IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28565

CHARLOTTE M. ANDERSEN,

Plaintiff-Appellee,

v.

ARTHUR S. ANDERSEN,

Defendant-Appellant.

Appeal from the Circuit Court
Fourth Judicial Circuit
Lawrence County, South Dakota

Honorable Michelle K. Comer, Presiding Judge

APPELLANT'S BRIEF

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Notice of Appeal filed March 15, 2018

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PRELIMINARY STATEMENT

Defendant-Appellant will be referred to as "Art."[1] Plaintiff-Appellee will be referred to as "Charlotte." The Settled Record will be referred to as "SR." The Appendix will be referred to as "APP," followed by the appropriate page number. The November 15, 2017 court trial transcript will be referred to as "CTT," followed by the appropriate page number. The March 13, 2018 motions hearing will be referred to as "MH," followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Art respectfully appeals the Honorable Michelle K. Comer's Order Granting Motion to Dismiss ("Order") that was signed and filed on March 14, 2108. SR 860. Notice of Entry was filed on March 14, 2018. SR 867. Art timely served Notice of Appeal on March 15, 2018. SR 869. The Order is appealable pursuant to SDCL 15-26A-3.

STATEMENT OF THE ISSUES

I. *When all issues have been fully adjudicated by the trial court prior to the death of one of the parties in a divorce, can the trial court enter a judgment and decree nunc pro tunc to effectuate its prior judicial act following the death of a party?*

The trial court erroneously held under *Larson v. Larson*, 89 S.D. 575, 235 N.W.2d 906, 907 (1975) that it did not retain jurisdiction following Art's death to

[1] Art passed away on February 20, 2018. SR 527. On February 27, 2018, Tena Haraldson ("Haraldson"), Art's sister, was appointed as Special Administrator of the Estate of Arthur S. Andersen to appear on Art's behalf in this divorce matter. SR 639-40. Haraldson moved for substitution of parties on March 1, 2018. SR 529. On April 18, 2018, the trial court granted Haraldson's motion, *nunc pro tunc* March 13, 2018. SR 907.

enter a judgment and decree *nunc pro tunc* to a date preceding Art's death to effectuate its prior judicial acceptance of the parties' stipulated agreement.

Relevant Authority:

Larson v. Larson, 89 S.D. 575, 235 N.W.2d 906, 907 (1975)
Ex parte Adams, 721 So.2d 148 (Ala. 1998)
In re B.A.R., 344 N.W.2d 90, 94 (S.D. 1984)
Todd v. Todd, 7 S.D. 174, 63 N.W. 777, 779 (1895);
SDCL 25-4-17.2

II. *Is an executed stipulated property settlement enforceable independent of the entry of a divorce decree after a party's death in a divorce action?*

The trial court erroneously held under *Larson* that it could not enforce the terms of the parties' Stipulation as a contract in the divorce action because its jurisdiction over the divorce action was abated completely.

Relevant Authority:

O'Connor v. Zeldin, 848 P.2d 647, 648 (Or. Ct. App. 1993)
Estate of Ladd v. Estate of Ladd, 640 A.2d 29 (Vt. 1994)
SDCL 25-2-10
SDCL 25-2-13

STATEMENT OF THE CASE

This appeal stems from a divorce action initiated by Charlotte on January 27, 2015. SR 3. On November 15, 2017, the parties appeared in front of the trial court for a scheduled court trial. CTT 2. At that time, the parties informed the trial court that they had reached a stipulation. *Id.* The parties further informed the trial court that, although it was their intent to sign a written stipulation immediately thereafter, the judgment and decree would not be filed until March 1, 2018, although the effective date of entry would be *nunc pro tunc* to December 31,

2017. *Id.* at 2-3. The stipulation was put on the record. *Id.* at 2-14. The trial court approved the parties' stipulation and bound the parties to their agreement. *Id.* at 14.

Five days later, on November 20, 2017, the parties filed an executed Stipulation and Agreement ("Stipulation"), as well as Affidavits of Jurisdiction and Grounds for Divorce by both parties, with the trial court. SR 488-505, APP A.

Unfortunately, on February 20, 2018, Art passed away before a judgment and decree was entered. SR 527. Three days later, Charlotte filed a Motion to Dismiss pursuant to SDCL 25-4-1 and began acting contrary to the terms of the Stipulation which she signed and agreed to be bound to. SR 506.

On March 13, 2018, a motions hearing was held before the Honorable Michelle K. Comer. MH 1. Relying on *Larson v. Larson*, 89 S.D. 575, 235 N.W.2d 906 (1975), the trial court erroneously granted Charlotte's Motion to Dismiss. MH, 13; SR 860. Art now appeals.

STATEMENT OF THE FACTS

Charlotte and Art were married on October 16, 2004. SR 3. After ten years of marriage, Charlotte filed for divorce on January 27, 2015, alleging irreconcilable differences. *Id.*

On November 15, 2017, the parties appeared before the trial court for a scheduled Court Trial. CTT 2. At that time, the parties informed the trial court that they had reached a stipulation on all issues. *Id.* at 2:8-9. The trial court

requested that one of the attorneys put the stipulation on the record and first explained to the parties:

> And as Mr. Brady is reading this, I would ask that both parties pay very specific attention, and if you can't hear, ask for clarification, because at the end I'm going to ask both of you if this is, in fact, your agreement, and *I will bind you to this agreement orally today*.

Id. at 2:17-22 (emphasis added). The following colloquy then occurred on the record:

> **Mr. Brady:** Okay. First of all, we are putting this stipulation on the record, but after we get done with this, Mr. Sabers has started a draft formal document and he will complete that document embodying this agreement in a written form that both of these parties are going to sign either today, when it's done, or tomorrow, whatever, but they're going to stay here and sign it before they leave town.
> **Mr. Sabers:** Agreed.
> *** * ***
> **Mr. Brady:** Number two, *this stipulation covers all material facts and property division issues that the Court would be asked to consider if this trial were to proceed*. All material terms and conditions of a stipulation agreement.
> **Mr. Sabers:** Agreed.
> **Mr. Brady:** Going forward, and using a draft settlement reached in the Andersen deal drafted by Mr. Sabers, upon which there's a lot of markings, it goes: Number one, *there will be a decree of divorce entered in favor of both parties against the other on the ground of irreconcilable differences. It will be entered March 1, 2018, unless otherwise mutually agreed, and it shall be nunc pro tunc to December 31, 2017.*
> **Mr. Sabers:** Agreed.

Id. at 2:24 to 3:23 (emphasis added). Mr. Brady subsequently read into the record the parties' agreement, which specifically resolved all issues of the divorce, including grounds for divorce, the division of property, alimony, and attorney fees. *Id.* 3-12. Mr. Sabers confirmed the parties' agreement, stating:

> Agreed. I think Mr. Brady identified the agreement that the parties have reached, and after we go to the ranch today to deal with some personal belongings, I will return to my office and continue to work on the stipulation agreement. My client is in town for the remainder of the week. We will get this done, including the approval of a form of a judgment and decree of divorce that will be submitted to the Court for signature at a later date, but form will be agreed to. A stipulation and agreement will be signed. Affidavits of irreconcilable difference will be signed all before the parties leave.

Id. at 12:24 to 13:9.

Following, the trial court canvassed the parties to confirm their agreement and to bind them to it:

> **The Court:** Thank you. Ms. Andersen, is this, in fact, your agreement?
> **Ms. Andersen**: Yes, it is.
> **The Court:** And do you agree to be bound by this agreement?
> **Ms. Andersen:** Yes, I do.
> **The Court:** And, therefore, do you agree to waive your right to a trial that was set for today?
> **Ms. Andersen:** Yes.
> **The Court:** Thank you. Mr. Andersen, is this, in fact, your agreement?
> **Mr. Andersen:** Yes.
> **The Court:** And do you agree to be bound by the terms of this agreement?
> **Mr. Andersen:** Yes.
> **The Court:** And do you agree to give up the trial that was set for today?
> **Mr. Andersen:** Yes.

Id. at 13:10 to 14:1.

On November 16 and 17, 2017, the parties signed the Stipulation, memorializing their agreement and resolving all issues, including grounds for divorce, division of property, alimony, and attorney's fees. SR 488-503, APP A. The Stipulation was filed on November 20, 2017. *Id.*

The Stipulation is nearly identical to, if not word-for-word, with that put on the record at the November 15, 2017 proceeding before the trial court. *Id.* In fact, the Stipulation notes that all of the terms "were agreed to in open Court on November 15, 2017[.]" SR 489, APP A-2. The Stipulation provides that a divorce would be granted to each party on the grounds of irreconcilable differences. SR 488; APP A-1. It provides that the Stipulation is binding on all heirs, successors, and personal representatives. SR 501, APP A-14. The Stipulation notes the trial court has jurisdiction. SR 489, APP A-2. Most importantly, the Stipulation ratifies the parties' intent that the Stipulation "*shall* subsequently be incorporated into a Judgment and Decree of Divorce," which was to "be filed on March 1, 2018" and "*shall be entered nunc pro tunc on December 31, 2017*." SR 489-50, APP A 2-3 (emphasis added).

The parties also filed Affidavits Establishing Jurisdiction and Grounds for Divorce. SR 504-05, APP B. The Affidavits undisputedly state that the parties consent to the jurisdiction of the trial court and to the trial court entering a judgment and decree on the grounds of irreconcilable differences. *Id*.

Thereafter, the parties began substantially performing pursuant to the terms of the Stipulation. Property was divided, delivered, and exchanged in accordance with the terms of the Stipulation. SR 576, 621-22, SR 664-823. Indeed, Charlotte either removed or had delivered numerous, if not all, of the items of personal

property specifically identified in the Stipulation to her residence in Missouri.[2] SR 576, 664. In addition, Art negotiated the sale of the Boke Ranch, and pursuant to the terms of the Stipulation, $25,000 of the closing proceeds were paid to the mortgage holder of the parties' Dubois shop building. SR 664. In short, both parties were complying with and performing pursuant to the terms of the Stipulation.

Unfortunately, before a judgment and decree was submitted for the trial court's signature, Art passed away. SR 527. Three days later, Charlotte filed a Motion to Dismiss pursuant to SDCL 25-4-1, and requested an emergency hearing. SR 506.

In order to respond to Charlotte's motion, Haraldson, Art's sister, was appointed as Special Administrator of the Estate of Arthur S. Andersen. SR 639-40. Haraldson subsequently filed a Suggestion of Death on the Record and moved to substitute herself, as Special Administrator, in place of Art in this action. SR 529. Undersigned counsel noted their appearance as attorneys for Haraldson, Special Administrator of the Estate of Arthur S. Andersen. SR 549. Charlotte did not object to Haraldson's Motion for Substitution.

On March 1, 2018, and pursuant to the parties' Stipulation, Haraldson then submitted a proposed Judgment and Decree of Divorce, requesting that the trial court sign it *nunc pro tunc* December 31, 2017, and forward to the Clerk for filing.

[2] The parties separated almost two years before the Stipulation was signed. SR 490.

SR 531, 642-43. Haraldson also filed a Motion for Entry of Nunc Pro Tunc Judgment and Decree of Divorce, as well as a brief in support of her motion and in opposition to Charlotte's Motion to Dismiss. SR 556-75. Again, Charlotte made no objection to Haraldson's appearance.

On March 13, 2018, a motions hearing was held before the Honorable Michelle K. Comer. Charlotte appeared in person and with counsel. MH 2. The undersigned noted her appearance for Art, as well as Haraldson. MH 2. No objection was made to Haraldson's appearance, and counsel for Haraldson was permitted to argue on behalf Art and Haraldson and in opposition to Charlotte's Motion to Dismiss.[3] MH 2.

The trial court granted Charlotte's Motion to Dismiss. MH 13. Relying exclusively on this Court's holding in *Larson v. Larson*, 89 S.D. 575, 235 N.W.2d 906, 907 (1975), the trial court erroneously held "that death abates jurisdiction of this Court." MH 13. Although noting its displeasure with the result, "I certainly, in a divorce, didn't necessarily want to go this way when there was already an agreement," the trial court erred in her legal conclusions that "the law is clear." *Id*. Art's timely Notice of Appeal followed. SR 869.

[3] To comport with the record, the trial court, over Charlotte's objection, signed an Order Granting Motion for Substitution of Parties on April 18, 2018, dated *nunc pro tunc* March 13, 2018. SR 907.

STANDARD OF REVIEW

A trial court's conclusions of law are reviewed *de novo*. *Surat Farms, LLC v. Brule Cty. Bd. of Comm'rs*, 2017 S.D. 52, ¶ 12, 901 N.W.2d 365, 369. Under this standard of review, the trial court's "conclusions of law are given no deference by this court on appeal." *City of Aberdeen v. Rich*, 2003 S.D. 27, ¶ 9, 658 N.W.2d 775, 778 (additional citations and quotation marks omitted).

ARGUMENT

I. The trial court erroneously relied on *Larson* to hold that a trial court cannot enter a judgment and decree *nunc pro tunc* following Art's death to effectuate its prior judicial acceptance of the parties' stipulated divorce agreement.

A. *Larson* is factually distinguishable and does not extend to control the outcome of this case.

This Court has never had the opportunity to address this issue presently before it: can a judgment and decree be entered *nunc pro tunc* following the death of a party to provide record of the trial court's prior judicial acceptance of a stipulated agreement? While the trial court held this Court's 1975 decision in *Larson* controls, *Larson* is factually distinguishable from the facts now before this Court, and by its own terms cannot be read to extend to prohibit a trial court from entering a *nunc pro tunc* decree. At the time of Art's death all issues had been fully adjudicated and accepted by the trial court, no judicial acts remained; entry of a *nunc pro tunc* decree following Art's death would have merely confirmed the trial court's prior judicial act.

In *Larson*, the wife commenced an action for divorce against her husband. 89 S.D. 575, 235 N.W.2d 906, 907 (1975). Unlike here, the parties in *Larson* could not reach an agreement on the division of property, necessitating a trial. *Id.* at 907. At the conclusion of the trial, the trial judge suggested that counsel prepare a memorandum proposing an acceptable property division and award. *Id.* Because the parties had stipulated that the grounds for divorce would not be contested and the trial court would not take fault into consideration in the division of property, the trial court noted "[t]he only thing for me to decide now is the financial arrangements and I'll do that after five days from now so you will have the decision within about two weeks from now." *Id.*

After the trial, the trial judge left for a five-week judges' college. *Id.* While away, the trial judge dictated a memorandum decision and sent it to his clerk for transcription. However, the husband died before the trial court had signed, filed, or served its memorandum decision. *Id.* 907, 909. Thus, in stark contrast to the facts here, at the time of the husband's death issues still remained in dispute for the *Larson* trial court to resolve to include the division of property and the date of divorce. *Id.*

A hearing was held on the wife's motion to substitute the husband's executor as defendant. *Id.* at 908. Recognizing that judicial acts remained, the trial court initially denied the motion and refused the wife's proposed *nunc pro tunc* decree, stating:

> It appears when a trial court has determined questions of fact and directed entry of a judgment, and the parties are entitled to have it entered while both parties are living, after the death of a party such a judgment may be entered nunc pro tunc as of the date within the lifetime of the deceased at the instance of persons whose rights are affected thereby, for the purpose of determining and fixing property rights or for the purpose of legalizing proceedings taken in the belief that the parties to the divorce were in fact divorced.

Id. at 908. Because no property division had occurred, the trial court held "there were judicial acts remaining that cannot be done 'now for then.'"[4] *Id.* However, the trial court subsequently reversed itself, granted the wife a divorce, divided the property, and signed a *nunc pro tunc* divorce decree to a date before the husband's death. *Id.* at 908-09.

On appeal, this Court addressed two issues: (1) did the divorce action survive the death of husband, and (2) even if the action was abated, did the trial court have the power to enter a *nunc pro tunc* divorce decree after, and despite, the husband's death? *Id.* at 909. Art acknowledges that the *Larson* court held that death abates a divorce action under South Dakota law under the facts of that case. *Id.* at 909. This is not at issue. But the *Larson* court did not end its analysis there. Instead, the *Larson* court went on to analyze two separate cases from Florida and Michigan to determine the second issue. And although the *Larson* court ultimately held that the trial court, under the facts before it, did not have authority to enter a *nunc pro tunc* decree after the husband's death, it is of vital importance

[4] "Now for then" is the true meaning of *nunc pro tunc*. *See In re B.A.R.*, 344 N.W.2d 90, 94 (S.D. 1984) (citation omitted).

that this Court carefully review how and why the *Larson* court reached its conclusion, which was: "because there were judicial acts still to be completed." *Id.* at 909-11. Here, no judicial acts remain to be completed. Moreover, neither case the *Larson* court relied on is factually similar to what is now before this Court.

Indeed, the *Larson* court first analyzed a 1944 case from Florida, *Sahler v. Sahler*, 17 So.2d 105 (1944), in which the Florida Supreme Court reversed entry of a *nunc pro tunc* divorce decree entered after the plaintiff's death. *Larson*, 235 N.W.2d at 909. The *Larson* court noted, just like the facts before it – but in complete opposite to here – that judicial acts remained to be done in *Sahler*. *Id.*; *see also Sahler*, 17 So.2d at 105-06. More specifically, the *Larson* court noted that the *Sahler* trial court, like the *Larson* trial court, asked the attorneys to draft a property division at the end of the trial. *Id.*; *see also Sahler*, 17 So.2d at 106. In addition, although the *Sahler* trial court stated it thought a divorce should be granted, it did not say to whom it should be granted. *Id.*; *see also Sahler*, 17 So.2d at 106-07.[5] And just as in *Larson*, before the *Sahler* parties could agree on the

[5] In 2000, the Florida Supreme Court noted *Sahler* was "decided under the Florida divorce law in existence prior to the enactment of the statutory 'no fault' dissolution scheme now prevailing[,]" and as such, "the [*Sahler*] case was complicated by the fact the trial court never announced in whose favor the divorce was to be granted. Thus, there was no final decision on the issue of dissolution prior to the death of the husband." *Gaines v. Sayne*, 764 So.2d 578, 581 (Fla. 2000). Here, the issue of dissolution was decided prior to Art's death. The parties agreed in open court and signed a Stipulation and Affidavit of Jurisdiction, expressly agreeing to irreconcilable differences as the ground for divorce. SR488; 504-05. As will be discussed *infra* at Section I.A (pg. 15-16) and I.C (pg. 23-25), under SDCL 25-4-17.2, a trial court is mandated to order dissolution of marriage if it finds there are irreconcilable differences.

property division and the court could prepare a written decree, the plaintiff died. *Id.* On appeal, the Florida Supreme Court noted:

> In the case at bar no decree had been signed by the Chancellor, or filed for record, or recorded, and not even a definite pronouncement had been made as to all of the things the final decree would contain if and when it was signed and recorded, prior to the death of the plaintiff.

Sahler, 17 So.2d at 106-07; *see also Larson*, 235 N.W.2d at 910.

While this was the case in *Larson*, it certainly is not the case here. Undeniably, "all of the things the final decree would contain if and when it was signed and recorded, prior to the death of [Art]" were placed on the record, accepted by the trial court, memorialized in writing, signed by the parties, and filed with the trial court – notably to include entry of a divorce decree *nunc pro tunc* to a date preceding Art's death. *Sahler*, 17 So.2d at 106-07; *see also In re B.A.R.*, 344 N.W.2d at 94 (defining *nunc pro tunc* and explaining "When applied to entry of a legal order or judgment, [*nunc pro tunc*] normally refers, not to a new or de novo decision, but to the judicial act previously taken, concerning which the record is absent or defective, and the later record-making act constitutes but later evidence of the earlier effectual act."). The trial court here left no question about her decision; indeed, she advised the parties "*I will bind you to this agreement orally today*." CTT 2 (emphasis added); *see also* CTT 13-14. Therefore, it would be inappropriate for this Court to rely on *Sahler* to extend *Larson* to this case.

The same holds true for the *LeTarte* case the *Larson* court also cited in support of its decision. In *LeTarte v. Malotke*, 188 N.W.2d 673 (Mich. App.

1971), the Michigan Court of Appeals held entry of a *nunc pro tunc* decree improper where no judgment had been rendered before the husband's death. It is anticipated that Charlotte will argue, as she did below, that *LeTarte* is "nearly factually identical to what transpired in this case." SR 829. And at first blush, it may seem Charlotte is correct because, like here, a property settlement was read into the record. However, a closer read of this case shows Charlotte's theory is incorrect.

In *LeTarte*, as explicitly recognized by the *Larson* court, "judicial acts remained to be done at defendant's death." *Larson*, 235 N.W.2d at 910; *see also*, *LeTarte*, 188 N.W.2d at 674-76. And contrary to what Charlotte argued below, those judicial acts in *LeTarte* included more than just a "rendition of a judgment." SR 829. Indeed, as the Michigan Court of Appeals noted:

> [E]ven though the parties were in accord on how the property should be divided, and in any event, the trial judge felt that *only the basic elements of the settlement* had been agreed upon and that it had yet to be put into writing and submitted for his review.

LeTarte, 188 N.W.2d at 675-76 (emphasis added). Quoting the trial court:

> After much reflection, the [trial court] is convinced that there was not on December 16, 1969, *a presently operative rendition of judgment* which only awaited entry. The statement of the [trial court] was entirely prospective, and *more remained to be done than merely to reduce to writing the oral record made in open court*.

Id. at 676 (emphasis added). Here, all facts *had been* adjudicated by the trial court and only a "presently operative rendition of judgment . . . awaited entry" at the time of Art's death. *Id.* Therefore, while *LeTarte* appears on the surface to be

factually closer to what occurred here as compared to *Larson*, it still cannot be read to prohibit entry of a *nunc pro tunc* decree under the facts of this case.

To be clear, the facts here are the complete opposite of *Larson*, as well as *LeTarte* and *Sahler*. No more remained to be done by the trial court at the time of Art's death. The parties had agreed on the record as to the grounds for divorce, the date of divorce to be December 31, 2017, division of property, alimony, and attorney fees. CTT 2-13. The trial court questioned each party on whether this was their agreement, and the trial court accepted and bound them to the terms of their agreement in open court. CTT 2 ("I will bind you to this agreement orally today."), 13-14. Both parties were represented by competent counsel.

Charlotte and Art then submitted and filed a written Stipulation with the trial court, going beyond any of the parties' actions in *Larson, Sahler*, or *LeTarte*. This Stipulation memorializes more than just the "basic elements of the settlement had been agreed upon." SR 488-503, APP A. In fact, the Stipulation shows that *all* elements of the settlement had been agreed upon and reduced to writing, specifically including the date of divorce, December 31, 2017, which preceded the date of Art's death. There were simply no further factual issues or judicial actions for the trial court to resolve after the Stipulation was submitted. Indeed, the Stipulation contains no language requesting the trial court approve and confirm the Stipulation or incorporate the same into a judgment and decree. *Id.* The reason for these omissions is obvious: the trial court had already approved the Stipulation and bound the parties to it in open court on November 15, 2017. *See* CTT 2, 13-

14. The Stipulation expressly acknowledges this fact: "the parties . . . have agreed in open Court to the terms and conditions as provided for in this Stipulation and *which shall subsequently be incorporated into a Judgment and Decree*." SR 489, APP A-2. Again, when the Stipulation was submitted, there was no further judicial decision to be made. All that was left for the trial court to do was sign a judgment and decree when presented. *Id. See also* CTT 2 ("*I will bind you to this agreement orally today*."), 14.[6]

The parties also filed Affidavits, submitting to the jurisdiction of this Court and consenting to the entry of a Judgment and Decree on the grounds of irreconcilable differences. SR 504-05.

Most importantly, and unlike any of the parties in *Sahler*, *LeTarte*, and *Larson*, Charlotte and Art specifically agreed to a Judgment and Decree being entered *nunc pro tunc* to a date that preceded Art's death prior to Art's death. SR 490.

In sum, unlike *Sahler*, *LeTarte*, and most notably *Larson*, at the time of Art's death all that was left for the trial court to do was sign a Judgment and Decree. Entry of the Judgment and Decree *nunc pro tunc* (to a date which

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[6] At the hearing, the trial court gave no indication that it would do anything but adopt the agreement:

> **The Court**: All right. Thank you. I applaud your hard work and efforts today. I think you'll be more than satisfied with an agreement reached between the parties as anything the Court could impose.

(CTT 14:2-6).

preceded Art's death, and which date the parties had agreed to on the record and in a written stipulation and the trial court had accepted) would have simply been a record of an "act previously taken, concerning which the record is absent or defective, and the later record-making act constitutes but later evidence of the earlier effectual act." *In re B.A.R.*, 344 N.W.2d at 94. The trial court was required to order "the dissolution of marriage" "[i]f from the evidence at the hearing, [it] finds that there are irreconcilable differences[.]" SDCL 25-4-17.2. Therefore, entry of a *nunc pro tunc* decree here would be an "act[] allowed to be done after the time when [it] should be done, with a retroactive effect; i.e., with the same effect as if regularly done." *In re B.A.R.*, 344 N.W.2d at 94; SDCL 25-4-17.2. Prior to and at the time of Art's death, there was (and still is) *no* judicial issue in dispute which required judicial determination. All issues were fully and completely adjudicated pursuant to the parties' Stipulation, and accepted by the trial court.

As is evident, *Larson* does not control nor should it be extended to control the outcome of this case. Instead, and because this Court has never had the opportunity to address this issue, this Court should turn to other jurisdictions which have entered *nunc pro tunc* decrees post mortem where, as here, all issues were fully and completely adjudicated and no further judicial act remained but the entry of a judgment.

B. Other jurisdictions recognize entry of a *nunc pro tunc* decree following the death of one of the parties to a divorce where all issues have been adjudicated.

Where all issues have been fully adjudicated by the trial court prior to the death of one of the parties to a divorce, and no further judicial act is required but the signing and entry of a decree, several jurisdictions have recognized that death does not prevent entry of a decree *nunc pro tunc* to a time prior to the death of the party.

For example, in *White v. Smith*, 645 So.2d 875 (Miss. 1994), the Supreme Court of Mississippi held the trial court did not error in entering a judgment of divorce *nunc pro tunc* when all issues were fully adjudicated in all respects by the trial court. In *White*, the parties entered into a handwritten "Consent to Divorce" on the grounds of irreconcilable differences prior to trial. *Id.* at 876-77.[7] The parties then designated certain items, relating specifically to the division of property, for the court's adjudication. *Id.* at 877-79. A trial was held, and the court heard testimony of the parties pertaining solely to division of property between them. *Id.* At the conclusion of the trial, the court ruled from the bench

[7] Pursuant to Miss. Code. Ann. § 93-5-2(3):

> If the parties are unable to agree upon adequate and sufficient provisions for . . . any property rights between them, they may consent to a divorce on the ground of irreconcilable differences and permit the court to decide the issues upon which they cannot agree. . . . No divorce shall be granted pursuant to this subsection until all matters involving custody and maintenance of any child of that marriage and property rights between the parties raised by the pleadings have been either adjudicated by the court or agreed upon by the parties and found to be adequate and sufficient by the court and included in the judgment of divorce.

and performed a division of property, adjudicating all issues before it. *Id.* at 879. The trial court stated: "Those are all the issues that have been submitted to the Court, and I'll grant the divorce on those conditions." *Id.* Eight days after the trial, and before a judgment of divorce had been entered, the husband died. *Id.* The trial court issued a judgment of divorce *nunc pro tunc* to the date of the trial, finding:

> [T]hat it made a full and complete adjudication between the parties. . . . All issues between the parties, both contested and the Consent to Divorce, were finally adjudicated in all respects by the Court, after having heard detailed testimony and having received documentary evidence. This was a completed case finally adjudicated in all respects.

Id. at 879-80.

The Mississippi Supreme Court agreed:

> [F]rom a technical standpoint, Luther died while married, since his death was prior to the entry of the decree. However, the record clearly *indicates that all submitted issues had been litigated and ruled upon by the chancellor on November 2, 1992. Nothing more was to be accomplished in the interim between the ruling and formal filing of the judgment*.

Id. at 881 (emphasis added). Like *White*, nothing more remained to be accomplished in the interim of this case between the filing of the Stipulation and the Affidavits and the formal filing of the judgment and decree to December 31, 2017, the parties' stipulated date which preceded Art's death.

Similarly, in facts strikingly similar to the facts here, the Supreme Court of Alabama in *Ex parte Adams*, 721 So.2d 148 (Ala. 1998), reversed and remanded a dismissal of a divorce action for entry of a judgment and decree, because no issues

remained to be decided at time of husband's death and all that remained was for the trial court to sign the judgment. *Id.*

In *Adams*, just as here, a final settlement was read into the record at trial. *Id.* at 148-49. The trial court directed the wife's attorney to draft a judgment incorporating the agreement and ordered that the terms were effective immediately. *Id.* at 149. A couple of months later, the husband committed suicide. *Id.* Like here, the trial court had not signed the judgment of divorce at the time of the husband's death. *Id.* The wife promptly moved to enforce the agreement, and the trial court refused, finding that the divorce action was abated by the husband's death. *Id.*

On appeal, the *Adams* court found that "[t]here were no other issues to be decided and all that remained was for the trial court to sign the judgment." *Id.* Accordingly, the court held "the husband's death did not make the final agreement unenforceable," and reversed and remanded for entry of a judgment and decree *nunc pro tunc* to a date prior to husband's death. *Id.* at 150. Likewise, in this case the parties agreed "in open Court to the terms and conditions as provided for in [their] Stipulation and which *shall subsequently be incorporated into* a Judgment and Decree of Divorce[,]" which "shall be entered *nunc pro tunc* December 31, 2017," a date which preceded Art's death. SR 489, APP A-2.

