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November 12, 2018

Public Utilities Commission
Kristie Fiegen, Chairperson
Gary Hanson, Vice Chairman
Chris Nelson, Commissioner
c/o Patricia Van Gerpen, Executive Director
Capitol Building, 1st floor
500 E. Capitol Ave.
Pierre, SD 57501-5070

VIA: kristie.fiegen@state.sd.us
VIA: gary.hanson@state.sd.us
VIA: chris.nelson@state.sd.us

Re: In the Matter of the Grain Buyer License Of H&I Grain Of Hetland, Inc.; GW17-002

Dear Ms. Fiegen, Mr. Hanson, and Mr. Nelson,

I write on behalf of my client CHS Hedging, LLC ("CHS") regarding the Second Petition to Appoint South Dakota Public Utilities Commission as Receiver (the "Renewed Petition") filed on October 10, 2018, by Gary Schumacher in the above-captioned matter. Attached to Mr. Schumacher's Renewed Petition as exhibits are (1) a copy of his initial petition filed on April 13, 2018; (2) a copy of the Commission's August 8, 2018 Order reflecting the Commission's unanimous determination to seek receivership over H & I Grain of Hetland, Inc. ("H & I Grain") from the Circuit Court; and (3) a copy of the Circuit Court's final written order entered October 2, 2018, dismissing the Commission's receivership petition with prejudice.

Despite the Circuit Court's order dismissing the receivership petition with prejudice, Mr. Schumacher has filed the present Renewed Petition with the Commission, which is nearly identical in form and substance to the initial April 13 petition. Having met and conferred directly with Mr. Schumacher by telephone, it is CHS's understanding that Mr. Schumacher is asking the Commission to simply re-petition the Circuit Court for a receivership over H & I Grain. The only difference in the proposed "re-petition" is that Mr. Schumacher believes the Commission should not state the purpose for the receivership in the court pleadings. However, as the Commission is aware, the purpose for the proposed receivership is well documented and cannot be hidden from the Circuit Court. For the two reasons discussed below, therefore, the Commission should either (1) summarily dismiss the Renewed Petition without consideration of its merits; or (2) deny the Renewed Petition.

First, the Renewed Petition is substantively identical to the initial April 13 petition, and the Circuit Court has issued a final ruling on the propriety of a receivership in these circumstances—i.e., there is no basis under South Dakota law that would permit the Commission to take receivership of H & I Grain. Because the Circuit has already made a binding and final determination on this question, South Dakota's law of res judicata makes clear that the Renewed Petition is impermissible. "The doctrine of res judicata serves as claim preclusion to prevent relitigation of an issue actually litigated or which could have been properly raised and determined in a prior action." *Link v. L.S.I., Inc.*, 793 N.W.2d 44, 55 (S.D. 2010) (quoting *Barnes v. Matzner*, 661 N.W.2d 372, 377 (S.D. 2003)). South Dakota courts apply this doctrine to give effect to two legal maxims: (1) a party to a lawsuit "should not be twice vexed for the same cause," and (2) "public policy is best served when litigation has a repose." *Black Hills Jewelry Mfg. Co. v. Felco Jewel Indus., Inc.*, 336 N.W.2d 153, 157 (S.D. 1983); *see Link*, 793 N.W.2d at 55. Res judicata applies if the following four elements are satisfied:

> (1) the issue in the prior adjudication [is] identical to the present issue, (2) there [was] a final judgment on the merits in the previous case, (3) the parties in the two actions [are] the same or in privity, and (4) there [was] a full and fair opportunity to litigate the issues in the prior adjudication.

Dakota, Minnesota & E. R.R. Corp. v. Acuity, 720 N.W.2d 655, 661 (S.D. 2006). All four elements are satisfied in this matter: the issues and parties are precisely identical, the Circuit Court ruled on the merits and dismissed the receivership petition with prejudice, and there was a full and fair opportunity to litigate the issues in this case when the Circuit Court held a hearing on the matter, at which the Commissioners and their counsel were present, in De Smet on September 19, 2018. Res judicata applies, and the Circuit Court would therefore dismiss any subsequent receivership petition. The Commission should dismiss or deny the Renewed Petition based upon the plain applicability of the doctrine of res judicata.

Second, recent factual developments have rendered the Renewed Petition entirely moot. Just days after the Circuit Court dismissed the previous receivership petition, the South Dakota Secretary of State formally dissolved H & I Grain as a business entity on October 6, 2018. The Certificate of Administrative Dissolution is attached hereto. Because H & I Grain has been administratively dissolved and had no assets at the time of its dissolution, there is simply nothing over which the Commission may seek a receivership. The Commission clearly cannot become receiver for a non-existent business entity to preserve non-existent assets. The Commission should dismiss or deny the Renewed Petition as moot because H & I Grain no longer exists and is not a going concern.

For the foregoing reasons, the Renewed Petition presently before the Commission is both legally improper and moot. The Commission should summarily dismiss or deny the Renewed Petition.

Sincerely,

/s/ J. Linebaugh

Jesse Linebaugh

South Dakota Secretary of State
SHANTEL KREBS

DUANE STEFFENSEN
RE: H & I GRAIN OF HETLAND, INC.
205 MAIN AVE
HETLAND, SD 57212-7711

August 2, 2018

NOTICE OF PENDING DISSOLUTION OR REVOCATION

Business ID:	Business Name:
DB037025	**H & I GRAIN OF HETLAND, INC.**

This is official notification under South Dakota Codified Law 47-1A-1420, that the above-named entity is in a dissolution or revocation pending status with this office.

This status was effective at the end of the business day on **August 1, 2018,** and is caused by a failure to file one or more **YEARLY** annual report(s) during the anniversary month of incorporation or qualification. It is the business's responsibility to file an annual report for each year in which the business entity exists.

If you would like to restore your **Good Standing** in this state, it is necessary to take action **ON OR BEFORE Friday, October 5TH, 2018** and file **ALL** delinquent annual reports, along with the proper filing fees and any associated late fees.

OR

If you would like to have your entity **Dissolved**, **DO NOTHING,** and your entity will be dissolved by our office on **Saturday, October 6th, 2018**.

To file your Annual Reports, go to our website: **www.sdsos.gov**, click on ***"Business Services"*** and select ***"File an Annual Report"***. To begin the report process, you will enter the Business ID listed above.

If the registered agent name and/or address have changed, state law requires a *Statement of Change of Registered Agent* to be filed along with the additional filing fee.

South Dakota Law does not allow for extensions or the waiving of fees; the report(s) must be filed prior to the date cited above.

Shantel Krebs

Shantel Krebs, Secretary of State

SD Secretary of State - Business Services Division

Mailing Address:	*Physical Address:*
500 E Capitol Ave	215 E. Prospect Ave
Pierre, SD 57501	Pierre, SD 57501

Phone: 605-773-4845 | www.sdsos.gov | corpinfo@state.sd.us

DUANE STEFFENSEN
RE: H & I GRAIN OF HETLAND, INC.
205 MAIN AVE
HETLAND, SD 57212-7711

State of South Dakota

Certificate of Administrative Dissolution

I, **Shantel Krebs**, Secretary of State of the State of South Dakota, by virtue of the authority vested in me by SDCL §47-1A-1421, §47-18-16.4, §47-24-13.2 and §47-34A-810 hereby administratively dissolves the below named to transact business in this state for failure to file the annual report(s) when due.

DB037025
H & I GRAIN OF HETLAND, INC.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of South Dakota, at Pierre, the Capital, this October 6, 2018.

Shantel Krebs

Shantel Krebs
Secretary of State

guished from its original jurisdiction. SDCL 10–2–1 provides for the State Board with appointment of five members from five districts identical with the supreme court districts. SDCL 10–2–1.1 then provides, in pertinent part, that the "state board of equalization ... shall retain the quasi-judicial ... functions (as defined in § 1–32–1) otherwise vested in it and shall exercise those functions independently of the secretary of revenue." SDCL 1–32–1(10) defines "quasi-judicial function" as "an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies." Finally, SDCL 10–11–42 provides that "[a]ny person, firm or corporation, public or private, feeling aggrieved by the action of the county board of equalization relative to the assessment of its property ... may ... appeal to the state board of equalization for a determination of such grievance."

While Butte County's brief goes back into the legislative history of the State Board through the evolution of the State Board to the Tax Commission and subsequently back to the State Board, we deem that inquiry unnecessary. "[R]esort[ing] to legislative history is justified only when legislation is ambiguous or its literal meaning is absurd or unreasonable. Absent these circumstances, we must give legislation its plain meaning. We cannot amend it to produce or avoid a particular result." *Lead-Deadwood School District v. Lawrence County,* 334 N.W.2d 24, 25 (S.D.1983). If we can learn anything from *Hansen, supra,* it is the observation of Justice Hanson in his dissent, wherein he stated:

> The laws of the past are helpful in determining their meaning but are not controlling as to the legislative intendment of the present. Our tax laws have undergone constant and drastic change since statehood. Our present statutes are but fragmentary bits retained in the culling out process. Companion statutes that once gave a meaning to some of our present laws are no longer in effect.

76 S.D. at 449–50, 80 N.W.2d at 313.

In our opinion, the legislation in its present form is clear and unambiguous. Its meaning becomes absurd and unreasonable only if Butte County's theory is applied to it.

We reverse the decision of the trial court and remand the case for further proceedings and disposition on the merits.

All the Justices concur.

BLACK HILLS JEWELRY MANUFACTURING CO., a South Dakota corporation; F.L. Thorpe & Company, Inc., a South Dakota corporation; and Stamper Black Hills Gold Jewelry, Inc., a South Dakota corporation, Plaintiffs and Appellants,

v.

FELCO JEWEL INDUSTRIES, INC., a corporation; South Dakota Gold Company, Inc., a South Dakota corporation; and Johnson Matthey, an international jewelry conglomerate, Defendants and Appellees.

Nos. 14002 and 14019.

BLACK HILLS JEWELRY MANUFACTURING CO., a South Dakota corporation; F.L. Thorpe & Company, Inc., a South Dakota corporation; and Stamper Black Hills Gold Jewelry, Inc., a South Dakota corporation, Plaintiffs and Appellants,

v.

GOLD RUSH, INC., a North Dakota corporation; GRMCO, Inc., a South Dakota corporation; and Confidential Casting Corp., a corporation, Defendants and Appellees.

Nos. 14003 and 14020.

Supreme Court of South Dakota.

Argued April 18, 1983.

Decided June 29, 1983.

Gold jewelry manufacturers brought common-law action against other manufac-

turers for unfair competition. Plaintiffs and some of the defendants had been parties to prior federal litigation which concluded with permanent injunction against those defendants on plaintiffs' claims under the Lanham Trade-Mark Act. In the instant action, defendants counterclaimed, alleging that plaintiffs were monopolizing the trade or commerce of manufacturing and distributing certain gold items. The Circuit Court, Seventh Judicial Circuit, Pennington County, Merton B. Tice, Jr., J., dismissed both plaintiffs' petitions and defendants' counterclaims. Plaintiffs appealed. The Supreme Court, Henderson, J., held that: (1) plaintiffs were barred by res judicata from bringing common-law action against other manufacturers for unfair competition, in light of prior federal action in which the federal court both issued permanent injunction in favor of plaintiffs and decided common-law claims adversely to them, from which appeal could have been taken on latter collateral ruling, though none was ever so taken; (2) defendants who were not parties to prior federal action could nonetheless raise affirmative defenses of collateral estoppel or res judicata to bar plaintiffs from reasserting issues which the plaintiffs had actually previously litigated and lost on the merits against other defendants; and (3) antitrust counterclaims, alleging that plaintiffs' action was anticompetitive and in restraint of trade, were properly dismissed, given that anticompetitive intent alone did not render plaintiffs' action a "sham" so as to invoke exception from general rule that court petitions are exempt from attacks based upon the Sherman Anti-Trust Act.

Affirmed.

Wollman, J., concurred specially and filed opinion.

1. Judgment ⇐650, 713(2), 720

Doctrine of res judicata serves as claim preclusion to prevent relitigation of an issue actually litigated or which could have been properly raised and determined in a prior action; of course, the earlier court must have had jurisdiction and its decision must be final and unreversed.

2. Judgment ⇐585(1)

For purposes of res judicata, cause of action is comprised of the facts which give rise to, or establish, right which a party seeks to enforce.

3. Judgment ⇐540, 634

Res judicata, which embodies the concepts of merger and bar, is therefore broader than issue preclusion function of collateral estoppel.

4. Judgment ⇐668(1), 678(1)

Res judicata bars an attempt to relitigate prior determined cause of action by the parties, or one of the parties in privity to a party in the earlier suit.

