lease being voidable. CR 2214-2215. The circuit court based its holding on the following conclusions:

- The consideration for the Agricultural Lease was annual rent of $87,648.50 to the Evridges in exchange for the right to graze cattle and farm the 3,070 acres comprising the Ranch.

- The Agricultural Lease has all the essential elements of a valid contract.

- The Agricultural Lease of 3,070 acres of the Ranch is a valid contract and is legally binding on the parties as of December 3, 2013 for a term of three years.

- The consideration for the Supplemental Agricultural Lease was annual rent of $69,351.50 in exchange for the right to graze an additional 200 cows and calves and six bulls directly tied to the Grand River Grazing Association permit.

- The Supplemental Lease allows for grazing on the Grand River Grazing Association land. It states: "In the event the permit is not transferred, LESSEE may terminate or renegotiate this lease." The power to terminate in the event the permit does not transfer is not available in the Agricultural Lease.

- The Supplemental Agricultural Lease has all the essential elements of a valid contract and is legally binding. However, Knecht may, pursuant to the written terms of the Supplemental Lease, choose to terminate this lease because the grazing rights from the Grazing Association did not transfer to Knecht for 2016. Therefore, the Supplemental Lease is a voidable contract.

- The Court also concludes that Knecht knew the Supplemental Lease involved the Grazing Association permit.

- Knecht made use of the permit and cannot seek recovery for money paid to Evridge in 2014 or 2015.

- Knecht received the benefits of the Supplemental Lease in 2014 and 20l5.

- *In 2016 the permit will not be issued: Knecht's remedy is included in the Supplemental Lease. He may terminate the lease.*

- Knecht cannot seek recovery of the amounts he paid on the Supplemental Lease in 2014 or 2015.

CR 2214-2215 (emphasis added).

In addition, resolving ambiguities in the leases against the Evridges, the circuit court held:

- There are no terms referring to the implementation of a Grazing Plan. The provision allowing Evridges to direct the movement of cattle is vague and ambiguous.

- Therefore, the implementation of a Grazing Plan is resolved against the Evridges.

- Knecht was not obligated to implement a Grazing Plan on the Ranch.

CR 2216. Accordingly, the circuit court entered the following Declaratory Orders:

- The Agricultural Lease is a valid and binding contract.

- The Supplemental Lease is a valid and voidable contract. Knecht may terminate this lease.

- Knecht was not obligated to implement a Grazing Plan on the Ranch.

- *Evridges are entitled to shared-use of Section 36 from the beginning of October to the beginning of December.*

- *Evridges may keep the small number of horses and bulls on the Ranch that were on the Ranch when Knecht took possession.*

- There has been a failure to prove an anticipatory breach in either the Agricultural Lease or the Supplemental Lease.

- There has been a failure to prove a rescission of either the Agricultural Lease the Supplemental Lease.

- *Knecht may not recover money for the failure of the Grazing Association to transfer the permit for 2016. Knecht's remedy is contained in the contract and he may terminate the Supplemental Lease.*

CR 2216-2217 (emphasis added). There has been no appeal from the court trial or from the Findings of Fact, Conclusions of Law, and Declaratory Orders.

The jury trial on the issue of damages was held on December 13 through December 15, 2017, with a different circuit judge, Judge Eric J. Strawn, presiding. CR 3431-4233. Evridges proposed a jury instruction that incorporated Judge Macy's previous Declaratory Orders. CR 3146. The proposed jury instruction would have instructed the jury:

> Previously, the Court entered Orders with which the parties are bound and the jury is to follow:
>
> 1. The Agricultural Lease is a valid and binding contract.
> 2. The Supplemental Lease is a valid and voidable contract. Knecht may terminate this lease.
> 3. Knecht was not obligated to implement a grazing plan on the ranch.
> 4. Evridges are entitled to shared use of Section 36 from the first part of October to the first part of December.
> 5. Evridges may keep the small number of horses and bulls on the ranch that were on the ranch when Knecht took possession.
> 6. Knecht may not recover money for the failure of the Grand River Cooperative Grazing Association to transfer the permit for 2016. Knecht's remedy is contained in the contract and he may terminate the Supplemental Lease. Knecht exercised his remedy and terminated the Supplemental Lease for 2016.

CR 3145. The parties and the circuit court discussed the proposed instruction. CR 3967-3972. The circuit court refused this instruction, stating: "But the Court has looked at Number 6, which talks specifically about, 'Knecht may not recover money for the failure of the Grand River Cooperative Grazing Association to transfer the permit for 2016. Knecht's remedy is contained in the contract and he may terminate the supplemental lease.' The Court finds that Number 6 may in of

itself be confusing and will frustrate the jury's fact-finding task, and as a result, I'm going to deny the jury instruction from being entered." CR 4149.

The jury ultimately awarded Knecht damages totaling $103,730.62 for years 2014 and 2015, and awarded Evridges damages totaling $63,824.25 for rent and fencing. CR 3149-3150; 4236-4237. Both Evridges and Knecht appeal from the jury verdict. CR 4352, 4360.

ARGUMENT AND AUTHORITIES

A. Certain of the Trial Court's Evidentiary Rulings Were Erroneous and an Abuse of Discretion

"The standard of review of 'a trial court's evidentiary ruling is that of abuse of discretion.'" *Bad Wound v. Lakota Cmty. Homes, Inc.*, 1999 S.D. 165, ¶ 6, 603 N.W.2d 723, 724-25 (other citations omitted). "'The trial court's evidentiary rulings are presumed correct and will not be overturned absent a clear abuse of discretion.'" *St. John v. Peterson*, 2011 S.D. 58, ¶ 10, 804 N.W.2d 71, 74 (other citations omitted). *See also Ferebee v. Hobart*, 2009 S.D. 102, ¶ 12, 776 N.W.2d 58, 62 ("this Court reviews a decision to admit or deny evidence under the abuse of discretion standard. . . . This applies as well to rulings on motions in limine.") (other citations omitted). "'When a [circuit] court misapplies a rule of evidence, as opposed to merely allowing or refusing questionable evidence, it abuses its discretion.'" *Kurtz v. Squires*, 2008 S.D. 101, ¶ 3, 757 N.W.2d 407, 409 (other citations omitted). "'The term 'abuse of discretion' defies an easy description. It is a fundamental error of judgment, a choice outside the range of permissible

choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *Id.* (citation omitted)

1. Evidence and Findings of Fact and Conclusions of Law Regarding the Supplemental Lease

Judge Macy found: "The Ranch is adjacent to the Grand River National Grassland. A portion of the Ranch has grazing rights with the Grand River Cooperative Grazing Association ("Grazing Association"), a non-governmental entity tasked with controlling grazing of government owned property within the national grassland." CR 2209-2210. In regard to the Grazing Association, Judge Macy also determined:

> The Evridges said the Ranch was tied to the Grazing Association on the National Grasslands where they had over 200 summer grazing units currently, in addition to the cattle that could be kept year round on the Ranch.
>
> The Evridges have been members of the Grand River Grazing Association since 1991. Evridges have held a grazing permit for over 40 years. Gayle Evridge knew the rules of the Grazing Association for obtaining and transferring the grazing permit.

CR 2210. Additionally, Judge Macy concluded: "In 2014, Knecht used the Evridge Ranch and the Grazing Association permit to graze his cattle" and that "[i]n 2015, Knecht again made use of the Evridge Ranch and the Association Grazing permit. In August of 2015, the Grazing Association became aware of the Supplemental Lease. The Grazing Association advised that the failure to notify the Association of the Supplemental Lease was a violation and the grazing permit was suspended for 2016." CR 2212-2213.

Based on those findings of fact, Judge Macy held that the Supplemental Lease allowed for grazing on the Grand River land, and specifically provided: "In the event the permit is not transferred, LESSEE may terminate or renegotiate this lease." CR 2214. Judge Macy's legal conclusion was that the Supplemental Lease was, therefore, voidable. Judge Macy went on to conclude:

> Knecht knew the Supplemental Lease involved the Grazing Association permit. Knecht made use of the permit and cannot seek recovery for money paid to Evridge in 2014 or 2015. . . . In 2016 the permit will not be issued. Knecht's remedy is included in the Supplemental Lease. He may terminate the lease. Knecht cannot seek recovery of the amounts he paid on the Supplemental lease in 2014 or 2015.

CR 2215. Judge Macy then entered several Declaratory Orders:

> (3) Evridges are entitled to shared-use of Section 36 from the beginning of October to the beginning od December.
>
> (4) Evridges may keep the small number of horses and bulls on the Ranch that were on the Ranch when Knecht took possession.
>
> . . .
>
> (8) Knecht may not recover money for the failure of the Grazing Association to transfer the permit for 2016. Knecht's remedy is contained in the contract and he may terminate the Supplemental Lease.

CR 2217.

Judge Macy's findings, conclusions, and Declaratory Orders were the law of the case, and could not be re-litigated during the damages portion of the trial. *See In re Pooled Advocate Tr.*, 2012 S.D. 24, ¶ 23, 813 N.W.2d 130, 139 (applying the "law of the case" doctrine to a declaratory judgment order and

explaining "the 'law of the case' doctrine . . . stands for the general rule that 'a question of law decided by" a court "becomes the law of the case, in all its subsequent stages[.]" "'The 'law of the case' doctrine is intended to afford a measure of finality to litigated issues.'") (citing *In re Estate of Siebrasse*, 2006 S.D. 83, ¶ 16, 722 N.W.2d 86, 90). Consequently, Evridges objected to all evidence regarding the Grand River grazing permit on the ground it was irrelevant because that issue had been decided, was the law of the case, and could not be re-litigated.

Nevertheless, during the jury trial, the circuit court allowed Knecht to argue and submit evidence and testimony on issues undeniably decided by Judge Macy's Declaratory Orders. For example, just prior to trial commencing, in response to Evridges' objection and in an attempt to relitigate Judge Macy's Declaratory Orders, counsel for Knecht argued:

> My client's testimony will be that he doesn't believe he overgrazed the property, but he did have more cattle on it, and the reason he had more cattle on it is because he didn't have Grand River permits. I mean, those permits allowed 230 cattle to be grazed for five and a half months, and he had to figure out where those cattle were going to be during the time frame that the prior two years they had been out on Grand River, and so some of those cattle stayed on his place at home and some of those cattle were on the Evridge place. And that's a direct result of Grand River pulling the permit, which is a direct result of the second lease.
>
> * * *
>
> So if we're going to dismiss the counterclaim, my client doesn't need to get into that, but if we're going to talk about the counterclaim and the alleged overgrazing, my client needs to explain why he had more cattle on that property in 2016. And that goes

> directly to the heart of Grand River, and why Grand River pulled the permits. It has to come in. It's all so interwoven with this we can't not talk about it.

CR 3435-3436. Then, during opening statement, counsel for Knecht stated:

> And so as you walk through how this relationship developed, Mr. Knecht got his cattle out there in the spring of 2014. Not long after that, he got a bill from Grand River Grazing Association. He thought he had paid the Evridges in his lease agreement because you'll see documents that identify exactly how they arrived at the price for those Grand River Grazing permits, and yet he got a bill from the Grand River Grazing Association for the same thing. Little did he know, those permits came with the first lease and had nothing to do with the second secret lease that really was only entered into because Grand River Grazing Association wouldn't allow the price that Evridges wanted for their property. It was against their rules of management.
>
> So Mike gets a bill from Grand River Grazing Association, he starts to ask questions. Finds out that the reason the second lease was a secret was because Grand River Grazing never would have allowed it.

CR 3451. Counsel for Evridges objected again and requested a standing objection to evidence on those issues, which the court overruled. CR 3452, 3471-3472. And throughout the trial, counsel for Evridges objected to various witnesses whose testimony related to those issues. *See e.g.* CR 3512, 3513-3514, 3526, 3539, 3532, 3533, 3535.

The circuit court also allowed Knecht's testimony about whether the lease arrangement between him and Evridges violated Grand River Grazing Association's rules of management: "Q. Mike, at some point did you become aware of whether or not the lease arrangement you had with Evridges violated Grand River's rules of management? A. Yeah." CR 3513. Counsel for Evridges

objected on the basis of relevance. *See id.* In addressing this issue, counsel for Evridges argued:

> How could it remotely be possibly relevant? Your Honor, we had a declaratory judgment action. The Court concluded that Mr. Knecht owed on the Ag lease and the supplemental lease for 2014 and 2015 and concluded that he had the right to terminate the supplemental lease in 2016 if the Grand River Grazing permits were not reissued to him that year. They were not reissued to him. He terminated that lease.
>
> So he didn't have -- he wasn't obligated to pay into the supplemental lease. He just had the agricultural lease. So the fact that this suggestion of what the rules and regulations of the Grand River Grazing Association is, we're not litigating that. They're not a party to this. There's going to be suggestions that violated their rules, there's going to be suggestions that it was illegal, there's going to be suggestions of all kinds of things. It doesn't make any difference. It has nothing to do with this lease.

CR 3514. Counsel for Evridges continued:

> It's all so simple. The Ag lease was in effect three years, the supplemental lease was in effect two years. Because he could not put his livestock on the Grand River in '16, he had the right to terminate this $69,000 obligation. He chose to terminate. That was his remedy. It's done. So now he has an Ag lease in 2016 and he's to comply with it. He doesn't have a permit –

CR 3516-3517. The circuit court overruled the objections, stating:

> The objection has been made. It is overruled. I will allow Mr. Galbraith to continue on this path. I'm really kind of fixing this on the idea that in some way it is really supporting the idea of the defense for the overgrazing, but also for your breach, so I'll allow you to proceed. Mr. Brady, your objections will be noted and ongoing.

CR 3518-3519.

Contrary to the Declaratory Orders and despite repeated objections to the admissibility and relevance, Knecht was further allowed to introduce evidence and call witnesses regarding these issues. For instance, over objection by Evridges, Knecht called Todd Campbell, the executive director of the Grand River Grazing Association, and Dan Anderson, the president of the Grand River Grazing Association, and elicited testimony from them regarding whether the Supplemental Lease violated the Grazing Association rules of management, and why the Grand River Grazing Association was not renewing the grazing permit for 2016. CR 3655, 3696-3703, 4042, 4066-4068.

But all of these issues had been previously litigated, considered, and decided by Judge Macy. CR 2209-2217. The law of the case doctrine barred Knecht's attempt to relitigate these issues. *See In re Pooled Advocate Tr.*, 2012 S.D. 24, ¶¶ 23-26, 813 N.W.2d at 139.

Moreover, none of this testimony or evidence was related to one issue before the jury – what damages, if any, resulted to Knecht from Evridges' alleged breach of the Agricultural Lease? This evidence did not support Knecht's claim for loss of grazing, hay, calves, grain crop, or loss of leased property from the alleged breach of the Agricultural Lease. Whether there could be a second lease or why the grazing permit for 2016 was canceled had absolutely no relevance to any issue.

Rather, the sole purpose of such evidence and testimony and the undeniable end result was to prejudice Evridges. The whole exercise was an attempt to

challenge the Evridges' credibility, honesty and integrity, all of which had absolutely nothing to do with a breach of Agricultural Lease by Evridges, and everything to do with an effort to inflame the jury and impassion them adversely to Evridges on issues that had already been determined by the circuit court. Again, the issue of the validity of the leases, and more importantly, Knecht's remedy under the Supplemental Lease, had already been determined by the circuit court.

Allowing such evidence on an issue not even before the jury was confusing, at best, and resulted in an unfair trial to Evridges, not only as to the damages awarded to Knecht but the refusal to award damages to Evridges for overgrazing. Indeed, Knecht used this evidence to claim he could use and overgraze the Ranch for his cattle because he did not have use of the grazing permit. But Judge Macy made clear that Knecht's remedy for not having use of the grazing permit was to terminate the Supplement Lease, not to overgraze the Ranch. Knecht exercised his remedy and terminated the Supplement Lease. Consequently, he was left with the Agriculture Lease, a valid and binding contract. This lease specifically provided "LESSEE agrees to use the property for agricultural purposes only and shall not *overgraze*[.]" CR 2788 (emphasis added).

In short, evidence and testimony about the execution of the lease documents or the reason the permit was not issued in 2016 was simply not relevant to any breach of contract claim. Moreover, these issues were decided by Judge Macy, whose rulings were the law the case. Knecht was precluded from

relitigating the issues before the jury. *See In re Pooled Advocate Tr.*, 2012 S.D. 24, ¶¶ 24-26, 813 N.W.2d at 139. The admission of any such evidence was erroneous and prejudicial to Evridges. The jury verdict should be reversed on this basis.

2. The Trial Court Erred in Refusing Evridges' Proffered Evidence Regarding the Intensified Grazing Program

After the court trial, Judge Macy entered just one finding of fact relating to the intensified grazing program:

> Evridges had engaged in an intensive grazing management plan for several years prior to leasing to Knecht. The intensive grazing plan required the Ranch to be divided into multiple pastures and the rotation of livestock on a regular basis. Evridges claim their intensive grazing plan was incorporated into the contracts. There is no mention of the intensive grazing plan in the contract. There is a provision in the Agricultural Lease which provides Evridges have the ability to direct movement of cattle on the Ranch.

CR 2212. Judge Macy entered no conclusions of law regarding the intensified grazing program. CR 2213-2216.

At the jury trial, Evridges sought to introduce testimony from Mr. Baumberger, who would offer his opinions regarding Knecht's overgrazing, which would, in part, include testimony regarding the "intensified grazing program." CR 3852. Knecht objected to Baumberger's testimony, and the circuit court took up the issue outside the presence of the jury. *Id.* at 3852-3854. Counsel for Evridges then made an offer of proof regarding Baumberger's proposed testimony:

> MR. BRADY: So if a person were to represent the capacity of that, it's -- of the Turkey Track, its capacity would be different if you ran it under an intensified grazing system versus just doing it however?

> MR. BAUMBERGER: Correct. You'd have more flexibility.
>
> MR. BRADY: Okay. So if a person would run 450 head out there on this ranch under an intensified grazing program, would you expect to be able to run the same number of head if you did not follow the grazing program?
>
> MR. BAUMBERGER: No.
>
> MR. BRADY: And so if you ran the same number of head out there without following the grazing program, does that risk overgrazing?
>
> MR. BAUMBERGER: Yes.

CR 3857. The circuit court still sustained Knecht's objection to Baumberger's testimony. *Id.* at 3858. Later, Gayle Evridge was also precluded from testifying about the intensified grazing program. CR 4015-4016.

Declaratory Order (3) states: "Knecht was not obligated to implement a Grazing Plan on the Ranch." Given that Declaratory Order (because it was the law of the case), Evridges were precluded from making a claim for damages in the jury trial for Knecht's failure to follow their intensified grazing program. But, the circuit court erroneously ruled that Evridges were also precluded from referring to or testifying about their intensified grazing program in totality, particularly in defense to the claims of Knecht as to how many cattle the Ranch could sustain without causing damage.

As the proffered testimony suggested, Evridges could run far more livestock pursuant to their intensified grazing program than could be sustained on the Ranch if the intensified grazing program were not followed. Knecht did not

have to follow that program – again, the law of the case. But Knecht claimed he was not overgrazing and could run more cattle than the pasture could handle because Evridges had done the same in the past. But Evridges could run more cattle on the pasture without overgrazing because they followed their intensified grazing plan. Evridges were precluded from explaining all of this to the jury and defending Knecht's claim and Knecht's claim Evridges represented the capacity to be greater than it was. This was an abuse of discretion.

