IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30783

CALVIN ARLEN BERWALD, d/b/a SOKOTA DAIRY v. STAN'S INC.

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

The Honorable Kent A. Shelton, Presiding

BRIEF OF APPELLANT CALVIN BERWALD

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Notice of Appeal was filed July 29, 2024

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JURISDICTIONAL STATEMENT

Calvin Berwald appeals from an Amended Judgment entered on May 7, 2024 (SR 1640), following a jury trial and from the trial court's refusal to grant a new trial. Notice of Entry of Judgment was served on May 15, 2024 (SR 1646). Berwald made a timely motion for a new trial, then the trial court granted an extension (SR 1679) to hear the Motion for New Trial but denied the motion on July 8, 2024 (SR 1719). The deadline for appeal was extended by SDCL § 15-26A-6 because of the timely Motion for New Trial and the trial court's Order extending the timeline for hearing and deciding the motion.

STATEMENT OF LEGAL ISSUES

I. Did the trial court err in dismissing Berwald's Breach of Contract claim due to the doctrine of Accord and Satisfaction?

The trial court ruled that Berwald's act of depositing a check from Stan's, Inc. amounted to accord and satisfaction of damages caused by Stan's, Inc. breach of a soybean-meal contract. (SR 827; SR 1746-1748)

- SDCL § 57A-3-311
- *Hubbard Milling Co. V. Frame*, 310 N.W.2d 155, 156 (SD 1981)
- *Clancy v. Callan*, 90 SD 115, 118 (SD 1976)

II. Was Berwald entitled to a New Trial due to the Defense withholding evidence until trial?

The trial court denied Berwald's Motion for New Trial.

- *Kaiser v. Univ. Physicians Clinic*, 2006 SD 95 ¶38, ¶46

III. Was Berwald entitled to a new trial due to juror misconduct?

The trial court denied Berwald's Motion for New Trial.

- SDCL § 15-6-59(a)(2)
- *Russo v. Takata*, 2009 SD 83, ¶39

STATEMENT OF THE CASE

The operative pleading, Berwald's Second Amended Complaint, includes claims for Breach of Warranty of Merchantability (UCC), Breach of Warranty of Fitness for a Particular Purpose (UCC), Breach of Contract (UCC), and Barratry.

The Warranty claims relate to contaminated cattle feed that Berwald purchased from Stan's, Inc. that contributed to the death of more than 200 of Berwald's cattle. (SR 403)

Berwald's Breach of Contract claim was based on Stan's, Inc. refusing to provide Berwald with soy-bean meal for Berwald's dairy operation at a pre-set price agreed to by the parties which caused Berwald various damages. (SR 404 - 405) The trial court dismissed that claim by granting Stan's, Inc's. Motion for Summary Judgment on January 24th, 2022, pursuant to the doctrine of Accord and Satisfaction. (SR 825)

The Warranty claims were tried to a jury in March of 2023 in Jerauld County, SD. The jury found that Stan's, Inc. breached the Warranty of Fitness for a Particular Purpose, but did not find a breach of the Warranty of Merchantability. However, finding no damages caused by Stan's, Inc.'s breach of the Warranty of Fitness, the jury returned a zero-dollar verdict for Berwald. (SR 1486 – 1488)

Following trial, a juror wrote a letter to the clerk expressing concerns about the deliberation process. (SR 1677) Notice of Entry of Judgment was given May 15, 2024 and the new trial was denied on July 8, 2024. (SR 1721)

This appeal involves a breach of contract claim the jury was prevented from hearing because of the improper application of accord and satisfaction to a partial payment of damages, expert testimony allowed to unfairly prejudice the outcome of the warranty claims as related to causation of the cattle's death of cattle, and an unusual post-trial occurrence where a juror expressed concerns about the deliberations being tainted by another juror with undisclosed, extreme biased in favor of Stan's Inc., likely due to connections that juror had to Stan's Inc.'s principal(s).

STATEMENT OF FACTS

This case involves a dispute that dates back to 2012 between a dairy farmer and a corporation that promised to provide feed for the farmer's herd. Berwald and his wife, Sara Tvedt, were dairy farmers near Alpena, South Dakota. The calves require care provided directly by humans that their bovine mothers might otherwise provide in nature. In this case, the humans caring for the calves are Berwald and Tvedt. (SR 2052 - 2054)

To budget and ensure they can provide feed for the calves and their milking mothers, Berwald contracted to buy raw ingredients for feed rations ahead of time. In this instance, Berwald contracted to purchase 400 tons of soybean meal, a primary component in Berwald's cattle feed ration, with Stan's, Inc.. (SR 436) That contract benefited both parties, and it was fair. If the price of soybean meal went up, Stan's, Inc. had already profited, and otherwise protected itself by purchasing future contract(s). If the price of soybean meal went down, Berwald would have to pay $319/ton, the contract price to Stan's, Inc. (SR 1845- 1846)

As things turned out, a nationwide draught caused the price of soybean meal to increase significantly between the time when Berwald contracted the soybean meal and the time when he sought to take delivery of it to actually use as feed. (SR 1846) It should not have mattered to the parties as this is exactly the sort of unforeseen circumstance that leads parties to contract in this manner. Yet, Stan's, Inc. unilaterally "cancelled" Berwald's soybean meal contract and issued Berwald a check for payment of the difference in the Chicago Board of Trade ("CBOT") pricing. (SR 635 - 638; SR 1846 – SR 1851). While that did help compensate Berwald for some financial damages related to what amounted to a breach of contract, it left Berwald with other direct and consequential contract damages.

For example, if there is a nationwide shortage of actual, physical cattle feed available, it does not matter to a cattle producer what a commodity chart in Chicago claims that soybean meal can be purchased for if no one will sell it to a cattle producer in South Dakota for that price. The contract at issue was to provide the feed Free on Board "FOB." (SR 1847). So if a cattle producer not only has to pay the CBOT price for the feed, but also pay to get the feed to where Stan's, Inc. promised to deliver it in the first place – in Alpena, SD near Berwald's farm, the transportation costs add to the damages. Furthermore, when livestock are deprived of proper feed due to a feed shortage caused by a unilateral contract breach, livestock can lose weight, value, and in the instance of dairy cattle, decreased milk production, so the cost of replacing a portion of the feed ration (soybean meal alone) on the CBOT is not the only contract damage.

Stan's, Inc. only dishonored its contract with Berwald at about the same time that Stan's, Inc. produced a feed ration for Berwald's calves that Berwald was claiming killed his calves. (SR 1826- 1827; 1829). The feed was incorrectly created because it mixed feed additives that are not supposed to be used in conjunction with one another (SR 1975). This practice is prohibited by the FDA, and can cause synergistic effects that would otherwise unpredictably exceed therapeutic levels of an individual additive. (SR 1986; 1314-1315) The feed additive(s) in this case are a category of additives referred to as ionophore(s). (SR 1951) If cattle feed does contain an ionophore like monensin or localasid, a label is statutorily required. (SR 986 – 992; SDCL §39-14-55) The feed in this case contained at least two different ionophores but there was not a specific label indicating as much. The feed in question contained more than one type of ionophore. (SR 1599-1601)

Stan's, Inc. defense at trial was primarily premised upon alleged lacking causation of damages – that the various failures and breaches by Stan's, Inc. did not kill Berwald's cattle. The Defense argued various other potential causes of the untimely death of hundreds of cattle, namely and primarily Berwald's allegedly poor-quality facilities. (SR 36-44)

On June 9, 2022, Dr. Little was deposed. (SR 1674-1675) Dr. Little claimed to have had background knowledge of Berwald's facility due to having previously been retained to look at Berwald's facility by a financing company, AgStar, about 12 years before. (SR 1674) At his deposition, Dr. Little swore he could not find anything

in his records from the visit he had done before this lawsuit.[1] (SR 1675) Dr. Little indicated he had contact prompted by some other entity as well, but claimed he had no records of those prior dealings. He testified on Page 20 starting at line 18 of his deposition "Q: And you said you were contacted by another entity that wasn't AgStar. What entity was that? A: I don't recall the name. I -- I have looked back in my files, but that's over 10 years ago. And I'm unable to find -- I didn't -- I usually keep things for around seven -- seven, eight years. It's variable, seven to ten. But I have been unable to find that information and just report it -- I referred to that in my opinions, which is there in my report, but I – I did not try to go back and recreate anything in there." Throughout discovery, Dr. Little insisted he did not have any records to support his testimony claiming specific recollections. (SR 1674 - 1675). He testified during deposition: "Q: So you had been to that facility, I would assume? A: Yes. I've been to the facility multiple times and then I was at the facility again. And I don't -- I can't find anything in my records."[2] (SR 1675)

Dr. Little and the Defense had denied for years during discovery the existence of any records concerning Dr. Little's prior contact with Berwald's facility, so Berwald and his counsel were shocked on the first morning of trial when the Defense suddenly produced what were purported to be historical "written notes" (SR 1963)

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[1] In a technological failure, what was supposed to be highlighted for ease of reference in deposition transcripts instead appears blacked out in the Settled Record as if it were redacted. The text was supposed to be highlighted, not redacted.

[2] The highlighted portions of Dr. Little's deposition confirming that he had no materials appear blacked out rather than highlighted in the Settled Record on SR 1674 and SR 1675 but are recited verbatim above.

from Dr. Little. (SR 1817) Then on the second morning of trial, the Defense produced dozens of photographs purported to have been taken at the same time as the written notes suddenly produced the day before. Until those two points in time during trial, the Defense had refused to disclose even the existence of any notes or photographs.

The trial court correctly ordered Dr. Little to refrain from testifying regarding the photographs that had been withheld from Berwald. (SR 1818) Nevertheless, on cross-examination, Dr. Little volunteered unsolicited testimony in violation of the court's order. (SR 1963) Namely, Dr. Little claimed he had taken photographs which suggested that his trial testimony was corroborated by something Berwald was hiding. (SR 1963) The belated disclosure of photographs that should have been produced in discovery, coupled with Dr. Little's reference to them even after the court had ordered them excluded, put Berwald in the impossible position of having the jury speculate about photographs that either should have been produced in the first place or should never have been mentioned in front of the jury.

Dr. Little confirmed during his testimony that he earlier had provided Stan's, Inc. with everything Dr. Little had related to the case, making it clear that the Defense withheld the information until springing it on Berwald at trial. (SR 1964). This was not a situation where an expert, either intentionally or carelessly, caused a belated production of evidence. Rather, Stan's, Inc. just chose to wait until the first morning of trial to produce anything to Berwald, and even after producing the "written notes" on the first day of trial the Defense still held back until the next day as many as 100 photographs, allegedly of Berwald's facility 12 years prior. The conduct was not

unintentional and the evidence was not innocuous, given that it went directly to the crux of the warranty claims.

The jury found that Stan's, Inc. did breach the implied Warranty of Fitness for a Particular Purpose, but found the breach had caused no damage to Berwald. (SR 1486-1488)

Shortly after trial, on March 27, 2023, the trial court sent an email to the parties that had been sent to the Third Circuit Administrator from one of the Jurors that further explained the inconsistent result. The email revealed a typed letter from one of the jurors indicating that deliberations had been tainted by another juror who had undisclosed business dealings with one of the principles of Stan's, Inc. (SR 1677). The same juror signed an Affidavit confirming as much. (SR 1676) On May 7, 2024, the trial court signed the Amended Judgment. (SR 1644 -1645) The Motion for New Trial was denied on July 8, 2024. (SR 1708)

ARGUMENT

Berwald raises three issues as to why a new trial should be granted.

I. The trial court erred in finding Berwald's Breach of Contract claim should be dismissed due to the doctrine of Accord and Satisfaction.

A grant or denial of summary judgment is reviewed de novo. *Zochert v. Protective Life Ins. Co.*, 2018 S.D. 84, ¶ 18, 921 N.W.2d 479, 486. The facts and the legal conclusion derived from those facts are both disputed. The check Stan's, Inc. sent to Berwald did not constitute valid accord and satisfaction. To be valid accord

and satisfaction, there either needs to be an agreement of what is occurring, or that it be obvious to the aggrieved party what is occurring. Neither are present in this case. Instead, what occurred was that Berwald objected in writing to the unilateral cancellation and did what he had to do in order to legally mitigate his damages. In effect, he is now being punished for that mitigation.

A. The Applicable UCC Law.

The soybean meal contract is governed by the Uniform Commercial Code ("UCC") under title 57A. SDCL § 57A-2-102 applies to transactions in goods. In order to be a valid accord and satisfaction the transaction must meet all of the elements of SDCL § 57A-3-311:

> "a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
>
> (b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim."

B. The Applicable Caselaw.

"It has been settled that to constitute an accord and satisfaction, there must be an agreement between creditor and debtor to extinguish the obligation in a given manner and a compliance with that agreement by the creditor." *Hubbard Milling Co. V. Frame*, 310 N.W.2d 155, 156 (SD 1981). "Thus, the new contract takes the place of and satisfies the old executory contract" *Id.* The burden of proof to establish such

defense is on the party who seeks to rely on it. *Clancy v. Callan*, 90 SD 115, 118 (SD 1976).

C. Stan's Failed to Meet its Burden.

The burden of proof is on Stan's, Inc. to establish that the check issued to Berwald would constitute an accord and satisfaction. Stan's, Inc. claims that the line in an enclosure letter, "This payment will satisfy all obligations Between Stan's, Inc. and Sakota Dairy." (SR 636) is the new agreement. But, by then, Berwald's then-counsel Mahlke, already had objected to what Stan's, Inc. indicated on June 11, 2012 it intended to do. (SR 635) Correspondence from Attorney Mahlke on June 14, 2012 to Les Eckels, of Stan's, Inc. confirmed and explained Berwald's objection to accepting the difference between the contract price and the CBOT price as satisfaction. (SR 639). Because payment of just the difference in price clearly had been objected to, Berwald already had made it clear there was no agreement to satisfy the unilaterally "canceled" contract, and Stan's, Inc., could not prove otherwise.

Stan, Inc.'s principal, Mike Kopfman, admitted at trial that Stan's, Inc. had chosen to sell on the CBOT the contract Stan's, Inc. had protecting itself from the risk of a potential price change on roughly the amount of soybean meal it had promised Berwald, made itself whole with proceeds of the sale, then sent Berwald a check. (SR 1859-1862) Stan's Inc. traded roughly equivalent futures contracts of soybean meal on the CBOT. Stan's, Inc. may have been satisfied, but there was no corresponding agreement between Stan's, Inc. and Berwald – "the creditor and debtor" – to extinguish any obligation. There was only a one-way street where Stan's, Inc. decided

to sell the CBOT contract, pay itself, and then discontinue any other services for Berwald. Stan's, Inc.'s unilateral announcement that the contract was "canceled"--neither a legal term nor a valid concept, followed by unilaterally announcing that this check satisfied its obligations to Berwald is an attempt at a legal disclaimer that occurred *after* Stan's, Inc. already *knew* Berwald objected to it.

D. Berwald Objected to Attempted Accord.

"Accord" literally means a new *agreement* between parties. How Stan's, Inc. can claim that Berwald agreed to anything in the face of Berwald's and Berwald's attorney's June 14, 2012 correspondence is incongruent. In Berwald's June 14, 2012, letter to Stan's, Inc. he attempted to clear up any issues prior to the contract being "canceled." (SR 793). However, Stan's, Inc. simply chose to ignore this correspondence. (SR 1862) Because of Stan's, Inc.'s conduct, no fair result was reached, so Stan's, Inc.'s check to Berwald would not be a valid accord and satisfaction pursuant to SDCL § 57A- 3-311 nor caselaw. Summary judgment should never have been entered in the face of these facts and circumstances; instead, a jury should have been allowed to consider all the facts surrounding the breach of contract alleged, and ascertain the full extent of Berwald's damages. Under the parties' contract, Stan's, Inc. held what turned out to be the relevant risk, given the increase in the market price of soybean meal. But, by its unilateral actions after discovering that it held more risk than Berwald, Stan's, Inc. tried to foist the harm that came from that risk back onto Berwald who was protected in the first place by the contract. The

measure of damages is not the buy/sell risk management through futures contract pricing the way that Stan's, Inc. wants it to be.

Where the UCC is silent, SDCL 57A-1-103 allows other "principles of law and equity" to supplement the UCC's provisions. Because the UCC does not address when lost profits are direct or consequential, general contract law is applied in addressing this question. This Court has stated that "the ultimate purpose behind allowance of damages for breach of contract is to place the injured party in the position he or she would have occupied if the contract had been performed, or to 'make the injured party whole.'" *Ducheneaux v. Miller*, 488 N.W.2d 902, 915 (S.D. 1992) (citations omitted) The amount of recovery may not exceed the amount the plaintiff would have gained if the contract had been fully performed. *Id. Stern Oil Co. v. Brown*, 2018 SD 15, P16-P17. (additional citations omitted). Berwald was never made whole, he simply mitigated his losses as he was required to do.

II. A New Trial should be granted pursuant to SDCL § 15-6-59(a)(4) because of the evidence provided by Dr. Little which was never provided to Berwald until the first and second mornings of trial.

Section 59(a)(4) provides for new trial relief in the instance of, "Newly discovered evidence, material to the party making the application, which he could not with reasonable diligence have discovered and produced at the trial[.]"

Thus, in addition to the erroneous dismissal of Berwald's breach of contract claim on summary judgment, Berwald was prejudiced by Stan's, Inc. and its expert acting unfairly with discovery, documents, and testimony up to and during the jury

trial. The trial court refused to grant Berwald a new trial despite discovery abuse, a clear, sustained violation of an Order in Limine, and juror misconduct.

Rulings on motions for new trial are reviewed under the abuse of discretion standard. Whether a new trial should be granted is left to the sound judicial discretion of the trial court and this Court will not disturb the trial court's decision absent a clear showing of abuse of discretion. *Fechner v. Case*, 2003 SD 37, ¶11. While the trial court correctly ruled during trial to exclude the evidence and testimony and also to strike the violative expert testimony, on Motion for New Trial, it was an abuse of discretion to not grant a new trial given the combined problems with discovery, trial and fundamental unfairness of this discovery ambush.

This discovery ambush started the first morning of trial when the Defense produced "written notes" (SR 1963) to Berwald that its expert had denied the existence of for years. (SR 1817) The ambush continued and got worse the second morning of trial, the Defense produced dozens of photographs taken at the same time as the written notes provided the day before that were similarly denied to exist.

The trial court ordered the defense expert, Dr. Little, to refrain from testifying regarding the photographs that Dr. Little together with Stan's, Inc. had withheld from Berwald up until moments earlier. (SR 1818) Dr. Little testified about some of those issues anyway despite the trial court's order (SR 1963). The combination of as-late-as-possible disclosure, of counsel holding it back even after Dr. Little had produced it to counsel (SR 152), and then the professional witness referring to it despite a GRANTED Motion in Limine combined to produce unfair prejudice to Berwald. Berwald tried to deal with the problem created by that misconduct as adeptly as

possible during some of the cross exam – by that point, there was little choice. The gamesmanship had already created a situation where Stan's, Inc. won either way – either through the admission of what would be perceived as unfavorable documents given the necessarily lacking vetting, or though insinuation that the documents and photographs were unhelpful to Berwald and that Berwald was hiding something. But no more than a bell could be "unrung" could the damage be controlled; Berwald was unfairly ambushed by photographs provided earlier that morning that supposedly had existed for nearly 12 years in the exclusive possession of Stan's, Inc. or its expert.

A new trial should be granted pursuant to SDCL § 15-6-59(a)(4). The late-as-possible evidence provided by Dr. Little on the first and second day of trial was not disclosed prior to trial. Had it been, the outcome of the trial may well have been different as Berwald would have had a fair opportunity to investigate and rebut the allegations and insinuations created by these documents, photos, and eventual testimony.

This is because Stan's, Inc. has long taken a position that the cattle did not die from contaminated feed, but instead from sickness due to the poor condition of Berwald's facilities. (SR 36 – 44) Prior to this disclosure, Stan's, Inc., never disclosed or even pretended to have any direct, substantive evidence corroborating what its paid expert witness – who had never personally witnessed the hundreds of dead cattle carcasses – claimed was mere sickness unattributable to the defective feed.

The critical non-disclosure was not due to any failure of Berwald in attempting to learn if exactly this type of thing existed. Berwald attempted with reasonable diligence to discover any materials Stan's, Inc. or its expert had regarding its

allegation. This diligence included Interrogatories and Requests for Production of Documents Berwald served on February 16, 2017. (SR 1668-1671) Berwald's interrogatories specifically asked, "Identify and describe why you claim Plaintiff(s) abused and neglected their cattle." and requested any and all documents identified in the answers to any of the interrogatories. (SR 1669) Stan's, Inc. answered that it never alleged abuse but that the damage may have occurred from neglect or failure to maintain facilities. (SR 1673) Yet no written notes nor photographs were ever provided during the years of litigation, until the first and second mornings of trial – more than six years later.

Berwald's 2017 discovery also required Stan's, Inc. to identify any expert it expected to produce at trial and provide a copy of any materials the expert relied upon. (SR 1668-1671) Stan's, Inc. supplemented its discovery answers on November 11, 2021, and provided a report that indicated Dr. Little had previously been to Berwald's for an unrelated event. But, still the expert disclosure report omitted everything that is discussed above including photos and notes alleged to have been contemporaneously created.

Part of the unfair prejudice of Stan's, Inc. failure to produce the evidence prior to trial was that Dr. Little was a crucial witness for Stan's, Inc. case and the only witness offering substantive testimony about sickness. And all this only occurred only after Berwald's experts had testified on video months earlier, long after Dr. Little misled Berwald during his deposition. And long after Berwald's experts could have examined Dr. Little's notes and photographs.

It is for the reasons stated above that Berwald should be granted a new trial on the new evidence that was produced during trial.

III. A New Trial should be Granted pursuant to SDCL § 15-6-59(a)(2) because there was misconduct by the jury.

The third reason a new trial should be granted is because there apparently was a juror who had done business with Stan's, Inc.'s principal, Mr. Kaufman, and while Stan's Inc. presumably was privy to that knowledge, it was not disclosed to Berwald until after deliberations and verdict, when another juror felt the issue needed to be raised. Obviously, the impact on deliberations appeared to the reporting juror to have been unfair. Yet the juror in question never disclosed even knowing Mr. Kaufman during voir dire; instead, the juror kept that crucial information secret until it was revealed as it heavily and unfairly prejudiced jury deliberations. (SR 1676-1677).