Likewise, in *In re Marriage of Mallory*, 55 Cal. App. 4th 1165 (1997), the Fifth Appellate District Court of Appeal of California ruled that a trial court has inherent authority to enter a divorce decree *nunc pro tunc* with respect to all

issues, including marital status, submitted to the court for decision prior to the death of a party, notwithstanding the general rule that death abates a divorce action. *Id.* at 1167.

In *Mallory*, the wife filed for divorce. *Id.* at 1167. On October 29, 1987, a divorce trial was held. Following written submissions of the parties, the case was finally submitted to the court for decision on January 5, 1988. *Id.* at 1168. On April 25, 1988, at 8:50 a.m., the husband was found dead in his home. *Id.* Later that same day, at 3:00 p.m., the trial court entered an order dissolving the marriage and dividing the property. *Id.* However, the husband's former lawyer and the wife's attorney stipulated in writing that the trial court's jurisdiction to issue a decree terminated at the death of the husband, and the trial court's April 25, 1988 order was "null and void." *Id.*

Years later, the executor of the husband's estate filed a motion to substitute himself into the divorce action as the real party-in-interest, to set aside the stipulation, confirm the order of the trial court, and enter a judgment *nunc pro tunc* as of a date prior to the husband's death. *Id.* The trial court denied the decedent estate's request for a judgment *nunc pro tunc*, but set aside the attorneys' stipulation and directed that a decree conforming to the trial court's April 25, 1999 order be entered. *Id.* A decree was subsequently filed. *Id.* Wife then moved to set aside the new decree, and husband's executor filed a counter-motion for an order reentering the judgment *nunc pro tunc* as of a date before husband's death. *Id.* at 1168-69. The trial court granted the wife's motion to vacate. *Id.* at 1169.

The decedent's estate appealed to the Fifth District Court of Appeal of California to raise the issue of whether the trial court should have granted a judgment *nunc pro tunc* to a date before the husband's death. *Id.* The appellate court concluded that a trial court has the "inherent power" to make findings and enter judgment when a party dies after submission of the case, and the inherent power to enter that judgment *nunc pro tunc* to a date before the death of the party. *Id.* at 1176-77. Indeed, "The power to enter judgments *nunc pro tunc* is inherent in the courts. . . . Such an order should be granted or refused as justice may require in view of the circumstances of a particular case." *Id.* at 1177 (quoting *Norton v. City of Pomona*, 53 P.2d 952, 955-56 (Cal. 1935)).

Finally, in *Tikalsky v. Tikalsky*, 208 N.W. 180 (Minn. 1926), the Supreme Court of Minnesota affirmed entry of judgment of divorce, entered after the death of the husband, *nunc pro tunc* to a date prior to his death. *Tikalsky v. Tikalsky*, 208 N.W. 180, 181 (Minn. 1926). The *Tikalsky* court explained:

> [W]here the trial court had determined the questions of fact and directed the entry of a judgment of divorce, and the complainant was entitled to have it entered while both parties were living, it may be entered nunc pro tunc as of a date within the lifetime of the deceased, at the instance of parties whose rights are affected thereby, for the purpose of determining and fixing property rights or legalizing proceedings taken in the belief that the parties were divorced.

Id. at 180-81 (collecting cases). The court then held:

> In the present case the court had determined all the issues presented, and directed that judgment divorcing the parties be entered. The judicial act was complete. All that remained to be done was for the clerk to enter the judgment in the judgment book as directed.

Id. at 181. *See also Anders v. Anders*, 170 Minn. 470, 471, 213 N.W. 35, 36 (1927) (explaining in *Tikalsky* there "was no uncertainty as to precise terms of the decree, and no further action of the trial judge was necessary.").

Like all the cases cited above, all issues had been presented, adjudicated, and settled by the trial court prior to Art's death, including the effective date of divorce: December 31, 2017, which preceded Art's death. As in *Adams*, the trial court here ordered that the terms were effective immediately by binding the parties to their agreement on the record. CTT 2. The parties filed a Stipulation incorporating their agreement. SR 488-503, APP A. The parties also submitted Affidavits consenting to entry of divorce on irreconcilable differences and to the jurisdiction of the court. SR 504-05. The parties began substantially performing under the terms of the agreement. *See* SR 665-823. The parties undisputedly agreed that a judgment would be submitted on or before March 1, 2018, *nunc pro tunc* to December 31, 2017, a date which preceded Art's death. SR 489-90, APP A1-2. Under the circumstances of this case, and because *Larson* does not control, this Court should follow the reasoning of other jurisdictions and rule that a Judgment and Decree 'entered *nunc pro tunc* to December 31, 2017 be granted.

C. Justice requires entry of a *nunc pro tunc* judgment and decree in view of the particular circumstances of this case.

"'*Nunc pro tunc'* is a phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect; i.e., with the same effect as if regularly done." *In re B.A.R.*, 344 N.W.2d at 94 (citation omitted). Its true

meaning is "now for then." *Id.* "[W]hen applied to entry of a legal order or judgment, [*nunc pro tunc*] normally refers, not to a new or de novo decision, but to the judicial act previously taken, concerning which the record is absent or defective, and the later record-making act constitutes but later evidence of the earlier effectual act." *Id.* (citation omitted).

Here, entry of a *nunc pro tunc* decree would not be a new or *de novo* decision. Indeed, all facts and issues have been adjudicated by the trial court. At the time of Art's death, there was nothing left for the trial court to do but place its signature on the judgment and decree. As outlined above, entry of a judgment and decree *nunc pro tunc* would simply be a record of an "act previously taken, concerning which the record is absent or defective, and the later record-making act constitutes but later evidence of the earlier effectual act." *In re B.A.R.*, 344 N.W.2d at 94. Because the parties agreed to irreconcilable differences and this Court is required to order "the dissolution of marriage" "if from the evidence at the hearing, [it] finds that there are irreconcilable differences," entry of *a nunc pro tunc* decree here would be an act "allowed to be done after the time when [it] should be done, with a retroactive effect; i.e., with the same effect as if regularly done." SDCL 25-4-17.2; *In re B.A.R.*, 344 N.W.2d at 94.

Moreover, this Court has made clear that a "nunc pro tunc order should be granted or refused, as justice may require, in view of the circumstances of the particular case." *Todd v. Todd*, 7 S.D. 174, 63 N.W. 777, 779 (1895) (citation omitted). And in this case, justice requires entry of a *nunc pro tunc* order.

Charlotte, in open court, agreed to be bound by the parties' agreement. CTT 2, 13. She then signed a Stipulation, agreeing to, among other things, the grounds for divorce, the effective date of the divorce (which preceded the date of Art's death), the division of property, alimony, and attorney fees. SR 488-503, APP A. Notably, Charlotte agreed and understood that a judgment and decree would be submitted on or before March 1, 2018, and entered *nunc pro tunc* December 31, 2017. SR 489-90, APP A1-2. Charlotte received substantial property pursuant to the terms of the Stipulation. SR 664-823. The parties sold a piece of real estate (the Boke Ranch) in accordance with the Stipulation. SR 664. But then three days after Art's death, Charlotte filed a motion to dismiss this action and requested an emergency hearing, arguing the divorce was abated and the Stipulation unenforceable. SR 506; *see also* 831. Her motives are clear: she wants the divorce dismissed because she believes she stands to receive more as a surviving spouse.

When parties have voluntarily entered into an agreement, bound themselves to the same, and relied and performed under the terms, it would be a substantial miscarriage of justice to not enter a judgment and decree *nunc pro tunc* and allow one party to gain more than she bargained for, to the detriment of the other and his estate.

II. The parties intended the Stipulation to be enforceable independent of the divorce decree.

Alternatively, even if this Court were to hold that *Larson* is somehow controlling (it is not) and agree with the trial court that it did not have jurisdiction to enter a *nunc pro tunc* decree declaring the parties divorced effective December 31, 2017, as the parties agreed, the trial court can still enforce the terms of the parties' Stipulation on all other issues, as it is a valid and enforceable contract, and under the surrounding circumstances, divorce was not a condition precedent to the enforceability of the Stipulation in this divorce proceeding.[8]

A. The parties entered into a binding contract.

The elements of a contract are: (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration. SDCL 53-1-2. The Stipulation meets all four elements.

Indeed, both parties were clearly capable of contracting here. In fact, the trial court canvassed them during the court trial, and moreover, the parties specifically attested they were "of firm mind" and "sign[ed] this Stipulation free of duress or compulsion." CTT 2, 13-14; SR 501; *see also* SR 488-503, APP A.

[8] It should be noted that, due to the divorce trial court's ruling that it did not retain jurisdiction to enforce the terms of the parties' Stipulation and Charlotte's position that the Stipulation was an unenforceable contract, Haraldson initiated a separate action in the Fourth Judicial Circuit, seeking declaratory relief in regard to the Stipulation and to include specific performance, breach of contract, and detrimental reliance on behalf of Art's estate. *Haraldson v. Andersen*, 40CIV18-86.

The parties freely consented on the record, as well as in the written Stipulation, to the essential elements and terms of their agreement. CTT 13-14; SR 499, 501, APP A-12, A-14. The parties further agreed to be bound by the terms of the Stipulation, and the trial court explicitly bound them to the terms during the November 15, 2017, hearing. CTT 2, 13-14.

A lawful object of the Stipulation was, in part, a divorce; but the division of property was also a lawful object of the Stipulation. *See* SDCL 25-2-10 ("Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as prescribed by law.") and SDCL 25-2-13 ("A husband and wife cannot by any contract with each other alter their legal relations, except as to property, and except that they may agree in writing to an immediate separation and may make provision for the support of either of them and of their children during such separation. The mutual consent of the parties is sufficient consideration for such separation agreement."). And despite what Charlotte argued below, Art's death did not render that lawful object a nullity. *See* SR 832 (arguing "The Stipulation is not enforceable as a contract because of the object of the contract was divorce, the property settlement was simply a necessary ancillary part of it and upon death the lawful object became a nullity."). Indeed, Art's death did not render impossible the performance of the Stipulation. *Groseth Int'l, Inc. v. Tenneco, Inc.*, 410 N.W.2d

159, 165-67 (S.D. 1987) (analyzing the commercial frustration of purpose doctrine on which Charlotte appears to rely below). "The fact that performance has become economically burdensome or unattractive [for Charlotte] is not sufficient to excuse [her] performance." *Id*. (citation omitted). "The question is whether the equities, considered in the light of sound public policy, require placing the risk of disruption or complete destruction of the contract's viability on one party or the other." *Id.* As outlined above, equity requires enforcement here

Finally, sufficient cause and consideration is noted throughout the Stipulation. In fact, Charlotte received an equal share of the marital property, including a $550,000 equalization payment. SR 497, APP A-10.

It is also important to note that, prior to Art's death, the parties had substantially performed under the terms of the Stipulation. Property has been divided and delivered. Real estate has been sold and proceeds split. Charlotte benefited from these exchanges. If the Stipulation is not now enforced, Art will have detrimentally relied on its terms. Further, the Stipulation unambiguously states it is binding on all "heirs, next of kin, devisees, legatees, executors, personal representatives, administrators and assigns." SR 501, APP A-14.

B. The contract terms are independently enforceable from a final decree and in spite of Art's death.

This Court has not yet had an opportunity to address this issue. However, other states have held that a property settlement agreement is enforceable independent of a final decree and in spite of the death of a party.

For example, in *O'Connor v. Zeldin*, 848 P.2d 647, 648 (Or. Ct. App. 1993), the Oregon Court of Appeals – under facts remarkably similar to here – affirmed the enforceability of an *oral* property settlement agreement entered into before the entry of a dissolution judgment and the death of the husband. In *O'Connor*, just like here, the parties negotiated and entered into an oral property settlement agreement in contemplation of dissolving their marriage. *Id.* Like here, at the court trial, the terms of their agreement were stated in open court and, when questioned by the court, both parties expressed their agreement. *Id.* However, before a judgment and decree was entered, the husband died. *Id.* The husband's personal representative then brought an action for specific performance of the property settlement agreement. *Id.* And the trial court held that the agreement was enforceable. *Id.*

On appeal, the court focused on "whether [the agreement] was enforceable before the decedent died or whether it was conditioned on entry of the dissolution judgment." *Id.* at 648. Reviewing the evidence, the court noted:

> [A]t the time of decedent's death, personal property had been divided and was in the possession of the individual spouses. It also appears that the sale of the parties' home was pending and that defendant was collecting and retaining the rent paid by the prospective purchasers pursuant to the terms of the agreement.

Id. Accordingly, the court held "there was no condition precedent or subsequent to the enforceability of the agreement discussed or agreed on." *Id.* The agreement "became effective when made." *Id.* at 649.

The same is true here. There is nothing in the record to suggest that it was the understanding and intent of the parties their assets would be divided *at the future time of the divorce.* In fact, the exact opposite is true. Just as in *O'Connor*, the record reflects it was obviously the intent of the parties that the division of their marital assets became effective immediately, regardless of whether they were divorced or not. Indeed, immediately following the November 2017 hearing – including that very afternoon – the parties begin dividing and exchanging assets in accordance with their oral and, ultimately, written Stipulation. SR 810-23. The Stipulation contains dates that property must be exchanged prior to submission of the decree in March 2018 – in fact, before December 31, 2017. *See* 490-91. The Stipulation states that the Boke Ranch "will be promptly listed for sale." SR. 492. (In fact, it was sold.) SR 664-823. Like in *O'Connor*, personal property was divided and in the possession of the individual spouses at the time of Art's death. As such, the Stipulation, at least as to the division of property, should be enforced.

The Supreme Court of Vermont reached the same conclusion in *Estate of Ladd v. Estate of Ladd*, 640 A.2d 29 (Vt. 1994). In *Estate of Ladd*, like here, the parties reached an agreement disposing of their property the morning of the final court hearing. *Id.* at 30. After the agreement was finalized, the court accepted the agreement and entered a decree nisi.[9] The husband died before the nisi period

[9] In Vermont, a divorce decree does not become absolute until the expiration of three months from entry of a decree nisi and the parties are considered married throughout the interlocutory period. Vt. Stat. Ann. tit. 15, § 554(a).

expired. *Id.* The wife moved to dismiss the divorce action on the grounds that the action had abated along with the husband's death prior to the expiration of the nisi period. *Id.* The husband's estate opposed the motion and moved for an order *nunc pro tunc* backdating the final decree to a date prior to the husband's death. The trial court agreed with the estate and entered a *nunc pro tunc* decree. *Id.*

On appeal, the Vermont Supreme Court notably recognized that entry of a *nunc pro tunc* decree may be appropriate in some cases. *Id.* (citing various cases and secondary sources, including *Entering Judgment or Decree of Divorce Nunc Pro Tunc*, 19 A.L.R.3d 648, 652 (1968)). However, the court held that the trial court could not issue a *nunc pro tunc* decree in this case, as it would improperly shorten the statutory waiting period retroactively. 640 A.2d at 31 (citation omitted).

The court then went on to hold that in certain instances a "parties' stipulated agreement is enforceable *independent* of the divorce decree in which it was incorporated." *Id.* at 32. The court noted the "critical inquiry is whether the parties intended the separation agreement to be contingent upon the entry of a judgment – either nisi or absolute – or to be effective from the date the agreement was executed." *Id.* Citing various cases, the court explained that in determining the parties' intent, the circumstances surrounding the agreement, as well as the language of the agreement, must be examined. *Id.* Importantly, the court specifically recognized that other courts have "enforced settlement agreements independently of divorce decrees when the agreements expressly provided that

they were enforceable against the personal representatives, heirs, and assigns of the parties." *Id.* Because "the stipulation constituted a final and comprehensive settlement of all financial matters between the parties," "the stipulation included provisions in which the parties agreed to take all action necessary to carry out the agreement and to waive all rights of inheritance arising from the marital relationship;" the "waiver provision expressly applied to the parties' heirs and assigns;" and "neither the wife's estate nor any provision in the separation agreement suggests that the agreement was dependent on the finality of the parties' divorce," the court concluded "that the husband's death abated the parties' divorce, *but did not terminate the separation agreement*, which unambiguously indicated the parties' intention that it stand independent of the divorce decree." *Id.* at 32-33 (emphasis added). *See also* cases cited within.

While Art recognizes that both of these cases were brought as separate actions outside of the underlying divorce actions, it would be a waste of judicial economy and the parties' (particularly the estate's) resources to require the same in this case. As such, this case should be remanded with instructions to enforce the terms of the parties' property settlement agreement. As in *O'Connor* and *Estate of Ladd*, it is clear from the record before this Court that the parties' stipulation constituted a full and final comprehensive settlement of all financial matters between the parties. Like in *Estate of Ladd*, the parties agreed on the record that these parties would take all necessary action to carry out the agreement. CTT 11. Moreover, as in *Estate of Ladd*, these parties agreed to

waive all rights of inheritance, and there was a separate waiver provision expressly applied to the parties' heirs and assigns. SR 497, 501. Most importantly, just as in *Estate of Ladd* and *O'Connor*, the parties immediately exchanged property, evidencing clear intent that the agreement was *not* dependent on the finality of the parties' divorce.

CONCLUSION

For all the reasons stated above, Art respectfully asserts that the trial court's order dismissing this case be reversed.

Dated May 23, 2018.

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

By: _____
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ORAL ARGUMENT IS HEREBY RESPECTFULLY REQUESTED.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, Cassidy M. Stalley, counsel for the Appellant does hereby submit the following:

The foregoing brief is 33 pages in length. It is typed in proportionally spaced typeface in Times New Roman 13 point. The footnotes are Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 32 pages, 8,648 words and 42,563 characters (no spaces) in the body of the brief.

_____
Cassidy M. Stalley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 23, 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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The undersigned further certifies that the original and two (2) copies of the Brief of Appellant in the above-entitled action were mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class postage thereon prepaid, the date above written.

_____
Cassidy M. Stalley

APPENDIX
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APPENDIX A

STATE OF SOUTH DAKOTA)SS: COUNTY OF LAWRENCE	)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
CHARLOTTE M. ANDERSEN, PLAINTIFF, v. ARTHUR S. ANDERSEN DEFENDANT.	)	File No. D15-05 **STIPULATION AND AGREEMENT**

PARTIES: The parties to this Stipulation and Property Settlement Agreement ("Stipulation") are Plaintiff Charlotte M. Andersen (hereinafter referred to as "Charlotte") and Defendant Arthur S. Andersen (hereinafter referred to as "Art").

WHEREAS, the parties were legally married in Badger, Kingsbury County, South Dakota, on October 16, 2004, and have been married since that time.

WHEREAS, no children were born to the parties during their marriage, and Plaintiff is not now pregnant.

WHEREAS, the Plaintiff was represented by Attorney Michael K. Sabers, and the Defendant was represented by Attorney Thomas E. Brady. Both parties have had access to independent counsel to advise them of their legal rights prior to agreeing to the terms and conditions identified below in open Court before the Honorable Judge Michelle Comer on November 15, 2017.

WHEREAS, the divorce will be granted to each party on the grounds of irreconcilable differences (SDCL 25-4-2 (7)); and

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and which were agreed to in open Court on November 15, 2017, the parties hereby enter into a Stipulation determining those respective rights, claims, and obligations as set forth below.

JURISDICTION

The parties hereby stipulate and agree that at the time of the commencement of this action, both parties were subject to the jurisdiction of this Court. Furthermore, and on November 15, 2017, both parties consented to the jurisdiction of the Court to enter Judgment and Decree of Divorce in this matter based on the terms and conditions agreed to in open Court and incorporated herein. Both parties shall sign Affidavits of Jurisdiction and are submitting the same to the Court for consideration contemporaneous with this Stipulation. As such, the parties do hereby submit to the jurisdiction of the Court of the State of South Dakota to hear this matter and enter the Judgment and Decree of Divorce.

SERVICE OF PROCESS

Plaintiff served a Complaint for Divorce on Defendant on January 27, 2015. Defendant answered the Complaint on February 27, 2015. The statutory cooling off period of no less than sixty (60) days has therefore long expired. The Court therefore has jurisdiction to enter a Judgment and Decree of Divorce incorporating the terms of this Stipulation and as agreed to in open Court on November 15, 2017.

WAIVER OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having consulted with legal counsel, and after being fully advised of their rights and legal obligations, the parties hereby specifically waive Notice of Trial, entry of Findings of Fact and Conclusions of Law, and have agreed in open Court to the terms and conditions as provided for in this Stipulation and which shall subsequently be incorporated into a Judgment

and Decree of Divorce. The parties agree that such Judgment and Decree of Divorce shall be entered nunc pro tunc on December 31, 2017. Such Judgment and Decree of Divorce shall be filed on March 1, 2018, or as mutually agreed.

DIVISION OF PROPERTY

a. **General Division**

The parties agree that they have been separated since January, 2015. Based on such, the parties agree that the property division will be addressed by identifying that personal property to which Charlotte shall be awarded and that the remainder of all personal property not listed shall be awarded to Art. As such, Charlotte shall be awarded the following:

1. Any and all of her or her family's personal belongings;
2. Any and all items (not uniquely personal to Art) that were in the gooseneck white trailer ("white trailer") removed from the Spearfish Boke Ranch by Charlotte;
3. Her grey honda silverwing motorcycle currently in the barn at the Spearfish Boke Ranch;
4. Her Cessna 172 airplane currently in a rented hanger at the Spearfish airport as well as any and all items incident to its ownership;
5. All of her tubs and totes containing personal property to which she is to receive currently in storage in Spearfish;
6. Her metal file cabinets and all folders contained within that are current in the shop at the Spearfish Boke Ranch;
7. Her Wood Prop with signatures that she won at the Reno air races;
8. A mounted water Buffalo, a mounted Impala, and mounted gazelle; if there is one and if not then a gazelle cape;
9. Her grandmother's china cabinet;
10. All books removed from bookshelf prior to loading into white trailer;
11. Her wedding dress;
12. Her and her grandmother's Christmas ornaments;
13. A painting done by one of Charlotte's patients to which was identified at hearing;
14. Her grandmother's side saddle;
15. Her trophies from her Dad's airplane;
16. A large gold framed watercolor of a lady (about 3x6) (graduation from medical school present);
17. A Ray McCarty Giclee picture;
18. Her 1987 BMW 325i vehicle;
19. Her 2016 Nissan Maxima;
20. Any other item uniquely personal to Charlotte to include but not be limited to pictures or other cards, etc.

Any property not removed from the Spearfish property by Charlotte on or before December 15, 2017, shall then become Art's property. Art shall deliver Charlotte's property that is located in Wyoming to the Spearfish Airport to be stored in Charlotte's hanger no later than December 15, 2017.

Both parties agree that there is a reciprocal obligation of each of them to return to the other party any personal property item which is uniquely and clearly the personal property of the other. Any items not listed above shall be awarded to Art Andersen as his sole property.

The parties agree that the white trailer is currently in Missouri and is in the possession of Charlotte but is being awarded to Art. Charlotte shall have until December 8, 2017 to remove any and all of her personal belongings from the white trailer and to provide notice of its location for pick up by Art. Art shall then be responsible for picking up such white trailer from Missouri at the location identified by Charlotte no later than December 31, 2017. Upon her return to Missouri, Charlotte shall take a picture of the license plate on such white trailer and email it to her attorney to be forwarded to counsel for Art to determine what, if anything, needs to be done to make such license current. Art shall be responsible for any such cost if he picks up such trailer. Charlotte shall be awarded such white trailer if Art does not pick the white trailer up by the date specified.

b. **Retirement / Investment Accounts**

Both parties have or had retirement and investment accounts or plans. As a part of an agreed to and equitable division of such accounts, it is understood that Art shall retain any Edward Jones or related investment accounts in his name. Also as a part of an agreed to and equitable division of such accounts, it is agreed that Charlotte shall be awarded all of her retirement plans (TSP), her IRA's, any

SEP IRA, or any other retirement plan or accounts in her name. The parties agree that there are no joint retirement accounts. In sum, all retirement accounts or plans will remain in the name of the party who owns the same and be held free and clear of any claim of the other. Last, both parties shall have any and all rights associated with any life insurance either may have in their name.

c. **Credit Card / Bank Accounts / Vehicle Loans**

The parties agree that each party will be responsible for any credit card debt or vehicle loans that were incurred by them since separation on or before January 1, 2015, or are otherwise in their own name. For Art, this will include but not be limited to:

1. Art's Cabela's Club Visa ending in 4721 and which had a balance of $5,807.15 as of March 30, 2017;

2. Art's American Express Account ending in 5-01005 which had a balance of $195.00 as of April 7, 2017.

The parties represent that there are no joint credit cards at this time. The parties further agree that each of them shall be entitled to any balance in any checking or savings bank account that either party has in their name.

d. **Real Property**

1. **Spearfish Farm / Ranch ("Boke Ranch")**

The parties own a farm / ranch near Spearfish commonly referred to as the "Boke Ranch" with an address of 1625 N. Rainbow Rd. Spearfish, SD. The parties agree that the Boke Ranch will be promptly listed for sale and will remain listed for sale until sold. Both parties agree that they will cooperate with the listing of the Boke Ranch for sale and any other reasonable actions necessary to list and sell the Boke Ranch.

If the property is sold outright, the proceeds from such sale shall first be utilized to pay any and all mortgages, liens, taxes, assessments, or encumbrances that may exist on the Boke Ranch at the time of sale. After such sale is closed, and if such were to occur prior to the sale of the Wyoming shop identified below, the parties agree that the sum of $25,000.00 shall be utilized to advance pay the mortgage payments then due and owing on the Wyoming shop mortgage, and then fifty percent (50%) of the remainder of such proceeds shall be paid to Charlotte in an amount up to the total remaining amount owed on the equalization payment identified herein. Any remaining proceeds shall be paid to Art. If the Boke Ranch has not sold on or before December 31, 2018, the parties agree that Charlotte shall be entitled to four percent interest commencing January 1, 2019, on the unfunded amount of the equalization payment owed her and identified herein until such time as the equalization payment is paid in full.

If the Boke Ranch were to be sold on contract for deed, the parties agree that the first payment made on the contract for deed, if in sufficient amount, shall pay any and all mortgages, liens, taxes, assessments, or encumbrances that may exist on the Boke Ranch at the time that the contract for deed was entered into by the parties. If such first payment is not sufficient to pay off all such liabilities, then the second payment shall be first used to pay off the same. Once such mortgages, liens, taxes, assessments, or encumbrances have been paid, the parties agree to the following formula for the division of payments. The parties agree that the next payments in the amount of $25,000.00 shall be utilized, if the Wyoming shop has not yet sold, to advance pay the mortgage payments on the Wyoming shop. At such time, and once the Wyoming Shop has and remains prepaid for a period of one year, or has been paid off, the parties agree that future payments shall be divided evenly until such time that Charlotte has been paid the equalization payment in full that is identified herein. Any remaining proceeds, after the equalization payment

owed to Charlotte has been satisfied, shall be paid to Art. Once Charlotte has been paid the equalization payment in full, the parties agree that Charlotte will sign and deliver a quit claim deed to Art transferring ownership to Art if the contract for deed has not been paid in full on such date. The parties agree that Charlotte shall be entitled to the same interest rate identified in the contract for deed on the remaining amount owed to her on the equalization payment identified herein once the contract for deed has been entered into by the parties. The parties further agree that Art shall be responsible for the payment of any property taxes, insurance, loan payments, utilities, encumbrances, or other costs associated with the Spearfish Ranch until such time as a contract for deed is entered into by the parties or the property is otherwise sold.

Art agrees to hold harmless and indemnify, to include reasonable attorney's fees and costs, Charlotte from any claims made by any person against either Charlotte or Art based on their ownership of the Boke Ranch. Charlotte shall tender any such defense of any such claim to Art's attorney. If Art does not retain an attorney, or the tender is not accepted, then Charlotte would have the right to hire an attorney to defend such action and would be entitled to be paid from any proceeds from the sale or contract for deed on the Boke Ranch after any and all mortgages, liens, taxes, assessments, or encumbrances that may exist are paid and before any other payment is made.

2. **Wyoming Shop**

The parties own a commercial building (the "Wyoming Shop") with an address of 5810 Highway 26, Dubois, Wyoming. The parties agree that the Wyoming Shop is currently listed for sale and will remain listed for sale until such time as Charlotte is paid the entire amount of the equalization payment identified herein. Both parties agree that they will continue to cooperate

with the listing of the Wyoming Shop for sale and any other reasonable actions necessary to sell the Wyoming Shop.

If the Wyoming Shop is sold outright, the proceeds from such sale shall first be utilized to pay any and all mortgages, liens, taxes, assessments, or encumbrances that may exist on the Wyoming Shop at the time of sale. This will remove Charlotte from any and all liabilities associated with the existing mortgage on the same. After such sale is closed, and if such were to occur prior to the sale of the Boke Ranch identified above, the parties agree that all proceeds from such sale after all liabilities are satisfied will be divided evenly until such time as Charlotte is paid the full amount of the equalization payment identified herein. Any remaining proceeds that exist after the above payments are made shall be paid to Art. If the Wyoming Shop has not sold by December 31, 2018, the parties agree that Charlotte shall be entitled to four percent interest commencing January 1, 2019, on the remaining unfunded amount of the equalization payment owed her and identified herein until such time as the equalization payment is paid in full.