5. Judgment ⇐634

Res judicata is premised upon two maxims: a person should not be twice vexed for the same cause, and public policy is best served when litigation has a repose; these maxims are served when the parties have had fair opportunity to place their claims in the prior litigation.

6. Judgment ⇐829(1)

Gold jewelry manufacturers were barred by res judicata from bringing common-law action against other manufacturers for unfair competition, in light of prior federal action in which the court both issued permanent injunction under the Lanham Trade-Mark Act in favor of former manufacturers and decided common-law claims adversely to them, from which appeal could have been taken on latter collateral ruling, though none was so taken. Lanham Trade-Mark Act, § 43(b), 15 U.S.C.A. § 1125(b).

7. Judgment ⇐632

Collateral estoppel or res judicata may be used in civil action when new defendant affirmatively raises those defenses to bar a plaintiff from reasserting issues that the plaintiff has actually previously litigated and lost on the merits against another defendant.

8. **Monopolies** ⇐28(6.2)

Antitrust counterclaims, alleging that plaintiffs' common-law action for unfair competition was anticompetitive and in restraint of trade, were properly dismissed; anticompetitive intent alone did not render plaintiffs' action a "sham" so as to invoke exception to general rule that court petitions are exempt from attacks based upon the Sherman Anti-Trust Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

George A. Bangs of Bangs, McCullen, Butler, Foye & Simmons, Rapid City, for plaintiffs and appellants.

Gene N. Lebrun of Lynn, Jackson, Shultz, & Lebrun, P.C., Rapid City, for defendants and appellees.

HENDERSON, Justice.

PROCEDURAL HISTORY

Considerable litigation underlies this action. At the outset, appellants Black Hills Jewelry Manufacturing Co., F.L. Thorpe & Company, Inc., and Stamper Black Hills Gold Jewelry (Black Hills Jewelry, Thorpe, and Stamper) brought suit in the United States District Court for the District of South Dakota, Western Division, seeking injunctive relief against appellees Gold Rush, Inc., and Felco Jewel Industries, Inc. (Gold Rush and Felco). This action culminated in a final judgment on May 1, 1980, granting a permanent injunction in favor of appellants. This judgment was affirmed upon appeal by the United States Court of Appeals for the Eighth Circuit. *Black Hills Jewelry Mfg. Co. v. LaBelle's,* 489 F.Supp. 754 (D.S.D.1980), *aff'd,* 633 F.2d 746 (8th Cir.1980). The effect of this judgment is under consideration here.

Next, appellee Felco and others brought suit against appellants in the United States District Court for the District of New Mexico. Appellants counterclaimed against Felco in the New Mexico action and instituted another action against Felco in the United States District Court, District of South Dakota, Western Division. These actions were dismissed with prejudice as per a stipulation between the parties.

Appellants then instituted two separate actions in our state courts seeking injunctions. One action was against appellees Felco, South Dakota Gold Company, Inc., and Johnson Matthey. In this action, appellee Felco filed a motion to dismiss. Additionally, appellee South Dakota Gold Company filed a motion for judgment on the pleadings, an answer, and a counterclaim for injunctive relief and damages. Johnson Matthey was not served with process. The other action was against appellees Gold Rush, GRMCO, Inc., and Confidential Casting Corp. In this action, appellee Gold Rush counterclaimed. Also, appellees Gold Rush, GRMCO, and Confidential Casting moved for dismissal and judgment on the pleadings. Confidential Casting Corp. filed a petition for relief in Bankruptcy requesting an automatic stay of proceedings.

On November 9, 1982, the trial court entered a memorandum decision and granted appellees' motions to dismiss in both actions. Appellants filed a notice of appeal in both actions on November 30, 1982. Appellees Gold Rush and Felco filed notices of review on their dismissed counterclaims on December 10, 1982. We consolidated all of the above state court actions on January 3, 1983. We affirm.

FACTS

In the Black Hills region of our state, appellants Black Hills Jewelry, Thorpe, and Stamper manufacture and sell distinctive, high quality, tri-color gold, grape and leaf designed jewelry. Appellants are separate, independent companies and have no contractual or licensing agreements between them. In 1978, appellee Felco, which is located in New Mexico, began manufacturing and marketing a tri-color gold, grape and leaf designed jewelry designated as "Black Hills Gold Jewelry." Appellee Gold Rush is located in Bismarck, North Dakota, and in 1978 also began marketing tri-color gold, grape and leaf designed jewelry

known as "Black Hills Gold Jewelry" and "Black Hills Gold by Gold Rush."

Appellants brought an action in the federal court system under common law and federal law to enjoin appellees Felco and Gold Rush from distributing their products as Black Hills Gold. This action resulted in issuance of an order providing in part:

> [I]t is hereby
>
> ORDERED that the Defendants, their servants, agents and employees, and all persons acting by, through or under authority of any of the Defendants are permanently enjoined from advertising, promoting, selling or offering for sale as Black Hills Gold or Black Hills Gold Jewelry, any item which is not manufactured in the Black Hills of South Dakota.

Black Hills Jewelry Mfg. Co. v. LaBelle's, 489 F.Supp. at 763. Additional federal litigation ensued between appellants and appellee Felco which resulted in a stipulation dismissing the actions.

After the federal litigation, appellant Black Hills Jewelry, pursuant to SDCL 37–6–10, registered trademarks with the Secretary of State of South Dakota for "Landstrom's Original Black Hills Gold Creations" and "Original Black Hills Gold Creations by Landstrom's." Additionally, appellant Black Hills Jewelry is now the owner of United States trademark Reg. No. 1,156,298 for "Landstrom's Original Black Hills Gold Creations," with a geographic disclaimer of the words "Black Hills Gold Creations" apart from the trademark as registered. Appellant Thorpe has registered a South Dakota trademark as "Original Black Hills Gold Jewelry."

Appellants next filed separate actions in our state courts alleging: (1) appellee Gold Rush was marketing its products under the title "Gold Rush Gold"; (2) appellee GRMCO, a South Dakota corporation incorporated on July 31, 1981, was assembling in the Black Hills component gold jewelry parts obtained from appellee Confidential Casting Corp. of Rhode Island, and selling the jewelry to appellee Gold Rush for distribution; (3) appellee South Dakota Gold Company, a South Dakota corporation, intended to market jewelry manufactured in the Black Hills under the name "Black Hills Gold"; (4) appellee Felco intended to manufacture gold jewelry in the Black Hills; and (5) appellees' activities were designed to create confusion in the marketplace and reap the benefits of appellants' reputations and goodwill.

Appellants' petitions admit that tri-color gold, grape and leaf designed jewelry is in the public domain as it has been produced, offered for sale, and sold under names such as "Alaska Gold," "Autumn Hill," "Black Hills Gold," "California Gold," "Colorado Gold," "Cripple Creek Gold," "Dakota Gold," "49'er Gold," "Gold Rush Gold," "New Mexico Gold," "Prospector Gold," "Rocky Mountain Gold," and "Superstition Gold." Appellants' petitions also stated: "The words 'Black Hills' being geographical, are not subject to exclusive appropriation as a trademark or trade name under either State or Federal law." Appellee Felco secured a state trademark for "Authentic Black Hills Gold Jewelry." Appellee Stamper does not have a trademark but designates its jewelry as "Stamper's Genuine Black Hills Gold Jewelry."

Appellees Gold Rush and South Dakota Gold Company counterclaimed averring that appellants were monopolizing the trade or commerce of manufacturing and distribution of Black Hills Gold. Appellees also motioned to dismiss appellants' petitions which the trial court granted on the basis that the final federal order was res judicata barring this action. Appellees' counterclaims were likewise dismissed by the trial court.

ISSUES

I.

DOES THE FINAL DECISION IN THE EARLIER FEDERAL COURT ACTION BAR THIS STATE COURT ACTION ON THE DOCTRINE OF RES JUDICATA? WE HOLD THAT IT DOES.

II.

DID APPELLEES' COUNTERCLAIMS, ALLEGING THAT APPELLANTS MONOPOLIZED THE TRADE OF BLACK HILLS GOLD, STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED? WE HOLD THAT THEY DID NOT.

DECISION

I.

Appellants contend that the federal court based its decision solely upon an application of the Lanham Trade-Mark Act, § 43(b), 15 U.S.C.A. § 1125 (1946) and therefore a common-law action for unfair competition is not barred by res judicata in our state courts.

[1] The doctrine of res judicata serves as *claim* preclusion to prevent relitigation of an *issue actually litigated or which could have been properly raised and determined* in a prior action. *Matter of Estate of Nelson,* 330 N.W.2d 151 (S.D.1983); *Schmidt v. Zellmer,* 298 N.W.2d 178 (S.D.1980); *Gottschalk v. South Dakota State Real Estate Comm'n,* 264 N.W.2d 905 (S.D.1978). Of course, the earlier court must have had jurisdiction and its decision must be final and unreversed. *Keith v. Willers Truck Serv.,* 64 S.D. 274, 266 N.W. 256 (1936).

[2, 3] For the purposes of res judicata, a cause of action is comprised of the facts which give rise to, or establish, the right a party seeks to enforce. *Carr v. Preslar,* 73 S.D. 610, 47 N.W.2d 497 (1951); *Jerome v. Rust,* 23 S.D. 409, 122 N.W. 344 (1909). In *Golden v. Oahe Enterprises, Inc.,* 90 S.D. 263, 240 N.W.2d 102 (1976), we approved of the test adopted in *Hanson v. Hunt Oil Co.,* 505 F.2d 1237 (8th Cir.1974), for determining if both causes of action are the same. This test is a query into whether the wrong sought to be redressed is the same in both actions. *See also, Woodbury v. Porter,* 158 F.2d 194 (8th Cir.1946). Res judicata, which embodies the concepts of *merger* and *bar,* is therefore broader than the *issue* preclusion function of collateral estoppel. *See Palma v. Powers,* 295 F.Supp. 924 (N.D.Ill.1969).

[4] Res judicata bars an attempt to relitigate a prior determined cause of action by the parties, or one of the parties in privity, to a party in the earlier suit. *Melbourn v. Benham,* 292 N.W.2d 335 (S.D. 1980). Modifying the strict privity requirement, we have held:

> In deciding who are parties for the purpose of determining the conclusiveness of prior judgments, the courts look beyond the nominal parties, and treat all those whose interests are involved in the litigation and who conduct and control the action or defense as real parties, and hold them concluded by any judgment that may be rendered.

Schell v. Walker, 305 N.W.2d 920, 922 (S.D. 1981). *See Carlock v. Loyd,* 43 S.D. 611, 181 N.W. 835 (1921).

[5] Res judicata is premised upon two maxims: A person should not be twice vexed for the same cause and public policy is best served when litigation has a repose. *Carr v. Preslar,* 47 N.W.2d at 502–03. These maxims are served when the parties have had a fair opportunity to place their claims in the prior litigation. *Luedtke v. Koopsma,* 303 N.W.2d 112 (S.D.1981).

[6] In the earlier federal action, appellants' proposed findings of fact and conclusions of law included:

10. In addition to the statutory claim above referred to (Section 43(a) of the Lanham Act), the [appellants] have a protectable common law right to be free from misappropriation and unfair competition.

19. [Appellants'] Complaint states a cause of action for unfair competition under the Lanham Trademark Act, Section 43(2), 15 U.S.C.A. § 1125(a), and [appellants] have standing under Section 43(a) to bring this action. [Appellants'] Complaint *also states a claim for unfair competition under the common law, of which this Court has pendent jurisdiction.* (Emphasis supplied.)

Although these proposed findings of fact and conclusions of law were rejected, the federal court entered the following conclusions of law:

3. In order to obtain the exclusive right to the use of the term Black Hills Gold or Black Hills Gold Jewelry, it is necessary for [appellants] to establish that they are entitled to a common law trademark.
4. In order to possess a common law trademark, [appellants] must establish that their products have acquired a secondary meaning.
5. To establish a secondary meaning, while it is not necessary to show that the public has become conscious of the personal identity of the manufacturer, it must be shown that whatever is asserted to carry the secondary meaning has come to signify origin from a single, though anonymous source.
6. In that there are three [appellants], there cannot be a single source of the product in question and [appellants] are precluded as a matter of law from establishing secondary meaning.

Appellants assert that res judicata ought not apply because they were unable to appeal from the favorable federal injunction they received. We disagree. The recent case of *Deposit Guaranty Nat'l Bank v. Roper,* 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980), *reh'g denied,* 446 U.S. 947, 100 S.Ct. 2177, 64 L.Ed.2d 804 (1980), holds that a prevailing party may appeal an adverse ruling collateral to the judgment so long as the party retains a stake in the litigation via a case or controversy. Appellants could have appealed the unfavorable ruling as it determined appellants' ability to restrain future Black Hills manufacturers from marketing products designated as "Black Hills Gold."