A new trial should be granted pursuant to SDCL § 15-6-59(a)(2) because there was jury misconduct that was not discovered and could not have been discovered until after trial. This issue did not arise until sua-sponte, a juror raised concerns about another juror and the unfair failure or refusal of that juror to disclose the juror's connection to the Defendant's principal. The first that the court formally dealt with this was during the Motion for New Trial hearing on June 26, 2024, which was completed after the trial court ordered an extension on June 5, 2024.

Pursuant to SDCL § 15-6-59(a)(2) a new trial may be granted for:

> [m]isconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

During deliberations, an outside influence was improperly brought to bear on the jurors. (SR 1676-1677) It was brought to the trial court's attention that at least one of the jurors had extrinsic dealings with Stan's, Inc. principal, Mike Kopfman, or perhaps from his father Stan Kopfman, i.e. Stan's, Inc.. (SR 1677) According to the juror who raised concerns, this amounted to "extreme bias in favor of Stan's Inc."

The Court in *Russo v. Takata* determined that extrinsic evidence is not enough to overturn a verdict, the party must also show prejudice. 2009 SD 83, ¶ 39, 774 N.W.2d 441, 451. The test is whether the extraneous matter had a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the evidence and the instructions of the court." *Id.* The extrinsic evidence of the juror having a significant personal experience with Stan's, Inc. during a business dealing that was not revealed during voir dire, combined with the impression of the concerned juror about that juror's influence can be fairly said to have substantially hindered Berwald's right to a fair and impartial jury.

IV. The Unusual Nature of the Post-Trial Time Period.

Several things beyond Berwald's control impacted the unusual time-period between the verdict and this eventual appeal. None of these things should be fatal to Berwald's appeal.

A. Additional Procedural Background

On November 18, 2021, Stan's, Inc. filed its Motion for Partial Summary Judgment to dispose of Berwald's breach of contract claim. (SR 627) After briefing

and a hearing, the trial court granted Stan's, Inc. Motion for Partial Summary Judgment on January 24, 2022. (SR 825) At that point, Berwald still had three viable claims against Stan's, Inc., which went to trial on March 20, 2023. A jury ultimately concluded that Stan's, Inc. did breach the Implied Warranty of Fitness for a Particular Purpose but awarded no damages. (SR 1486 – 1488).

On March 27, 2023, prior to any judgments being proposed, an email was sent to the parties from the trial court including a letter sent from a juror who had contacted the trial court post-trial about juror issues. (SR 1677) The letter prompted Berwald to request the voir dire transcripts by March 29th, 2024 from the court reporter, as they could be important for determining what disclosures were actually made by the juror in question, and to better specify and deal with issues of disclosure and fairness during the briefing of any post-trial motions.

No transcripts were available until October 9th, 2024 – long after all hearings in this matter, including after the trial court denied the Motion for New Trial. (SR 1741-2109) Thus, the trial did not have the transcripts that the parties now having confirming what the concerned juror said – that no such disclosure of a professional relationship was disclosed to counsel during voir dire.

Stan's, Inc. proposed a judgment on March 28, 2023. Berwald's counsel objected to it. The trial court agreed with Berwald's Counsel that an amended judgment needed to be filed on April 5, 2023. Both parties proposed amended judgments to the trial court. (SR 1640-1641; 1644-1645) The Amended Judgments

were not entered as the parties and trial court chose to not create additional time-deadline burdens on the court reporter that she had already expressed concerns of.

A year went by, and the transcripts had not been provided. Yet, after thirteen months, the trial court signed the original Judgment proposed by Stan's, Inc. (SR1635 – 1636) This prompted additional emails from the parties as the signed judgment was the incorrect judgment. Both parties filed an amended judgment, and the trial court signed both of them. Notice of entry of both judgments was filed May 16, 2024. (SR 1646)

Still without transcripts from the trial, Berwald filed his Motion for New Trial on May 29, 2024, within the 10-day post-judgment period allowed by statute. (SR 1651) The trial court granted a continuance SDCL § 15-6-59(b) on June 5th, 2024, extending the period for ruling on the Motion for New Trial. (SR 1679) The Motion for New Trial hearing was on June 25th, 2024. After the hearing, Defendant's Proposed Findings of Fact and Conclusions of Law were entered without Berwald having an opportunity to respond. (SR 1702-1707)

The trial court Order Denying Berwald's Motion for New Trial was entered on July 8, 2024, disposing of Berwald's claim for a new trial and issued contained therein. (SR 1708)

B. Argument

Issues II. and III. raised by Berwald above stem from the denial of Berwald's Motion for New Trial as there was no method by which prior to that to deal with the

substance and merits of Stan's, Inc. discovery abuse, Dr. Little's violation of the Order in Limine, and the juror's concern about the non-disclosure of a professional relationship by another juror in deliberations who was extremely biased. The proper time, place, and manner to deal with those issues was upon the Motion for New Trial. Absent this information, it would starve Berwald an opportunity to even have those things in the record before the time for appeal would have already run.

SDCL § 15-26A-3 allows for appeals from:

> (1) A judgment;
> (2) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;
> (3) An order granting a new trial;
> (4) Any final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment [...]

Nothing in *Wilge v. Cropp,* 74 S.D. 511 changes this nor prevents the appeal from being taken, particularly in light of the extension the trial court granted pursuant to SDCL § 15-6-59(b).

Berwald appeals from the trial court's Order Denying his Motion for New Trial. The two issues raised by Berwald regarding his Motion for New Trial should not be dismissed on appeal as untimely because both suggest that the new trial should have been granted and there was not a prior judgment to appeal from with the issues properly in the record and briefed before that time. Any judgment earlier than the trial court's Order Denying Motion for New Trial, for example, did not and could not contemplate the trial court's determination of how to deal with the issues related to the juror's letter to the clerk of courts, and the potential remedy for the Defense's

discovery misconduct. Even that decision was lacking the transcript that is now available.

Issue I., above, regarding the Summary Judgment on the Breach of Contract, was a previous, non-final order on a motion that occurred years earlier. Berwald's Appeal from Stan's, Inc. Motion for Partial Summary Judgment is now appealable pursuant to SDCL § 15-26A-3. The trial court signed the Order granting Stan's, Inc. Motion for Partial Summary Judgment on January 24, 2022 and on January 25, 2022, Stan's filed its Notice of Entry of Order. However, at that time, Berwald still had three viable claims against Stan's for Breach of the Implied Warrant of Merchantability, the Implied Warranty of Fitness for a Particular Purpose, and Barratry. Therefore, this is not a final order and as such it was not appealable until the final order was issued, entered, and noticed on July 8th, 2024.

Stan's, Inc. will no doubt claim that the Notice of Entry of Judgment on May 15th, 2023 was the final order which started the timeline for appeal on this Summary Judgment issue, yet the summary judgment order remained un-final and unappealable given the court's extension of the Motion for New Tral pursuant to SDCL § 15-6-59 which left jurisdiction with the trial court on other remaining issues.

The time for appeal was tolled by Berwald's timely filed Motion for New Trial combined with the court's ordered extension to hear the same. SDCL § 15-26A-6 provides:

> The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the circuit court by any party pursuant to

> § 15-6-59 or § 15-6-50(b), or both, and the full time for appeal fixed by this section commences to run after the order made pursuant to such motion shall be signed, attested, filed and written notice of entry thereof shall have been given to the adverse party…

Therefore, Berwald's Appeal of the trial court's ruling on January 24, 2022, was not ripe until the signing of the Order denying Berwald's Motion for New Trial on July 8, 2024. Berwald's Appeal from the trial court's Order on January 24, 2022, should not be dismissed because it was not ripe until July 8, 2024.

This Court in *Nelson* stated, "[i]n determining whether a decision is final and appealable, "we examine the substance of the circuit court's order over its designation to determine whether the order 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Nelson v. Estate of Campbell*, 2023 SD 14,¶ 16, 987 N.W.2d 675, 682.

SDCL 15-6-54(b) adjudicating some, but not all, pending claims is therefore a threshold question affecting this Court's jurisdiction. *First Nat'l Bank v. Inghram*, 2022 SD 2, ¶ 30, 969 N.W.2d 47, 478-479.

Conclusion

Berwald's Appeals should not be dismissed as they are all appealable and for reasons described above Berwald should be allowed a new trial.

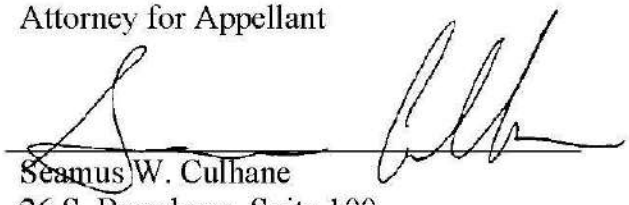
This case has been a procedural mess since long before current counsel were even involved. However, the Amended Complaint, which became the operative framework for the lawsuit, should have entitled Berwald to a trial on all claims, and a fair trial at that. One of his claims was unfairly dismissed by summary

judgment. The other two were tried, but unfairly – both because a biased juror hid his bias and because the defense ignored first the rules of discovery and then the evidentiary ruling of the court.

The solution is to start over with a new trial on all claims: Breach of Contract, Breach of the Warranty of Fitness for a Particular Purpose, and Breach of Warranty of Merchantability.

Dated this 5th day of December 2024

TURBAK LAW OFFICE, P.C.
Attorney for Appellant



Seamus W. Culhane
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CERTIFICATE OF COMPLIANCE

I hereby certify that the above Brief of Appellant has been produced in Microsoft Word using a 12.5 point proportionally spaced typeface for the text of the Brief and a 12.5 point proportionally spaced typeface for footnotes; that the Brief contains 6,186 words, and that this complies with the Court's type volume under SDCL 15-26A66(b)(2).

CERTIFICATE OF SERVICE

The undersigned, attorney for the Plaintiff/Appellant, hereby certifies that the Plaintiff/Appellant's Brief in the above-entitled action was duly served upon the interested parties on the following:

Richard Rylance
Morgan Theeler, LLP
PO Box 1025
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Attorney for Defendant/Appellee

by Odyssey File and Serve this 5th day of December 2024.

The undersigned further certifies that he caused the original of Plaintiff/Appelant's Brief to be mailed to:

Shirley Jameson-Fergel
Clerk, South Dakota Supreme Court
500 East Capitol
Pierre, SD 57501-5070

By United State mail, postage prepaid, this 5th day of December 2024.

TURBAK LAW OFFICE, P.C.
Attorneys for Plaintiff/Appellant

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STATE OF SOUTH DAKOTA) : SS COUNTY OF JERAULD)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
CALVIN BERWALD, d/b/a SOKOTA DAIRY, Plaintiff, vs. STAN'S INC., Defendant.	36CIV15-000010 **ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter having come before the Court upon the Defendant's *Motion for Partial Summary Judgment* pursuant to SDCL 15-6-56 and this issue having been considered at a telephonic hearing held at 2:00 p.m. on Tuesday, January 11, 2022, and the Plaintiff having been represented by Counsel, Dillon Martinez; and the Defendant having been represented by Counsel, Richard J. Rylance, II; and the Court having reviewed the matter contained herein and having made its oral findings of fact and conclusions of law on the record; it is hereby

ORDERED that the Defendant's Motion for Partial Summary Judgment is GRANTED.

BY THE COURT:
1/24/2022 10:38:24 AM

The Honorable Kent A. Shelton
Third Circuit Court Judge

Attest:
Neely, Lynnette
Clerk/Deputy

ATTEST

STATE OF SOUTH DAKOTA) : SS COUNTY OF JERAULD)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
CALVIN BERWALD, D/B/A SOKOTA DAIRY, PLAINTIFF, -VS- STAN'S INC., Defendant.	File # 36 CIV 15-10 TRANSCRIPT OF MOTION HEARING ORIGINAL

Before
The Honorable Kent A. Shelton
Circuit Court Judge

Beadle County Courthouse
Huron, South Dakota

January 11, 2022

APPEARANCES:

For the Plaintiff: Dillon P. Martinez
Attorney at Law
26 South Broadway # 100
Watertown, South Dakota 57201

For the Defendant: Scott A. Hindman
Attorney at Law
PO Box 1678
Sioux City, Iowa 51102

Richard J. Rylance II
Attorney at Law
PO Box 1025
Mitchell, South Dakota 57301

* *

Marie H. Bales
Official Court Reporter
450 Third Street SW
Huron, South Dakota 57350

I N D E X

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JUDGE SHELTON'S RULING 6

(Whereupon, the following telephonic proceedings were held at 2:01 p.m.)

THE COURT: Hello, this is Judge Shelton. Who do we have on here for Mr. Berwald?

MR. MARTINEZ: Dillon Martinez, Your Honor, on behalf of Plaintiff Calvin Berwald.

THE COURT: And for Stan's Inc.?

MR. RYLANCE: Richard Rylance appearing on behalf of Stan's, Your Honor.

THE COURT: This is Jerauld County civil file 15-10, Calvin Arlene Berwald, doing business as Sokota Dairy versus Stan's Inc.

This is the time set for a motion for partial summary judgment in this matter. The Defendant has brought this motion.

I've reviewed the file. I've reviewed the briefs on behalf of both parties, as well as the reply brief, the affidavits.

Mr. Rylance, would you like to proceed?

MR. RYLANCE: Yes, Your Honor. Thank you.

The briefs are short in this case, I think, because the issue is simple, Your Honor.

Back in 2012, in an effort to resolve the dispute over the feed contract, Mr. Berwald was presented with a check. After being provided notice, that check was cashed with him.

There was also some funds that were applied to his balances that were due and owing to Stan's. That check was sent with a letter that was very clear in terms of what its purpose was.

The letter, in fact, stated this payment will satisfy all obligations between Stan's and Sokota Dairy. The time it was received -- it was sent on June 18th of 2012. It was cashed shortly thereafter with no equivocal statement.

While it appears from the correspondence the Plaintiff would rather have had the contract reinstated, he accepted the terms by cashing that check.

There is a subsequent communication in August that threatened litigation, but doesn't equivocate or indicate in any way that that payment that he accepted was done on any conditional terms; and so there was an unequivocal acceptance of that payment. That is accord and satisfaction.

And I don't think it matters whether you're looking at the common law rule, which is in statute 20-7-4, or you're looking at the UCC provision in 57-3-311. The UCC provision, the latter of those two provisions adopts the common law principle of accord and satisfaction. And I don't think it makes any distinction.

I think Plaintiff's reply brief -- or opposition brief, excuse me, indicates that by selecting the appropriate case law, that which was decided on 20-7-4, the common law rule, which I don't think there's any distinction.

There are no facts alleged in any way by the Plaintiff in opposition suggesting that somehow the Plaintiff manifested a contrary intention. There is no other contemporaneous statement to go along with that. And no affidavit from Plaintiff. There is nothing in the arguments or filings made by Plaintiff in opposition to this, which suggests that accord and satisfaction wouldn't apply.

It is interesting that Plaintiff is advocating the UCC is more applicable. I think, if anything, that clarifies the elements which we have laid out in the briefs are all present, but creates only two exceptions. And that is a repayment or payment not being delivered to the proper location. Neither of which has been pled by the Plaintiff in opposition.

So neither of the exceptions which might otherwise be available in the UCC that aren't so expressly laid out in the common law statute are present.

And so for those reasons, we believe partial summary judgment as to the breach of contract claim in Plaintiff's second amended complaint should be dismissed.

THE COURT: Okay. Thank you.

Mr. Martinez?

MR. MARTINEZ: Yes, Your Honor.

Your Honor, South Dakota Codified Law 20-7-4 is a modification of common law. It's not actual common law. The Uniform Commercial Code in the notes says that it is similar

to common law, but 20-7-4 is a modification of the common law; therefore, it is not applicable. And the UCC is the applicable law to this. Given that the UCC is the applicable law, it requires that you meet every single element of it. And which requires there be a dispute between the amount owed, which would be accord and satisfaction. There is not a dispute. Stan's says -- you can even see in their letters -- we are cancelling the contract. Here is your money. There is no dispute. That was it. They drew the line. There's no dispute as to any amount owed because they never had the ability to dispute it. It was here is the line. We're drawing it. It is what it is. Here is your money. Have a good day. That's not a true accord and satisfaction.

THE COURT: Okay.

MR. MARTINEZ: And essentially, Your Honor, the rest of it we've laid out in our briefing. I'm not going to reread my brief.

THE COURT: Anything further?

MR. MARTINEZ: No, Your Honor.

THE COURT: Okay. Any response, Mr. Rylance?

MR. RYLANCE: No, Your Honor.

THE COURT: Okay. Well, like I stated, I've reviewed the briefs by both parties. Obviously, the applicable law in this is SDCL 20-7-4 and SDCL 57A-3-311.

And in using Mr. Martinez's argument, according to

57A-3-311 there must be an instrument which is tendered in full satisfaction of the claim in good faith. The amount is unliquidated and disputed. The instrument or an accompanying written communication contains a conspicuous statement to the effect that the instrument is tendered in full satisfaction of the claim. And fourthly, the instrument is paid.

There are a couple exceptions to the general rule, but I don't find that they apply here.

I find that Stan's check was tendered to satisfy the feed contract dispute. The amount was disputed. I.e. the amount was not definite exact and there was a genuine dispute regarding the amount due or the party's liability regarding that amount. The letter sent with the check explicitly stated this payment will satisfy all obligations between Stan's Inc. and Sokota Dairy. And Berwald cashed the check and received payment.

Stan's offer to pay out the remainder of Berwald's contract as an alternative to performing its obligation under the contract, which I find is the accord. And Stan's performed it's new obligation under the accord by tendering the money after Berwald accepted, signed, cashed the check. I find that to be the satisfaction.

The offer was the check and letter. Consideration was the cash instead of performing providing soybean meal. And the acceptance, cashing the check, were present to form the

accord. And the subsequent satisfaction discharged both the original agreement and the accord.

So I will grant the motion for partial summary judgment.

Mr. Rylance, if you would prepare the order.

Anything further, Mr. Rylance?

MR. RYLANCE: No, Your Honor. I will do that.

THE COURT: Mr. Martinez, anything further?

MR. MARTINEZ: No, Your Honor.

THE COURT: Okay. Thank you. Have good day.

(Whereupon, the proceedings adjourned at 2:10 p.m.)

* * * * *

STATE OF SOUTH DAKOTA)
: SS CERTIFICATE
COUNTY OF BEADLE)

I, the undersigned, a Registered Shorthand Reporter of the State of South Dakota, do hereby certify that I acted as the Official Court Reporter at the hearing in the above-entitled matter at the time and place indicated.

That I took in shorthand all of the proceedings had at the said time and place and that said shorthand notes were reduced to typewriting, and that the foregoing typewritten pages are a full and complete transcript of the shorthand notes so taken.

Dated this 9th day of October, 2024.

Marie H. Bales

Marie H. Bales
Official Court Reporter
Third Judicial Circuit

STATE OF SOUTH DAKOTA : SS COUNTY OF JERAULD	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
CALVIN BERWALD, d/b/a SOKOTA DAIRY, Plaintiff, vs. STAN'S INC., Defendant.		36CIV15-000010 **AMENDED JUDGMENT**

The above-entitled matter having come on for trial before the Court and Jury starting on the on the 20th day of March, 2023; The Honorable Kent A. Shelton presiding in the Jerauld County Courthouse, Wessington Springs, South Dakota; Plaintiff, Calvin Berwald, not having been personally present and represented by Counsel, Seamus W. Culhane and Dillon P. Martinez, of Turbak Law Office, P.C. Watertown, South Dakota; and Defendant Stan's Inc., having been personally present and represented by Counsel, Richard J. Rylance, of MorganTheeler LLP, Mitchell, South Dakota, and Scott Hindman, of Mayne, Hindman, Frey, Parry & Wingert, Sioux City, Iowa; and the Court and Jury having heard the testimony, evidence and having received the Exhibits presented; and the issues having been duly tried and the Jury having rendered its Verdict on March 22nd, 2023, which Verdict is incorporated herein by reference, the Jury having found in favor of Defendant Stan's Inc. that the Defendant did not breach an implied warranty of merchantability; the Jury having found in favor of Plaintiff Cal Berwald d/b/a Sokota Dairy that Defendant did breach an implied warranty for a particular purpose; the Jury having found in favor of Defendant Stan's Inc. that the breach of an implied warranty for a particular purpose was not a legal cause of any damages suffered by Plaintiff; and the Jury having found in favor of Stan's Inc. that the Defendant did not commit barratry; and the Court being fully advised in the premises, it is hereby

1. ORDERED, ADJUDGED AND DECREED that Plaintiff recover nothing against the Defendant Stan's Inc. on Plaintiff's claims for Breach of Implied Warranty of Merchantability; and it is further

2. ORDERED, ADJUDGED AND DECREED that Plaintiff recover nothing against the Defendant Stan's Inc. on Plaintiff's claims for Breach of Implied Warranty of Fitness for a Particular Purpose; and it is further

3. ORDERED, ADJUDGED AND DECREED that Plaintiff recover nothing against the Defendant Stan's Inc. on Plaintiff's claims for Barratry; and it is further

4. ORDERED, ADJUDGED AND DECREED that neither party shall be entitled to recover a Judgment for taxable costs and disbursements pursuant to SDCL §§ 15-6-54(d), 15-17-37, and 15-17-52.

5/7/2024 8:00:50 AM
BY THE COURT:

Attest:
Damm, Lynnette
Clerk/Deputy

HON. KENT A. SHELTON
CIRCUIT COURT JUDGE

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF JERAULD	)	THIRD JUDICIAL CIRCUIT
CALVIN BERWALD, d/b/a SOKOTA DAIRY, Plaintiff, vs. STAN'S INC., Defendant.		36CIV15-000010 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter having come before the Honorable Kent A. Shelton on June 25, 2024, for a hearing; Plaintiff, Calvin Berwald, not having been personally present and represented by Counsel, Seamus W. Culhane, not personally present, and Dillon P. Martinez, personally present, of Turbak Law Office, P.C. Sioux Falls, South Dakota; and Defendant Mike Kopfmann, having been personally present and represented by Counsel, Richard J. Rylance, II, of MorganTheeler LLP, Mitchell, South Dakota, personally present, and Scott Hindman, of Mayne, Hindman, Frey, Parry & Wingert, Sioux City, Iowa, present by phone.

The Court having reviewed the pleadings and submissions filed by the parties and having heard oral argument, and the Court having entered certain findings and conclusions on the record, which are hereby incorporated by reference, does hereby enter the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff initiated a lawsuit against Defendant on April 30, 2015.