If the Wyoming Shop were to be sold on contract for deed, the parties agree that the first payment made on the contract for deed, if in sufficient amount, shall pay any and all mortgages, liens, taxes, assessments, or encumbrances that may exist on the Wyoming Shop at the time that the contract for deed was entered into by the parties. If such first payment is not sufficient to pay off all such liabilities, then the second or subsequent payments shall be first used to pay off all such identified liabilities. Once such mortgages, liens, taxes, assessments, or encumbrances have been paid, the parties agree that all future payments shall be paid to the parties evenly until such time as Charlotte is paid the full amount of the equalization payment identified herein. Any remaining proceeds that exist after the above payments are made shall be paid to Art. Once

Charlotte has been paid the equalization payment in full, the parties agree that Charlotte will sign and deliver a quit claim deed to Art transferring ownership of the Wyoming Shop to Art if the contract for deed has not been paid in full on such date. The parties agree that Charlotte shall be entitled to the same interest rate identified in the contract for deed on the remaining amount owed to her on the equalization payment identified herein once the contract for deed has been entered into by the parties. The parties further agree that Art shall be responsible for the payment of any property taxes, insurance, mortgage payments, utilities, encumbrances, or other costs associated with the Wyoming Shop until such time as a contract for deed is entered into by the parties or the property is otherwise sold.

The parties agree that the purpose of the above provisions on the Boke Ranch and the Wyoming Shop is to both collateralize and guarantee that Charlotte is paid the full amount of the equalization payment identified herein. The parties agree that the above provision shall be read and interpreted in such a fashion to make certain that Charlotte is receiving interest on her equalization payment due and owing as provided for in a contract for deed or at four percent if such properties have not been sold to fund the equalization payment or that Charlotte paid in full on the equalization payment on or before December 31, 2018.

3. **Wyoming Home**

The parties own a marital home with an address of 29 Hart Ct., Dubois, Wyoming. The parties are of the understanding that Charlotte is not on the mortgage or associated with or otherwise responsible for any liability associated with such martial home. As such, Art is being awarded such martial home but agrees to hold harmless and indemnify Charlotte from any and all mortgages, liens, taxes, assessments, encumbrances, that may now or in the future exist on

such marital home. Charlotte shall sign and deliver a quit claim contemporaneous herewith and deliver the same to Art for the property.

4. **Ziegler and Leseberg Contracts for Deed.**

The parties agree that they entered into two contracts for deed during the marriage commonly referred to as the Ziegler and Leseberg contracts for deed. The parties agree that Art shall be awarded any and all future payments associated with such contracts for deed. Charlotte shall sign and deliver a quit claim contemporaneous herewith and deliver the same to Art for the properties.

PROPERTY DIVISON PAYMENT

The parties agree that to make a property division equitable an equalization payment is necessary. Art agrees to pay Charlotte the total sum of five hundred fifty thousand dollars ($550,000.00) payable as provided for in the Boke Ranch and Wyoming Shop listing / sale / contract for deed provisions in this Stipulation. The parties agree that this property division payment shall not be considered alimony, but rather shall constitute a Section 1041 tax free transfer under 26 U.S.C. §1041. Such amount shall bear interest at four percent commencing January 1, 2019, on any unfunded portion of the equalization payment or as provided for at the rate in any contract for deed. Such applicable interest rate shall continue to accrue until such amount is satisfied in full.

ALIMONY

Both parties agree that they are waiving any and all right to claims of alimony now or in the future.

WAIVER OF ESTATES

Each party waives and renounces any and all rights to inherit from the estate of the other upon his or her death, or to receive any property of the other under a Last Will and Testament

executed before the effective date of this Stipulation, or to claim any family allowance or probate homestead from the other's estate, or to in any manner act as either Power of Attorney or Personal Representative of the other.

CONFLICT OF LAWS

This Stipulation shall be construed in accordance with the substantive laws of the State of South Dakota.

ATTORNEY'S FEES AND COSTS

Each party agrees to pay his or her own outstanding attorney fees and any other expenses incurred in connection with the process of achieving a divorce. Both parties further agree that both parties, and their attorneys, were involved in and made changes and revision to this Stipulation prior to its finalization.

FUTURE PROPERTY AND EARNINGS

Except as specifically provided herein, neither party shall have any other or future claims in or to the property or earnings of the other from the date of the signing of the Stipulation.

INTERFERENCE

The parties shall hereafter live separate and apart. Each party shall be free from interference, authority or control, direct or indirect, from the other party. Each party may, from his or her separate benefit, engage in any employment, business or profession he or she may choose and each may reside at such place or places as he or she may select. The parties agree not to molest or interfere with each other in any aspect of their personal or professional lives.

MODIFICATION AND PERFORMANCE OF AGREEMENTS

This Stipulation shall not be modified or annulled by the parties hereto except by written instrument, executed in the same manner as this instrument, and approved by the Court. The

failure of either party to insist upon the strict performance of any provision of this agreement shall not be deemed a waiver of the right to insist upon the strict performance of any other provision of this Stipulation at any other time. The obligations incurred under this agreement may be enforced by specific performance.

BREACH

If either party breaches any provision of this Stipulation, the other party shall have the right, at his or her election, to pursue any legal or equitable remedy as may be available.

VOLUNTARY EXECUTION

Each party acknowledges that this Stipulation has been entered into of his or her own volition, and that each believes this Stipulation to be fair and reasonable under the circumstances. Each of said parties understands that the agreements and obligations assumed by the other are assumed with the express understanding and agreement that they are in full and complete satisfaction and settlement of any and all obligations each party now has to the other as a result of their marriage.

TAX ISSUES AND 2017 TAX FILING

The parties acknowledge and understand that an audit of the 2010 tax return remains pending. The parties also agree that a (stale) tax return check in the amount of $41,681.00 exists. Art agrees that he is taking full responsibility for the audit and agrees to hold Charlotte harmless and indemnify her from any and all liabilities associated with the same. In exchange for the same, Charlotte agrees to waive any and all right to any of the $41,681.00 in proceeds from the tax return check and further agrees to endorse the same over to Art if such is both reissued and requested of her at a future date. Art shall be entitled to any tax refund and shall be responsible for any tax liability for any joint tax return filed in 2014 and prior thereto.

The parties further understand and agree that Charlotte has filed married filing separately for both 2015 and 2016. Art has not filed either a 2015 or 2016 federal income tax return. Art agrees that for those years he will file married filing separately and will agree to hold harmless and indemnify Charlotte for any and all liabilities that may exist. Consequently, Charlotte agrees that any return to which Art may be entitled to based upon his 2015 and 2016 filings will be Art's sole and exclusive funds. Last, both parties agree that they will file separately for 2017.

The parties acknowledge that they have been separately advised by their respective attorneys that there may be certain tax consequences pertaining to this Stipulation, that neither attorney has furnished tax advice with respect to this Stipulation, that each party has been directed and advised to obtain independent tax advice from qualified tax accountants or tax counsel prior to signing this Stipulation and that they have had the opportunity to do so.

MILITARY:

Each party acknowledges they are not and never have been a member of the United States Armed Forces.

ENFORCEMENT OF AGREEMENT:

If either party should find it necessary to hire counsel to enforce any provision of this Stipulation, as incorporated into the Decree of Divorce, the party successfully enforcing the terms of this Stipulation shall be reimbursed for all costs necessarily incurred in its enforcement, including reasonable attorney's fees and expenses. Such reasonable attorney's fees and expenses, if still feasible, shall be reimbursed as the case may be from Charlotte's equalization payment or from Art's share of the sale or contract for deed proceeds which remain due and owing on either the Spearfish Ranch or Wyoming Shop property regardless of whether or not

such were to occur prior to or subsequent to Charlotte being paid the entirety of the equalization payment identified herein.

BINDING EFFECT:

This Stipulation shall bind and inure to the benefit of the parties and their respective heirs, next of kin, devisees, legatees, executors, personal representatives, administrators and assigns.

RIGHT TO CONSULT WITH COUNSEL

The parties agree and affirm that they had the right to consult with counsel before agreeing to the terms and conditions provided for herein in open Court on November 15, 2017. Both parties affirm and attest they are of firm mind and are signing this Stipulation free of duress or compulsion.

SIGNATURE PAGE

Dated this 17th day of November, 2017.

Charlotte M. Andersen

Charlotte M. Andersen

State of South Dakota)
)ss.
County of Pennington)

On this 17 day of November, 2017, before me the undersigned officer, personally appeared, Charlotte M. Andersen, known to me or satisfactorily proven to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and seal.

Bradee L. Beard

Notary Public
My Commission Expires: 9-23-2020

(SEAL)

SIGNATURE PAGE

Dated this 16th day of November, 2017.

Arthur S. Andersen

State of South Dakota)
)ss.
County of Lawrence)

On this 16th day of November,2017, before me the undersigned officer, personally appeared, Arthur S. Andersen, known to me or satisfactorily proven to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and seal.

RENAE TYSDAL
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

(SEAL)

Notary Public
My Commission Expires: My Commission Expires July 2, 2020

APPENDIX B

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS:	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
CHARLOTTE M. ANDERSEN,	)	40DIV D15-000005
PLAINTIFF,	)	
v.	)	**ORDER GRANTING MOTION TO DISMISS**
ARTHUR S. ANDERSEN	)	
DEFENDANT.	)	

The Court conducted a hearing on March 13th, 2018 on the Plaintiff's Motion to Dismiss based upon the undisputed death of the Defendant prior to this Court having entered a Judgment and Decree of Divorce. Based upon the same, and the written legal authority submitted as well as the record in this case, the Court hereby finds that this Court lacks jurisdiction over this matter due to the Defendant's death and further that the signing of a Judgment and Decree and Divorce is not a ministerial act and hereby enters an Order of Dismissal with prejudice and with each party bearing their own attorney's fees and costs.

Dated this 14 day of March, 2018.

ATTEST:
Clerk of Courts
By: Carol Latuseck
Deputy Clerk

BY THE COURT:
Michelle Comer
Honorable Judge Michelle K. Comer
Fourth Judicial Circuit Court Judge

FILED
MAR 14 2018
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By:

APPENDIX C

25-2-10 Property transactions of husband or wife--Transactions between spouses.

25-2-10. Property transactions of husband or wife--Transactions between spouses. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as prescribed by law.

25-2-13 Alteration of legal relations by husband and wife--Separation and support agreements.

25-2-13. Alteration of legal relations by husband and wife--Separation and support agreements. A husband and wife cannot by any contract with each other alter their legal relations, except as to property, and except that they may agree in writing to an immediate separation and may make provision for the support of either of them and of their children during such separation. The mutual consent of the parties is sufficient consideration for such separation agreement.

25-4-17.2 Dissolution of marriage--Legal separation--Continuance--Orders during continuance--Consent of parties.

25-4-17.2. Dissolution of marriage--Legal separation--Continuance--Orders during continuance--Consent of parties. If from the evidence at the hearing, the court finds that there are irreconcilable differences, which have caused the irremediable breakdown of the marriage, it shall order the dissolution of the marriage or a legal separation. If it appears that there is a reasonable possibility of reconciliation, the court shall continue the proceeding for a period not to exceed thirty days. During the period of the continuance, the court may enter any order for the support and maintenance of the parties, the custody, support, maintenance, and education of the minor children of the marriage, attorney fees, and for the preservation of the property of the parties. At any time after the termination of the thirty-day period, either party may move for the dissolution of the marriage or a legal separation, and the court may enter its judgment decreeing the dissolution or separation.

The court may not render a judgment decreeing the legal separation or divorce of the parties on the grounds of irreconcilable differences without the consent of both parties unless one party has not made a general appearance.

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TAB

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28565

CHARLOTTE M. ANDERSEN,	)
	)
Plaintiff /Appellee;	)
	)
vs.	)
	)
ARTHUR S. ANDERSEN,	)
	)
Defendant/Appellant.	)

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA
NOTICE OF APPEAL FILED: March 15, 2018

The Honorable Michelle K. Comer, Circuit Court Judge, presiding

---

APPELLEE'S BRIEF

ATTORNEYS FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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(605) 721-1517

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PRELIMINARY STATEMENT

Defendant-Appellant will be referred to as "Art" or "Estate". Plaintiff-Appellee will be referred to as "Charlotte." The Settled Record will be referred to as "SR." The Appellant's Appendix will be referred to as "APP," followed by the appropriate page number. The Appelee's Appendix will be referred to as "APPE", followed by the appropriate page number. The November 15, 2017 court trial transcript will be referred to as "CTT," followed by the appropriate page number. The March 13, 2018 motions hearing will be referred to as "MH," followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Charlotte agrees that the Notice of Appeal was timely filed, and that this Court has jurisdiction and the Order Granting Motion to Dismiss is appealable pursuant to SDCL 15-26A-3.

STATEMENT OF THE ISSUES

I. *Whether the Circuit Court erred when it dismissed the case based upon death of one of the parties to a divorce?*

The trial court held that Art's death terminated the marriage and abated jurisdiction of the court to enter a judgment and decree of divorce that had not been reduced to writing or presented to the court prior to before his death.

Relevant Authority:
Larson v. Larson, 89 S.D. 575, 235 N.W.2d 906 (1975)
LeTarte v. Malotke, 188 N.W.2nd 673 (Mich. App 1971)
Todd v. Todd, 7 S.D. 174, 63 N.W. 777 (1895)
SDCL 25-4-1; SDCL 15-6-58

II. *Is a stipulated property settlement enforceable independent of the entry of a divorce decree after the death of a party?*

The trial court held under *Larson* that death of a party abated jurisdiction.

Relevant Authority:
Larson v. Larson, 89 S.D. 575, 235 N.W.2d 906 (1975)
In re Marriage of Connell, 870 P.2d 632 (1994)
SDCL 15-6-58

STATEMENT OF THE CASE

This case arises from the death of Art Andersen prior to the conclusion of the pending divorce. The divorce action was started by Charlotte on January 27, 2015 after more than 10 years of marriage. SR3. A court trial was scheduled for November 15, 2017. CTT 2. The morning of the court trial the parties reached a stipulation. *Id.* The stipulation was generally read into the record and the parties advised the trial court that a formal document would be drafted by the parties. *Id. at 2-3.* The parties signed and filed the Stipulation and Agreement on November 20, 2017. SR 488-505.

The Stipulation provides that the Judgment and Decree of Divorce would be entered March 1, 2018, or as mutually agreed. *Id.* The delay was requested by Art so that he could continue to remain married and have access to Charlotte's federal health insurance for medical treatment. SR 834, 836, 840-854 APPEE 1-6, 7-26. Art died on February 20, 2018, following medical treatment. At the time of the Art's death, no Judgment and Decree had been reduced to writing, submitted or signed by the Court.

Based on Art's death, on February 23, 2018, Charlotte filed a Motion to Dismiss pursuant to SDCL 25-4-1. SR 506. On February 27, 2018, Tena Haraldson, filed an *Ex Parte Petition for Appointment of Special Administrator* and was appointed Special Administrator of the Estate of Arthur S. Andersen (hereinafter "Haraldson"). SR 529. On March 9, 2018, Haraldson filed a Motion for Entry of *Nunc Pro Tunc* Judgment and Decree of Divorce. SR 556.

On March 13, 2018, a motions hearing was held before the Honorable Michelle

K. Comer. MH1. Judge Comer found that based upon settled South Dakota statute and law that death abates jurisdiction of the court if it occurs prior to entry of a Judgment and Decree of Divorce. MH 13-14. The court denied Motion for Entry of *Nunc Pro Tunc* Judgment and Decree of Divorce and granted Charlotte's Motion to Dismiss. MH 13-14, SR 860. This appeal follows.

STATEMENT OF THE FACTS

This matter was scheduled for court trial on November, 15, 2017. CTT 2. That morning the parties reached an agreement and advised the court of the same. *Id.* The agreement was generally read into the record and the parties agreed that it would be drafted, further reduced to writing, signed by the parties and filed with the court. *Id.* at 2:24-3:8.

After the agreement had generally been read into the record, the court asked both Art and Charlotte if this was their agreement, if they waived their right to a trial and if they agreed to be bound by the terms of the agreement to which each answered yes. *Id.* at 13:10-14:1. The court then stated,

> The Court: All right. Thank you. I applaud your hard work and efforts today. I think you'll be more satisfied with an agreement reached between the parties as anything the Court could impose. I look forward to receiving the agreement.
>
> Court's in recess.

Id. at 14:2-7 (emphasis added). The trial court did not declare or order the parties were divorced. *Id.* The trial court did not state that it accepted or adopted the agreement that was read into the record. *Id.* The trial court simply stated "I look forward to receiving the agreement." *Id.* There is no evidence in the record that the Trial Court reviewed the Stipulation prior to Art's death.

The agreement was reduced to writing and titled "Stipulation and Agreement" (hereinafter "Stipulation"). SR 488-503. It was signed by both the parties and filed November 20, 2017. *Id.* The Stipulation provided that the Stipulation *shall* be incorporated into a Judgment and Decree of Divorce. SR 489-450 (emphasis added). The Stipulation further provided that the Judgment and Decree of Divorce would be filed March 1, 2018, or as mutually agreed. *Id.* It also provided the Judgment and Decree was to be entered *nunc pro tunc* on December 31, 2017. *Id.*

It is undisputed the basis for the delay in entry of the Judgment and Decree of divorce was because Art demanded to remain married so as to receive the benefit of Charlotte's federal health insurance as a covered spouse. SR 834-836; SR 840-859. From January 2, 2018 through February 10, 2018, Charlotte's insurance paid more than $60,000.00 for medical care and services for Art as a married spouse. SR 840-859. It is also undisputed that Art was giving Charlotte's number to medical providers as an alternate contact number. SR 840-842, 859. Art died on February 20, 2018, less than 10 days after his last medical procedure.

Prior to Art's death a Judgment and Decree of Divorce had not been drafted nor presented to the trial court. Likewise the record is void of any evidence that any deeds to real property had been drafted transferring ownership of marital property between the parties. In fact, the only deed that had been prepared post Stipulation was for the sale of land the parties jointly owned outside of Spearfish, South Dakota, known as the Boke Ranch. SR 673-687, 693-695. That property was sold by Art and Charlotte on a contract for deed on December 15, 2017. SR 673-687. The contract for deed and the accompanying warranty deed were prepared by Art's attorney, Tom Brady. *Id.* In each

of those documents, Art and Charlotte are referenced owning said property, as husband and wife, as joint tenants with right of survivorship. APPE Pg. 27-41, 42-44. This is no different than how Art was representing himself to the medical providers as married. *Id.*

Following Art's death, Charlotte filed a motion for dismissal on February 23, 2017. SR 506 Notice was served on Art's counsel. *Id.* As noted previously, Tena Haraldson, Art's sister made an appearance as the Special Administrator of the Estate of Arthur S. Andersen. SR 549. Ms. Haraldson filed a Motion for Entry of *Nunc Pro Tunc* Judgment and Decree of Divorce. SR 556-557.

On March 13, 2018, a motions hearing was held before the Honorable Michelle K. Comer. MH1. Relying on the settled South Dakota statutory and case law presented, Judge Comer held that Art's death abated jurisdiction and the court granted Charlotte's Motion to Dismiss. MH 13-14, SR 860. This appeal follows.

STANDARD OF REVIEW

A trial court's conclusions of law are reviewed *de novo. Surat Farms, LLC v. Brule Cty. Bd. of Comm'rs, 2017 S.D. 52,* ¶ 12, 901 N.W.2d 365, 369. Under this standard of review, the trial court's "conclusions of law are given no deference by this court on appeal." *City of Aberdeen v. Rich,* 2003 S.D. 27, ¶ 9, 658 N.W.2d 775, 778 (additional citations and quotation marks omitted).

ARGUMENT

I. The Circuit Court correctly ruled that Art's death came before divorce and that the Court lacked jurisdiction to enter a judgment *nunc pro tunc.*

SDCL 25-4-1 states: Marriage is dissolved only: 1) By the death of one of the parties; or 2) By the judgment of a court of competent jurisdiction decreeing a divorce of

the parties. Here the trial court, relying upon this statue as well as *Larson v. Larson*, 89 S.D. 575, 235 N.W.2d 906 (1975) held that Art Andersen's death came before divorce and granted Charlotte's Motion to Dismiss.

A. Settled South Dakota law controls the result in this case.

The Estate attempts to distinguish the facts of this case from that of *Larson* and the cases cited therein. It cannot do so. The Estate argues that this case is distinguishable because the parties had filed a written Stipulation that was to be incorporated into a Judgment and Decree of Divorce and that is unlike *Larson* or the cases it relies on. The Estate further argues that justice requires the entry of a *nunc pro tunc* judgment and decree in view of the circumstances.

Charlotte's responses to the Estate's arguments will follow, but what must be noted at the outset of this analysis is the one distinguishing factor which the Estate fails to even reference in its Brief. Art demanded, and the Stipulation then provided, that the Judgment and Decree of Divorce would not be submitted until March 1, 2018, nearly three and a half months after signing the Stipulation. Art demanded to remain married so Art could have the benefit as a covered spouse under Charlotte's health insurance for all of the medical care and treatment he planned to undergo. SR 834-836, 840-859; APPEE Pg. 1-6, 7-12. Hence, this case is only unlike *Larson* because in this case, and unlike all others, Art got the benefit that he bargained for in remaining married. In all of the other cases cited, the parties were waiting on the court or lawyers for the divorce to be final. In this case Art was intentionally delaying the date of his divorce so that he could get medical care under his wife's health insurance plan, and it was during this intentional delay that he died. It was not the injustice of the system moving too slowly that caused

the delay in ending the marriage as was true in most of the cases cited by the Estate; rather it was a conscious choice by Art that prevented the Judgment and Decree from being entered. Art wanted the benefit of being married. For this reason alone, this Court should affirm the trial court because death came before divorce and the only reason that occurred was a conscious decision of Art himself.

B. *Larson* is not distinguishable, it is controlling.

The Estate argues Larson is distinguishable because in this case, "At the time of Art's death, all issues had been fully adjudicated and accepted by the trial court, no judicial acts remained; entry of a *nunc pro tunc* decree following Art's death would have merely confirmed the trial court's prior judicial act." Appellant's Brief at 9. Notwithstanding the arguments above, Charlotte would respectfully disagree and submit that the record is void of any evidence that the court judicially accepted the agreement. Likewise, the transcript from the court trial is void of any statement by the trial court that it had accepted the parties' verbal stipulation put on the record by counsel. After the agreement had generally been read into the record the court asked both Art and Charlotte if this was their agreement, if they waived their right to a trial and if they agreed to be bound by the terms of the agreement to which each answered yes. *Id.* at 13:10-14:1. The court then stated,

> **The Court:** All right. Thank you. I applaud your hard work and efforts today. I think you'll be more satisfied with an agreement reached between the parties as anything the Court could impose. *I look forward to receiving the agreement.*
>
> Court's in recess.

Id. at 14:2-14:7 (Emphasis added). No where did the court adopt the verbal stipulation of the parties. No where did the trial court declare on the record that the stipulation was

received and adopted and would be the order of the court. No where did the trial court say based upon these statements I am binding you to this agreement. What the court said was, "I look forward to receiving the agreement." *Id.* For the Estate to suggest that there was "prior judicial acceptance of a stipulated agreement" is without basis in the record.

Larson is much more similar to this case than the Estate suggests. In *Larson*, wife filed for divorce from husband and the parties stipulated prior to trial that the grounds for divorce would not be contested and that the trial court would not take fault into consideration in the property division. *Larson v. Larson* 89 S.D. 575, 235 N.W.2d 906, 907 (1975). The only issue for trial was the nature, extent and division of property. *Id.* Following the day long trial, the court pronounced that "there will be a divorce. The only thing for me to decide now is the financial arrangements and I'll do that after five days you will have the decision within about two weeks from now." *Id.* The court directed the parties' counsel to prepare a memorandum proposing an acceptable division of the property. *Id.* No memorandum was issued within the time period and shortly thereafter Husband's attorney filed a motion requesting that the decision be held until there could be an evaluation of new medical information on husband's physical condition. *Id.* On June 3rd, counsel withdrew his request but almost immediately the judge left South Dakota for a five-week judges' college in Nevada. *Id.* While in Nevada the judge dictated a memorandum on the case, set it to his court reporter in South Dakota for transcription, then revised the language of the draft and sent it back to his reporter. *Id.* The decision was dated July 1, 1974. Husband died July 5, 1974 before the decision was signed or transmitted to counsel. *Id.* at 908. In *Larson* (like here) this Court noted that,

> "It is undisputed that nothing had been filed with the clerk of courts nor had anything been sent to counsel for either part by

> Judge Adams nor in fact had any opinion, decision or memorandum been signed by him purporting to dissolve the Larson marriage bonds prior to the death of Mr. Larson."

Id. at 909. Thereafter this court stated, "This being the situation … did the divorce action survive and had the trial court power to pronounce Margaret and Verlyn Larsons no longer husband and wife by reasons of a civil decree of divorce? To both questions we must answer in the negative." *Id.*

In answering the first part of the self-posed question, this Court in *Larson* unequivocally stated,

> "The bond uniting a man and a woman as husband and wife is a person one and out law provides that it is terminated in only two ways –death or divorce. Death having come in advance of any judicial decree the bond was thereby severed. Thereafter there was no bond upon which the decree could work. The law in this state is as it is in many others**:** *in a suit for divorce where the death of one of the parties to the suit occurs before a decree of divorce has been issued the action abates and the jurisdiction of the court to proceed with the action . . . is terminated*."

Larson at 909 (citations omitted) (Emphasis added). There is no question here, as in *Larson,* that death preceded divorce. The answer to the first question being that the divorce did not survive, this Court analyzed whether the judge's attempt to remedy the situation by issuing a *nunc pro tunc* divorce decree after the defendant's death was effective. In the analysis, this court looked to a similar case of *Sahler v. Sahler,* 154 Fla. 206, 17 So. 2d 105 (1944).

In *Sahler*, a hearing on a petition for divorce was heard on July 12, 1943. *Id.* At the conclusion of the hearing the Chancellor made statements indicating that a decree of divorce should be granted, but without stating on whose behalf. *Id.* The Chancellor asked the attorneys to draw a decree which could include property division but

preparation was delayed. *Id.* On July 28th the plaintiff died. On August 17, 1943, the Chancellor entered a *nunc pro tunc* decree as of July 12. *Id.* The Florida Supreme Court overruled the Chancellor stating,

> [Construing] the announcements made by the Court at the conclusion of the hearing, in the aspect most favorable to the plaintiff, the most that can be said of them is that the Chancellor had announced certain things he desired to be incorporated in the final decree when it was prepared and entered.
> ***
> By no rule of construction, or any process of reasoning, known to the writer could such oral pronouncements by the Chancellor be construed to be a final decree; however it is the opinion of this writer that had the Chancellor announced a decree, that such decree would not have been effective until it had been reduced to writing, signed by the Judge, and recorded in the Chancery Order Book as provided in Section 62.16, Florida Statutes 1941, F.S.A.

Larson, 235 N.W.2d 910. It is important that this Court in *Larson* cited this particular language from the *Sahler* opinion that states "*had the Chancellor announced a decree, that such decree would not have been effective until it had been reduced to writing, signed by the Judge, and recorded in the Chancery Order Book.*" *Id.* (emphasis added; See also SDCL 15-6-58). This holding is exactly opposite of what the Estate asks this Court to hold. The Estate argues the trial court accepted the agreement (despite the fact that no such announcement appears in the settled record or the court trial transcript) and therefore this Court must enter a judgment *nunc pro tunc.* However, the *Sahler* court, upon which this court previously relied, specifically stated that an oral decree "would not have been effective until it had been reduced to writing, signed by the Judge, and recorded…" *Id.*

The trial court in this case made similar findings to the Florida Supreme Court in *Sahler.* The trial court stated:

> **The Court**: The Court further finds that signing is a judicial act. Signing is more than a ministerial act and a divorce or any action is not final until a judgment is entered, and there's reason for that. That's what starts the finality.

MH 13:14-19.

This Court in *Larson* also previously reviewed and relied upon a case from the state of Michigan, *LeTarte v. Malotke*, 188 N.W.2d 673 (Mich. App.1971). *LeTarte* is nearly identical to the fact of this case. In *LeTarte*, on December 16, 1969, the morning of the divorce trial the case was settled in open court. *Id.*at 674. "The parties also decided on a property settlement, which was read into the record." *Id.* After the property settlement had been read into the record the court stated,

> The Court: A judgment of divorce will enter upon presentation of the proper form incorporating therein the complete property settlement which, as I understand, has been dictated upon the record between counsel?
>
> Mr. Wilson: Yes. Thank you, Judge.
>
> The Court: Have the property settlement in by Monday, December the 22nd.

Id. 674-675. Subsequently a docket entry was made by the clerk indicating the plaintiff had been granted a judgment of divorce and the judge signed the entry. *Id.* On December 20, 1969, Robert LeTarte died before a final judgment of divorce had been given to the judge for signing. *Id.* Mrs. LeTarte moved to dismiss the divorce action on the ground that no final action had been rendered and thus the case was moot. *Id.* The personal representative of the deceased asked that a *nunc pro tunc* judgment of divorce be granted. The Michigan Court of Appeals held that, "the language of the court is prospective only. The judge was merely saying in effect that Ms. LeTart was entitled to a divorce and that as soon as he was presented with and signed a judgment, the divorce would be granted."