We are convinced that the common law issue of unfair competition was litigated and determined in favor of appellees Felco and Gold Rush as evidenced by the federal court's conclusion that appellants were not entitled to the exclusive use of the regional title "Black Hills Gold." Our decision is not altered by appellants' claims of changed circumstances. Although appellants have registered state trademarks, they correctly concede that the geographical term "Black Hills" is not subject to appellants' exclusive appropriation under our state law. Appellants' contention that appellees are now manufacturing gold jewelry in the Black Hills ignores the fundamental point that appellants are without recourse to stop any Black Hills manufacturer or merchant from using the words "Black Hills" in the name of their products or company. This is the same alleged "wrong" appellants sought to have redressed in the federal action, namely, that appellees not call their products "Black Hills" gold.

[7] We must next examine the issue of determining which litigants are covered by res judicata to make our holding definitive. Under our past decisions, there can be no doubt that appellees Felco and Gold Rush are parties protected by the prior federal decision. However, it is unclear under our past decisions if appellees GRMCO, South Dakota Gold, and Confidential Casting can be considered to be parties, or in privity with the parties in the federal litigation. *See also, Midcontinent Broadcasting Co. v. Dresser Indus.,* 486 F.Supp. 858 (D.S.D. 1980).

We stand at a juncture, unwilling to embark in an exercise of "metaphysical privity," [1] yet faced with the uncomforting thought that our prior decisions would possibly allow appellants to litigate an identical issue against countless future competitors without any res judicata or collateral estoppel effect. As the United States Supreme Court held when it eradicated the privity requirement in defensive uses of res judicata: [2] "Permitting repeated litigation

1. This concept and its inherent dangers were coined in: Comment, Collateral Estoppel: The Changing Role of the Rule of Mutuality, 41 Mo.L.Rev. 521, 524 (1976).

2. A "defensive use" of res judicata is when "a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant."

of the same issue as long as the supply of unrelated defendants holds out reflects . . . the aura of the gaming table . . . 'hardly a worthy or wise basis for fashioning rules of procedure.'" *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 329, 91 S.Ct. 1434, 1443, 28 L.Ed.2d 788, 799–800 (1971) (quoting in part *Kerotest Mfg. Co. v. C–O–Two Fire Equip. Co.,* 342 U.S. 180, 185, 72 S.Ct. 219, 222, 96 L.Ed. 200, 204 (1952)). Several generations of legal minds have questioned the illogical basis of privity (or mutuality) in res judicata reasoning.[3] These attacks on privity have borne fruit as many jurisdictions have abandoned the privity requirement in defensive settings.[4]

We now join those jurisdictions which have allowed the use of collateral estoppel or res judicata in a civil action when a new defendant affirmatively raises these defenses to bar a plaintiff from reasserting issues the plaintiff has actually previously litigated and lost on the merits against another defendant. The dismissal of appellants' claim is affirmed as for all appellees.

II.

[8] Appellees Gold Rush and South Dakota Gold assert the trial court erred in dismissing their antitrust counterclaims, the thrust of which was that appellants' legal proceedings were anticompetitive and in a restraint of trade. Appellees acknowledge the well-established *Noerr-Pennington* Doctrine[5] which generally provides that court petitions are exempt from attacks based upon the Sherman Antitrust Act. However, appellees contend that appellants' actions fall within the *Noerr-Pennington* Doctrine exception for litigation which is merely a sham, and in reality an attempt to interfere with a competitor's business. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972).

We are unable to adopt appellees' view that appellants' litigation in state court is merely a sham. As the Tenth Circuit Court held in *Hydro-Tech Corp. v. Sundstrand Corp.,* 673 F.2d 1171, 1176–7 (10th Cir.1982) (footnote omitted):

> [T]he term "sham" means misuse or corruption of the judicial process. The filing of a lawsuit "without probable cause" and with an anticompetitive intent simply does not come up to this standard set by the Supreme Court in *California Motor Transport.*

After reviewing the settled records herein, we are convinced appellants did not misuse judicial process. *See Stauffacher v. Brother,* 67 S.D. 314, 292 N.W. 432 (1940).

Appellees' counterclaims were properly dismissed by the trial court. Because of our holdings, we need not reach appellants' remaining issues.

Affirmed.

FOSHEIM, C.J., and DUNN and MORGAN, JJ., concur.

WOLLMAN, J., concurs specially.

WOLLMAN, Justice (concurring specially).

I am gratified that we have made clear that the restrictive doctrine of mutuality should no longer be applied to bar those who were not parties, or in privity, to the earlier litigation from asserting the defens-

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 at n. 4, 99 S.Ct. 645, 649, 58 L.Ed.2d 552, 559 (1979).

3. A particularly well-reasoned attack on mutuality is found in 7 Works of Jeremy Bentham, 171 (Bowring ed. 1843). *See also* Moschzisker, "Res Judicata" 38 Yale L.J. 299 (1929).

4. A partial listing can be found in 18 Wright, Miller and Cooper, *Federal Practice and Procedure* § 4464 at 576 n. 13 (1981). *See also,* Annot. 31 A.L.R.3d 1044 § 4(c) (1970). As of 1980, twelve jurisdictions were listed as continuing to cling to a strict privity requirement. 18 Wright, Miller and Cooper, § 4463 at 561 n. 4 (1981).

5. This doctrine is a product of: *United Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464, *reh'g denied,* 365 U.S. 875, 81 S.Ct. 899, 5 L.Ed.2d 864 (1961).

es of res judicata and collateral estoppel. Cf. *Melbourn v. Benham*, 292 N.W.2d 335, 339 n. 3 (S.D.1980); *Id.* at 339 (Wollman, J., dissenting).

Cleo L. ROSANDER, Petitioner and Appellee,

v.

The BOARD OF COUNTY COMMISSIONERS OF BUTTE COUNTY, and Calvin Wahl, Manuel Kindsfater, Bob Pflaumer, Frank Walton, and William Smeenk, Constituting the Members of Said Board, Appellants.

No. 14077.

Supreme Court of South Dakota.

Considered on Briefs May 26, 1983.

Decided July 6, 1983.

Person recommended for appointment as deputy sheriff sought a writ of mandamus against the county commission compelling the commissioners to install her as a deputy sheriff. The Circuit Court, Eighth Judicial Circuit, Butte County, Warren G. Johnson, J., granted a peremptory writ of mandamus and board of county commissioners appealed. The Supreme Court, Henderson, J., held that the commissioners were not required to accept the recommendations of the sheriff, but could exercise discretion in choosing appointees from among those recommended by the sheriff.

Reversed and remanded.

1. Statutes ⇐212.5

When legislature amends terms of statute, it is generally presumed that legislature intended to alter meaning of statute to comport with new terms.

2. Constitutional Law ⇐50

Legislatures are empowered to remove power of appointment from one authority and confer it upon another authority.

3. Sheriffs and Constables ⇐18

Board of county commissioners had discretion in choosing deputy sheriff appointees from among those recommended by sheriff and was not required to accept his recommendation. SDCL 7–12–10.

4. Mandamus ⇐4(5)

When board of county commissioners' failure to act forecloses aggrieved party's ability to appeal, aggrieved party is free to pursue other remedies such as mandamus. SDCL 7–8–27.

5. Mandamus ⇐76

Mandamus would be proper remedy to compel county commissioners to act if they failed to make any appointments of deputy sheriffs. SDCL 7–12–10.

6. Mandamus ⇐76

As general rule, mandamus will not issue to compel performance of discretionary act such as choosing which recommended appointees will become deputy sheriffs. SDCL 7–12–10.

William H. Coacher, Sturgis, for petitioner and appellee.

Laurence J. Zastrow, Butte County Deputy State's Atty., Belle Fourche, for appellants.

HENDERSON, Justice.

On January 11, 1983, appellee Rosander applied for a peremptory writ of mandamus. After a show cause hearing, the trial court on February 4, 1983, entered a judgment granting a peremptory writ of mandamus against the Board of County Commissioners of Butte County, appellants, and awarding appellee Rosander damages for wages lost as a result of not being appointed to the position of deputy sheriff and clerk. Pursuant to appellants' motion, we granted an accelerated appeal herein. We reverse and remand.

ner v. Brownlee, 2006 SD 38, ¶¶ 14–15, 713 N.W.2d 592, 597 (concluding that beneficiary attorney's fees are available when the beneficiary's actions resulted in a substantial benefit to the estate) (citing *In re Estate of Siebrasse*, 2004 SD 46, ¶ ¶ 26–29, 678 N.W.2d 822, 828–29). Here, Melanie was successful in arguing that the land should have been appraised at its $290,000 fair market value rather than the $140,000 cash flow value. This increase substantially benefited the estate, and therefore, we grant Melanie's motion for attorney's fees in the amount of $5,916.05. Because the Estate was unsuccessful in this appeal, its motion for attorney's fees is denied.

[¶ 23.] Affirmed.

[¶ 24.] GILBERTSON, Chief Justice, and SABERS, KONENKAMP, and MEIERHENRY, Justices, concur.

2006 SD 72

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION, Plaintiff and Appellee,

v.

ACUITY, a Mutual Insurance Co. f/k/a Heritage Mutual Insurance Company, d/b/a Heritage Insurance, Defendant and Appellant.

No. 23601.

Supreme Court of South Dakota.

Argued March 21, 2006.

Decided Aug. 9, 2006.

Background: Insured brought action against its automobile insurer, seeking award of uninsured motorist (UM) benefits concerning personal injuries that were sustained by its employee. Following a jury trial, the Circuit Court, Third Judicial Circuit, Beadle County, Robert L. Timm, J., entered judgment in favor of insured. Insurer appealed.

Holdings: The Supreme Court, Lovrien, Circuit Judge, held that:

(1) doctrine of collateral estoppel did not apply;

(2) insurer satisfied res judicata doctrine's element concerning whether issue in prior case was identical to current issue;

(3) insured did not have full and fair opportunity to litigate UM issue in prior action, and thus doctrine of res judicata did not bar action, and

(4) prejudgment interest would run from commencement of action.

Affirmed.

See also 2002 SD 7, 639 N.W.2d 513.

1. Insurance ⚿3557

Doctrine of collateral estoppel did not apply in insured's action to recover uninsured motorist (UM) benefits concerning personal injuries that were sustained by its employee, although insurer had prevailed in insured's prior declaratory judgment action concerning whether insurer was obligated to defend and provide coverage to insured in employee's action under Federal Employers' Liability Act (FELA); UM issue was not actually litigated in prior action, and insured took no position in prior action that was clearly inconsistent with position in UM action. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Appeal and Error ⚿863

Supreme Court's standard of review of a trial court's grant or denial of a motion to dismiss is the same as Court's

review of a motion for summary judgment: Court reviews whether pleader is entitled to judgment as a matter of law.

3. Appeal and Error ⇐863

Supreme Court will affirm trial court's granting of motion for summary judgment only when there are no genuine issues of material fact and the legal questions have been correctly decided. SDCL § 15–6–56(c).

4. Judgment ⇐185(2)

When deciding motion for summary judgment, all reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. SDCL § 15–6–56(c).

5. Judgment ⇐185(2)

Burden is on the party moving for summary judgment to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. SDCL § 15–6–56(c).

6. Appeal and Error ⇐863

Supreme Court makes an independent review of the record and is not bound by the trial court's factual assessments in granting summary judgment.

7. Judgment ⇐540, 634

Res judicata and collateral estoppel are two distinct doctrines, and while these two doctrines are very similar in nature, they produce different results.

8. Judgment ⇐720

"Collateral estoppel" prevents relitigation of issues that were actually litigated in a prior proceeding.

See publication Words and Phrases for other judicial constructions and definitions.

9. Judgment ⇐713(1)

Collateral estoppel precludes a party which successfully maintains a certain position in a legal proceeding from later assuming a contrary position simply because that party's interests have changed, especially if the change works to the prejudice of one who acquiesced in the position formerly taken by that party.

10. Judgment ⇐634

Purpose of collateral estoppel is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.

11. Insurance ⇐3557

In seeking to preclude under doctrine of res judicata insured's action for uninsured motorist (UM) benefits concerning personal injuries that were sustained by its employee, insurer satisfied doctrine's element concerning whether issue in prior case was identical to current issue; in prior declaratory judgment action, insured sought defense and indemnification concerning employee's action under Federal Employers' Liability Act (FELA), and wrong for which insured sought redress in both actions was insurer's alleged breach of policy. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

12. Judgment ⇐584

"Res judicata" prevents the relitigation of a claim or issue that was actually litigated or which could have been properly raised.

See publication Words and Phrases for other judicial constructions and definitions.

13. Judgment ⇐540

Res judicata is founded upon two premises: a person should not be twice vexed for the same cause, and public policy is best served when litigation has a repose.