2. Plaintiff served Defendant with Interrogatories and Requests for Production of Documents on February 16, 2017.

3. Defendant supplemented its Answer to Interrogatories on November 11, 2021, in which it identified Dr. Daniel Little as an individual likely to have discoverable information due to his previous investigation of Sokota Dairy.

4. Dr. Little was deposed on June 9, 2022.

5. At his deposition, Dr. Little informed the parties that he had a report from his investigation that he could not locate.

6. On March 15, 2023, Plaintiff issued a subpoena on Dr. Little requesting the report.

7. A jury trial began on March 20, 2023, in Wessington Springs, South Dakota.

8. Plaintiff's counsel received Dr. Little's report from his previous investigation of Sokota Dairy on the first morning of trial.

9. Plaintiff's counsel received a stack of photographs taken during Dr. Little's investigation of Sokota Dairy on the second morning of trial.

10. Prior to the commencement of the second day of trial, Plaintiff made a Motion in Limine seeking to exclude the introduction of the report and photographs into evidence.

11. Defense counsel did not object to the Motion in Limine.

12. Plaintiff's Motion in Limine was granted.

13. At the end of the second day of trial, Dr. Little testified.

14. Dr. Little provided direct testimony regarding his investigation of Sokota Dairy at trial.

15. In response to a question during cross-examination, Dr. Little began to mention the photographs.

16. Plaintiff moved to strike the testimony.

17. Plaintiff's motion was granted, and the jury was admonished.

18. During further cross-examination of Dr. Little, Plaintiff's counsel used the report in an attempt to impeach Dr. Little's testimony.

19. Trial concluded on March 22, 2023.

20. The jury found that Defendant did not breach the Implied Warranty of Merchantability or commit Barratry.

21. The jury found that Defendant breached the Implied Warranty of Fitness for a Particular Purpose, although it did not award damages.

22. On March 27, 2023, this Court provided the parties with a letter received by the Third Circuit Court Administrator from one of the jurors.

23. The letter, authored by Dr. Floyd Olson, stated that he had learned post-trial that another juror was buying a major business from Defendant.

24. In the letter, Dr. Olson alleged that the juror had an extreme influence on jury deliberations because of the business relationship.

25. On May 23, 2024, Dr. Olson signed an affidavit making similar allegations.

26. On June 5, 2024, Mike Kopfmann signed an affidavit stating that Stan's Inc. was not selling a business at the time and that the allegation of Dr. Olson was untrue.

CONCLUSIONS OF LAW

27. Any Conclusions of Law deemed to be a Finding of Fact or vice versa shall be appropriately incorporated into the Findings of Fact or Conclusions of Law, as the case may be.

28. "During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." SDCL § 19-19-606(b)(1).

29. The SDCL § 19-19-606(b)(1) prohibition "pertains to intrinsic information, which includes 'statement or discussions which took place during

deliberations.'" *Russo v. Takata Corp.*, 2009 SD 83, ¶ 28, 774 N.W.2d 441, 448 (citations omitted).

30. Intrinsic information includes "(1) the effect such extraneous information had upon [the juror's] minds; (2) statements or discussions which took place during deliberations; or (3) evidence of 'intimidation or harassment of one juror by another, or other intra-jury influences.'" *State v. Wilkins*, 536 N.W.2d 97, 99 (1995) (citation omitted).

31. A juror was one of several people who purchased a business from Defendant years before trial.

32. This information was not discovered by Dr. Olson until after trial.

33. All information in Dr. Olson's letter and affidavit is intrinsic information prohibited by SDCL § 19-19-606(b)(1).

34. This Court finds that the letter and affidavit of Dr. Olson should be excluded under SDCL § 19-19-606(b)(1).

35. For purposes of preserving the record, Defendant's Motion to Strike is denied.

36. "[W]hen a party attempts to impeach the verdict on the basis of juror misconduct and relies on testimony from a juror, that party must show evidence of extrinsic interference with the deliberations of the jury." *Buisker v. Thuringer*, 2002 SD 81, ¶ 13, 648 N.W.2d 817, 821.

37. The party must also show that he "was prejudiced by the misconduct." *Id.* (citation omitted).

38. The test for prejudice is whether "a typical, reasonable, or normal juror could have been influenced by the facts presented." *Russo*, 2009 SD 83, ¶ 43, 774 N.W.2d at 452 (citation omitted).

39. The information in Dr. Olson's letter and affidavit is intrinsic information.

40. Plaintiff has failed to show any evidence of extrinsic interference with the deliberations of the jury or prejudice.

41. "[N]ew trial motions based on newly discovered evidence request extraordinary relief; they should be granted only in exceptional circumstances and then only if the requirements are strictly met." *Id.* ¶ 31, 976 N.W.2d at 770 (citations omitted).

42. This Court finds that this is not a case in which exceptional circumstances warranting a new trial exist.

43. "To prevail on a motion for a new trial based upon newly discovered evidence, [the moving party] must [first] prove . . . [that] 'the evidence was undiscovered by the movant at the time of trial . . . .'" *State v. Otobhiale*, 2022 SD 35, ¶ 30, 976 N.W.2d 759, 770 (citations omitted).

44. Plaintiff was given the report on the first morning of trial and the photographs on the second morning of trial.

45. Plaintiff made a Motion in Limine seeking to exclude the evidence from trial.

46. This Court granted the Motion in Limine.

47. Plaintiff used the report during Dr. Little's cross-examination for impeachment purposes.

48. Plaintiff has not shown that the evidence was undiscovered by it at the time of trial.

49. "To prevail on a motion for a new trial based upon newly discovered evidence, [the moving party] must [also] prove . . . [that] 'the evidence is material, not merely cumulative or impeaching . . . .'" *Otobhiale*, 2022 SD 35, ¶ 30, 976 N.W.2d at 770 (citations omitted).

50. Plaintiff used the report in an attempt to discredit Dr. Little's testimony on cross-examination.

51. The photographs were taken during Dr. Little's investigation of Sokota Dairy.

52. Dr. Little provided direct testimony about his experience investigating Sokota Dairy.

53. Plaintiff has not shown that the evidence was material.

54. This Court finds that the report and photographs are cumulative evidence that would only be used for impeachment purposes.

55. The test used in a civil case is whether "there is a reasonable probability that the newly discovered evidence would probably produce a different result at a new trial." *Bridgewater Quality Meats, L.L.C. v. Heim*, 2007 SD 23, ¶ 19, 729 N.W.2d 387, 394 (citations omitted).

56. The report and photographs were created as part of Dr. Little's investigation of Sokota Dairy.

57. Dr. Little provided direct testimony at trial about his investigation of Sokota Dairy.

58. Plaintiff had the opportunity to cross-examine Dr. Little regarding this testimony.

59. Plaintiff has not shown that there is a reasonable probability that the materials would have affected the jury's determination.

60. A tactical strategy decision is not a basis for forming an irregularity in the proceedings to support a motion for new trial. *State v. Zephier*, 2012 S.D. 16, ¶ 17, 810 N.W.2d 770, 773.

61. Plaintiff's Motion for a New Trial is denied.

Let the Order Denying Plaintiff's Motion for a New Trial and Denying Defendant's Motion to Strike be Entered Accordingly.

BY THE COURT:

7/8/2024 8:41:01 AM

Attest:
Damm, Lynnette
Clerk/Deputy

Honorable Kent A. Shelton
Circuit Court Judge, Third Judicial Circuit

STATE OF SOUTH DAKOTA) : SS COUNTY OF JERAULD)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
CALVIN BERWALD, d/b/a SOKOTA DAIRY, Plaintiff, vs. STAN'S INC., Defendant.	36CIV15-000010 **ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL AND DENYING DEFENDANT'S MOTION TO STRIKE**

This matter having come before the Honorable Kent A. Shelton on the 25th day of June, 2024; Plaintiff, Calvin Berwald, not having been personally present and represented by Counsel, Seamus W. Culhane, not personally present, and Dillon P. Martinez, personally present, of Turbak Law Office, P.C. Sioux Falls, South Dakota; and Defendant Mike Kopfmann, having been personally present and represented by Counsel, Richard J. Rylance, II, of MorganTheeler LLP, Mitchell, South Dakota, personally present, and Scott Hindman, of Mayne, Hindman, Frey, Parry & Wingert, Sioux City, Iowa, present by phone; the Court having considered the Defendant's Motion for New Trial and having heard the arguments by Counsel; the Court does hereby Order:

1. Plaintiff's Motion for New Trial is denied.
2. Defendant's Motion to Strike is denied.

BY THE COURT:

7/8/2024 8:39:53 AM

Attest:
Damm, Lynnette
Clerk/Deputy

Honorable Kent A. Shelton
Third Circuit Court Judge, Jerauld County

STATE OF SOUTH DAKOTA) : SS COUNTY OF JERAULD)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
CALVIN BERWALD, d/b/a SOKOTA DAIRY, Plaintiff, vs. STAN'S INC., Defendants.	36CIV15-000010 **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true and correct copies of 1) Defendant's Proposed *Findings of Fact and Conclusions of Law,* 2) Defendant's Proposed *Order Denying Plaintiff's Motion for a New Trial and Denying Defendant's Motion to Strike,* and 3) this *Certificate of Service,* in the above-entitled matter were, on the 2nd day of July, 2024, electronically served and sent by email through Odyssey thereto as follows, to-wit:

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Filed: 7/2/2024 9:37 AM CST Jerauld County, South Dakota 36CIV15-000010

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL # 30783

* * * *

CALVIN ARLEN BERWALD,
d/b/a SOKOTA DAIRY — Plaintiff and Appellant,

v.

STAN'S INC, — Defendant and Appellee.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE THIRD JUDICIAL CIRCUIT
JERAULD COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE KENT A. SHELTON
Circuit Judge

* * * *

APPELLEES' BRIEF

* * * *

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Notice of Appealed filed July 29, 2024

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PRELIMINARY STATEMENT

Appellant, Calvin Berwald d/b/a Sokota Dairy, will be referred to as Plaintiff or Berwald. Appellee, Stan's Inc., will be referred to as Defendant or Stan's. References to the Settled Record will be made using *SR* followed by the page number corresponding to the Jerauld County Clerk of Courts prepared index.

JURISDICTIONIONAL STATEMENT

This Court does not have jurisdiction to hear this appeal. The Orders sought to be appealed are not appealable pursuant to SDCL 15-26A-3. Berwald is incorrect in his assertion in the Jurisdictional Statement of Appellant's Brief that he appealed from the Amended Judgments dated May 7, 2024. The Amended Judgments are not referred to in Berwald's Docketing Statement or in Berwald's Notice of Appeal.

STATEMENT OF LEGAL ISSUES

I. The South Dakota Supreme Court does not have jurisdiction to hear this appeal under SDCL 15-26A-3.

The trial court did not issue an opinion on this issue.

Wilge v. Cropp, 54 N.W.2d 568 (S.D. 1952).
Johnson v. Lebert Constr., Inc., 2007 S.D. 74, 736 N.W.2d 878.
Huls v. Meyer, 2020 S.D. 24, 943 N.W.2d 340.
State Highway Commission v. Madsen, 119 N.W.2d 924 (S.D.1963)

SDCL 15-26A-3
SDCL 15-26-1 (1967)
SDCL 15-26A-4
SDCL 15-26A-7
SDL 15-26A-8

II. The trial court did not err in granting Stan's Motion for Partial Summary Judgment on the Breach of Contract Claim pursuant to the doctrine of Accord and Satisfaction.

The trial court granted Stan's Motion for Partial Summary Judgment, concluding that the doctrine of accord and satisfaction eliminated Berwald's breach of contract claim.

Eberle v. McKeown, 159 N.W.2d 391 (S.D. 1968)
Kirkeby v. Renaas, 186 N.W.2d 513 (S.D. 1971)
Clancy v. Callan, 238 N.W.2d 295 (S.D. 1976)

SDCL 57A-3-311
SDCL 20-7-4

III. The trial court did not abuse its discretion in its denial of Berwald's motion for a new trial based on newly discovered evidence.

The trial court denied Berwald's Motion for New Trial based on newly discovered evidence because the evidence was not undiscovered at the time of trial, the evidence was cumulative, and Berwald did not prove that the evidence would probably produce a different result at trial.

State v. Otobhiale, 2022 S.D. 35, 976 N.W.2d 759
Bridgewater Quality Meats, L.L.C. v. Heim, 2007 SD 23, 729 N.W.2d 387
State v. Gehm, 1999 S.D. 82, 600 N.W.2d 535

SDCL 15-6-59(a)(4)

IV. The trial court did not abuse its discretion in denying Berwald's Motion for a New Trial based on juror misconduct.

The trial court denied Berwald's Motion for Trial based on juror misconduct because the letter and affidavit provided by the juror was intrinsic evidence.

Bucholz v. State, 336 N.W.2d 834 (S.D. 1985)
Shamburger v. Behrens, 418 N.W.2d 299 (S.D. 1988)
Russo v. Takata Corp., 2009 S.D. 83, 774 N.W.2d 441

SDCL 19-19-606

STATEMENT OF THE CASE

In April of 2015, Berwald filed his original Complaint with the trial court in Jerauld County, Third Judicial Circuit. *SR* at 1-10. On November 4, 2021, Berwald amended his complaint alleging breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, breach of contract, and barratry. *SR* at 595-605. On January 4, 2022, Stan's filed their second amended answer with affirmatives defenses, including accord and satisfaction. *SR* at 772-777.

Stan's filed a motion for partial summary judgment as to Berwald's breach of contract claim alleging that it was barred by the doctrine of accord and satisfaction. *SR* at 627. The trial court issued an oral ruling on January 11, 2022, and signed its Order on January 25, 2022, granting Stan's motion for partial summary judgment dismissing the breach of contract claim. *SR* at 1747, 825.

A jury trial was held March 20-22, 2023. *SR* at 1644. The jury ultimately determined that Stan's did not breach the implied warranty of merchantability, but did breach the implied warrant for a particular purpose. *SR* at 1486. Additionally, the jury concluded that Berwald did not incur damages as a result of the breach of the implied warranty for a particular purpose and found that Stan's did not engage in barratry. *SR* at 1487-1488.

On May 29, 2024, Berwald filed a motion for new trial. *SR* at 1651. On July 2, 2024, the trial court entered Findings of Fact and Conclusions of Law along with an Order denying Berwald's motion for new trial. *SR* at 1702-1708. Berwald filed his notice of appeal on July 29, 2024. *SR* at 1730.

STATEMENT OF THE FACTS

In 2012, Stan's and Berwald entered into a contract in which Stan's would provide soybean meal to Berwald. *SR* at 13. Stan's would provide 400 tons of soybean meal at $319 per ton. *SR* at 480. Berwald received approximately one hundred and twenty-five (125) tons of soybean meal from Stan's between February 2012 and May 2012. *Id.*

On June 11, 2012, a letter was sent to Berwald indicating that Stan's would be cancelling soybean meal contract #1267 due to insufficient credit performance. *SR* at 635. The remaining balance of 274.56 tons would be priced at the July Soybean Meal futures

on the Chicago Board of Trade for a price of $45 per ton. *Id.* The funds would be applied to the accounts receivable, and a payment would be issued to Berwald for any balance. *Id.*

In a letter on June 14, 2012, Berwald requested that the contract remain in effect. *SR* at 639. On June 18, 2012, a letter was sent by Stan's to Berwald consistent with their communication on June 11, 2012. *SR* at 636. This letter itemized the outstanding accounts receivable from Berwald, applied the proceeds from the cancellation, and contained a check payable to Berwald in the amount of $6,921.57. *SR* at 636-638. The letter enclosed with the check noted, "This payment will satisfy all obligations between Stan's Inc and Sokota Dairy." *SR* at 636.

Berwald signed and cashed the settlement check on behalf of Sokota Dairy. *SR* at 638. The check posted on June 20, 2012, and was endorsed, "Sokota Dairy, Cal A. Berwald." *Id.* Berwald sent a letter to Stan's through counsel on August 17, 2012, which did not repudiate the agreed-upon settlement. *SR* 640-641.

On April 30, 2015, Berwald filed a lawsuit against Stan's alleging, among other things, that Stan's had improperly mixed monensin into the feed to be provided to Berwald's cattle. *SR* at 4. Berwald alleges, due to the improper feed mixing by Stan's, that two hundred and twenty-three (223) of his calves died as a result. *SR* at 5. Berwald filed his second amended complaint on November 4, 2021, alleging breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, breach of contract, and barratry. *SR* at 595-605.

On November 18, 2021, Stan's filed a motion for partial summary judgment as to Berwald's breach of contract claim under the doctrine of accord and satisfaction. *SR* at

627. On January 24, 2022, the trial court granted Stan's motion for partial summary judgment. *SR* at 825.

On June 9, 2022, Dr. Little was deposed. *SR* at 852. During Dr. Little's deposition, he testified that he inspected Berwald's dairy in 2010. *SR* at 1817. At the time of his deposition, Dr. Little recalled taking photographs of the dairy and writing a report after his inspection. *Id.* Little testified that he was not able to locate those photographs or the report. *SR* at 1817-1818. During his visit in 2010, Dr. Little had concerns about the living conditions of the cattle being cared for by Berwald. *SR* at 1930.

On March 13, 2023, Berwald subpoenaed Dr. Little to produce the inspection report he testified to in his deposition. *SR* at 1291. On the first morning of trial, March 20, 2023, Stan's counsel provided the report to Berwald. *SR* at 1818. On the second morning of trial, March 21, 2023, Stan's received and provided Berwald with photographs taken by Dr. Little during his 2010 inspection. *SR* at 1817. Berwald brought a motion in limine on the morning of March 21, 2023, regarding the photographs. *SR* at 1818. Stan's did not object and the motion was granted by the trial court. *Id.*

During Dr. Little's cross-examination, Berwald's counsel referenced the report after Dr. Little testified that he had not provided a written report from his 2010 inspection to Stan's because he did not believe he had the report in his possession. *SR* at 1962-1963. During this questioning, Dr. Little testified that he was unaware he still had the report and mentioned the photographs he took in 2010 as well. *SR* at 1963. Berwald's counsel moved to strike the testimony regarding the photos. *Id.* The trial court granted the motion. *Id.*

Dr. Little testified that "this was the most deplorable situation [he had] ever seen in a dairy operation." *Id.* The living and feeding conditions of the cattle were of concern to Dr. Little due to mold growth in sileage and "a pallet of product containing … 1200 mg of Rumensin stacked in one of the bays and being actively fed to animals." *SR* at 1930-33.

The jury ultimately determined that Stan's did not breach the implied warranty of merchantability, but did breach the implied warrant for a particular purpose. *SR* at 1486. Additionally, the jury concluded that Berwald did not incur damages as a result of the breach of the implied warranty for a particular purpose and found that Stan's did not engage in barratry. *SR* at 1487-1488.

The trial court signed the first Amended Judgment and the second Amended Judgment on May 7, 2024. *SR* at 1640-1641, 1644-1645. On May 16, 2024, Notice of Entry of the Amended Judgments was filed. *SR* at 1646.

Following trial, the court received a letter from a juror, Dr. Floyd Olson, stating that he believed one of the jurors was biased towards Stan's by supporting them throughout deliberations. *SR* at 1677. When discussing the situation with his wife, she stated "well of course she's on the side of Stan's, she's buying a business from Stan's." *Id.*

A motion for new trial was filed by Berwald due to the alleged juror misconduct and based upon the newly discovered evidence produced by Dr. Little at trial on May 29, 2024. *SR* at 1651. Berwald and Stan's provided briefs and oral argument on the issue. *SR* at 1652, 1681, 1750. Accompanying Berwald's motion and brief was an affidavit of Dr. Floyd Olson stating that information that the juror was purchasing a business from Stan's

was prejudicial. *SR* at 1676. An affidavit was provided by Mike Kopfmann, the President of Stan's Inc., stating that "Stan's Inc. was not selling any business at the time of trial[.]" *SR* at 1694. On July 2, 2024, the trial court issued Findings of Fact and Conclusions of Law along with an Order denying Berwald's motion for new trial. *SR* at 1702, 1708.

Berwald filed a notice of appeal and docketing statement on July 29, 2024. *SR* at 1730-1731. The orders included in Berwald's docketing statement were the Orders Granting Defendant's Motion for Partial Summary Judgment on January 24, 2022, and the Order Denying Berwald's Motion for New Trial on July 8, 2024. *SR* at 1732. Neither the Notice of Appeal nor Docketing Statement referred to the Judgment or Amended Judgments. *SR* at 1730-1732.

ARGUMENT

I. The South Dakota Supreme Court does not have jurisdiction to hear this appeal under SDCL 15-26A-3.

Standard of Review

Questions of jurisdiction are legal questions reviewed under a de novo standard," Further, "[i]ssues of constitutional and statutory interpretation are ... subject to de novo review." *State v. Waldner*, 2024 S.D. 67, ¶ 18, 14 N.W.3d 229, 236.

Legislative History

SDCL 15-26A-3 (1980) dictates which judgments and orders may be appealed to the South Dakota Supreme Court.[1] SDCL 15-26A-3 remains unchanged since its last amendment in 1986.[2] The respective predecessors to SDCL 15-26A-3 are SDCL 15-26-1 (1967), SDC 1939 & Supp 1960, §33.0701, and § 3168 Rev.Code 1919.

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[1] SL 1980, Ch. 384, pp. 615-616.
[2] SL 1986, Ch. 160, pp. 377: § 15-26A-3 was updated to include current subsection (7).

§ 3168(3) Rev.Code 1919 specifically indicated, "the following orders, when made by the court, may be carried to the supreme court…3)…when it grants or refuses a new trial." Emphasis added. Twenty years later, in 1939, SDC 33.0701(3) provided, "Appeals to the Supreme Court from the Circuit Court, or from the County Court…may be taken as provided in this title from: (3) An order granting a new trial." Emphasis added. The legislature specifically removed the right to appeal from an order denying a new trial in 1939. See *Wilge v. Cropp*, 513, 54 N.W.2d 568, 568 (S.D. 1952), and *Johnson v. Lebert Const., Inc.*, 2007 S.D. 74, ¶ 9, 736 N.W.2d 878, 881.

In the various iterations and updates to SDCL 15-26A-3 since 1939, subsection (3) has remained untouched—an appeal of right only exists with respect to an order granting a new trial. This Court held as much in *Wilge v. Cropp* in 1952 and again in *Johnson v. Lebert Const., Inc.* in 2007.

