

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

46 CIV 20 - 177

COMPLAINT
FIRST AMENDED COMPLAINT

Filed: 7/1/2020 6:49 PM CST Meade County, South Dakota 46CIV20-000177

TREVER WAGNER, REBEKAH WOJAHN,)
 BRADLEY WOJAHN, JAMIE NELSON,)
 CHRIS NELSON, MEGAN SALISBURY, BRYCE)
 SALISBURY, ADAM GEIGLE, NATASHA)
 GEIGLE, MICHAEL SOUZA, JEREMIAH)
 SUTTON, HEATHER HEINERT, SARAH NAVA,)
 BLAKE HALLERT, JAMES LITTLE,)
 MISTY LITTLE, NICOLE MOORE)
 MICHAEL MOORE, MIKE ESPOSTO,)
 JAMES RADENIC, DEBORAH RADENIC,)
 KOREY SCHULTZ, KELLY SCHULTZ,)
 LORI KIEHN, JOHNATHAN CINA, KRISTIN)
 CINA, MATTHEW WAGNER, WENDY)
 WAGNER, CARISA GERVING, ROBERT)
 GERVING, ANDREA FISCHER, SCOTT SMITH,)
 SAMANTHA SMITH, MICHAEL LORGE,)
 CAROLYN LORGE, MARK WIRKUS,)
 CATHERINE WIRKUS, COURTNEY AHRENDT,)
 EZRA AHRENDT, SANDRA RAUE, JASON)
 HANSON, CHRIS CONNERS, DEIDRA)
 CONNERS, JUSTIN SCHUMMER, ROBERT)
 MINICK, GENEVA MINICK, JENNIFER)
 BIGGERS, JOHN BIGGERS, WILLIAM)
 SCHAMBER, GLENDA SCHAMBER, DAVID)
 LOWE, RICHARD OXNER, BRENDA OXNER,)
 JUSTIN BOMWICH, DIANA BROMWICH,)
 THERESA MAXON, BRUCE STACY, SHERI)
 STACY, ALBERT REITZ, JOSEPH WEST, JULIE)
 WEST, KALYN AGA, RANDY AGA, BEAU)
 DEINES, DANIELLE HIGH BEAR, ERIC HIGH)
 BEAR, CARLOS LLORENS, JENNI LLORENS,)
 DAVID MCKELVEY, SHILOU MCKELVEY,)
 CRYSTAL POWELL, JOCELYN POWELL,)
 SHANE GALLES, TRISTA GALLES, THERESA)
 JOHNSON, DARRIN JOHNSON)
 residents of Meade County, South Dakota)
)
 Plaintiffs,)
)

v.)
)
SOUTH DAKOTA HOUSING DEVELOPMENT)
AUTHORITY, a South Dakota public authority,))
MEADE COUNTY, a local government agency))
and WAYNE GUTZMER, CARL BRUCH, BOB)
POWLES, DAYLE HAMMOCK, BOB MALLOW,))
CURTIS NUPEN, JIM SCHROEDER, DEAN)
WINK, TIM POTTS, CRAIG SHAVER, BILL)
RICH, JACK WILSON the duly elected,)
qualified, and acting Members of the Meade)
County Commission, individual and in their)
official capacities, and KIRK CHAFFEE, the)
duly appointed, qualified and acting)
Equalization Director of Meade County,)
HIGH PLAINS TITLE SERVICE, INC D.B.A.)
MEADE COUNTY TITLE COMPANY, BLACK)
HILLS TITLE, INC, a South Dakota)
Corporation, STEWART TITLE COMPANY,)
a Texas Corporation., RENNER AND)
SPERLICH ENGINEERING COMPANY., a)
South Dakota Corporation, SPERLICH)
CONSULTING, INC., a South Dakota)
Corporation, LONGBRANCH CIVIL)
ENGINEERING, INC, a South Dakota)
Corporation, KALE MCNABOE, an employee)
of SPERLICH CONSULTING, INC and the)
registered agent of LONGBRANCH CIVIL)
ENGINEERING, INC, RAYMOND FUSS,)
Developer of Fuss Subdivision, LARRY FUSS,)
Developer of Fuss Subdivision, ADELAIDE)
FUSS, Developer of Fuss Subdivision, KEITH)
KUCHENBECKER,Developer of Hideaway)
Hills Subdivision,LINDA KUCHENBECKER,)
Developer of Hideaway Hills Subdivision,)
REMAX OF RAPID CITY, a South Dakota)
Corporation, RONALD SJODIN, Agent of)
REMAX OF RAPID CITY, VIVIAN SJODIN,)
Agent of REMAX OF RAPID CITY, FOUST)

CONSTRUCTION, INC, a South Dakota)
Corporation, NEIL FOUST, an employee of)
FOUST CONSTRUCTION, INC and the)
registered agent of FOUST CONSTRUCTION,)
INC., MELVIN LAMKE, a professional)
surveyor.)
)
Defendants.)