14. Judgment ⇐584, 713(2)

Judgment which bars a second action upon the same claim under doctrine of res

judicata extends not only to every matter offered and received to sustain or defeat the claim or demand but also to all other admissible matters which might have been offered to the same purpose.

15. Insurance ⚿3557

Insured did not have full and fair opportunity to litigate issue of entitlement to uninsured motorist (UM) benefits in its prior declaratory-judgment action, which asserted that insurer had duty to defend and indemnify insured in action that was brought by insured's employee under Federal Employers' Liability Act (FELA), and thus doctrine of res judicata did not bar insured's subsequent UM action, although issues concerning UM coverage could have been raised in prior action; issues of duty to defend and indemnify and obligation to provide UM coverage would have been tried separately, and each cause of action was different. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

16. Judgment ⚿584, 590(3)

Where the second action between the same parties is upon a different cause or demand, the principle of res judicata is applied much more narrowly; in this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

17. Interest ⚿39(2.35)

Prejudgment interest would run from commencement of action, not from date of jury verdict, in insured's action to recover uninsured motorist (UM) benefits. SDCL § 21–1–13.1.

18. Appeal and Error ⚿893(1)

Prejudgment calculations are done as a matter of law; as such, the standard of review is de novo. SDCL § 21–1–13.1.

19. Appeal and Error ⚿80(6), 358

Supreme Court lacked jurisdiction to review trial court's discovery decisions on bad-faith claim in insured's action, which involved claims for bad faith and for recovery of uninsured motorist (UM) benefits and which had been bifurcated for trial purposes; insurer's appeal was properly before Supreme Court concerning final judgment on UM claim, bad-faith claim was still pending in trial court since there was no final judgment on bad-faith claim, and insurer had not followed statutory requirements for discretionary appeal. SDCL § 15–26A–13.

Brian J. Donahoe and Meredith A. Moore of Cutler & Donahoe, Sioux Falls, South Dakota, Attorneys for plaintiff and appellee.

Gary P. Thimsen and Jennifer L. Wollman of Woods, Fuller, Shultz & Smith, Sioux Falls, South Dakota, Attorneys for defendant and appellant.

LOVRIEN, Circuit Judge.

[¶ 1.] Dakota, Minnesota and Eastern Railroad (DM & E) sued its automobile insurance company, Acuity, alleging that the negligence of an unidentified and uninsured motorist caused an accident involving a vehicle driven by DM & E employee Julian Olson (Olson) and that the business automobile policy issued by Acuity to DM & E covered the loss. A Beadle County jury found for DM & E and the trial court entered judgment accordingly. We affirm.

FACTS AND PROCEDURE

[¶ 2.] On July 28, 1998, DM & E employee Olson was operating a motor vehicle within the scope of his employment on I–90 near Rapid City. Olson was involved in a serious rollover accident which rendered him a paraplegic. DM & E held a business automobile policy with Acuity which was in effect on the day of Olson's accident.

[¶ 3.] Olson brought suit against DM & E under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq* (FELA), for negligent maintenance of the vehicle's Hy–Rail System.[1] DM & E tendered defense of the suit to Acuity. Acuity refused. The case went to trial. On the last day of trial, before the jury reached a verdict, a settlement was reached between Olson and DM & E.

[¶ 4.] DM & E then brought a declaratory judgment action against Acuity to determine whether Acuity was obligated to defend and provide coverage for Olson's FELA action against DM & E. Acuity claimed that coverage was barred due to valid policy exclusions. The trial court agreed and granted summary judgment in favor of Acuity. It concluded that the employee indemnification and employer's liability exclusion in the policy barred coverage for Olson's accident. We affirmed the trial court's grant of summary judgment in *DM & E v. Heritage Mut. Ins. Co.,* 2002 SD 7, 639 N.W.2d 513 (*DM & E I*).

[¶ 5.] During the pendency of *DM & E (I)*, Olson brought a products liability suit against the manufacturer of the Hy–Rail system. That lawsuit was settled in April 2003. On July 26, 2001, also during the pendency of *DM & E (I)*, DM & E brought the present Uninsured Motorist (UM) action against Acuity. DM & E claimed the negligence of an unidentified and uninsured motorist was the cause of Olson's accident.

[¶ 6.] On November 21, 2001, Acuity moved to dismiss the present action based upon res judicata and collateral estoppel. Acuity also moved for summary judgment, claiming it had no obligation under the policy to pay uninsured motorist benefits to DM & E for injuries suffered by a DM & E employee. DM & E moved to hold the case in abeyance until this Court decided *DM & E (I)*. On February 28, 2002, after our decision in *DM & E (I)*, the trial court denied Acuity's motion to dismiss. In April 2002 Acuity filed an application for stay and petition for discretionary appeal. Both motions were denied. On February 3, 2004, the trial court dismissed Acuity's motion for summary judgment. In April 2004 Acuity filed a second application for stay and petition for discretionary appeal. These motions were denied on April 5, 2004.

[¶ 7.] On April 9, 2004, DM & E moved to amend its complaint to add a cause of action for bad faith. The motion was granted. Acuity moved to bifurcate the bad faith and UM claim. The motion to bifurcate was granted. After the trial court ruled on preliminary discovery motions in the bad faith matter, the parties agreed to suspend any further action on that claim until resolution of the UM claim.

[¶ 8.] The UM claim was tried on January 24–25, 2005, in Beadle County, Huron, South Dakota. The jury returned a verdict in favor of DM & E, finding an unidentified motorist negligently caused Olson's accident. An amended partial judgment was filed on February 15, 2005. Over Acuity's objection, DM & E sought

1. The Hy–Rail System is equipment that when attached to a motor vehicle allows the vehicle to be driven on either railroad tracks or the public roadway.

and was granted prejudgment interest. Acuity moved for judgment notwithstanding the verdict and a new trial. Both motions were denied. Acuity filed its notice of appeal on April 6, 2005. While a number of issues were raised by Acuity on appeal, we conclude that only a few issues merit discussion.

ANALYSIS

ISSUE ONE

[¶ 9.] **Did the trial court err in failing to grant Acuity's motion to dismiss based upon res judicata and collateral estoppel?**

[1] [¶ 10.] Acuity claims that *DM & E (I)* settled, or should have settled, all of the issues between the parties and that the trial court committed error when it refused to grant Acuity's motion to dismiss based upon the doctrines of res judicata and collateral estoppel. We affirm the trial court's decision to deny Acuity's motion to dismiss.

[2–6] [¶ 11.] This Court's review of such motions is well settled. Our standard of review of a trial court's grant or denial of a motion to dismiss is the same as our review of a motion for summary judgment: is the pleader entitled to judgment as a matter of law. *See Jensen Ranch, Inc. v. Marsden,* 440 N.W.2d 762, 764 (S.D.1989).

> Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." SDCL 15–6–56(c). We will affirm only when there are no genuine issues of material fact and the legal questions have been correctly decided. *Bego v. Gordon,* 407 N.W.2d 801, 804 (S.D.1987). All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *Morgan v. Baldwin,* 450 N.W.2d 783, 785 (S.D.1990). The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. *Wilson v. Great Northern Ry. Co.,* 83 S.D. 207, 212, 157 N.W.2d 19, 21 (1968).

Holzer v. Dakota Speedway, Inc., 2000 SD 65, ¶ 8, 610 N.W.2d 787, 792 (citing *Kimball Investment Land, Ltd. v. Chmela,* 2000 SD 6, ¶ 7, 604 N.W.2d 289, 292 (citing *Mattson v. Rachetto,* 1999 SD 51, ¶ 8, 591 N.W.2d 814, 816–17 (quoting *Estate of Shuck v. Perkins County,* 1998 SD 32, ¶ 6, 577 N.W.2d 584, 586))). We make an independent review of the record and are not bound by the trial court's factual assessments in granting summary judgment. *Spenner v. City of Sioux Falls,* 1998 SD 56, ¶ 7, 580 N.W.2d 606, 609; *Carpenter v. City of Belle Fourche,* 2000 SD 55, ¶ 6, 609 N.W.2d 751, 756.

[7] [¶ 12.] Res judicata and collateral estoppel are two distinct doctrines. *Nelson v. Hawkeye Ins. Co.,* 369 N.W.2d 379, 380 (S.D.1985); *Schell v. Walker,* 305 N.W.2d 920, 922 (S.D.1981). While these two doctrines are very similar in nature, they produce different results. *Schell,* 305 N.W.2d at 922.

[8–10] [¶ 13.] Collateral estoppel prevents relitigation of issues that were actually litigated in a prior proceeding. *Id.* It also precludes a party which

> successfully maintains a certain position in a legal proceeding ... from later assuming a contrary position simply because that party's interests have changed, especially if the change works to the prejudice of one who acquiesced in the position formerly taken by that party.

Watertown Concrete Products, Inc. v. Foster, 2001 SD 79, ¶ 10, 630 N.W.2d 108, 112 (citing *New Hampshire v. Maine,* 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)). The purpose of collateral estoppel is to "protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire,* 532 U.S. at 749–50, 121 S.Ct. 1808. This Court has held that three elements must be satisfied in order to apply collateral estoppel: (1) the later position must be clearly inconsistent with the earlier one; (2) the earlier position was judicially accepted, creating the risk of inconsistent legal determinations; and (3) the party taking the inconsistent position would derive an unfair advantage or impose an unfair detriment to the opponent if not estopped. *Watertown Concrete Products,* 2001 SD 79, ¶ 12, 630 N.W.2d at 112.

[¶ 14.] We conclude that the doctrine of collateral estoppel is inapplicable here. The uninsured motorist issue was not "actually litigated" in the prior proceeding, *DM & E (I)*. In addition, DM & E took no position in *DM & E (I)* that is clearly inconsistent with its position in this case. In both cases it maintained that Olson's accident was caused by something other than a malfunction of the Hy–Rail System equipment. The trial court did not err by refusing to grant Acuity's motion to dismiss based on the doctrine of collateral estoppel.[2]

[11–13] [¶ 15.] Res judicata prevents the relitigation of a claim or issue that was "actually litigated or which could have been properly raised." *Nelson,* 369 N.W.2d at 381; *see also Keith v. Willers Truck Serv. Inc.,* 64 S.D. 274, 266 N.W. 256 (1936). Res judicata is founded upon two premises: "A person should not be twice vexed for the same cause and public policy is best served when litigation has a repose." *Black Hills Mfg. Inc. v. Felco Jewel Ind., Inc.,* 336 N.W.2d 153, 157 (S.D. 1983). In *Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948), the United States Supreme Court noted that:

> The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell v. County of Sac,* 94 U.S. 351, 352, 24 L.Ed. 195 (1876). The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. *See* von Moschzisker, 'Res Judicata,' 38 Yale L.J. 299; Restatement of the Law of Judgments, §§ 47, 48.

Id.

[14] [¶ 16.]This Court has previously held that a final judgment on the merits is a bar to any future action between the same parties or their privies upon the same cause of action settling not only every issue actually presented to sustain or

2. Since the first element of collateral estoppel has not been satisfied, there is no need to consider the remaining two elements.

defeat the right asserted, but every issue that might have been raised in the first action. *Adam v. Adam,* 254 N.W.2d 123, 130 (S.D.1977)(citing *Chicago & N.W. Ry. Co. v. Gillis,* 80 S.D. 617, 622, 129 N.W.2d 532, 534 (1964)). A judgment which bars a second action upon the same claim extends not only to every matter offered and received to sustain or defeat the claim or demand but also to all other admissible matters which might have been offered to the same purpose. *Id.* at 130–31.

[¶ 17.] This Court has held that four elements must be satisfied in order to apply res judicata: (1) the issue in the prior adjudication must be identical to the present issue, (2) there must have been a final judgment on the merits in the previous case, (3) the parties in the two actions must be the same or in privity, and (4) there must have been a full and fair opportunity to litigate the issues in the prior adjudication. Matter of *Guardianship of Janke,* 500 N.W.2d 207, 209 (S.D.1993)(citing *Raschke v. DeGraff,* 81 S.D. 291, 295, 134 N.W.2d 294, 296 (1965)).

[¶ 18.] As to the first element, whether the issue in *DM & E (I)* is identical to the present issue, the Eighth Circuit Court of Appeals in *Hanson v. Hunt Oil Co.,* 505 F.2d 1237, 1240 (8th Cir.1974), established the test which this Court has repeatedly applied: "whether the wrong for which redress is sought is the same in both actions." *Woodbury v. Porter,* 158 F.2d 194, 195 (8th Cir.1946); *Barnes v. Matzner,* 2003 SD 42, ¶ 16, 661 N.W.2d 372, 377. In *DM & E (I),* DM & E sought defense and indemnification from Acuity in its suit with Olson. DM & E based its claim on the terms of its business automobile insurance contract with Acuity. In this case, DM & E seeks recovery under the uninsured motorist provisions of the same insurance contract. Acuity correctly asserts that in both *DM & E (I),* and the present case, the wrong for which redress is sought by DM & E is Acuity's alleged breach of the same insurance contract. *See Great West Cas. Co. v. Hovaldt,* 1999 SD 150, ¶ 8, 603 N.W.2d 198, 201 (recognizing an action on the policy is contractual). Therefore, Acuity argues that DM & E should have brought all of the claims it had against Acuity under the provisions of the insurance contract, including the claim of unidentified motorist coverage, in *DM & E (I).* Acuity argues that since it did not, DM & E is now precluded by the doctrine of res judicata from raising the issue of unidentified motorist coverage in a second lawsuit.