The circuit court also erroneously precluded Evridges' expert witness, Rod Baumberger, from testifying about the intensified grazing program to give an explanation on a number of factors affecting the grazing program: how the Ranch was set up into 22 different pastures, why there were fences where they were, why there were water systems where they were, why the range capacity of the ranch was enhanced because of the intensified grazing program if followed, and why, when Knecht did not follow the program (as he was not required to do), that his number of livestock on the ranch in 2016 was too many and resulted in overgrazing the ranch as of September 2016 (and then he even continued to have his high numbers of livestock on the ranch for three additional months).

Further, Knecht was allowed to claim that Evridges overrepresented the grazing capacity of the Ranch to handle his herd. However, the circuit court precluded the Evridges from explaining how the Ranch capacity could be enlarged if the intensified grazing plan was utilized, which formed the basis of their representations. If Knecht had followed their plan, Knecht's herd could have been

handled and not have caused harm to the Ranch. Knecht did not follow their plan, causing harm to the Ranch because he was not able to run the same number of cattle the Evridges had in the past.

The court in essence allowed Knecht to claim that Evridges misrepresented the capacity of the ranch, yet erroneously precluded Evridges from defending and explaining how to maximize capacity. Evridges' credibility was attacked regarding how they operated their ranch and yet they were refused the opportunity to explain how they did it, why they did it, the science behind how they did it, the set up of their ranch to do it, the success that they had doing it, and the amount of grass to graze that could be generated if it were done, all of which supported their claim for overgrazing in 2016. Consequently, the jury awarded Evridges nothing on their overgrazing claim, despite the undisputed testimony of expert Rod Baumberger that the Ranch was overgrazed by September of 2016.

The proffered testimony regarding the intensified grazing program was significant to the claim of overgrazing, an issue that was not settled by Judge Macy's Declaratory Orders. As the proffered testimony established, overgrazing was directly affected by the intensified grazing program. The circuit court's exclusion of testimony relevant to this issue was detrimental to Evridges' claim of overgrazing and reversible error. *See St. John v. Peterson*, 2011 S.D. 58, ¶ 10, 804 N.W.2d at 74; *In re Pooled Advocate Tr.*, 2012 S.D. 24, ¶¶ 24-26, 813 N.W.2d at 139.

B. The Trial Court erred in Failing to Instruct the Jury on the Trial Court's Previous Findings of Fact, Conclusions of Law and Declaratory Orders

This Court has summarized the standard of review for jury instructions:

> A trial court has discretion in the wording and arrangement of its jury instructions and therefore we generally review a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard. However, no court has discretion to give incorrect, misleading, conflicting, or confusing instructions: to do so constitutes reversible error if it is shown not only that the instructions were erroneous, but also that they were prejudicial. . . . "Erroneous instructions are prejudicial when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party."

Jacquot v. Rozum, 2010 S.D. 84, ¶ 21, 790 N.W.2d 498, 505-06 (internal and other citations omitted). *See also Vetter v. Cam Wal Elec. Co-op., Inc.*, 2006 S.D. 21, ¶ 10, 711 N.W.2d 612, 615. "Accordingly, when the question is whether a jury was properly instructed overall, that issue becomes a question of law reviewable de novo. Under this de novo standard, 'we construe jury instructions as a whole to learn if they provided a full and correct statement of the law.'" *Id.* (other citations omitted).

This Court reviews the circuit trial court's refusal of a proposed instruction for abuse of discretion. *See State v. Eagle Star*, 1996 S.D. 143, ¶ 13, 558 N.W.2d 70, 73. However, it considers whether the jury was "properly instructed overall" de novo. *See Vetter*, 2006 S.D. 21, ¶ 10, 711 N.W.2d at 615. While the circuit court has broad discretion in instructing the jury, it also "has a duty to instruct the jury on the law applicable to a particular case." *Black v. Gardner*, 320 N.W.2d 153, 158 (S.D. 1982). "Jury instructions are sufficient when, considered as a

whole, they correctly state the applicable law and inform the jury." *Eagle Star*, 1996 S.D. 143, ¶ 13, 558 N.W.2d at 73 (other citations omitted).

As noted above, following the court trial on the legal issues, the circuit court entered Findings of Fact, Conclusions of Law and Declaratory Orders. Those findings, conclusions and orders became the law of the case. *See In re Pooled Advocate Tr.*, 2012 S.D. 24, ¶¶ 24-26, 813 N.W.2d at 139; *In re Estate of Siebrasse*, 2006 S.D. 83, ¶ 16, 722 N.W.2d at 90 ("The 'law of the case' doctrine is intended to afford a measure of finality to litigated issues. It is a rule of practice and procedure which for policy reasons provides that once an issue is litigated and decided it should remain settled for all subsequent stages of the litigation") (other citations omitted). The circuit court was bound by those findings, conclusions, and orders during the damages phase of trial. *See id.*

Accordingly, to properly and completely inform the jury of the settled issues in the case, Evridges submitted a proposed jury instruction that incorporated Judge Macy's relevant conclusions of law. Evridges requested that the circuit court instruct the jury:

> Previously, the Court entered Orders with which the parties are bound and the jury is to follow:
>
> 1. The Agricultural Lease is a valid and binding contract.
> 2. The Supplemental Lease is a valid and voidable contract. Knecht may terminate this lease.
> 3. Knecht is not obligated to implement a grazing plan on the ranch.
> 4. Evridges are entitled to shared use of Section 36 from the first part of October to the first part of December.

5. Evridges may keep the small number of horse and bulls on the ranch that were on the ranch when Knecht took possession.
6. Knecht may not recover money for the failure of the Grand River Cooperative Grazing Association to transfer the permit for 2016. Knecht's remedy is contained in the contract and he may terminate the Supplemental Lease.

CR 3145. The circuit court erroneously refused this instruction, resulting in prejudice to Evridges.

Because the proposed jury instruction incorporated the law of the case, nearly word for word, that instruction correctly stated the applicable law and informed the jury as to what issues had already been determined. *See In re Pooled Advocate Tr.*, 2012 S.D. 24, ¶¶ 24-26, 813 N.W.2d at 139. The circuit court's refusal to instruct the jury on the applicable law of the case resulted in the jury not being properly instructed. The jury was not provided any instruction regarding the circuit court's own findings, conclusions, and orders, and the jury was allowed to hear evidence and argument contrary to, in derogation of, or in regard to matters resolved by the circuit court during the court trial. As a result, the jury awarded Knecht damages for Evridges' horses' and bulls' presence on the Ranch, as well as Evridges' use of Section 36, all issues that had already been determined by Judge Macy. CR 2216. *See In re Pooled Advocate Tr.*, 2012 S.D. 24, ¶¶ 24-26, 813 N.W.2d at 139.

For example, Judge Macy ruled, "Evridges are entitled to shared-use of Section 36 from the beginning of October to beginning of December" and "Evridges may keep the small number of horses and bulls on the Ranch that were

on the Ranch when Knecht took possession." CR 2216. But Judge Strawn refused to so instruct. As a result, the jury awarded Knecht damages for the presence of Evridges' horses on the land – horses that Judge Macy had already concluded were allowed to be there. CR 2216. Without a doubt, had the circuit court properly instructed the jury on its prior conclusions and orders (the law of the case), the jury would not have awarded any damages to Knecht by reason of Evridges' eight horses that were on the property, because the jury would have been instructed that Evridges were entitled to have them there. In other words, the jury would not have awarded Knecht such damages because it would have been properly instructed it could not do so.

Similarly, Evridges had 22 bulls on the property at the time the lease commenced and they were entitled to have them there, according to Judge Macy's Conclusions of Law and Declaratory Orders. CR 2216. They only had 12 bulls in 2015 and none in 2016. As a matter of law, Knecht could not have been awarded damages for Evridges' bulls' presence on the property in 2014 or 2015, but the jury awarded just such damages because the jury was not instructed that it could not.

Likewise, Judge Macy concluded that Evridges used Section 36 and they were entitled to use Section 36 from the "beginning of October to the beginning of December." CR 2216. Therefore, the jury could not award any damages to Knecht for Evridges' heifers being in Section 36, but they were not so instructed

by Judge Strawn. As a result, the jury awarded damages that Judge Macy previously ruled were not recoverable.

The error and prejudice as a result of the circuit court's refusal of Evridges' proposed instruction are undeniable. The incomplete, incorrect, misleading, conflicting and confusing instructions led to the excessive and erroneous jury verdict, which cannot be reconciled with the Declaratory Orders – the law of the case. The circuit court's refusal of Evridges' proposed jury instruction was erroneous and prejudicial.

C. The Jury's Verdict for Knecht is Not Supported by the Evidence

This Court's "review of the sufficiency of the evidence on appeal involves consideration of the evidence and inferences derived from the evidence in the light most favorable to upholding the verdict." *Table Steaks v. First Premier Bank, N.A.*, 2002 S.D. 105, ¶ 13, 650 N.W.2d 829, 834 (other citations omitted). This Court has also explained:

> Whether a new trial should be granted is left to the sound judicial discretion of the trial court, and this court will not disturb the trial court's decision absent a clear showing of abuse of discretion. If the trial court finds an injustice has been done by the jury's verdict, the remedy lies in granting a new trial. [W]e determine that an abuse of discretion occurred only if no "judicial mind, in view of the law and the circumstances of the particular case, could reasonably have reached such a conclusion."

Id. (internal and other citations omitted).

Inexplicably, the jury awarded Knecht damages in the amount of $62,800 for 2014 and $40,930.62 for 2015. CR 3149-3150. This award is simply not

supported by the evidence, and could have only resulted from unfair prejudice and/or the erroneous jury instructions and evidentiary rulings noted above. Due to the circuit court's errors, the jury awarded Knecht damages for Evridges' horses' and bulls' presence on the leased property and Evridges' use of Section 36, contrary to Judge Macy's legal conclusion.

In addition, while the Evridges moved some cows to another portion of the leased property, there was no evidence whatsoever that these heifers (during a mere eight days in that pasture) resulted in any material damage to Knecht. CR 4099-4100. In fact, Evridges' expert, who reviewed that pasture after the eight days of use, determined that as the result of their feeding operation, the effect was limited overgrazing at 60% on less than 11 acres. CR 4128-4130.

There was also no evidence that Knecht did not have enough grass on the Evridges' ranch for his livestock in 2014. Nevertheless, the jury awarded Knecht damages of over $60,000 for 2014, nearly $7,500 per day or nearly $6,000 per acre for the eight days and 11 acres occupied by the heifers, and $40,930.62 for 2015. The only other explanation for this verdict is the jury's consideration of the presence of Evridges' horses and bulls on the Ranch. But, as concluded by Judge Macy, Evridges were entitled to have them there.

In sum, the jury's awards to Knecht for 2014 and 2015 and its refusal to award Evridges anything as the result of the undisputed overgrazing by Knecht in 2016 are not supported by the evidence and are the result of unfair prejudice

against Evridges as the result of the circuit court's evidentiary rulings and/or the erroneous jury instructions.

D. The Jury's Determination that Evridges' Ranch Suffered No Damages as a Result of Knecht's Actions is Not Supported by the Evidence

The jury also only awarded Evridges damages for their fencing in the amount of $20,000, and the undisputed unpaid rent payments in the amount of $43,824.25. Evridges were not awarded any damages for Knecht's overgrazing – in excess of 60% – of their entire 3,000 acre ranch in 2016.

The undisputed evidence regarding Evridges' breach of contract claim established the following: Knecht raised weeds on the 294 acres of tilled farm ground for three years, the tumbleweeds were knocking down the fences, and erosion was occurring and drifting into the fence lines, as testified to by Levi Derner. CR 3817-3822. Further, expert Clair Stymiest provided his undisputed opinion regarding the cost to rehabilitate the 294 acre weed patch Knecht created. CR 3840-3841. While the jury need not have accepted the expert's opinion, the fact that there were 294 acres of weeds remains undisputed. As such, no fair juror could find no damage to Evridges' ranch. The zero verdict on Evridges' claim is contrary to the evidence presented and could only have been the result of unfair prejudice, the evidentiary rulings, and/or the erroneous jury instructions. *See Berry v. Risdall*, 1998 S.D. 18, ¶ 11, 576 N.W.2d 1, 4 (holding that where a review "of the jury instructions fails to provide any indication, other than passion,

prejudice or a mistake of law, as to why the jury would return a verdict . . . awarding zero damages," a new trial was warranted).

In short, the circuit court's admission of evidence regarding whether the lease arrangement between Knecht and Evridges violated Grand River Grazing Association's rules of management was erroneous and prejudicial. Additionally, the circuit court's exclusion of evidence regarding the intensified grazing program was also erroneous and prejudicial. Finally, the circuit court's rejection of the proposed jury instruction that incorporated Judge Macy's findings, conclusions, and orders – the law of the case – was erroneous and prejudicial. All these errors led the jury to reach a verdict that is simply incompatible with Judge Macy's Findings of Fact, Conclusions of Law and Declaratory Orders and with the evidence adduced at trial.

CONCLUSION

For all these reasons, Evridges respectfully request that this Court reverse the jury's verdict against them and that they be granted a new trial.

Dated this 19th day of November, 2018.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

By: */s/ Cassidy M. Stalley*

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A-66(b). Proportionally spaced font Times New Roman 13 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Brief of Appellants contains 7,755 words as counted by Microsoft Word.

/s/ Cassidy M. Stalley
Cassidy M. Stalley

CERTIFICATE OF SERVICE

Cassidy M. Stalley, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 20th day of November, 2018, she electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

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Sioux Falls, SD 57103-7008
brian@donahoelawfirm.com
Attorneys for Appellee

The undersigned further certifies that the original and two (2) copies of the Brief of Appellants in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Cassidy M. Stalley
Cassidy M. Stalley

APPENDIX

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
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COUNTY OF PERKINS	)	FOURTH JUDICIAL CIRCUIT
	)	
	)	CIV. NO. 14-22
MICHAEL J. KNECHT,	)	
Plaintiff	)	COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECLARATORY ORDERS
vs.	)	
GAYLE EVRIDGE and LINDA EVRIDGE,	)	
Defendants.	)	

The above matter came before the Court on August 24, 2015, August 31, 2015, and September 23, 2015. Knecht was represented by James P. Hurley. Attorneys Steven Iverson and Thomas E. Brady represented Gayle and Linda Evridge. The purpose of the court trial was to determine the following issues: (1) whether the Agricultural Lease and the Supplemental Lease are valid, and (2) if valid, the terms of such leases.

The Court having heard the evidence, received exhibits, and being fully advised enters the following:

FILED
JAN 11 2016
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

FINDINGS OF FACT

1. Plaintiff, Michael Knecht ("Knecht") is a Perkins County resident.
2. Defendants, Gayle Evridge and Linda Evridge ("Evridges"), are Perkins County residents.
3. Evridges own 3,070 acres of property used for ranching and farming ("Ranch") along twelve miles of the North Grand River.
4. The Ranch is adjacent to the Grand River National Grassland. A portion of the Ranch has grazing rights with the Grand River Cooperative Grazing Association ("Grazing

Association"), a non-governmental entity tasked with controlling grazing of government-owned property within the national grassland.

5. In 2012, Knecht ran an advertisement in a local paper seeking to lease ranchland. Knecht was looking to lease ranchland for his cattle herd. He needed a place to lease for summer and fall grazing, preferably year round.
6. Linda Evridge called Knecht and said that she and her husband, Gayle Evridge, wanted to retire and rent the Ranch through a long-term lease. Knecht told Evridges that is what he had been looking for, a long-term lease to increase his cattle numbers over several years.
7. The Evridges said the Ranch was tied to the Grazing Association on the National Grasslands where they had over 200 summer grazing units currently, in addition to the cattle that could be kept year round on the Ranch.
8. The Evridges have been members of the Grand River Grazing Association since 1991. Evridges have held a grazing permit for over 40 years. Gayle Evridge knew the rules of the Grazing Association for obtaining and transferring the grazing permit.
9. After phone calls between the parties, a viewing of the Ranch, and discussion of terms, the parties agreed to a lease. Gayle Evridge explained to Knecht that the rent would be based on AUMs (Animal Unit Month) and that the total yearly lease would be $157,000.00. Evridges requested the yearly payment up-front each year, but Knecht, based on the advice of his banker, wanted the yearly lease amount payable in two yearly payments.
10. Evridges advised Knecht they would have their lawyer, Mr. Tim Parmley, prepare a written lease. Knecht met with the Evridges at Parmley's office in Lemmon, SD on December 3rd, 2013.

11. At the December 3rd meeting, Evridges presented Knecht with two leases. One lease was captioned, "Agricultural Lease," and the second lease was captioned, "Supplemental Lease." Evridges told Knecht that the only way they could lease the Ranch was by having two leases.

12. The Agricultural Lease had a per acre price of $28.55 for 3,070 acres for the Ranch. The Supplemental Lease had the same real property description, but a set yearly rental to graze 200 head cow/calf pairs and 6 bulls.

13. Gayle Evridge advised Knecht that the Supplemental Lease had to be kept secret. When Knecht inquired as to the reason for keeping the lease secret, Gayle Evridge explained he was sorry but that is the way it had to be done.

14. Gayle Evridge further explained that only the Agricultural Lease would be submitted to the Grazing Association. Knecht had never been a member of the Grazing Association and did not know the rules of the association.

15. Knecht and Evridges signed the Agricultural Lease and Supplemental Lease at Parmley's office at the December 3rd meeting. Knecht never consulted a lawyer about the leases.

16. Knecht made the payments as required for the lease. In early 2014, Knecht moved his cattle onto the Evridge Ranch.

17. Pursuant to the Grazing Association Rules, all leases had to be filed with the association by March 1st, 2014. Gayle Evridge filed the Agricultural Lease with the association to assist in transferring the grazing permit to Knecht for the three-year lease term. The association transferred the permit to Knecht.

18. Gayle Evridge knew that the grazing permit could not be subleased through the lease of his ranch. Gayle Evridge knew that the association could limit the per acre lease value of

the Ranch. Evridge presented a lease amount of $30.00 per acre for the Ranch, but the Grazing Association rejected the per acre amount because it was too high.

19. The Supplemental Lease allowed Evridges to include the Grazing Association permit and receive compensation without the knowledge of the Grazing Association, which Evridge knew was a violation of the Grazing Association rules.

20. When Knecht took possession of the Ranch in 2014, Evridges had some horses and bulls on the property. Knecht did not object to the Evridges keeping the horses and bulls until the lawsuit was filed. Although not in the Agricultural Lease, Knecht agreed to allow Evridges to keep some horses and bulls in pastures around their home.

21. In 2014, Knecht used the Evridge Ranch and the Grazing Association permit to graze his cattle.

22. The Evridges use of Section 36 consisted of feeding heifers from the first part of October through the first part of December. In October of 2014, Gayle Evridge asked Knecht if he could move his 400 head of heifers to another pasture on the Ranch. Knecht would not agree. Gayle Evridge told Knecht, "Maybe this is not the best lease for you." Evridges cut three fences and moved their heifers to other pastures on the Ranch without Knecht's permission. Evridges did not repair the fences. This lawsuit followed.