COME NOW The Plaintiffs and for their complaint state and allege as follows:

PREFACE

1.

All of the Plaintiffs listed in this caption are legal clients who are under contract/contingency fee agreement with Fitzgerald Law Firm, A Professional Law Corporation located in Rapid City, South Dakota.

2.

The South Dakota Rules of Professional Conduct prohibit, Rule 4.2, provides, Communication with Person Represented by Counsel,

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

3.

This law firm, the attorneys who will be contracted with this law firm expressly deny and prohibit lawyer(s) who may represent other clients in this matter from contacting or communicating about the subject of the representation with any of the clients listed in this caption and any others who may contract with this law firm.

4.

VENUE

South Dakota Codified Laws 15-5-1 provides that venue is proper in Meade County "For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property:"

5.

STANDING

"Standing is established through being a 'real party in interest' and it is statutorily controlled." Wang v. Wang, 393 N.W.2d 771, 775 (S.D.1986). Under SDCL 15-6-17(a), "[e]very action shall be prosecuted in the name of the real party in interest." The real party in interest requirement for standing is satisfied if the litigant can show "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the Defendant." Parsons v. South Dakota Lottery Commission, 504 N.W.2d 593, 595 (S.D.1993) (quoting Gladstone, Realtors v. Bellwood, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66, 76 (1979)).

6.

The Plaintiffs are all owners and or have a legal interest in real estate and its fixtures in Meade County, South Dakota.

7.

The Plaintiffs have all suffered damages individually due to the conduct of those defendants whose actions contributed to the catastrophe occurring April 27, 2020 in the subdivision known as "Hideaway Hills."

8.

DAMAGES

By law in South Dakota:

The owner of property either real or personal is qualified to express his opinion of the value of the property by reason of his status as owner. Enos v. St. Paul Fire & Marine Ins. Co., 4 S.D. 639, 57 N.W. 919; Smith v. Mutual Cash Guaranty Fire Ins. Co., 21 S.D. 433, 113 N.W. 94; Moulton v. Globe Mutual Ins. Co., 36 S.D. 339, 154 N.W. 830; State Highway Commission v. Olson, 81 S.D. 401, 136 N.W.2d 233; Smith v. Riedinger, N.D., 95 N.W.2d 65;

9.

Each of the Plaintiffs listed in the complaint whether owner in fee or in equity hereby express their opinion that their real estate has been damaged by a diminishment in value either in part or in whole by the catastrophic events occurring April 27, 2020. Plaintiffs are qualified experts to render this opinion in advance of any geotechnical survey or other survey which would establish the structural integrity of the real estate and the potential poisons located in the real estate.

10.

DAMAGES ARE NOT MEASURABLE ON A CLASS WIDE BASIS

The Plaintiffs have all suffered individualized damages to the value of their real estate in Meade County. There are four distinct and separate types of features that have caused catastrophic injury to the real estate's value including but not limited to: First the discovery of an underground gypsum mine, second, the discovery of homes built on mine "spoils," third the discovery of homes built on sewage lagoons which caused serious health problems, and fourth the stigma caused by the discovery of the first three. Some homes have been diminished in value by one hundred percent and some homes may have only been partially damaged. Some residents have become ill and others have not. Any damages model would be far short of establishing that damages are capable of measurement on a class wide basis, questions of individual damage calculations will inevitably overwhelm questions common to the class.

DEFENDANTS

11.

The South Dakota Housing Development Authority is a government agency tasked with providing affordable housing within the State of South Dakota.

12.

Meade County is a government body tasked with, among other things, managing and conducting itself to provide for the best interests of all residents, including, but not limited to the decision making authority to approve or disapprove of the improvements of real estate located in Meade County, South Dakota.

13.

Wayne Gutzmer was a commissioner on the Meade County Commission at the time plats of the Hideaway Hills Subdivision were approved.