Id. These facts are nearly identical to this case if you set aside the facts that Art demanded they stay married following signing of the Stipulation and intentionally delayed the submission of the Judgment and Decree of Divorce. Nevertheless, there, like here, a trial was scheduled, the parties reached agreement morning of the trial, the agreement was read into the record, a judgment was to be rendered and entered but it was not done at the time of the husband's death.

While in this case the parties reduced their oral agreement to writing and filed it with the clerk, the fact remains that no judgment and decree had been reduced to writing incorporating the Stipulation, as required in the Stipulation, and presented to the Court prior to Art's death. The Estate argues that "When the Stipulation was submitted, there was no further judicial decision to be made. All that was left for the trial court to do was sign a judgment and decree when presented." (Appellant's Brief Pg. 16). It is disingenuous for the Estate to assume that the trial court was simply going to sign whatever judgment and decree of divorce that it placed in front of it. Such is <u>not</u> a ministerial act. There certainly is no factual basis in the record for such a position and as noted by the trial court in this case it views the signing of a judgment and decree is more than a ministerial act. MH 13:14-18. Nowhere in the record does the trial court state the parties will be, shall be or are divorced or that the divorce will be effective, the day of trial, December 31, 2017, or March 1, 2018. And certainly, nowhere in the record is there any evidence that the trial court agreed that its Judgment and Decree would be entered *Nunc Pro Tunc* to any date in the past or future. These are all arguments that the Estate repeatedly makes without basis in the settled record.

What is clear from the settled record is this. The parties were married. Art died

on February 20, 2018. The parties were married on said date. Prior to that date no judgment and decree of divorce had been reduced to writing, entered by the court nor had any judgment and decree of divorce even been presented to the court for its review despite the parties' Stipulation having been entered more than 3 months previously. As stated by this Court in *Larson*, comparing the facts of *Larson* to the facts of *LeTarte*, "There, as here, judicial acts remained to be done at defendant's death." *Id.* The only judicial act to be done in *LeTarte* was the rendition of a judgment to be reviewed and signed by the judge. That was precisely posture of the case before this before the trial court who ruled that death came before divorce and dismissed the case. Here, like in *Larson, LeTarte and Sahler,* a *nunc pro tunc* decree would be improper and the Court should deny Estate's claim.

C. Only a minority of jurisdictions recognize the entry of *nunc pro tunc* decrees following the death of a party to a divorce.

The Estate argues that where all issues have been fully adjudicated by the trial court prior to the death of one of the parties and no further judicial act is required but the signing and entry of a decree, several jurisdictions have recognized that death does not prevent entry of a decree *nunc pro tunc* to a time prior to the death of a party. (Appellant's Brief Pg. 18) These states however, are in the minority, and each of these cases is distinguishable from the facts of this case.

The Estate first argues the case of *White v. Smith,* 645 So.2d 875 (Miss. 1994), wherein the Supreme Court of Mississippi held the trial court did not error in entering a judgment of divorce *nunc pro tunc* when all issues were fully adjudicated in all respects by the trial court. (Appellant's Brief Pg. 18). In *White,* the parties entered into a handwritten "Consent to Divorce" on the grounds of irreconcilable differences prior to

trial. *White, 645 So.2d at 876-877.* A trial was held and the court heard testimony pertaining solely to the division of property between them. *Id.* At the conclusion of the trial, the court ruled from the bench and performed a division of property, adjudicating all the issues before it. *Id.* At 879. At the conclusion the trial court stated, "Those are all the issues that have been submitted to the Court, and I'll grant the divorce on those conditions." *Id.* Eight days later the husband died before a judgment of divorce had been entered. *Id.* The trial court issued a judgment of divorce *nunc pro tunc* to the date of the trial finding there had been a "full and complete adjudication between the parties" and that "all issues between the parties, both contested and the Consent to Divorce, were finally adjudicated I all respects by the Court." *Id.* Those are not the facts of this case. As noted above, here there court did not rule on nor adjudicate anything prior to Art's death.

While the Supreme Court of Mississippi affirmed the entry of a *nunc pro tunc* judgment under the facts of *White* it is unlikely that would do so under the facts of this case. The Mississippi Supreme Court stated:

> In the present case, from a technical standpoint, Luther died while married, since his death was prior to the entry of the decree. However, the record clearly indicates that all submitted issues had been *litigated and ruled upon* by the chancellor on November 2, 1992. Nothing more was to be accomplished in the interim between ruling and formal filing of the judgment.

Id. At 881 (emphasis added). The Court continued by stating:

> The general rule, so far as a general rule may be deduced from the few cases falling within this subdivision, is that, if the facts justifying the entry of a decree were adjudicated during the lifetime of the parties to a divorce action, so that a decree was rendered or could or should have been rendered thereon immediately**,** but for some reason was not entered as such on the judgment record, the death of one of the parties to the action subsequently to the rendition thereof, but before it is in fact entered upon

> the record, does not prevent entry of a decree nunc pro tunc to take effects as of a time prior to death of a party. But if no such final adjudication was made during the lifetime of the parties, a decree nunc pro tunc may not be entered after the death of one of the parties, to take effect as of a prior date.
>
> Because the chancellor both fully considered all issues raised by the parties and rendered his opinion prior to Luther White's death, the order entering judgment of divorce nunc pro tunc was not manifestly in error. *Id.*

In this case, there was no final adjudication made during Art's lifetime. Additionally, and most importantly, the Mississippi Supreme Court states that the general rule for justifying entry of a decree *nunc pro tunc*, is if the facts were adjudicated during the lifetime of the parties to a divorce action, so that a decree rendered could or should have been rendered *immediately*. *Id.* In this case the trial court could not have rendered judgment immediately because the Stipulation intentionally prevented it.

Likewise the case of *Ex parte Adams*, 721 So2d 148 (Ala. 1998), cited by the Estate is distinguishable from the facts of this case and certainly should not form the basis of overturning or modifying *Larson*. In *Adams,* a final settlement was read into the record at trial. *Id.* at 148-49. The trial court then entered an order directing the wife's attorney to draft a judgment of divorce incorporating the agreement. *Id.* The trial court also ordered that the terms of the agreement were effective immediately. *Id.* (emphasis added). A few months later the husband committed suicide before the judgment of divorce was signed. *Id.* The wife moved to enforce the agreement and the trial court refused, finding that the divorce action abated by the husband's death. *Id.* The facts of *Adams* are not at all similar to those in this case. In *Adams*, the trial court ordered the terms of the agreement were effective immediately. *Id.* That was not the case here. Again, the Stipulation prevented immediate action, at the insistence of Art. Likewise, the

court did not order the agreement was effective at any time prior to Art's death. Even the Court of Appeals in *Adams* noted, "Because a cause of action for divorce is purely personal, it is generally recognized that, upon death of either spouse, such a cause of action terminates or, if divorce action has been commenced, the action abates. However, we agree with wife's argument *under the particular facts of this case.*" *Id.* (Emphasis added).

The particular facts of *Adams* included the trial court ordering the terms of the agreement were effectively immediately after they were put on the record. This was an act that occurred during both parties lifetime. It is not factually similar to what transpired in this case as there was no such order from the trial court here.

The Estate next relies upon a California case, *In re Marriage of Mallory*, 55 Cal. App. 4th 1165 (1997). This case is clearly distinguishable for the fact that California has a Family Code section that specifically allows for entry of orders *nunc pro tunc.* It is Family Code section 2346, which reads in part as follows:

> (a) If the court determines that a judgment of dissolution of marriage should have been granted but by mistake, negligence, or inadvertence, the judgement has not been signed, filed or entered, the court may cause the judgement to be signed, dated, filed and entered in the proceeding as of the date when the judgment could have been signed, dated, filed and entered originally . . .

And

> (c) The court may cause the judgment to be entered *nunc pro tunc* as provided in this section, even though the judgment may have been previously entered, when through mistake, negligence, or inadvertence the judgment was not entered as soon as it could have been entered under the law if applied for.

Mallory is both factually and procedurally distinguishable from the case at hand. Furthermore, given the parties' Stipulation wherein it prevented the entry of a Judgment

and Decree until a later date so that Art could receive marital health insurance benefits, it could hardly be argued that the judgment was not previously entered through mistake, negligence, or inadvertence as soon as it could be. Here it was not entered because that is exactly what Art demanded.

Finally, the Estate wants this court to rely upon the Minnesota case of *Tikalsky v. Tikalsky* 208 N.W. 180 (Minn. 1926). It is interesting to note that *Tikalsky* was decided before *Larson.* Surely a sister state's precedent would had been considered by this Court in *Larson* which was decided in 1970. However, *Tikalsky* too is distinguishable from the facts of this case. As noted in Appellant's brief, *Tikalsky* involved a court trial where the court made specific findings on the record as well as conclusions of law and order for judgment. *Id.* There following the evidence, the trial court stated,

> That plaintiff is not entitled to any relief in this action and that the defendant is entitled to judgment adjudging and decreeing that the bond of matrimony now and heretofore existing between plaintiff and defendant are forever dissolved and awarding to defendant an absolute divorce from Plaintiff. Let judgment be entered accordingly. *Id.*

Again in this case, unlike *Tikalsky*, there was no order adjudging the parties divorced from one another, either oral or written, made by the trial court during Art's lifetime.

To be clear, the facts of this case are unlike those of *White, Adams, Mallory* or *Tikalsky.* Each of those cases involved an adjudication of the facts on the record with an announcement that a divorce would be granted. That is not the case here. In each of those cases one of the parties died while waiting for the judgment to be entered. Here Art died during a period he demanded to remain married during so that he could have the benefit of Charlotte's health insurance. Under these circumstances it would be an unjustice to rewrite clear South Dakota law where judgment was not entered, nor

announced, prior to Art's death when it fell under the marital time he demanded.

D. Art Andersen demanded that the Judgment and Decree of Divorce not be entered until March 1, 2018, so he could receive the benefit of his wife's health insurance and entry of a nunc pro tunc judgment is unwarranted.

The Estate argues that in this case, justice requires the entry of a *nunc pro tunc* judgment and decree of divorce. However, nothing is further from the truth. The Estate has offered no specific authority on how justice requires entry of a *nunc pro tunc* judgment in this case. The Estate argues that *nunc pro tunc* orders should be granted or refused, as justice may require, in view of the circumstances of the particular case. (Appellant's Brief p 24). Here, it would be an injustice to enter a judgment *nunc pro tunc*. Art got exactly what he wanted. He wanted to remain married so that he could make use of Charlotte's health insurance benefit. He got that that benefit as a married man and passed away during the same period.

In support of their argument that the interests of justice require the entry of a judgement and decree *nunc pro tunc*, the Estate cites this court's ruling in *Todd v. Todd*, 7 S.D. 174, 63 N.W. 777, 779 (1895) arguing "this Court has made clear that a '*nunc pro tunc* order should be granted or refused, as justice may require, in view of the circumstance of the particular case." (Appellant's Brief Pg. 24). However, the Estate fails to address what our United States Supreme Court said regarding the entry of a judgment or decree as of a date anterior to that on which it was in fact rendered, as was set out by this court in *Todd*. The Supreme Court stated,

> We content ourselves with saying that the rule established by the general concurrence of the American and English courts is that where the delay in rendering a judgment or a decree arises from the act of the court, - -that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, either the intricacy of the questions involved, *or of other cause not attributable of the laches of the parties,* --

> the judgment or decree may be entered, respectively, as of a time when it should or might have been entered up. *Id.* at 779.

The record here does not show that the delay in entry of the judgment was caused by the court, rather it was caused by the parties, hence it would not seem that interest of justice require entry of a judgment *nunc pro tunc* in this case.

II. The Stipulation is not enforceable independent of the divorce decree.

The Estate argues that if this Court upholds the trial court and finds that death abates jurisdiction, then alternatively this Court should create new law in South Dakota and find that the Stipulation was a valid and enforceable contract independent of the divorce decree and that divorce was not a condition precedent to the enforceability of the Stipulation. However in making this argument, the Estate fails to cite this Court to the enforceability paragraph explicitly set out in the Stipulation. That paragraph reads in part as follows:

> "If either party should find it necessary to hire counsel to enforce any provision of this Stipulation, *as incorporated into the Decree of Divorce,* the party successfully enforcing the terms of this Stipulation shall be reimbursed for all costs necessarily incurred in its enforcement…"

SR 500. (Emphasis added). Here the parties expressly qualified enforcement of the Stipulation *"as incorporated into the Decree of Divorce"*. If the parties intended the Stipulation to be enforceable independent of the divorce decree then they would not have included such clear unambiguous language to the contrary. Furthermore, the parties specifically agreed that the Stipulation *shall* be incorporated into a Judgment and Decree of Divorce. SR 489-450. Here a condition precedent to enforcement of the Stipulation is the incorporation of the Stipulation into the Decree of Divorce.

"[I]t is a general principle of contract law that failure of a condition precedent ...

bars enforcement of the contract." *Johnson v. Coss*, 2003 S.D. 86, ¶ 13, 667 N.W.2d 701, 705 (quoting *Farmers Feed & Seed, Inc. v. Magnum Enterprises, Inc.,* 344 N.W.2d 699, 701 (S.D.1984)) (further citations omitted). A condition precedent is a contract term distinguishable from a normal contractual promise in that it does not create a right or duty, but instead is a limitation on the contractual obligations of the parties. *Id.* 705-06

A condition precedent is a fact or event which [sic] the parties intend must exist or take place before there is a right to performance.... A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor.... If the condition is not fulfilled, the right to enforce the contract does not come into existence. *Id.* at 706 (citing 13 Richard A. Lord, Williston on Contracts, § 38:1 (4th ed.2000)), *see also Bublitz v. State Bank of Alcester,* 369 N.W.2d 137 (S.D.1985) (holding a contract unenforceable because a stated condition precedent failed to occur).

While Charlotte does not believe that this Court needs to look any further that the Stipulation itself to deny the Estate's prayer for relief, so as to leave no stone unturned, she will respond to the remainder of the Estate's arguments suggesting that the Stipulation is enforceable independent of the Divorce.

A. The Stipulation is not a binding contract because the object of the Stipulation was the divorce of two living spouses.

The elements of a contract are: (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration. SDCL 53-1-2. The Stipulation fails to meet these elements because the object of the Stipulation was the divorce between two living spouses and not a division of property.

As set out above, it is clear from the language used by the parties in the

enforceability paragraph of the Stipulation that the object was the Decree of Divorce and the property stipulation was only enforceable after entry of the same. As death preceded divorce the court is without jurisdiction to enter a Decree of Divorce and the objection of the Stipulation is a nullity. See SDCL 25-4-1, *Larson v. Larson*, 89 S.D. 575, 580, 235 N.W.2d 906, 909 (1975).

Further supporting the proposition that the object of the Stipulation was the decree of divorce vs. the separation of property is the fact that no deeds had been drafted by the parties separating their joint ownership of a number of properties owned by the parties in both South Dakota and Wyoming. In fact, Tom Brady, attorney for Art Andersen, drafted a contract for deed and warranty deed for the sale of the Boke Ranch near Spearfish, South Dakota, shortly after the signing of the Stipulation. Each document Mr. Brady prepared affirmatively held Art and Charlotte as husband and wife. SR 673-687, 693-695, APPEE 27-41, 42-44.

If the object of the Stipulation was to separate their interest in marital properties, then changing title to real estate would have been at the top of the list and there was nothing legally preventing deeds being prepared and signed separating their joint ownership and/or completely transferring any ownership interest in the properties following the filing of the Stipulation. The fact that deeds, drawn by Art's attorney Tom Brady, holds Art and Charlotte out as husband and wife, following the signing and filing of the Stipulation, should be binding upon the Estate. If nothing else, it certainly should prohibit the Estate of claiming that Art and Charlotte were not still legally married following their signing and filing of the Stipulation. Furthermore, the fact that Mr. Brady did not draw other deeds for Charlotte to sign transferring her interest in property to Art

as set out in the Stipulation further supports Charlotte's position that the property division was ancillary to and contingent upon the entry of the decree of divorce which remained pending at the time of Art's death.

B. The Stipulation is not independently enforceable from the divorce.

The majority view is that property settlement is merely incidental to the marriage dissolution and that when one of the parties has died prior to entry of the final decree the case is abated as a matter of law. One such example is seen in the case of *In re Marriage of Connell,* 870 P.2d 632 (1994), a case from the Colorado Court of Appeals. In *Connell,* husband filed for divorce from wife, who was disabled. Wife was represented by a legal guardian and conservator during the pendency of the dissolution action. Husband and wife's guardian signed a Separation Agreement which fully resolved all matters relating to property division, custody of the couple's minor children, and support. The Agreement was submitted to the court together with an Affidavit for Entry of Decree Without Appearance of the Parties. *Id.* A decree of dissolution, incorporating the Separation Agreement, was signed by a district court magistrate on July 1, 1992. However, unbeknownst to the magistrate, the wife had died six days earlier on June 25, 1992. *Id.* Husband subsequently filed a motion to set aside the decree of dissolution and to dismiss the action with prejudice. *Id.* The district court denied the motion, finding that the parties' Separation Agreement and Affidavit for Entry of Decree Without Appearance evidenced the parties' "clear intent" to dissolve the marriage. The court reasoned that the administrative delay between the filing of the parties' affidavit and entry of the final decree "should not work to defeat the clearly expressed intent of the parties." *Id.*

The Court of Appeals reversed holding, "Judicial action is necessary to dissolve a

marriage, even when the parties have amicably resolved all issues pertaining to the dissolution." *Id.* Further, under Colorado law, a decree of dissolution or legal separation is not final until it has been signed and entered in the court register of actions. *Id*. (citations omitted). It necessarily follows under this statutory framework that if either spouse dies prior to the entry of a valid decree, the marriage is terminated as a matter of law and the trial court is divested of jurisdiction to proceed further in the dissolution. *Id.*

South Dakota's framework is procedural framework is similar to that of Colorado. SDCL 15-6-58 - Entry of judgment and orders--Effective date provides:

> Subject to the provisions of § 15-6-54(b), judgment upon the jury verdict or upon the decision of the court, shall be promptly rendered. Every judgment shall be set forth on a separate document. *A judgment or an order becomes complete and effective when reduced to writing, signed by the court or judge, attested by the clerk and filed in the clerk's office.* The clerk, immediately after the filing of any judgment, shall docket the same as provided by law. Judgments of divorce pursuant to chapter 25-4 and judgments of foreclosure pursuant to chapter 21-47 or chapter 21-48 shall be docketed by the notation "see file." Entry of the judgment shall not be delayed for the taxing of costs.

Here the judgment was never reduced to writing until after Art's death, there is no judgment that has been signed by the judge, attested by the clerk and filed in the clerk's office. There has been no judicial act to dissolve the marriage. There is simply no legal basis upon which to enforce the Stipulation because it is simply incidental to the divorce proceeding and jurisdiction has abated. *See also Matter of Marriage of Wilson*, 13 Kan.App.2d 291 (1989), (holding we adopt the majority rule and hold that an action to dissolution of marriage abates upon the death of either party prior to the entry of decree, and at that time the trial court loses jurisdiction to determine incidental issues such as the disposition of property rights involved in the marriage.), *Corte v. Cucchiara*, 257 Md. 14, 261 A.2d 775(1970) (holding "In Maryland a decree has been said not to be effective

unless reduced to writing, signed by the judge and filed for record."), *Williams v. Williams,* 146 Neb. 383, 19 N.W. 630 (1945)(stating in a divorce action the money and property interests involved are only incidental to the principal object of the suit. Whether the object sought is a limited or an absolute divorce, the primary and underlying purpose of such action is a modification or dissolution of the marriage relation.)

Finally, a review of *O'Connor v. Zeldine*, 848 P2d 647, 648 (Or. Ct. App. 1993) cited by the Estate reveals that the holding in not analogous to the facts of this case because here enforcement of the Stipulation is contingent filing the Judgment and Decree of Divorce and pursuant to our state's statues (cited above) the Judgment and Decree is not effective until reduced to writing, signed, attested and filed.

In *O'Connor,* Defendant and wife negotiated and entered into an oral property settlement agreement. *Id.* The terms of the agreement were stated in open court and when questioned by the court, both parties expressed their agreement. *Id.* The hearing was recessed so the agreement could be memorialized in writing, but before the final dissolution judgment was entered, wife died. *Id.* Plaintiff, the personal representative of the decedent's estate, bought action for specific performance of the property settlement agreement. *Id.* The trial court held the agreement was enforceable. *Id.* On appeal the Oregon Court of Appeals first considered, "whether [the agreement] was enforceable before decedent died or whether it was conditioned on entry of the dissolution judgment." *Id.* It being an oral stipulation the court found no condition precedent or subsequent to the enforceability of the agreement. *Id.* In this case however, the enforceability is conditioned upon the judgment and decree of divorce. As noted above, the enforceability clause in the Stipulation specifically states that, "If either party should find it necessary to

hire counsel to enforce any provision of this Stipulation, *as incorporated in the Decree of Divorce,* …" SR 488-503. The Stipulation also states that it shall be incorporated into the Judgment and Decree of Divorce. Each of these references demonstrate that the Stipulation is not to be viewed alone. *Id.* The Stipulation has no effect absent the Judgment and Decree of Divorce and given the circumstances of this case, jurisdiction has abated upon Art's death, and it is a nullity.

CONCLUSION

The Trial Court's dismissal of this divorce case under this Court's settled precedent in *Larson* should be affirmed. Death preceded divorce. Art passed away while he was married, while he was receiving the marital benefit of his spouse's health insurance that he bargained for, and during the time Art and his attorney were representing to all parties, through the contract for deed and warranty deed drafted after the Stipulation was signed, that he and Charlotte were husband and wife. APPE Pg. 27-41, 42-44. No judgment and decree of divorce was ever reduced to writing, signed by the court or judge, attested by the clerk, or filed prior to death. The Trial Court had no jurisdiction, under *Larson* which was settled law when the Stipulation was signed, to do anything other than dismiss the case as it was stripped of jurisdiction as of the date of Art's death. Last, the Stipulation was predicated upon an objective of divorce between two living spouses and when Art passed away prior to judgment that objective ceased to exist. Charlotte respectfully requests that this Court affirm the Trial Court's dismissal of the case due to Art's passing while he remained married and prior to a Judgment and Decree being reduced to writing, signed by the court, attested by the clerk and filed prior to his death.

Respectfully submitted this ___ day of July, 2018.

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_____

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4) counsel for Appellee states that the foregoing brief is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this Brief indicated that there were a total of 8,194 words and a total of 48,329 characters (with spaces) in the body of the Brief including footnotes.

CLAYBORNE, LOOS & SABERS LLP.

_____
Michael K. Sabers

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of July, 2018, I 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:

Ms. Cassidy Stalley
Lynn, Jackson, Shultz & Lebrun, P.C.
909 St. Joseph Street, Suite 800
Rapid City, SD 57701
CStalley@lynnjackson.com

Mr. Thomas Brady
Lynn, Jackson, Shultz & Lebrun, P.C.
909 St. Joseph Street, Suite 800
Rapid City, SD 57701
TBrady@lynnjackson.com

I further certify that the original and two (2) copies of the Brief of the

Appellee and Appendix in the above-entitled action were mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class postage thereon prepaid, the date above written

CLAYBORNE, LOOS & SABERS LLP.

_____
Michael K. Sabers

APPELLEE'S APPENDIX

APP. No.	Description	Appellant's Appendix Page Numbers
1.	Affidavit of Michael K. Sabers in Support of Motion to Dismiss	0001-0006
2.	Affidavit of Charlotte Andersen in Support of Motion to Dismiss	0007-0026
3.	Contract for Deed	0027-0041
4.	Warranty Deed	0042-0044
5.	Statute 25-4-1	0045

APPELLEE'S APPENDIX

APP. No.	Description	Appellant's Appendix Page Numbers
1.	Affidavit of Michael K. Sabers in Support of Motion to Dismiss	0001-0006
2.	Affidavit of Charlotte Andersen in Support of Motion to Dismiss	0007-0026
3.	Contract for Deed	0027-0041
4.	Warranty Deed	0042-0044
5.	Statute 25-4-1	0045

APPELLEE'S APPENDIX 1

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS:	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

CHARLOTTE M. ANDERSEN,	)	File No. D15-05
	)	
PLAINTIFF,	)	
	)	**AFFIDAVIT OF ATTORNEY**
v.	)	**MICHAEL K. SABERS IN SUPPORT**
	)	**MOTION TO DISMISS**
ARTHUR S. ANDERSEN	)	
	)	
DEFENDANT.	)	

COMES NOW Attorney Michael K. Sabers, attorney of record for Plaintiff, and being first duly sworn upon his oath, hereby states as follows in support of Plaintiff's pending Motion to Dismiss:

1. That I am one of the attorneys of record for the Plaintiff in the above-entitled action.

2. That no Judgment and Decree of Divorce had been entered by the Court let alone proposed to the Court at the time of Defendant's passing.

3. It is undisputed that the reason that no Judgment and Decree of Divorce had been entered by this Court is that Defendant bargained for, and mandated, that he continue to be married to Plaintiff so that he could receive medical care as a married person under Plaintiff's Federal Health Insurance leading up to and at the time of his passing.

4. That emails between myself and Attorney Brady confirm that it was Defendant's term and condition that was proposed, and then agreed to by my client, that he remained married during the time period specified and leading up to his passing.

5. That I drafted an email to Attorney Tom Brady on November 14, 2017, stating my client's agreement to allow the parties to remain married so that Defendant could continue to receive medical care as a covered spouse. That email, attached as Exhibit 1 to this Affidavit, stated in pertinent part:

> Tom,
>
> . . . .
>
> This is in response to your client's offer 11/10/17.
>
> . . . .

"We agree to hold the Judgment and Decree of Divorce as long as stipulation signed for a period of time (not to exceed three months – just want it to be a reasonable amount of time but if he can get it done by end of year save all deductibles?) to allow Art to get hernia / knee surgery as you referenced (Attached as Exhibit 1) (emphasis added)

5. That during the divorce proceeding Defendant's email to his attorney was produced, and which is attached as Exhibit 2 to this Affidavit, which reflected Defendant understood his medical condition and its severity as well as the issue of health insurance. Defendant referenced he had previously "died a few times" in that email and then continued to state in regards to health insurance that "her insurance has saved paid pretty well, I have a huge stack of copays."

6. Defendant negotiated the benefit of remaining married during the time period he passed away to obtain covered spouse health insurance coverage understanding the risks associated with the same.

7. That attached to this Affidavit as Exhibit 3 is a copy of a letter received from the Wyoming Department of Health indicating that the death record cannot be provided as "the marital status of the decedent is pending litigation."

8. That such letter (Exhibit 3) was obtained from a request made by Plaintiff when attorneys for Defendant refused to either respond to or produce a death certificate, refused multiple written requests for any alleged last will, and last threatened "criminal trespass" to Plaintiff if she were to travel to the Wyoming properties after Defendant's passing.

Dated this 12th day of March, 2018.

Michael K. Sabers

Subscribed and sworn to before me on this 12th day of March, 2018.

(SEAL) ERIN K. HIX NOTARY SEAL PUBLIC STATE OF SOUTH DAKOTA

Notary Public

My Commission Expires: My Commission Expires December 29, 2023

Michael K. Sabers

From: Michael K. Sabers
Sent: Tuesday, November 14, 2017 12:34 PM
To: Thomas E. Brady (TBrady@lynnjackson.com); Michael K. Sabers
Cc: Eric Schlimgen
Subject: Settlement offer - Time is of essence (MKS to TB 11/14/17)
Attachments: scans@clslawyers.net_20171114_113503.pdf

Tom,

Settlement offer. These terms are in no specific order. This is in response to your client's offer of 11/10/17. All of this is for settlement purposes only:

1. Art keeps 310, helicopter, all equipment associated with those aircraft;
2. Art keeps Wyo hangar, Wyo house, Wyo shop (Charlotte is not on house debt we confirmed);
3. Art is assigned all rights to Leseberg CFD;
4. Art keeps all equipment, personal belongings, everything on his property exhibit, the half interest in dump truck, including all guns, ammo, silencers, .50 cal etc. except;
5. Charlotte gets those items on exhibit 41, 44 (attached) and her personal belongings such as jewelry, red leather furniture, fireproof file cabinet, mounted cape buffalo, gazelle, impala etc.;
6. Charlotte gets her .375 h&h and .300 wsm;
7. Charlotte gets her motorcycle / 2013 Ranger (delivered, see 14 below; already offered);
8. Charlotte is assigned all rights under the Ziegler CFD;
9. Charlotte gets her Cessna 172;
10. Counter at 1.75m per our discussion on Boke Ranch, from those proceeds pay off debt on spearfish ranch from first payment, then need to discuss how shop loan paid off from remaining payments, and how to divide remainder of payments to get to equalization payment below in no. 15 (also, btw, the realtor asked me if I wanted to see comparables when I told her that we were at 1.75m, just an fyi in case she calls);
11. We agree to hold the Judgment and Decree as long as stipulation signed for a period of time (not to exceed three months – just want it to be a reasonable amount of time but if he can get done by end of year save all deductibles?) to allow Art to get hernia / knee surgery done as you referenced.
12. Charlotte gets her retirement and accounts;
13. Art gets tax return check (currently stale), but will be responsible for 2010 audit, and costs of audit, and will hold Charlotte harmless / indemnify from any tax liabilities;
14. Art will deliver Charlotte's items in a trailer (u-haul) identified above or on 41, 44 within thirty days of agreement signed (he already offered) and then he can tow the white trailer back so he can clean out remainder of Spearfish property including equipment, Jeep(s), work truck, minivan, all the belongings in the storage container, house, etc.;
15. Equalization payment. $500,000 at 4%, paid out of spearfish ranch, payments to Charlotte not to exceed half of each payment from Spearfish CFD (to give Art cash flow) and then we would have a condition that if shop sells that Charlotte's remainder owed would be due at that closing. Wyo Shop would remain listed until sold.
16. Charlotte would be collateralized as discussed / indemnify language.