23. Evridges had engaged in an intensive grazing management plan for several years prior to leasing to Knecht. The intensive grazing plan required the Ranch to be divided into multiple pastures and the rotation of livestock on a regular basis. Evridges claim their intensive grazing plan was incorporated into the contracts. There is no mention of the intensive grazing plan in the contracts. There is a provision in the Agricultural Lease which provides Evridges have the ability to direct movement of cattle on the Ranch.

24. In April 2013, there was a prairie fire that damaged fences on the Evridge Ranch. In October 2013, fences on the ranch were further damaged by snow storm, Atlas.
25. The fences on the Ranch were not in a condition to operate the intensive grazing plan as contemplated by Evridges without Knecht completing fencing.
26. In 2015, Knecht tendered payment for the leases which was not accepted by the Evridges. The money, by Order of the Court, was deposited with the Perkins County Clerk of Courts.
27. In 2015, Knecht again made use of the Evridge Ranch and the Association Grazing permit. In August of 2015, the Grazing Association became aware of the Supplemental Lease. The Grazing Association advised that the failure to notify the Association of the Supplemental Lease was a violation and the grazing permit was suspended for 2016.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court now enters the following Conclusions of Law:

1. The Court has jurisdiction over the parties and jurisdiction over the subject matter of this proceeding.
2. To the extent a Conclusion of Law as stated herein is actually a Finding of Fact, or vice versa, it is hereby redesignated as such.
3. The essential elements of a contract are set out in SDCL § 53-1-2. "Elements essential to the existence of a contract are: (1) Parties capable of contracting; (2) Their consent; (3) A lawful object; and (4) Sufficient cause or consideration."
4. The parties were capable of entering into a contract. The contracts also involve a lawful object.

5. Both contracts were put into writing and signed by the Evridges and Knecht, in accordance with the Statute of Frauds.
6. The consideration for the Agricultural Lease was annual rent of $87,648.50 to the Evridges in exchange for the right to graze cattle and farm the 3,070 acres comprising the Ranch.
7. The Agricultural Lease has all the essential elements of a valid contract. Thus, the Agricultural Lease of 3,070 acres of the Ranch is a valid contract and is legally binding on the parties as of December 3, 2013 for a term of three years.
8. The consideration for the Supplemental Agricultural Lease was annual rent of $69,351.50 in exchange for the right to graze an additional 200 cows and calves and six bulls directly tied to the Grand River Grazing Association permit.
9. The Supplemental Lease allows for grazing on the Grand River Grazing Association land. It states: "In the event the permit is not transferred, LESSEE may terminate or renegotiate this lease." The power to terminate in the event the permit does not transfer is not available in the Agricultural Lease.
10. The Supplemental Agricultural Lease has all the essential elements of a valid contract and is legally binding. However, Knecht may, pursuant to the written terms of the Supplemental Lease, choose to terminate this lease because the grazing rights from the Grazing Association did not transfer to Knecht for 2016. Therefore, the Supplemental Lease is a voidable contract.
11. The Court concludes the Agricultural Lease and the Supplemental Lease are separate contracts.

12. The Court also concludes that Knecht knew the Supplemental Lease involved the Grazing Association permit. Knecht made use of the permit and cannot seek recovery for money paid to Evridge in 2014 or 2015. Knecht received the benefits of the Supplemental Lease in 2014 and 2015. In 2016, the permit will not be issued. Knecht's remedy is included in the Supplemental Lease. He may terminate the lease. Knecht cannot seek recovery of the amounts he paid on the Supplemental Lease in 2014 or 2015.

13. SDCL § 53-8-5 provides that the execution of a contract in writing supersedes oral negotiations or stipulations. The statute states: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which precede or accompanied the execution of the instrument." Therefore, the Evridges may not insert additional terms to either lease.

14. Both of the lease contracts in this case were drafted by Evridges' lawyer. Knecht did not draft the leases.

15. In *Clements v. Gabriel*, 472 N.W.2d 480 (S.D. 1991), the South Dakota Supreme Court stated: "Ambiguities arising in a contract should be interpreted and construed against the scrivener." This rule of construction is to be applied against one who drafted an ambiguous contract. Weisser v. Kropuenske, 226 N.W.2d 760, 761 (S.D. 1929). "Any doubts arising from an ambiguity of language in a contract should be resolved against the speaker or writer, because they can by exactness of expression more easily prevent mistakes in meaning than the one with whom they are dealing." Enchanted World Doll Museum v. Buskohl, 398 N.W.2d 149, 152 (S.D. 1986).

16. Any ambiguities arising from either lease contract are resolved against the Evridges.

17. There are no terms referring to the implementation of a Grazing Plan. The provision allowing Evridges to direct the movement of cattle is vague and ambiguous. Therefore, the implementation of a Grazing Plan is resolved against the Evridges. Knecht was not obligated to implement a Grazing Plan on the Ranch.

ORDER

Based on the foregoing, the Court enters the following:

(1) The Agricultural Lease is a valid and binding contract.

(2) The Supplemental Lease is a valid and voidable contract. Knecht may terminate this lease.

(3) Knecht was not obligated to implement a Grazing Plan on the Ranch.

(4) Evridges are entitled to shared-use of Section 36 from the beginning of October to the beginning of December.

(5) Evridges may keep the small number of horses and bulls on the Ranch that were on the Ranch when Knecht took possession.

(6) There has been a failure to prove an anticipatory breach in either the Agricultural Lease or the Supplemental Lease.

(7) There has been a failure to prove a rescission of either the Agricultural Lease or the Supplemental Lease.

(8) Knecht may not recover money for the failure of the Grazing Association to transfer the permit for 2016. Knecht's remedy is contained in the contract and he may terminate the Supplemental Lease.

BY THE COURT:

1-11-16

The Honorable Randall Macy
Circuit Court Judge

ATTEST:

Trish Peck

Clerk of Court

By: _____
Deputy

(SEAL)

FILED

JAN 11 2016

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By_____

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PERKINS	)	FOURTH JUDICIAL CIRCUIT
		CIV. NO. 14-22
MICHAEL J. KNECHT,	)	
Plaintiff	)	**NOTICE OF ENTRY OF COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECLARATORY ORDERS**
vs.	)	
GAYLE EVRIDGE and **LINDA EVRIDGE,**	)	
Defendants.	)	

TO: MICHAEL J. KNECHT AND HIS ATTORNEY, JAMES P. HURLEY:

YOU WILL PLEASE TAKE NOTICE that the hereto attached copy of Court's Findings of Fact and Conclusions of Law and Declaratory Orders is a true and correct copy of said Findings of Fact, Conclusions of Law and Declaratory Orders entered and filed January 11, 2016.

Dated this 12th day of January, 2016.

BRADY PLUIMER, P.C.

By: *___/s/ Steven T. Iverson*_____

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Filed: 1/12/2016 1:52:42 PM CST Perkins County, South Dakota 52CIV14-000022

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of January, 2016, a true and correct copy of **Notice of Entry of Court's Findings of Fact and Conclusions of Law and Declaratory Orders**, together with attached copy of **Court's Findings of Fact and Conclusions of Law and Declaratory Orders** were served in the following manner upon the following person, by placing the same in the service indicated, postage prepaid as applicable, addressed as follows:

James P. Hurley	[ ]	U.S. Mail
Bangs, McCullen, Butler, Foye & Simmons	[ ]	Hand Delivery
P.O. Box 2670	[ ]	Facsimile
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Attorney for Michael J. Knecht		

BRADY PLUIMER, P.C.

By: ___*/s/ Steven T. Iverson*_____
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Filed: 1/12/2016 1:52:42 PM CST Perkins County, South Dakota 52CIV14-000022
- Page 2219 -

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF PERKINS	)	FOURTH JUDICIAL CIRCUIT
	)	
	)	CIV. NO. 14-22
MICHAEL J. KNECHT,	)	
	)	
Plaintiff	)	COURT'S FINDINGS OF FACT
	)	AND
vs.	)	CONCLUSIONS OF LAW
	)	AND
GAYLE EVRIDGE and	)	DECLARATORY ORDERS
LINDA EVRIDGE,	)	
	)	
Defendants.	)	

The above matter came before the Court on August 24, 2015, August 31, 2015, and September 23, 2015. Knecht was represented by James P. Hurley. Attorneys Steven Iverson and Thomas E. Brady represented Gayle and Linda Evridge. The purpose of the court trial was to determine the following issues: (1) whether the Agricultural Lease and the Supplemental Lease are valid, and (2) if valid, the terms of such leases.

The Court having heard the evidence, received exhibits, and being fully advised enters the following:

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4TH CIRCUIT CLERK OF COURT
By

FINDINGS OF FACT

1. Plaintiff, Michael Knecht ("Knecht") is a Perkins County resident.
2. Defendants, Gayle Evridge and Linda Evridge ("Evridges"), are Perkins County residents.
3. Evridges own 3,070 acres of property used for ranching and farming ("Ranch") along twelve miles of the North Grand River.
4. The Ranch is adjacent to the Grand River National Grassland. A portion of the Ranch has grazing rights with the Grand River Cooperative Grazing Association ("Grazing

Association"), a non-governmental entity tasked with controlling grazing of government-owned property within the national grassland.

5. In 2012, Knecht ran an advertisement in a local paper seeking to lease ranchland. Knecht was looking to lease ranchland for his cattle herd. He needed a place to lease for summer and fall grazing, preferably year round.
6. Linda Evridge called Knecht and said that she and her husband, Gayle Evridge, wanted to retire and rent the Ranch through a long-term lease. Knecht told Evridges that is what he had been looking for, a long-term lease to increase his cattle numbers over several years.
7. The Evridges said the Ranch was tied to the Grazing Association on the National Grasslands where they had over 200 summer grazing units currently, in addition to the cattle that could be kept year round on the Ranch.
8. The Evridges have been members of the Grand River Grazing Association since 1991. Evridges have held a grazing permit for over 40 years. Gayle Evridge knew the rules of the Grazing Association for obtaining and transferring the grazing permit.
9. After phone calls between the parties, a viewing of the Ranch, and discussion of terms, the parties agreed to a lease. Gayle Evridge explained to Knecht that the rent would be based on AUMs (Animal Unit Month) and that the total yearly lease would be $157,000.00. Evridges requested the yearly payment up-front each year, but Knecht, based on the advice of his banker, wanted the yearly lease amount payable in two yearly payments.
10. Evridges advised Knecht they would have their lawyer, Mr. Tim Parmley, prepare a written lease. Knecht met with the Evridges at Parmley's office in Lemmon, SD on December 3rd, 2013.

11. At the December 3rd meeting, Evridges presented Knecht with two leases. One lease was captioned, "Agricultural Lease," and the second lease was captioned, "Supplemental Lease." Evridges told Knecht that the only way they could lease the Ranch was by having two leases.

12. The Agricultural Lease had a per acre price of $28.55 for 3,070 acres for the Ranch. The Supplemental Lease had the same real property description, but a set yearly rental to graze 200 head cow/calf pairs and 6 bulls.

13. Gayle Evridge advised Knecht that the Supplemental Lease had to be kept secret. When Knecht inquired as to the reason for keeping the lease secret, Gayle Evridge explained he was sorry but that is the way it had to be done.

14. Gayle Evridge further explained that only the Agricultural Lease would be submitted to the Grazing Association. Knecht had never been a member of the Grazing Association and did not know the rules of the association.

15. Knecht and Evridges signed the Agricultural Lease and Supplemental Lease at Parmley's office at the December 3rd meeting. Knecht never consulted a lawyer about the leases.

16. Knecht made the payments as required for the lease. In early 2014, Knecht moved his cattle onto the Evridge Ranch.

17. Pursuant to the Grazing Association Rules, all leases had to be filed with the association by March 1st, 2014. Gayle Evridge filed the Agricultural Lease with the association to assist in transferring the grazing permit to Knecht for the three-year lease term. The association transferred the permit to Knecht.

18. Gayle Evridge knew that the grazing permit could not be subleased through the lease of his ranch. Gayle Evridge knew that the association could limit the per acre lease value of

the Ranch. Evridge presented a lease amount of $30.00 per acre for the Ranch, but the Grazing Association rejected the per acre amount because it was too high.

19. The Supplemental Lease allowed Evridges to include the Grazing Association permit and receive compensation without the knowledge of the Grazing Association, which Evridge knew was a violation of the Grazing Association rules.

20. When Knecht took possession of the Ranch in 2014, Evridges had some horses and bulls on the property. Knecht did not object to the Evridges keeping the horses and bulls until the lawsuit was filed. Although not in the Agricultural Lease, Knecht agreed to allow Evridges to keep some horses and bulls in pastures around their home.

21. In 2014, Knecht used the Evridge Ranch and the Grazing Association permit to graze his cattle.

22. The Evridges use of Section 36 consisted of feeding heifers from the first part of October through the first part of December. In October of 2014, Gayle Evridge asked Knecht if he could move his 400 head of heifers to another pasture on the Ranch. Knecht would not agree. Gayle Evridge told Knecht, "Maybe this is not the best lease for you." Evridges cut three fences and moved their heifers to other pastures on the Ranch without Knecht's permission. Evridges did not repair the fences. This lawsuit followed.

23. Evridges had engaged in an intensive grazing management plan for several years prior to leasing to Knecht. The intensive grazing plan required the Ranch to be divided into multiple pastures and the rotation of livestock on a regular basis. Evridges claim their intensive grazing plan was incorporated into the contracts. There is no mention of the intensive grazing plan in the contracts. There is a provision in the Agricultural Lease which provides Evridges have the ability to direct movement of cattle on the Ranch.

24. In April 2013, there was a prairie fire that damaged fences on the Evridge Ranch. In October 2013, fences on the ranch were further damaged by snow storm, Atlas.

25. The fences on the Ranch were not in a condition to operate the intensive grazing plan as contemplated by Evridges without Knecht completing fencing.

26. In 2015, Knecht tendered payment for the leases which was not accepted by the Evridges. The money, by Order of the Court, was deposited with the Perkins County Clerk of Courts.

27. In 2015, Knecht again made use of the Evridge Ranch and the Association Grazing permit. In August of 2015, the Grazing Association became aware of the Supplemental Lease. The Grazing Association advised that the failure to notify the Association of the Supplemental Lease was a violation and the grazing permit was suspended for 2016.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court now enters the following Conclusions of Law:

1. The Court has jurisdiction over the parties and jurisdiction over the subject matter of this proceeding.
2. To the extent a Conclusion of Law as stated herein is actually a Finding of Fact, or vice versa, it is hereby redesignated as such.
3. The essential elements of a contract are set out in SDCL § 53-1-2. "Elements essential to the existence of a contract are: (1) Parties capable of contracting; (2) Their consent; (3) A lawful object; and (4) Sufficient cause or consideration."
4. The parties were capable of entering into a contract. The contracts also involve a lawful object.

5. Both contracts were put into writing and signed by the Evridges and Knecht, in accordance with the Statute of Frauds.
6. The consideration for the Agricultural Lease was annual rent of $87,648.50 to the Evridges in exchange for the right to graze cattle and farm the 3,070 acres comprising the Ranch.
7. The Agricultural Lease has all the essential elements of a valid contract. Thus, the Agricultural Lease of 3,070 acres of the Ranch is a valid contract and is legally binding on the parties as of December 3, 2013 for a term of three years.
8. The consideration for the Supplemental Agricultural Lease was annual rent of $69,351.50 in exchange for the right to graze an additional 200 cows and calves and six bulls directly tied to the Grand River Grazing Association permit.
9. The Supplemental Lease allows for grazing on the Grand River Grazing Association land. It states: "In the event the permit is not transferred, LESSEE may terminate or renegotiate this lease." The power to terminate in the event the permit does not transfer is not available in the Agricultural Lease.
10. The Supplemental Agricultural Lease has all the essential elements of a valid contract and is legally binding. However, Knecht may, pursuant to the written terms of the Supplemental Lease, choose to terminate this lease because the grazing rights from the Grazing Association did not transfer to Knecht for 2016. Therefore, the Supplemental Lease is a voidable contract.
11. The Court concludes the Agricultural Lease and the Supplemental Lease are separate contracts.

12. The Court also concludes that Knecht knew the Supplemental Lease involved the Grazing Association permit. Knecht made use of the permit and cannot seek recovery for money paid to Evridge in 2014 or 2015. Knecht received the benefits of the Supplemental Lease in 2014 and 2015. In 2016, the permit will not be issued. Knecht's remedy is included in the Supplemental Lease. He may terminate the lease. Knecht cannot seek recovery of the amounts he paid on the Supplemental Lease in 2014 or 2015.

13. SDCL § 53-8-5 provides that the execution of a contract in writing supersedes oral negotiations or stipulations. The statute states: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which precede or accompanied the execution of the instrument." Therefore, the Evridges may not insert additional terms to either lease.

14. Both of the lease contracts in this case were drafted by Evridges' lawyer. Knecht did not draft the leases.

15. In *Clements v. Gabriel*, 472 N.W.2d 480 (S.D. 1991), the South Dakota Supreme Court stated: "Ambiguities arising in a contract should be interpreted and construed against the scrivener." This rule of construction is to be applied against one who drafted an ambiguous contract. Weisser v. Kropuenske, 226 N.W.2d 760, 761 (S.D. 1929). "Any doubts arising from an ambiguity of language in a contract should be resolved against the speaker or writer, because they can by exactness of expression more easily prevent mistakes in meaning than the one with whom they are dealing." Enchanted World Doll Museum v. Buskohl, 398 N.W.2d 149, 152 (S.D. 1986).

16. Any ambiguities arising from either lease contract are resolved against the Evridges.

17. There are no terms referring to the implementation of a Grazing Plan. The provision allowing Evridges to direct the movement of cattle is vague and ambiguous. Therefore, the implementation of a Grazing Plan is resolved against the Evridges. Knecht was not obligated to implement a Grazing Plan on the Ranch.

ORDER

Based on the foregoing, the Court enters the following:

(1) The Agricultural Lease is a valid and binding contract.

(2) The Supplemental Lease is a valid and voidable contract. Knecht may terminate this lease.

(3) Knecht was not obligated to implement a Grazing Plan on the Ranch.

(4) Evridges are entitled to shared-use of Section 36 from the beginning of October to the beginning of December.

(5) Evridges may keep the small number of horses and bulls on the Ranch that were on the Ranch when Knecht took possession.

(6) There has been a failure to prove an anticipatory breach in either the Agricultural Lease or the Supplemental Lease.

(7) There has been a failure to prove a rescission of either the Agricultural Lease or the Supplemental Lease.

(8) Knecht may not recover money for the failure of the Grazing Association to transfer the permit for 2016. Knecht's remedy is contained in the contract and he may terminate the Supplemental Lease.