14.

Carl Brunch was a commissioner on the Meade County Commission at the time plats of the Hideaway Hills Subdivision were approved.

15.

Bob Powles was a commissioner on the Meade County Commission at the time plats of the Hideaway Hills Subdivision were approved.

16.

Dayle Hammock was a commissioner on the Meade County Commission at the time plats of the Hideaway Hills Subdivision were approved.

17.

Bob Mallow was a commissioner on the Meade County Commission at the time plats of the Hideaway Hills Subdivision were approved.

18.

Curtis Nupen was a commissioner on the Meade County Commission at the time plats of the Hideaway Hills Subdivision were approved.

19.

Jim Schroeder was a commissioner on the Meade County Commission at the time plats of the Hideaway Hills Subdivision were approved.

20.

Dean Wink was a commissioner on the Meade County Commission at the time plats of the Hideaway Hills Subdivision were approved.

21.

Tim Potts was a commissioner on the Meade County Commission at the time plats of the Hideaway Hills Subdivision were approved.

22.

Craig Shaver, was a commissioner on the Meade County Commission at the time plats of the Hideaway Hills Subdivision were approved.

23.

Bill Rich was a commissioner on the Meade County Commission at the time plats of the Hideaway Hills Subdivision were approved.

24.

Jack Wilson was a commissioner on the Meade County Commission at the time plats of the Hideaway Hills Subdivision were approved.

25.

Kirk Chaffee served the Meade County Commission as the duly appointed, qualified and acting Equalization Director at the time plats of the Hideaway Hills Subdivision were approved.

26.

High Plains Title Service, Inc is a company, licensee, and or franchisee which offers insurance policies that guarantee the merchantability, soundness and warranty of legal title to real estate in Meade County and in surrounding counties in South Dakota. Its principal place of business and nexus of decision making occurs in Sturgis, South Dakota. High Plains Title Service is an exclusive retailer of Stewart Title Insurance.

27.

Meade County Title Company, DBA is a DBA authority of High Plains Title Service, Inc.

28.

Black Hills Title, Inc is a company, licensee, and or franchisee which offers insurance policies that guarantee the merchantability, soundness and warranty of legal title to real estate in Meade County and in surrounding counties in South Dakota. Its principal place of business and nexus of decision making occurs in Sturgis, South Dakota. Black Hills Title, Inc is an exclusive retailer of Stewart Title Insurance.

29.

Black Hills Title Company, Inc is a company, licensee, and or franchisee which offers insurance policies that guarantee the merchantability, soundness and warranty of legal title to real estate in Meade County and in surrounding counties in South Dakota. Its principal place of business and nexus of decision making occurs in Sturgis, South Dakota. Black Hills Title Company, Inc is an exclusive retailer of Stewart Title Insurance.

30.

Black Hills Title Company, DBA is a DBA authority of Black Hills Title Company, Inc.

31.

Stewart Title Company is the guarantor of the title insurance policies issued by High Plains Title Service, Black Hills Title, Inc, Black Hills Title Company, Pennington Title Company, First American Title Company, First American Title Company of South Dakota and Dakota Title.

32.

Renner and Sperlich Engineering Company is a professional civil engineering firm in Rapid City, South Dakota.

33.

Sperlich Consulting is a professional engineering consulting firm based in Rapid City, South Dakota.

34.

Longbranch Civil Engineering, previously known as Sperlich Consulting, is a professional engineering consulting firm based in Rapid City, South Dakota.

35.

Kale McNaboe is an employee of Sperlich Consulting and Longbranch Civil Engineering who prepared and represented the Hideaway Hills plat to the Meade County Commission.

36.

Raymond Fuss was the original developer of the Fuss Subdivision in Meade County, South Dakota.

37.

Larry Fuss was a co-developer of the Fuss Subdivision in Meade County, South Dakota.

38.

Adelaide Fuss was the spouse of Larry Fuss and co-developer of the Fuss Subdivision in Meade County, South Dakota.

39.

Keith Kuchenbecker was a co-developer of Hideaway Hills Subdivision in Meade County, South Dakota.

40.

Linda Kuchenbecker was the spouse of Keith Kuchenbecker and co-developer of the Hideaway Hills Subdivision in Meade County, South Dakota.

41.

Remax of Rapid City is a professional real estate brokerage based in Rapid City, South Dakota.

42.