SDCL 15-26A-4 was created by Supreme Court Rule 79-1 in 1979.[3] It became law the following year in 1980. SDCL 15-26A-4, states in part, "Failure of an appellant to take any step other than timely service and filing of a notice of appeal does not affect the validity of the appeal, but is grounds only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal." Emphasis added. This Court's appellate jurisdiction is never "presumed but must affirmatively appear from the record." *Matter of Estate of Ager*, 2024 S.D. 55, ¶ 6, 11 N.W.3d 878, 879 (citing *Johnson*, supra).

SDCL 15-26A-7 specifically provides, "on appeal from a judgment the Supreme Court may review any order, ruling, or determination of the trial court, including an order

[3] SL 1979, Ch. 361, pp. 622-641.

denying a new trial, and whether any such order, ruling, or determination is made before or after judgment involving the merits and necessarily affecting the judgment and appearing upon the record." SDCL 15-26A-7 traces its origins to SDC 1939 & Supp 1960 § 33.0710. The Legislature specifically contemplated how an order denying a motion for new trial or an appeal from an order granting partial summary judgment should be appealed in 1939. No subsequent change or decision has altered the reference in SDCL 15-26A-7 to an order denying a motion for a new trial.

SDCL 15-26A-8 provides, "Such of the matters specified in subdivisions 15-6-59(a)(6) and (7) as may have been timely presented to the trial court by motion for directed verdict, request for findings, or other apt motion, offer, or objection may be reviewed on appeal from the judgment without necessity for an application for new trial." Emphasis added.

Argument

This Court issued an Order to Show Cause to Berwald on August 15, 2024. The Order to Show Cause indicated, "it appearing to the Court that the order form which appeal is sought in the above-entitled matter may not be an order appealable of right pursuant to SDCL 15-26A-3." The Order to Show Cause directed Berwald to show cause why the appeal should not be dismissed on the ground that no appeal of right exists from the order sought to be appealed. This Court directed this appeal to proceed, specifically ordering the parties to address whether *Wilge*, supra, applies under these circumstances where there have been changes to the rules of civil appellate procedure since that decision, including the adoption of SDCL 15-26A-4.

Berwald's only refence to *Wilge* is a conclusory statement that *Wilge* does not prevent this appeal from being filed. Appellant's Brief, p. 21. Berwald appears to have sidestepped the direction of the Court in addressing the Jurisdictional issue raised by the Court's Order to Show Cause. Berwald fails to address the impact of *Wilge* and the legislative changes that have occurred since 1952. Berwald also fails to recognize the issue present by his failure to appeal from the judgment in this matter.

Berwald focuses on the timeliness of the filing of the notice of appeal, rather than its substance.[4] Stan's concedes that SDCL 15-26A-6 applies and the running of the time for appeal began on the filing of the Notice of entry of the Amended Judgments.[5] Neither the Amended Judgments, signed May 7, 2024, nor the prior Judgment, signed January 24, 2024, were referenced in Berwald's Notice of Appeal or Docketing Statement as required by SDCL 15-26A-4. Instead, the orders appealed from and included in Plaintiff's Notice of Appeal and Docketing Statement are the Order Granting Defendant's Motion for Partial Summary Judgment on January 24, 2022, and the Order Denying Plaintiff's Motion for New Trial on July 8, 2024.[6] This Court does not have jurisdiction to review those orders pursuant to SDCL 15-26A-3.

This Court has recently determined that the appropriate remedy is dismissal when this Court lacks appellate jurisdiction of an appellant's failure to comply with the requirements of 15-26A. See e.g. *Dittus v. Black Hills Care & Rehab. Ctr., LLC,* 2024 S.D. 80. Berwald did not appeal from the Judgment, or the Amended Judgments signed

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[4] Appellant's Brief, p. 21 arguing that the issues, "should not be dismissed on appeal as untimely."
[5] The Trial Court signed similar, but distinct Amended Judgments filed by the parties.
[6] Berwald incorrectly states in his Jurisdictional Statement in his Appellant's Brief that he appealed from the Judgment or subsequent Amended Judgments.

by the Trial Court on January 24, 2024, and May 7, 2024, respectively.[7] Berwald did not provide any explanation in his response to the Order to Show Cause. In fact, it appears that Berwald did not understand the central issue – whether the Orders appealed from in his Notice of Appeal are or were appealable of right pursuant to SDCL 15-26A-3. For the reasons stated below, this Court does not have jurisdiction over the orders identified in the Notice of Appeal or Docketing Statement.

A. Order Granting Partial Summary Judgment.

As indicated in the Notice of Appeal, the trial court entered its Order granting partial summary judgment in favor of Stan's with regard to Berwald's breach of contract claim. The Order granting partial summary judgment was signed on January 24, 2022. *SR* at 825. This Court in *Huls v. Meyer* reasoned that a summary judgment order that resolves a portion of the case cannot serve as a final appealable order. 2020 S.D. 24, ¶ 14, 943 N.W.2d 340, 344.

A party may not appeal a circuit court order to the Supreme Court "unless it is authorized under SDCL 15-26A-3." *Dollar Loan Center of South Dakota, LLC, v. Department of Labor and Regulation, Division of Banking*, 2018 S.D. 77, ¶ 14, 920 N.W.2d 321, 324-25. Where a circuit court's order does not resolve all the claims in an action, "the ruling [is] not appealable as a matter of right unless the circuit court determine[s] that there [is] no just cause for delay and direct[s] entry of a final judgment [pursuant to SDCL 15-6-54(b)]. *Goens v. FDT, LLC*, 2022 S.D. 71, ¶ 4, 982 N.W.2d 415, 517-18. There was no certification of the Order Granting Partial Summary Judgment

[7] See Fn. 6.

pursuant to SDCL 15-6-54(b).[8] The Order Granting Partial Summary Judgment did not resolve all the claims in the action.

"Ordinarily, a notice of appeal that specifies the final judgment in a case should be understood to bring up for review all of the previous rulings and orders that led up to and served as a predicate for that final judgment." *Stromberger Farms, Inc. v. Johnson*, 2020 S.D. 22, ¶ 18, 942 N.W.2d 249, 255 (internal citation omitted). There is no authority suggesting that an appeal referencing only specific orders or rulings necessarily relate to the subsequent judgment.

In the present case, Berwald failed to identify any Judgment in his Notice of Appeal. Such failure deprives this Court of Jurisdiction pursuant to SDCL 15-26A-3. Berwald failed to appeal from the Judgment—the only final order which would give this court jurisdiction under SDCL 15-26A-7 and 15-26A-8 to review the Order Granting Partial Summary Judgment.

This Court does not have jurisdiction to review the Order Granting Partial Summary Judgment entered on January 24, 2022, pursuant to SDCL 15-26A-3. This appeal should be dismissed pursuant to this Court's authority under SDCL 15-26A-4.

B. Order denying Motion for New Trial

Stan's concedes that the Order denying Berwald's Motion for New Trial extends the time for filing the notice of appeal pursuant to SDCL 15-26A-6. Timing, however, is not the issue regarding this Court's jurisdiction. An appeal may not be taken from an

[8] This fact is undisputed and Berwald does not assert that the Partial Summary Judgment Order was a Final Order. Appellant's Brief, p. 22.

order denying a new trial. *State Highway Commission v. Madsen*, 119 N.W.2d 924, 927 (S.D.1963) (citing *Meyer v. Meyer*, 77 N.W.2d 559, 560 (S.D.1956)).

This Court considered this issue in *Wilge v. Cropp*, 74 S.D. 511, 54 N.W.2d 568 (1952), and *Johnson v. Lebert Const., Inc.*, 2007 S.D. 74, 736 N.W.2d 878. This Court in *Wilge* went on to clarify that it is the judgment itself that gives rise to the right to appeal, noting "the judgment in such circumstances has already been entered an appeal can of course be taken from the judgment." *Id.* This Court also determined that an order denying a new trial is not appealable under subsections (2) or (4), reviewing the language contained in the same subsections of SDCL 15-26A-3.[9]

In *Johnson*, this Court held an order denying a motion for a new trial is "reviewable in an appeal from the judgment." 736 N.W.2d at 882. If not appealed from the judgment, a post-judgment motion, such as an order denying a motion for a new trial, is not reviewable by this Court. In fact, *Johnson* outlines that the precedent set forth in *Wilge*, supra, has been affirmed by this Court on multiple occasions. *Id.* citing *Oahe Enterprises Inc. v. Golden*, 218 N.W.2d 485 (S.D. 1974); *Waln v. Putnam*, 196 N.W.2d 579 (S.D. 1972); *Fales v. Kaupp*, 161 N.W.2d 855 (S.D. 1968); *State Highway Comm. v. Madsen*, 119 N.W.2d 924, 927 (S.D. 1963); *Meyer v. Meyer*, 77 N.W.2d 559 (S.D. 1956); and *Wilge v. Cropp*, 54 N.W.2d 568 (S.D. 1952). This precedent has remained undisturbed by this Court for more than seventy years and was re-affirmed following the legislative changes that have occurred since *Wilge* was decided. *Johnson* was decided in

[9] The wording of subsections (2) and (4) is unchanged in the transition from SDC 33.0701 to SDCL 15-26-1 to SDCL 15-26A-3.

2007, long after the legislative changes that gave rise to the current provisions of SDCL 15-26A.

Nothing in the subsequent changes or additions to what is now contained in SDCL 15-26A, specifically regarding SDCL 15-26A-3 and 15-26A-4, gives rise to a right to appeal from an Order denying a motion for a new trial. Instead, the legislature specifically contemplated that an appeal from a judgment would necessarily and specifically include a review of an Order denying a motion for a new trial. See SDCL 15-26A-7 and SDCL 15-26A-8. Berwald failed to appeal from the judgment – his failure is fatal and his appeal should be dismissed pursuant to this Court's authority in SDCL 15-26A-4 for failure to comply with SDCL 15-26A-3.

II. The trial court did not err in granting Stan's Motion for Partial Summary Judgment on the Breach of Contract Claim pursuant to the doctrine of Accord and Satisfaction.

Standard of Review

The standard of review applied by this Court to a trial court's decision on a motion for summary judgment is *de novo*. *N. Star. Mut. Ins. v. Korzan*, 2015 S.D. 97, ¶ 12, 873 N.W.2d 57, 61.

> In reviewing a grant or a denial of summary judgment under SDCL 15-6-56(c), we must determine whether the moving party demonstrates the absence of any genuine issue of material fact and [established] entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party[,] and reasonable doubts should be resolved against the nonmoving party.

Citibank (S.D.), N.A. v. Hauff, 2003 S.D. 99, ¶ 10, 668 N.W.2d 528, 538.

Argument

The doctrine of accord and satisfaction is an affirmative defense which must be proven by the party relying on it. *Lang v. Burns*, 97 N.W.2d 863, 8365 (S.D. 1959). To

succeed on its summary judgment claim, Stan's "must make it clear that the check which [they] sent is offered only on condition that it is taken in full payment." *Hubbard v. Milling Co. v. Frame*, 310 N.W.2d 155, 157 (S.D. 1981) (quoting Williston on Contracts, Third Edition, Section 1856).

The relevant UCC statute, SDCL § 57A-3-311, provides:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
> (b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.
> (c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:
> (1) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.
> (2) The claimant, whether or not an organization, proves that within ninety days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph (1)(i).
> (d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

The South Dakota rule on accord and satisfaction is set forth in SDCL § 20-7-4 (1987) as follows:

> Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing [...] for that purpose though without any new consideration extinguishes the obligation.

Rang v. Hartford Variable Annuity Life Ins. Co., 908 F.2d 380, 382 (8th Cir. 1990). The court in *Rang* upheld the grant of summary judgment by the trial court noting, "we hold that where, as here, the endorsement is admitted, is unequivocal and clearly states that the check is accepted as a complete discharge of debt, such is the result. *Id.* at 383 (relying on *Petroleum Collections, Inc. v. Sulser*, 265 Cal.App.2d Supp. 976, 70 Cal.Rptr. 537, 539 (1968)). Following the decision by the Eighth Circuit, the South Dakota Supreme Court, relying on *Eberle v. McKeown*, 159 N.W.2d 391 (S.D. 1968), held that "the cashing of a check with similar wording extinguished the obligation even though it be for an amount the debtor admitted was due and needed no new consideration." *Kirkeby v. Renaas*, 186 N.W.2d 513, 520 (S.D. 1971).

To support his claim, Berwald cites *Hubbard Milling Co. v. Frame*, contending that no agreement existed between Berwald and Stan's that would have extinguished Stan's obligation. 310 N.W.2d at 156. However, the check in *Hubbard* lacked notation that the check offered by debtor was on the condition that it would be accepted in full payment of the debt. *Id.* at 157. The check offered by Stan's was accompanied by a letter on June 18, 2012, stating, "This payment will satisfy all obligations between Stan's Inc. and Sokota Dairy." *SR* at 636. This statement in the letter accompanying the check extinguishes the obligation under the analysis in *Kirkeby v. Renaas,* supra. Letters were received by Stan's on June 14, 2012, and August 14, 2012, neither of the letters objected or contained any other statement contrary to the June 18, 2012, letter expressing any contrary intention. SR at 639-641. Berwald accepted and cashed the check as final payment of the soybean meal contract without any restrictive, equivocal, or limiting endorsement made on the check. *SR* at 638. It is factually impossible for Berwald to have

both objected to the proffered settlement, and also to have cashed the check and accepted the proffered terms of the accord. Berwald accepted monies, which he was not owed or otherwise due, but for the buyout of the terms of his contract with Stan's.

In other cases, factually consistent with the present matter, the Court upheld summary judgment based on accord and satisfaction.

> In *Qualseth v. Thompson*, 1921, 44 S.D. 190, 183 N.W. 116, for example, we held that the endorsing and cashing of a check marked "Balance for sawing lumber" constituted an acceptance in writing of part performance. We also found accord and satisfaction in *Adams v. Morehead*, 1922, 45 S.D. 216, 186 N.W. 830, when a creditor cashed a debtor's draft which had been sent "to close my account." In *Eberle v. McKeown*, 1968, 83 S.D. 345, 159 N.W.2d 391, the word 'final' appeared on checks tendered on a disputed debt and we found accord and satisfaction.

Clancy v. Callan, 238 N.W.2d 295, 298-99 (S.D. 1976).

The statement accompanying the check tendered by Stan's meets the requirements for accord and satisfaction established by the case law cited by *Clancy v. Callan*. Berwald wanted to continue with the contract; Stan's was forced to cancel the contract due to payment issues. Stan's offered to resolve the dispute based upon the current market price, resulting in the June 18, 2012 letter to Berwald along with the check in the amount $6,971.25. Berwald cashed the check without equivocation, accepting the terms of the settlement proposed. While Berwald's correspondence suggested that they would have preferred for the contract to remain as of June 14, 2012, it is clear that Berwald accepted the terms of the proffered settlement by endorsing and accepting the payment.

In its oral ruling on January 11, 2022, and Order on January 25, 2022, the trial court granted Stan's motion for partial summary judgment and dismissed the breach of contract claim on the grounds that accord and satisfaction had been established. *SR* at 1747, 825. Specifically, The trial court noted:

> Stan's offer to pay out the remainder of Berwald's contract as an alternative to performing its obligation under the contract, which I find is the accord. And Stan's performed it's new obligation under the accord by tendering the money after Berwald accepted, signed, cashed the check. I find that to be the satisfaction. The offer was the check and letter. Consideration was the cash instead of performing providing soybean meal. And the acceptance, cashing the check, were present to form the accord. And the subsequent satisfaction discharged both the original agreement and the accord.

SR at 1747-1748.

III. The trial court did not abuse its discretion in its denial of Berwald's motion for a new trial based on newly discovered evidence.

Standard of Review

This Court's standard of review for an order denying a motion for new trial is abuse of discretion. *Kusser v. Feller*, 453 N.W.2d 619, 621 (S.D. 1990). The Court must find that "an abuse of discretion occurred only if no judicial mind, in view of the law and the circumstances of the particular case, could reasonably have reached such a conclusion." *Junge v. Jerzak*, 519 N.W.2d 29, 31 (S.D. 1994).

Argument

A new trial may be granted due to "[n]ewly discovered evidence, material to the party making the application, which he could not with reasonable diligence have discovered and produced at trial." SDCL § 15-6-59(a)(4). Berwald must prove four factors to prevail on his motion for a new trial based on newly discovered evidence:

> (1) the evidence was undiscovered by the movant at the time of trial; (2) the evidence is material, not merely cumulative or impeaching; (3) that it would probably produce [a different result at a new trial]; and (4) that no lack of diligence caused the movant to fail to discover the evidence earlier.

State v. Otobhiale, 2022 S.D. 35, ¶ 30, 976 N.W.2d 759, 770 and *Bridgewater Quality Meats, L.L.C. v. Heim,* 2007 SD 23 ¶19, 729 N.W.2d 387, 394. "[N]ew trial motions based on newly discovered evidence request extraordinary relief; they should be granted

only in exceptional circumstances and then only if the requirements are strictly met." *Id.* ¶ 31.

Berwald must prove that "the evidence was undiscovered by [him] at the time of trial…" *Id.* ¶ 30. Dr. Little was deposed on June 9, 2022. During his deposition, Dr. Little indicated that he had a report from an investigation of Berwald's dairy that Little could not locate. Berwald sent a subpoena to Little on March 15, 2023. Trial began on March 20, 2023. *SR* at 1723. Stan's delivered Dr. Little's report to Berwald on the first morning, followed by the photographs on the second day. *SR* at 1818. Berwald had the opportunity to inspect and object to this material. *Id.* Berwald's counsel chose to make a Motion in Limine prohibiting Stan's from introducing the photographs into evidence. *SR* at 1816. Berwald did not ask to delay or postpone the trial during the Motion in Limine argument. *SR* at 1817-1818. Stan's did not object and the trial court granted Berwald's Motion in Limine. *SR* at 1816. During Dr. Little's cross-examination, Berwald's counsel introduced Little's report to impeach Dr. Little, but did not offer it into evidence. *SR* at 1962-1963. Berwald cannot satisfy the first element of proof, as he had access to the evidence during trial, had a Motion in Limine granted, and subsequently introduced Little's report during cross-examination.

Even if This Court finds the first element is met, Berwald must prove that "the evidence is material, not merely cumulative or impeaching." *State v. Otobhiale*, 2022 S.D. 35, ¶ 30, 976 N.W.2d at 770. "Evidence that is merely cumulative is not newly discovered and does not constitute grounds for a new trial." *State v. Timmons*, 2022 S.D. 28, ¶ 26, 974 N.W.2d 881, 889. The Court has held that "a new trial is not warranted in cases where the 'newly discovered evidence would merely impeach or discredit a trial

witness[.]'" *Id.* ¶ 26 at 890 (quoting *State v. Lodermeier*, 481 N.W.2d 614, 628 (S.D. 1992)).

The report and photographs provided by Dr. Little stemmed from a prior investigation at Berwald's dairy operation and are cumulative. Dr. Little provided direct testimony regarding his investigation of Plaintiff's dairy at his deposition and at trial. The photographs and report merely reinforced his findings. Under *State v. Timmons*, this evidence is merely cumulative because it simply serves to support Dr. Little's testimony. Furthermore, Berwald used Little's report during trial to impeach Dr Little. This impeachment supports the conclusion that this evidence would only serve to discredit Dr. Little and such discovery of evidence does not support the granting of a new trial.

Third, Berwald must prove "whether there is a reasonable probability that newly discovered evidence would probably product a different result at a new trial." *Bridgewater Quality Meats*, 2007 S.D. 23, ¶ 19, 729 N.W.2d at 394 (citations and internal quotations omitted). "'[I]t is not enough to ask if the verdict would possibly be different. The question is would it probably be different.'" *Id.* (quoting *State v. Gehm*, 1999 S.D. 82, ¶ 17, 600 N.W.2d 535, 542) emphasis added.

There is no reasonable probability that Dr. Little's photographs would have changed the trial's outcome. Dr. Little testified about his investigation and was cross-examined on it. The report and photographs merely served as visual aids, as his testimony was based on the same visit. The lack of probability of a different result is further supported by the jury's verdict. Dr. Little opined that Stan's did not breach the implied warranty of merchantability or the implied warranty of fitness for a particular purpose. However, the jury found that Stan's did breach the latter warranty, suggesting that they

did not rely on Dr. Little's testimony in reaching their verdict, suggesting Berwald's impeachment efforts with the report were effective and the photographs would have had, if anything, the same result.

Lastly, Berwald must prove "that no lack of diligence caused the movant to fail to discover the evidence earlier." *State v. Otobhiale*, 2022 S.D. 35, ¶ 30, 976 N.W2d at 770 (citations omitted). "Due diligence requires reasonable exertion to discover evidence." *Gehm*, 1999 S.D. 82, ¶ 15, 600 N.W.2d at 541. "Courts have long been skeptical of new trial motions asserting 'newly discovered' evidence when petitioners fail to exercise reasonably diligence to discover the evidence beforehand." *Id.* ¶ 16 (citations omitted). "The rule viewing with doubt 'new evidence' as grounds for a new trial expresses an age-old policy: Litigation must have practical finality." *Id.* ¶ 17 at 542 (*Ackermann v. United States*, 340 U.S. 193, 198 (1950)).

This element is inapplicable in this case, as the report and photographs were produced at trial, prior to Dr. Little's testimony. Stan's received no advantage – Stan's received the photographs when Berwald did. Stan's did not object to the motion in limine and indicated they did not intend to use them at trial. *SR* at 1817. Stan's did, however, turn the photographs over to Berwald for him to determine whether he wanted to use them at trial.

Berwald has not proven the requisite elements for a new trial, and the trial court did not abuse its discretion in denying the motion. This case does not present the "exceptional circumstances" required for granting such relief. *State v. Otobhiale*, 2022 S.D. 35, ¶ 31, 976 N.W.2d at 770. Berwald's Motion in Limine was granted, excluding the photographs from evidence. The argument that the jury was influenced by the

photographs lacks merit, and Berwald used Little's report during Dr. Little's cross-examination. No prejudice resulted, and Berwald should not be permitted to use a failed strategy as grounds for seeking alternative relief. See e.g. *State v. Zephier*, 2012 S.D. 16, ¶ 17, 810 N.W.2d 770, 773 (a tactical strategy decision is not a basis for forming an irregularity in the proceedings to support a motion for new trial and it was not an abuse of discretion for the trial court to deny a motion for new trial); see also *Long v. State*, 335 S.E.2d 587, 589 (1985) (stating that party "is not entitled to a second chance just because he chose to adopt a different strategy for trial than one he now things would have been more effective.").