BY THE COURT:

1-11-16

The Honorable Randell Macy
Circuit Court Judge

ATTEST:
Trish Peck
Clerk of Court
By: _____
Deputy
(SEAL)

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

STATE OF SOUTH DAKOTA))SS COUNTY OF PERKINS)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT 52CIV14-000022
MICHAEL J. KNECHT, Plaintiff vs. **GAYLE EVRIDGE** and **LINDA EVRIDGE**, Defendants.	**VERDICT FORM**

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues, find as follows:

On the Plaintiff, Michael Knecht's, claim against the Defendants, Gayle Evridge and Linda Evridge, we find in favor of:

Plaintiff: X
Defendants: _____

If you find for the Plaintiff, please identify the Plaintiff's damages for each of the following years:

2014 62,800.00
2015 40,930.62
2016 0

On the Defendants, Gayle Evridge and Linda Evridge's, claim against the Plaintiff, Michael Knecht, we find in favor of:

Defendants: X
Plaintiff: _____

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By_____

If you find for the Defendants, please identify the Defendants' damages for the following:

That Knecht over-grazed Evridges' ranch resulting in temporary damages to the ranch 0

That Knecht damaged fencing on Evridges' ranch and has refused to repair the fencing 20,000

That Knecht failed to farm the Evridges' property in accordance with practices of good husbandry 0

That Evridges suffered a loss on the sale of their cattle in 2016 0

That Knecht failed to pay lease rent 43,824.25

Dated this 15 day of December, 2017.

Foreperson

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SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By

AGRICULTURAL LEASE

This is an agreement between GAYLE EVRIDGE and LINDA EVRIDGE of 17951 110th St, Lemmon, SD 57638, hereinafter referred to as "LESSORS" and MICHEL J. KNECHT of 12699 SD Hwy 75, Lodgepole, SD, 57640, hereinafter referred to as "LESSEE."

LESSORS agree to let, lease and demise unto LESSEE the real estate described as:

Twp. 21 N., Rge. 13 EBHM, Perkins Co., SD:
Sec. 1: N1/2NW1/4; NW1/4NE1/4; S1/2NE1/4; N1/2SE1/4
Sec. 2: E1/2NE1/4; NE1/4SE1/4

Twp. 21 N., Rge. 14 EBHM, Perkins Co., SD:
Sec. 5: All
Sec. 6: All
Sec. 7: NW1/4; NE1/4; SE1/4; NE1/4SW1/4
Sec. 8: NW1/4; N1/2SW1/4

Twp. 22 N., Rge. 13 EBHM, Perkins Co., SD:
Sec. 36: All (shared use with LESSORS)

according to the terms herein. The above description is for approximately 3,080 acres, less 10 acres for 3,070 acres at $28.55 per acre.

The term of this lease is for three years beginning December 1, 2013 and terminating December 31, 2016. LESSEE covenants and agrees to pay to LESSORS the annual rent of EIGHTY-SEVEN THOUSAND SIX HUNDRED FORTY-EIGHT DOLLARS FIFTY CENTS ($87,648.50), payable 10% due upon signing of this agreement of EIGHT THOUSAND SEVEN HUNDRED SIXTY-FOUR DOLLARS AND EIGHTY-FIVE CENTS ($8,764.85) which is nonrefundable; and THIRTY-FIVE THOUSAND FIFTY-NINE DOLLARS AND FORTY CENTS ($35,059.40) due December 1, 2013, but no later than January 1, 2014; and the remaining FORTY-THREE THOUSAND EIGHT HUNDRED TWENTY-FOUR DOLLARS TWENTY-FIVE-CENTS ($43,824.25) shall be due and payable no later than November 10, 2014. Subsequent year payments shall be payable FORTY-THREE THOUSAND EIGHT

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EXHIBIT
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1

STATE OF SOUTH DAKOTA)) SS COUNTY OF PERKINS)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
MICHAEL J. KNECHT, Plaintiff, vs. GAYLE EVRIDGE AND LINDA EVRIDGE, Defendants.	52CIV14-000022 **JUDGMENT ON JURY VERDICT**

THIS MATTER, having been tried to a jury on December 13, 2017 through December 15, 2017, the Honorable Eric J. Strawn, Circuit Court Judge, presiding, the Plaintiff, Michael Knecht, appearing personally and through his counsel, Robert J. Galbraith, the Defendants Gayle Evridge and Linda Evridge, appearing personally and through their counsel, Thomas E. Brady, the issues having been duly tried, and the jury having rendered its Verdict, it is hereby

ORDERED ADJUGED AND DECREED that the Plaintiff, Michael J. Knecht, shall have a judgment against the Defendants, Gayle Evridge and Linda Evridge, jointly and severally, in the amount of $103,730.62, plus pre-judgment interest in the amount of $26,571.41 and post-judgment interest from the date of Verdict until the same is paid; and it is further

Filed on: 08/22/2018 Perkins County, South Dakota 52CIV14-000022

ORDERED ADJUDGED AND DECREED that the Defendants, Gayle Evridge and Linda Evridge, shall have a judgment against the Plaintiff, Michael J. Knecht, in the amount of $63,824.25, plus pre-judgment interest in the amount of $4,802.66 and post-judgment interest from the date of Verdict until the same is paid.

Dated this 22nd day of August, 2018, *nunc pro tunc*, December 15, 2017.

BY THE COURT:

Signed: 8/22/2018 3:24:58 PM

HONORABLE ERIC J. STRAWN
Circuit Court Judge

Attest:
Peck, Trish
Clerk/Deputy

Filed on: 08/21/2018 Perkins County, South Dakota 52CIV14-000022

STATE OF SOUTH DAKOTA)) SS COUNTY OF PERKINS)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
MICHAEL J. KNECHT, Plaintiff, vs. GAYLE EVRIDGE AND LINDA EVRIDGE, Defendants.	52CIV14-000022 **NOTICE OF ENTRY OF JUDGMENT ON JURY VERDICT**

TO: DEFENDANTS, GAYLE EVRIDGE and LINDA EVRIDGE, and their attorney of record, THOMAS E. BRADY,

YOU ARE HEREBY NOTIFIED that on the 22nd day of August, 2018, the Honorable Eric J. Strawn, Circuit Court Judge in the Fourth Judicial Circuit, Perkins County, South Dakota, entered a Judgment on Jury Verdict in the above-captioned matter. The Judgment on Jury Verdict was filed with the Perkins County Clerk of Courts on August 22, 2018. A true and correct copy of the Judgment on Jury Verdict is attached hereto and served upon you.

Dated this 22nd day of August, 2018.

NOONEY & SOLAY, LLP

/s/ Robert J. Galbraith
ROBERT J. GALBRAITH
Attorneys for Plaintiff
326 Founders Park Drive / P.O. Box 8030
Rapid City, SD 57709-8030
(605) 721-5846
robert@nooneysolay.com

CERTIFICATE OF SERVICE

I, Robert J. Galbraith, attorney for Plaintiff, hereby certify that a true and correct copy of the foregoing was served on this 22nd day of August, 2018, by electronic service through Odyssey File & Serve, to:

Thomas E. Brady
135 E. Colorado Boulevard
Spearfish, SD 57783
tbrady@lynnjackson.com

/s/ Robert J. Galbraith
ROBERT J. GALBRAITH

STATE OF SOUTH DAKOTA)) SS COUNTY OF PERKINS)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
MICHAEL J. KNECHT, Plaintiff, vs. GAYLE EVRIDGE AND LINDA EVRIDGE, Defendants.	52CIV14-000022 **JUDGMENT ON JURY VERDICT**

THIS MATTER, having been tried to a jury on December 13, 2017 through December 15, 2017, the Honorable Eric J. Strawn, Circuit Court Judge, presiding, the Plaintiff, Michael Knecht, appearing personally and through his counsel, Robert J. Galbraith, the Defendants Gayle Evridge and Linda Evridge, appearing personally and through their counsel, Thomas E. Brady, the issues having been duly tried, and the jury having rendered its Verdict, it is hereby

ORDERED ADJUGED AND DECREED that the Plaintiff, Michael J. Knecht, shall have a judgment against the Defendants, Gayle Evridge and Linda Evridge, jointly and severally, in the amount of $103,730.62, plus pre-judgment interest in the amount of $26,571.41 and post-judgment interest from the date of Verdict until the same is paid; and it is further

Filed on: 08/22/2018 Perkins County, South Dakota 52CIV14-000022
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App. 28
- Page 4240 -

ORDERED ADJUDGED AND DECREED that the Defendants, Gayle Evridge and Linda Evridge, shall have a judgment against the Plaintiff, Michael J. Knecht, in the amount of $63,824.25, plus pre-judgment interest in the amount of $4,802.66 and post-judgment interest from the date of Verdict until the same is paid.

Dated this 22nd day of August, 2018, *nunc pro tunc*, December 15, 2017.

BY THE COURT:

Signed: 8/22/2018 5:24:58 PM

HONORABLE ERIC J. STRAWN
Circuit Court Judge

Attest:
Peck, Trish
Clerk/Deputy

Filed on: 08/21/2018 Perkins County, South Dakota 52CIV14-000022
Filed: 8/22/2018 6:04 PM CST Perkins County, South Dakota 52CIV14-000022

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28780

MICHAEL J. KNECHT,

Plaintiff and Appellee,

vs.

GAYLE W. EVRIDGE and LINDA M. EVRIDGE,

Defendants and Appellants.

APPEAL FROM THE FOURTH JUDICIAL CIRCUIT
PERKINS COUNTY, SOUTH DAKOTA

THE HONORABLE ERIC J. STRAWN
CIRCUIT COURT JUDGE

BRIEF OF APPELLEE KNECHT

ATTORNEYS FOR APPELLANTS GAYLE EVRIDGE AND LINDA EVRIDGE:

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daniel@donahoelawfirm.com

Notice of Appeal Filed: September 20, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

In this brief, Appellants Gayle and Linda Evridge will be referred to as "Evridges" and Appellee, Michael J. Knecht, will be referred to as "Knecht."

Citations to the certified record as reflected by the Clerk's Index are designated as "CR" followed by the initial page number. Citations to the 2015 trial transcript are designated as "TT" followed by the page number and citations to the 2017 trial transcript are designated as "JT."

STATEMENT OF JURISDICTION

Evridges appeal from 1) the Circuit Court's evidentiary rulings during trial; 2) the Circuit Court's refusal of their proposed jury instructions; 3) the jury's verdict; and 4) the Circuit Court's denial of their Motion for New Trial. Judgment on the jury's verdict was entered on August 22, 2018, and Notice of Entry of Judgment was filed that same day. The Circuit Court did not issue a ruling on the Motion for New Trial, therefore it was deemed denied pursuant to SDCL § 15-6-59(b). Evridges timely filed their Notice of Appeal on September 20, 2018.

REQUEST FOR ORAL ARGUMENT

Appellee, Michael J. Knecht, respectfully requests the privilege of appearing before this Court for oral argument.

STATEMENT OF THE ISSUES

I. Whether the Circuit Court properly admitted evidence regarding the Supplemental Lease and excluded evidence of the Intensified Grazing Program.

Schoon v. Looby, 2003 S.D. 123, 670 N.W.2d 885
State v. Barber, 1996 SD 96, 552 N.W.2d 817
State v. Harris, 2010 S.D. 75, 789 N.W.2d 303
Supreme Pork, Inc. v. Master Blaster, Inc., 2009 S.D. 20, 764 N.W.2d 474

II. Whether the Circuit Court properly refused to instruct the jury on Evridges' piecemeal version of the previous Declaratory Orders

Luke v. Deal, 2005 SD 6, 692 N.W.2d 165
Papke v. Harbert, 2007 S.D. 87, 738 N.W.2d 510
Schultz v. Scandrett, 2015 S.D. 52, 866 N.W.2d 128
State v. Packed, 2007 SD 75, 736 N.W.2d 851

III. Whether the jury's verdict for Knecht is supported by the evidence.

Lenards v. DeBoer, 2015 S.D. 49, 865 N.W.2d 867
Biegler v. Am. Fam. Mut. Ins. Co. 2001 S.D. 13, 621 N.W.2d 592
Miller v. Hernandez, 520 N.W.2d 266 (S.D.1994)
State v. Packed, 2007 SD 75, 736 N.W.2d 851

IV. Whether the jury's verdict denying damages to Evridges is supported by the evidence.

Alvine Family Ltd. P'ship v. Hagemann, 2010 S.D. 28, 780 N.W.2d 507
Miller v. Hernandez, 520 N.W.2d 266 (S.D.1994)
Rogen v. Monson, 2000 S.D. 51, 609 N.W.2d 456
State v. Packed, 2007 SD 75, 736 N.W.2d 851

STATEMENT OF THE CASE

Knecht brought this action asserting a breach of contract claim against Evridges, who counterclaimed for breach of contract. (CR. 1, 3050). The case was bifurcated into (i) a court trial on the declaratory judgment regarding the enforceability and construction of the two lease agreements entitled "Agricultural Lease" and "Supplemental Agricultural Lease" and (ii) a jury trial for any remaining issues including damages. (CR. 111). The court trial was conducted on August 24, 2015, August 31, 2015 and September 23, 2015. (CR.1203-1825).

The Court entered its Findings of Fact and Conclusions of Law and Declaratory Orders on January 11, 2016. (CR.2209).

Knecht contested the Findings of Fact and Conclusions of Law and Declaratory Orders and resulting Judgment, and filed an interlocutory appeal. That appeal was dismissed by the South Dakota Supreme Court for lack of subject matter jurisdiction by Order dated July 18, 2016. (CR. 2614). Those issues are now being address, with others arising from the jury trial, in Appeal No. 28781 before this court.

A Jury Trial on the remaining issues of this case was held from December 13, 2017 to December 15, 2017 in Perkins County. (CR. 3146). The Jury awarded Knecht $103,3730.62 in damages against Evridges, plus pre and post judgment interest. (CR. 4236). And Evridges were awarded $63,824.25 in damages against Knecht, plus pre and post judgment interest. (CR. 4236). Of this amount, $20,000

was for alleged fencing damages and the remainder was for 2016 rent.

On July 26, 2018, Evridges' filed a motion for new trial. (CR.3382). Knecht resisted this motion. (CR. 3422).

On August 22, 2018, Judgment on Jury verdict and Notice of Entry of Judgment was filed. (CR.4236, 4238). Evridges' withdrew their Motion for New Trial on August 31, 2018. (CR. 4275). Six days later, Evridges' refiled their Motion for New Trial. (CR. 4279). There was no ruling on the Motion by the Circuit Court, although such motion is deemed denied by operation SDCL § 15-6-59(b).

Evridges now appeal from the Circuit Court's evidentiary rulings, jury instructions, jury verdict and denial of Motion for New Trial. Knecht also filed Notice of Appeal (No. 28781), raising several issues, and the two appeals have now been consolidated.

STATEMENT OF THE FACTS

Knecht set forth a very detailed statement of facts in Appeal No. 28781 because the claims at issue require an understanding of the sequence of events and issues presented. A concise review of pertinent facts is set forth below.

In late 2012, Mike Knecht placed advertisements seeking to lease ranchland on an annual basis. (CR. 1203) (TT 7, 96). Knecht connected with Evridges, who stated that their land was tied to the Grand River Grazing Association ("Grand River"). This was especially attractive to Knecht because 1) it ensured his cattle

would have more than enough grass and water during the summer months[1] and 2) Grand River would provide salt and minerals to cattle grazing its lands, so no additional supplements were necessary. (CR. 1203) (TT 15, 16).

The parties eventually reached agreement on terms. On December 3, 2013, Knecht met Evridges at their lawyer's office to execute a lease agreement for use of Evridges' ranch. (CR. 2209) (FF ¶ 11). To his surprise, Knecht was presented with two sperate leases for the same ground: the "Agricultural Lease" and the "Supplemental Lease." (CR. 1203, 2209) (TT 9) (FF ¶ 11). When Knecht questioned why there were two leases instead of one, he was told it was the only way Evridges could lease their ranch. (CR. 1203, 2209) (TT 9, 140) (FF ¶ 11). Knecht relied on representations of Evridges and executed both leases that evening, providing Evridges with two separate checks totaling $15,700.00 as a down payment.[2] (CR. 799) (AFF ¶ 8). The leases are set forth in Appellee's Appendix at pages 1-9**.**

After the leases were executed, Evridges advised Knecht that the Supplemental Lease had to be kept secret and that he was not to talk to the neighbors or tell anyone about its existence. (CR. 799, 1203) (AFF ¶8) (TT 154). When Knecht questioned why this was so, Evridges responded that they didn't want anyone knowing their financial business and it was just the way things had to

[1] The Grand River permit provided Knecht use of federal grasslands to graze his cattle from mid-May until October each year. (CR.1203) (TT 15, 16).
[2] Knecht issued separate checks for the Agricultural Lease and for the Supplemental Lease because Evridges told him it was necessary for tax purposes. (CR.799) (AFF ¶ 8).

be done. (CR. 1203, 2209) (TT 154) (FF ¶ 13). Furthermore, when Evridges was asked about the Supplemental Lease during the August 31, 2015 trial, he testified:

> [T]here's got to be two leases, and it's got to be hushed up, it's got to be quiet, it's got to be secret. Is this my wishes? No. I am extremely uncomfortable with this. I never plan [sic] in my life to have a second lease. This is not right, Its underhanded. There's nothing good about it. But if people get old, their livelihood depends on it, they may have to do it. I did not sign those two leases with a good feeling in my heart. I signed those two leases because I could not work on my own terms. (CR. 1203) (TT 517-521).

Grand River is an entity regulated by the U.S. Department of Agriculture, Forest Service with the authority to allow private parties access to government owned grasslands for grazing purposes. (CR. 606, 868). Grand River operates in accordance with a set of management rules that are approved by the Forest Service. (CR. 606, 868). All members of the association must abide by these rules to be issued a grazing permit. (CR. 606, 868).

Knecht had never grazed cattle on government land and knew nothing about the rules. (CR. 1203) (TT 9-10). Rather, Knecht relied on Evridges to get his permit approved per the Agricultural Lease terms. (CR. 2209, 2896) (AFF ¶8) (AFF2 ¶7-8). Evridges had been members of Grand River since 1991 and held a valid grazing permit for over 40 years. (CR. 1203) (TT 516).

Although Evridges were fully aware of the Grand River's rules, they chose to blatantly ignore them. (CR. 2209) (FF ¶ 8, 19). First, Evridges knew that the grazing permit could not be subleased. (CR. 1203) (TT 516). Nonetheless, they

created the Supplemental Lease which purportedly did exactly that. (CR. 2896) (AFF2 ¶8). The following is Evridges' testimony from the August 31, 2015 trial:

> Q: And paragraph 5, "Grazing privileges cannot be subleased through the leasing of the based property." Do you see that?
>
> A: Yes, sir, I do.
>
> Q: And you knew that; right?
>
> A: I do. I know that very well.

(CR.1203) (TT 516).

Second, Evridges knew that all leases involving land attached to a grazing permit had to be approved by Grand River. (CR. 1203) (TT 568). In fact, before the Supplemental Lease was executed, Evridges presented Grand River's leasing committee with a hypothetical lease proposing $30 per acre cash rent for their land. (CR. 1203) (TT 569). The committee rejected Evridges' proposed lease because the amount was too high. (CR.1203) (TT 569). Evridges prepared the Agricultural Lease at $28.55 per acre to ensure its approval. (CR. 1203) (TT 569-570). They then created the Supplemental Lease, which leased the same ground, to receive additional compensation without Grand River's knowledge. (CR. 1203, 2209) (TT 569-570) (FF ¶19). Evridges testified that one of the reasons they established the Supplemental Lease was to cover their overhead expenses from the ranch. (CR. 1203) (TT 519, 569).

Evridges submitted the Agricultural Lease to Grand River to assist in transferring their grazing permit to Knecht but withheld the Supplemental Lease. (CR. 2209) (FF ¶ 17, 19).