I need to hear back from you as soon as possible for obvious reasons.

This should certainly settle this case.

Sincerely,

Mike Sabers

The Law Offices of
Clayborne, Loos & Sabers
Michael K. Sabers
Clayborne, Loos & Sabers, L.L.P.
2834 Jackson Blvd. Suite 201
PO Box 9129
Rapid City, SD 57709-9129
(605) 721-1517

Thomas E. Brady

From: Farmstrip <farmstrip@aol.com>
Sent: Wednesday, May 24, 2017 12:51 PM
To: Thomas E. Brady
Subject: Divorce

None of that is difficult. Some doesn't exist. Rather than do all the work, then go back to offering to settle, why not work on a settlement first?

Status on items they request:
Medical:

1. Flew to Chicago to a pain specialist for back pain. Then found out I had ruptured discs and a cyst on spinal cord. Back surgery at black hills neurosurgery and spine in Rapid City Jan 19th. It was recovering well when.....
2. Passed out , fell, luckily discovered nearly dead. and was life flighted to Riverton Regional hospital in Riverton Wy. Released undiagnosed.. they thought it was drug overdose. I knew it wasn't. Back home.
3. It's. It but a few days and another Lifeflight to Lander Wy hospital , then lifeflighted on to Casper hospital. Advanced viral pneumonia, quit breathing 2-3 times... lung collapsed, 2.5qts of fluid in me, so Surgery and procedures there. IV antibiotics. Refused further surgery. Was released in a week or so, or once stable. Went home to try to recover
4. Passed out, fell, hurt back, lifeflight back to Casper hospital. Infection was so bad I just collapsed with no blood pressure. Was serious emergency snd was expected to die from viral infection, hole in lung, etc. did surgery to cut/scrape out infection, several other tubes and procedures Month in hospital total. Released with damaged lung. Had a pic line and did several weeks IV twice a day of antibiotics
5. Dubois medical clinic and Lisa rose PA watched over me. Fluid rebuilt. Lung partially collapsed.
6. Went to Jackson hole regional to have fluid drawn off, fluid had thickened and couldn't do procedure. Requires surgery. Have not because of risk of outcome

Infection is dead. What ever lung damage there is will remain that way. On oxygen at night, carry emergency oxy with me 7. Jackson hole regional for steroid shots in back, MRI ordered, meeting a new surgeon Friday. Back surgery certain. Pain level is highest its been. Must have hurt it when I passed out and fell two different times

8. Apparently nerve damage to my legs. They don't work tight, are weak, both knees are terrible and won't hold me up. I fall a lot

So.....I can't change lung damage. It's what it is
Back surgery is a sure thing. Weak legs I don't have control of. I'm like a drunk walking. Steps one at a time

Airplanes : sold 88WY for $125,000, bought 98SD for $125,000.

Land/Ranch:
There is no contract for deed. I leased it to them for $50,000. They are doing what they want there. I still use it too. I have a verbal promise to sell it to them when I can for $1.7SM

Personal property: There is no inventory, it includes all of her things from before marriage, all kitchen stuff, her furniture.....all her stuff and some of mine. It's in an enclosed trailer locked up. Dry n safe
All the "pallets" remain as they were

I've sold personal property and machinery to live and pay bills. All the bills on all the property. I have had 3 surgeries, died a few times, have a lightning damaged house, and physically can't do anything. My back and leg weakness barely lets me buy groceries and run errands. More surgery coming. I can't even play. I'm done for. Healthy, but my back and legs have had it. I'm trying everything I can as fast as I can Her insurance has saved paid pretty well, I have s huge stack of copays

Wyoming Department of Health

Commit to your health.
visit www.health.wyo.gov

Thomas Forslund, Director

Governor Matthew H. Mead

3/5/2018

RE: Anderson, Arthur / Death

ATTN: Charlotte Anderson

We are unable to process your request for the death record listed above because:
The marital status of the decedent is pending litigation. As such, the certificate cannot be issued to you until that matter is settled. We will hold your request on file for 60 days or until notified of the outcome of this case (whichever occurs first). We are returning your fee at this time as we cannot process your request.

Your request will be held on file for 60 days. If applicant does not respond within those 60 days, Vital Records may retain all monies paid.

Return this letter and a self-addressed stamped envelope, along with any additional information requested in order that your original correspondence can be located and your request processed.

Vital Statistics Services
2300 Capitol Avenue
Hathaway Bldg
Cheyenne WY 82002

EXHIBIT 3

APPELLEE'S APPENDIX 2

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS:	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

CHARLOTTE M. ANDERSEN,	)	File No. D15-05
	)	
PLAINTIFF,	)	
	)	**AFFIDAVIT OF CHARLOTTE**
v.	)	**ANDERSEN IN SUPPORT**
	)	**MOTION TO DISMISS**
ARTHUR S. ANDERSEN	)	
	)	
DEFENDANT.	)	

COMES NOW Plaintiff, Charlotte Andersen, being first duly sworn upon her oath, and hereby states as follows in support of her pending Motion to Dismiss:

1. That I was the Plaintiff in the above-entitled action. That Defendant is deceased.

2. That no Judgment and Decree of Divorce had been entered let alone proposed to the Court at the time of Defendant's passing.

3. It is undisputed that the reason that no Judgment and Decree of Divorce had been entered by this Court is that Defendant bargained for, and mandated, that he continue to be my husband for purposes of obtaining health care until March 1, 2018. Defendant's continued use of the Federal Health Insurance as my covered spouse was ongoing at the time of his passing.

4. That emails between attorneys confirm that Art required, and I agreed, that we continue to remain married so that he could obtain the requested health insurance under the covered spouse provision of my Federal Health Insurance. As my attorney indicated to attorney for Defendant on November 14, 2017:

> This is in response to your client's offer 11/10/17.
>
> "We agree to hold the Judgment and Decree of Divorce as long as stipulation signed for a period of time (not to exceed three months – just want it to be a reasonable amount of time but if he can get it done by end of year save all deductibles?) to allow Art to get hernia / knee surgery as you referenced (Attached to Affidavit of Michael Sabers in Support of Motion to Dismiss as Exhibit 1).

5. That between the time the parties signed the Stipulation and Agreement and the time that Defendant passed away Defendant repeatedly represented himself as my husband and covered spouse under my Federal Health Insurance.

6. That between the time the parties signed the Stipulation and Agreement and the time Defendant passed away Defendant incurred in excess of $50,000.00 in covered medical care under my Federal Health Insurance as my covered spouse and husband. Again, each time Defendant sought medical care during that time period he represented himself to each medical provider as a covered spouse. If we had been divorced Defendant could not have done so.

7. That I attach to this Affidavit as Exhibit 1 the correspondence from Blue Cross Blue Shield, as well as Explanations of Benefit (EOB's) reflecting the substantial medical care that Art Anderson, a covered benefit plan member because he remained my husband through the date of death, was receiving.

8. That the documents I received from Blue Cross Blue Shield confirm the facts above. The covered spouse for purposes of the Federal Health Insurance is Charlotte Andersen. The patient name and covered spouse is Arthur Andersen. We were still married when Defendant passed away.

9. That on February 15, 2018 I received a call from one of Defendant's medical providers in regards to a surgery he was having (hernia). Defendant had provided my name and number to the medical entity to call. As of this date, Defendant and I were still married and Defendant was providing my contact information to his medical providers. A screenshot from my phone of such message is attached to this Affidavit as Exhibit 2.

10. That as of the date of death, Defendant's attorney had proposed no deeds to sign, nor had other obligations been fulfilled in the Stipulation and Agreement as provided for in the Brief in Opposition to Motion to Dismiss.

Dated this 11th day of March, 2018.

Charlotte Andersen

Charlotte Andersen

Subscribed and sworn to before me in Jefferson City, Cole County, Missouri on this 11th day of March, 2018.

Notary Public

My Commission Expires: 4-3-2019

(SEAL)

CLIFFORD W. CORNELL
Notary Public - Notary Seal
STATE OF MISSOURI
County of Boone
My Commission Expires 4/3/2019
Commission # 15424920

BlueCross BlueShield
Federal Employee Program.

P.O. Box 52080
Phoenix, AZ 85072-2080
Attention: Prior Approval
Clinical Services
Fax: 1-877-378-4727

02/21/2018

ARTHUR ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY, MO 65109

Re: *******1402

Prescribing Physician: BRENDA BARKER
Physician Phone: 3074736717
Physician Fax: 3074736780

Dear Service Benefit Plan Member:

This letter is to inform you that we did not approve your recent Prior Approval request for **OxyContin 10mg ER (oxycodone).**

How we based our decision

The indicated use of this medication, as provided by your physician, does not meet the Blue Cross and Blue Shield Service Benefit Plan's criteria due to the following reason:

concurrent use of this medication with any of the following listed anti-anxiety benzodiazepines does not establish medical necessity for this drug. Anti-anxiety benzodiazepines are alprazolam (Xanax), clonazepam (Klonopin), diazepam (Valium), lorazepam (Ativan), oxazepam (Serax), chlordiazepoxide (Librium), and clorazepate dipotassium (Tranxene). Medical necessity is determined by adherence to generally accepted standards of medical practice in the United States, is clinically appropriate, in terms of type, frequency, extent, site, duration and considered effective for the patient's illness, injury, disease, or its symptoms. For more information, please refer to the 2018 Blue Cross and Blue Shield Service Benefit Plan brochure (RI 71-005). Details regarding medical necessity are listed on page 150

Upon request, we will send you any diagnosis codes provided by your prescribing physician, and their corresponding meanings, used in making our decision.

You may verify the status of your prior approval request, obtain a copy of the criteria and/or clinical rationale used in making our decision free of charge. You can receive this information

EXHIBIT

BlueCross BlueShield
Federal Employee Program
www.fephlue.org

Explanation of Benefits
THIS IS NOT A BILL

BLUE CROSS BLUE SHIELD OF WYOMING
P.O. BOX 2266
CHEYENNE, WY 82003-2266
307-634-1393 1-800-442-2376

CHARLOTTE M ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY MO 65109-6808

EXPLANATION OF BENEFITS AT A GLANCE

WE SENT CHECK TO: PROVIDER OF SERVICE
PATIENT NAME: ARTHUR ANDERSEN
DATES OF SERVICE: 02/05/2018 - 02/10/2018
YOU OWE THE PROVIDER: $350.00

ID NUMBER: R60207114
CLAIM NUMBER: 180514064500
CLAIM PAID ON: 03/06/2018
CLAIM RECEIVED ON: 02/20/2018
CLAIM PROCESSED ON: 02/22/2018

PROVIDER: ST JOHNS HOSPITAL
TYPE: PREFERRED PROVIDER

DATES OF SERVICE: 02/05/2018 - 02/10/2018

TYPE OF SERVICE	SUBMITTED CHARGES	PLAN ALLOWANCE	REMARK CODES	DEDUCT	COINSURANCE OR COPAY	MEDICARE/ OTHER INS.	WHAT WE PAID	YOU OWE THE PROVIDER
MEDICAL CARE	7,950.00	7,791.00	110 610		350.00		7,441.00	350.00
PRESCRIPTION DRUG	6,502.00	6,371.96	110 610				6,371.96	
PRESCRIPTION DRUG	668.50	655.13	110 610				655.13	
MEDICAL EQUIP/SUPPLY	2,048.00	2,007.04	110 610				2,007.04	
MEDICAL EQUIP/SUPPLY	640.00	627.20	110 610				627.20	
MEDICAL EQUIP/SUPPLY	25,860.00	25,342.80	110 610				25,342.80	
DIAGNOSTIC LAB TEST	105.00	102.90	110 610				102.90	
DIAGNOSTIC LAB TEST	915.00	896.70	110 610				896.70	
DIAGNOSTIC LAB TEST	400.00	392.00	110 610				392.00	
SURGERY	9,015.00	8,834.70	110 610				8,834.70	
SURGERY	600.00	588.00	110 610				588.00	
ANESTHESIA	1,480.00	1,450.40	110 610				1,450.40	
MEDICAL CARE	260.02	254.82	110 610				254.82	
PHYSICAL MEDICINE	360.00	352.80	110 610				352.80	
PHYSICAL MEDICINE	170.00	166.60	110 610				166.60	
SURGERY	710.00	695.80	110 610				695.80	
TOTALS:	57,683.52	56,529.85		0.00	350.00	0.00	56,179.85	350.00

CONTINUED ON NEXT PAGE

BlueCross. BlueShield.
Federal Employee Program
www.fepblue.org

Explanation of Benefits
THIS IS NOT A BILL

CHARLOTTE M ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY MO 65109-6808

CLAIM NUMBER: 180514069500 (CONTINUED):

EXPLANATION OF REMARK CODES

110--BECAUSE OF AN AGREEMENT BETWEEN THE LOCAL BLUE CROSS AND BLUE SHIELD PLAN AND THE PROVIDER OF SERVICE, THE REQUIRED PRECERTIFICATION HAS BEEN OBTAINED FOR YOU. FOR THIS REASON, YOUR BENEFITS HAVE NOT BEEN REDUCED ON THIS CLAIM.

610--THE SUBMITTED CHARGES EXCEED OUR ALLOWABLE CHARGES FOR THESE SERVICES. OUR ALLOWABLE CHARGES ARE THE SUBMITTED CHARGES LESS ANY NON-COVERED CHARGES. BECAUSE THIS PROVIDER IS A PREFERRED OR PARTICIPATING NETWORK PROVIDER, YOU ARE NOT RESPONSIBLE FOR THE DIFFERENCE BETWEEN THE SUBMITTED CHARGES AND OUR ALLOWABLE CHARGES.

HEALTH TIPS

AFTER YOUR HOSPITAL STAY, PLEASE CALL YOUR DOCTOR TO CHECK YOUR MEDICINE AND CARE SO YOU CONTINUE TO GET WELL.

EARN FINANCIAL REWARDS TO USE FOR QUALIFIED MEDICAL EXPENSES WHEN YOU COMPLETE A HEALTH ASSESSMENT AND OTHER WELLNESS ACTIVITIES. VISIT WWW.FEPBLUE.ORG TO LEARN ABOUT THE WELLNESS INCENTIVES PROGRAM.

SUMMARY OF OUT-OF-POCKET EXPENSES FOR 2018

		CATASTROPHIC PROTECTION	
	CALENDAR YEAR DEDUCTIBLE	PREFERRED	NON-PREFERRED/ PREFERRED TOTAL
WHAT YOU HAVE PAID			
INDIVIDUAL	$350.00	$2,942	$2,942
FAMILY/SELF+ONE	$350.00	$3,000	$3,000
ANNUAL MAXIMUM			
INDIVIDUAL	$350.00	$5,000	$7,000
FAMILY/SELF+ONE	$700.00	$10,000	$14,000

YOUR OUT-OF-POCKET EXPENSES ON THIS CLAIM

CALENDAR YEAR DEDUCTIBLE	$0.00
PER ADMISSION COPAY	$350.00
COINSURANCE	$0.00
COPAYMENT	$0.00
NON-COVERED CHARGES	$0.00
PRECERTIFICATION PENALTY	$0.00
TOTAL:	$350.00

IF YOU HAVE QUESTIONS, PLEASE CALL A CUSTOMER SERVICE REPRESENTATIVE AT YOUR LOCAL BLUE CROSS AND BLUE SHIELD PLAN. YOU MAY ALSO REQUEST THE DIAGNOSIS CODES, THE TREATMENT CODES, AND THE CORRESPONDING MEANINGS OF THE CODES FOR YOUR CLAIM. IF YOU DISAGREE WITH THE DECISION ON YOUR CLAIMS OR REQUEST FOR SERVICES, AND WISH TO HAVE THE DECISION RECONSIDERED, YOU MUST NOTIFY YOUR PLAN IN WRITING WITHIN 6 MONTHS FROM THE DATE OF THIS DECISION I.E. 09/06/2018. YOU MAY REQUEST COPIES, FREE OF CHARGE, OF ANY RELEVANT MATERIALS AND PLAN DOCUMENTS RELATING TO YOUR CLAIM. YOUR PLAN WILL NOT ACCEPT UNAUTHORIZED RECONSIDERATIONS FROM PROVIDERS. SEE THE DISPUTED CLAIMS SECTION OF YOUR SERVICE BENEFIT PLAN BROCHURE.

BlueCross. BlueShield.
Federal Employee Program
www.fepblue.org

Explanation of Benefits
THIS IS NOT A BILL

BLUE CROSS BLUE SHIELD OF WYOMING
P.O. BOX 2266
CHEYENNE, WY 82003-2266
307-634-1393 1-800-442-2376

CHARLOTTE M ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY MO 65109-6808

EXPLANATION OF BENEFITS AT A GLANCE

WE SENT CHECK TO:	PROVIDER OF SERVICE
PATIENT NAME:	ARTHUR ANDERSEN
DATES OF SERVICE:	01/31/2018 - 01/31/2018
YOU OWE THE PROVIDER:	$38.80

ID NUMBER:	R60207114
CLAIM NUMBER:	1803612659
CLAIM PAID ON:	02/13/2018
CLAIM RECEIVED ON:	02/05/2018
CLAIM PROCESSED ON:	02/06/2018

PROVIDER: ROSE
TYPE: PREFERRED PROVIDER

DATES OF SERVICE: 01/31/2018 - 01/31/2018

TYPE OF SERVICE	SUBMITTED CHARGES	PLAN ALLOWANCE	REMARK CODES	DEDUCT	COINSURANCE OR COPAY	MEDICARE/ OTHER INS.	WHAT WE PAID	YOU OWE THE PROVIDER
OFFICE VISIT	35.00	29.00	610		25.00		4.00	25.00
MEDICAL CARE	45.00	45.00			6.75		38.25	6.75
DIAGNOSTIC PATHOLOGY	43.00	41.00	610		6.15		34.85	6.15
MEDICAL CARE	21.72		634					
DIAGNOSTIC PATHOLOGY	9.00	6.00	610		.90		5.10	.90
TOTALS:	153.72	121.00		0.00	38.80	0.00	82.20	38.80

EXPLANATION OF REMARK CODES

610--THE SUBMITTED CHARGES EXCEED OUR ALLOWABLE CHARGES FOR THESE SERVICES. OUR ALLOWABLE CHARGES ARE THE SUBMITTED CHARGES LESS ANY NON-COVERED CHARGES. BECAUSE THIS PROVIDER IS A PREFERRED OR PARTICIPATING NETWORK PROVIDER, YOU ARE NOT RESPONSIBLE FOR THE DIFFERENCE BETWEEN THE SUBMITTED CHARGES AND OUR ALLOWABLE CHARGES.

634--BENEFITS FOR THESE SERVICES ARE INCLUDED IN OUR ALLOWABLE CHARGES FOR ANOTHER COVERED SERVICE PROVIDED ON THE SAME DATE OF SERVICE. ADDITIONAL BENEFITS ARE NOT AVAILABLE FOR THIS CHARGE. BECAUSE THIS PROVIDER IS A PREFERRED OR PARTICIPATING NETWORK PROVIDER, YOU ARE NOT RESPONSIBLE FOR THESE CHARGES.

CONTINUED ON NEXT PAGE

Explanation of Benefits
THIS IS NOT A BILL

CHARLOTTE M ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY MO 65109-6808

CLAIM NUMBER: 1803612659 (CONTINUED):

HEALTH TIPS
EARN FINANCIAL REWARDS TO USE FOR QUALIFIED MEDICAL EXPENSES WHEN YOU COMPLETE A HEALTH ASSESSMENT AND OTHER WELLNESS ACTIVITIES. VISIT WWW.FEPBLUE.ORG TO LEARN ABOUT THE WELLNESS INCENTIVES PROGRAM.

SUMMARY OF OUT-OF-POCKET EXPENSES FOR 2018

		CATASTROPHIC PROTECTION	
	CALENDAR YEAR DEDUCTIBLE	PREFERRED	NON-PREFERRED/ PREFERRED TOTAL
WHAT YOU HAVE PAID			
INDIVIDUAL	$350.00	$1,486	$1,486
FAMILY/SELF+ONE	$350.00	$1,521	$1,521
ANNUAL MAXIMUM			
INDIVIDUAL	$350.00	$5,000	$7,000
FAMILY/SELF+ONE	$700.00	$10,000	$14,000

YOUR OUT-OF-POCKET EXPENSES ON THIS CLAIM

CALENDAR YEAR DEDUCTIBLE	$0.00
PER ADMISSION COPAY	$0.00
COINSURANCE	$13.80
COPAYMENT	$25.00
NON-COVERED CHARGES	$0.00
PRECERTIFICATION PENALTY	$0.00
TOTAL:	$38.80

IF YOU HAVE QUESTIONS, PLEASE CALL A CUSTOMER SERVICE REPRESENTATIVE AT YOUR LOCAL BLUE CROSS AND BLUE SHIELD PLAN. YOU MAY ALSO REQUEST THE DIAGNOSIS CODES, THE TREATMENT CODES, AND THE CORRESPONDING MEANINGS OF THE CODES FOR YOUR CLAIM. IF YOU DISAGREE WITH THE DECISION ON YOUR CLAIMS OR REQUEST FOR SERVICES, AND WISH TO HAVE THE DECISION RECONSIDERED, YOU MUST NOTIFY YOUR PLAN IN WRITING WITHIN 6 MONTHS FROM THE DATE OF THIS DECISION I.E. 08/13/2018. YOU MAY REQUEST COPIES, FREE OF CHARGE, OF ANY RELEVANT MATERIALS AND PLAN DOCUMENTS RELATING TO YOUR CLAIM. YOUR PLAN WILL NOT ACCEPT UNAUTHORIZED RECONSIDERATIONS FROM PROVIDERS. SEE THE DISPUTED CLAIMS SECTION OF YOUR SERVICE BENEFIT PLAN BROCHURE.

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Explanation of Benefits
THIS IS NOT A BILL

BLUE CROSS BLUE SHIELD OF WYOMING
P.O. BOX 2266
CHEYENNE, WY 82003-2266
307-634-1393 1-800-442-2376

CHARLOTTE M ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY MO 65109-6808

EXPLANATION OF BENEFITS AT A GLANCE

WE SENT CHECK TO: PROVIDER OF SERVICE
PATIENT NAME: ARTHUR ANDERSEN
DATES OF SERVICE: 01/09/2018 - 01/09/2018
YOU OWE THE PROVIDER: $35.00

ID NUMBER: R60207114
CLAIM NUMBER: 1801013247
CLAIM PAID ON: 01/23/2018
CLAIM RECEIVED ON: 01/10/2018
CLAIM PROCESSED ON: 01/12/2018

PROVIDER: ROSENBERG
TYPE: PREFERRED PROVIDER

DATES OF SERVICE: 01/09/2018 - 01/09/2018

TYPE OF SERVICE	SUBMITTED CHARGES	PLAN ALLOWANCE	REMARK CODES	DEDUCT	COINSURANCE OR COPAY	MEDICARE/ OTHER INS.	WHAT WE PAID	YOU OWE THE PROVIDER
OFFICE VISIT	150.00	105.00	610		35.00		70.00	35.00
TOTALS:	150.00	105.00		0.00	35.00	0.00	70.00	35.00

EXPLANATION OF REMARK CODES

610--THE SUBMITTED CHARGES EXCEED OUR ALLOWABLE CHARGES FOR THESE SERVICES. OUR ALLOWABLE CHARGES ARE THE SUBMITTED CHARGES LESS ANY NON-COVERED CHARGES. BECAUSE THIS PROVIDER IS A PREFERRED OR PARTICIPATING NETWORK PROVIDER, YOU ARE NOT RESPONSIBLE FOR THE DIFFERENCE BETWEEN THE SUBMITTED CHARGES AND OUR ALLOWABLE CHARGES.

SUMMARY OF OUT-OF-POCKET EXPENSES FOR 2018

	CALENDAR YEAR DEDUCTIBLE	CATASTROPHIC PROTECTION PREFERRED	CATASTROPHIC PROTECTION NON-PREFERRED/ PREFERRED TOTAL
WHAT YOU HAVE PAID			
INDIVIDUAL	$191.58	$299	$299
FAMILY/SELF+ONE	$191.58	$299	$299
ANNUAL MAXIMUM			
INDIVIDUAL	$350.00	$5,000	$7,000
FAMILY/SELF+ONE	$700.00	$10,000	$14,000

YOUR OUT-OF-POCKET EXPENSES ON THIS CLAIM

CALENDAR YEAR DEDUCTIBLE	$0.00
PER ADMISSION COPAY	$0.00
COINSURANCE	$0.00
COPAYMENT	$35.00
NON-COVERED CHARGES	$0.00
PRECERTIFICATION PENALTY	$0.00
TOTAL:	$35.00

IF YOU HAVE QUESTIONS, PLEASE CALL A CUSTOMER SERVICE REPRESENTATIVE AT YOUR LOCAL BLUE CROSS AND BLUE SHIELD PLAN. YOU MAY ALSO REQUEST THE DIAGNOSIS CODES, THE TREATMENT CODES, AND THE CORRESPONDING MEANINGS OF THE CODES FOR YOUR CLAIM. IF YOU DISAGREE WITH THE DECISION ON YOUR CLAIMS OR REQUEST FOR SERVICES, AND WISH TO HAVE THE DECISION RECONSIDERED, YOU MUST NOTIFY YOUR PLAN IN WRITING WITHIN 6 MONTHS FROM THE DATE OF THIS DECISION I.E. 07/23/2018. YOU MAY REQUEST COPIES, FREE OF CHARGE, OF ANY RELEVANT MATERIALS AND PLAN DOCUMENTS RELATING TO YOUR CLAIM. YOUR PLAN WILL NOT ACCEPT UNAUTHORIZED RECONSIDERATIONS FROM PROVIDERS. SEE THE DISPUTED CLAIMS SECTION OF YOUR SERVICE BENEFIT PLAN BROCHURE.

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CHARLOTTE M ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY MO 65109-6808

EXPLANATION OF BENEFITS AT A GLANCE

WE SENT CHECK TO: PROVIDER OF SERVICE
PATIENT NAME: ARTHUR ANDERSEN
DATES OF SERVICE: 01/02/2018 - 01/02/2018
YOU OWE THE PROVIDER: $226.58

ID NUMBER: R60207114
CLAIM NUMBER: 1800216954
CLAIM PAID ON: 01/23/2018
CLAIM RECEIVED ON: 01/02/2018
CLAIM PROCESSED ON: 01/12/2018

PROVIDER: GOETZ
TYPE: PREFERRED PROVIDER

DATES OF SERVICE: 01/02/2018 - 01/02/2018

TYPE OF SERVICE	SUBMITTED CHARGES	PLAN ALLOWANCE	REMARK CODES	DEDUCT	COINSURANCE OR COPAY	MEDICARE/ OTHER INS.	WHAT WE PAID	YOU OWE THE PROVIDER
OFFICE VISIT	212.00	154.00	610		35.00		119.00	35.00
MEDICAL CARE	214.00	76.00	610	76.00				76.00
PRESCRIPTION DRUG	15.00	8.58	610	8.58				8.58
XRAY	199.00	107.00	610	107.00				107.00
TOTALS:	640.00	345.58		191.58	35.00	0.00	119.00	226.58

EXPLANATION OF REMARK CODES

610--THE SUBMITTED CHARGES EXCEED OUR ALLOWABLE CHARGES FOR THESE SERVICES. OUR ALLOWABLE CHARGES ARE THE SUBMITTED CHARGES LESS ANY NON-COVERED CHARGES. BECAUSE THIS PROVIDER IS A PREFERRED OR PARTICIPATING NETWORK PROVIDER, YOU ARE NOT RESPONSIBLE FOR THE DIFFERENCE BETWEEN THE SUBMITTED CHARGES AND OUR ALLOWABLE CHARGES.

SUMMARY OF OUT-OF-POCKET EXPENSES FOR 2018

	CALENDAR YEAR DEDUCTIBLE	CATASTROPHIC PROTECTION PREFERRED	CATASTROPHIC PROTECTION NON-PREFERRED/ PREFERRED TOTAL
WHAT YOU HAVE PAID			
INDIVIDUAL	$191.58	$264	$264
FAMILY/SELF+ONE	$191.58	$264	$264
ANNUAL MAXIMUM			
INDIVIDUAL	$350.00	$5,000	$7,000
FAMILY/SELF+ONE	$700.00	$10,000	$14,000

YOUR OUT-OF-POCKET EXPENSES ON THIS CLAIM	
CALENDAR YEAR DEDUCTIBLE	$191.58
PER ADMISSION COPAY	$0.00
COINSURANCE	$0.00
COPAYMENT	$35.00
NON-COVERED CHARGES	$0.00
PRECERTIFICATION PENALTY	$0.00
TOTAL:	$226.58

IF YOU HAVE QUESTIONS, PLEASE CALL A CUSTOMER SERVICE REPRESENTATIVE AT YOUR LOCAL BLUE CROSS AND BLUE SHIELD PLAN. YOU MAY ALSO REQUEST THE DIAGNOSIS CODES, THE TREATMENT CODES, AND THE CORRESPONDING MEANINGS OF THE CODES FOR YOUR CLAIM. IF YOU DISAGREE WITH THE DECISION ON YOUR CLAIMS OR REQUEST FOR SERVICES, AND WISH TO HAVE THE DECISION RECONSIDERED, YOU MUST NOTIFY YOUR PLAN IN WRITING WITHIN 6 MONTHS FROM THE DATE OF THIS DECISION I.E. 07/23/2018. YOU MAY REQUEST COPIES, FREE OF CHARGE, OF ANY RELEVANT MATERIALS AND PLAN DOCUMENTS RELATING TO YOUR CLAIM. YOUR PLAN WILL NOT ACCEPT UNAUTHORIZED RECONSIDERATIONS FROM PROVIDERS. SEE THE DISPUTED CLAIMS SECTION OF YOUR SERVICE BENEFIT PLAN BROCHURE.