Based upon the factors and analysis listed in the trial court's Findings of Fact and Conclusions of Law dated July 8, 2024, the trial court did not abuse its discretion in denying Berwald's Motion for a New Trial based on newly discovered evidence.

IV. The trial court did not abuse its discretion in denying Berwald's Motion for a New Trial based on juror misconduct.

Standard of Review

The Court's standard of review of "a trial court's factual determination regarding juror misconduct [is] the clearly erroneous standard." *Russo v. Takata Corp.*, 2009 S.D. 83, ¶ 25, 774 N.W.2d 441, 448 (citing *State v. Wilkins*, 536 N.W.2d 97, 99 (S.D. 1995). "A finding is 'clearly erroneous' when after reviewing all of the evidence, we are left with a definite and firm conviction that a mistake was made." *Id.* (citing *Wilkins*, 536 N.W.2d at 99) (quoting *State v. Almond*, 511 N.W.2d 572, 574 (S.D. 1994). The trial court's application of the law to its finding of facts are reviewed under the abuse of discretion standard. *Id.* (citing *Wilkins*, 536 N.W.2d at 99). "[A]n abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against

reason and evidence." *Id.* (quoting *Almond*, 511 N.W.2d at 572). As stated above, the Court's standard of review on Motions for a New Trial is an abuse of discretion. *Kusser*, 453 N.W.2d at 621. "[A]n abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *Russo*, 2009 S.D. 83, ¶ 25, 774 N.W.2d at 448. (quoting *Almond*, 511 N.W.2d at 572).

Argument

"[A] juror may not impeach is own verdict once the jury has been discharged." *Bucholz v. State*, 366 N.W.2d 834, 838 (S.D. 1985) (citations omitted).

> The purpose of this rule is: (1) to discourage harassment of jurors by the losing party anxious to have the verdict set aside; (2) to encourage open discussion of the facts among the jurors; (3) to reduce incentives for jury tampering; (4) to promote finality to cases; and (5) to maintain the viability of the jury as a judicial decision-making body.

Id. (citing *McDonald v. Pless*, 238 U.S. 264 (1915)). "Contrasting with this rule is the right of a litigant to a jury which decides his case in a fair and impartial manner." Id. to accommodate these two polices, the South Dakota legislature enacted SDCL § 19-14-7, which was amended by SDCL § 19-19-606 in 2016. *Shamburger v. Behrens*, 418 N.W.2d 299, 303 (S.D. 1988). The current statute provides:

> During an inquiry in the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statements on these matters.

SDCL §19-19-606(b)(1). This statute "operates to prohibit testimony concerning certain conduct by the jurors which has no verifiable outward manifestations." *Shamburger*, 418 N.W.2d at 303. "The prohibition on admitting testimony and affidavits pertains to intrinsic information, which includes 'statements or discussions which took place during

deliberations.'" *Russo*, 2009 S.D. 83, ¶ 28, 774 N.W.2d at 448 (citations omitted). Intrinsic information includes "(1) the effect such extraneous information had upon their minds; (2) statements or discussions which took place during deliberations; or (3) evidence of 'intimidation or harassment of one juror by another, or other intra-jury influences." *Wilkins*, 536 N.W.2d at 99.

After the jury was discharged, Dr. Floyd Olson sent a letter to the Trial Court Administrator alleging that a juror had been influenced by her professional affiliation with Stan's. *SR* at 1677. This letter contains prohibited intrinsic information. First, Dr. Olson described "extreme bias in favor of Stan's Inc that had been evidenced by one of the jurors." *Id.* This is clearly information prohibited by SDCL § 19-19-606(b)(1) because it provides statements or discussions that took place during deliberations. Dr. Olson then described this juror as "extremely influential during the jury deliberations." This is information regarding an intra-jury influence, which also falls within the prohibition under SDCL 19-19-606(b)(1).

Dr. Olson also signed an affidavit with similar allegations. *SR* at 1676. He claimed the juror introduced "extraneous information" that prejudiced Berwald, but did not indicate that the juror mentioned a business transaction with Stan's. *Id.* In fact, Dr. Olson's letter stated he only learned this after trial when discussing deliberations with his wife and not during deliberations. *SR* at 1677. Dr. Olson also alleged the juror "would not listen to evidence" because of her positive experience with Stan's, and that the "juror's outside experience" influenced the entire jury. *Id.* Because all of the information provided in the letter and affidavit of Dr. Olson is intrinsic information, "[t]he court may not

receive [the] juror's affidavit or evidence of [the] juror's statement on these matters." SDCL § 19-19-606(b)(1).

If the Court determines that Berwald met his burden of showing evidence of extrinsic evidence, Berwald must show that the misconduct caused prejudice. *Id.* The test is whether "a typical, reasonable, or normal juror could have been influenced by the facts presented." *Russo*, 2009 S.D. 83, ¶ 43, 774 N.W.2d at 452. The Court has previously held that no reasonably juror could be influenced by phrases such as "bad news" and "he's been in trouble all his life" because they are vague and nonspecific. *Bucholz*, 366 N.W.2d at 840. If the juror had mentioned a previous business relationship with Stan's, it is unlikely that it would have influenced the other jurors. It is also material that Olson referred to the juror buying a business from Stan's and learning of the mistaken fact only after trial concluded in speaking with his wife. *SR* at 1677. As noted in the trial record, Stan's was not selling any business at the time of trial. *SR* at 1694. It is also material that Dr. Olson indicated, "eleven of the jurors voted one way and I was usually the lone dissenting vote. *Id.* Neither Dr. Olson's letter, nor Berwald's argument consider the high likelihood that the jurors considered the evidence, or lack thereof, presented at trial by Berwald with regard to his claims.

The jury deliberated for more than three (3) hours and asked three (3) questions. The jury was able to consider the instructions thoroughly enough to differentiate between two closely related legal concepts: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. This demonstrates the high level of consideration the jury gave the legal issues in this case. Therefore, it is highly unlikely that this jury could have been influenced by this juror's alleged business relationship. Dr.

Olson did not learn of the juror's alleged business relationship until after trial during a conversation with his wife. *SR* at 1677. Dr. Olson took no steps to determine the truth behind his wife's statement, instead he submitted a letter stating that the alleged relationship affected the jury's verdict. *Id.* The after-learned allegations from Dr. Olson are untrue, and he points to no other extrinsic evidence to prove his allegation of juror misconduct. Therefore, the trial court did not abuse its discretion in denying Berwald's motion for new trial.

CONCLUSION

This Court does not have jurisdiction to hear Berwald's appeal due to his failure to appeal from the judgment as required by SDCL 15-26A-3. There is no separate right of appeal as to a motion granting partial summary judgment or an order denying a motion for new trial pursuant to SDCL 15-26A-3.

Even if this Court reaches the merits of the appeal, Berwald's arguments fail. The Trial Court correctly determined the issue of accord and satisfaction with regard to the contract dispute. Stan's offered to buy out the remaining contract at the current price. Stan's sent a letter to Berwald indicating, "this payment will satisfy all obligations between Stan's Inc. and Sokota Dairy." Berwald was not owed or due this money for any other reason than the present value of the remaining contract. He accepted the terms of the agreement, cashed the check, and received those monies. It is factually impossible for him to object to the terms of the accord and to object to them at the same time.

The Trial Court did not abuse its discretion when denying the motion for a new trial. Berwald chose his remedy with regard to the photos from Dr. Little. Berwald used Little's report, received the first day of trial, to impeach Dr. Little. Based upon the Jury's

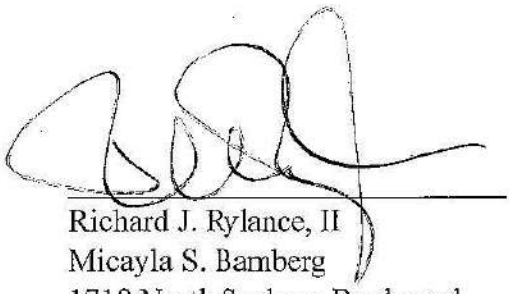
verdict, it appears that effort was successful as the Jury did not agree with Dr. Little, finding instead that Stan's breached the warranty of fitness for a particular purpose.

Further, the information offered by juror Dr. Olson after trial was intrinsic information prohibited by SDCL § 19-19-606(b)(1). The Trial Court did not abuse its discretion in denying Berwald's Motion for a New Trial based on the juror letter from Dr. Olson.

This Court does not have jurisdiction and Berwald's appeal should be dismissed for failure to appeal from the judgment. In the alternative, if this Court does have jurisdiction, this Court should affirm the determination of the trial court as to all three issues.

Dated at Mitchell, South Dakota, this 16th day of January, 2025.

MORGANTHEELER LLP



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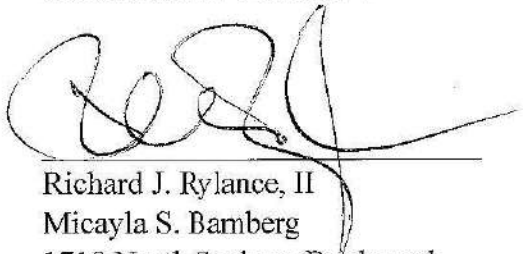
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that *Appellee's Brief* complies with the type volume limitations set forth in SDCL 15-26A-66. *Appellee's Brief* uses Times New Roman in 12-point font and was produced using Microsoft Word 365. *Appellee's Brief* contains 7,641 words and 38,363 characters, not to include the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, any certificates of counsel, and any addendum materials. I have relied on the Microsoft Word processing system to determine the word and character count.

Dated at Mitchell, South Dakota, this 16th day of January, 2025.

MORGANTHEELER LLP



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Appellee's Brief* was filed electronically with the South Dakota Supreme Court and that the original was filed by mailing the same to 500 East Capitol Avenue, Pierre, South Dakota, 57501-5070, on the 16th day of January, 2025.

I further certify that on the 16th day of January, 2025, a true and correct copy of *Appellee's Brief* was served via Odyssey File and Serve upon:

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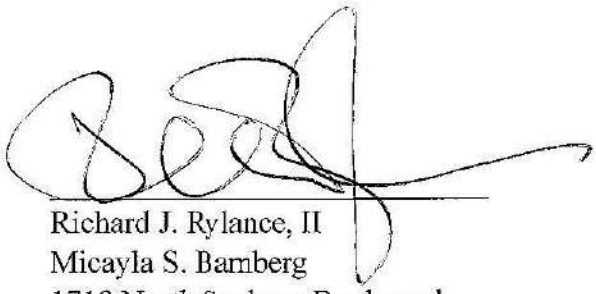

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APPENDIX

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STATE OF SOUTH DAKOTA) : SS COUNTY OF JERAULD)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
CALVIN BERWALD, d/b/a SOKOTA DAIRY, Plaintiff, vs. STAN'S INC., Defendant.	36CIV15-000010 **STATEMENT OF UNDISPUTED MATERIAL FACTS**

COMES NOW, Defendant, Stan's Inc., by and through its attorneys of record, Richard J. Rylance, II, of MorganTheeler LLP, and Scott Hindman of Mayne, Hindman, Parry, & Wingert, respectfully submits this *Statement of Undisputed Material Facts* accompanying Defendant's *Brief in Support of Motion for Summary Judgment* filed contemporaneously herewith. Defendant further states:

1. On June 11, 2012, a letter was sent to Cal Berwald by Les Eckles indicating that soybean meal contract #1267 was being cancelled due to insufficient credit performance. *Affidavit of Les Eckels in Support of Motion for Partial Summary Judgment*, **EXHIBIT A**.
2. The letter indicated that the balance of the contract (274.56 tons) would be priced at the July Soybean Meal futures on the Chichago Board of Trade. *Affidavit of Les Eckels in Support of Motion for Partial Summary Judgment*, **EXHIBIT A**.
3. The funds would be applied to the AR and a payment would be issued to Berwald for any balance. *Affidavit of Les Eckels in Support of Motion for Partial Summary Judgment*, **EXHIBIT A**.

4. Consistent with the terms of the June 11, 2012 letter, a subsequent letter was sent by Certified mail to Cal Berwald on June 18, 2012. *Affidavit of Les Eckels in Support of Motion for Partial Summary Judgment,* **EXHIBIT B**.
5. This letter itemized the outstanding accounts receivable from Berwald, applied the proceeds from the cancellation, and contained a check payable to Berwald in the amount of $6,921.57. *Affidavit of Les Eckels in Support of Motion for Partial Summary Judgment,* **EXHIBIT B**.
6. The letter enclosed with the check further noted, "This payment will satisfy all obligations between Stan's Inc. and Sokota Dairy." *Affidavit of Les Eckels in Support of Motion for Partial Summary Judgment,* **EXHIBIT B**.
7. Berwald subsequently signed and cashed the settlement check on behalf of Sokota Dairy. *Affidavit of Les Eckels in Support of Motion for Partial Summary Judgment,* **EXHIBIT C**.
8. The check posted on June 20, 2012 and was endorsed, "Sokota Dairy, Cal A Berwald." *Affidavit of Les Eckels in Support of Motion for Partial Summary Judgment,* **EXHIBIT C**.
9. Plaintiff sent a letter to Stan's Inc. through counsel on June 11, 2012, which did not repudiate the proposed settlement. *Affidavit of Les Eckels in Support of Motion for Partial Summary Judgment,* **EXHIBIT D**.
10. Plaintiff sent a letter to Stan's Inc. through counsel on August 17, 2012, which did not repudiate the agreed-upon settlement. *Affidavit of Les Eckels in Support of Motion for Partial Summary Judgment,* **EXHIBIT E**.

Dated this 18th day of November, 2021.

/s/ Richard J. Rylance, II

Richard J. Rylance, II, Esq.
Of MorganTheeler LLP
PO Box 1025 – 1718 N. Sanborn Blvd.
Mitchell, SD 57301-1025

Filed: 11/18/2021 3:38 PM CST Jerauld County, South Dakota 36CIV15-000010

STATE OF SOUTH DAKOTA) : SS COUNTY OF JERAULD)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
CALVIN BERWALD, d/b/a SOKOTA DAIRY, Plaintiff, vs. STAN'S INC., Defendant.	36CIV15-000010 **AFFIDAVIT OF LES ECKELS, IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF Beadle)

Les Eckels, being first duly sworn upon oath, states, and alleges that:

1. This Affidavit is submitted in support of Defendant's Motion for Partial Summary Judgment.

2. A true and correct copy of the letter sent to Calvin Berwald by Stan's Inc. on June 11, 2012, is attached hereto as **EXHIBIT A.**

3. A true and correct copy of the letter sent to Calvin Berwald by Stan's Inc. on June 18, 2012 and the accompanying check, are attached hereto as **EXHIBIT B.**

4. A true and correct copy of the returned check signed by Plaintiff Calvin Berwald d/b/a Sokota Dairy, is attached hereto as **EXHIBIT C.**

5. A true and correct copy of the letter sent from Plaintiff's counsel, Reed Mahlke, to Stan's Inc. on June 14, 2012, is attached hereto as **EXHIBIT D.**

6. A true and correct copy of the letter sent from Plaintiff's counsel, Steve Huff, to Stan's Inc. on August 17, 2012, is attached hereto as **EXHIBIT E.**

Dated this 18 day of November, 2021.

Les Eckels

Subscribed and sworn to before me, a Notary Public, this 18 day of November, 2021.

(SEAL)

Notary Public – South Dakota Amber Wenzel
My Commission Expires: 6-9-23

Stan's

PO Box 100
1008 Railway
Alpena, SD 57312
Phone: 605-849-3582
Fax: 605-849-3590
Toll Free: 888-849-3582

6-11-12

Sokota Dairy
Cal Berwald
24050 393rd Ave.
Letcher, SD 57395

RE: Outstanding Accounts Receivable & Open Contract

Dear Cal,

This letter is to notify you that at the close of trading, Friday June 15th at 2:00 PM, we will be cancelling the balance of your soybean meal contract #1267 due to insufficient credit performance. We will price the contract balance of 274.56 tons at -$45.00 the July Soybean Meal futures on the CBOT. The funds from this transaction will be applied towards your outstanding accounts receivable balance of $5,982.75. The remaining proceeds from the contract cancellation will be sent to you by registered mail on Monday June 18th.

Regards,

Les E. Eckels
Controller
Stan's, Inc.

Stan's

PO Box 100
1008 Railway
Alpena, SD 57312
Phone: 605-849-3582
Fax: 605-849-3599
Toll Free: 888-849-3582

6-18-12

Sokota Dairy
Cal Berwald
24050 393rd Ave.
Letcher, SD 57395

RE: Soybean Meal contract settlement & Accounts Receivable

Dear Cal,

As notified in our previous correspondence, we have cancelled your soybean meal contract #1267. The calculations are as follows:

6-15-12 CBOT July Soybean Meal futures close	$411.00
Apply local basis	-45.00
Net futures amount	366.00
Less Contract #1267 price	- 319.00
Gain/Loss from contract cancellation	47.00
Contract #1267 contract balance	274.56
Contract cancellation sales proceeds	12,904.32
Less outstanding A/R balance	-5,982.75
Balance Due Sokota Dairy	6,921.57

Please find enclosed a check in the amount of $6,921.57. This payment will satisfy all obligations Between Stan's, Inc. and Sokota Dairy. Thank you for the opportunity to serve you in the past and the best of continued success in the future.

Regards,

Les E. Eckels

Les E. Eckels
Controller
Stan's, Inc.

EXHIBIT B

99618

STAN'S
P.O. BOX 100
ALPENA, SD 57312
PH 605-849-3582

Wells Fargo Bank, N.A.
Huron, SD 57350

78-4-914

Six Thousand Nine Hundred Twenty One Dollars and 57 Cents

DATE 6/18/2012

AMOUNT $6,921.57

PAY TO THE ORDER OF
Sokota Dairy
24050 393rd Ave
Letcher SD 57395

AUTHORIZED SIGNATURE

Security features. Details on back.

⑈099618⑈ ⑆091400046⑆ 1800006277⑈

STAN'S, INC.

99618

Vendor ID	Name	Payment Number	Check Date	Check Number
3183	Sokota Dairy	00000000000013808	6/18/2012	99618

Invoice Number		Date	Amount	Amount Paid	Discount	Net Amount Paid
SBM CONTRACT # 1267	Contract 1267 Cancellation	6/18/2012	$6,921.57	$6,921.57	$0.00	$6,921.57

$6,921.57 $6,921.57 $0.00 $6,921.57

PRODUCT DLM102 USE WITH 91500 ENVELOPE PRINTED IN U.S.A.

A - 007

Mailed 3/18/12

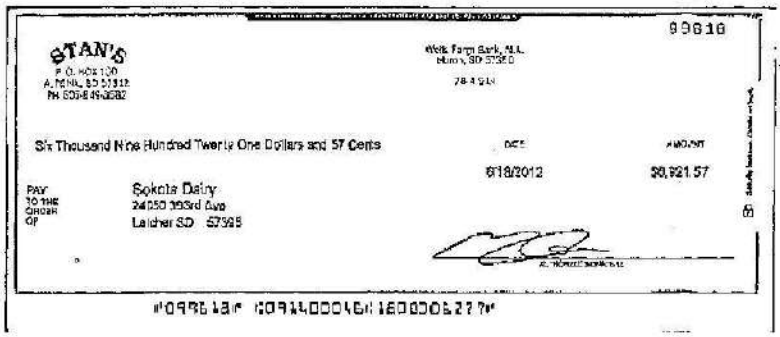
EXHIBIT B

WELLS FARGO

Wells Fargo Advisors

View Check Copy

Check Number	Date Posted	Check Amount	Account Number
99618	08/20/12	$6,921.57	Stan's Inc Regular XXXXX6277



99618

STAN'S
P.O. BOX 100
ALTAMONT, SD 57313
PH 605-846-2682

Wells Fargo Bank, N.A.
Huron, SD 57350
78-4/910

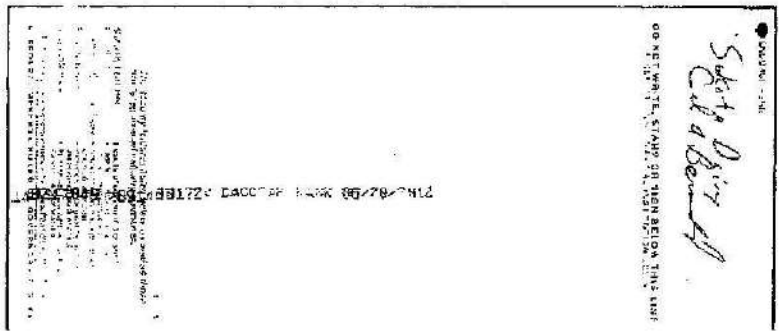
Six Thousand Nine Hundred Twenty One Dollars and 57 Cents

DATE 8/18/2012

AMOUNT $6,921.57

PAY TO THE ORDER OF Sokota Dairy
24050 393rd Ave
Letcher SD 57359

#099618# C091400016# 160000627 7#



Sokota Dairy
Cut & Bend

DO NOT WRITE, STAMP OR SIGN BELOW THIS LINE

Equal Housing Lender

EXHIBIT C

GEORGE S. MICKELSON
1941-1993

ALAN F. GLOVER
RICHARD J. HELSPER
JEROMY J. PANKRATZ
REED T. MAHLKE*
* Also licensed in Minnesota

GLOVER & HELSPER, P.C.
ATTORNEYS AND COUNSELORS AT LAW
415 EIGHTH STREET SOUTH
BROOKINGS, SOUTH DAKOTA 57006
TELEPHONE: (605) 692-7775
FAX: (605) 692-4611

E-MAIL ADDRESSES:
afg1@brookings.net
rjh1@brookings.net
jjp1@brookings.net
rtm1@brookings.net

June 14, 2012

Mr. Les E. Eckels, Controller
Stan's
P.O. Box 100
1008 Railway
Alpena, South Dakota 57312

RE: SOKOTA DAIRY - OUTSTANDING ACCOUNTS RECEIVABLE

Dear Mr. Eckels:

My name is Reed Mahlke and I have been asked by Sokota Dairy to respond to your June 11, 2012 letter threatening to cancel the balance of Soybean Meal Contract #1267 due to insufficient credit performance.

In speaking with Cal, he stated that the last invoice he received from you on May 31st, showing a balance of $6,284.00 has been paid and the check has cleared. As of today's date, he hasn't received a bill for the $5,982.75. In reviewing the payments from the May 31, 2012 statement, it is unclear to me how the payment history shows any type of insufficient credit performance.