In January of 2014, Grand River approved the Agricultural Lease and granted Knecht's grazing permit, authorizing 239 head cow/calf pairs and 6 bulls to graze on their land during the summer months. (CR. 2896) (AFF2 ¶14). Knecht then tendered the remainder of his 2014 lease payment to Evridges. (CR. 2896) (AFF2 ¶14). On February 28, 2014, Knecht brought around 200 head of cattle onto the ranch. (CR. 799) (AFF ¶11). Shortly after, conflicts arose between Knecht and Evridges. (CR. 799) (AFF ¶12-28). The most notable issue involves Evridges use of land leased to and paid for by Knecht, without Knecht's consent. (CR. 2896) (AFF2 ¶21-28). Although the contract between Knecht and Evridges provided that they would both have shared use of one section of the ranch (Section 36), after the leases were executed, Knecht verbally agreed to allow Evridges house two pet cows and three horses on the ranch. (CR. 3431) (JT 111). However, Evridges actual use of the ranch greatly exceeded this agreement. (CR. 3431) (JT 112-116).

Specifically, during 2014, Evridges allowed 400 yearlings, 8 horses and 16 bulls to graze on the land Knecht leased. (CR. 3431) (JT 112-116). In 2015, Evridges allowed 350 yearlings, 8 horses and 12 bulls to graze on the land Knecht leased. (CR. 3431) (JT 112-116). Evridges' unauthorized use of the ranch

prevented Knecht from using significant portions of the ranch for his own herd. (CR. 2896) (AFF2 ¶21-28). During those years, Evridges admittedly used roughly 40% of the land they leased to Knecht.[3] (CR. 3964) (JT 671, 683). What's more, at one point, Evridges requested that Knecht allow them to move their yearlings from section 36 to another part of the ranch, which Knecht declined. (CR. 3660) (JT 460). Regardless, Evridges cut down three of the ranch's fences to facilitate the unauthorized move. (CR. 2209, 3660) (FF ¶22) (JT 460).

Due to Evridges' explanation of the leases, Knecht genuinely believed the Agricultural Lease was for use of Evridges' ranch (3,070 acres) and the Supplemental Lease was for use of Evridges' grazing permit with Grand River. (CR. 1203, 2896) (TT 154) (AFF2 ¶21-28). Evridges further explained that the Knecht would receive a small bill from Grand River for salt and oilers. (CR. 1203) (TT 31). However, in April of 2014, Grand River sent Knecht an invoice for $14,047, which he paid.[4] (CR. 608, 1203) (TT 31). This unexpected expense caused Knecht to question Grand River and its members about the association's rules. (CR. 1203) (TT 32). Thereafter, Knecht discovered that Grand River did not receive a copy of the Supplemental Lease. (CR. 1203) (TT 33). And even though it was not Knecht's responsibility to submit the Supplemental Lease to Grand River, he did so because it was required by the rules. (CR. 1203) (TT 33).

[3] In 2016, Evridges' use of the ranch declined. (CR.3964) (JT 671).
[4] In 2015, Knecht received a second invoice from Grand River for $15,769.83, which he paid. (CR. 2532) (AFF3 ¶24).

On November 10, 2014, Knecht submitted the second half of the 2014 lease payment to Evridges, which they accepted. (CR. 799) (AFF ¶28). In December of 2014, Knecht tendered the first half of the 2015 lease payment to Evridges, but it was rejected. (CR. 799) (AFF ¶29). Several weeks later, Evridges' attorney sent Knecht a letter indicating that he was in violation of the lease agreements. (CR. 945). The letter also explicitly stated that Evridges were aware Knecht had contacted Grand River, and they were not willing to change the terms of their contract with Knecht. (CR. 945). This lawsuit was then commenced.

After filing, Knecht deposited the first half of his 2015 lease payment with the Perkins County Clerk of Court. (CR. 1, 799) (AFF ¶28). In response to Knecht's lawsuit, Evridges sought to terminate the agreements. (CR. 2896) (AFF2 ¶32, 33). Although Knecht undoubtedly received much less than he had bargained for, Knecht refused to cancel the leases because "he had nowhere to go and … had to run his cattle." (CR. 3431) (JT 126). Knecht testified "you can't just take cattle and box them up and put them away in [sic] a shelf for two years…I still had to have that lease." (CR. 3431) (JT 126).

One of Evridges' allegations was that Knecht violated a provision in the Agricultural Lease requiring him to repair fences on the ranch, if damaged by Knecht's cattle. (CR. 592). Before Knecht occupied the ranch, a prairie fire damaged 1,000 acres of Evridges' ranch, including numerous fences. (CR. 1203) (TT46). Six months later, the Atlas snow storm further damaged Evridges' fences.

(CR. 1203) (TT 72-73). That same year, Evridges ran more than 950 head of cattle on their ranch which also damaged their fences. (CR. 2896) (AFF2 ¶80). Knecht testified that by the time he leased the ranch in 2014, Evridges fences were "horrid" and "in pretty tough shape." (CR. 1203) (TT 45). Even though Knecht's cattle did not cause the damage, he repeatedly requested Evridges provide him with materials to repair the perimeter fences as required by the Agricultural Lease. (CR. 1203, 2896, 3431) (TT 46) (AFF2 ¶82) (JT 127). Knecht eventually repaired the fences at his own expense to ensure his cattle stayed within the boundaries of the ranch. (CR. 1203, 2896) (TT 47) (AFF2 ¶82).

Evridges also alleged that Knecht violated the lease agreements by failing to implement an intensified grazing program. (CR. 2209) (FF ¶23). The intensive grazing plan required the Ranch to be divided into multiple pastures, limiting the area in which livestock graze and duration of grazing. (CR. 2209) (FF ¶23). However, at the court trial, Judge Macy concluded that 1) there was no mention of the intensive grazing plan in the contracts, 2) the fences on the ranch were not in a condition to operate the intensified grazing program as contemplated by Evridges; and 3) Knecht was not obligated to implement a grazing plan on the ranch. (CR. 2209) (CL ¶17).

On March 19, 2015, Grand River sent notice to Knecht and Evridges that the Supplemental Lease agreement violated the Grand River rules with the United States Forest Service (CR. 866). In addition, commensurability had been

compromised by Evridges grazing on bases acres which were to be used for winter grazing by Knecht. (CR. 866). Grand River further recommended that the parties operate solely under the Agricultural Lease agreement and terminate the Supplemental Lease. (CR. 866).

A month later, Grand River sent a second letter indicating that Knecht would have a conditional grazing permit for 2015, so long as the Court held the Agricultural Lease to be valid. (CR. 798). This letter also stated, "under no circumstance shall the second Supplemental Lease be in force, nor shall Evridges receive any remuneration from this lease." (CR. 798).

In August of 2015, Grand River suspended Evridges' grazing permit, preventing Knecht's use of the permit in 2016. (CR. 1007). A month later, Knecht appeared in front of the Grand River board to request that his grazing permit be reinstated for 2016. (CR. 2369). On February 19, 2016, Grand River sent a letter to Knecht affirming their decision to suspend his grazing permit for 2016. (CR. 2369). In that letter, Grand River stated the following: "if [Knecht's] request to have the 2016 permit was granted, the Court would require Knecht to pay Evridges for the amount in the Supplementary Lease which would create another violation." (CR. 2369). The violation of Grand River's rules is a breach of federal regulations. (CR. 2372). Thus, Knecht lost his Grand River grazing permit for 2016. (CR.2369, 2896) (AFF2 ¶30).

Knecht needed the feed available from Grand River to carry his cattle operation thorough the next year. (CR. 3431) (JT 138). The benefits of the grazing permit in 2016, as specified in his lease, would have allowed him to save 800 tons of hay. (CR. 3431) (JT 143). This hay would then be used to feed his cattle in the spring of 2017. Because Knecht did not have enough hay to feed all his cattle, some of Knecht's cattle had to be sold. (CR. 3431) (JT 142).

ARGUMENT AND AUTHORITIES

I. THE CIRCUIT COURT'S EVIDENTIARY RULINGS WERE PROPER.

[E]videntiary rulings are presumed correct [.]" *State v. Berget*, 2014 S.D. 61, ¶ 13, 853 N.W.2d 45, 51-52. This Court reviews those rulings for an abuse of discretion. *State v. Engesser*, 2003 S.D. 47, ¶ 15, 661 N.W.2d 739, 746. An abuse of discretion is "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *State v. Kvasnicka*, 2013 S.D. 25, ¶ 17, 829 N.W.2d 123, 127-28. "If error is found, it must be prejudicial before this Court will overturn the trial court's evidentiary ruling." *State v. Harris*, 2010 S.D. 75, ¶ 8, 789 N.W.2d 303, 307. Evidence is not prejudicial merely because its legitimate probative force damages the defendant's case. SDCL § 19-12-403. *Novak v. McEldowney*, 2002 S.D. 162 ¶11, 655 N.W.2d 909. Rather, there must be unfair advantage gained by opposing party through evidence which persuades trier of fact by illegitimate

means. *Sander v. Geib, Elston, Frost Professional Ass'n*, 506 N.W.2d 107, 119 (S.D.1993).

The denial of a motion for a new trial is also reviewed for an abuse of discretion. *Hewitt v. Felderman*, 2013 S.D. 91, ¶ 14, 841 N.W.2d 258, 262. "This Court will uphold a jury verdict 'if the jury's verdict can be explained with reference to the evidence,' viewing the evidence in a light most favorable to the verdict." *Id.* (quoting *Alvine Family Ltd. P'ship v. Hagemann,* 2010 S.D. 28, ¶ 18, 780 N.W.2d 507, 512). "This Court should only set a jury's verdict aside in 'extreme cases' where the jury has acted under passion or prejudice or where 'the jury has palpably mistaken the rules of law.' " *Id.*(quoting *Roth v. Farner–Bocken Co.*, 2003 S.D. 80, ¶ 10, 667 N.W.2d 651, 659. 'if there is competent and substantial evidence to support the verdict, it must be upheld.' " *Kremer v. American Family Mut. Ins. Co.,* 501 N.W.2d 765, 772 (S.D.1993) (citations omitted).

a. Evidence of the Supplemental Lease was Properly Admitted at Trial Because it is Relevant to Knecht's Breach of Contract Claim and Necessary to Defend Evridges' Counterclaim

Evidence regarding the grazing association's disapproval of the Supplemental Lease and the reasoning behind their subsequent termination of said lease is directly relevant Knecht's breach of contract claim and his defense to Evridges' counterclaim for overgrazing. Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence. SDCL § 19-19-401. Pursuant to SDCL § 19-19-402, "all relevant evidence is admissible, except as otherwise provided by constitution or statute or by this chapter or other rules promulgated by the Supreme Court of this state." "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." SDCL §19-19-403. However, "admission of evidence is favored, and the judicial power to exclude such evidence" when its probative value is substantially outweighed by unfair prejudice "should be used sparingly." *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶30, 764 N.W.2d 474, 484 (citation omitted).

The Circuit Court correctly addressed this issue at an in chambers conference prior to the commencement of trial:

> [T]he crux of this case was that there was this additional lease that was done. "Don't tell anybody about this lease," is my understanding of what the Evridges were telling him, and then when he did confront the Association with this additional lease, then that raised the issue because he says, "I've got two leases."
>
> ***
>
> [Knecht's] claim is is [sic] based on what appears to be in his opinion dubious contractual relationships or contracts were created. One was a standard one that was required by the Association, and one was a secret one that was done in the end. He's got to bring that out so he can show that there was. Judge Macy's decision did not preclude the jury from not hearing that there was a second lease. We got to talk about the second lease.

(CR. 3438, 3441, 3443)

Nevertheless, Evridges argue that evidence regarding the grazing association's disapproval of the Supplemental Lease and the reasons behind its subsequent termination of the lease is irrelevant to Knecht's breach of contract claim because none of the damages claimed by Knecht resulted from his loss of the grazing permit. This argument is misguided.

According to an express provision of the Agricultural Lease, Evridges contracted to "[assist Knecht] with issuance of a grazing permit" tied to their ranch. (CR. 592) Without question, Evridges failed to fulfil this obligation and breached the contract with resulting damages to Knecht in 2016. But more importantly, it is undisputed that Evridges' wrongful conduct is the primary reason Knecht's permit was questioned and revoked, which, in effect, damaged Knecht's cattle operation.

Specifically, Evridges convinced Knecht to execute the Supplemental Lease, knowing it violated the grazing associations rules. Knecht was then told to keep the lease a secret for arbitrary reasons. In 2016, when the association became aware of the Supplemental Lease, it revoked Knecht's permit. The revocation of Knecht's grazing permit damaged his cattle operation because without the permit, Knecht was unable to accumulate the hay needed to carry his cattle operation through the next year. (CR. 3431) (JT 138). Knecht's ability to use the benefits of the grazing permit in 2016, as specified in the lease, would have allowed him to

conserve 800 tons of hay. (CR. 3431) (JT 143). This hay would then be used to feed his cattle in the spring of 2017. Because Knecht did not have enough hay to feed all his cattle, some of his cattle were sold prematurely. (CR. 3431) (JT 142). As such, Evridges' breach of the Agricultural Lease agreement clearly damaged Knecht. Furthermore, the association's involvement, including its reasoning for terminating Knecht's permit, is directly relevant to his breach of contract claim.

Evridges contend that Knecht breached the leases by overgrazing the ranch and running more cattle then it could sustain. However, once again, Evridges' initial plan and wrongful conduct is the sole reason any overgrazing occurred. Evridges did not include specific lease terms incorporating mandated grazing details and were to "share" certain portions of the ranch and graze their own animals only as set forth in the leases. But evidence demonstrated disputes over use of the leased premises by Evridges. (CR. 3431) (JT 111-116). Thus, the entire plan of the parties and conduct throughout the lease were at issue in the case. Further, as mentioned above, Evridges' persuaded Knecht to execute the Supplemental Lease, knowing it was prohibited by the grazing association. When the association became aware of the Supplemental Lease in 2016, they revoked Knecht's grazing permit because the lease violated their rules of management. (CR. 2372). As a result, Knecht lost his ability to graze on federal land and was forced to graze his entire herd on Evridges' deeded property.

The grazing permit effectively allowed Knecht to run additional livestock on Evridges ranch because, for half of the year, a set number of cattle would be housed and fed on federal land. Without the permit, Knecht had no other option but to maintain his entire herd on Evridges' ranch. Thus, any overgrazing that occurred in 2016 was a direct result of the revocation of Knecht's permit. And, but for Evridges' intentional violation of the grazing association's rules, Knecht's permit would not have been revoked. Therefore, the admission of such evidence is both relevant and necessary to Knecht's defense of Evridges counterclaim for overgrazing.

Moreover, to prohibit the jury from hearing this evidence would, without a doubt, cause confusion and unfairly prejudice Knecht. SDCL § 19-19-403. Had the jury not been apprised of evidence regarding the grazing association's disapproval of the Supplemental Lease and the fact that Evridges' deliberate conduct resulted in the revocation of Knecht's grazing permit in 2016, it would have wrongfully assumed that Knecht's actions alone caused the loss of his permit. Again, the events leading up to 2016 and use of the deeded property plus the Grand River grazing rights established the condition of the deeded property and reasons for its condition. Therefore, the loss of grazing rights is necessary for context. Without admission of such evidence, Knecht would be unfairly prejudiced because the jury would lack fundamental facts – Evridges' intentional violation of the association rules caused Knecht to lose his permit – necessary to a fair and just

verdict. *See Supreme Pork, Inc.*, 2009 S.D. 20, ¶30, 764 N.W.2d at 484. (prejudicial evidence is that which has the capacity to persuade the jury by illegitimate means which results in one party having an unfair advantage) (citation omitted). Thus, because the exclusion of such evidence would have persuaded the jury by illegitimate means and resulted in an unfair advantage to Evridges, it was properly admitted by the Circuit Court. *Id.* at ¶30. at 484.

Alternatively, Evridges have failed to meet their burden of establishing such evidence is inadmissible. *See Supreme Pork,* 2009 S.D. 20, ¶ 56, 764 N.W.2d at 490. ("The party objecting to the admission of evidence has the burden of establishing that the trial concerns expressed in Rule 403 substantially outweigh probative value.") (emphasis omitted) (citations omitted). In their brief, Evridges fail to adequately explain how they were prejudiced by the court's admission of evidence regarding the grazing association and their intentional violation of its rules. Evridges' mere disapproval of the evidence, because it raises questions regarding their credibility and presumably damages their case, is insufficient to justify its preclusion. *See State v. Barber,* 1996 SD 96, ¶ 19, 552 N.W.2d 817, 821. (Evidence is not prejudicial "merely because its legitimate probative force damages the defendant's case.") Because the admission of evidence regarding the grazing association and its reasoning for terminating Knecht's grazing permit was necessary for a fair and impartial verdict, the probative value of such evidence

largely outweighed its prejudicial effect of harming Evridges' case. As such, the Circuit Court properly admitted this evidence.

Even if the circuit erred in allowing such evidence, it does not amount to an abuse of discretion because overall, Evridges were not prejudiced. *See Harris*, 2010 S.D. 75, ¶ 8, 789 N.W.2d 303 at 307. (Holding that even if error is found, it must be prejudicial before the trial court's evidentiary ruling will be overturned). Despite the unquestionable damages suffered by Knecht in 2016 due to the loss of his grazing permit, which occurred by no fault of his own, the jury awarded Knecht zero damages for that year. In fact, Evridges were awarded $43,824.25, the full lease payment on the Agricultural Lease in 2016. Thus, the admission of evidence regarding the grazing association and its reasoning for terminating Knecht's grazing permit did not prejudice Evridges because it had no effect on the 2016 verdict and did not harm their substantial rights. *See Schoon v. Looby*, 2003 S.D. 123, ¶ 18, 670 N.W.2d 885, 891 (Error is prejudicial if it "most likely has had some effect on the verdict and harmed the substantial rights of the moving party."). For this reason, any error that may have occurred is deemed harmless, and does not amount to an abuse of discretion. *See* SDCL §15-6-61. Accordingly, the Circuit Courts evidentiary rulings must be affirmed.

b. The Circuit Court's Refusal of Evidence Regarding Evridges' Intensified Grazing Program was Proper.

The Circuit Court did not err in refusing Evridges proffered evidence regarding the intensified grazing program because Knecht was not obligated to

follow the grazing program and the admission of such evidence would have confused the jury. In their brief, Evridges assert that because Judge Macy "entered no conclusions of law regarding the intensified grazing program," testimony regarding the grazing program should have been admitted. *Br. of Appellant* at pg. 18. This is not the case. Judge Macy's Conclusions of Law explicitly addressed the issue:

> Any ambiguities arising from either lease contract are resolved against the Evridges. There are no terms referring to the implementation of a Grazing Plan. The provision allowing Evridges to direct the movement of cattle is vague and ambiguous. Therefore, the implementation of a Grazing Plan is resolved against the Evridges. Knecht was not obligated to implement a Grazing Plan on the Ranch.

(CR. 2209) (CL ¶17). Because Judge Macy ruled that Knecht was not obligated to implement a grazing plan on the ranch, testimony from Evridges or any of their experts regarding Knecht's failure to implement the grazing program was properly precluded by the Circuit Court.