Ronald Sjodin is a realtor licensed in South Dakota who worked for Remax to market and sell real estate within the Hideaway Hills Subdivision on behalf of the property developers.

43.

Vivian Sjodin is a realtor licensed in South Dakota who worked for Remax to market and sell real estate within the Hideaway Hills Subdivision on behalf of the property developers.

44.

Foust Construction is a construction company based in Rapid City, South Dakota which constructed homes within the Hideaway Hills subdivision.

45.

Niel Foust is the owner and registered agent of Foust Construction.

46.

Melvin Lamke is a professional surveyor who surveyed the sites of the Hideaway Hills Subdivision. As a surveyor, Mr. Lamke has professional obligations and is subject to ethical standards and review.

47.

RECORD OF TITLE.

The majority of the Hideaway Hills subdivision which is the real property subject to this action, is located in the East Half of the NW $\frac{1}{4}$ of Section 8, Township 2 Range 7, Meade County, South Dakota. However most of the property mentioned in the below listed transactions also encompasses the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$, Sec.8., Twn. 2, Range 7. Those parcels will not be specifically mentioned.

48.

The East Half of the NorthWest quarter section of Section 8, is composed of the NE $\frac{1}{4}$ and the SE $\frac{1}{4}$.

49.

On or about July 2nd, 1891 the North East Quarter and the South East Quarter of the NW $\frac{1}{4}$, Section 8, Township 2, Range 7, became patented by Olaf Olson and Wife, respectively, (*Book 11 Vol. 470 and Book 10 Vol. 32.*)

50.

On or about March 17, 1910 Olaf Olson and Wife, equitably sold those parcels by contract for Deed to Benjamin Alexander for \$8,000.00. (*Book 44, Vol. 28.*)

51.

On or about March 17, 1910, Benjamin Alexander assigned his interest in the Contract for Deed to the Dakota Plaster Company. (*Book 44, Vol. 33.*)

52.

On or about January 10, 1917, Benjamin Alexander satisfied the Contract for Deed and the property transferred by warranty deed, to the Dakota Plaster Company for the sale price of \$8,000.00. (*Book 91. Vol. 220.*)

53.

On or about April 7, 1927, the Dakota Plaster Company mortgaged the aforementioned parcels to the Security Savings Bank for the sum of \$10,000.00.

54.

The Dakota Plaster Company defaulted on its mortgage and on January 4, 1929, Security Savings Bank foreclosed on the property. (*Book 149. Vol 156.*)

55.

Security Savings Bank's license was suspended, (presumably due to the financial crisis) a receiver was appointed and on April 10, 1930 the land was purchased by George P. Bennet for \$5,000.00. (*Book 151. Vol. 509.*)

56.

George P. Bennet sold the land to the U.S. Gypsum Company on July 17, 1930 for \$10,000.00. (*Book 152 Vol. 227.*)

57.

On or about May 29, 1945 the U.S. Gypsum Company sold the property to one H.A. Biesman. (*Book 186. Vol. 525.*)

58.

On the same day Mr. Biesman sold the property to local developer Ed Stensaas. (*Book 186. Vol. 525.*)

59.

Mr. Stensaas had previously developed the "East Lawn, " Subdivision in Black Hawk, SD.

60.

On April 8, 1971 the Meade County Commissioners approved the plat submitted by Mr. Stensaas. This plat created Lots A, B, and C, and Tract 1, namely in the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 8, Township 2, Range 7,

61.

On or about September 5, 1974, the Meade County Commissioners approved the plat located in plat book 4, Page 27, re: portions of the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$ Section 8, Township 2, Range 7. The property was owned by Alan R. Sutton and Patricia A. Sutton.

62.

The State Cement Plant by virtue of the State of South Dakota, purchased the property at some time in the 1980s.

63.

On or about June 17, 1994, the State of South Dakota sold the land to Raymond C. Fuss and Carol M. Fuss of Rapid City, South Dakota. The State of South Dakota reserved all mineral interests in the property. Raymond C. Fuss and Carol M. Fuss transferred the property to Larry and Adelaide Fuss.

64.

Larry and Adelaide Fuss equitably sold the property on February 1, 2001 on an installment contract to Keith Kuchenbecker and Linda Kuchenbecker. However, the contract of sale did not become satisfied until sometime in 2005. Kuchenbeckers and by acquiescence or explicit or implicit agreement Larry Fuss and Adelaide Fuss, caused to be surveyed for stick built development and submitted a plat to the Meade County Commission for domestic housing development. Since Larry and Adelaide Fuss were owners in title, all plats required their signatures.