In addition, my client's concern is that by canceling the balance of the Soybean Meal Contract #1267, it would result in significant losses for him.

I am asking that you do not cancel the Soybean Meal Contract #1267 until we have had a chance to further discuss. I am also asking for a copy of the contract and a reference to any of the credit requirements that my client has failed to meet.

Please contact me at your earliest convenience to discuss.

Sincerely,

GLOVER & HELSPER, P.C.

Reed T. Mahlke

REED T. MAHLKE

RTM:kls
cc: Cal Berwald

EXHIBIT D

Recd 8/20/12

JMMWH

JOHNSON, MINER, MARLOW, WOODWARD & HUFF, PROF. LLC

ATTORNEYS

MICHAEL F. MARLOW
SHEILA S. WOODWARD*†
STEVEN K. HUFF*
LINDSAY J. HOVDEN
BETH A. ROESLER

OF COUNSEL

STEVEN M. JOHNSON
CELIA MINER
GERALD L. READE

*ALSO ADMITTED IN IOWA
†ALSO ADMITTED IN NEBRASKA

CONTACT INFORMATION

200 WEST 3RD STREET
P.O. BOX 667
YANKTON, SD 57078

TELEPHONE: 605.665.5009
FACSIMILE: 605.665.4788

WEBSITE:
WWW.JMMWH.COM

August 17, 2012

Les E. Eckels, Controller
Stan's
PO Box 100
Alpena, SD 57312

Re: Cal Berwald d/b/a Sokota Dairy
Breach of Commodity Contract/Cattle Poisoning

Dear Mr. Eckels:

Our firm has been retained by Mr. Berwald and his dairy operation regarding several very serious matters, including your company's unwarranted termination of his Commodity Contract No. 1267 as well as delivering tainted feed to his farm that were fed to dozens calves (death toll in 2012 is 47 and rising). There is also an issue of Mr. Berwald's grain bank account mysteriously disappearing without an accounting from your organization.

Please be advised that Stan's is legally required to preserve any and all documents, correspondence, emails, and other information including all invoices and accounts regarding Mr. Berwald and his dairy. Should a mutually acceptable resolution not be obtained, these documents and information will be needed in the litigation process.

It would appear from all documentation that I have reviewed that, no one disputes that the Berwald calves were poisoned by feed containing rumensin far in excess of ranges acceptable even to adult cattle. Moreover, it would appear from the time line of events that shortly after Mr. Berwald reported his sick cattle to your elevator, his Commodity Contract was terminated for alleged "due to insufficient credit performance." Yet, all the invoices that I received do not show any payments past due 30 days. If you have other information to the contrary, please provide it to me immediately.

In the spirit of mutual agreement and/or reconciliation, Mr. Berwald hereby respectfully requests that his Commodity Contract No. 1267 be immediately reinstated or, in the alternative, a commodity contract is drawn up on identical terms consistent with Contract No. 1267. If that is not possible, please advise as to why this could not occur as a good faith measure on your organization's part to resolve the matter absent litigation.

EXHIBIT E

If no response is received by me to this request in 10 calendar days, please be advised that Mr. Berwald has authorized me to bring suit against your elevator for wrongful termination of the Commodity Contract, poisoning his animals, and/or issues with the grain bank accounting. This suit will in addition to regular damages claim punitive damages based on the facts and circumstances outlined herein and further gathered in the litigation process.

If you wish to talk about this matter directly with me, please feel free to do so but please direct all future correspondence to me. If you would instead wish me to communicate with counsel of your choosing, please advise and I will do so from that point forward.

In short, unless your organization reinstates Commodity Contract No. 1267 and/or offers terms of identical kind to my client within the next 10 days, litigation will not be avoided. I have also been advised by Mr. Berwald that he had over 100 head pass away last year under circumstances that appear similar to those his calves suffered this spring. Your company's prompt attention to this situation would be greatly appreciated and I would suggest you provide a copy of this correspondence to your carrier as a written notice of claim.

Sincerely,

Johnson, Miner, Marlow, Woodward & Huff, Prof. LLC

S K Huff

Steven K. Huff
For the Firm
Sender's Email: steve@jmmwh.com

SKH/ss

cc: Cal Berwald

§ 3168. What Orders Reviewable. The following orders, when made by the court, may be carried to the supreme court:

1. An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.

2. A final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment.

3. When an order grants, refuses, continues or modifies a provisional remedy, or grants, refuses, modifies or dissolves an injunction; when it dissolves or refuses to dissolve a warrant of attachment; when it grants or refuses a new trial; or when it sustains or overrules a demurrer.

4. When it involves the merits of an action or some part thereof; when it orders judgment on application therefor, on account of the frivolousness of a demurrer, answer or reply, or strikes out such demurrer, answer or reply on account of the frivolousness thereof.

5. From orders made by the circuit court vacating or refusing to set aside orders made at chambers, where, by the provisions of this part, an appeal might have been taken in case the order so made at chambers had been granted or denied by the circuit court in the first instance. For the purposes of an appeal from an order, either party may require the order to be entered by the clerk of record and it shall be entered accordingly.

Source: § 23, Ch. 20, 1887; § 5236, C. L.; § 462, Rev. Civ. Proc.

Court will not review order on appeal from order refusing to vacate it. Vert v. Vert, 3 S. D. 619, 54 N. W. 655.

Appeal from judgment after two years. Thompson v. Guenthner, 5 S. D. 504, 59 N. W. 727.

Appeal lies from order without motion for new trial. First Nat. Bank v. Comfort, 4 Dak. 167, 28 N. W. 855.

Order refusing to vacate appealable order not appealable, order dismissing justice appeal is appealable. Travelers' Ins. Co. v. Weber, 2 N. D. 239, 50 N. W. 703.

Appeal from order in attachment. Wyman v. Wilmarth, 1 S. D. 172, 46 N. W. 190.

Order enjoining foreclosure by advertisement not appealable. Commercial Bank v. Smith, 1 S. D. 28, 44 N. W. 1024.

Order refusing to modify findings appealable. Schmidtgall v. Walshtown Twp., 27 S. D. 103, 129 N. W. 1042.

Order on habeas corpus appealable. McMahon v. Mead, 30 S. D. 515, 139 N. W. 122.

Appeal from order dismissing action. First Nat. Bank v. McIlvaine, 31 S. D. 37, 139 N. W. 596; First Nat. Bank v. McIlvaine, 31 S. D. 40, 139 N. W. 597.

Order sustaining demurrer with leave to amend not a final judgment. Bode v. N. E. Inv. Co., 1 N. D. 121, 45 N. W. 197.

Order vacating an attachment is appealable. Red River Bank v. Freeman, 1 N. D. 196, 46 N. W. 36.

Order refusing to vacate judgment by default appealable. Meade Co. Bank v. Decker, 17 S. D. 590, 98 N. W. 86.

Subsequent appeal from order allowable after appeal from judgment dismissed. Carlberg v. Field, 31 S. D. 209, 140 N. W. 267.

Order vacating an order sustaining demurrer is appealable. Jennings v. Des Moines Co., 33 S. D. 385, 146 N. W. 564.

Attachment order appealable. F. & M. State Bank v. Michael, 36 S. D. 172, 153 N. W. 1008.

Dismissal of appeal from judgment does not preclude subsequent appeal from order on motion for new trial, pending when appeal from judgment is taken. Carlberg v. Field, 31 S. D. 209, 140 N. W. 267.

Actions for violation of city ordinance are not criminal and are reviewable on appeal. City of Madison v. Horner, 15 S. D. 359, 89 N. W. 474.

Order discharging of record notice of lis pendens, in action to establish lien, not appealable order. Kirby v. Drapeau, 34 S. D. 239, 147 N. W. 982.

Ex parte order appointing receiver of defendant mining corporation, in action to enforce miner's lien, is appealable. Cessna v. Otho Development & Power Co., 35 S. D. 557, 153 N. W. 380.

Order which changes venue of action affects merits thereof and is appealable. Kramer v. Heins, 34 N. D. 507, 158 N. W. 1061.

Order of district court allowing amended complaint to be filed is not appealable. Holobuck v. Schaffner, 30 N. D. 344, 152 N. W. 660.

Order of district court allowing amended complaint to be filed is not appealable. Marquart v. Schaffner, 30 N. D. 342, 152 N. W. 660.

Order striking amended complaint from files is appealable. Stimson v. Stimson, 30 N. D. 78, 152 N. W. 182.

Order denying motion for judgment notwithstanding verdict is not appealable. Turner v. Crumpton, 25 N. D. 134, 141 N. W. 209.

Ruling upon objection to introduction of evidence on ground of insufficiency of complaint not decision on a demurrer. Ross v. Wait, 2 S. D. 638, 51 N. W. 866.

Order denying motion to set aside summons not appealable. Ryan v. Davenport, 5 S. D. 203, 58 N. W. 568.

Order refusing withdrawal of complaint of intervention appealable. Schaetzel v. City of Huron, 6 S. D. 134, 60 N. W. 741.

Order granting or denying new trial is appealable. Bedford v. Kissick, 8 S. D. 536, 67 N. W. 609; Granger v. Roll, 6 S. D. 611, 62 N. W. 970; Sands v. Cruickshank, 12 S. D. 1, 80 N. W. 370; Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419.

Appeal in habeas corpus proceedings. In re Hammill, 9 S. D. 390, 69 N. W. 577; Carruth v. Taylor, 8 N. D. 166, 77 N. W. 617.

Order refusing to dismiss appeal from a justice is appealable. Smith v. Coffin, 9 S. D. 502, 70 N. W. 636; Brown v. Brown, 12 S. D. 380, 81 N. W. 627.

An order appointing referee is appealable. Russell v. Whitcomb, 14 S. D. 426,

33.0729 Amendment of appeal proceedings; perfection of appeal; undertaking may be supplied.
33.0730 Supreme Court decision on appeal; scope; remittitur; entry of judgment in lower court; return of papers and record to lower court; limitation of time; rehearings in Supreme Court.
33.0731 New trial ordered; limitation of time for such trial in lower court.
33.0732 Notification of appeal to Supreme Court; transmission of papers by the clerk of lower court, transmission of appeal fee required; limitations of time.
33.0733 Transcript of record for appeal: written order required; limitation of time; extensions of time; reporter's fees and payment.
33.0734 Form of transcript for appeal record.
33.0735 Assignments of error: requirement; form.
33.0736 Transcript: service and filing; apportionment of use between parties.
33.0737 Waiver of transcript; records settled without.
33.0738 Preparation of proposed settled record: duties of clerk; notice to parties or attorneys; limitations of time.
33.0739 Settlement of record: presentment to court; hearing; duties of court.
33.0740 Stipulation for settled record authorized; approval of Court required.
33.0741 Certificate of settled record required; page numbering and indexing by clerk of courts required.
33.0742 Appeals taken by several parties: single record sufficient; duties of trial court.
33.0743 Briefs on appeal: civil, criminal, original proceedings; required content; statement of ultimate facts; assignments of error; indexing contents and exhibits separately; list of cases cited; violation of requirements affects right to costs.
33.0744 Printing and binding of briefs: general requirements.
33.0745 Service and filing of briefs on appeal: limitations of time; number of copies and proof of service filed.
33.0746 Extension of time for serving and filing briefs; stipulation of parties.
33.0747 Settled record transmitted to Supreme Court on completion of briefs; certificate from Clerk of Supreme Court to clerk of trial court for transmission of record; Supreme Court may order transmission of record any time; return of settled record to trial court on completion of appeal.
33.0748 Amendment of appeal proceedings: power of Court or Presiding Judge to permit and prescribe procedure.
33.0749 Violation of rules: rejection of brief; refusal of costs.
33.0750 Oral argument on appeal: notice in briefs required; calendar of oral argument; notice of time for oral argument; time permitted on oral argument; reading from brief on oral argument, limited.
33.0751 Rehearings: petition; answer; service.
33.0752 Remittitur: certified copy of decision and appeal record returned to trial court.
33.0753 Taxation of costs and damages; Clerk taxes without notice; objections and hearing.
33.0754 Judgment for costs or damages: entry in trial court upon filing of remittitur.

33.0701 Appellate jurisdiction of Supreme Court: appeals from judgments, orders, proceedings of Circuit Courts and municipal court. Appeals to the Supreme Court from the Circuit Court, or from the county court except in matters of probate and guardianship, or from the municipal court may be taken as provided in this title from:

(1) A judgment;

(2) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;

(3) An order granting a new trial;

(4) Any final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment;

(5) An order which grants, refuses, continues, dissolves, or modifies any of the remedies of arrest and bail, claim and delivery, injunction, attachment, garnishment, receivership, or deposit in court;

(6) Any other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion,

and to be allowed by the Supreme Court in the manner provided by rules of such Court only when the Court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding.

Source: § 3168 Rev. Code 1919, revised to include appeals from municipal courts, and combined with part of § 2257 Rev. Code 1919, and amplified to vest discretion in Supreme Court as to allowance of appeals from the intermediate orders referred to in subdivision (6).

Cross-reference: Ch. 32.09 "Jurisdiction of Courts" for general statement of Supreme Court jurisdiction.

33.0702 Time in which appeals are permitted. An appeal to the Supreme Court must be taken within sixty days after written notice of the filing of the order shall have been given to the party appealing. Every other appeal allowed must be taken within one year after the judgment shall be signed, attested, and filed.

Source: § 3147 Rev. Code 1919.

33.0703 Method of taking and perfecting appeal; notice; undertaking; several appeals allowed under one notice and undertaking. An appeal must be taken by serving on the adverse party and filing with the clerk of the court in which the judgment or order appealed from is entered a notice, in writing, signed by the appellant or his attorney, stating the appeal from the same and whether the appeal is from the whole or a part thereof, and if from a part only, specifying the part appealed from.

The appellant may unite in one notice, and under one undertaking of the amount required for a single appeal, all appeals from one or more judgments and from one or more orders made in or pertaining to the same action or proceeding, subject however to all limitations of time for taking appeals.

The appeal shall be deemed to be taken by the service and filing of the notice of appeal and perfected by service of the undertaking for costs, or the deposit of money instead, or the waiver thereof, as hereinafter in this chapter prescribed, and deposit of the fee of the Clerk of the Supreme Court as hereinafter provided.

When the service of a notice of appeal and undertaking cannot in any case be made within this state, the Court may prescribe a mode for serving the same.

Source: Supreme Court Rule 54 of 1939. (§ 3146 Rev. Code 1919, revised to permit double appeal.)

Cross-reference: § 33.1607 application for new trial not required as foundation for appeal.

33.0704 Petition for allowance of appeal from intermediate order. Whenever any party desires to appeal from an intermediate order as provided in subdivision (6) of section 33.0701, he must serve and file with his notice of appeal a petition for allowance thereof, and must provide the clerk of the court from which such appeal is sought with six additional copies of such petition. Such clerk shall thereupon forthwith transmit to the Clerk of the Supreme Court a certified copy of the notice of appeal as provided in section 33.0732 together with the original and five copies of such petition. Such petition must contain the following:

(1) A succinct statement, in narrative form, of the nature of the case, and the proceedings theretofore had therein, including a summary of any evidence taken which is material to the question or questions sought to be reviewed;
(2) The assignment or assignments of error on which the petitioner proposes to rely;
(3) A concise statement, without argument, of the principles of law on which the petitioner relies, with citations of authorities to support the same;
(4) The reasons as claimed by petitioner why the ends of justice require that the appeal should be allowed, and the questions involved therein determined in advance of the final determination of the action or proceeding;
(5) Copies, to be attached to the petition as exhibits thereto, of:
   (a) All pleadings;
   (b) The order sought to be reviewed;

33.0740 Stipulation for settled record authorized; approval of Court required.
33.0741 Certificate of settled record required; page numbering and indexing by clerk of courts required; additional time to settle record.
33.0742 Appeals taken by several parties: single record sufficient; duties of trial court.
33.0743 Briefs on appeal: civil, criminal, original proceedings; required content; statement of ultimate facts; assignments of error; indexing contents and exhibits separately; list of cases cited; violation of requirements affects right to costs.
33.0744 Printing and binding of briefs: general requirements.
33.0745 Service and filing of briefs on appeal: limitations of time; number of copies and proof of service filed.
33.0746 Extension of time for serving and filing briefs; stipulation of parties.
33.0747 Settled record transmitted to Supreme Court on completion of briefs; certificate from Clerk of Supreme Court to clerk of trial court for transmission of record; Supreme Court may order transmission of record any time; return of settled record to trial court on completion of appeal.
33.0748 Amendment of appeal proceedings: power of Court or Presiding Judge to permit and prescribe procedure.
33.0749 Violation of rules: rejection of brief; refusal of costs.
33.0750 Oral argument on appeal: notice in briefs required; calendar of oral argument; notice of time for oral argument; time permitted on oral argument; reading from brief on oral argument, limited.
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33.0701 Appellate jurisdiction of Supreme Court: appeals from judgments, orders, proceedings of Circuit Courts and municipal court. Appeals to the Supreme Court from the Circuit Court, or from the county court except in matters of probate and guardianship, or from the municipal court may be taken as provided in this title from:

(1) A judgment;
(2) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;
(3) An order granting a new trial;
(4) Any final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment;
(5) An order which grants, refuses, continues, dissolves, or modifies any of the remedies of arrest and bail, claim and delivery, injunction, attachment, garnishment, receivership, or deposit in court;
(6) Any other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court in the manner provided by rules of such Court only when the Court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding.

Source: § 3168 Rev. Code 1919, revised to include appeals from municipal courts, and combined with part of § 2257 Rev. Code 1919, and amplified to vest discretion in Supreme Court as to allowance of appeals from the intermediate orders referred to in subdivision (6).

Cross-reference: Ch. 32.09 "Jurisdiction of Courts" for general statement of Supreme Court jurisdiction.

33.0702 Time in which appeals are permitted. An appeal to the Supreme Court must be taken within sixty days after written notice of the filing of the order shall have been given to the party appealing. Every other appeal allowed must be taken within six months after the judgment shall be signed, attested, filed and written notice of entry thereof shall have been given to the adverse party.

Source: § 3147 Rev. Code 1919; § 1, Ch. 124, 1943.

33.0703 Method of taking and perfecting appeal; notice; undertaking; several appeals allowed under one notice and undertaking. An appeal must be taken by serving on the adverse party and filing with the clerk of the court in which

33.0706 Determination of petition. The Supreme Court, in its discretion, may grant or deny such petition, depending upon whether the Court considers an appeal should be allowed under the provisions of subdivision (6) of section 33.0701. If the petition is denied, no further action with reference to such appeal shall be taken. If the petition is granted, the appeal shall take the same course as other appeals, and the Court may in its discretion stay all further proceedings in the court from which the appeal is taken, pending determination of the appeal, and require of the appellant such security as the Court deems necessary to safeguard any other party from damage by reason of the delay. In connection with the determination of the petition, neither the petitioner nor any other party shall as a matter of right be entitled to file briefs or make oral argument, but the Court may in its discretion direct that either written or oral argument be interposed. The Court, for purposes of determination of the petition, may direct the certification to the Court of any portion of the record in the court below.

Source: Supreme Court Rule 57 of 1939.

33.0707 Disregard of requirements as to contents of petition. In any case where it appears to the Court that a petitioner has willfully failed to comply with the requirements of section 33.0704 as to the form and contents of such petition, or has intentionally made an unfair or inaccurate statement in such petition, this shall constitute sufficient grounds for denial of the petition. In any case where the Court is satisfied that such petition has been filed without reasonable grounds, and that the filing of the same may be fairly considered vexatious, the Court may impose upon the petitioner such terms as the Court deems proper.

Source: Supreme Court Rule 58 of 1939.

33.0708 Deposit of fees: Supreme Court fees; Circuit Court fees. The appellant shall deposit in the office of the Clerk the fee of the Clerk of the Supreme Court, which shall be ten dollars, and of the clerk of the trial Court, which shall be five dollars.

Source: New statute proposed so as to require deposit of both Supreme Court and Circuit Court fees at time of perfecting appeal.

Note: See § 12.1406 (10) for change in amount of fee of the Clerk of Courts.

33.0709 Cost bond required: appeal to Supreme Court. To render an appeal effectual for any purpose, an undertaking must be executed on the part of the appellant by at least two sureties to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding two hundred fifty dollars.

Source: § 3150 Rev. Code 1919.

Cross-reference: §§ 33.0703 and 33.0726 authorizing deposit of cash with Clerk in lieu of bond.

33.0710 Scope of review. On appeal from a judgment the Supreme Court may review any order, ruling, or determination of the trial court, including an order denying a new trial, and whether any such order, ruling, or determination is made before or after judgment involving the merits and necessarily affecting the judgment and appearing upon the record. When an order denying a new trial is assigned as error, the Court may on such assignment review all matters properly and timely presented to the Court by the application for new trial.

Such of the matters specified in subdivisions (6) and (7) of section 33.1605 as may have been timely presented to the trial court by motion for directed verdict, request for findings, or other apt motion, offer, objection, or exception may be reviewed on appeal from the judgment without necessity for an application for new trial.

When the appeal is from any order subject to appeal, the Court may review all matters appearing on the record relevant to the question of whether the order appealed from is erroneous. By its judgment, the Supreme Court may reverse, affirm, or modify the judgment or order appealed from, and may either direct a new trial or the entry by the trial court of such judgment as the Supreme Court deems is required under the record.

Source: § 3169 and part of § 3170 Rev. Code 1919, revised and combined.

33.0711 Remand of record: certain motions for new trial; application to Supreme Court. Whenever, after appeal to the Supreme Court, it shall appear to the satisfaction of the Supreme Court upon application of a party that the ends of justice require that such party should be permitted to make a motion for a new

15-26-16. Briefs and argument on petition for appeal from intermediate order.
15-26-17. Certification of record on petition for appeal from intermediate order.
15-26-18. Grant or denial of appeal from intermediate order—Further proceedings—Stay in trial court pending determination of appeal.
15-26-19. Orders and determinations of trial court subject to review on appeal from judgment.
15-26-20. New trial motion not required for review on insufficiency of evidence or error of law.
15-26-21. Matters subject to review on appeal from order denying new trial.
15-26-22. Scope of review on appeal from order.
15-26-23. Oral argument on notice.
15-26-24. Supreme Court calendar for oral argument—Notice required.
15-26-25. Time allowed for oral argument—Reading during argument prohibited.
15-26-26. Actions available to Supreme Court on decision.

CROSS-REFERENCES

Circuit court procedure applicable in Supreme Court except as otherwise provided, § 15-24-1.

Criminal cases, appeal to Supreme Court, Chapter 23-51.