Next, Evridges argue that the Circuit Court erred in precluding their testimony regarding the intensified grazing program as a defense to Knecht's claim concerning the number of cattle Evridges' ranch adequately supports without causing damage. Once again, this argument carries no weight. An intensified grazing program allows a ranch to sustain substantially more cattle then it could otherwise because the pastures are split into sections by fences, limiting the area in which livestock graze and duration of grazing. (CR. 2209) (FF ¶23). It is not the only method of preventing overgrazing, but a very specific one. Because

implementation of a grazing program was not required under the lease agreements at issue, and specifically because it was not spelled out and incorporated into the agreements, Knecht cannot be held to that standard. (CR. 2209) (FF ¶23). More importantly, Evridges did not leave the fences in place to conduct that type of range management, and Knecht's only obligation regarding fencing was to repair the existing fences using Evridges' materials, which were never provided. (CR. 2209) (FF ¶25).

When Knecht took possession of Evridges' ranch in February of 2014, the majority of the interior fences had been destroyed by natural disasters. (CR. 2209) (FF ¶24). As a result, "the fences on the ranch were not in a condition to operate the intensified grazing program as contemplated by Evridges". (CR. 2209) (FF ¶25). Therefore, any testimony pertaining to the intensified grazing plan, regardless of whether Evridges had once implemented such a plan to maximize the ranch's grazing capacity, was irrelevant because it was fundamentally impossible for Knecht to follow suit. Additionally, if admitted, such testimony would have confused the jury because the court would then be required to notify the jury that any testimony regarding the intensified grazing program is not to be considered in determining overgrazing damages nor could it apply to fencing, since there were no intensive grazing fences in place. *See* SDCL § 19-19-403 (Evidence that would cause confusion of issues is properly excluded). Accordingly, the Circuit Court properly precluded this evidence.

Lastly, Evridges argue that the Circuit Court erred in allowing Knecht to testify regarding Evridges' misrepresentation of their ranch's grazing capacity. However, Knecht's testimony on this issue was both relevant and admissible because it not only supported his breach of contract claim, but also was necessary to refute Evridges' claim that he overgrazed the ranch. Without such testimony, Knecht would have been unfairly prejudiced because it would have led the jury to believe that Knecht knew Evridges' ranch would not suit the needs of his herd, but nevertheless leased it with the intention of depleting its resources by intentionally overloading its capacity. This is simply false. As such, the exclusion of Knecht's testimony regarding Evridges' misrepresentation of their ranch's grazing capacity would have persuaded the jury by illegitimate means, which is unlawful. *See State v. Ralios*, 2010 S.D. 43, ¶42, 783 N.W.2d 647, 655. (Unfair prejudice, when determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, means evidence that has the capacity to persuade by illegitimate means.) Thus, the probative value of Knecht's testimony considerably outweighed its prejudicial effect and was properly admitted.

Furthermore, even if the court allowed this testimony in error, it does not amount to an abuse of discretion because the testimony did not prejudice Evridges. *See Harris*, 2010 S.D. 75, ¶ 8, 789 N.W.2d 303, 307. (Holding that even if error is found, it must be prejudicial before the trial court's evidentiary ruling will be overturned). In fact, the jury was not swayed by Kencht's testimony regarding

Evridges' misrepresentation of their ranch's grazing capacity because Knecht's damages were awarded due to the fact that he was deprived use of 40% of the ranch in 2014 and 2015, which is further discussed below. (CR. 3431, 3964) (JT 112-118, 671, 683). Moreover, Knecht received zero damages for 2016, the year in which Evirdges' misrepresentation of the ranch's grazing capacity adversely impacted Knecht the most since his ability to graze cattle on federal land was revoked, and he was forced to house his herd solely on Evridges' deeded property. Consequently, Evridges have failed to meet their burden of showing prejudice. *See Harris*, 2010 S.D. 75, ¶ 17, 789 N.W.2d 303, 309 ("A defendant must prove that trial court's admission of evidence resulted in prejudice." Error is prejudicial when, in all probability it produced some effect upon the final result and affected rights of the party assigning it.). Therefore, the Circuit Court's evidentiary rulings must be affirmed.

II. THE CIRCUIT COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON EVRIDGES' PIECEMEAL VERSION OF THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY ORDERS.

The Circuit Court's refusal to instruct the jury on Evridges' piecemeal version of Judge Macy's Findings of Fact, Conclusions of Law and Declaratory Orders was proper to avoid misleading or confusing the jury. The Circuit Court has discretion in the wording and arrangement of its jury instructions, and this court reviews a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard. *See Luke v. Deal*, 2005 SD 6, ¶ 11, 692 N.W.2d

165, 168 (citation omitted). "However, no court has discretion to give incorrect, misleading, conflicting, or confusing instructions: to do so constitutes reversible error if it is shown not only that the instructions were erroneous, but also that they were prejudicial." *State v. Packed*, 2007 SD 75, ¶ 17, 736 N.W.2d 851, 856 (quoting *Vetter v. Cam Wal Elec. Co-op., Inc.*, 2006 SD 21, ¶ 10, 711 N.W.2d 612, 615) (internal citations omitted). Erroneous instructions are prejudicial under SDCL § 15-6-61 when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party. *Id.*

Evridges argue that 1) the Circuit Court erred in refusing to allow their proposed jury instructions because the instructions mirrored Judge Macy's rulings from the court trial and were the law of the case; and 2) the Circuit Court abused its discretion by precluding said jury instructions because the end result prejudiced Evridges. This cannot be further from the truth. What Evridges failed to mention in their brief is that their proposed jury instructions were a "cherry-picked" version of Judge Macy's decision, and the court was willing to either admit the entire decision or none of it at all to prevent misleading or confusing the jury. *See Packed*, 2007 SD 75, ¶ 17, 736 N.W.2d 851, 856, (Holding that no court has discretion to give incorrect, misleading, conflicting, or confusing jury instructions).

At trial, counsel for Evridges attempted to persuade the court to admit a piecemeal version of Judge Macy's Order:

> [T]he Court is required to instruct the jury on various orders of the Court, because the parties are bound by those orders and the jury is to follow those orders… specifically 1, 2, 3, 4, 5, and 8. I'm not submitting the findings or conclusions. [Just] the order.

(CR. 3967, 3969) Counsel for Knecht immediately objected to this request and when the issue was later raised, he responded:

> If we want to piecemail [sic] this out and give the jury a part of it, I can pick four findings of fact and two conclusions of law that I would love to submit to the jury without the rest of it, but if we're going to give them a picture of what Judge Macy did, we have to give them the whole picture.

(CR. 4148). The court went on to say:

> I'd rather [the jury] look at the actual issues that we have right now, and that's the breach. [Judge Macy's] orders are premised on something…there was some decision that was rendered that allowed those orders to be issued[.] So, therefore, the findings of fact must [also]come in. That was the judge's decision as to why those orders came in, so you either get one or you get none.
>
> ***
>
> The order has -- previous orders have been complied with, but to submit them directly to the jury, the Court finds will not be -- will not benefit them in their deliberations.

(CR. 3791, 4151).

The Circuit Court's decision in refusing Evirdges' "cherry picked" jury instructions was both proper and necessary in that it allowed the jury to focus on the issues presented and prevented needless confusion. Had the jury been instructed otherwise, it would have prejudiced both parties because the jury would not have acted solely as the factfinder. Instead, the jury would have founded their analysis of the existing issues on Judge Macy's prior rulings, rather than weighing

the evidence on their own, which is improper. *See Packed*, 2007 S.D. 75 ¶ 34, 736 N.W.2d 851 (Holding that the jury's function is to resolve evidentiary conflicts, determine the credibility of witnesses, and weigh the evidence).

Moreover, Evridges' implausible example of how the admission of Judge Macy's orders would have changed the jury's outcome is less than convincing. Specifically, Evridges allege that the jury would not have awarded Knecht damages for Evridges' use of the ranch if the court instructed the jury to consider the following two orders:

> Evridges are entitled to shared-use of Section 36 from the beginning of October to beginning of December. [And,] Evridges may keep the small number of horses and bulls the Ranch that were there on the Ranch when Knecht took possession.

(CR. 2209) (O ¶4, 5)

Unfortunately, Evridges are mistaken. Damages were awarded to Knecht for 2014 and 2015 because he was limited to slightly more than half of the ranch during those years. There was extensive testimony on the use of Section 36 outside the limits found by Judge Macy, along with testimony about the lack of grazing access and lost feed suffered by Knecht because Evridges did not allow full use of the ranch. (CR. 3431) (JT 112-116). The fact that Judge Macy concluded that Evridges were entitled to shared-use of one pasture of the ranch and were permitted to keep a small amount of livestock on ranch does not change what actually occurred. In 2014, Knecht was precluded from using 40% of the pastures leased from Evridges because their livestock either occupied the pastures or

consumed all of the grass, rendering it useless to Knecht. (CR. 3431) (JT 112-116). In 2015, Knecht was precluded from using slightly less than 40% of the pastures he leased from Evirdges for the same reasons. (CR. 3431) (JT 112-116). The reality is that Evridges used far more of the ranch then agreed upon. This is undisputed. (CR. 3964) (JT 671, 683). Knecht paid for use of 100% of the ranch but instead received 60%. Without question, Knecht received much less than he bargained for. Viewing these facts in a light most favorable to upholding the verdict, it is highly improbable that the inclusion of the above-referenced orders in the jury instructions would have changed the jury's decision. *See Lenards v. DeBoer*, 2015 S.D. 49, ¶ 10, 865 N.W.2d 867, 870. ("This Court will uphold a jury verdict 'if the jury's verdict can be explained with reference to the evidence,' viewing the evidence in a light most favorable to the verdict.") (citation omitted).

And, even if this court finds that Judge Macy's Orders regarding Evridges' use of the ranch should have been admitted as jury instructions, the Circuit Court's error in denying them does not constitute reversible error because Evridges were not prejudiced by their preclusion. *See Schultz v. Scandrett*, 2015 S.D. 52, 866 N.W.2d 128. (Holding that an instruction must be shown to be both erroneous and prejudicial to constitute reversible error); *See also Papke v. Harbert*, 2007 S.D. 87, ¶ 13, 738 N.W.2d 510, 515). (Erroneous instructions are prejudicial when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party). Specifically, the inclusion of these orders as jury

instructions would not have affected the jury's verdict whatsoever because the fact that Evridges were entitled to shared-use of one section for a few months and permitted to keep a "small number" of livestock on the ranch does not amount to what actually took place - depriving Knecht's use of 40% of the property in 2014 and 2015.

Consistent with the lease, Knecht was allotted roughly 4,800 AUMS per year.[5] In 2014, Evridges kept 8 horses on the ranch for the entire year, 16 bulls on the ranch for 10 months and 400 heifers on the ranch for three months, which deprived Knecht of 1,764 AUMS. (CR. 3431) (JT 112-116). In 2015, Evridges kept 8 horses on the ranch for the entire year, 12 bulls on the ranch for 2 months and 350 heifers on the ranch for three months, which deprived Knecht of 1,387.5 AUMS. (CR. 3431) (JT 112-116). In these two years alone, Evridges use of the ranch, leased to and paid for by Knecht, deprived him of 3,151.5 AUMS. In total, Knecht paid Evridges $121,269.72 for the 3,151.5 AUMS consumed by Evridges' livestock. (CR. 3431) (JT 112-116). Because Evridges' actual use of the ranch was so far above their allotted use as indicated in Judge Macy's Orders, no reasonable jury would have ruled differently. Therefore, the exclusion of the Orders was at most, harmless error. Accordingly, the Circuit Court did not abuse its discretion in

[5] AUMs are calculated by multiplying the number of animal units by the number of months grazing and is used as an indicator of the total amount of forage consumed. In essence, AUMS determine the total number of grazing livestock the ranch can support.

refusing to instruct the jury on their piecemeal version of Judge Macy's Findings of Fact, Conclusions of Law, and Declaratory Orders.

III. THE JURY'S VERDICT FOR KNECHT IS SUPPORTED BY THE EVIDENCE.

The evidence introduced at trial is sufficient for this court to uphold the jury's verdict in favor of Knecht. "This Court will uphold a jury verdict 'if the jury's verdict can be explained with reference to the evidence,' viewing the evidence in a light most favorable to the verdict." *Lenards*, 2015 S.D. 49, ¶ 10, 865 N.W.2d 867, 870. "In considering the verdict of a jury in any particular case, to determine whether or not it is sustained by the evidence, we are not to speculate or query how we would have viewed the evidence and testimony ...." *Biegler v. Am. Fam. Mut. Ins. Co.*, 2001 S.D. 13, ¶ 32, 621 N.W.2d 592, 602. "[I]f there is competent and substantial evidence to support the verdict, it must be upheld." *Rogen v. Monson*, 2000 S.D. 51, ¶ 18, 609 N.W.2d 456, 461. This Court is not free to reweigh the evidence or gauge the credibility of the witnesses...." *Miller v. Hernandez*, 520 N.W.2d 266, 272 (S.D.1994) (citations omitted).

At the conclusion of the 2017 trial, the jury awarded Knecht damages in the amount of $62,800.00 for 2014 and $40,930.62 for 2015. These amounts are supported by the evidence because they directly correlate with the testimony presented to the jury during trial. In fact, the damages awarded to Knecht for 2014 and 2015 are close, but less than amounts in Knecht's testimony regarding the damages owed by Evridges for breach of the contract:

> **Q** So if you take the per animal unit monthly that you were allotted to get and what [Evridges] took from you, 1,764, that they used, times 38.48, what is the amount that you get?
>
> **A** I get $67,878.72.
>
> **Q** And did you then, in 2015, also have the same rental rate such that it would calculate out to about $38.48 per AUM?
>
> **A** Yes.
>
> **Q** So your testimony is that Evridges used up 1,387.5 AUMs in 2015 times 38.48 gets you to what?
>
> **A** Gets me to $53,391.

(CR. 3431) (JT 118, 119). Because the jury's verdict is practically parallel to Knecht's testimony regarding damages, there is competent and substantial evidence to support the verdict. *See Rogen*, 2000 S.D. 51, ¶ 18, 609 N.W.2d 456, 461 ("[I]f there is competent and substantial evidence to support the verdict, it must be upheld."). Therefore, this Court must uphold the verdict in favor of Knecht.

In their brief, Evridges erroneously attribute Knecht's verdict to the fact that Evridges' proposed use of the ranch was permissible, and the jury was not instructed to consider that finding. The jury was, however, presented with evidence and testimony indicating that one section of the ranch was to be shared for a few months and that Evridges were permitted to have a "small number" of livestock on the property. (CR. 3431) (JT 35) The jury also heard evidence by testimony and reviewed the lease terms. Apparently, the jury, tasked as the

ultimate fact finder in this case, did not find that evidence persuasive. *See Packed,* 2007 S.D. 75 ¶ 34, 736 NW.2d 851 (Holding that the jury's function is to resolve evidentiary conflicts, determine the credibility of witnesses, and weigh the evidence.) *See also Miller*, 520 N.W.2d 266, 272 (S.D.1994) ("This Court is not free to reweigh the evidence or gauge the credibility of the witnesses....").

Evirdges used far more of the ranch then agreed upon and in doing so, they deprived Knecht of 40% of the land he leased and paid for. No reasonable jury would conclude that because Evridges were entitled to shared use of one section of the ranch for a few months and permitted to have a "small number" of livestock on it, they were authorized to utilize almost half of the property leased to Knecht and still collect 100% of the rent. Thus, the jury's verdict in favor of Knecht is supported by the evidence and must be affirmed.

IV. THE JURY'S VERDICT DENYING DAMAGES TO EVRIDGES IS SUPPORTED BY THE EVIDENCE.

This court must uphold the jury's verdict denying damages to Evridges because it is supported by competent and substantial evidence. *Rogen,* 2000 S.D. 51, ¶ 18, 609 N.W.2d 456, 461. That said, Evridges' argument that the zero verdict on their breach of contract claim is contrary to the evidence because Knecht overgrazed and allowed weeds to grow on their ranch can be dispelled rather swiftly.

a. Overgrazing

As the evidence clearly indicates, Knecht's livestock were not the only livestock occupying Evridges' ranch during his tenure. (CR. 3431) (JT 112-116). In fact, Evridges' livestock grazed the ranch simultaneously and therefore contributed to any overgrazing that may have occurred. *Id.* Additionally, Evridges misrepresented the capacity of their ranch to Knecht with knowledge of 1) the number of cattle Knecht intended to run on the ranch; 2) the fact that they were planning to house livestock on it as well; and 3) the fact that Knecht's grazing permit could be revoked at any time, leaving him no other option but to run his entire herd on the deeded property. (CR. 1203, 2209, 3431) (TT 15, 16) (FF ¶ 18, 19) (JT 112-116). Evridges' undeniable contribution to the overgrazing as well as their inherent knowledge of the aforementioned facts effectively diminishes their claim and clearly illustrates that if anyone should be blamed, it is them. Therefore, a zero verdict on the overgrazing issue of Evridges' claim is supported by substantial evidence and duly justified. *Rogen*, 2000 S.D. 51, ¶ 18, 609 N.W.2d 456, 461.

b. Weeds

Next, Evridges' expert, Clair Stymiest's testimony regarding the weeds allegedly caused by Knecht was inconclusive. Pursuant to his lease, Knecht's obligation was to leave the ranch in the condition it was received. (CR. 28). Stymiest testified that he visited the ranch on March 25, 2017, four months after Knecht left, to evaluate the property. (CR. 3838). However, Stymiest had not

assessed the condition of the ranch prior to or during Knecht's use, so he had no knowledge of whether the current condition of the ranch was how Knecht initially received it. (CR. 3845). Additionally, Stymiest testified that his sole purpose in visiting the ranch was to provide a cost estimate and he did not evaluate the entire ranch. (CR. 3846). Instead, Stymiest only analyzed certain fields as directed by Evridges. *Id*. Therefore, Stymiest's analysis was not only heavily influenced by Evridges, but also partial in their favor. Regardless, after carefully considering the evidence presented, the jury decided to not to award Evridges damages on this issue. *See Packed*, 2007 S.D. 75 ¶ 34, 736 NW.2d 851 (Holding that the jury's function is to resolve evidentiary conflicts, determine the credibility of witnesses, and weigh the evidence.) *See also Miller*, 520 N.W.2d 266, 272 (S.D.1994) (This Court is not free to reweigh the evidence or gauge the credibility of the witnesses....") Because the jury's verdict can be explained with reference to the evidence, Evridges' mere disapproval of the jury verdict does not, by itself, warrant a new trial. *Alvine Family Ltd. P'ship* 2010 S.D. 28, ¶ 18, 780 N.W.2d 507, 512 (citation omitted). Accordingly, the jury verdict denying damages to Evridges must be affirmed.

CONCLUSION

In sum, the Circuit Court's evidentiary rulings and jury instructions at the 2017 jury trial were proper and ultimately led to a verdict supported by competent and substantial evidence. Evridges failed to show that the court abused its

discretion by 1) admitting evidence regarding their intentional violations of the Grazing Association's rules; 2) excluding evidence regarding an intensified grazing program that was fundamentally impossible to implement; and 3) rejecting jury instructions that included a piecemeal version of Judge Macy's Orders. Evridges' mere disapproval of the jury verdict does not, by itself, warrant reversal.

For all these reasons, Knecht respectfully request that this Court affirms the jury's verdict in favor of Evridges.