[¶ 19.] In support of its argument, Acuity relies on this Court's decision in *Nelson,* 369 N.W.2d at 379. There, in the initial case between the parties (*Nelson I*), Nelson instituted a declaratory judgment action against Hawkeye. *Id.* at 380. This Court held that, pursuant to the provisions and exceptions of its policy, Hawkeye had no duty to defend. *Id.* In the second action (*Nelson II*), Nelson brought an action against the insurer seeking reimbursement of counsel fees and judgment for death loss of his pigs caused by the insured's negligence. *Id.* Summary judgment was entered in favor of Hawkeye. *Id.* Based upon pre-trial investigation by both parties, this Court determined that the death loss of pigs suffered by the original plaintiff Schultz was either known or should have been known in the first declaratory judgment action. *Id.* at 381. As a result, the judgment in *Nelson I* was held to be res judicata. *Id.*

[¶ 20.] The issue in *DM & E I* was whether, under the terms of the insurance policy, Acuity had a duty to defend and indemnify DM & E in the suit brought by Olson. The issue in the present case is whether, under the terms of the same insurance policy, DM & E is entitled to

UM benefits due to the negligence of an unidentified driver. While the specific issue in *DM & E I* is not identical to the specific issue in this case, both issues relate to the same accident, the same set of facts, the same insurance contract and can only be resolved by making a determination of DM & E's rights under that contract. In addition, DM & E knew or should have known of the existence of an unidentified slow moving vehicle when *DM & E I* was tried. In fact, DM & E used evidence of an unidentified slow moving vehicle to bolster its claims in *DM & E I* that the accident was caused by something other than the Hy–Rail equipment. We conclude that all claims DM & E had against Acuity under the provisions of the insurance contract could have been brought in *DM & E I*. Acuity has demonstrated a technical basis to conclude the first element has been satisfied.

[15] [¶ 21.] Concerning the second and third elements, it is undisputed that there has been a final judgment on the merits in *DM & E I*, and the parties in the two actions are the same. Therefore, we turn to the fourth element, was there or would there have been a full and fair opportunity to litigate all of the contract issues in *DM & E I?* We hold that the fourth element has not been established.

[¶ 22.] First, while all issues could have been brought in *DM & E I,* we conclude that the fact that they were not did not violate the policy considerations underlying the doctrine of res judicata. Given the particular facts of this case, even if DM & E's claims against Acuity for defense and indemnification and unidentified motorist coverage were all brought in *DM & E I*, it would be reasonable to expect that the trial court would have bifurcated these issues and tried each separately. A resolution of the various issues would almost certainly have followed the same course as has been followed here, whether these issues had been raised in a single lawsuit or in separate lawsuits. Acuity would have had to defend the two causes of action. The only question is whether Acuity would do this at separate trials in a bifurcated lawsuit or at separate trials in separate lawsuits. Since two trials were inevitable, the policy behind the doctrine of res judicata would not have been served by application of the doctrine. Acuity would have still been twice vexed for DM & E's claims under the insurance contract, this litigation would not have found repose until both issues were resolved and the use of judicial resources would not have been conserved in any significant way.

[16] [¶ 23.] Second, while both actions are based on the terms and provisions of the same insurance contract, each cause of action is different. Because each cause of action is different, the doctrine of res judicata is applied much more narrowly.

> [But] where the second action between the same parties is upon a different cause or demand, the principle of res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell,* 94 U.S. at 353. *See also Russell v. Place,* 94 U.S. 606, 24 L.Ed. 214 (1876); *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48, 18 S.Ct. 18, 27, 42 L.Ed. 355 (1897); *Mercoid Corp. v. Mid–Continent Inv. Co.,* 320 U.S. 661, 671, 64 S.Ct. 268, 273, 88 L.Ed. 376 (1944). Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the

> first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel.

Sunnen, 333 U.S. at 597–98, 68 S.Ct. 715.

[¶ 24.] Here the unidentified motorist claim was not "swallowed" by the judgment in *DM & E (I)*, even though all issues could have been tendered in that cause of action. Accordingly, we conclude the parties were free to litigate the unidentified motorist claim, which was not at issue in the first proceeding, even though it might have been brought and decided at that time. The trial court did not err by refusing to grant Acuity's motion to dismiss based on the doctrine of res judicata.

ISSUE TWO

[¶ 25.] **Was DM & E entitled to recover prejudgment interest on the jury's verdict?**

[17, 18] [¶ 26.] Acuity argues that the prejudgment interest determination is controlled by the insurance policy. As such, DM & E would not be entitled to prejudgment interest until there was a determination that DM & E was legally entitled to recover under the terms of that policy. This would be the date of the jury verdict: January 25, 2005. DM & E contends that South Dakota law is clear on this issue and that prejudgment interest is required from the date a demand is made for the policy benefits: July 23, 2001. *See Isaac v. State Farm Mut. Auto. Ins. Co.*, 522 N.W.2d 752, 764 (S.D.1994). Prejudgment calculations are done as a matter of law. As such, the standard of review is de novo. *City of Sioux Falls v. Johnson*, 2001 SD 108, ¶ 8, 632 N.W.2d 849, 852; *City of Colton v. Schwebach*, 1997 SD 4, ¶ 8, 557 N.W.2d 769, 771.

[¶ 27.] We find DM & E's argument persuasive and a correct statement of the law.

> Any person who is entitled to recover damages . . . is entitled to recover interest thereon from the day that the loss or damage occurred[.] . . . Prejudgment interest on damages arising from a contract shall be at the contract rate, if so provided in the contract; otherwise, if prejudgment interest is awarded, it shall be at the category B rate of interest specified in § 54–3–16.

SDCL 21–1–13.1. The trial court determined that the date of DM & E's demand was July 23, 2001, the date this action was commenced. Acuity relies on case precedent from other jurisdictions in support of its argument that the date of the jury verdict controls. We find this authority unpersuasive. A determination of prejudgment interest is mandated by statute. South Dakota law is clear as to the date and rate from which prejudgment interest shall run. Therefore, the trial court correctly determined the proper date from which prejudgment interest should run is from the commencement of this action: July 23, 2001.

ISSUE THREE

[¶ 28.] **Did the trial court abuse its discretion in granting DM & E's motion to compel discovery and denying Acuity's motion to quash?**

[19] [¶ 29.] As noted earlier, the trial court allowed DM & E to amend its complaint to add a cause of action for bad faith and also granted Acuity's motion to bifurcate the UM and bad faith causes of action. DM & E began discovery on the bad faith claim, issuing subpoenas to Acuity's attorney Gary Thimsen and his partner James Moore. Acuity did not respond to discovery. DM & E then moved to compel discovery. Acuity moved to quash the

subpoenas. DM & E's motion to compel was granted and Acuity's motion to quash was denied. Acuity has appealed these rulings.

[¶ 30.] We note the request to bifurcate the trial of the UM claim and the bad faith claim was made by Acuity. It sought two trials. An appeal of the UM matter is properly before us because the trial court has entered a final judgment as to the UM matter. However, an appeal of the trial court's rulings related to the bad faith cause of action is not properly before us because that action is still pending. The trial court has entered no final judgment concerning the bad faith cause of action. No appeal from a final judgment concerning the bad faith claim has been filed with this Court. Therefore, the issues surrounding the bad faith claim are not properly before us on appeal.[3] In reality, Acuity is seeking a discretionary appeal of the trial court's discovery orders entered in the bad faith action. Acuity has not followed the statutory requirements for a discretionary appeal found at SDCL 15–26A–13.[4] Acuity cannot put these issues before us by simply including them in its appeal of the UM action. Accordingly, we conclude we lack jurisdiction to review the decisions of the trial court on the bad faith claim.

[¶ 31.] Acuity has also raised a number of other issues on appeal.[5] We have carefully considered these issues and find them to be without merit. The decisions and rulings of the trial court were within the trial court's sound discretion and were clearly supported by the law and the facts. Accordingly, as to the trial court's rulings on the bad faith claim we conclude we have no jurisdiction. On all other issues, we affirm.

[¶ 32.] GILBERTSON, Chief Justice, and MEIERHENRY, Justice, and GORS, Circuit Judge, and ENG, Circuit Judge, concur.

[¶ 33.] LOVRIEN, Circuit Judge, for SABERS, Justice, disqualified.

[¶ 34.] GORS, Circuit Judge for KONENKAMP, Justice, disqualified.

[¶ 35.] ENG, Circuit Judge for ZINTER, Justice, disqualified.

3. *See* SDCL 15–26A–3.

4. SDCL 15–26A–13 provides:

> An appeal from an intermediate order made before trial as prescribed by subdivision 15–26A–3(6) may be sought by filing a petition for permission to appeal, together with proof of service thereof upon all other parties to the action in circuit court, with the clerk of the Supreme Court within ten days after notice of entry of such order.

5. In addition to the issues discussed herein, Acuity claims on appeal:

1. That the uninsured motorist endorsement in the automobile liability policy between Acuity and DM & E did not provide coverage for DM & E in the event one of its employees sustained injury as the result of the negligence of a third party.
2. That the trial court should have granted Acuity's motions for directed verdict or in the alternative, its motions for judgment notwithstanding the verdict and new trial because the trial court:

a. Allowed witness Barbara Radlinger's recorded recollection to be received in evidence under SDCL 29–26–9;
b. Allowed expert witness Michael Selves to give his opinion;
c. Allowed the jury to view a video tape showing the operation of Hy–Rail equipment;
d. Found that sufficient evidence was presented at trial for the jury to find negligence on the part of the unidentified driver, and;
e. Instructed the jury on proximate cause rather than the specific language of the insurance policy and did not use a form of verdict requested by Acuity.

Halter, 1999 S.D. 11, ¶¶ 12, 18, 588 N.W.2d 231, 233–34 (citations omitted). The record contains sufficient evidence to support the trial court's findings and conclusion that Bowes failed to establish it suffered damages caused by the breach it alleges. We therefore need not further address whether the Department breached the subcontracts with Bowes or breached a duty of good faith and fair dealing. With no proof of causation of damages, Bowes cannot prevail under any of the theories of recovery it has presented.

[¶ 25.] Affirmed.

[¶ 26.] GILBERTSON, Chief Justice, and KONENKAMP, ZINTER and MEIERHENRY, Justices, concur.

2010 S.D. 103

Jay E. LINK, Plaintiff and Appellant,

v.

L.S.I., INC., a South Dakota Corporation, John E. Link, Troy J. Link, John A. Hermeier, Lawrence J. Jarvela, Terry L. Smith, Douglas Walz and John Doe Defendants 1–5, Defendants and Appellees.

Jay E. Link, Plaintiff and Appellee,

v.

L.S.I., Inc., a South Dakota Corporation, John E. Link, Troy J. Link, John A. Hermeier, Lawrence J. Jarvela, Terry L. Smith, Douglas Walz and John Doe Defendants 1–5, Defendants and Appellants.

Nos. 25525, 25610.

Supreme Court of South Dakota.

Argued Nov. 16, 2010.

Decided Dec. 29, 2010.

Background: Shareholder petitioned for judicial dissolution of corporation. The Circuit Court, Third Judicial Circuit, Jerauld County, Jon R. Erickson, J., denied petition and granted corporation's petition to buy out shares. Shareholder appealed and corporation filed subsequent appeal.

Holdings: The Supreme Court, Gilbertson, C.J., held that:

(1) court used proper method to determine "fair value" of shares;

(2) court acted within its discretion in ordering installment payments rather than lump sum;

(3) corporation was not judicially estopped from arguing financial hardship as justification for installment payments;

(4) breach of fiduciary duty claims were not barred by collateral estoppel;

(5) breach of fiduciary duty claims were barred by res judicata; and

(6) denial of motion to vacate award of interest was not final, appealable order.

Affirmed in part, reversed in part, and remanded.

1. Appeal and Error ⚿893(1)

Whether the circuit court used the correct method of determining fair market value of a dissenting shareholder's stock is a question of law reviewed de novo.

2. Appeal and Error ⚿893(1)

The dismissal of claims is a question of law that is reviewed de novo.

3. Appeal and Error ⚿893(1)

The Supreme Court reviews questions of law de novo.