65.

Larry Fuss and Keith Kuchenbecker approached Meade County with a proposal for development of a manufactured housing community over the Hideaway Mine on or about July 13, 2000. Meade County's minutes record that a *"visual inspection,"* and *"soils test"* was conducted. Its report concluded, *"Based on initial visual observation, on-site soil appears suitable for the proposed development."... "In the early 1900's an underground gyp mining operation took place on the NE corner of the property. Field boring operation may be required to identify any cavities that may be a safety hazard."* At some point in time the manufactured home plan was replaced with a plan to build stick built homes.

66.

Renner & Sperlich Engineering Company, a civil engineering company was contracted and did complete the engineering specifications for the plat.

67.

Melvin B. Lamke Professional Land Surveyor was contracted and did survey the plat.

68.

This plat contained Lots 1 through 11 of Block 1, Lots 1 through 12 of Block 2, Lots 1 through 12 of Block 3, Lot 1 of Block 4, and Lot 1 of Block 5. This plat contains the areas commonly known as, "West Daisy," Orchid Lane, Orchid Court and a portion of Meadow Rose Lane.

69.

On or about October 2, 2002 the Meade County Commission approved the said plat located in Plat Book 21 Page 28.

70.

Kuchenbecker and Fuss sold the lots to individual contractors who constructed homes and sold the homes to the public at large.

71.

On or about June 4th, 2004, developers Fuss and Kuchenbecker created the East Half of Daisy Street, Lots 15 through 25 in Block 2, and Lots 16 through 25 in Block 4.

72.

Sperlich Consulting, Inc., engineered this section of the subdivision for soundness and safety.

73.

Melvin B. Lamke surveyed this section of the subdivision.

74.

On or about August 8, 2004, the Meade County Commission approved the said plat and located it in plat book 21 pages 217-218.

75.

The lots were then sold by Fuss and Kuchenbecker to individual contractors.

76.

A half hearted attempt was made by the developers to warn contractors and realtors that they were buying and eventually would sell a piece of real estate that likely had zero value and which presented a high risk of death or serious bodily injury to the eventual owners. This warning consisted of a simple piece of paper which stated:

77.

The Warning

The BUYERS acknowledge that they have been made aware that the property being purchased hereunder, along with the adjoining

property, was once mined on the surface and underground for gypsum. The SELLER is unaware as to the exact date that the underground mining ceased but believes it was sometime in the 1950's. The surface of the property was reclaimed to meet the requirements of the State of South Dakota after the surface mining operation was completed. The SELLER IS not making any warranty, express or implied, concerning any subsurface conditions that may exist on the property being purchased by the BUYER herein. It will be the BUYER'S responsibility to remediate any subsurface conditions that exist on the property including but not limited to, fissures or cavities that may be as a result of these mining operations. The BUYER has accepted the (illegible) subsurface of the property in an "as is" condition, without any warranty by the SELLER.

78.

Neither the developers, the Meade County Commissioners, contractors, the respective title companies, Engineers, Realtors nor the surveyor believed the warning should have been recorded in the Register of Deeds Office.

79.

COUNT ONE (1)

DENIAL OF DEFENDANT'S USE OF THE STATUTE OF LIMITATIONS

"LACK OF SUBSTANTIAL COMPLETION"

80.

Preceding paragraphs incorporated herein, the statute of limitations for this matter is found in SDCL 15-2A. SDCL 15-2A-3 potentially limits actions against those involved in the design[ing], planning, supervision, inspection, and observation of construction or construction of an improvement to real property...ten years after substantial completion [of the real property improvement].

81.

No substantial completion of the real property improvement took place as the building on top of an underground gypsum mine, the building on top of mine "waste," "spoils," "etc.," and or the building on top of sewage lagoons, or tailings ponds, would entail the proper and safe building on top of such ultrahazardous conditions of the real estate. Any substantial completion would entail the ensuring that such improvements would prevent the loss, subsidence and prevention of the negative fruition of such condition.

82.