Dated at Sioux Falls, South Dakota, this 4th day of January, 2019.

DONAHOE LAW FIRM, P.C.

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Michael Knecht

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellee Michael Knecht complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 8,349 words, excluding the Table of Contents, Table of Authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman font (13 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 4th day of January, 2019.

DONAHOE LAW FIRM, P.C.

/s/ Daniel B. Weinstein
Daniel B. Weinstein

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Brief of Appellee" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on January 4, 2019.

The undersigned further certifies that an electronic copy of "Brief of Appellee" was emailed to the attorneys set forth below:

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Thomas G. Fritz
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Dated at Sioux Falls, South Dakota, this 4th day of January, 2019.

DONAHOE LAW FIRM, P.C.

/s/ Daniel B. Weinstein
Daniel B. Weinstein

APPENDIX

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AGRICULTURAL LEASE

This is an agreement between GAYLE EVRIDGE and LINDA EVRIDGE of 17951 110th St, Lemmon, SD 57638, hereinafter referred to as "LESSORS" and MICHEL J. KNECHT of 12699 SD Hwy 75, Lodgepole, SD, 57640, hereinafter referred to as "LESSEE."

LESSORS agree to let, lease and demise unto LESSEE the real estate described as:

Twp. 21 N., Rge. 13 EBHM, Perkins Co., SD:
Sec. 1: N1/2NW1/4; NW1/4NE1/4; S1/2NE1/4; N1/2SE1/4
Sec. 2: E1/2NE1/4; NE1/4SE1/4

Twp. 21 N., Rge. 14 EBHM, Perkins Co., SD:
Sec. 5: All
Sec. 6: All
Sec. 7: NW1/4; NE1/4; SE1/4; NE1/4SW1/4
Sec. 8: NW1/4; N1/2SW1/4

Twp. 22 N., Rge. 13 EBHM, Perkins Co., SD:
Sec. 36: All (shared use with LESSORS)

according to the terms herein. The above description is for approximately 3,080 acres, less 10 acres for 3,070 acres at $28.55 per acre.

The term of this lease is for three years beginning December 1, 2013 and terminating December 31, 2016. LESSEE covenants and agrees to pay to LESSORS the annual rent of EIGHTY-SEVEN THOUSAND SIX HUNDRED FORTY-EIGHT DOLLARS FIFTY CENTS ($87,648.50), payable 10% due upon signing of this agreement of EIGHT THOUSAND SEVEN HUNDRED SIXTY-FOUR DOLLARS AND EIGHTY-FIVE CENTS ($8,764.85) which is nonrefundable; and THIRTY-FIVE THOUSAND FIFTY-NINE DOLLARS AND FORTY CENTS ($35,059.40) due December 1, 2013, but no later than January 1, 2014; and the remaining FORTY-THREE THOUSAND EIGHT HUNDRED TWENTY-FOUR DOLLARS TWENTY-FIVE-CENTS ($43,824.25) shall be due and payable no later than November 10, 2014. Subsequent year payments shall be payable FORTY-THREE THOUSAND EIGHT

HUNDRED TWENTY-FOUR DOLLARS TWENTY-FIVE CENTS ($43,824.25) due December 1 and the remaining FORTY-THREE THOUSAND EIGHT HUNDRED TWENTY-FOUR DOLLARS TWENTY-FIVE CENTS ($43,824.25) payable November 10 of each respective year.

This is a grazing lease and LESSEE shall be entitled to hay using his own equipment and labor. Grazing shall be subject to LESSORS' requirements, LESSEE has discussed this and understands the requirements. LESSORS may move cattle or direct LESSEE to move the cattle on the home place. LESSEE is not entitled to hunt on the property.

LESSEE is entitled to use corrals and certified scales subject to priority use by LESSORS. LESSEE shall be responsible for repairing corrals due to damage caused by LESSEE'S livestock. LESSEE shall repair fences and LESSORS agree to provide necessary materials. LESSEE agrees to reimburse LESSORS for any labor, feed or salt/minerals provided.

All cattle must have a South Dakota hot iron brand.

LESSEE shall maintain a liability insurance policy providing liability coverage for a minimum of One Million Dollars per occurrence, showing LESSORS as named insureds and LESSEE agrees to indemnify and hold LESSORS harmless from all claims, liability, loss, damage or expense resulting from LESSEE'S occupation and use of the property. LESSORS have no responsibility nor obligation for LESSEE'S cattle.

LESSEE shall not be entitled to sublease the premises without written consent of LESSORS. LESSORS shall spray for noxious weeds. LESSORS shall at all times maintain the right to inspect the premises. Livestock health and death loss shall be the sole responsibility of LESSEE.

LESSEE agrees to use the property for agricultural purposes only and shall not overgraze any of the grass, shall not permit waste and upon termination of the lease, LESSEE agrees to vacate the property without further notice and leave the property including facilities used by LESSEE, in as good as condition as now, ordinary wear and tear and damage by elements beyond the control of LESSEE only excepted.

GRAND RIVER GRAZING REQUIREMENTS:

This lease contemplates LESSORS assisting LESSEE with issuance of a grazing permit tied to the above property and both parties agree;

1. The Lessors and the Lessee hereby acknowledge that the Grand River Grazing Association may monitor grazing use of the based property included in this Lease to assure that commensurability is maintained and the stocking rates and management do not damage the rangeland.
2. The Lessors and the Lessee jointly acknowledge and agree that this lease is for privately owned property only and that the grazing permit on the National Grasslands associated with this base property is waived to the Grazing Association and issuance of the permit is authorized by the Board of Directors.
3. In the event a grazing permit is issued to the Lessee, said Lessee agrees to comply with all Association Rules of Management and to abide by any approved allotment management plans in effect on the grazing allotments involved.

Dated this 3rd day of December, 2013.

Gayle Evridge

Linda Evridge

Michael J. Knecht

STATE OF SOUTH DAKOTA)
) ss
COUNTY OF PERKINS)

On this the 3 day of December, 2013, before me, the undersigned officer, personally appeared GAYLE EVRIDGE and LINDA EVRIDGE, known to me or satisfactorily proven to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same for the purposes therein contained.

In Witness Whereof, I hereunto set my hand and official seal.

TIMOTHY P. PARMLEY NOTARY Seal PUBLIC STATE OF SOUTH DAKOTA

Notary Public, South Dakota
My Commission Expires: 11-4-18

STATE OF SOUTH DAKOTA)
) ss
COUNTY OF PERKINS)

On this the 3 day of December, 2013, before me, the undersigned officer, personally appeared MICHEL J. KNECHT, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In Witness Whereof, I hereunto set my hand and official seal.

TIMOTHY P. PARMLEY NOTARY Seal PUBLIC STATE OF SOUTH DAKOTA

Notary Public, South Dakota
My Commission Expires: 11-4-18

SUPPLEMENTAL AGRICULTURAL LEASE

This is an agreement between GAYLE EVRIDGE and LINDA EVRIDGE, husband and wife of 17951 110th Street, Lemmon, SD 57638, hereinafter referred to as "LESSORS" and MICHEL J. KNECHT of 12699 SD Hwy 75, Lodgepole SD, 57640, hereinafter referred to as "LESSEE."

LESSORS agree to let, lease and demise the following described real estate:

Twp. 21 N., Rge. 14 EBHM, Perkins County, SD:
Section 5: All
Section 6: All
Section 7: N1/2; NE1/4SW1/4; SE1/4
Section 8: NW1/4; N1/2SW1/4

Twp. 21 N, Rge. 13 EBHM, Perkins County, SD:
Section 1: N1/2NW1/4; NW1/4NE1/4; S1/2NE1/4; N1/2SE1/4
Section 2: E1/2NE1/4; NE1/4SE1/4

Twp. 22 N, Rge. 13 EBHM, Perkins County, SD:
Section 36: All (shared use with LESSORS)

to LESSEE according to the terms herein.

There are approximately 3,070 acres being made available to LESSEE. The payment due herein is SIXTY-NINE THOUSAND THREE HUNDRED FIFTY-ONE DOLLARS FIFTY CENTS ($69,351.50), payable 10% upon the signing of this lease in the amount of SIX THOUSAND NINE HUNDRED THIRTY-FIVE DOLLARS FIFTEEN CENTS ($6,935.15), which is nonrefundable; TWENTY-SEVEN THOUSAND SEVEN HUNDRED FORTY DOLLARS SIXTY CENTS ($27,740.60) due December 1, 2013 but no later than January 1, 2014; and the balance of THIRTY-FOUR THOUSAND SIX HUNDRED SEVENTY-FIVE DOLLARS SEVENTY-FIVE CENTS ($34,675.75) due no later than November 10, 2014. Subsequent year payments shall be payable THIRTY-FOUR THOUSAND SIX HUNDRED

SEVENTY-FIVE DOLLARS SEVENTY-FIVE CENTS ($34,675.75) due December 1 and no later than January 1; and THIRTY-FOUR THOUSAND SIX HUNDRED SEVENTY-FIVE DOLLARS SEVENTY-FIVE CENTS ($34,675.75) due November 10 of each respective year. LESSEE'S bank will provide letter of credit, guaranteeing payment of the balance due after payment of the 10% down, effective for the term of this lease.

The term of this lease shall be for three (3) years, beginning December 1, 2014 and terminating December 31, 2016.

The LESSEE agrees to occupy and possess said premises during the term aforesaid; to farm such land in a good and skillful manner; to furnish all labor, machinery and implements required to properly farm such land and all of the expense thereof; to keep the land reasonably free from weeds and to commit no waste or damage to the lands or the improvements thereon and to allow none to be committed.

LESSEE shall not overgraze any of the grass and shall farm the land in accordance with the practices of good husbandry as practiced in the community. LESSEE shall farm the land so as to be consistent with the rules and regulations governing participation in government farm program payments.

All necessary movement of cattle through the pasture system shall be managed and accomplished by LESSEE. LESSORS accept no liability nor responsibility for death loss. All fencing shall be accomplished by LESSEE with LESSORS providing material.

There is hay on hand for the 2013-2014 year which will be sold to LESSEE at the then current market value.

Carrying capacity on the 3,060 acres is based on drought conditions experienced over the last few years. The 200 head cow/calf and six bulls carrying capacity may be increased if conditions warrant.

LESSEE shall be entitled to use a portion of the facilities for calving and LESSORS shall inform LESSEE as to the availability and time for such usage.

Branding and processing of cattle, including worming and medicating, shall be at the expense of LESSEE although LESSORS agree to provide the working pens.

LESSEE shall maintain insurance against liability in the amount of $1,000,000.00 with the policy showing LESSORS as a named insured and LESSEE further agrees to indemnify and hold harmless LESSORS for any acts of negligence of LESSEE.

LESSORS shall retain all hunting rights and LESSEE shall have no right to hunt nor allow others to hunt on the property.

LESSEE shall not be entitled to sublease the premises without written consent of LESSORS. LESSORS shall spray for noxious weeds. LESSORS shall at all times maintain the right to inspect the premises. Livestock health and death loss shall be the sole responsibility of LESSEE.

LESSORS agree that LESSEE, observing the terms of this lease, shall have the quiet and peaceable possession of such property during the term herein provided except for the rights of any lessees or owners of oil, gas or other minerals. Any damages that may be due by reason or destruction of crops by exploration, development or production of minerals during the terms of this lease shall be paid to LESSEE and all other damages that may be payable by reason thereof shall be paid to LESSORS.

The lessors and the lessee hereby acknowledge that the Grand River Grazing Association may monitor grazing use of the base property included in this lease to assure that commensurability is maintained and that stocking rates and management do not damage the rangeland.

The lessors and the lessee jointly acknowledge and agree that this lease is for privately-owned property only and that the grazing permit on the National Grasslands associated with this base property is waived to the Grazing Association. Such grazing permit may be issued to the lessee for the duration of this lease provided the lease is approved by the Grazing Association and issuance of the permit is authorized by the Board of Directors. In the event the permit is not transferred, LESSEE may terminate or renegotiate this lease.

In the event a grazing permit is issued to the lessee, said lessee agrees to comply with all Association Rules of Management and to abide by any approved allotment management plans in effect on the grazing allotments involved.

Dated this 3 day of Dec., 2013.

LESSORS:

Gayle Evridge

Gayle Evridge

Linda Evridge

Linda Evridge

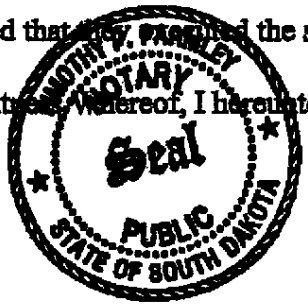
LESSEE:

Michel J. Knecht

STATE OF SOUTH DAKOTA)
) ss
COUNTY OF PERKINS)

On this the 3 day of December, 2013, before me, the undersigned officer, personally appeared Gayle Evridge and Linda Evridge, husband and wife, known to me or satisfactorily proven to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same for the purposes therein contained.

In Witness Whereof, I hereunto set my hand and official seal.



Notary Public, South Dakota
My Comm. Expires: 11-4-18

STATE OF SOUTH DAKOTA)
) ss
COUNTY OF PERKINS)

On this the 3 day of December, 2013, before me, the undersigned officer, personally appeared Michel J. Knecht, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In Witness Whereof, I hereunto set my hand and official seal.

Notary Public, South Dakota
My Comm. Expires: 11-4-18

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28780

MICHAEL J. KNECHT,

Plaintiff / Appellee,

v.

GAYLE EVRIDGE AND LINDA EVRIDGE,

Defendant / Appellants.

Appeal from the Circuit Court,
Fourth Judicial Circuit
Perkins County, South Dakota
The Honorable Eric J. Strawn, Presiding

REPLY BRIEF OF APPELLANTS

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NOTICE OF APPEAL FILED SEPTEMBER 20, 2018

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Other Authorities

PRELIMINARY STATEMENT

This brief is in response to Plaintiff Michael J. Knecht's Appellee brief. Plaintiff-Appellee will be referred to as "Knecht." Defendants-Appellants will be referred to as "Evridges." Reference to the record shall be as designated as "CR," followed by the appropriate page number. Reference to Knecht's Appellee Brief will be referred to as "Knecht Brief" followed by the appropriate page number.

RESPONSE TO KNECHT'S STATEMENT OF THE CASE

As addressed in Evridges' Appellee Brief in Appeal No. 28781, Knecht mischaracterizes the record. *See* Evridge Appellee Brief, pp. 3-4. Contrary to Knecht's assertion, Knecht never "contested" the circuit court's "Findings of Fact and Conclusions of Law and Declaratory Orders ("Declaratory Judgment") until his Notice of Appeal, dated September 21, 2018. *Id.*; CR 2209. While Knecht did file an appeal in 2016, the appeal was not an appeal of the circuit court's Declaratory Judgment, but an appeal of a judgment and order granting Evridges' Motion for Partial Summary Judgment and Motion for Release of Funds. CR 2490-93. Indeed, Knecht's Notice of Appeal and Docketing Statement indicate he is appealing specifically from the Judgment and Order, dated March 30, 2016. CR 2483-2491; CR 2398-2400, 2323, 2337, 2354, 2356.

RESPONSE TO KNECHT'S STATEMENT OF FACTS

Evridges' issues on appeal are all related to the jury trial, and they allege errors by the circuit court in its evidentiary rulings and jury instructions, and that the jury verdict cannot be sustained by the evidence presented at trial. Evridges'

Appellant Brief, pp. iv-v. Nevertheless Knecht's appellee brief is filled with facts that are completely irrelevant to those issues, and instead Knecht includes nine pages of facts that are not only irrelevant, but more importantly, inaccurate.[1]

For example, numerous times throughout his Appellee Brief (as well as in his Appellant Brief in Appeal No. 28781), Knecht claims he was "surprise[d]" when he was presented with two separate leases in December 2013. Knecht Brief, p. 12. But, as early as November 2013 when Evridges provided him with draft leases at his home and urged him to seek counsel for review, Knecht was aware there would be two leases. CR 1664-65, 1899-1901. Indeed, changes were requested to the two draft leases by Knecht's "banker." CR 1330-32, 1665, 1899. Moreover, in September or October 2013, Evridges told Knecht that the Supplemental Lease was not going to be turned into the Grand River Cooperative Grazing Association ("Grazing Association"). CR 1686, 1875, 1882, 1990. And, Knecht never testified at trial that he was allegedly "surprised" by the two leases. *See* CR 1212-13; 2896-2934.

Knecht also claims he was duped as to his responsibility to pay Grazing Association dues. *See* Knecht Brief, p. 15. However, prior to Knecht signing the leases, Evridges provided him with an itemized statement of costs associated with the leases. CR 918-920, 1895. Included in that itemized statement were the costs associated with the Grazing Association dues. CR 919. In fact, the statement

[1] Knecht failed to comply with the statutory directive to provide this Court with a statement of facts "relevant to the grounds urged for reversal" and which "must be stated fairly, with complete candor, and as concisely as possible." SDCL 15-26A-60(5).

clearly states "Knecht's Cost . . . G.R.A. Dues - $12,100.00." CR 919. Although Knecht claimed at trial that he was not provided an exact copy of the statement, he did admit to receiving "something similar." CR 1334-35; 3728.

Knecht also misconstrues the terms and purpose of the Supplemental Lease. *See* Knecht Brief, pp. 12-13 ("[T]hey created the Supplemental Lease" to sublease the their grazing permit.); p. 15 ("Knecht genuinely believed the Agricultural Lease was for use of Evridges' ranch . . . the Supplemental Lease was for use of Evridges' grazing permit[.]") What Knecht fails to appreciate, apparently from inception, is that the Supplemental Lease was not to "sublease" the Evridges' grazing permit.

Indeed, nowhere in its plain and unambiguous terms does the Supplemental Lease even purport to sublease the grazing permit tied to the Evridges' property. CR 1150-1154. And no violation for subleasing was ever noted by the Grazing Association. CR 2369-73. Moreover, the executive director of the Grazing Association plainly defined "subleasing" to mean that a "member cannot sublease out – cannot lease it to someone and that person cannot lease it to someone else, which would be a sublease." CR 1536. This is obviously not what occurred. It is undisputed that Evridges leased their deeded property to Knecht, and Knecht only. Knecht is patently incorrect in claiming that Evridges "created the Supplemental Lease which purportedly did exactly that," i.e., sublease their grazing permit. Knecht Appellee Brief. 12-13.

Moreover, while Knecht continues to vilify Evridges for the Supplemental Lease, no where in the Rules of Management is there an express provision regarding the amount charged for leasing base property. CR 892-93. Further, Evridges clearly explained that the Supplemental Lease was not to charge Knecht for use of Evridges' grazing privileges. CR 1755, 1760-62, 1851; 1881 ("Q. Did you lease the government pasture units to Mike? A. Did we lease the government – absolutely not.").

The facts relevant to the issues presented in Evridges' appeal, as fairly stated in their opening brief, which will not be repeated here, demonstrate not only that the circuit court's evidentiary issues are reversible error, but also that the jury's verdict lack evidentiary support, and should be reversed.