15-26-1. Judgments and orders of circuit, county and municipal courts from which appeal may be taken.—Appeals to the Supreme Court from the circuit court, or from the county court except in matters of probate and guardianship, or from the municipal court may be taken as provided in this title from:

(1) A judgment;

(2) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;

(3) An order granting a new trial;

(4) Any final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment;

(5) An order which grants, refuses, continues, dissolves, or modifies any of the remedies of arrest and bail, claim and delivery, injunction, attachment, garnishment, receivership, or deposit in court;

(6) Any other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court in the manner provided by rules of such court only when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding.

s/Francis G. Dunn
Associate Justice

s/Laurence J. Zastrow
Associate Justice

s/Donald J. Porter
Associate Justice

s/Robert E. Morgan
Associate Justice

ATTEST:

s/Gloria J. Engel
Clerk of the Supreme Court

(SEAL)

CHAPTER 361

(SUPREME COURT RULE 79-1)

RULES OF CIVIL APPELLATE PROCEDURE ADOPTED
IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE ADOPTION)
OF THE RULES OF CIVIL)
APPELLATE PROCEDURE) Rule 79-1

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The Supreme Court, upon filing of Rules of Civil Appellate Procedure with the Clerk, and pursuant to notice and hearing thereon, hereby adopts the following Rules of Civil Appellate Procedure.

RULES OF CIVIL APPELLATE PROCEDURE

Rule 1 Scope of Rules.

These rules shall govern procedure in civil appeals to the Supreme Court of South Dakota.

Rule 2 Suspension of Rules.

In the interest of expediting decision in cases of pressing concern to the public or to litigants, or for other good cause shown, the Supreme Court, except as otherwise provided in Rule 16, may suspend the requirement or provision of these rules on application of a party or on its own motion and may order proceedings in accordance with its direction.

Rule 3 Appeals of Right--How Taken.

An appeal permitted by SDCL 15-26-1 as of right shall be taken as follows:

(1) Notice of appeal. The notice shall specify the party or parties taking the appeal; shall designate the judgment, order, or part thereof appealed from; and shall be signed by the appellant or his attorney.

(2) Service of the notice of appeal. The appellant, or his counsel, shall serve the notice of appeal on counsel of record of each party other than appellant, or, if a party is not represented by counsel, on the party at his last known address.

(3) Filing notice of appeal. Before the expiration of the time to appeal, appellant shall file the notice of appeal with the clerk of the trial court in which the judgment or order was entered. The clerk of the trial court shall not accept for filing a notice of appeal unless accompanied by proof of service of a copy thereof on each party other than the appellant together with the required statutory filing fees unless exempt by law.

Failure of an appellant to take any step other than timely service and filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal.

(4) Transmittal to Supreme Court. Upon compliance with subdivision (3) of this rule, the clerk of the trial court shall immediately transmit to the clerk of the Supreme Court certified copies of the notice of appeal, proof of service, the judgment or order appealed from and the required statutory filing fees unless exempt by law.

(5) Joint appeals. If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may serve and file a joint notice of appeal, or may join in appeal after serving and filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant.

Appeals may be consolidated by order of the Chief Justice of the Supreme Court upon motion of a party.

Rule 4 Appeals--When Taken.

Appeals from judgments or orders must be taken within sixty days after the attestation and filing of the judgment or order appealed from.

The clerk of courts shall not accept for attestation and filing any judgment or order signed by the court unless accompanied by proof of service of a conformed copy thereof on all other parties.

The clerk of courts shall give written notice of the filing of any judgment or order to all parties immediately upon filing. Failure of the clerk to give such written notice shall not suspend the time for appeal.

A written notice of appeal filed before the attestation and filing of such signed judgment or order shall be deemed as filed on the date of the attestation and filing of the judgment or order.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the circuit court by any party pursuant to SDCL 15-6-59 or SDCL 15-6-50(b), or both, and the full time for appeal fixed by this rule commences to run and is to be computed from the attestation and filing of an order made pursuant to such motion or if the circuit court fails to take action on such motion within the time prescribed, then the date shall be computed from the date on which the time for action by the circuit court expires.

Rule 5 Discretionary Appeals.

(1) Petition for permission to appeal. An appeal from an intermediate order made before trial as prescribed by SDCL 15-26-1(6) may be sought by filing a petition for permission to appeal with the clerk of the Supreme Court within ten days after the entry of such order with proof of service on all other parties to the action in circuit court.

The original and five copies of the petition shall be filed with the clerk of the Supreme Court together with the required statutory filing fees unless exempt by law.

(2) Content of petition. The petition shall be captioned in the Supreme Court and entitled as in the circuit court. It shall contain:

(a) A statement of facts necessary to an understanding of the controlling questions of law or fact determined by the order of the circuit court;

(b) A statement of the question itself;

(c) A concise statement, without argument, of the principles of law on which the petitioner relies, with citations of authorities to support the same;

(d) The reasons as claimed by the petitioner why the ends of justice require that an intermediate appeal be allowed; and

(e) Copies shall be attached as exhibits to the petition of:

(i) All relevant pleadings;

(ii) The order sought to be reviewed;

(iii) All findings of fact, conclusions of law, or memorandum opinions relating thereto; and

(iv) Copies of such other papers and exhibits as petitioner may deem relevant and material.

(3) Response to petition. Within seven days after the service of the petition, any party to the action may serve and file a response thereto. The original and five copies of the answer shall be filed with the clerk of the Supreme Court.

The petition and any response shall be submitted without oral argument unless otherwise ordered.

(4) Grant of permission to appeal--procedure. If permission to appeal is granted, the clerk of the Supreme Court shall serve notice of the order granting permission to appeal by mailing a copy of the order to the clerk of the trial court and the counsel of record of each party to the action. The appellate petitioner shall then file the bond for costs as required by Rule 7 and shall thereafter proceed as though the appeal had been instituted by service of a written notice of appeal. In the order granting the appeal, the Court shall fix the time for the filing of the bond, briefs and the transmitting of the record if necessary.

Rule 6 Appellee's Right to Obtain Review.

An appellee may obtain review of a judgment or order entered in the same action which may adversely affect him by filing a notice of review with the clerk of the Supreme Court within twenty days after the service of the notice of appeal. The clerk of the Supreme Court shall not accept for filing such notice of review unless accompanied by proof of service of such notice on all other parties. The notice of review shall specify the judgment or order to be reviewed.

Rule 7 Bond or Deposit for Costs and Filing Fee.

(1) Form and amount of bond or deposit. Unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, a bond for costs on appeal or equivalent security shall be filed by the appellant with the clerk of the circuit court within the time provided by Rule 4; but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum or value of $500.00. A bond for costs shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed, the judgment or order affirmed, or of such costs as the Supreme Court may direct if the judgment or order is modified or affirmed in part. After a bond for costs is filed, appellee may except to the form of the bond or to the sufficiency of the surety.

(2) Waiver of bond or deposit, or affidavit of indigency. The bond for costs, or deposit of money in lieu thereof, shall be deemed waived if appellant shall file with the clerk of the circuit court, within the time provided by Rule 4, the written consent of each appellee, or an affidavit of indigency. The verity of such affidavit may be contested in the same manner as provided in Rule 8(5) for exception to personal surety.

(3) Affidavit of indigency in lieu of filing fee. In lieu of the filing fee provided for in Rule 3, appellant may file an affidavit of indigency which may be contested as provided in Rule 8(5) for the exception to personal surety.

Rule 8 Stay of Execution Pending Appeal.

(1) When stay of judgment or order allowed. An appeal from a judgment or order shall not stay enforcement of proceedings in the circuit court except as provided in SDCL 15-6-62 unless the appellant executes a supersedeas bond in the amount and form approved by the circuit court or otherwise complies with the provisions of this rule.

(a) Money judgment. If the appeal is from a judgment directing the payment of money, the conditions of the bond shall be the payment of the judgment or that part of the judgment which is affirmed together with interest thereon from the date of the judgment.

(b) Judgment directing the assignment or delivery of documents or personal property. If the appeal is from a judgment directing the assigment or delivery of documents or personal property, the condition of the bond shall be the obedience by appellant to the judgment or order of the Supreme Court. The bond provided by this subdivision need not be furnished if the appellant places the documents or personal property in the custody of such officer or receiver as the presiding judge of the circuit court shall appoint.

(c) Judgment directing the sale or possession of real property. If the appeal is from a judgment directing the sale or delivery of possession of real property the condition of the bond shall be that during the possession of such property by appellant, he will not commit or suffer to be committed any waste thereof, and that if the judgment is affirmed, he will pay the value of the use and occupation of the property, from the time of appeal until the delivery of possession thereof pursuant to the judgment.

(d) Judgment directing execution of an instrument. If the appeal is from a judgment directing the execution of a conveyance or other instrument, its execution shall not be stayed by the appeal unless the instrument shall be properly executed and deposited with the clerk of the circuit court to abide the judgment of the Supreme Court.

(e) Perishable property. If the appeal is from a judgment directing the sale or possession of perishable property, the circuit court may order the property to be sold and the proceeds deposited in court to abide the judgment of the Supreme Court.

(f) Appeal from other judgments and orders. If the appeal is from any judgment or order not expressly covered by these rules the bond shall be conditioned in such amount and form as the circuit court directs.

(2) Extent of stay. When an approved supersedeas bond is filed it shall stay all further proceedings in circuit court upon the judgment or order accordingly, except that the circuit court may proceed upon any other matter included in the action, not affected by the judgment or order appealed from.

(3) Joinder of bonds. The cost bond and supersedeas bond required by these rules may be in one instrument or several, at the option of appellant.

(4) Notice of application for bond. When the amount, form, or effect of any bond is required to be fixed or approved by a court or judge, at least twenty-four hours' notice of the application therefor shall be given the adverse party.

(5) Personal sureties--exceptions to and justification of. Except when the undertaking is with a corporate surety, an undertaking upon an appeal shall be of no effect unless it be accompanied by the affidavit of the sureties, in which each surety shall state that he is worth a certain sum mentioned in such affidavit, over and above all his debts and liabilities, in property within this state not by law exempt from execution, and which sum so sworn to by such sureties shall in the aggregate, be double the amount specified in such undertaking. An appellee may, however, except to the sufficiency of the sureties by service of exception upon appellant within ten days after filing of the bond. Appellant, within the next ten days and upon at least four days' notice to adverse parties, shall produce before the circuit court the sureties who thereupon may be examined on oath by adverse parties as to their sufficiency in such manner as the circuit court deems proper. If the circuit court finds the personal sureties sufficient, it shall endorse its allowance upon the undertakings and cause them to be filed with the clerk. The costs of the justification shall be paid by appellant if the sureties are found insufficient, but if found sufficient, the party or parties excepting to the sureties shall pay the costs of the justification. Unless the sureties justify as so prescribed within the allotted time, the appeal shall be regarded as if no undertaking had been given.

(6) Service of bond on adverse party. A copy of every bond required to be furnished by this rule shall be filed with the clerk of the circuit court. The clerk shall not accept such bond for filing without proof of service of a copy thereof on all adverse parties.

(7) Bond sureties, proceedings against. Whenever a bond for costs or supersedeas bond is given with one or more corporate or individual sureties, each surety thereon submits himself to the jurisdiction of the circuit court and irrevocably appoints the clerk of the circuit court as his agent upon whom any papers affecting his liability on the bond may be served. His or its liability may be enforced on motion in the circuit court without the necessity of an independent action. The motion and such notice of motion as the circuit court shall prescribe shall be served on the clerk of the circuit court, who shall forthwith mail copies to the sureties at their last known address.

(8) Stay of execution without bond by public agency or officer. When the state, any state board or officer, any county, township, municipal corporation, school district, or its officers, in a purely official capacity, shall take an appeal, service and filing of the notice of appeal shall perfect the appeal and stay the execution or performance of the judgment or order appealed from and no undertaking or bond need be given, but the Supreme Court may, on motion, require security to be given in such form and manner as it shall in its discretion prescribe as a condition of the further prosecution of the appeal.

(9) Application to the Supreme Court for special relief. A motion for the relief above provided may be made to the Supreme Court but said motion shall show that the application to the circuit court for the relief sought is not practicable or that the circuit court has denied an application or has failed to afford the relief which the applicant requested, with the reasons given by the circuit court for its action. Said motion shall also show the reasons for the relief requested and the facts relied upon; and if the facts are subject to dispute, the motion shall be supported by affidavit or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk of the Supreme Court and normally will be considered by all members of the Court, but in exceptional cases where such a procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single justice of the Court.

Rule 9 Reserved for future use.

Rule 10 The Record on Appeal.

(1) Composition of the record on appeal. The original pleadings, papers, offered exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases.

(2) The transcript of proceedings; duty of appellant to order; notice to respondent if partial transcript is ordered; duty of reporter; form of transcript.

(a) Within ten days after the filing of the notice of appeal, the appellant shall order from the reporter a transcript of the proceedings or such parts thereof as he deems necessary. The order shall be in writing and within the same period, a copy shall be filed with the clerk of the circuit court.

(b) Unless the entire transcript is to be included, the appellant shall within the ten days' time provided in (2)(a) of this rule file with the clerk of the circuit court a statement of the issues be intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript of other parts of the proceedings be necessary, he shall, within ten days after the service of the order or certificate and the statement of the appellant file with the clerk of the circuit court and serve on the appellant a designation of additional parts to be included. Unless within ten days after service of such designation the appellant has ordered such parts and has so notified the appellee, the appellee may within the following ten days either order the parts or move in the circuit court for an order requiring the appellant to do so.

(c) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the costs of the transcript and all necessary copies. The reporter shall acknowledge at the foot of the order the fact that he has received it and

the date on which he expects to have the transcript completed and shall transmit the order so endorsed to the clerk of the Supreme Court. If the transcript cannot be completed within forty-five days after receipt of the order, the reporter shall request an extension of time from the clerk of the Supreme Court and the action of the clerk of the Supreme Court shall be entered on the record and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the Supreme Court shall take such steps as may be directed by the Chief Justice of the Supreme Court.

(d) The transcript shall be in the form prescribed in the appendix of forms. The reporter shall file the original transcript with the clerk of the circuit court and shall transmit a copy to the attorney for each party to the appeal separately represented and directly to any parties not represented. In the event that more than three copies are necessary to comply with the foregoing requirement, appellant may make application, upon notice, to the circuit court for an order determining the number of copies to be served and the time of use by the parties. Copies of the transcript may be reproduced by any duplicating or copying process which produces a clear black image on white paper. The reporter shall certify the correctness of the original and all copies of the transcript. He shall notify the clerk of the Supreme Court that he has filed the original transcript and transmitted the copies.

(3) Duty of clerk of trial court to assemble and certify the record; time and manner. Within five days after the filing of the notice of appeal, it shall be the duty of the clerk of the trial court to assemble and consecutively number the pages of all pleadings, documents, papers, and exhibits filed in said action, including any opinion which the trial court may have filed or authorized for filing, except the parties may stipulate as to the contents of the record. The clerk shall then prepare and attach an alphabetical index to the records and shall promptly serve a copy on all counsel of record. The clerk's certified record together with the transcript shall constitute the record on appeal.

(4) Statement of the proceedings when no report was made or when the transcript is unavailable. If no report of all or any part of the proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may, within fifteen days after service of the notice of appeal, prepare a statement of the proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within fifteen days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the trial court and the statement as approved by the trial court shall be included in the record.

(5) Agreed statement as the record. In lieu of the record as defined in Rule 10(1), the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to

a decision of the issues presented. If the statement conforms to the truth, together with such additions as the trial court may consider necessary to present the issues raised by the appeal, shall be approved by the trial court and shall be the record on appeal.

(6) Correction or modification of the record. If anything material to either party is omitted from the record, is misstated therein, or is improper, the parties by stipulation, or the trial court, before the record is transmitted to the Supreme Court, or the Supreme Court, on motion by a party or on its own initiative, may direct the record be corrected and if necessary require a supplemental record be approved and transmitted.

Rule 11 Transmission of the Record.

(1) Time for transmission. When the briefs have been served and filed in the Supreme Court, or the time for filing briefs has expired, the clerk of the Supreme Court shall so notify the clerk of the trial court in writing, and the clerk of the trial court shall then forthwith transmit the record on appeal to the clerk of the Supreme Court. Transmission of the record is effected when the clerk of the trial court mails or otherwise forwards the record to the Supreme Court.

(2) Transmittal of record for preliminary hearing. The Supreme Court may also at any time before or after the completion of an appeal by order directed to the clerk of the trial court require the transmission of the record or any part thereof to the clerk of the Supreme Court.

(3) Disposition of record after appeal. The record on appeal shall remain on file in the office of the clerk of the Supreme Court until the action has finally been disposed of. It shall then be returned to the trial court with the remittitur.

Rule 12 Briefs.

(1) Brief of appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(a) A table of contents, with page references.

(b) A table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(c) A jurisdictional statement setting forth the date and form of the judgment or order sought to be reviewed, and the date when the notice of appeal was filed. This statement must make it appear, in cases of appeal, that the order sought to be reviewed is appealable.

(d) A concise statement of the legal issue or issues involved, omitting unnecessary detail. Each issue shall be stated as an appellate court would state the broad issue presented. Each issue shall be followed by a concise statement of how the trial court decided it.

(e) A statement of the case and the facts. A statement of the case shall first be presented identifying the trial court and the trial judge and indicating briefly the nature of the case and its disposition in the trial court. There shall follow a statement of facts relevant to the grounds urged for reversal, modification, or other relief. The facts must be stated fairly, with complete candor, and as concisely as possible. Where it is claimed that a verdict, finding of fact, or other determination is not sustained by the evidence, the statement must set forth the particulars in which the evidence is claimed to be insufficient. Each statement of a material fact shall be accompanied by a reference to the record where such fact appears.

(f) An argument. The argument shall contain the contentions of the party with respect to the issues presented, the reasons therefor, and the citations to the authorities relied on. Each issue shall be separately presented. Needless repetition shall be avoided.

(g) A short conclusion stating the precise relief sought.

(h) Appendix, if any. Such appendix may include the judgment, order or decision in question, any relevant portions of the pleadings, instructions, findings or opinion, and any other parts of the record to which the parties wish to direct the particular attention of the Court.

(2) Brief of appellee. The brief of the appellee shall conform to the requirements of Rule 12, except that a statement of the issues or of the case of facts need not be made unless the appellee is dissatisfied with the statement of appellant. If a notice of review is filed pursuant to Rule 6, the appellee's brief shall contain the issues specified in the notice of review and the argument thereon as well as the answer to the brief of appellant.

(3) Reply brief. The appellant may file a brief in reply to the brief of the appellee. The reply brief must be confined to new matter raised in the brief of the appellee.

(4) References in briefs to parties. In their briefs and oral arguments counsel should minimize references to parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the trial court, or the actual names of the parties, or descriptive terms such as "employer", "owner", "guest", "injured person", "husband", etc.

(5) References in briefs to record. Whenever reference is made in the briefs to any part of the record it shall be made to the particular part of the record, suitably designated, and to the specific pages thereof.

(6) Reproduction of statutes, ordinances, rules, regulations, etc. If determination of the issues presented requires the study of statutes, ordinances, rules, regulations, etc., or relevant parts thereof, they shall be reproduced in the brief or in an appendix at the end.

(7) Length of briefs. No brief shall exceed sixty pages without prior approval of the Supreme Court.

(8) Briefs of multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(9) Specifications for printing and binding of briefs. All briefs in the Supreme Court shall be printed and the term "printed" shall include,

(a) lead type and line, offset, or other approved process used by the commercial printing industry,

(b) the reproduction of typewriting by mimeograph, multigraph, photographic, or other similar reproduction process which may be approved by the Supreme Court from time to time. All briefs shall substantially conform to the following standards, requirements, and conditions:

(i) Each brief shall be printed in black in a clear and legible manner on one side only (except when printed as in (a) above it may be printed on both sides) of white, unglazed, opaque paper of good texture, eight and one-half inches wide and eleven inches long.

(ii) No smaller than "standard pica" type shall be used. The printing shall be double-spaced, except for lengthy quotations which shall be indented and may be single spaced.

(iii) The left margin shall be one and one-half inches and all other margins shall not be less than one inch.

(iv) Each page of the brief, except the front index, shall be consecutively numbered in Arabic figures centered at the bottom of each page.

(v) The cover of each brief shall state the title of the action, indicating which party is appellant and which is appellee; the name of the court from which the appeal is taken; the name of the judge who tried the action; whether the brief is for the appellant or appellee; the names and addresses of the attorneys for the appellant and appellee; and the date the notice of appeal was filed.

(vi) Each brief shall be securely bound on the left margin by substantial staples and binding tape or other approved binding.

(10) Brief failing to conform to requirements; duty of clerk of Supreme Court. The clerk of the Supreme Court may refuse to file a brief which does not substantially comply with the requirements of this rule or any brief which is not printed or reproduced in a clear and legible manner. When a brief is refused for filing the clerk shall immediately notify the party or attorney who submitted the same of

the rejection. Such party shall then have ten days in which to file a brief in compliance, for which no additional costs may be taxed.

(11) Supplemental brief with late authorities--service on opposing counsel. Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief, he shall serve a copy thereof upon opposing counsel and file fifteen copies of the supplemental brief, restricted to such new matter and otherwise in conformity with these rules, up to the time the case is called for hearing, or by leave of Court thereafter.

Rule 13 Brief and Argument of Amicus Curiae.

A brief of an amicus curiae may be filed only at the request of the Court or by leave of the Court granted upon motion and notice to the parties. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. An amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the Court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer.

Amici curiae counsel will not be entitled to participate in oral argument unless counsel for either party agrees to share his time and the Court allows the appearance of amici curiae counsel.

Rule 14 Filing and Service of Briefs.

(1) Time for serving and filing briefs. The appellant shall serve and file his brief within forty-five days after delivery of the transcript by the reporter or within forty-five days after the Court approval provided for in Rule 10(4) or 10(5). If the transcript is obtained prior to appeal, or if the record on appeal does not include a transcript, then the appellant shall serve and file his brief within forty-five days after service of the notice of appeal upon the adverse party. The appellee shall serve and file his brief within forty-five days after service of the brief of appellant. The appellant may serve and file a reply brief within fifteen days after service of appellee's brief.