COUNT TWO (2)

DENIAL OF THE STATUTE OF LIMITATIONS SPECIFIC STANDARD OF CARE NOT MET

Preceding paragraphs incorporated herein, no statute bars the Plaintiffs' claims in this action as SDCL 15-2A-1 provides that the ten year limitation applies only to "*actions under a general standard of care.*" Building on top of a gypsum mine, mine "fill," or mine, "spoils," and or sewage lagoons or "mine tailings ponds" would require a specific standard of care. No statute bars the Plaintiffs claims of negligence, when a defendant fails to use a "*specific standard of care.*".

83.

The Defendants Larry Fuss, Adelaide Fuss, Keith Kuchenbecker, Linda Kuchenbecker, were on notice that on the real estate, there existed an underground gypsum mine, a part of the real estate that was composed on the surface of mine, "fill," or mine, "spoils," and finally that there existed including, but not limited to, a condition on the real estate that was composed of a sewage lagoon and or a tailings pond.

84.

The Defendants Larry Fuss, Adelaide Fuss, Keith Kuchenbecker, Linda Kuchenbecker were on notice of the conditions of the real estate that there existed an underground gypsum mine, a part of the real estate that was composed on the surface or mine, "fill," or mine, "spoils," and finally that there existed a condition including but not limited to a condition on the real estate that was composed of a sewage lagoon and or a tailings pond. Each of the intra paragraph named

defendants were on notice that due to the unusual and extraordinary conditions of the real estate, that the development of the real estate would require a “specific,” standard of care.

85.

The failure of the aforementioned above paragraph named defendants to require the use of those engineers, contractors, and or realtors and those who observed the construction to possess the requisite “specific,” standard of care constituted negligence upon the defendants, The Defendants Larry Fuss, Adelaide Fuss, Keith Kuchenbecker, Linda Kuchenbecker.

86.

Larry Foust, Foust construction was contracted and did purchase with the intent to build a residential, “speculation,” home, certain lots within the “Hideaway Hills,” subdivision, in Meade County South Dakota.

87.

Larry Foust and or Foust Construction, did purchase such lots with the intent to build such, “speculation homes,” with the knowledge that such homes existed on top of an underground gypsum mine and or, untested “mine fill,” and or mine “spoils,” and or sewage lagoons, and or “tailings ponds.”

88.

Larry Foust and or Foust Construction did purchase such lots with the knowledge that such homes existed on top of an underground gypsum mine and or, untested “mine fill,” and or mine “spoils,” and or sewage lagoons, and or “tailings ponds,” and with knowledge that the construction of such homes would require a “specific,” and not a “general,” standard of care.

89.

Larry Foust and or Foust Construction did purchase such lots with the knowledge that such homes existed on top of an underground gypsum mine and or, untested for compaction, “mine fill,” and or mine “spoils,” and or sewage lagoons, and or “tailings ponds,” and with knowledge that the construction of such

homes would require a “specific,” and not a “general,” standard of care with the knowledge that its construction company did not possess the requisite knowledge to execute such specific standard of care.

90.

Renner & Sperlich Engineering Company, Sperlich Consulting, Inc., and Longbranch Engineering, did agree to contract and complete the civil engineering required for an “ordinary subdivision.”

91.

An ordinary subdivision consists of a subdivision which does not pose any known risk of total or partial loss in real estate value or a subdivision which does not pose a risk of or an immediate risk of imminent bodily harm and or death.

92.

Renner & Sperlich Engineering Company, Sperlich Consulting, Inc., Longbranch Engineering, and Kale McNaboe with the knowledge that such homes existed on top of an underground gypsum mine and or, untested “mine fill,” and or mine “spoils,” and or sewage lagoons, and or “tailings ponds,” did pursue and or complete such civil engineering contract(s) to the standard of, “ordinary care,” with the knowledge that the civil engineering of such a subdivision on top of such ultrahazardous conditions required a specific standard of care.

93.

Wayne Gutzmer, Tim Potts, Craig Shaver, Bob Powles, Bob Mallow, Kirk Chaffee, Bill Rich, Carl Bruch, Cutis Nupen, Jim Schroeder and Dean Wink composed the duly elected officials of the Meade County Commission during the approval of the Hideaway Hills Subdivisions. Each of the above named commissioners knew that such subdivision did exist on top of an underground gypsum mine and or, untested “mine fill,” and or mine “spoils,” and or sewage lagoons, and or “tailings ponds,”

94.

Each of the commissioners knew that the development of such land required a “specific,” and not *general standard of care*. The failure to require a *specific*

standard of care prohibits the commissioners from asserting the statute of limitations as a defense.