ARGUMENT AND AUTHORITIES

A. The Circuit Court's Admission of Evidence Regarding the Supplemental Lease and Grazing Permit Is Reversible Error

Evridges objected to admission of evidence pertaining to the Supplemental Lease on the grounds of relevancy. In response to this argument, Knecht first misstates the standard of review to evidentiary rulings. Specifically, Knecht misstates the standard for whether an evidentiary ruling is prejudicial, stating "there must be unfair advantage gained by [the] opposing party through evidence which persuades [the] trier of fact by illegitimate means." Knecht Brief, pp. 19-20 (citing *Sander v. Geib, Elston, Frost Prof. Assoc.,* 506 N.W.2d 107, 119 (S.D.

1993)). The standard cited by Knecht is for the exclusion of relevant evidence under Rule 403, which is completely inapplicable here.

Knecht then goes on to misstate the facts, arguing "regarding the grazing association's disapproval of the Supplemental Lease and the reasoning behind their subsequent termination of said lease is directly relevant [to] Knecht's breach of contract claim and his defense to Evridges' counterclaim for overgrazing." Knecht Brief, p. 20. To be clear, the Grazing Association did not terminate the Supplemental Lease between Evridges and Knecht as stated by Knecht. Having not been a party to that lease, the Grazing Association could not do so; the Grazing Association merely suspended Knecht's grazing permit for the year 2016. CR 2213; 2350-51.

But, even this fact is of no consequence to Knecht's claim of breach of the Agricultural Lease. Knecht's argument of relevancy goes something like this: Evridges convinced Knecht to sign the Supplemental Lease, but when the Grazing Association found out about the Supplemental Lease, it canceled the grazing permit, resulting in damages to Knecht because he did not have enough hay to feed his cattle. *See* Knecht's Brief, pp. 22-23; *see also* CR 1134. In essence, Knecht attempts to couch his damages for breach of the Supplemental Lease in terms of damages for breach of the Agricultural Lease.

The infirmity with this argument lies in the fact that Knecht could not recover damages for breach of the Supplemental Lease, as he elected his remedy for Evridges' inability to comply with the Supplemental Lease for 2016 –

termination of the lease for that year. Judge Macy, during the court trial, correctly held: "Knecht may not recover money for the failure of the Grazing Association to transfer the permit for 2016. Knecht's remedy is contained in the contract and he may terminate the Supplemental Lease." CR 2217. *See also* CR 11 ("In the event the permit is not transferred, [Knecht] may terminate or renegotiate this lease."). *FB & I Bldg. Prod., Inc. v. Superior Truss & Components, a Div. of Banks Lumber, Inc.*, 2007 S.D. 13, ¶ 18, 727 N.W.2d 474, 479 ("when contracting parties specifically provide for a resolution in the event that contract conditions are not met, then we must defer to their agreement."). Knecht did just that – he terminated the Supplemental Lease, his *only* remedy for the suspension of grazing permit in 2016. Thus, the very basis for Knecht's claim that evidence regarding the Supplemental Lease was relevant – because it was related to his claim for damages – was already decided and rejected by Judge Macy. CR 2215-2217. The law of the case doctrine bars his argument now on appeal, just as it barred Knecht's attempt to relitigate this issue at the time of the jury trial. *In re Pooled Advocate Tr.,* 2012 S.D. 24, ¶ 23-26, 813 N.W.2d 130, 139.

Knecht then argues that the overgrazing – the subject of Evridges' counterclaim of breach of contract of the Agriculture Lease – was due to the revocation of the grazing permit, and that evidence of the grazing permit and the fact it had been suspended, was relevant to his defense of Evridges' counterclaim. Knecht Brief 23-24. In short, Knecht argues his breach of the Agricultural Lease was excused or justified by the suspension of the grazing permit, which was a term

of the *other* lease, the Supplemental Lease. Notably, Knecht makes this argument without citing a single authority, and it must, therefore, be disregarded. *See Veith v. O'Brien*, 2007 S.D. 88, ¶ 50, 739 N.W.2d 15, 29 (citing SDCL 15-26A-60(6)).

Judge Macy found as a matter of law that "the Agricultural Lease and Supplemental Lease are separate contracts." CR 2214. Since Knecht failed to appeal from the Declaratory Judgment (*see* Evridge Appellee Brief 5-9), this became the law of the case. *See In re Pooled Advocate Tr.,* 2012 S.D. 24, ¶ 23-26, 813 N.W.2d. at 139. And, it is well established that a party's breach of one agreement (Evridges' alleged breach of the Supplemental Lease) does not, however, justify breach of a wholly separate agreement (Knecht's breach of the Agricultural Lease). *See Nat'l Farmers Org. v. Bartlett & Co., Grain,* 560 F.2d 1350, 1357 (8th Cir. 1977) ("It is well established that the breach of one contract does not justify the aggrieved party in refusing to perform another separate and distinct contract."); *In re Smith,* 100 B.R. 330, 336 (Bankr. S.D. Ohio 1989) ("Where there exists two sets of obligations or contracts, the breach or non-performance of one contract does not justify the aggrieved party in refusing to perform another separate and distinct contract.") RESTATEMENT (SECOND) OF CONTRACTS § 240 cmt.b (1981) ("If there are two separate contracts, one party's performance under the first and the other party's performance under the second are not to be exchanged under a single exchange of promises, and even a total failure of performance by one party as to the first has no necessary effect on the other party's duty to perform the second.").

Therefore, even if the suspension of the grazing permit were relevant to Knecht's termination of the Supplemental Lease following Evridges' alleged breach of the Supplemental Lease in 2016, it was clearly not relevant to, nor justification for, Knecht's breach of the Agricultural Lease. The Agricultural Lease remained in effect in 2016 and Knecht remained on the property to his benefit, to the Evridges' detriment. Knecht was not excused from his performance of his contractual duties under the Agricultural Lease. Under the specific, unambiguous terms of the Agricultural Lease Knecht was "not to overgraze any of the grass" and "leave the property . . . in as good as condition as now." CR 6.

Moreover, if suspension of the grazing permit resulted in Knecht having to seek additional or different feed for his cattle, he could have and should have sought cover by locating other pasture land or purchasing additional hay, for instance. He could have then sued for damages and recovered the amount he spent on the alternative pasture land and/or hay. But in no sense did the suspension of the grazing permit excuse Knecht's performance under the terms of the Agriculture Lease and allow him to overload the property with "his entire herd."

"It is well established that a material breach of a contract excuses the non-breaching party from further performance." *FB & I Bldg. Products, Inc. v. Superior Truss & Components*, 2007 S.D. 13, ¶ 15, 727 N.W.2d 474, 478. However, if the breach was not material, then the non-breaching party would not be excused from further performance under the contract, and would be limited to seeking damages as the remedy for a nonmaterial breach. *See Miller v. Mills*

Const., Inc., 352 F.3d 1166, 1171-72 (8th Cir. 2003); *Thunderstik Lodge, Inc. v. Reuer*, 1998 S.D. 110, ¶¶ 25-26, 585 N.W.2d 819, 824. Under South Dakota law, a material breach is a breach that "defeat[s] the very object of the contract." *Icehouse, Inc. v. Geissler*, 2001 S.D. 134, ¶ 20, 636 N.W.2d 459, 465.

In this case, the object of the Agricultural Lease was use of the Evridges' ranch. The suspension of the grazing permit did not "defeat the very object of the contract." Indeed, when the grazing permit was suspended in 2016, Knecht terminated the Supplemental Lease and remained on the Evridge property under the terms of the Agricultural Lease, continuing to reap the benefits of the same.

In short, Knecht's breach of the Agricultural Lease and reasons therefor (suspension of the grazing permit) had nothing to do with the Supplemental Lease, and Knecht should not have been allowed to present evidence of suspension of the grazing permit, or of the Supplemental Lease, its breach, and alleged resulting damages in support of his claim of breach or as a defense to his breach of the Agricultural Lease. It was error to admit such evidence, and the prejudice from such error is clear.

Knecht argues that "to prohibit the jury from hearing this evidence would, without a doubt, cause confusion and unfairly prejudice Knecht," citing SDCL 19-19-403. Knecht Brief, p. 24. Again, this statute is inapplicable, as it relates to the ability of a court to "*exclude relevant evidence* if its probative value is substantially outweighed by a danger of . . . unfair prejudice." The issue before the circuit court and this Court is whether the evidence was relevant and whether

admission of irrelevant evidence was prejudicial. Rule 403 is wholly inapplicable to this determination and Knecht's argument that he would have been prejudiced by its admission is off the mark.

The correct standard requires that Evridges demonstrate that the improperly admitted evidence "'in all probability affected the jury's conclusion.'" *Ruschenberg v. Eliason*, 2014 S.D. 42, ¶ 23, 850 N.W.2d 810, 817 (other citations omitted). In other words, to establish "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.* (other citations omitted).[2] As previously argued, allowing the jury to hear evidence on an issue not even before them was confusing, at best, and resulted in prejudice as seen in the damages they awarded to Knecht and the refusal to award damages to Evridges for Knecht's overgrazing.

Apparently, the jury did exactly what Knecht argues in his brief – it considered Evridges' alleged breach of the Supplemental Lease by their "intentional violation of the grazing association's rules" and resulting suspension of the grazing permit when considering Knecht's breach of the Agricultural Lease by overgrazing. Knecht Brief, pp. 22-23. The Leases were separate agreements and the respective breaches of each should have been considered separately. *See* CR 2214; *Nat'l Farmers Org*., 560 F.2d at 1357. However, by admitting evidence

[2] Again, the standard from a Rule 403 analysis is inapplicable here, and Knecht's argument that Evridges must establish that the "trial concerns expressed in Rule 403 substantially outweigh their probative value," is simply incorrect.

of the Supplemental Lease and the Evridges' alleged breach of it, even though that lease was terminated, the circuit court allowed the jury to do what was prohibited under settled contract law. *See Nat'l Farmers Org*., 560 F.2d at 1357; *In re Smith*, 100 B.R. at 336; RESTATEMENT (SECOND) OF CONTRACTS § 24 cmt.b.

Evridges have established not only that evidence of the Supplemental Lease and grazing permit was irrelevant and inadmissible, but also the admission of evidence was prejudicial. Evridges are entitled to a new trial on this basis alone.

B. The Circuit Court's Exclusion of the Intensified Grazing Program Is Reversible Error

A new trial is also warranted for the circuit court's exclusion of relevant evidence – the intensified grazing program. Knecht argues the circuit court properly excluded evidence of the intensified grazing program during the jury trial because during the court trial, it was determined that Knecht did not have to follow that program.[3] However, at the jury trial, the evidence of the intensified grazing program evidence was not offered to show that Knecht was obligated to follow the program or was in any way in breach for his failure to do so. Rather, Evridges offered evidence of the intensified grazing program in response to the circuit court allowing Knecht's "defense" to his breach of the Agricultural Lease by overgrazing, and to rebut Knecht's claims as to how many cattle the Ranch could sustain without causing damage – one of the main bases for Evridges' breach of contract claim. *See e.g.* CR 3852-53.

[3] Evridges have acknowledged that the circuit determined Knecht did not have to follow the intensified grazing program and does not challenge that ruling.

According to Evridges' uncontradicted offer of proof, the intensified grazing program would allow a person to run far more livestock on the land than if an intensified grazing program were not followed. CR 3857. This evidence was relevant and significant because Knecht argued at trial that he was not overgrazing and could run more cattle on the pasture because Evridges had done so in the past. CR 3486-87. But the evidence regarding the intensified grazing program, which the circuit court excluded, would have explained to the jury how Evridges could run the same number of cattle as Knecht, without damage: because they followed the intensified grazing program.

Knecht's only response to this argument is that "Knecht cannot be held to that standard" and that the "fences were not in a condition to operate the intensified grazing program." Knecht Brief, p. 28. Again, Evridges did not seek to hold Knecht to that standard or to suggest to the jury that Knecht should have followed the intensified grazing program; rather, they offered that evidence only to rebut the claim that he could run as many cattle on the Ranch as the Evridges did. Evridges could run the number of cattle they ran on the Ranch without damage because they followed the program. Knecht could not run as many cattle on the Ranch without damage because he did not follow the program. This is merely explanatory of why Evridges could run that many cattle, which was Knecht's offered justification for what he did in breach of the Agricultural Lease. When Knecht's strategy to avoid damages for overgrazing was to compare his use of the

Ranch to Evridges' use, Evridges should have been allowed to explain the difference between their situation and Knecht's.

The circuit court's exclusion of this evidence was patently prejudicial, in light of the fact that the jury did not award Evridges any damages for their overgrazing claim. The only explanation for the jury's refusal to award damages for Knecht's overgrazing is the jury's belief that Evridges ran as many head of cattle as Knecht did, without being told there was a difference. The exclusion of the evidence "in all probability," if not unquestionably, affected the jury's verdict, and must be reversed. *See Ruschenberg*, 2014 S.D. 42, ¶ 23, 850 N.W.2d at 817. A new trial is, accordingly, warranted.

C. The Circuit Court's Refusal to Instruct on the Law of the Case is Reversible Error

In addition to the evidentiary errors, the circuit court erred in requiring Evridges' proposed instruction that included the law of the case. Knecht characterizes the proposed instruction on the circuit court's previous Declaratory Orders as "piecemeal," and claims the proposed instruction contained "cherry-picked" portions of Judge Macy's decision. Knecht Brief, pp. 30-31. In fact, the proposed instruction contained every one of Judge Macy's Declaratory Orders *relevant to the jury's task*. *Compare* CR 2209-2217 with 3146. It makes no sense to provide the jury with portions of the Declaratory Orders having nothing to do with the jury trial. For example, while paragraphs (6) and (7) were not included in Evridges' proposed instruction, those were not issues before the jury. CR 2216

(court determined there was no anticipatory breach and no rescission of either lease).

Further, while Knecht's trial attorney and now his appellate counsel both argue for inclusion of the Findings of Fact and Conclusions of Law, in addition to the Declaratory Orders, those portions of the previous trial were not pertinent to the issues the jury would be deciding and would have been confusing and misleading, and invaded the province of the jury to decide issues of fact. For example, none of the findings of fact were issues the jury had to determine; they were already determined by the trial court and/or undisputed and/or immaterial. CR 2209-2213. The conclusions of law stated by the circuit court are not within the scope of the jury's duties; indeed, it is axiomatic that legal determinations are expressly for the court, not the jury. So, to include conclusions of law in instructions to the jury would be unnecessary, confusing, and misleading. *See Jacquot v. Rozum,* 2010 S.D. 84, ¶ 21, 790 N.W.2d 498, 505-06 (no court has discretion to give incorrect, misleading, conflicting, or confusing instructions). The Declaratory Orders constitute the law of the case. *See In re Pooled Advocate Tr*., 2012 S.D. 24, ¶ 23, 813 N.W.2d at 139 (applying the "law of the case" doctrine to a declaratory judgment order and explaining "the 'law of the case' doctrine . . . stands for the general rule that 'a question of law decided by" a court "becomes the law of the case, in all its subsequent stages[.]"). The Declaratory Orders, thus, would have instructed the jury on the applicable law, which would have assisted them in make their related determinations. *See Black v. Gardner*,

320 N.W.2d 153, 158 (S.D. 1982). It was error for the circuit court to refuse this instruction which provided the jury not only with a correct statement of the law, but also gave it direction on the issues it was tasked with deciding.

As explained, the prejudice from the erroneous instructions is evident. The jury awarded Knecht damages for the presence of Evridges' horses even though it was already determined they were allowed to be there, as reflected in the Declaratory Orders. CR 2216. Knecht argues "Evridges' actual use of the ranch was so far above their allowed use as indicated in Judge Macy's Orders, no reasonable jury would have ruled differently." Knecht Brief, p. 35. There is no support for this assertion, as indicated by the lack of citation to record evidence.

In fact, the record shows this argument is without merit, since as noted by Knecht, *when he took possession of the Ranch in 2014,* Evridges had eight horses (year round, 16 bulls (for 10 months) and 400 heifers (for three months). Knecht Brief, p. 35. That was the number of animals determined by Judge Macy that were allowed to be on the Ranch. CR 2216 ("Evridges may keep the small number of horses and bulls on the Ranch that were on the Ranch *when Knecht took possession*.") (emphasis added). In 2015, the number of animals and/or the amount of time they were kept on the Ranch by Evridges only decreased, as noted by Knecht himself – eight horses (year round), 12 bulls (but only 2 months) and 350 heifers (for three months), and Evridges had no bulls on the Ranch in 2016. Knecht Brief, p. 35.

Thus, contrary to Knecht's unsupported statement, Evridges' allotted use as indicated in Judge Macy's Declaratory Orders actually *decreased*. Had the jury been instructed that Evridges were allowed to keep the animals on the Ranch that they had there when Knecht took possession, the jury could not have awarded Knecht damages for the presence of those animals there. The prejudice from the circuit court's refusal of Evridges' proposed instruction is clear, and reversal of the jury's verdict for Knecht is warranted on this basis as well.

D. The Jury's Verdict is Not Supported by the Evidence

1. The Verdict for Knecht Is Not Supported

For the same reasons as expressed in Section C. above, the damages awarded to Knecht are not supported by the evidence. Knecht justifies the damage award by reference to his own testimony. Knecht Brief, p. 37. But that testimony fails to take into account the law of the case – the Declaratory Order that Evridges were entitled to have that number of animals on the ranch as Knecht claims damaged him. Further, there was no evidence at trial that supports the jury's verdict that Evridges' heifers' presence on the leased property for a mere eight days caused any damage to Knecht, and Knecht cites to none in his brief. *See* Knecht Brief, pp. 36-38.

2. The Verdict Against the Evridges for Overgrazing is Not Supported

In support of the jury's verdict against Evridges for the overgrazing, Knecht again relies on the fact that Evridges had animals grazing on the Ranch and claims that they misrepresented the number of animals they had there. This theory that

Evridges had more animals than was represented is not borne out by the evidence. As explained above, the number and/or length of time that Evridges had animals grazing on the lease property actually decreased from 2014 when Knecht took possession to 2016. The overgrazing simply cannot be attributed to the Evridges' own animals.

Knecht also relies on the alleged breach of the Supplemental Lease by the suspension of the grazing permit as an excuse for his livestock overgrazing the property. As explained, Knecht could have sought cover and sued for damages for having to obtain other grazing alternatives for his livestock. He did not. The suspension of the grazing permit did not excuse his contractual obligations under the Agricultural Lease. Further, he cannot recover damages he could never have recovered recover as justification for the jury's erroneous verdict.

The jury's verdict is simply contrary to the evidence, and is the result of unfair prejudice, erroneous evidentiary rulings and/or erroneous jury instructions. On this basis as well, the verdict should be reversed and a new trial had. *See Berry v. Risdall*, 1998 S.D. 18, ¶ 11, 576 N.W.2d 1, 4.

CONCLUSION

For all these reasons, as well as those stated in Evridges' other briefing submitted in this and Knecht's cross-appeal, Evridges respectfully request that the Court reverse the jury's verdict against them and that they be granted a new trial.

Dated this 17th day of January, 2019.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

By: */s/ Cassidy M. Stalley*

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL 15-26A-66(b). Proportionally spaced font Times New Roman 13 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Brief of Appellants contains 4,540 words as counted by Microsoft Word.

/s/ Cassidy M. Stalley
Cassidy M. Stalley

CERTIFICATE OF SERVICE

Cassidy M. Stalley, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 17th day of January, 2019, she electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

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The undersigned further certifies that the original and two (2) copies of this Reply Brief in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Cassidy M. Stalley
Cassidy M. Stalley