4. Corporations and Business Organizations ⚿3058(2)

Trial court used proper method to determine "fair value" of shareholder's

shares for purposes of corporation's buyout of those shares to prevent judicial dissolution; trial court took reports from three appraisers, one for corporation, one for shareholder, and one neutral appraiser, fair value determination was reached by majority of appraisers, and trial court accepted highest valuation that was presented to it.

5. Corporations and Business Organizations ⚿1526(7)

A non-marketability discount is applied when shares lack a ready and available market based on the theory that the shares have less value than stock that is easily liquidated.

6. Corporations and Business Organizations ⚿3058(2)

A lack of marketability discount is inapposite when a corporation elects to buy out a shareholder who has filed for dissolution of a corporation.

7. Corporations and Business Organizations ⚿3058(1)

Trial court acted within its discretion in ordering the fair value of shareholder's shares to be paid in monthly installments over five years when granting corporation's petition to buy shares to prevent judicial dissolution; statutes governing ordered purchases did not create a presumption that a lump sum payment was necessary, but rather permitted the court, in its discretion, to allow payments in installments if necessary in the interests of equity. SDCL §§ 47–1A–1434.4, 47–1A–1434.6.

8. Estoppel ⚿68(2)

Corporation was not judicially estopped from arguing financial hardship as a justification for installment payments to shareholder, rather than lump sum payment, for purposes of trial court's grant of corporation's petition for buyout of shares to avoid judicial dissolution; although corporation had previously taken position that its current financial situation was not relevant to the valuation of the shares, it was relevant to the terms of the payments following valuation.

9. Judgment ⚿822(3)

Shareholder's breach of fiduciary duty claims against directors of corporation were not barred by collateral estoppel, where shareholder's claims were against different directors than claims in previous action in Wisconsin, even though allegations against these directors were virtually identical as those against directors in Wisconsin action.

10. Judgment ⚿720

Collateral estoppel prevents relitigation of issues that were actually litigated in a prior proceeding.

11. Judgment ⚿717, 720

Issue preclusion only bars a point that was actually and directly in issue in a former action and was judicially passed upon and determined by a domestic court of competent jurisdiction.

12. Judgment ⚿821

Shareholder's breach of fiduciary duty claims against directors of corporation were barred by res judicata, where, although claims in instant action were against different directors than in previous action in Wisconsin, allegations were virtually identical, and the Wisconsin court in prior action would have had personal jurisdiction over directors in instant case.

13. Judgment ⚿584, 713(1)

A party must have had a full and fair opportunity to litigate the issues in the prior proceeding in order to invoke the claim preclusive effect of res judicata.

14. Appeal and Error ⚿82(1)

Trial court's denial without prejudice of motion to vacate award of accrued interest based on newly discovered evidence

while appeal of matter was pending was not a final, appealable order in action for corporation's buyout of shareholder's shares to avoid judicial dissolution, where trial court did not consider merits of motion, and court made clear that it was waiting for appellate decision before making determination on motion. SDCL § 15–26A–3.

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GILBERTSON, Chief Justice.

[¶ 1.] Jay Link petitioned for judicial dissolution of L.S.I., Inc. (LSI). The circuit court denied the petition and granted LSI's petition to buy out Jay's shares at a "fair value." Jay appeals the valuation of his shares, the condition of the payments, and the dismissal of his remaining claims. We affirm in part, reverse in part, and remand. LSI filed a later appeal, challenging the interest awarded on the buyout. We conclude the circuit court did not issue a final order reviewable on appeal.

FACTS

[¶ 2.] Jack Link and his sons, Jay and Troy, owned various companies that produced and distributed meat and cheese snacks. Link Snacks, a Wisconsin corporation, was founded and owned by Jack. It is the sole customer of LSI, a South Dakota corporation located in Alpena that produces snack products pursuant to Link Snacks' specifications. L.S.I., Inc.–New Glarus is another Wisconsin corporation that makes products for Link Snacks. Jay was employed at LSI, Link Snacks, and LSI–New Glarus. After years of conflict with Jack and Troy, Jay agreed to terminate his employment with the companies. The parties were unable to negotiate a buy-out of Jay's shares. In September 2005, Link Snacks, Jack, and Troy filed an action in Wisconsin to, in part, enforce buy-out agreements for the Wisconsin companies. The complaint was amended, alleging Jay breached fiduciary duties. Jay filed a counterclaim alleging Jack, Troy, and other officers and directors of the Link companies breached fiduciary duties. On November 17, 2005, Jay filed an action in South Dakota seeking to dissolve LSI and recover damages from LSI directors for breach of fiduciary duties. In March 2006, the South Dakota action was stayed pending disposition of the Wisconsin action. On November 17, 2006, LSI filed an election to purchase Jay's shares under SDCL 47–1A–1434 in an effort to prevent dissolution.

[¶ 3.] As part of the Wisconsin action, the parties entered into a stipulated order regarding appraisal of various Link companies. The agreed appraisal process for Jay's shares involved three appraisers, one selected by Jay, one by the Link compa-

nies, and a neutral appraiser. The appraisers were ordered to determine the "fair market value" of Jay's shares in LSI, that is, "the price which a willing buyer would pay a willing seller for such shares." They were also ordered to determine the "fair value" or the undiscounted, proportionate value of Jay's shares in LSI, as a going concern, as of December 31, 2005. As part of the process, each appraiser wrote a preliminary report that was exchanged with the other appraisers. They discussed each other's conclusions. The neutral appraiser originally valued Jay's shares in LSI at $21,000,000. However, after discussing the amount with the others, LSI's appraiser convinced him that the value should be lower to account for the fact that LSI only had one customer, which is an extremely high customer concentration. This fact lowered the undiscounted "fair value" amount of Jay's LSI shares to $16,550,000 in the final report, which was determined by a majority vote of the appraisers. The "fair market value" of Jay's shares in LSI was $11,200,000.

[¶ 4.] After years of discovery and waiting for reports, the Wisconsin court conducted a three-phase jury trial in May 2008. The jury in the Wisconsin action found that Troy and Jay each owned 50% of LSI, making both equal shareholders. The jury also found that Jay had breached fiduciary duties to LSI both while employed and after he had left. The jury found that the four directors sued in the action, two of whom were also LSI directors, had not breached any duties to Jay, but that Jack and Troy had. Finally, the jury found that Jay was not oppressed and the court denied Jay's petition for dissolution of the Wisconsin corporations. Specific performance of the Wisconsin companies' buy-out agreements was ordered. Notably, there was no buy-out agreement for LSI. The Wisconsin court entered a final judgment on October 2, 2008.

[¶ 5.] LSI noticed a hearing to lift the stay in the South Dakota action on October 16, 2008, and to proceed with its election to purchase Jay's shares in LSI. Jay agreed to the stay being lifted but argued the motion to proceed with the election was untimely. The circuit court rejected Jay's argument and set a hearing for May 2009 to determine the "fair value" of Jay's shares under SDCL 47–1A–1434.3.

[¶ 6.] At the hearing, the parties presented extensive expert testimony from the party appraisers and neutral appraiser in the Wisconsin action, in addition to detailed valuation reports. On May 15, 2009, the circuit court issued a Memorandum Decision, in which it found that LSI was a stand-alone corporation, separate from the Wisconsin Link corporations; that the appropriate date for determining the "fair value" of Jay's shares was December 31, 2005; that Jay was entitled to "fair value" of his shares, meaning his proportionate interest in LSI as a going concern without minority or lack-of-marketability discounts; and, that the undiscounted, proportionate "fair value" of Jay's shares in LSI was $16,550,000, thus rejecting Jay's appraiser's opinion. An order was entered adopting the Memorandum Decision on June 5, 2009, and the circuit court ordered further proceedings to determine the terms and conditions for the purchase of Jay's shares. LSI filed a motion with supporting affidavits to pay the fair value in monthly installments over five years with 4% interest commencing on May 15, 2009, the date of the court's valuation. Jay moved for an order to receive a lump-sum payment of the fair value within 10 days with an interest rate of either 12 or 15%, compounded annually and commencing on November 16, 2005.

[¶ 7.] On October 7, 2009, the circuit court issued a Memorandum Decision, finding that requiring LSI to pay Jay in one lump-sum payment would be a hardship and that monthly payments for five years were necessary in the interests of equity. It also awarded Jay simple interest on $16,550,000 at 4.5% beginning November 16, 2005. This rate amounted to nearly three million dollars in interest. The court also found Jay had failed to demonstrate "probable grounds" to dissolve LSI and therefore denied Jay's request for attorney's fees. An order adopting the Memorandum Decision was issued December 2, 2009, in which Jay was ordered to sell all his shares in LSI pursuant to those terms. No security was given to Jay for the fair value amount. The court dismissed the action with prejudice, including the breach of fiduciary duty claims against two LSI directors residing in South Dakota.

[¶ 8.] On January 6, 2010, LSI moved the circuit court under SDCL 15–6–60(b) to vacate its award of accrued interest granted pursuant to the December 2, 2009 order. On January 11, 2010, Jay filed a notice of appeal, including the December 2, 2009 order that included the award of interest. Appeal # 25525. The circuit court heard LSI's motion to vacate the award of accrued interest on March 4, 2010, and entered an order denying the motion without prejudice on March 23, 2010. LSI filed a notice of appeal on April 16, 2010, challenging the denial of the order to vacate the award of accrued interest. Appeal # 25610. By order of this Court, appeals # 25525 and # 25610 were consolidated.

[¶ 9.] Jay raises the following issues on appeal:

1. Whether the circuit court erred in determining the "fair value" of Jay's shares.
2. Whether the circuit court erred in ordering the fair value of Jay's shares to be paid in monthly installments over five years.
3. Whether the circuit court erred in not granting Jay any security for the fair value LSI owed him.
4. Whether the circuit court erred in dismissing Jay's claims against LSI Directors with prejudice.

[¶ 10.] LSI raises the following issue on appeal:

5. Whether the circuit court erred in denying LSI's motion to vacate Jay's award of accrued interest.

STANDARD OF REVIEW

[¶ 11.] The parties dispute the standard of review for valuation of shareholder stock bought pursuant to an election under SDCL 47–1A–1434. Jay argues that review should be de novo because it is a mixed question of law and fact. He compares the issue to a review of a circuit court's determination of the fair value of a dissenting shareholder's stock and cites *Richardson v. Palmer Broadcasting Co.,* 353 N.W.2d 374, 378 (Iowa 1984). LSI argues that the circuit court found as a matter of fact that $16,550,000 was the fair value of Jay's shares, and therefore the standard of review is clearly erroneous. LSI cites the following cases to support its position: *In re Midnight Star Enter., L.P.,* 2006 S.D. 98, ¶ 7, 724 N.W.2d 334, 336; *Fausch v. Fausch,* 2005 S.D. 63, ¶ 11, 697 N.W.2d 748, 753; *Priebe v. Priebe,* 1996 S.D. 136, ¶¶ 8, 18, 556 N.W.2d 78, 80.

[1] [¶ 12.] We stated in *Midnight Star* that "[o]ur review of a circuit court's valuation of property is clearly erroneous. Whether the circuit court *used the correct method* of determining fair market value is a question of law reviewed de novo." 2006 S.D. 98, ¶ 7, 724 N.W.2d at 336 (internal citations omitted) (emphasis added). *See*

also First Western Bank Wall v. Olsen, 2001 S.D. 16, ¶ 12, 621 N.W.2d 611, 616 (applying a de novo standard of review because the circuit court determined the "fair value" of dissenting shareholders' stock, which is a question of statutory interpretation). In this case, the statute requires the circuit court to determine "fair value" as opposed to fair market value. However, *Midnight Star*'s standard applies because we are reviewing to ensure an appropriate valuation method was used.

[¶ 13.] In ordering the terms of the payment for Jay's shares, the circuit court was exercising its discretion under the statutes. This Court must determine if the circuit court abused its discretion. *DFA Dairy Fin. Serv., L.P. v. Lawson Special Trust*, 2010 S.D. 34, ¶ 18, 781 N.W.2d 664, 670 ("If facts plainly exist to warrant equitable relief and no facts exist to disentitle a party to such relief, then a court is not free simply to ignore the remedy in the name of discretion.") (citing *Adrian v. McKinnie*, 2002 S.D. 10, ¶ 9, 639 N.W.2d 529, 533).

[2, 3] [¶ 14.] The dismissal of claims is a question of law. We review questions of law de novo. *McGregor v. Crumley*, 2009 S.D. 95, ¶ 15, 775 N.W.2d 91, 95.