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CHARLOTTE M ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY MO 65109-6808

EXPLANATION OF BENEFITS AT A GLANCE

WE SENT CHECK TO:	PROVIDER OF SERVICE
PATIENT NAME:	ARTHUR ANDERSEN
DATES OF SERVICE:	01/14/2018 - 01/14/2018
YOU OWE THE PROVIDER:	$27.60

ID NUMBER:	R60207114
CLAIM NUMBER:	1803814558
CLAIM PAID ON:	02/13/2018
CLAIM RECEIVED ON:	02/07/2018
CLAIM PROCESSED ON:	02/08/2018

PROVIDER: GREENBAUM
TYPE: PREFERRED PROVIDER

DATES OF SERVICE: 01/14/2018 - 01/14/2018

TYPE OF SERVICE	SUBMITTED CHARGES	PLAN ALLOWANCE	REMARK CODES	DEDUCT	COINSURANCE OR COPAY	MEDICARE/ OTHER INS.	WHAT WE PAID	YOU OWE THE PROVIDER
MEDICAL CARE	301.00	184.00	610		27.60		156.40	27.60
TOTALS:	301.00	184.00		0.00	27.60	0.00	156.40	27.60

EXPLANATION OF REMARK CODES

610--THE SUBMITTED CHARGES EXCEED OUR ALLOWABLE CHARGES FOR THESE SERVICES. OUR ALLOWABLE CHARGES ARE THE SUBMITTED CHARGES LESS ANY NON-COVERED CHARGES. BECAUSE THIS PROVIDER IS A PREFERRED OR PARTICIPATING NETWORK PROVIDER, YOU ARE NOT RESPONSIBLE FOR THE DIFFERENCE BETWEEN THE SUBMITTED CHARGES AND OUR ALLOWABLE CHARGES.

SUMMARY OF OUT-OF-POCKET EXPENSES FOR 2018

	CALENDAR YEAR DEDUCTIBLE	CATASTROPHIC PROTECTION PREFERRED	CATASTROPHIC PROTECTION NON-PREFERRED/ PREFERRED TOTAL
WHAT YOU HAVE PAID			
INDIVIDUAL	$350.00	$1,560	$1,560
FAMILY/SELF+ONE	$350.00	$1,595	$1,595
ANNUAL MAXIMUM			
INDIVIDUAL	$350.00	$5,000	$7,000
FAMILY/SELF+ONE	$700.00	$10,000	$14,000

YOUR OUT-OF-POCKET EXPENSES ON THIS CLAIM

CALENDAR YEAR DEDUCTIBLE	$0.00
PER ADMISSION COPAY	$0.00
COINSURANCE	$27.60
COPAYMENT	$0.00
NON-COVERED CHARGES	$0.00
PRECERTIFICATION PENALTY	$0.00
TOTAL:	$27.60

IF YOU HAVE QUESTIONS, PLEASE CALL A CUSTOMER SERVICE REPRESENTATIVE AT YOUR LOCAL BLUE CROSS AND BLUE SHIELD PLAN. YOU MAY ALSO REQUEST THE DIAGNOSIS CODES, THE TREATMENT CODES, AND THE CORRESPONDING MEANINGS OF THE CODES FOR YOUR CLAIM. IF YOU DISAGREE WITH THE DECISION ON YOUR CLAIMS OR REQUEST FOR SERVICES, AND WISH TO HAVE THE DECISION RECONSIDERED, YOU MUST NOTIFY YOUR PLAN IN WRITING WITHIN 6 MONTHS FROM THE DATE OF THIS DECISION I.E. 08/13/2018. YOU MAY REQUEST COPIES, FREE OF CHARGE, OF ANY RELEVANT MATERIALS AND PLAN DOCUMENTS RELATING TO YOUR CLAIM. YOUR PLAN WILL NOT ACCEPT UNAUTHORIZED RECONSIDERATIONS FROM PROVIDERS. SEE THE DISPUTED CLAIMS SECTION OF YOUR SERVICE BENEFIT PLAN BROCHURE.

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CHARLOTTE M ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY MO 65109-6808

EXPLANATION OF BENEFITS AT A GLANCE

WE SENT CHECK TO: PROVIDER OF SERVICE
PATIENT NAME: ARTHUR ANDERSEN
DATES OF SERVICE: 01/09/2018 - 01/09/2018
YOU OWE THE PROVIDER: $44.25

ID NUMBER: R60207114
CLAIM NUMBER: 1803715010
CLAIM PAID ON: 02/13/2018
CLAIM RECEIVED ON: 02/06/2018
CLAIM PROCESSED ON: 02/07/2018

PROVIDER: HALING
TYPE: PREFERRED PROVIDER

DATES OF SERVICE: 01/09/2018 - 01/09/2018

TYPE OF SERVICE	SUBMITTED CHARGES	PLAN ALLOWANCE	REMARK CODES	DEDUCT	COINSURANCE OR COPAY	MEDICARE/ OTHER INS.	WHAT WE PAID	YOU OWE THE PROVIDER
DIAGNOSTIC XRAY	444.00	295.00	610		44.25		250.75	44.25
TOTALS:	444.00	295.00		0.00	44.25	0.00	250.75	44.25

EXPLANATION OF REMARK CODES

610--THE SUBMITTED CHARGES EXCEED OUR ALLOWABLE CHARGES FOR THESE SERVICES. OUR ALLOWABLE CHARGES ARE THE SUBMITTED CHARGES LESS ANY NON-COVERED CHARGES. BECAUSE THIS PROVIDER IS A PREFERRED OR PARTICIPATING NETWORK PROVIDER, YOU ARE NOT RESPONSIBLE FOR THE DIFFERENCE BETWEEN THE SUBMITTED CHARGES AND OUR ALLOWABLE CHARGES.

SUMMARY OF OUT-OF-POCKET EXPENSES FOR 2018

	CALENDAR YEAR DEDUCTIBLE	CATASTROPHIC PROTECTION PREFERRED	CATASTROPHIC PROTECTION NON-PREFERRED/ PREFERRED TOTAL
WHAT YOU HAVE PAID			
INDIVIDUAL	$350.00	$1,532	$1,532
FAMILY/SELF+ONE	$350.00	$1,568	$1,568
ANNUAL MAXIMUM			
INDIVIDUAL	$350.00	$5,000	$7,000
FAMILY/SELF+ONE	$700.00	$10,000	$14,000

YOUR OUT-OF-POCKET EXPENSES ON THIS CLAIM

CALENDAR YEAR DEDUCTIBLE	$0.00
PER ADMISSION COPAY	$0.00
COINSURANCE	$44.25
COPAYMENT	$0.00
NON-COVERED CHARGES	$0.00
PRECERTIFICATION PENALTY	$0.00
TOTAL:	$44.25

IF YOU HAVE QUESTIONS, PLEASE CALL A CUSTOMER SERVICE REPRESENTATIVE AT YOUR LOCAL BLUE CROSS AND BLUE SHIELD PLAN. YOU MAY ALSO REQUEST THE DIAGNOSIS CODES, THE TREATMENT CODES, AND THE CORRESPONDING MEANINGS OF THE CODES FOR YOUR CLAIM. IF YOU DISAGREE WITH THE DECISION ON YOUR CLAIMS OR REQUEST FOR SERVICES, AND WISH TO HAVE THE DECISION RECONSIDERED, YOU MUST NOTIFY YOUR PLAN IN WRITING WITHIN 6 MONTHS FROM THE DATE OF THIS DECISION I.E. 08/13/2018. YOU MAY REQUEST COPIES, FREE OF CHARGE, OF ANY RELEVANT MATERIALS AND PLAN DOCUMENTS RELATING TO YOUR CLAIM. YOUR PLAN WILL NOT ACCEPT UNAUTHORIZED RECONSIDERATIONS FROM PROVIDERS. SEE THE DISPUTED CLAIMS SECTION OF YOUR SERVICE BENEFIT PLAN BROCHURE.

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Explanation of Benefits
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P.O. BOX 2266
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307-634-1393 1-800-442-2376

CHARLOTTE M ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY MO 65109-6808

EXPLANATION OF BENEFITS AT A GLANCE

WE SENT CHECK TO: PROVIDER OF SERVICE
PATIENT NAME: ARTHUR ANDERSEN
DATES OF SERVICE: 01/15/2018 - 01/15/2018
YOU OWE THE PROVIDER: $35.00

ID NUMBER: R60207114
CLAIM NUMBER: 180171361
CLAIM PAID ON: 01/23/2018
CLAIM RECEIVED ON: 01/17/2018
CLAIM PROCESSED ON: 01/18/2018

PROVIDER: ROSENBERG
TYPE: PREFERRED PROVIDER

DATES OF SERVICE: 01/15/2018 - 01/15/2018

TYPE OF SERVICE	SUBMITTED CHARGES	PLAN ALLOWANCE	REMARK CODES	DEDUCT	COINSURANCE OR COPAY	MEDICARE/ OTHER INS.	WHAT WE PAID	YOU OWE THE PROVIDER
OUTPATIENT PHYSICIAN	333.00	189.00	610		35.00		154.00	35.00
TOTALS:	333.00	189.00		0.00	35.00	0.00	154.00	35.00

EXPLANATION OF REMARK CODES

610--THE SUBMITTED CHARGES EXCEED OUR ALLOWABLE CHARGES FOR THESE SERVICES. OUR ALLOWABLE CHARGES ARE THE SUBMITTED CHARGES LESS ANY NON-COVERED CHARGES. BECAUSE THIS PROVIDER IS A PREFERRED OR PARTICIPATING NETWORK PROVIDER, YOU ARE NOT RESPONSIBLE FOR THE DIFFERENCE BETWEEN THE SUBMITTED CHARGES AND OUR ALLOWABLE CHARGES.

SUMMARY OF OUT-OF-POCKET EXPENSES FOR 2018

	CALENDAR YEAR DEDUCTIBLE	CATASTROPHIC PROTECTION PREFERRED	CATASTROPHIC PROTECTION NON-PREFERRED/ PREFERRED TOTAL
WHAT YOU HAVE PAID			
INDIVIDUAL	$194.88	$365	$365
FAMILY/SELF+ONE	$194.88	$366	$366
ANNUAL MAXIMUM			
INDIVIDUAL	$350.00	$5,000	$7,000
FAMILY/SELF+ONE	$700.00	$10,000	$14,000

YOUR OUT-OF-POCKET EXPENSES ON THIS CLAIM

CALENDAR YEAR DEDUCTIBLE	$0.00
PER ADMISSION COPAY	$0.00
COINSURANCE	$0.00
COPAYMENT	$35.00
NON-COVERED CHARGES	$0.00
PRECERTIFICATION PENALTY	$0.00
TOTAL:	$35.00

IF YOU HAVE QUESTIONS, PLEASE CALL A CUSTOMER SERVICE REPRESENTATIVE AT YOUR LOCAL BLUE CROSS AND BLUE SHIELD PLAN. YOU MAY ALSO REQUEST THE DIAGNOSIS CODES, THE TREATMENT CODES, AND THE CORRESPONDING MEANINGS OF THE CODES FOR YOUR CLAIM. IF YOU DISAGREE WITH THE DECISION ON YOUR CLAIMS OR REQUEST FOR SERVICES, AND WISH TO HAVE THE DECISION RECONSIDERED, YOU MUST NOTIFY YOUR PLAN IN WRITING WITHIN 6 MONTHS FROM THE DATE OF THIS DECISION I.E. 07/23/2018. YOU MAY REQUEST COPIES, FREE OF CHARGE, OF ANY RELEVANT MATERIALS AND PLAN DOCUMENTS RELATING TO YOUR CLAIM. YOUR PLAN WILL NOT ACCEPT UNAUTHORIZED RECONSIDERATIONS FROM PROVIDERS. SEE THE DISPUTED CLAIMS SECTION OF YOUR SERVICE BENEFIT PLAN BROCHURE.

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Explanation of Benefits
THIS IS NOT A BILL

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P.O. BOX 2266
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307-634-1393 1-800-442-2376

CHARLOTTE M ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY MO 65109-6808

EXPLANATION OF BENEFITS AT A GLANCE

WE SENT CHECK TO: PROVIDER OF SERVICE
PATIENT NAME: ARTHUR ANDERSEN
DATES OF SERVICE: 01/09/2018 - 01/09/2018
YOU OWE THE PROVIDER: $3.30

ID NUMBER: R60207114
CLAIM NUMBER: 1801610466
CLAIM PAID ON: 01/23/2018
CLAIM RECEIVED ON: 01/16/2018
CLAIM PROCESSED ON: 01/17/2018

PROVIDER: ROSE
TYPE: PREFERRED PROVIDER

DATES OF SERVICE: 01/09/2018 - 01/09/2018

TYPE OF SERVICE	SUBMITTED CHARGES	PLAN ALLOWANCE	REMARK CODES	DEDUCT	COINSURANCE OR COPAY	MEDICARE/ OTHER INS.	WHAT WE PAID	YOU OWE THE PROVIDER
MEDICAL CARE	35.00	35.00					35.00	
PRESCRIPTION DRUG	13.00	3.30	610	3.30				3.30
TOTALS:	48.00	38.30		3.30	0.00	0.00	35.00	3.30

EXPLANATION OF REMARK CODES

610--THE SUBMITTED CHARGES EXCEED OUR ALLOWABLE CHARGES FOR THESE SERVICES. OUR ALLOWABLE CHARGES ARE THE SUBMITTED CHARGES LESS ANY NON-COVERED CHARGES. BECAUSE THIS PROVIDER IS A PREFERRED OR PARTICIPATING NETWORK PROVIDER, YOU ARE NOT RESPONSIBLE FOR THE DIFFERENCE BETWEEN THE SUBMITTED CHARGES AND OUR ALLOWABLE CHARGES.

SUMMARY OF OUT-OF-POCKET EXPENSES FOR 2018

WHAT YOU HAVE PAID	CALENDAR YEAR DEDUCTIBLE	CATASTROPHIC PROTECTION PREFERRED	CATASTROPHIC PROTECTION NON-PREFERRED/ PREFERRED TOTAL
INDIVIDUAL	$194.88	$330	$330
FAMILY/SELF+ONE	$194.88	$331	$331
ANNUAL MAXIMUM			
INDIVIDUAL	$350.00	$5,000	$7,000
FAMILY/SELF+ONE	$700.00	$10,000	$14,000

YOUR OUT-OF-POCKET EXPENSES ON THIS CLAIM	
CALENDAR YEAR DEDUCTIBLE	$3.30
PER ADMISSION COPAY	$0.00
COINSURANCE	$0.00
COPAYMENT	$0.00
NON-COVERED CHARGES	$0.00
PRECERTIFICATION PENALTY	$0.00
TOTAL:	$3.30

IF YOU HAVE QUESTIONS, PLEASE CALL A CUSTOMER SERVICE REPRESENTATIVE AT YOUR LOCAL BLUE CROSS AND BLUE SHIELD PLAN. YOU MAY ALSO REQUEST THE DIAGNOSIS CODES, THE TREATMENT CODES, AND THE CORRESPONDING MEANINGS OF THE CODES FOR YOUR CLAIM. IF YOU DISAGREE WITH THE DECISION ON YOUR CLAIMS OR REQUEST FOR SERVICES, AND WISH TO HAVE THE DECISION RECONSIDERED, YOU MUST NOTIFY YOUR PLAN IN WRITING WITHIN 6 MONTHS FROM THE DATE OF THIS DECISION I.E. 07/23/2018. YOU MAY REQUEST COPIES, FREE OF CHARGE, OF ANY RELEVANT MATERIALS AND PLAN DOCUMENTS RELATING TO YOUR CLAIM. YOUR PLAN WILL NOT ACCEPT UNAUTHORIZED RECONSIDERATIONS FROM PROVIDERS. SEE THE DISPUTED CLAIMS SECTION OF YOUR SERVICE BENEFIT PLAN BROCHURE.

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Explanation of Benefits

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OF ARIZONA
P.O. BOX 2924
PHOENIX, ARIZONA 85062-2924
1-602-864-4102 1-800-345-7562

#BWNCDVV#
#000411702O6RBOE8#
CHARLOTTE M ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY MO 65109-6808

EXPLANATION OF BENEFITS AT A GLANCE

We Sent Check To: PROVIDER OF SERVICE
Patient Name: ARTHUR ANDERSEN
Dates of Service: 01/31/2018 - 01/31/2018
You Owe the Provider: $1.94

ID Number: R60207114
Claim Number: 01132701639700
Claim Paid On: 02/09/2018
Claim Received On: 02/07/2018
Claim Processed On: 02/08/2018
Patient Acct No: 64005658

Provider: LABORATORY CORPORATION OF AMERICA
Type: PREFERRED PROVIDER

Dates of Service: 01/31/2018 - 01/31/2018

Type of Service	Submitted Charges	Plan Allowance	Remark Codes	Deduct	Coinsurance Or Copay	Medicare/ Other Ins.	What We Paid	You Owe the Provider
DIAGNOSTIC PATHOLOGY	21.85	4.93	610		.73		4.20	.73
DIAGNOSTIC PATHOLOGY	33.00	8.12	610		1.21		6.91	1.21
TOTALS:	54.85	13.05		0.00	1.94	0.00	11.11	1.94

EXPLANATION OF REMARK CODES

610--THE SUBMITTED CHARGES EXCEED OUR ALLOWABLE CHARGES FOR THESE SERVICES. OUR ALLOWABLE CHARGES ARE THE SUBMITTED CHARGES LESS ANY NON-COVERED CHARGES. BECAUSE THIS PROVIDER IS A PREFERRED OR PARTICIPATING NETWORK PROVIDER, YOU ARE NOT RESPONSIBLE FOR THE DIFFERENCE BETWEEN THE SUBMITTED CHARGES AND OUR ALLOWABLE CHARGES.

Summary of Out-of-Pocket Expenses for 2018

What You Have Paid	Calendar Year Deductible	Catastrophic Protection Preferred	Non-Preferred/ Preferred Total
Individual	$350.00	$1,488	$1,488
Family/Self+One	$350.00	$1,523	$1,523
Annual Maximum			
Individual	$350.00	$5,000	$7,000
Family/Self+One	$700.00	$10,000	$14,000

Your Out-of-Pocket Expenses On This Claim

Calendar Year Deductible	$0.00
Per Admission Copay	$0.00
Coinsurance	$1.94
Copayment	$0.00
Non-covered Charges	$0.00
Precertification Penalty	$0.00
TOTAL:	$1.94

If you have questions, please call a customer service representative at your local Blue Cross and Blue Shield Plan. You may also request the diagnosis codes, the treatment codes, and the corresponding meanings of the codes for your claim. If you disagree with the decision on your claims or request for services, and wish to have the decision reconsidered, you must notify your Plan in writing within 6 months from the date of this decision, i.e. 08/09/2018. You may request copies, free of charge, of any relevant materials and Plan documents relating to your claim. Your Plan will not accept unauthorized reconsiderations from providers. See the Disputed Claims section of your Service Benefit Plan Brochure.

CORE020-CUT (11/15)

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Explanation of Benefits
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CHARLOTTE M ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY MO 65109-6808

EXPLANATION OF BENEFITS AT A GLANCE

WE SENT CHECK TO: PROVIDER OF SERVICE
PATIENT NAME: ARTHUR ANDERSEN
DATES OF SERVICE: 01/14/2018 - 01/15/2018
YOU OWE THE PROVIDER: $350.00

ID NUMBER: R60207114
CLAIM NUMBER: 180224089400
CLAIM PAID ON: 01/30/2018
CLAIM RECEIVED ON: 01/22/2018
CLAIM PROCESSED ON: 01/24/2018

PROVIDER: ST JOHNS HOSPITAL
TYPE: PREFERRED PROVIDER

DATES OF SERVICE: 01/14/2018 - 01/15/2018

TYPE OF SERVICE	SUBMITTED CHARGES	PLAN ALLOWANCE	REMARK CODES	DEDUCT	COINSURANCE OR COPAY	MEDICARE/ OTHER INS.	WHAT WE PAID	YOU OWE THE PROVIDER
PRESCRIPTION DRUG	97.25	95.30	610				95.30	
PRESCRIPTION DRUG	8.50	8.33	610				8.33	
PRESCRIPTION DRUG	61.00	59.78	610				59.78	
MEDICAL EQUIP/SUPPLY	522.50	512.05	610				512.05	
MEDICAL EQUIP/SUPPLY	16.00	15.68	610				15.68	
DIAGNOSTIC LAB TEST	21.00		634					
DIAGNOSTIC LAB TEST	275.00	269.50	610				269.50	
DIAGNOSTIC LAB TEST	80.00	78.40	610				78.40	
DIAGNOSTIC LAB TEST	55.00	53.90	610				53.90	
XRAY, TECHNICAL CHRG	345.00	338.10	610				338.10	
XRAY, TECHNICAL CHRG	250.00	245.00	610				245.00	
MEDICAL CARE	1,170.00	1,146.60	610		350.00		796.60	350.00
PRESCRIPTION DRUG	60.75	59.53	610				59.53	
PRESCRIPTION DRUG	60.75	59.53	610				59.53	
PRESCRIPTION DRUG	60.75	59.53	610				59.53	
PRESCRIPTION DRUG	1.00	.98	610				.98	
MEDICAL CARE	1,154.88	1,131.78	610				1,131.78	
MEDICAL CARE	290.00	284.20	610				284.20	
MEDICAL CARE	109.00		634					
TOTALS:	4,634.38	4,418.19		0.00	350.00	0.00	4,068.19	350.00

EXPLANATION OF REMARK CODES

610--THE SUBMITTED CHARGES EXCEED OUR ALLOWABLE CHARGES FOR THESE SERVICES. OUR ALLOWABLE CHARGES ARE THE SUBMITTED CHARGES LESS ANY NON-COVERED CHARGES. BECAUSE THIS PROVIDER IS A PREFERRED OR PARTICIPATING NETWORK PROVIDER, YOU ARE NOT RESPONSIBLE FOR THE DIFFERENCE BETWEEN THE SUBMITTED CHARGES AND OUR ALLOWABLE CHARGES.

634--BENEFITS FOR THESE SERVICES ARE INCLUDED IN OUR ALLOWABLE CHARGES FOR ANOTHER COVERED SERVICE PROVIDED ON THE SAME DATE OF SERVICE. ADDITIONAL BENEFITS ARE NOT AVAILABLE FOR THIS CHARGE. BECAUSE THIS PROVIDER IS A PREFERRED OR PARTICIPATING NETWORK PROVIDER, YOU ARE NOT RESPONSIBLE FOR THESE CHARGES.

CONTINUED ON NEXT PAGE

Explanation of Benefits
THIS IS NOT A BILL

CHARLOTTE M ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY MO 65109-6808

CLAIM NUMBER: 180224089400 (CONTINUED):

HEALTH TIPS

EARN FINANCIAL REWARDS TO USE FOR QUALIFIED MEDICAL EXPENSES WHEN YOU COMPLETE A HEALTH ASSESSMENT AND OTHER WELLNESS ACTIVITIES. VISIT WWW.FEPBLUE.ORG TO LEARN ABOUT THE WELLNESS INCENTIVES PROGRAM.

SUMMARY OF OUT-OF-POCKET EXPENSES FOR 2018

		CATASTROPHIC PROTECTION	
	CALENDAR YEAR DEDUCTIBLE	PREFERRED	NON-PREFERRED/ PREFERRED TOTAL
WHAT YOU HAVE PAID			
INDIVIDUAL	$350.00	$1,431	$1,431
FAMILY/SELF+ONE	$350.00	$1,432	$1,432
ANNUAL MAXIMUM			
INDIVIDUAL	$350.00	$5,000	$7,000
FAMILY/SELF+ONE	$700.00	$10,000	$14,000

YOUR OUT-OF-POCKET EXPENSES ON THIS CLAIM

CALENDAR YEAR DEDUCTIBLE	$0.00
PER ADMISSION COPAY	$350.00
COINSURANCE	$0.00
COPAYMENT	$0.00
NON-COVERED CHARGES	$0.00
PRECERTIFICATION PENALTY	$0.00
TOTAL:	$350.00

IF YOU HAVE QUESTIONS, PLEASE CALL A CUSTOMER SERVICE REPRESENTATIVE AT YOUR LOCAL BLUE CROSS AND BLUE SHIELD PLAN. YOU MAY ALSO REQUEST THE DIAGNOSIS CODES, THE TREATMENT CODES, AND THE CORRESPONDING MEANINGS OF THE CODES FOR YOUR CLAIM. IF YOU DISAGREE WITH THE DECISION ON YOUR CLAIMS OR REQUEST FOR SERVICES, AND WISH TO HAVE THE DECISION RECONSIDERED, YOU MUST NOTIFY YOUR PLAN IN WRITING WITHIN 6 MONTHS FROM THE DATE OF THIS DECISION I.E. 07/30/2018. YOU MAY REQUEST COPIES, FREE OF CHARGE, OF ANY RELEVANT MATERIALS AND PLAN DOCUMENTS RELATING TO YOUR CLAIM. YOUR PLAN WILL NOT ACCEPT UNAUTHORIZED RECONSIDERATIONS FROM PROVIDERS. SEE THE DISPUTED CLAIMS SECTION OF YOUR SERVICE BENEFIT PLAN BROCHURE.

BlueCross BlueShield
Federal Employee Program
www.fepblue.org

Explanation of Benefits
THIS IS NOT A BILL

BLUE CROSS BLUE SHIELD OF WYOMING
P.O. BOX 2266
CHEYENNE, WY 82003-2266
307-634-1393 1-800-442-2376

CHARLOTTE M ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY MO 65109-6808

EXPLANATION OF BENEFITS AT A GLANCE

WE SENT CHECK TO:	PROVIDER OF SERVICE
PATIENT NAME:	ARTHUR ANDERSEN
DATES OF SERVICE:	01/09/2018 - 01/09/2018
YOU OWE THE PROVIDER:	$272.95

ID NUMBER:	R60207114
CLAIM NUMBER:	180224088100
CLAIM PAID ON:	01/30/2018
CLAIM RECEIVED ON:	01/22/2018
CLAIM PROCESSED ON:	01/23/2018

PROVIDER: ST JOHNS HOSPITAL
TYPE: PREFERRED PROVIDER

DATES OF SERVICE: 01/09/2018 - 01/09/2018

TYPE OF SERVICE	SUBMITTED CHARGES	PLAN ALLOWANCE	REMARK CODES	DEDUCT	COINSURANCE OR COPAY	MEDICARE/ OTHER INS.	WHAT WE PAID	YOU OWE THE PROVIDER
DIAGNOSTIC LAB TEST	49.00	48.02	610		7.20		40.82	7.20
XRAY, TECHNICAL CHRG	1,580.00	1,548.40	610	39.40	226.35		1,282.65	265.75
TOTALS:	1,629.00	1,596.42		39.40	233.55	0.00	1,323.47	272.95

EXPLANATION OF REMARK CODES

610—THE SUBMITTED CHARGES EXCEED OUR ALLOWABLE CHARGES FOR THESE SERVICES. OUR ALLOWABLE CHARGES ARE THE SUBMITTED CHARGES LESS ANY NON-COVERED CHARGES. BECAUSE THIS PROVIDER IS A PREFERRED OR PARTICIPATING NETWORK PROVIDER, YOU ARE NOT RESPONSIBLE FOR THE DIFFERENCE BETWEEN THE SUBMITTED CHARGES AND OUR ALLOWABLE CHARGES.

SUMMARY OF OUT-OF-POCKET EXPENSES FOR 2018

	CALENDAR YEAR DEDUCTIBLE	CATASTROPHIC PROTECTION PREFERRED	CATASTROPHIC PROTECTION NON-PREFERRED/ PREFERRED TOTAL
WHAT YOU HAVE PAID			
INDIVIDUAL	$350.00	$1,081	$1,081
FAMILY/SELF+ONE	$350.00	$1,081	$1,081
ANNUAL MAXIMUM			
INDIVIDUAL	$350.00	$5,000	$7,000
FAMILY/SELF+ONE	$700.00	$10,000	$14,000

YOUR OUT-OF-POCKET EXPENSES ON THIS CLAIM	
CALENDAR YEAR DEDUCTIBLE	$39.40
PER ADMISSION COPAY	$0.00
COINSURANCE	$233.55
COPAYMENT	$0.00
NON-COVERED CHARGES	$0.00
PRECERTIFICATION PENALTY	$0.00
TOTAL:	$272.95

IF YOU HAVE QUESTIONS, PLEASE CALL A CUSTOMER SERVICE REPRESENTATIVE AT YOUR LOCAL BLUE CROSS AND BLUE SHIELD PLAN. YOU MAY ALSO REQUEST THE DIAGNOSIS CODES, THE TREATMENT CODES, AND THE CORRESPONDING MEANINGS OF THE CODES FOR YOUR CLAIM. IF YOU DISAGREE WITH THE DECISION ON YOUR CLAIMS OR REQUEST FOR SERVICES, AND WISH TO HAVE THE DECISION RECONSIDERED, YOU MUST NOTIFY YOUR PLAN IN WRITING WITHIN 6 MONTHS FROM THE DATE OF THIS DECISION I.E. 07/30/2018. YOU MAY REQUEST COPIES, FREE OF CHARGE, OF ANY RELEVANT MATERIALS AND PLAN DOCUMENTS RELATING TO YOUR CLAIM. YOUR PLAN WILL NOT ACCEPT UNAUTHORIZED RECONSIDERATIONS FROM PROVIDERS. SEE THE DISPUTED CLAIMS SECTION OF YOUR SERVICE BENEFIT PLAN BROCHURE.