95.

Ronald Sjodin and or Vivian Sjodin each knew and did understand that the listing and sale of homes on such ultrahazardous conditions required a *specific standard of care* not met by the civil engineers and contractors and or developers.

96.

The failure of Ronald Sjodin and or Vivian Sjodin to insist on a *specific standard of care* prior to, or commensurate with, the sale of the house constituted the selling of the home devoid of the requisite specific standard of care denies the defendants the defense of the statute of limitations.

97.

COUNT THREE (3)

DENIAL OF THE STATUTE OF LIMITATIONS BASED ON

FRAUD AND INDEPENDENTLY AS THE TORT OF FRAUD

Preceding paragraphs incorporated herein, Larry Fuss, Adelaide Fuss, Keith Kuchenbecker, Linda Kuchenbecker were all experienced developers who knew about the gypsum mine and knew the construction of a development on top of an underground gypsum mine was dangerous to property rights and values, and presented an immediate danger to life and limb. The intra paragraph defendants owed a duty to disclose the peril of the subdivision to all foreseeable owners, the failure of which constituted the commission of fraud and deceit to all foreseeable owners.

98.

Ronald Sjodin and Vivian Sjodin were both experienced realtors with knowledge that the selling of homes on top of an underground gypsum mine, near and on top of hazardous sewage lagoons, and mine spoils, was dangerous to

property rights and values, and presented an immediate danger to life and limb. The intra paragraph defendants owed a duty to disclose the peril of the homes they listed and sold to all immediate and foreseeable owners, the failure of which constituted the commission of fraud to immediate purchasers and all foreseeable owners.

99.

COUNT FOUR (4)

BREACH OF FIDUCIARY DUTY

Preceding paragraphs incorporated herein, Ronald Sjodin and Vivian Sjodin both owed a fiduciary duty to purchasers and their assigns, transferors and heirs. The duty constituted a duty to disclose the nature of the ultrahazardous conditions including, but not limited to, an underground mine, sewage lagoons and mine spoils. This duty was owed to all purchasers and all foreseeable owners.

100.

Renner & Sperlich Engineering, Sperlich Consulting Inc. Longbranch Engineering, were each at the time of the events that gave rise to the action, experienced civil engineers which knew the ultrahazardous features of the real estate. The intra paragraph defendants knew the dangers which would be incumbent upon designing and engineering a subdivision on top of an underground gypsum mine, sewage lagoons and mine spoils. The intra paragraph defendants owed a duty to disclose to all immediate owners of the real estate and foreseeable owners the dangers of loss of real estate value and the immediate peril to life and limb. The failure to disclose such dangers constituted fraud and deceit.

101.

Neil Foust, and or Foust Construction, were each at the time of the events that gave rise to the action, experienced in the construction of homes and their appurtenances. These contractors knew of the ultrahazardous features of the real estate, including but not limited, the dangers of building on top of an underground mine, building on top of mine waste and building on top of sewage lagoons. These contractors thus had a duty to disclose to immediate purchasers and occupants and their foreseeable assigns, transferees and heirs.

102.

COUNT FIVE (5)

DENIAL OF THE STATUTE OF LIMITATIONS BASED ON

WILLFUL MISCONDUCT

AND INDEPENDENTLY AS THE TORT OF WILLFUL MISCONDUCT

Preceding paragraphs incorporated herein, willful misconduct means an intentional act or omission which is in disregard of either a known risk or a risk so obvious that it cannot be said one was truly unaware of it and or it was a risk so great that it is highly probable that harm will follow or it means the intentional doing of a wrongful act, or the wrongful failure to act, without just cause or excuse, where the actor is aware that the actor's conduct will probably result in injury.

103.

Wayne Gutzmer, Tim Potts, Craig Shaver, Bob Powles, Bob Mallow, Kirk Chafee, Bill Rich, Carl Bruch, Cutis Nupen, Jim Schroeder and Dean Wink composed the duly elected officials of the Meade County Commission during the approval of the Hideaway Hills Subdivisions. The County Commissioners did approve the subdivision with knowledge of the dangerous conditions including but not limited to, the underground gypsum mine, the sewage lagoons and the mine spoils. Reasonable people would conclude that building the homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features constitutes disregard of an obvious risk coupled with a high probability of resultant injury or harm.

104.