ANALYSIS AND DECISION

[¶ 15.] **1. Whether the circuit court erred in determining the "fair value" of Jay's shares.**

[4] [¶ 16.] SDCL 47–1A–1434.4 provides that "the court ... shall ... determine the fair value of the petitioner's shares as of the day before the date on which the petition ... was filed." This Court has not had an opportunity to review a circuit court's "fair value" determination under this statute. No definition of the term is provided. The Legislature could have put a definition in the "General Provisions" section of South Dakota's Business Corporation Act, SDCL 47–1A–140, but did not. Instead, a definition of "fair value" was provided as it related to statutes governing appraisal rights. SDCL 47–1A–1301(4).[1] This Court, however, reviewed a "fair value" determination under repealed SDCL 47–6–40(3) in *Olsen*, 2001 S.D. 16, 621 N.W.2d 611. SDCL 47–6–40(3) [2] related to the valuation of a dissenting shareholder's stock.

[¶ 17.] Although the determination of fair value in *Olsen* is informative, it is not controlling because the purposes and policies in that case differ from elections to buy out a shareholder in a dissolution case. The purpose of dissenters' rights statutes is to protect minority shareholders. *Olsen*, 2001 S.D. 16, ¶ 16, 621 N.W.2d at 617. In this case, Jay owned 50% of the stock, making him an equal owner as opposed to a minority shareholder. Also in contrast to dissenting shareholders, petitioners for dissolution who are being bought out are

1. SDCL 47–1A–1301(4) provides:
"Fair value," the value of the corporation's shares determined:
(a) Immediately before the effectuation of the corporate action to which the shareholder objects;
(b) Using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal; and
(c) Without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles pursuant to subdivision 47–1A–1302(5).

2. Repealed in 2005, SDCL 47–6–40(3) provided that "fair value" was defined as "[the shares] value immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of such corporate action unless such exclusion would be inequitable." SDCL 47–1A–1301(4) replaced SDCL 47–6–40(3).

more akin to "willing sellers" who want out of the corporation, which could be for a variety of reasons. Petitioners for dissolution are trying to get out of the corporation either through dissolution or by being bought out.

[¶ 18.] However, some of the same principles from dissenting-shareholders cases still apply. For instance, the corporation (or in some cases, existing shareholders) will increase its control or ownership in the corporation when it buys out a shareholder. The shares are not being bought by a third party. This makes application of a "fair market value" determination inappropriate because the economic reality is that the shares are not being bought on the market. In *Olsen*, we rejected the Bank's assertion that "fair value" was analogous with "fair market value." *Id.* ¶ 17, 621 N.W.2d at 617. Our definition of "fair value" in *Olsen* was the "value of those shares as a proportionate interest in the business as an entity, in other words as 'a going concern.' ... An appraisal proceeding must focus [on] ... the stock only as it represents a proportionate part of the enterprise as a whole." *Id.*

[¶ 19.] Although the definitions of "fair value" provided by SDCL 47–1A–1301(4) and *Olsen* are not controlling, it is appropriate in this case to draw from them for guidance, as the circuit court did. This approach is supported by the comments to the Model Business Corporation Act (MBCA). The MBCA comments, on which SDCL ch. 47–1A is based, note that § 14.34 "does not specify the components of 'fair value,' and the court may find it useful to consider valuation methods that would be relevant to a judicial appraisal of shares under section 13.30." [3] SDCL §§ 47–1A–1330 to –1330.4 are synonymous with MBCA § 13.30. The comment goes on to caution that "the two proceedings are not wholly analogous, however, and the court should consider all relevant facts and circumstances of the particular case in determining fair value." [4] This statute was written to give substantial discretion to a circuit court in considering the equities of each case.

[¶ 20.] Jay argues a non-marketability discount inappropriately tainted the valuation process.[5] The parties stipulated in the Wisconsin action that each party would hire their own appraiser and that there would also be a neutral appraiser. They agreed upon a two-step process. First, all the parties would prepare a preliminary written report setting forth their opinions as to the value of LSI and Jay's 50% interest in LSI, including a breakdown of

3. The comments were not enacted as part of the South Dakota statute. Nevertheless, we have relied upon comments to uniform laws in previous cases as persuasive authority in construing the statute. *Estate of Klauzer*, 2000 S.D. 7, ¶ 33 n. 5, 604 N.W.2d 474, 481 n. 5. We do so mindful that SDCL 2–14–13 states that a uniform law is to be interpreted and construed "as to effectuate its general purpose to make uniform the law of those states which enact it." *Miller v. Hernandez*, 520 N.W.2d 266, 269 (S.D.1994).

4. The comment goes on to give several factors that courts may want to consider in determining value, such as liquidating value, wrongful conduct or the absence thereof, or any shareholders' agreements. The circuit court discussed the egregious conduct of the parties and noted that "there is little in the evidence to determine from where it started. Therefore ... this [C]ourt does not believe it is pertinent in determining the fair value to be assessed LSI now that division has been determined."

5. Jay does not argue on appeal that the circuit court erred in declining to apply a minority discount to the value of his shares. Although some of the language used by the circuit court in its order mixes the minority and non-marketability discount language, it is clear that the circuit court did not intend that either discount apply.

any discounts. Next, the appraisers would exchange those reports, meet to discuss, and issue a final report, to be determined by a majority vote if necessary. This process was followed. The neutral appraiser and LSI's appraiser agreed in the final report that the undiscounted fair value of Jay's shares in LSI was $16,550,000. The neutral appraiser testified that when he issued his initial report, in which he initially valued Jay's shares at $21,000,000, he did not take into account LSI's "extremely concentrated customer base relative to the peer group of companies that we utilized from a market perspective." LSI's only customer is Link Snacks. After discussion, the neutral appraiser testified he was persuaded that he had not considered all the different risks associated with only having one customer and that this was a "proper" criticism of his initial opinion. Jay argues that this "give and take" process included a decrease in valuation because "a hypothetical willing buyer would pay less for LSI because of the significant risk associated with such a high customer concentration."

[¶ 21.] After hearing expert testimony regarding the valuation and the process by which the amount was determined, the circuit court accepted the valuation of Jay's shares in LSI at $16,550,000, as reached by a majority of the appraisers. LSI's appraiser and the neutral appraiser testified that this amount was the value of Jay's shares without regard to discounts. In its Memorandum Decision, the circuit court stated that he specifically rejected Jay's appraiser's opinions as to valuation. The court noted:

> In order to reach these figures, [Jay's appraiser] projected that the cost [of] beef would decrease as time went on. In fact, they did not. Additionally, [Jay's appraiser] initially took the view that LSI should be considered as part of the larger entity, the entire Jack Link's business entities. However, LSI is a stand-alone corporation.

The circuit court therefore provided other reasons why it rejected Jay's appraiser's higher valuation besides a discount. Additionally, the circuit court accepted the higher dollar amount of the majority appraisers' valuation, not the lower $11,200,000 amount which they said included discounts. Furthermore, the decrease from the neutral appraiser's initial report was not a discount. The decrease was due to further discussion and consideration of LSI's high customer concentration, which is one of many factors the appraisers considered in reaching the final opinion on the fair value of Jay's shares. In looking at the entire appraisal process, to which Jay agreed, and the many factors of the business that had to be considered, this decrease was not a discount.

[5, 6] [¶ 22.] The circuit court determined that it would be "unjust and inequitable" to apply a discount for either non-marketability or lack-of-control of shares. A non-marketability discount is applied when shares lack a ready and available market based on the theory that the shares have less value than stock that is easily liquidated. *Olsen*, 2001 S.D. 16, ¶ 25, 621 N.W.2d at 619. It is not relevant that the petitioning shareholder would have had a difficult time liquidating their shares as that was never their intent. Under SDCL 47–1A–1430, a petitioning shareholder was trying to have the corporation dissolved. A buy-out election is a way for remaining shareholders or the corporation to stop that dissolution. Because LSI elected to purchase Jay's shares, a discount for non-marketability is inapplicable as LSI elected to be a ready market for the shares. "A lack of marketability discount is inapposite when a corporation elects to buy out a shareholder who has filed for dissolution of a corporation."

Charland v. Country View Golf Club, Inc., 588 A.2d 609, 613 (R.I.1991). Therefore, we find the reasoning in *Olsen* persuasive, even though that case involved dissenting shareholders and is not controlling, and we determine that the circuit court applied an appropriate method of valuation in this case.

[¶ 23.] **2. Whether the circuit court erred in ordering the fair value of Jay's shares to be paid in monthly installments over five years.**

[7] [¶ 24.] Jay argues SDCL 47–1A–1434.6 presumes a lump-sum payment. It provides in part, "The purchase ordered pursuant to § 47–1A–1434.4 shall be made within ten days after the date the order becomes final." However, SDCL 47–1A–1434.4 provides in part, "Upon determining the fair value of the shares, the court shall enter an order directing the purchase *upon such terms and conditions as the court deems appropriate,* which may include payment of the purchase price in installments, *if necessary in the interests of equity* [.]" (emphasis added). Jay argues LSI has not overcome the "presumption."

[¶ 25.] The circuit court rejected Jay's argument that SDCL 47–1A–1434.6 created a presumption. We agree. The language of SDCL 47–1A–1434.4 permits a court, in its discretion, to allow payments in installments if necessary in the interests of equity. These statutes must be read together. *See Peterson, ex rel. Peterson v. Burns,* 2001 S.D. 126, ¶ 32, 635 N.W.2d 556, 568. In doing so, a plain reading of the statutes does not support a presumption of a lump-sum payment. Furthermore, following basic principles of statutory construction, the circuit court fulfilled the plain-language requirements of the statute. The circuit court reviewed financial evidence, including affidavits, submitted by LSI that supported its argument that it did not have the sum of the purchase price of Jay's stock readily available and could not get a loan for the amount.[6]

[8] [¶ 26.] Jay also argued that LSI was judicially estopped from raising financial hardship as a reason for needing to pay in installments. The circuit court held that judicial estoppel was not applicable:

> While it is true that LSI earlier took the position that its current financial situation was not relevant to [the circuit court's] determination, that concerned . . . the value of the company at the time of the breakdown between the stockholders. In this instance, the value of the company goes to a different issue—the ability of the company to make a one-time payment versus payment in installments.

We agree with the circuit court that judicial estoppel is not applicable. The circuit court correctly determined that LSI's financial status at the time of the order was relevant to the terms of the payments but not to the valuation of Jay's shares.

[¶ 27.] The MBCA's corresponding comments state that "in determining whether installment payments are 'necessary in the interests of equity,' the court should weigh any possible hardship to the purchaser against the petitioner's interest in receiving full and prompt payment of the value of his or her shares." The circuit court did not abuse its discretion in

6. Jay argues that one of the affidavits, in which the Chief Financial Officer for Link states that "unnamed banks would not lend the company $16,550,000," was hearsay. However, the circuit court specifically stated that it would not consider that affidavit in determining whether payment in installments was necessary. Additionally, Jay waived this argument because he had the opportunity to request an evidentiary hearing regarding this document and did not do so.

ordering the payment to Jay in installments. There is no statutory presumption of a lump-sum payment. The circuit court considered proper evidence in determining that installment payments were "necessary in the interests of equity." LSI was not judicially estopped from demonstrating financial hardship to the circuit court.

[¶ 28.] **3. Whether the circuit court erred in not granting Jay any security for the fair value LSI owed him.**

[¶ 29.] SDCL 47–1A–1434.4 provides in part:

> Upon determining the fair value of the shares, the court shall enter an order directing the purchase upon such terms and conditions as the court deems appropriate, which *may include* payment of the purchase price in installments, if necessary in the interests of equity, *provision for security to assure payment of the purchase price* and any additional costs, fees, and expenses as may have been awarded.

(emphasis added). Like payment in installments, the circuit court enjoys discretion in ordering the provision of security.

[¶ 30.] The December 2, 2009, order stated that "the order does not create or grant a security interest in any of LSI's assets to or for the benefit of Jay Link, who upon sale of shares will become an unsecured creditor of LSI." While the parties submitted briefs to the circuit court regarding proposed terms of the payment, the court did not make reference to the issue of security in its Memorandum Decision, from which LSI prepared the order.

[¶ 31.] The comments to MBCA section 14.34, from which SDCL 47–1A–1434.4 was adopted, state that "before ordering payment in installments, the court should be satisfied with the purchaser's ability to meet the scheduled payments and to provide such security as the court deems necessary." Unlike its discussion on the order to make installment payments, the circuit court did not provide any analysis or reasoning as to why it did not grant security. We are therefore unable to review the court's reasoning for its decision. Jay has brought forth sufficient evidence to raise the issue of security. Moreover, at oral argument Jay's counsel indicated that Jay is ready to transfer his LSI shares. Circumstances have therefore changed since this matter was last available for the circuit court's consideration. We remand on this issue and direct the circuit court to enter findings on the issue of security for the debt owed to Jay.