BlueCross BlueShield
Federal Employee Program
www.fepblue.org

Explanation of Benefits
THIS IS NOT A BILL

BLUE CROSS BLUE SHIELD OF WYOMING
P.O. BOX 2266
CHEYENNE, WY 82003-2266
307-634-1393 1-800-442-2376

CHARLOTTE M ANDERSEN
619 HOBBS CT UNIT F
JEFFERSON CTY MO 65109-6808

EXPLANATION OF BENEFITS AT A GLANCE

WE SENT CHECK TO:	PROVIDER OF SERVICE
PATIENT NAME:	ARTHUR ANDERSEN
DATES OF SERVICE:	01/02/2018 - 01/02/2018
YOU OWE THE PROVIDER:	$35.00

ID NUMBER:	R60207114
CLAIM NUMBER:	1800314328
CLAIM PAID ON:	01/16/2018
CLAIM RECEIVED ON:	01/03/2018
CLAIM PROCESSED ON:	01/05/2018

PROVIDER: ROSENBERG
TYPE: PREFERRED PROVIDER

DATES OF SERVICE: 01/02/2018 - 01/02/2018

TYPE OF SERVICE	SUBMITTED CHARGES	PLAN ALLOWANCE	REMARK CODES	DEDUCT	COINSURANCE OR COPAY	MEDICARE/ OTHER INS.	WHAT HE PAID	YOU OWE THE PROVIDER
OFFICE VISIT	220.00	156.00	610		35.00		121.00	35.00
TOTALS:	220.00	156.00		0.00	35.00	0.00	121.00	35.00

EXPLANATION OF REMARK CODES

610—THE SUBMITTED CHARGES EXCEED OUR ALLOWABLE CHARGES FOR THESE SERVICES. OUR ALLOWABLE CHARGES ARE THE SUBMITTED CHARGES LESS ANY NON-COVERED CHARGES. BECAUSE THIS PROVIDER IS A PREFERRED OR PARTICIPATING NETWORK PROVIDER, YOU ARE NOT RESPONSIBLE FOR THE DIFFERENCE BETWEEN THE SUBMITTED CHARGES AND OUR ALLOWABLE CHARGES.

SUMMARY OF OUT-OF-POCKET EXPENSES FOR 2018

	CALENDAR YEAR DEDUCTIBLE	CATASTROPHIC PROTECTION PREFERRED	CATASTROPHIC PROTECTION NON-PREFERRED/ PREFERRED TOTAL
WHAT YOU HAVE PAID			
INDIVIDUAL	$0.00	$35	$35
FAMILY/SELF+ONE	$0.00	$35	$35
ANNUAL MAXIMUM			
INDIVIDUAL	$0.00	$5,000	$7,000
FAMILY/SELF+ONE	$0.00	$10,000	$14,000

YOUR OUT-OF-POCKET EXPENSES ON THIS CLAIM	
CALENDAR YEAR DEDUCTIBLE	$0.00
PER ADMISSION COPAY	$0.00
COINSURANCE	$0.00
COPAYMENT	$35.00
NON-COVERED CHARGES	$0.00
PRECERTIFICATION PENALTY	$0.00
TOTAL:	$35.00

IF YOU HAVE QUESTIONS, PLEASE CALL A CUSTOMER SERVICE REPRESENTATIVE AT YOUR LOCAL BLUE CROSS AND BLUE SHIELD PLAN. YOU MAY ALSO REQUEST THE DIAGNOSIS CODES, THE TREATMENT CODES, AND THE CORRESPONDING MEANINGS OF THE CODES FOR YOUR CLAIM. IF YOU DISAGREE WITH THE DECISION ON YOUR CLAIMS OR REQUEST FOR SERVICES, AND WISH TO HAVE THE DECISION RECONSIDERED, YOU MUST NOTIFY YOUR PLAN IN WRITING WITHIN 6 MONTHS FROM THE DATE OF THIS DECISION I.E. 07/16/2018. YOU MAY REQUEST COPIES, FREE OF CHARGE, OF ANY RELEVANT MATERIALS AND PLAN DOCUMENTS RELATING TO YOUR CLAIM. YOUR PLAN WILL NOT ACCEPT UNAUTHORIZED RECONSIDERATIONS FROM PROVIDERS. SEE THE DISPUTED CLAIMS SECTION OF YOUR SERVICE BENEFIT PLAN BROCHURE.

(307) 733-3900
phone
February 15, 2018 at 11:20 AM

Transcription Beta

"Hi this is Karine from Dr. and _____ and I was trying to get in touch with Art Anderson data birth three 1856 this was the alternate number um it's just regarding his surgery if someone could give me a call back the number here is 307-733-3900 thank you..."

Was this transcription useful or not useful?

0:00 -0:26

Speaker Call Back Delete

(307) 527-6053 2/1/18
phone 0:46

EXHIBIT 2

APPELLEE'S APPENDIX 3

Prepared By:
Lynn, Jackson, Shultz & Lebrun, P.C.
135 E. Colorado Blvd.
Spearfish, SD 57783
Telephone: (605) 722-9000

CONTRACT FOR DEED

THIS AGREEMENT ("Agreement"), made and entered into this 15 day of December, 2017, by and between **ARTHUR S. ANDERSEN** of P. O. Box 2020, Dubois, WY 82513, and **CHARLOTTE M. ANDERSEN** of 619 F Hobbs Court, Jefferson City, MO 66109, husband and wife, as joint tenants with right of survivorship and not as tenants in common, hereinafter referred to as "*Sellers*"; **LAZY HD LLC**, a South Dakota Limited Liability Company, of 11656 Lazy HD Lane, St. Onge, SD 57779, hereinafter referred to as "*Buyer*"; and, **RODNEY BENSON** and **TRACY BENSON** of 11656 Lazy HD Lane, St. Onge, SD 57779, hereinafter referred to as "*Guarantors*".

WITNESSETH:

Sellers agree to sell and Buyer agrees to purchase the following described real property, to-wit:

> NE¼NW¼ and W½NE¼ and NW¼NW¼ and S½NW¼, Section 9, Township 6 North, Range 3 East, B.H.M., Lawrence County, South Dakota, consisting of 240 acres more or less, together with buildings and improvements thereon.
>
> Subject to all covenants, conditions, restrictions, easements, agreements, reservations, rights of way and other matters of record in the Office of the Lawrence County Register of Deeds;
>
> the "*Property*",

and including the following described personal property:

1. Wooden fence posts, already in the ground
2. Barn cupalos acting as an entrance to buildings
3. Two magazine clay pigeon throwers that are stationary *excluding* the automatic clay pigeon thrower
4. Shop floor jack
5. Fuel tanks *except* the 550 gal 12 volt tank and pump,

upon the following terms and conditions mutually understood and agreed to by and between the parties as follows:

1. **PURCHASE PRICE AND PAYMENT:** The total purchase price for the Property shall be the sum of $1,650,000 payable in the following manner:

a. A down payment in the sum of $300,000 shall be paid on date of closing.

b. The balance of $1,350,000, together with interest on the unpaid principal balance from time to time remaining at the rate of 4% per annum commencing December 15, 2017, (subject to a default rate of 8% per annum), shall be paid in semi-annual principal payments in the amount of $200,000 on August 1, 2018 and $200,000 on December 31, 2018, plus accrued interest to date of payment, and likewise on August 1 and December 31 each year thereafter until the principal balance and accrued interest are paid in full.

c. In the event any semi-annual payment is not paid and received by Sellers within five (5) days of the due date, there shall be a $1,000 late payment fee. Any late payment fee shall be paid in addition to and separately from the semi-annual payments pursuant to this Agreement.

d. In the event Buyer defaults in making timely payment of any semi-annual payment, interest at the default rate of 8% per annum shall then accrue on said payment(s) commencing on the 6th day following the due date until date of payment.

e. All payments shall be made to the escrow agent hereinafter designated. The date the escrow agent posts the payment shall be deemed the date payment was made.

f. The purchase price is allocated as follows: $250,000 to buildings and improvements; and, $1,400,000 to land.

2. **PREPAYMENT:** Buyer shall have the right and privilege of paying any part or all of the unpaid balances hereunder at any time without penalty for unearned interest. However, in the event Buyer make any principal prepayment(s), the obligation to continuously make the semi-annual payments required by Section 1. subparagraph b., above, shall remain in force until the remaining principal balance and accrued interest have been paid in full. In the event Buyer elects to make any partial prepayment(s), the payment shall be first applied to unpaid late payment fees, then to accrued and unpaid interest, and the remainder to principal.

3. **CLOSING/DATE OF POSSESSION:** Closing shall occur on December 15, 2017. Dakota Title, Spearfish, South Dakota, shall act as closing agent. Buyer shall be entitled to possession upon closing.

4. **COSTS:** Sellers shall pay for (1) one-half of the closing fee; (2) cost of the owner's title insurance policy; (3) one-half of the initial escrow fee and payment processing fee; and, (4) the attorney fees incurred for the preparation of the Contract for Deed and related documents. Buyer shall pay for (1) one-half of the closing fee; (2) one-half of the initial escrow fee and payment processing fee; (3) the Lawrence County Register of Deeds filing fees incurred for recording the Short Form Contract for Deed; and, (4) independent attorney fees, if any, of Buyer. Other fees and expenses shall be paid by the respective parties as is customary.

5. **TAXES/ASSESSMENTS:** Sellers agree to pay and be responsible for all taxes, levies and assessments pro-rated to the date of closing based upon the most recent assessments and mill levy. Buyer shall be responsible for and pay before delinquent all subsequent taxes, levies and assessments.

6. **TITLE INSURANCE:** Sellers agree to provide to Buyer before closing a title insurance policy certified to a current date showing good and marketable title in the Property.

Sellers hereby represent that there may exist a materialman's lien filed by Broderson Brothers in regard to work performed on the steel building located on the Property. Sellers warrant and represent that the Property shall be free and clear of such lien before December 15, 2018, and if necessary Sellers will post bond for the lien and shall remove the same on or before December 15, 2018. If Buyer elects to prepay this Agreement in full before December

15, 2018, Sellers shall thereupon post bond for the lien and remove it upon payment in full and deliver marketable title free and clear of the lien. Sellers hereby expressly reserve to themselves all claims and causes of action that they may have against Broderson Brothers in regard to the work performed to include defective workmanship and specifically but not limited to the work performed on the steel building. Sellers hereby agree to unconditionally defend and indemnify Buyer should or if Broderson Brothers ever pursue a claim in regard to the work performed, the subject matter of the lien or in regard to claims pursued by Sellers. The Sellers representations, warranties and indemnity obligation in this Section 6 shall survive the closing and delivery of the Warranty Deed as herein provided.

7. CONVEYANCE: Sellers shall convey the Property to Buyer by a good and sufficient Warranty Deed and Bill of Sale for personal property, which instruments of conveyance are to be executed and signed by Sellers at closing and placed in escrow with the escrow agent hereinafter named and by such escrow agent delivered to Buyer upon payment of the purchase price in full.

8. ASSIGNMENT: Buyer shall not assign any right, title or interest acquired hereunder without first securing written approval and consent of Sellers. Sellers shall not unreasonably withhold their consent and approval to any assignment proposed by Buyer to financially responsible parties.

9. ACCEPTANCE/DISCLOSURE STATEMENT: Buyer has had full opportunity to inspect the Property and, subject to Seller's representations and warranties in Section 10 and the warranties of title in Section 6, agrees to accept the same "where is" and "as is" and has not relied on any warranties or representations of Sellers as to any condition, other than information contained in the Seller's Property Condition Disclosure Statement and Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards, receipt of which is acknowledged by Buyer.

10. REPRESENTATIONS AND WARRANTIES OF SELLERS: In addition to any other obligations and covenants of Sellers pursuant to this Agreement, Sellers hereby represent and warrant that the following are true statements of law and fact on the date hereof

and shall be true and correct on the closing date, and which representations and warranties shall survive the closing and delivery of the Warranty Deed as herein provided:

a. Sellers have full and legal authority to enter into this Agreement and take those actions necessary so as to consummate the transaction contemplated by this Agreement. The existing Contract for Deed with Boke Ranch, Inc. and Stonebrook of Spearfish, L.L.C. shall be paid in full at the closing of this Agreement, and Sellers shall be vested with fee title to the Property as part of the closing of this Agreement.

b. This Agreement has been duly executed and delivered by Sellers and constitutes a legal, valid and binding obligation of Sellers enforceable against Sellers in accordance with its terms.

c. The ownership, use, occupancy and operation of the Property subject to this Agreement shall be in compliance with all applicable laws. Sellers have not received written notice of any violation of law with respect to the ownership, use, occupancy or operation of the Property.

d. There are no leases or other tenancy arrangements, either written or oral, relative to the Property which will extend beyond the date of closing. No one is or will be in possession thereof, under claim of right, other than Sellers on the closing date.

e. Sellers are not a party to any agreement, written or oral, which will give rise to a lien (including, but not limited to, construction lien, or mechanic's lien) or other encumbrance on the Property.

f. There are no options, rights of refusal or other agreements to purchase all or any portion of the Property, other than this agreement. To Sellers' knowledge, there are no restrictive covenants or agreements or agreements affecting the use of the Property other than those of record, as identified in the legal description above.

g. Sellers have no knowledge of any boundary disputes or drainage disputes, existing, actual or threatened, special assessments, taxes or condemnation proceedings concerning the Property. There are no easements or rights of way which have been acquired by prescription or which are otherwise not of record with respect to the Property.

h. Sellers warrant and agree that Sellers are not retaining or reserving any oil and gas rights or mineral rights or royalty rights in or related to the Property upon the sale to Buyer as provided herein and all such oil and gas rights, mineral

rights and/or royalty rights will be conveyed and transferred to Buyer at the time the purchase price is paid in full.

i. There are no permits, exchange of use agreements, conservation easements, soil leases or other agreements, public or private, related to the ownership, use or occupation of the Property.

j. There is no litigation at law, in equity, or any other proceeding pending or to the knowledge of Sellers that is threatened against Sellers that may adversely affect the Property or the occupation of the Property or that involves a possibility of any judgment, order, award, or other decision that might impair the ability of Sellers to perform under this Agreement.

k. With respect to the environmental conditions of the Property:

(i) To the best of Sellers' knowledge, Sellers are in compliance in all material respects with all applicable environmental laws relating to the ownership, use, occupancy, or operation of the Property, and Sellers have not engaged in any environmental activity in violation of any applicable environmental laws.

(ii) No investigations, inquiries, orders, hearings, actions, or other proceedings by or before any governmental authority are pending or to Sellers' knowledge threatened in connection with any environmental activity with respect to the Property.

(iii) Sellers have not received any notice, order, directive, Complaint or other communication from or issued by any governmental authority alleging the occurrence of any environmental activity in violation of any environmental laws with regard to the Property, and has not received any written or oral notice of other indication from any third party of any proposed or threatened environmental activity on the Property which would violate any environmental laws.

(iv) To the best of Sellers' knowledge, there is not constructed, deposited, stored, disposed, placed or located on the Property any hazardous substance (as defined in Federal and State environmental laws).

(v) To the best of Sellers' knowledge, the Property does not contain nor has it contained any underground storage tanks of any type.

11. MODIFICATIONS OR IMPROVEMENTS: Buyer shall not make any modifications or improvements to the Property with a cost exceeding $100,000 per project without the express written consent of Sellers, which shall not be unreasonably withheld by Sellers provided that any such modifications or improvements to the Property shall be paid for

in full by Buyer, lien waivers shall be received by Buyer and provided to Sellers from any contractors or suppliers prior to commencement of construction, and any and all modifications or improvements shall be deemed part of the Property subject to this Agreement.

12. **LIENS AND ENCUMBRANCES:** Buyer agrees that Buyer will not permit the filing of any liens or encumbrances against the Property at any time during the term of this Agreement. Buyer agrees that if any liens or encumbrances are filed, that such shall constitute a default and that Buyer will pursue the discharge or release of such lien. Any lienholder, creditor or secured party's interest shall at all times be inferior to the interest of Sellers.

13. **BOUNDARY/FENCES/SURVEY:** Subject to the representations and warranties of Sellers in Article 10 (g), as to any existing fences, Sellers make no further warranty or representation that fence lines are located on the Property lines or that the property located within the fence lines is part of the Property herein conveyed. Sellers are conveying the Property only by the legal description that exists. Should a survey disclose that any fence is not located on the legal boundary, such shall not affect this Agreement or the purchase price, regardless as to whether it is determined that more or less acres are contained within the boundary of any fence line.

In the event any perimeter fencing is required or necessary, the fence shall be constructed at Buyer's cost pursuant to requirements of SDCL §43-23-4 or as may otherwise be agreed by those affected.

14. **REMOVAL OF PERSONAL PROPERTY:** Arthur S. Andersen shall be responsible to remove all personal property from the Property on or before Labor Day, Monday, September 3, 2018. In regard to any personal property that remains on the Property as of date of closing, Arthur S. Andersen shall be solely and exclusively responsible for all risk of loss by reason of any occasion, casualty or cause. Arthur S. Andersen and Charlotte M. Andersen, jointly and severally hereby unconditionally and without limitation release Buyer, Rodney Benson and Tracy Benson from any personal liability or obligation in regard to the safety, preservation, care or storage of any personal property while such remains on the Property after date of closing and prior to the removal from the Property. Buyer will have full

access to the buildings where this personal property is stored after closing, and shall have the right to clean clutter outside of the shop area, which will include moving, stacking and/or covering personal property items. Buyer also needs sufficient room in the shop building to house Buyer's equipment and will have all authority to move, stack and/or cover personal property items. Any such personal property not removed from the Property on or before Labor Day, Monday, September 3, 2018 shall be deemed abandoned by the Sellers and Buyer shall have the right to dispose of the same as Buyer sees fit without notice or any liability or obligation to either Seller.

15. **REALTOR FEES:** Sellers shall not be obligated to pay or share in any real estate commission, and Sellers represent and warrants Sellers have not dealt with any broker, realtor or real estate agent in connection with this sale. To the extent Buyer has entered into any real estate brokerage agreement, Buyer shall be solely and exclusively responsible to make payment of any and all real estate commissions or fees in regard to this transaction.

16. **BUYER'S OBLIGATIONS:** Buyer assumes and agrees to be responsible for any and all matters relating to the Property to include but not be limited to the following:

a. ***Maintenance:*** To maintain said Property in as good a condition as the same now is, reasonable wear and tear by the elements alone excepted.

b. ***Farming Practices:*** To use the Property in a good husbandry manner; to farm the Property in a good and workmanlike manner and to observe customary farming and conservation practices commonly followed in the community.

c. ***Weeds:*** To maintain and control noxious weeds as may now or hereinafter be required by any county, state or federal administrative or regulatory agency, rule, regulation, ordinance or statute.

d. ***Waste:*** To not commit or cause to be committed any waste or disposal of hazardous materials upon the Property.

17. **HOLD HARMLESS:** Sellers agree to defend and hold Buyer harmless from any causes of action or damages that may be incurred or claimed by any person as the result of the Sellers' use, occupation and possession of the Property prior to time of possession by Buyer.

Buyer agrees to defend and hold Sellers harmless from any causes of action or

damages that may be incurred or claimed by any person as the result of the Buyer's use, occupation and possession of the Property from and after time of possession by Buyer.

18. INSURANCE: Buyer shall maintain property casualty insurance, fire and extended coverage insurance, insuring against loss or damage by fire and such other risks as are from time to time included in a standard form of fire and extended coverage policy of insurance available in the State of South Dakota, naming Sellers as an additional insured as the Sellers' interest therein appears. Unless Sellers and Buyer otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, provided such restoration or repair is economically feasible. If such restoration or repair is not economically feasible, the insurance proceeds shall be applied to the sums secured by this Agreement and the excess, if any, paid to Buyer.

Buyer further agrees to carry premises liability insurance covering the Property in the minimum amount of One Million Dollars ($1,000,000) each occurrence and Two Million Dollars ($2,000,000) annual aggregate, naming Sellers as an additional insured.

Buyer agrees to continue such insurance in force throughout the term of this Agreement and to furnish to the Sellers upon demand therefor a certificate or certificates demonstrating that there is insurance in force in compliance with this part of the Agreement. In addition, any such policy or policies shall contain a provision requiring at least ten (10) days' written notice to Sellers prior to cancellation, change or modification of such insurance. On or before the due date of premium payments, Buyer shall provide to Sellers evidence of payment upon Sellers request for such documentation, but not otherwise.

19. PERSONAL GUARANTY: In consideration of Sellers entering into this Agreement with Buyer, Rodney Benson and Tracy Benson, as Guarantors, individually, jointly and severally agree to guarantee the performance of all terms, covenants and conditions of this Agreement required to be performed by Buyer. However, Sellers agree that they shall first exhaust the collateral under this Agreement to which Sellers may be entitled to resort for payment, or to pursue legal remedies against the Buyer on said obligation, before proceeding against Rodney Benson and Tracy Benson, as Guarantors. Said Guarantors expressly waive the following notice and rights: Notice of acceptance of this undertaking; notice of any right

to withdraw from this undertaking; the furnishing to said Guarantors by Sellers of a copy of this undertaking; and, any right of withdrawal from this undertaking at any time. A mere delay on the part of Sellers to proceed against Buyer or to enforce other remedies herein shall not exonerate or release Guarantors. Guarantors further severally agree that in the case of their death, Guarantors' estates shall continue to be liable under the terms of this guaranty. Guarantors hereby represent that they are the both members of Lazy HD LLC and in the event any membership interest is sold, transferred or conveyed, then and in that event, said person or entity shall give a guaranty to Sellers consistent with the provisions of this section. The members shall not vote for or permit Lazy HD LLC to be dissolved, liquidated or merged, without first obtaining Sellers' consent in writing. The Guarantors referred to and bound by this guaranty shall be signatories to this Agreement.

20. ESCROW AGENT: The parties agree that Black Hills Escrow, LLC, Spearfish, South Dakota, shall be and act as escrow agent for the parties under the terms of this Agreement, and that the Warranty Deed, Certificate of Real Estate Value, title insurance policy, recorded Short Form Contract for Deed and this Agreement are to be placed in escrow with said escrow agent. Sellers hereby authorize said escrow agent, or any of its officers and employees, to deliver said documents to Buyer upon payment of the purchase price in full and to deduct the cost of transfer tax.

21. DEFAULT: Time is of the essence of this Agreement. That in the event any payment is not paid in full when due or should Buyer fail or default in the performance of any of the obligations or in compliance with the conditions of this Agreement, Sellers shall notify Buyer of such default and Buyer shall have 30 days time thereafter in which to correct the same. All notices of default shall be given by Sellers to Buyer by certified mail; and, should Buyer fail to correct the default within the 30 days thereafter, this Agreement shall be in default and the full amount remaining unpaid may, at Sellers' option, become immediately due and payable and failure on the part of Buyer to cure such default shall give Sellers the right to foreclose this Agreement as provided by the laws of the State of South Dakota.

22. LEGAL REPRESENTATION: Buyer and Sellers are each represented by separate legal counsel.

23. **NOTICES**: All notices required by this Agreement shall be in writing and sent by certified mail, return receipt requested, postage prepaid to the following:

Sellers:	Arthur S. Andersen P.O. Box 2020 Dubois, WY 82513	Charlotte M. Andersen 619 F Hobbs Court Jefferson City, MO 66109
Buyer:	Lazy HD LLC 11656 Lazy HD Lane St. Onge, SD 57779	
Guarantors:	Rodney & Tracy Benson 11656 Lazy HD Lane St. Onge, SD 57779	

Sellers or Buyer may change their address for delivery of any notice by providing the new address in writing by certified mail, return receipt requested, postage prepaid.

24. **SHORT FORM CONTRACT FOR DEED**: The parties hereto agree to execute contemporancously with this Agreement a Short Form Contract for Deed, which shall be recorded in the Office of the Lawrence County Register of Deeds to provide public notice of this transaction.

25. **CONSTRUCTION:** This Agreement shall be construed and governed in accordance with the laws of the State of South Dakota. Each party has reviewed and revised this Agreement and has had equal opportunity for input into this Agreement. Neither party shall be construed to be the drafter or primary drafter of this Agreement. In the event of any dispute regarding the construction of this Agreement or any of its provisions, ambiguities or questions of interpretation shall not be construed more in favor of one party than the other; rather, questions of interpretation shall be construed equally as to each party.

26. **ATTORNEY FEES AND COURT COSTS:** In the event any legal action is filed to enforce or recover under any provision of this Agreement, the prevailing party in the suit shall be entitled to recover court costs and reasonable attorney's fees from the non-prevailing party to the extent allowed by law.

27. **WAIVER:** A waiver by Sellers or the Buyer of any breach of any covenant or duty

under the terms of this Agreement shall not be deemed a waiver of any other covenant or duty, or of any subsequent breach of the same covenant or duty.

28. **AMENDMENT:** Any amendment to or modification of this Agreement shall be binding only if evidenced by a writing signed by each of the parties.

29. **OTHER DOCUMENTS:** The parties hereby mutually agree to execute any and all other documents necessary or needed in order to effectuate the purposes of this Agreement.

30. **WRITTEN MEMORANDUM/FINAL AGREEMENT:** This Agreement constitutes a memorandum of the final meeting of the minds between the parties hereto of all prior negotiations had by the parties in reference to all matters covered herein; and, this Agreement is to be binding upon the respective heirs, executors, administrators and assigns of the parties hereto.

That any existing lease agreement or other relationship of the parties as may exist as of date and time of closing, if any, is hereby terminated, null and void, deemed fully paid or performed and in regard thereto, the parties hereto unconditionally and without reservation release each other upon any claim, if any, in regard to any such agreement.

31. **NO PARTNERSHIP:** Buyer and Sellers are not, and shall not be deemed to be, partners, joint-venturers, acting together in any legal business formation or entity, or otherwise involved together in a business venture by virtue of this Agreement, and are merely the Buyer of and Sellers of real property.

32. **SEVERABILITY OF PROVISIONS:** In the event that any portion of this Agreement is determined to be invalid or unenforceable, such determination shall not affect the validity or enforceability of any other provision herein.

33. **COUNTERPARTS:** This Agreement may be executed in separate counterparts, all of which taken together shall constitute one and the same instrument, and any party hereto may execute this Agreement by signing any such counterpart. Facsimile and electronic versions of signatures shall be treated as originals.

[Separate Signature Pages Follow]

Dated this 18th day of December, 2017.

Seller:

Arthur S. Andersen

State of Wyoming)
) ss.
County of Fremont)

On this 18th day of December, 2017, before me, the undersigned officer, personally appeared Arthur S. Andersen, known to me 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 have set my hand and official seal.

(SEAL)
My Commission Expires: June 30, 2021

Notary Public

JESSICA SHULER - NOTARY PUBLIC
County of Fremont
State of Wyoming
My Commission Expires June 30, 2021

Dated this 15th day of December, 2017.

Seller:

Charlotte M. Andersen

Charlotte M. Andersen

State of South Dakota)
) ss.
County of Lawrence)

On this 15 day of December, 2017, before me, the undersigned officer, personally appeared Charlotte M. Andersen, known to me to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same for the purposes therein contained.

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

JENNIFER M. WHITEHOUSE NOTARY (SEAL) STATE OF SOUTH DAKOTA

My Commission Expires: March 3, 2023

Notary Public

Dated this 15 day of December, 2017.

Buyer:

LAZY HD LLC

By: _____
Tracy Benson, Manager

State of South Dakota)
) ss.
County of Lawrence)

On this 15 day of December, 2017, before me, the undersigned officer, personally appeared Tracy Benson, who acknowledged herself to be the Manager of Lazy HD LLC, a South Dakota Limited Liability Company, and that she as such Manager, being authorized so to do, executed the foregoing instrument for the purposes therein contained.

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

JENNIFER M. WHITEHOUSE NOTARY PUBLIC STATE OF SOUTH DAKOTA (SEAL)

My Commission Expires: March 3, 2023 Notary Public

Dated this 15 day of December, 2017.

Guaranters:

_____ _____
Rodney Benson Tracy Benson

State of South Dakota)
) ss.
County of Lawrence)

On this 15 day of December, 2017, before me, the undersigned officer, personally appeared Rodney Benson and Tracy Benson, known to me 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 have set my hand and official seal.