(2) Extension of time for serving and filing briefs. The parties to an appeal may allow to each other by stipulation, one extension of time not exceeding fifteen days for serving and filing the appellant's and appellee's initial brief, provided such stipulation is made and presented to the clerk of the Supreme Court before the time for filing such brief as provided in Rule 14(1) has expired. Thereafter, no other extension of time fixed by these rules for filing briefs will be allowed, except upon application and notice. The application shall be made to the Chief Justice of the Supreme Court and shall be allowed only for good cause.

(3) Number of copies to be served and filed. Two copies of each brief shall be served on the attorney for each party to the appeal separately represented and upon any party who is not represented by counsel. Fifteen copies of each brief shall be filed with the clerk of the Supreme Court. The clerk shall not accept a brief for filing unless it is accompanied by admission or proof of service.

(4) Consequence of failure to file briefs. If an appellant fails to file his brief within the time provided by this rule or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to timely file his brief, he will not be heard at oral argument except by permission of the Court. The clerk may not accept for filing any brief not timely submitted for filing.

(5) Briefs mailed for filing--time. When briefs are forwarded to the clerk for filing by mail they shall be accompanied by an affidavit of mailing or certificate of service of mailing and shall be deemed to be filed as of the date of mailing.

Rule 15 Oral Argument.

(1) Supreme Court calendar for oral argument; duty of clerk. The clerk of the Supreme Court shall keep a calendar under the direction of the Chief Justice in which the dates for oral argument shall be entered.

When an appeal or an original proceeding is set for oral argument the clerk shall give written notice by first class mail to all attorneys of record in the case stating the date and place that argument will be heard. If any party is not represented by an attorney, such notice shall be given to such party by mailing to his last known post office address. The Court may in its discretion consider the appeal on the briefs and record without oral argument.

(2) Time allowed for argument. For oral argument, unless otherwise ordered, the appellant shall be allowed twenty minutes to open, the appellee shall be allowed twenty minutes to answer and the appellant shall be allowed ten minutes for rebuttal. If additional time is deemed necessary for adequate presentation, counsel shall obtain permission from the Court before commencing the argument. A party is not obliged to use all of the time allowed.

(3) Order and content of argument. The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Counsel should not read at length from the record, briefs or authorities.

(4) Nonappearance of parties. If counsel for a party fails to appear to present argument, the Court may hear argument of counsel who is present, and the case will be decided on the briefs unless the Court otherwise orders.

(5) Submission on briefs. By agreement of the parties, a case may be submitted for decision on the briefs, but the Court may direct that the case be argued.

(6) Physical exhibits used at argument. If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the courtroom before the Court convenes on the date of the argument. After the argument, counsel shall cause the exhibits to be removed from the courtroom unless the Court otherwise directs.

(7) When member of Court absent. Whenever any member of the Court is not present at the oral argument of a case, such case shall be deemed submitted to such member of the Court on the record, briefs, and recorded arguments and when during the consideration of a case there is a change in the personnel of the Court the case shall be deemed submitted to the new member or members on the record, briefs, and recorded arguments of counsel.

(8) Prehearing conference. At any time before oral argument the Court may direct the attorneys for the parties to appear before the Court or a justice thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceedings by the Court. The Court or a justice shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceedings unless modified to prevent manifest injustice.

Rule 16 Enlargement of Time.

The Supreme Court for good cause shown may upon motion enlarge or extend the time prescribed by these rules for doing any act or may permit an act to be done after the expiration of such time; but the Supreme Court may not enlarge the time for filing a notice of appeal.

Rule 17 Title.

These rules shall be known as the South Dakota Rules of Civil Appellate Procedure and may be cited as S.D.R.C. App.P. Rule _____ .

APPENDIX OF FORMS

Form 1 NOTICE OF APPEAL

State of South Dakota)
)
County of _____)

In Circuit Court

_____ Judicial Circuit

A.B.,)
)
Plaintiff,)
)
v.)
)
C.D.,)
)
Defendant,)

Notice of Appeal

To: John Jones, Attorney for Plaintiff, A.B.

Please take notice, that the defendant C.D. appeals to the Supreme Court of South Dakota from the final judgment rendered in this action on the _____ day of _____ , 19 ___ .

Dated this _____ day of _____ , 19 ___ .

Name and address of attorney for C.D.

(Note: The trial court caption is used on the notice of appeal, cost and supersedeas bonds, or stipulation waiving bonds. The originals and duplicate originals are filed with the clerk of the trial court. All subsequent documents are captioned in the Supreme Court and are filed with the clerk of the Supreme Court.)

Admission, certificate, or affidavit of service to be added.

Form 2 NOTICE OF REVIEW

STATE OF SOUTH DAKOTA
IN THE SUPREME COURT

A.B.,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Notice of Review
	)	
C.D.	)	
	)	
Defendant-Appellant.	)	

To: Smith & Smith, attorneys for defendant-appellant, C.D.

Please take notice that the plaintiff-appellee, A.B., will seek review of the order of the circuit court entered on the ____ day of _____, 19 ____, denying plaintiff's motion for new trial on the issue of damages.

Dated this _____ day of _____, 19 ___.

Name and address of attorney for appellee

Admission, certificate, or affidavit of service added.

Form 3 APPEAL TRANSCRIPTS

1. Appeal transcripts shall consist of volumes of 250 pages or less, prepared on 8 1/2" x 11" white opaque paper with 28 prenumbered, double-spaced lines per page.

2. Each page shall have ruled margins with 3/4" top and bottom margins, a 1 1/2" left margin, and a 1/2" right margin.

3. The transcript shall be typed using pica type with 10 characters per inch; questions shall start with a "Q" flush at the left margin, with two spaces between "Q" and the text of the question; answers shall start with an "A" flush at the left margin with two spaces between "A" and the beginning of the text of the answer; colloquy, such as "THE COURT," "MR. JONES," etc., shall start three spaces from the left margin.

4. The pages shall be consecutively numbered throughout the entire transcript (not according to volume) located at the bottom center of each page.

5. Each volume shall be securely bound with a protective cover upon which or through which the following shall appear: (a) a 1 1/2" blank space at the top of the page; (b) the trial court name, location and case number; (c) the case name; (d) the type of proceeding; (e) the date of the proceeding reported in that volume; (f) the name of the judge before whom the proceedings occurred; (g) appearances; (h) the volume number and the pages included in the volume.

6. An index of witnesses, motions, and exhibits shall follow the cover page of the first volume of each transcript; each major event of the proceeding shall be listed separately and identified by the transcript page number at which it begins.

STATE OF SOUTH DAKOTA)
)
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
Civ. # 78-1

_____)
)
JOHN C. DOE,)

TRANSCRIPT OF

Plaintiff,)
)
v.)
)
RICHARD P. ROE,)
Defendant.)
)
_____)

CIVIL JURY TRIAL PROCEEDINGS

Volume 1 of 2

(Pages 1 to 120: June 7, 1977)
(Pages 121 to 250: June 8, 1977)

BEFORE: THE HONORABLE JAMES M. WINSTON
Circuit Judge, and Jury at
Sioux Falls, South Dakota on
June 7, 8, 9 and 10, 1977.

APPEARANCES: For Plaintiff: Stephen S. Summer
Attorney at Law
455 Summit Drive
Sioux Falls, So. Dak.

For Defendant: Larry Linton of
Linton and Lawler
Attorneys at Law
128 Lyndale Avenue
Sioux Falls, So. Dak.

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WITNESSES:	Direct	Cross	Redirect	Recross
For the Plaintiff:				
John C. Doe	34	80	112	115
Ralph R. Schultz	116	122	125	130
Frank H. Hunt	131	142	148	
James E. Larson	150	186		
Burton B. Sears	187	210	213	
For the Defendant:				
Michael R. Gillen	220	231	240	248
Edward L. Renfer	250	253	260	
Susan M. Vangen	262	289	305	326
Richard P. Roe	328	259	377	382
Rebuttal:				
James E. Larson, M.D.	387	420	431	448

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CROSS-EXAMINATION

Q (by MR. SUMMER) Okay. With respect to this stocking cap, is State's Exhibit Number 13 similar to the ones you sell?

A They look exactly like the ones he bought. He bought 3 of them.

Q Okay. Go through it again. It could be one that is similar to that as opposed to the actual one.

MR. LINTON: That argumentative, Your Honor.

THE COURT: Well, he's already answered the question previously.

MR. SUMMER: What was his answer?

THE COURT: I believe he said it could be.

MR. LINTON: Wait just a minute, Your Honor. I move that answer be stricken.

THE COURT: If in fact he answered the question it will be stricken. Any further questions, Mr. Summer?

MR. SUMMER: No, Your Honor.

RE-DIRECT EXAMINATION

Q (By MR. LINTON) Sir, I'm going to hand you again State's Exhibit 13, and will you examine it and tell the Court what differences if any you see between this particular exhibit and the stocking cap you sold on January 7th, 1977.

A Well, just that the way it is laying here, it's open and the ones that we have on display are folded up like this. But other than that I don't really see any difference.

MR. LINTON: That's all I have, Your Honor.

THE COURT: Very well, Mr. Summer, your next witness.

MR. SUMMER: Your Honor, please be advised that I anticipate

Form 4 APPELLANT'S BRIEF

Cover Page
IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

A.B.,
Plaintiff and Appellee,
v.
C.D.,
Defendant and Appellant.

Appeal from the Circuit Court, First Judicial Circuit, Yankton County, South Dakota. The Hon. _____ Judge presiding.

Appellant's Brief

Names and addresses of attorneys for Appellant and Appellee.

The notice of appeal was filed on the _____ day of _____ , 19 ___ .

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8 Am.Jur.2d, Automobile and Highway Traffic,
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(3) JURISDICTIONAL STATEMENT
(4) LEGAL ISSUES

I. Does the driver of a motor vehicle approaching an intersection forfeit the right-of-way when traveling at an unlawful rate of speed?
Trial Court. Held in the negative.

II. Should an expert witness be allowed to give reconstruction testimony when there is direct evidence of the event by eye witnesses?
Trial Court. Held in the affirmative.

(5) STATEMENT OF THE CASE AND FACTS
CASE HISTORY

This is an action for personal injuries and property damage arising out of a motor vehicle accident which occurred in the city of Yankton, Yankton County, South Dakota, on _____ , 19 ____ . Action was commenced by service of Summons and Complaint on _____ , 19 ____ , in the First Judicial Circuit, Hon. _____ Judge presiding.

The jury returned a verdict for plaintiff in the amount of $ _____ . Judgment was entered on _____ , 19 _____ . Defendant appealed from the judgment by service and filing of a notice of appeal on _____ , 19 ____ .

STATEMENT OF FACTS

Shortly after noon on _____ , 19 ____ , a motor vehicle collision occurred at the intersection of Dakota Avenue and 20th Street in the city of Yankton. The plaintiff A.B. was driving his Ford automobile north on Dakota Avenue. Defendant was driving, etc. ***

(6) ARGUMENT

I. The driver of a motor vehicle approaching an intersection forfeits his right-of-way when traveling at an unlawful rate of speed.

(Each legal issue should be separately argued.)

II. An expert witness should not be allowed to reconstruct an accident when there is direct evidence of the event by eyewitness.

(7) CONCLUSION

It is urged that the judgment appealed from be reversed.

Respectfully submitted,

Attorney for Defendant-Appellant

(8) APPENDIX (if any)

EFFECTIVE DATE

These rules shall take effect on July 1, 1979. They shall govern all proceedings after they take effect, and all further proceedings in actions then pending, except to the extent that, in the opinion of the Supreme Court, their application in a particular action pending when the rules take effect would not be feasible, or would work an injustice, in which event the previous procedure shall apply.

Dated at Pierre, South Dakota, this 5th day of January, 1979.

BY THE COURT:

ROGER L. WOLHMAN
Chief Justice
FRANCIS G. DUNN
Associate Justice
LAURENCE J. ZASTROW
Associate Justice
DONALD J. PORTER
Associate Justice
ROBERT E. MORGAN
Associate Justice

ATTEST:
GLORIA J. ENGEL
Clerk of the Supreme Court

CHAPTER 362

(SUPREME COURT RULE 79-2)

RULES OF CIVIL APPELLATE PROCEDURE AMENDED
IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

****

IN THE MATTER OF THE AMENDMENT OF)
FORM 3 OF THE APPENDIX OF FORMS) RULE 79-2
OF SUPREME COURT RULE 79-1, RULES)
OF CIVIL APPELLATE PROCEDURE)

The Court having adopted the Rules of Civil Appellate Procedure (Supreme Court Rule 79-1) on January 5, 1979, and it appearing to the Court that good cause exists for the amendment of Form 3 of the Appendix to said Rules, now, therefore, it is

DATED at Pierre, South Dakota, this 31st day of December, 1979.

BY THE COURT:

/s/Roger L. Wollman
Chief Justice

ATTEST:

/s/Gloria J. Engel
Clerk of the Supreme Court

(SEAL)

CHAPTER 384

(Supreme Court Rule 80-1)

CERTAIN OLD RULES OF APPELLATE PROCEDURE SUPERSEDED

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

****

IN THE MATTER OF THE DECLARATION THAT CERTAIN SECTIONS OF SDCL 15-26 HAVE BEEN SUPERSEDED BY SDCL 15-26A, THE REPEAL, TRANSFER, AND AMENDMENT AND TRANSFER OF CERTAIN SECTIONS OF SDCL 15-26	)	RULE 80-1

Pursuant to a hearing held on December 19, 1979, at Pierre, South Dakota, relating to the amendment, transfer and repeal of all sections of SDCL 15-26 in order to bring said Chapter into conformity with SDCL 15-26A, the Court having considered the correspondence and oral presentations relating to said proposals and being fully advised in the premises, now, therefore, it is

ORDERED that SDCL 15-26-3, 15-26-5, 15-26-6, 15-26-9, 15-26-10, 15-26-11, 15-26-12, 15-26-16, 15-26-18, 15-26-23, 15-26-23.1, 15-26-24, 15-26-25, 15-26-25.1, 15-26-25.4, 15-26-25.5 and 15-26-25.6 be and they are hereby declared to have been superseded by SDCL 15-26A.

IT IS FURTHER ORDERED that SDCL 15-26-4, 15-26-14, 15-26-17 and 15-26-25.2 be and they are hereby transferred to SDCL 15-26A.

IT IS FURTHER ORDERED that SDCL 15-26-13 be and it is hereby repealed and reenacted to reflect proposed amendment as a section of SDCL 15-26A to read in its entirety as follows:

Noncompliance with requirements and inaccurate statements as grounds for denial of appeal from intermediate order.--In any case where it appears to the Supreme Court that a petitioner has willfully failed to comply with the requirements of §§ 15-26A-5 to 15-26A-9, inclusive, as to the form and contents of a petition for allowance of an appeal from an intermediate order, or has intentionally made an unfair or inaccurate statement in such petition, this shall constitute sufficient grounds for denial of the petition.

IT IS FURTHER ORDERED that SDCL 15-26-15 be and it is hereby repealed and reenacted to reflect proposed amendment as a section of SDCL 15-26A to read in its entirety as follows:

Stay of further proceedings pending petition for appeal from intermediate order--Security required--Filing of order granting stay.--Upon the filing of any petition referred to in § 15-26A-5 with the clerk of the Supreme Court, the petitioner may make application to the court for a stay of proceedings pending action of the court on such petition. The court shall grant such stay only when satisfied that the ends of justice require it, and upon such security as the court may direct to safeguard any other party against damage by reason of delay. If the court makes an order granting such stay, a certified copy thereof must be filed with the clerk of the court from which the appeal is sought. The filing of the petition shall not operate to stay proceedings except as provided in this section.

IT IS FURTHER ORDERED that SDCL 15-26-25.3 be and it is hereby repealed.

IT IS FURTHER ORDERED that the effective date of this Rule shall be July 1, 1980.

DATED at Pierre, South Dakota, this 23rd day of January, 1980.

BY THE COURT:

/s/Roger L. Wollman
Chief Justice

ATTEST:

/s/Gloria J. Engel
Clerk of the Supreme Court

(SEAL)

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 15-6-11 be amended to read as follows:

~~15-6-11. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name; whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this section an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.~~

(a) Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion or other paper and state his address. Unless otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(b) If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which shall include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

(c) The court shall make findings of fact and conclusions of law for every order entered pursuant to this section. Upon conclusion of the case or controversy, an order entered pursuant to this section shall be considered a final order and is appealable as a matter of right under § 15-26A-3.

(d) The Supreme Court shall consider all appeals pursuant to this section without any presumption of the correctness of the trial court's findings of fact and conclusions of law. Reasonable attorney fees and costs shall be awarded to the successful party on appeal.

Section 2. That § 15-26A-3 be amended by adding thereto a new subdivision to read as follows:

(7) An order entered on a motion pursuant to § 15-6-11.

Signed March 7, 1986.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30783

CALVIN ARLEN BERWALD, d/b/a SOKOTA DAIRY v. STAN'S INC.

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

The Honorable Kent A. Shelton, Presiding

REPLY BRIEF OF APPELLANT CALVIN BERWALD

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Attorney for Appellee

Notice of Appeal was filed July 29, 2024

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ARGUMENT

As indicated in earlier briefing, the substance of *Wilge v. Cropp,* 74 S.D. 511 does not apply where post-trial occurrences including the discovery of potential juror misconduct during trial and a trial court granting an extension to deal with this and other issues making the earlier, May 7th, 2024 judgment(s) not practical to appeal. Stan's, Inc.'s ("Stan's") reading and application of *Wilge* attempts to apply to the circumstances in this case. In *Wilge,* "[a]ll the matters that appellant seeks to have reviewed in this appeal from the order denying the new trial could have been reviewed in an appeal from the judgment." *Wilge* at 514. Here, that is not the case. If the rule were as Stan's suggested, litigants would be unallowed a remedy for things that were not discovered until after trial and The Supreme Court would have to deal with issues that occurred at trial without insight, nor a ruling from a trial court, nor a trial transcript when the underlying trial court granted extension.

So, while Stan's alleges that it is not a *timing* issue, it is rather a *judgement* issue, the practical effect is that judgment(s) were not final until the trial court made its post-trial rulings, findings of fact and conclusions of law i.e. the special proceedings – which is the exactly the timing issue. And the trial court granted an *extension* to deal with the unusual post-trial issues that is briefed on pg. 18-23 of Appellant's Brief within the time for appeal. There was no time and no hearing set to deal with these issues before the Motion for New trial hearing, something that the parties and court were waiting for the Court reporter regarding. The parties had ordered the transcript more than a year earlier. Everyone was under the impression it

would be dealt with at the Motion for New Trial Hearing. Furthermore, appeals are not necessarily always limited to *judgments* as Stan's would suggest.

What Stan's suggests is an appropriate application of *Wilge* is a sort of pre-emptive appeal on what a Court might do post-trial after a juror raised misconduct during trial. And, at that time, there was no transcript, so the parties and the trial court waited. While Stan's focuses on SDCL § 15-6-26(A)-3(3), and its lacking allowance of an appeal from an order *denying* a new trial, it would appear that this case is the sort of circumstance where Section (4) "Any final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment[.]" Stan's reading of *Wilge* would render the cited subsection meaningless and *Wilge* did not even attempt to apply to cases involving post-trial sorts of irregularities.

What is more is that SDCL § 15-26A-4 specifically accounts for the idea that appeals can occur after and pursuant to judgments and *orders*. "(1) Notice of appeal. The notice shall specify the party or parties taking the appeal; shall designate the judgment, *order*, or part thereof appealed from[.]" (emphasis added) Stan's fails to explain why the legislature specifically left intact a right to appeal from an order. A forced appeal from the May 7th 2024 judgments would create exactly the piecemeal situation that extensive case law regarding final orders are designed to prevent. There was no final order prior to that point in time in light of the trial court's extension of time to deal with these issues. Had the trial court not granted the extension, the

earlier judgment would have been determined to be a final order that *must* have been appealed from. But that is not what occurred.

The ordered delay allowed some of the merits of the issues to be dealt with during post-trial motions. Then, the appeal followed from a better, albeit still not complete record on the merits rather than an entirely incomplete record that existed at the time of the May 7th, 2024 judgments. The May 7th 2024 judgments dealt in no substantive way with the juror misconduct issue and the parties and court had not briefed the nor argued that issue by that point in time. It was entirely a pending issue.

Furthermore, it is not as if The Court *must* dismiss an appeal on this basis as SDCL § 15-26A-4 specifically allows the Supreme Court to take such action as it deems appropriate. In this instance, Berwald was attempting to avoid an unnecessary piecemeal appeal that would have not been complete.

Finally, nothing about either of the "Amended Judgments" that the trial court signed on May 7th, 2024 indicate either (1.) that they were "final", nor (2.) that they attempted to finalize the Summary Judgment from 2022 regarding accord and satisfaction. In reality, the pendency of a final judgment had been ongoing for more than a year, interrupted by the filing of an incorrect judgment and notice thereof, and intentionally delayed so that a transcript could be accommodated. All of this was understood to be occurring in the context of the Motion for New Trial, wherein the parties and Court anticipated discussing the irregularities of deliberations raised by the juror.

CONCLUSION

It is appropriate for The Court to deal with these issues on the merits.

Dated this 13th day of February 2025

TURBAK LAW OFFICE, P.C.
Attorney for Appellant

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CERTIFICATE OF COMPLIANCE

I hereby certify that the above Reply Brief of Appellant has been produced in Microsoft Word using a 12.5 point proportionally spaced typeface for the text of the Brief and a 12.5 point proportionally spaced typeface for footnotes; that the Brief contains 862 words, and that this complies with the Court's type volume under SDCL 15-26A66(b)(2).

CERTIFICATE OF SERVICE

The undersigned, attorney for the Plaintiff/Appellant, hereby certifies that the Plaintiff/Appellant's Brief in the above-entitled action was duly served upon the interested parties on the following:

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Attorney for Defendant/Appellee

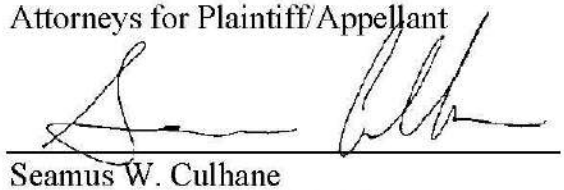
by Odyssey File and Serve this 13th day of February 2025.

The undersigned further certifies that he caused the original of Plaintiff/Appelant's Brief to be mailed to:

Shirley Jameson-Fergel
Clerk, South Dakota Supreme Court
500 East Capitol
Pierre, SD 57501-5070

By United State mail, postage prepaid, this 13th day of February 2025.

TURBAK LAW OFFICE, P.C.
Attorneys for Plaintiff/Appellant



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