[¶ 32.] **4. Whether the circuit court erred in dismissing Jay's claims against LSI directors with prejudice.**

[¶ 33.] As part of the Wisconsin action, Jay alleged breach of fiduciary duty claims against Jack, Troy, two other LSI directors, John Hermeier and Larry Jarvela, and two directors in other Link companies. Using separate jury forms for each director, the Wisconsin jury found that Hermeier and Jarvela had not breached any fiduciary duties owed to Jay. In the South Dakota action, Jay alleged that Jack, Troy, and two LSI directors residing in South Dakota, Terry Smith and Doug Walz, had breached fiduciary duties owed to Jay as a shareholder.[7] Smith and Walz were not parties in the Wisconsin action. However, Jay's allegations against the LSI directors in each action were virtually identical.[8]

7. Jay also included Larry Jarvela and John Hermeier in the South Dakota complaint but does not argue on appeal that it was improper to dismiss his claims against them.

8. In Jay's Wisconsin counterclaim and South Dakota claim, he alleged that "[LSI directors] went along with the scheme [to force Jay out of LSI and accept less than fair value of his

The breach of fiduciary duty claims were not litigated before the circuit court. As part of the December 2, 2009 order dismissing the petition for dissolution, the circuit court stated that "this action is dismissed with prejudice and without costs.... This Court does, however, retain jurisdiction to enforce the terms of this order[.]" The circuit court did not provide any reasoning or analysis regarding the dismissal.

[¶ 34.] LSI argues Jay's dismissed claims are barred by collateral estoppel and res judicata.[9] We address the applicability of each doctrine in turn. This Court recently discussed the doctrine of res judicata in *American Family Insurance Group v. Robnik*, 2010 S.D. 69, ¶¶ 14–22, 787 N.W.2d 768, 774–76. We explained that "res judicata consists of two preclusion concepts: issue preclusion and claim preclusion." *Id.* ¶ 15, 787 N.W.2d at 774 (citing *Christians v. Christians*, 2001 S.D. 142, ¶ 46, 637 N.W.2d 377, 387 (Konenkamp, J., concurring specially)). We cited to the United States Supreme Court's explanation of the doctrine:

> The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." *See* Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402 (1981). Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. *See* Restatement, *supra*, § 27. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit[.]

Id. (citing *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984)); *see also Christians*, 2001 S.D. 142, ¶ 46, 637 N.W.2d at 387.

[9, 10] [¶ 35.] LSI first invokes collateral estoppel, or the issue preclusion effect of res judicata. Collateral estoppel "prevents relitigation of issues that were actually litigated in a prior proceeding." *Dakota, Minn. & E. R.R. Corp. v. Acuity*, 2006 S.D. 72, ¶ 13, 720 N.W.2d 655, 659. LSI argues that collateral estoppel prohibits Jay from litigating the breach of fiduciary duties claims in South Dakota. The breach claims allege that Smith and Walz, as LSI directors, went along with Jack and Troy's "scheme" to force Jay out of LSI and accept less than fair value for his various Link ownership interests "in violation of their fiduciary duties." LSI notes that Jay has not alleged that Smith or

Link ownership interests], in violation of their fiduciary duties, out of fear of termination and/or loss of compensation."

9. LSI argues that SDCL 47–1A–1434.5 "contemplates a clean break and a separation between the company and the petitioning shareholder, by barring claims that the petitioner may have had as a shareholder." SDCL 47–1A–1434.5 provides that "upon entry of an order under ... 47–1A–1434.4, the court shall dismiss the petition to dissolve the corporation under § 47–1A–1430, and the petitioning shareholder no longer has any rights or status as a shareholder of the corporation, except the right to receive the amounts awarded by the order of the court[.]" We do not address this argument as Jay's claims are precluded by res judicata.

Walz did anything different than the other LSI directors in the Wisconsin action, who were not found to have breached their fiduciary duties. Jay argues that he never actually litigated the issue whether Smith and Walz breached their fiduciary duties to Jay as directors of LSI.

[11] [¶ 36.] Issue preclusion, or collateral estoppel, is not appropriate to bar Jay's claims in this case. "Issue preclusion only bars 'a point [that] was *actually and directly in issue* in a former action and was judicially passed upon and determined by a domestic court of competent jurisdiction.' " *Robnik*, 2010 S.D. 69, ¶ 18, 787 N.W.2d at 775 (emphasis added) (citing *Sodak Distrib. Co. v. Wayne*, 77 S.D. 496, 502, 93 N.W.2d 791, 794 (1958)). The issue whether Smith and Walz breached fiduciary duties when they allegedly took actions to "go along with [Jack and Troy's] scheme" to force Jay out of the Link enterprises was not litigated as part of the Wisconsin trial. Smith and Walz were not parties in the Wisconsin action, and therefore the issue could not have been actually and directly in issue in that action. Therefore, we conclude that Jay's claims against Smith and Walz were not barred by collateral estoppel.

[12] [¶ 37.] LSI next argues that the claim preclusion effect of res judicata prevents litigation of Jay's alleged breach of fiduciary duty claims.

> The doctrine of res judicata serves as *claim* preclusion to prevent relitigation of an *issue actually litigated or which could have been properly raised and determined* in a prior action. For purposes of res judicata, a cause of action is comprised of the facts which give rise to, or establish, the right a party seeks to enforce.... [T]he test is a query into whether the wrong sought to be redressed is the same in both actions. Res judicata, which embodies the concepts of *merger* and *bar*, is therefore broader than the *issue* preclusion of collateral estoppel. Res judicata bars an attempt to relitigate a prior determined cause of action by the parties, or one of the parties in privity, to a party in the earlier suit.

Barnes v. Matzner, 2003 S.D. 42, ¶ 16, 661 N.W.2d 372, 377 (emphasis in original).

[¶ 38.] Jay argues that res judicata, or claim preclusion, does not apply because neither Smith nor Walz were named parties in the Wisconsin action. LSI contends the Wisconsin court would have had personal jurisdiction over Smith and Walz under Wisconsin's long-arm statute.[10] We have previously stated that claim preclusion not only "precludes relitigation of issues previously heard and resolved; it also bars prosecution of claims that could have been raised in the earlier proceeding, even though not actually raised." *Robnik*, 2010 S.D. 69, ¶ 19, 787 N.W.2d at 775 (citing *Lee v. Rapid City Area Sch. Dist., No. 51–4*, 526 N.W.2d 738, 740 (S.D.1995)). Similarly, LSI argues that the doctrine of res judicata applies not only to named parties but also to those who could have been sued as parties in an earlier action as well. *Black Hills Jewelry Mfg. Co. v. Felco Jewel Indus., Inc.*, 336 N.W.2d 153, 159 (S.D. 1983) (allowing a new defendant to affirmatively raise the defense of res judicata

10. Wisconsin's long-arm statute recognizes personal jurisdiction over non-resident defendants "in any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant," Wis. Stat. § 801.05(3), or "in any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided that at the time of the injury ... solicitation or service activities were carried on within this state by or on behalf of the defendant[.]" Wis. Stat. § 801.05(4).

to bar a plaintiff from reasserting issues the plaintiff had previously litigated against another defendant).

[13] [¶ 39.] We agree with LSI. A party must have had a "full and fair opportunity to litigate the issues in the prior proceeding" in order to invoke the claim preclusive effect of res judicata. *Robnik,* 2010 S.D. 69, ¶ 20, 787 N.W.2d at 775 (citing *People ex rel. L.S.,* 2006 S.D. 76, ¶ 22, 721 N.W.2d 83, 90). Jay had a full and fair opportunity to litigate the issue of breach of fiduciary duties by Smith and Walz as LSI directors in the Wisconsin action. Jay could have sued them as part of his counterclaim along with the other LSI directors. Jay argues that jurisdiction in Wisconsin over Smith and Walz was uncertain. However, no attempt was made to bring them in that action and Jay does not offer a credible explanation as to why he did not sue them in Wisconsin. Nor does Jay offer an explanation as to why he did not pursue the claims against Smith and Walz in the South Dakota action. Other than filing the complaint, Jay took no steps regarding these claims and made no requests of the circuit court. Thus, we affirm the circuit court's dismissal of the claims with prejudice because they are barred by res judicata.

[¶ 40.] **5. Whether the circuit court erred in denying LSI's motion to vacate Jay's award of accrued interest.**

[14] [¶ 41.] The December 2, 2009 order that Jay appealed contained the award of interest. In March 2010, the circuit court denied a motion filed by LSI under SDCL 15–6–60(b)(2) and (b)(3) to set aside Jay's award of accrued interest in the December 2009 order based on newly discovered evidence and fraud, misrepresentation, or other misconduct by Jay. The circuit court denied the motion without prejudice.

[¶ 42.] Neither party raised the question of the circuit court's jurisdiction to entertain the motion that is now on appeal to this Court. Although the jurisdiction of the circuit court to address the motion is questionable, we do not reach the issue.[11] The circuit court's language from the order denying the motion to vacate the award of interest clearly demonstrates the court's reluctance to rule while this appeal was pending. The order denying the motion provides LSI "with leave to resubmit said motion following disposition of the appeal." The circuit court's comments during the hearing on this issue also clearly illustrate the court's reluctance to rule during the pendency of this appeal:

> What I'm going to do is I'm going to deny the motion for the moment. Once the Supreme Court rules, we'll have an opportunity—you will have an opportunity to raise it again. And at that time, I think I will have more options avail-

11. In *Menno State Bank v. City of Menno,* 297 N.W.2d 460 (S.D.1980), the issue before this Court was "whether SDCL 15–6–60(b) contemplates a procedure whereby a motion to vacate a judgment may be entertained by a trial court during the pendency of an appeal." *Id.* at 461. This Court adopted the Eighth Circuit Court of Appeals' rule:

> [I]n such a situation the district court has jurisdiction to consider the motion and if it finds the motion to be without merit to enter an order denying the motion from which order an appeal may be taken.... If, on the other hand, the [circuit] court decides that the motion should be granted, counsel for the movant should request the [Supreme Court] remand the case so that a proper order can be entered.

Id. (citing *Pioneer Ins. Co. v. Gelt,* 558 F.2d 1303, 1312 (8th Cir.1977)). We do not address whether *Menno State Bank* applies in this case because the circuit court here did not make a ruling on the merits of LSI's motion. Even if it had ruled favorably on LSI's motion, this Court received no remand request.

able. I don't know if Jay has violated SDCL 47–1A–1434 or not, but if he has, I have certain options available there also. But at this point in time, I'm not going to make that decision because I think I'll have a better opportunity to do that once we know what the Supreme Court says.

While denying the motion, the circuit court's decision essentially defers ruling on the issue until after the appeal has run its course.

[¶ 43.] SDCL 15–26A–3 limits our appellate jurisdiction by allowing appeals only from a final order or judgment. *Jacquot v. Rozum*, 2010 S.D. 84, ¶ 12, 790 N.W.2d 498, 502. We have recognized the United States Supreme Court's standard that generally a final decision is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Midcom, Inc. v. Oehlerking,* 2006 S.D. 87, ¶ 15, 722 N.W.2d 722, 726 (citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199, 108 S.Ct. 1717, 1720, 100 L.Ed.2d 178 (1988)). The circuit court did not enter a final order from LSI's motion to vacate because it was denied without prejudice. Nor did the circuit court consider the merits of LSI's motion. It made clear it was waiting for the decision from the initial appeal to be released before making a determination on LSI's motion. Therefore, whether the circuit court had jurisdiction or not, it did not enter a final order. Accordingly, we do not address the merits of LSI's argument on appeal.

CONCLUSION

[¶ 44.] We affirm the circuit court on the valuation of Jay's shares, the order to pay Jay the fair value of his shares in monthly installments over five years, and the dismissal of Jay's breach of fiduciary duty claims. We reverse on the issue of security and remand for the circuit court to enter findings. Finally, we remand for the circuit court to consider LSI's motion to vacate the award of accrued interest on the merits.

[¶ 45.] KONENKAMP, ZINTER, MEIERHENRY, and SEVERSON, Justices, concur.

2010 S.D. 104

Leon R. FEIST and Becky Lemieux–Feist, Petitioners and Appellees,

v.

Zachary E. LEMIEUX–FEIST, Respondent,

and

Ashley Fousek, Respondent and Appellee,

and

State of South Dakota, Intervenor and Appellant.

No. 25530.

Supreme Court of South Dakota.

Argued Oct. 5, 2010.

Decided Dec. 29, 2010.

Rehearing Denied March 21, 2011.

Background: Paternal grandparents filed petition to gain custody of mother's and father's child. Mother filed motion to dismiss. The Seventh Judicial Circuit Court, Pennington County, Merton B. Tice, Jr., J., granted mother's motion, and grandparents appealed.

Holding: The Supreme Court, Meierhenry, J., held that statutes governing third-party custody and visitation did not violate