JENNIFER M. WHITEHOUSE NOTARY PUBLIC STATE OF SOUTH DAKOTA (SEAL)

My Commission Expires March 3, 2023 Notary Public

APPELLEE'S APPENDIX 4

Certified To Be A True And Correct Copy Of The Original Dakota Title

Prepared By:
Lynn, Jackson, Shultz & Lebrun, P.C.
135 E. Colorado Blvd.
Spearfish, SD 57783
Telephone: (605) 722-9000

WARRANTY DEED

ARTHUR S. ANDERSEN of P. O. Box 2020, Dubois, WY 82513, and CHARLOTTE M. ANDERSEN of 619 F Hobbs Court, Jefferson City, MO 66109, husband and wife, *Grantors*, for and in consideration of One Million Six Hundred Fifty Thousand Dollars ($1,650,000), *GRANT, CONVEY AND WARRANT TO* LAZY HD LLC, a South Dakota Limited Liability Company, *Grantee*, of 11656 Lazy HD Lane, St. Onge, SD 57779, the following described real estate in the County of Lawrence in the State of South Dakota, to-wit:

NE¼NW¼ and W½NE¼ and NW¼NW¼ and S½NW¼, Section 9, Township 6 North, Range 3 East, B.H.M., Lawrence County, South Dakota, consisting of 240 acres more or less, together with buildings and improvements thereon.

Subject to all covenants, conditions, restrictions, easements, agreements, reservations, rights of way and other matters of record in the Office of the Lawrence County Register of Deeds.

Dated this 18 day of December, 2017.

Arthur S. Andersen

State of Wyoming)
) ss.
County of Fremont)

On this 18th day of December, 2017, before me, the undersigned officer, personally appeared Arthur S. Andersen, known to me 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 have set my hand and official seal.

(SEAL)
My Commission Expires: June 30, 2021

Notary Public

JESSICA SHULER - NOTARY PUBLIC
County of Fremont
State of Wyoming
My Commission Expires June 30, 2021

Dated this 15th day of December, 2017.

Charlotte M. Andersen
Charlotte M. Andersen

State of South Dakota)
) ss.
County of Lawrence)

On this 15 day of December, 2017, before me, the undersigned officer, personally appeared Charlotte M. Andersen, known to me to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same for the purposes therein contained.

Witness Whereof, I have set my hand and official seal.

JENNIFER M. WHITEHOUSE NOTARY PUBLIC STATE OF SOUTH DAKOTA Seal

(SEAL)

My Commission Expires March 3, 2023

Notary Public

SD EForm - 0919 V4

CERTIFICATE OF REAL ESTATE VALUE [SDCL 7-9-7(4)]

COURTHOUSE USE ONLY
Book _____ Page _____
Ratio Card No. _____

STATE OF SOUTH DAKOTA, COUNTY OF LAWRENCE

Seller(s): Arthur S. Anderson / Charlotte M. Andersen — (605) 639-5476
Name — Phone Number

Mailing Address: PO Box 2020 / 619 F Hobbs Court — Dubois/Jefferson City — WY 82513
Street/Box Number — City — State/Zip Code MO 66109

Buyer(s): Lazy HD Lane
Name — Phone Number

Current Mailing Address: ~~St Onge~~ 11652 Lazy HD Lane — ~~St Onge~~ — SD 57779
Street/Box Number — City — State/Zip Code

NEW Mailing Address: 11652 Lazy HD Lane — St Onge — SD 57779
Street/Box Number — City — State/Zip Code

OWNER OCCUPIED - THIS BOX TO BE COMPLETED BY BUYER ONLY
These items are important to complete for property to continue to be classified as owner occupied for a lower property tax rate.

Property is currently classified as owner-occupied — YES ☐ NO ☐
Property will be occupied by buyer on _____ (date) — YES ☐ NO ☐
Property will be principal residence of buyer on the above stated date — YES ☐ NO ☐
Do you own any other residential property in the United States? — YES ☐ NO ☐ If yes, state location _____

Signature (BUYER ONLY) _____

Legal Description (Please include the number of acres for unplatted properties)

NE¼NW¼ and W½NE¼ and NW¼NW¼ and S½NW¼, Section 9, Township 6 North, Range 3 East, B.H.M., Lawrence County, South Dakota.

(1) Date of Instrument 12-15-17

(2) Type of Instrument:

Contract for Deed	☐	Executor's Deed	☐	Mineral Deed	☐
Quit Claim Deed	☐	Trustee's Deed	☐	Gift	☐
Warranty Deed	☑	Administrator's Deed	☐	Other (Specify)	☐

(3) Items Involved in Transaction

(a) Was this property offered for sale to the general public — YES (●) NO ( )
(b) Relationship between buyer and seller? — YES ( ) NO (●)
(c) Property was sold by owner (●) agent ( )

(d) Actual Consideration Exchanged: $ 1,650,000
(e) Adjusted price paid for real estate: $ 1,650,000
(actual consideration less amount paid for major items of personal property which are listed below)

In the blanks below, list any major items of personal property and their value which were included in the total purchase price (i.e. furniture, inventory, crops, leases, franchises):

(4) Was there Buyer Financing YES (●) NO ( ) If yes, items (a) and (b) below MUST be completed

(a) Type of Buyer Financing - Check where applicable

Conventional Bank Loan	☐	Like Kind Exchange	☐
Cash Sale	☐	Assumed mortgage	☐
FHA, FmHA, SDHA Loan	☐	Farm Credit Service	☐
Contract for Deed	☑	(must complete part (b))	

(b) Contract for Deed YES (●) NO ( ) (If yes, MUST complete items below)

Down Payment $300,000.00
Monthly/Yearly Payment $200,000.00 Interest Rate 4
No. of Payments 7 Balloon Payment

(Signature of Seller, Buyer or agent of _____) — (Date) 12-15-17

PT 56 (Rev 6/05) Form required pursuant to SDCL 7-9-7(4) and Administrative Rule 64:04:01:06.01

APPELLEE'S APPENDIX 5

25-4-1. Marriage dissolved only by death or divorce--Status of parties after divorce.

25-4-1. Marriage dissolved only by death or divorce -- Status of parties after divorce. Marriage is dissolved only:

(1) By the death of one of the parties; or

(2) By the judgment of a court of competent jurisdiction decreeing a divorce of the parties.

The effect of such judgment is to restore the parties to the state of unmarried persons.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28565

CHARLOTTE M. ANDERSEN,

Plaintiff-Appellee,

v.

ARTHUR S. ANDERSEN,

Defendant-Appellant.

Appeal from the Circuit Court
Fourth Judicial Circuit
Lawrence County, South Dakota

Honorable Michelle K. Comer, Presiding Judge

APPELLANT'S REPLY BRIEF

Ms. Cassidy M. Stalley
Mr. Thomas E. Brady
Lynn, Jackson, Shultz & Lebrun
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Rapid City, SD 57701
605-342-2592

Attorneys for Appellant

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Mr. Travis B. Jones
Clayborne, Loos & Sabers, LLP
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PO Box 9129
Rapid City, SD 57709-9129
605-721-1517

Attorneys for Appellee

Notice of Appeal filed March 15, 2018

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TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

This brief is in reply to Charlotte's brief. Reference to the record and transcripts shall be as designated in Art's opening brief. All abbreviations defined and used in Art's opening brief shall have the same meaning when used herein. References to Charlotte's appeal brief will be referred to as "Appellee Br.," followed by the appropriate page number. References to Appellant's Appendix will be referred to as "APP," followed by the appropriate page number. References to Appellee's Appendix will be referred to as "APPE," followed by the appropriate page number.

RESPONSE TO CHARLOTTE'S STATEMENT OF FACTS

Charlotte is directed by statute to provide this Court with a statement of facts which must be stated fairly and with complete candor. SDCL 15-26A-60(5). Charlotte fails to do so. Art will provide this Court with reference to where errors in fact are present.

In her statement of facts, as well as numerous times throughout her brief, Charlotte insinuates, and even claims, that the trial court did not judicially accept, adopt, or bind the parties to their agreement. Appellee Br. at 3; *see also e.g.* 7-8, 12-13. This is not the record before this Court. In fact, the record reflects the exact opposite. Charlotte misrepresents (and omits) the trial court's statements.

The trial court emphatically stated: "*I will bind* you to this agreement orally *today*." CTT 2:22 (emphasis added). (Notably, Charlotte omits this language from her brief.) Moreover, the trial court asked, and the parties agreed,

to be bound by the agreement – at the time of the November 15, 2017 court trial, not sometime in the future. CTT 13:10 to 14:1. The trial court did not need to review the Stipulation prior to Art's death as Charlotte claims. *See* Appellee Br. at 4. The trial court heard and considered the parties' Stipulation, as it was read into the record. The trial court made no inquiries on the record about the agreement. Instead, the trial court orally bound the parties to their agreement. By orally binding the parties to their agreement, the trial court accepted the Stipulation. And by accepting the Stipulation on the record, which specifically outlined the terms of their divorce and property division, all issues were adjudicated on November 15, 2017. For Charlotte to suggest otherwise is a misrepresentation of the record.

Charlotte also unfairly (and impermissibly) interjects settlement negotiations and extrinsic evidence in her statement of facts. Charlotte uses this tactic in hopes that this Court will shift its focus from the true legal issue (can a trial court enter a judgment and decree *nunc pro tunc* following death of a party to effectuate its prior judicial acceptance of the parties' stipulated – and substantially performed – divorce agreement?) to an impermissible and flawed argument (that Art got exactly what he bargained for) which Charlotte has provided this Court with no authority to support.

Whatever the rationale behind the parties agreeing to entry of a judgment and decree on March 1, 2018, *nunc pro tunc* December 31, 2017, should have little bearing on this Court's analysis, and certainly not for the reason Charlotte argues. Charlotte and Art, each represented by competent counsel, negotiated the terms of

their divorce. Each had reasons for how their interests were divided, but those reasons have no impact on the matter before this Court. The reasons were a part of settlement negotiations and not incorporated into the Stipulation (oral or written). The trial court did not base its ruling on dismissal on the reasons behind the Stipulation. Most importantly, Charlotte agreed to the delay. It was part of the bargained-for agreement. By introducing this evidence, Charlotte hopes to change the terms of the fully-integrated Stipulation for her sole benefit. But as the record stands, Charlotte has received everything she bargained for (and more). Though Art may have received the benefit of Charlotte's health insurance, insurance was only one element of the deal. Art did not receive and has not received exactly what he bargained for under the terms of the Stipulation that Charlotte herself agreed to be bound by.

Finally, in a thinly-veiled attempt to refute performance of the Stipulation, Charlotte relates that no deeds to real property had been drafted transferring ownership of marital property between the parties. However, Charlotte fails to candidly inform the Court that, under the terms of the Stipulation, only one deed was required to be immediately signed and delivered, by Charlotte no less. *See* APP at 10 (referencing the "Ziegler and Leseberg Contracts for Deed). Two of the remaining pieces of real property (the "Boke Ranch" and "Wyoming Shop") were to be listed for sale. APP at 6-9. Quitclaim deeds to these two pieces of real estate were to be transferred only if and when Charlotte had received a $500,000 equalization payment, and then only if the property or properties remained under a

contract for deed. APP at 6-9. At the time of Art's death, Charlotte had not been paid the equalization payment in full. Only one of the properties had been sold on a contract for deed. APPE 27-44. The warranty deed Charlotte referenced in her statement of facts does not connote non-performance. Instead, the warranty deed signed by the parties for the Boke Ranch pursuant to the terms of the Stipulation undoubtedly manifests performance. *See* APP 5-7. The fourth and final piece of real estate was owned outright by Art; his name was the only name on the warranty deed. APP at 9-10; APPE at 3. No transfer of deed was necessary.

Charlotte also fails to candidly relate the numerous pieces of personal property she received in furtherance of the Stipulation. Such personal property was not insubstantial. Indeed, missing from Charlotte's statement of facts is any reference that, prior to Art's death, in performance of the Stipulation, Charlotte received a Cessna 172 airplane, a Honda Silver Wing motorcycle, a mounted water buffalo, a mounted impala, a mounted gazelle, a 1987 BMW 325i, a 2016 Nissan Maxima, jewelry, and numerous unidentified pieces of personal property from three storage units, a barn, a gooseneck trailer, and the Wyoming home. APP 3; SR 644-46, 667, 810-23.

ARGUMENT

I. The rationale behind the parties' agreement to entry of a judgment and decree on March 1, 2018, *nunc pro tunc* to December 31, 2017, is impermissible settlement negotiation and extrinsic evidence, irrelevant, and ignores Charlotte's agreement to the same.

Impermissibly introducing settlement negotiation and extrinsic evidence, Charlotte contends that this Court should affirm the trial court for the sole reason that Art "demanded" the delay of entry of a judgement and decree so he could use Charlotte's health insurance, and he "got the benefit that he bargained for[.]" Appellee Br. at 6-7. This argument is legally impermissible, made for an improper purpose, and factually in error.

As this Court is well aware, "[t]he 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 preceded or accompanied the execution of the instrument." SDCL 53-8-5. It is a long-standing principle that "[p]arol or extrinsic evidence may not be admitted to vary the terms of a written instrument or to add to or detract from the writing." *Jensen v. Pure Plant Food Int'l., Ltd.*, 274 N.W.2d 261, 263-64 (S.D.1979) (citation omitted); *see also Lewis v. Benjamin Moore & Co.*, 1998 S.D. 14, ¶ 9, 574 N.W.2d 887, 889 ("Settlement agreements are subject to the same rules of constructions as contracts" and "extrinsic evidence will not be admitted to vary the terms of a written instrument that is not found ambiguous."). "[P]arol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and

different contract from the one evidenced by the writing, is incompetent." *Pankratz v. Hoff*, 2011 S.D. 69, ¶ 14, 806 N.W.2d 231, 236. In addition, SDCL 19-19-408 makes clear that statements made during settlement negotiations are inadmissible.

Charlotte's citation to an affidavit of her counsel and emails between counsel prior to the court trial confirm this is impermissible settlement and extrinsic evidence.[1] And Charlotte produces this evidence to produce a new and different contract – actually no contract at all.

But even if this evidence could be considered (it cannot), Charlotte's argument for its use is fundamentally flawed. Indeed, the first problem with Charlotte's argument is that this evidence had nothing to do with the trial court's decision to dismiss. The trial court dismissed the case because it erroneously relied on *Larson v. Larson*, 89 S.D. 575, 235 N.W.2d 906 (1975), to hold that it did not have jurisdiction to enter a judgment and decree *nunc pro tunc* following Art's death to effectuate its prior judicial acceptance of the parties' Stipulation. Without jurisdiction, the trial court never got to the "why." There was no hearing,

[1] It is noteworthy that Charlotte's counsel submitted an affidavit to the trial court making himself a witness by attesting, under oath, to the facts behind the *nunc pro tunc* entry. *See* APPE at 1-6. Yet, counsel continues as her attorney on this appeal. *See Haberer v. First Bank of S. Dakota (NA)*, 429 N.W.2d 62, 65-66 (S.D. 1988) ("The general rule is that attorney affidavits or testimony in litigation matters should not be used unless the affidavits or testimony relate to uncontested matters or matters of formality." Attorney "affidavits must not deal with contested matters or facts, or otherwise give evidence regarding matters that would be questions or facts."); *see also* SDCL 16-18, Appendix A, Rule 3.7.

testimony, or evidence on this issue. And because it never got to the "why," it is irrelevant to the issue before this Court.

Moreover, Charlotte's argument ignores that Charlotte herself *agreed* to the delay, and the trial court accepted it. Why did she agree? Because although not stated on the record, the delay for the use of medical coverage was part of the entire bargained-for agreement. Notably absent from Charlotte's brief is any mention of what Charlotte demanded and what Art gave up or bargained for in exchange for the delay and use of medical coverage. But Art's negotiated delay is no different than a party asking for a certain piece of property in exchange for an equalization payment. The delay for the use of medical coverage was only part of the bargain. It was part of the entire agreement Art and Charlotte agreed to – on the record, in open court – and which the trial court judicially accepted by binding them to it on the record.

For Charlotte to suggest that Art "got the benefit he bargained for" is disingenuous. Art only received a single fragment of what he bargained for under the terms of the Stipulation. As the record currently stands, Art did not receive and has not received what he bargained for. In fact, Art has been, and continues to be, harmed by complying with the terms of the Stipulation. Art substantially performed under the terms of the Stipulation. Pursuant to the Stipulation, Art transferred significant personal property assets, including a plane, motorcycle, cars, and jewelry, to Charlotte. Art listed two pieces of real estate and sold one, in an effort to pay Charlotte half a million dollars. Charlotte got what she bargained

for – a divorce (essentially) and certain property. What she wants now is to change the terms of the agreement so that she gets all of the property and assets divided under the terms of the Stipulation. "The law favors the compromise and settlement of disputed claims." *Kroupa v. Kroupa*, 1998 S.D. 4, ¶ 25, 574 N.W.2d 208, 212 (quoting *Johnson v. Norfolk*, 76 S.D. 565, 572, 82 N.W.2d 656, 660 (1957)). It would be a substantial miscarriage of justice for this to be the end result.

II. The trial court judicially accepted the Stipulation by binding the parties to it on the record on November 15, 2017.

Charlotte's entire argument on appeal is based on a factually flawed premise: "the record is void of any evidence that the [trial] court judicially accepted the agreement." Appellee Br. at 7. As mentioned above, as well as in Art's opening brief, the record reveals the exact opposite.

In a futile attempt to refute that *Larson* is (and the cases relied upon therein are) distinguishable, Charlotte boldly makes several inaccurate statements. Charlotte claims: "the record is void of any evidence that the [trial] court judicially accepted the agreement;" "the transcript from the court trial is void of any statement by the trial court that it had accepted the parties' verbal stipulation;" "no where did the [trial] court adopt the verbal stipulation of the parties;" and most notably, "no where did the trial court say based on these statements I am binding you to this agreement." Appellee Br. at 7-8. But accepting and binding the parties

to the agreement is precisely what the trial court did here. Charlotte's position is in direct contradiction to the record.

Without question, at the start of the hearing, the trial court stated on the record: "I'm going to ask both of you if this is, in fact, your agreement, and I will *bind you* to this agreement orally *today*." CTT 2:17-22 (emphasis added). And after all the material facts and specific property division issues were put on the record, issues beyond basic elements of a settlement that the trial court would have been asked to consider had the case gone to trial, the trial court did exactly what it said it would at the outset: asked the parties if it was their agreement and bound them to it. CTT 13:10 to 14:1.

Black's Law Dictionary defines "bind" as follows:

> 1. To firmly tie, restrain, or confine with a cord, chain, or the like <to bind a prisoner>. 2. To impose one or more legal duties on (a person or institution) <the contract binds the parties> <courts are bound by precedent>. 3. To place (oneself) under constraint or duty to perform <he bound himself to deliver the goods on that day>. 4. To make obligated by means of a binder. See binder. 5. *Hist.* To indenture; to legally obligate to serve <to bind an apprentice>.

BLACK'S LAW DICTIONARY (10th ed. 2014). Comparing this definition to the language of the trial court, Charlotte's assertion cannot be reconciled with the record.

Moreover, the trial court bound the parties to their agreement after hearing all material terms of the Stipulation read and agreed to on the record. CTT 2:24 to 3:23. In doing so, the trial court did not ask a single question about the material terms of the Stipulation. The trial court did not question the delay in entry. Most

importantly, the trial court did not question, or give any indication that it questioned, entry of a *nunc pro tunc* judgment and decree to a date specified by the parties (a date which pre-dated Art's death). And by not asking these questions, but instead stating on the record that the parties were bound, it is difficult to understand how Charlotte can argue the trial court did not "accept" the Stipulation. If the trial court did not accept the Stipulation, why did it bind the parties to it?

Charlotte also cannot escape the fact that the parties acted as if the trial court had accepted the Stipulation and bound them to it. The parties submitted and filed a written Stipulation, memorizing the oral terms read into the record, including the date of divorce, December 31, 2017. SR 488-503, APP A. The parties submitted affidavits, submitting to the jurisdiction of the trial court and consenting to the entry of a judgment and decree on the grounds of irreconcilable differences. SR 504-05. The parties began, nearly the day the Stipulation was put on the record, dividing and exchanging substantial pieces of personal property, and listing and selling real estate. SR 576, 621-22, 664-823. If the trial court had not accepted the Stipulation, why did the parties (especially Charlotte) act as if it had? If the parties were not bound by it, why did they act as if they were?

III. No judicial act remained for the trial court after accepting and binding the parties to their Stipulation.

Charlotte also asserts that like *Larson*, *Sahler*, and *LeTarte*, "judicial acts remained to be done at defendant's death." Appellee Br. at 13. But Charlotte fails

to identify exactly what judicial acts remained for the trial court, beyond signing a judgment and decree to effectuate its prior acceptance of the fully adjudicated Stipulation. More notably, Charlotte's argument misses the point. Charlotte fails to recognize the many nuances of *Larson*, *Sahler*, and *LeTarte*, and that the facts before this Court are wholly unlike the facts in those cases.

For example, as anticipated, Charlotte claims that *LeTarte v. Malotke* is "nearly identical to the fact of this case." Appellee Br. at 11. But what Charlotte fails to acknowledge is that in *LeTarte*, "*only the basic elements* of the settlement had been agreed upon *and that it had yet to be put into writing* and submitted for review." 188 N.W.2d 673, 676 (Mich. App. 1971) (emphasis added). Again, such was not the case here. Indeed, it can hardly be said that "only the basic elements of the settlement had been agreed upon." The parties agreed in open court that "all material facts and property division issues that the [trial] court would be asked to consider if this trial were to proceed" were covered by the Stipulation read into the record. CTT 2:24 to 3:23. On the record, the parties discussed the grounds for divorce, specific division of property, and most importantly, the exact date of the divorce, including entry of a *nunc pro tunc* judgment and decree. Then, in complete contrast to *LeTarte*, the parties here put their Stipulation "into writing and submitted" it to the trial court. *LeTarte*, 188 N.W.2d at 676.

Relying on her incomplete analysis of *LeTarte*, Charlotte claims that "it is disingenuous for [Art] to assume that the trial court was simply going to sign whatever judgment and decree of divorce that it placed in front of it." Appellee

Br. at 12. But in all actuality, what else was the trial court going to do or could do with the Stipulation? There were no further factual or legal issues for the trial court to determine, rule on, or adjudicate. The trial court heard from the parties themselves that this was their entire agreement. The trial court had accepted and bound the parties to it. Arguably, the trial court bound itself to entry of a *nunc pro tunc* judgment and decree. Every single issue down to the date of divorce (which predated Art's death) was decided, agreed upon, and accepted at the November 15, 2017 court trial. Art submits it is disingenuous for Charlotte to argue the trial court would have done anything but sign the judgment and decree when it was submitted on or about March 1, 2018.[2]

Likewise, in her analysis of *Sahler v. Sahler*, 154 Fla. 206, 17 So. 2d 105 (1944), Charlotte purposely omits important language from the Florida Supreme Court's reasoning in reversing a *nunc pro tunc* divorce decree. Appellee's Br. at 10. Charlotte does so to support her manufactured facts that the trial court had not accepted the parties' Stipulation, and judicial acts remained at the time of Art's death. However, the language Charlotte omits is what makes *Sahler* distinguishable from the facts before this Court. Indeed, the omitted language details the numerous judicial decisions that remained for the *Sahler* trial court prior to the plaintiff's death:

[2] It should be noted that Tena Haraldson, as Special Administrator, and pursuant to the parties' Stipulation, submitted a proposed Judgment and Decree to the trial court on March 1, 2018. SR 531. Charlotte never filed an objection to form.

> The Chancellor stated that he thought a divorce should be granted, but he didn't say to whom it should be granted. He stated that he thought the property should be divided in certain proportions, but he didn't make any division of the property, and he expressed the wish that the parties, through their counsel, would get together and agree on a division.

Sahler, 17 So. 2d at 106. And it was because these judicial decisions remained at the time of the plaintiff's death in *Sahler* that the Florida Supreme Court reversed, stating: "had the Chancellor announced a decree, that such a decree would not have been effective until it had been reduced to writing, signed by the Judge, and recorded in the Chancery Order Book." *Id.* But these are not the facts that are before this Court. To be clear, "all of the things the final decree would contain if and when it was signed and recorded, prior to the death of [Art]" were placed on the record, agreed to by the parties, accepted by the trial court, bound on the parties, memorialized in writing, signed by the parties, and filed with the trial court – notably to include entry of a divorce decree *nunc pro tunc* to a date preceding Art's death. *Id.*at 107. Unlike *Sahler*, there were simply no further judicial decisions to be made here.

Finally, without explaining exactly how, Charlotte claims that "*Larson* is much more similar to this case than the Estate suggests." Appellee Br. at 8. Charlotte apparently overlooks the specific facts of *Larson*. The only similarity that can possibly be drawn between *Larson* and this case is that one of the parties died before the trial court signed a judgment and decree. But the facts of *Larson* are in complete opposite to the facts before this Court. Unlike *Larson*, the parties'

Stipulation here was read on the record, agreed to on the record, bound on the parties on the record, and most importantly, accepted by the trial court on the record. Moreover, the Stipulation was then memorialized, signed, and filed with the trial court. Again, there were simply no further judicial decisions to be made by the trial court. *Larson* cannot (and should not) be read to extend to or include the facts before this Court. To do so would allow Charlotte to escape from an agreement she negotiated, agreed, and bound herself to. It would be a significant miscarriage of justice.

IV. Charlotte waived her condition precedent argument by failing to raise the argument to the trial court.

For the first time on appeal, Charlotte asserts that the Stipulation cannot be independently enforced because "a condition precedent to enforcement of the Stipulation is the incorporation of the Stipulation into a Decree of Divorce." Appellee's Br. at 20. But it is the long-standing rule of this Court that issues may not be raised for the first time on appeal. *Fed. Land Bank of Omaha v. Jensen*, 415 N.W.2d 155, 159 (S.D. 1987) (citation omitted).

The record does not contain any reference that Charlotte raised this argument in response to Art's Brief in Opposition to Motion to Dismiss and in Opposition of Motion for Entry of *Nunc Pro Tunc* Judgment and Decree of Divorce, or at the March 13, 2018 motions hearing on this matter. *See* SR 824-33; MH 2-7. As such, Charlotte should not be allowed for the first time to raise this issue on appeal.

However, even if she had, Charlotte's argument is rendered meaningless because of the parties' substantial performance prior to the alleged "condition precedent," as well as the fact that the Stipulation was expressly made binding on the parties' heirs, successors, and personal representatives. *See Weitzel v. Sioux Valley Heart Partners,* 2006 S.D. 45, ¶ 38, 714 N.W.2d 884, 895 (explaining "[a] condition precedent is a fact or event which the parties *intend* must exist or take place *before* there is a right to performance.") (emphasis added); *see also* SR 488-503, APP A. "[C]onditions precedent are not favored by courts." 714 N.W.2d at 895 (citation omitted). And this Court has made clear that:

> The document as a whole must be examined and it must be determined that the intent of the parties was to pre-agree that the happening or nonoccurrence of the stated event after the contract becomes binding would cause the contract to terminate without further duties or obligations on either party.

Id. at 896. Such was obviously not the case here. The plain, unambiguous language of the Stipulation is void of a condition precedent, and the parties' substantial performance immediately after they agreed and were bound to their Stipulation erases any doubt of the same.

V. Divorce, which Charlotte claims was the "object of the Stipulation," has essentially occurred.

Charlotte argued below, and briefly mentions on appeal, that the object of the Stipulation was a divorce, not the division of property, and thus the Stipulation is not a binding contract. *See* Appellee's Br. at 21-22; SR 832. Charlotte cites no

authority for her position and therefore waives the argument on appeal. *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 842 (S.D. 1990) (citation omitted).

Under South Dakota law, married couples are permitted to enter into contracts to divide their property. *See* SDCL 25-2-10, 25-2-13. This is what the parties did. Sure, part of the Stipulation was for the parties' divorce, and a decree would have terminated the marriage. But the division of their interests and assets also formed a significant part of the Stipulation. And the parties substantially performed under the terms of the Stipulation in regards to the agreed division. With Art's death, Charlotte's argument is misplaced. Charlotte is getting exactly what she bargained for – a divorce and certain (significant) property. What she should not get is more property to the detriment of Art and his estate.

CONCLUSION

For all the reasons stated above, as well as in Art's opening brief, Art respectfully submits that the trial court's order should be reversed, or in the alternative, that the terms of the Stipulation should be enforced as to the parties' division of property.

It would be a substantial miscarriage of justice for this Court to affirm the trial court under these facts. Charlotte agreed to and was bound by the terms of the Stipulation, the trial court accepted the terms, and Charlotte received significant personal property in performance of the Stipulation. To allow her now to claim the Stipulation is void under these facts, has the potential to dissuade parties from reaching settlements, and instead forge ahead to trial, clogging the

judicial docket. Parties should be and are encouraged to settle. And settle is exactly what the parties did here.

Dated this 8th day of August, 2018.

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ORAL ARGUMENT IS HEREBY RESPECTFULLY REQUESTED.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, Cassidy M. Stalley, counsel for the Appellant does hereby submit the following:

The foregoing brief is 17 pages in length. It is typed in proportionally spaced typeface in Times New Roman 13 point. The footnotes are Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 18 pages, 4,347 words and 21,817 characters (no spaces) in the body of the brief, excluding the Preliminary Statement and including footnotes.

_____
Cassidy M. Stalley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of August, 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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The undersigned further certifies that the original and two (2) copies of the Brief of Appellant in the above-entitled action were mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class postage thereon prepaid, the date above written.

_____
Cassidy M. Stalley