Larry Fuss and Adelaide Fuss and Keith Kuchenbecker and Linda Kuchenbecker proposed and or caused to be created the Hideaway Hills subdivisions, with knowledge of the dangerous conditions existing on the real estate including but not limited to, the underground gypsum mine, the sewage lagoons

and the mine spoils. Reasonable people would conclude that building the homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features constitutes disregard of an obvious risk coupled with a high probability of resultant injury or harm.

105.

Renner & Sperlich Engineering Company, Sperlich Consulting, Inc., and Longbranch Engineering, with knowledge of the dangerous conditions existing on the real estate including but not limited to, the underground gypsum mine, the sewage lagoons and the mine spoils did design and engineer the Hideaway Hills Subdivision. Reasonable people would conclude that building the homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features constitutes disregard of an obvious risk coupled with a high probability of resultant injury or harm.

106.

COUNT SIX (6)

DENIAL OF THE STATUTE OF LIMITATIONS

BASED ON FRAUDULENT MISREPRESENTATION

AND INDEPENDENTLY AS THE TORT OF FRAUDULENT MISREPRESENTATION

Preceding paragraphs incorporated herein, the tort of fraudulent misrepresentation occurs, when a defendant made a representation as a statement of fact, the representation was untrue; , the defendant knew the representation was untrue or he made the representation recklessly; the defendant made the representation with intent to deceive the plaintiff and for the purpose of inducing the plaintiff to act upon it the plaintiff justifiably relied on the representation, the plaintiff suffered damage as a result. N. Am. Truck & Trailer, Inc. v. M.C.I. Com. Serv., 2008 S.D. 45, ¶ 10, 751 N.W.2d 710, 714;

107.

The Defendants Larry Fuss, Adelaide Fuss, Keith Kuchenbecker, Linda Kuchenbecker, Ronald Sjodin, Vivian Sjodin, Foust Construction, Renner & Sperlich Engineering, Sperlich Consulting, Inc., Longbranch, and Neil Foust did each execute warranty deeds to or cause to be executed warranty deeds which constituted a fraudulent misrepresentation.

Every warranty deed contains the following implied covenants

That he is lawfully seized of the premises in fee simple, and has good right to convey the same;

That the premises are free from all encumbrances;

That he warrants to the grantee, his heirs, and assigns, the quiet and peaceable possession thereof; and

That he will defend the title thereto against all persons who may lawfully claim the same.

Such covenants shall be obligatory upon any grantor, his heirs, and personal representatives, as fully and with like effect as if written at length in such deed.

108.

The following are not an exhaustive list of the implied covenants that were fraudulently misrepresented, that the grantor, "had good right to convey the same;" that the premises [were] free from all encumbrances," that he warrants to the grantee, his heir and assigns, the "quiet and peaceable possession thereof."

109.

The Defendants Larry Fuss, Adelaide Fuss, Keith Kuchenbecker, Linda Kuchenbecker, Ronald Sjodin, Vivian Sjodin, Foust Construction, Renner & Sperlich Engineering, Sperlich Consulting Inc., Longbranch Engineering, Neil Foust, Harvey Homes, Ed Harvey, Canyon Construction Company, did each execute warranty deeds to or cause to be executed warranty deeds which constituted a fraudulent misrepresentation as those defendants were on notice that the property contained,

either or an underground mine drift, areas of mine spoils, with insufficient compaction or compaction that was not possible and or tailings and or sewage lagoons.

110.

Encumbrances

A sewage lagoon which has been drained, an underground mine drift and or mine spoils constitute, physical encumbrances. The grantee was not aware of these physical features of which the grantor was aware. Further the grantee upon visual or other reasonable inspection would not have been aware and could not have made himself or herself aware of such physical feature(s). Because the grantor was aware and the grantee was not aware and could not have been made aware of the presence of these features, the same constitute an encumbrance under which the law affords a remedy.

111.

Those in the chain of possession and title, whether legally or equitably, may claim and assert privity of deed, possession and contract with those who first took claim of title from those defendants listed in paragraphs, who asserted by warranty deed that the property was free of encumbrances.

112.

Good Right to Convey

Those defendants who executed warranty deeds also violated the covenant of good right to convey the same.

113.

The right to convey also encompasses the right of whether the conveyance of the property is likely to contain a latent defect which will cause harm to the subsequent purchasers. As the grantors were aware of all of the defective conditions of the property, the covenant of the right to convey was not proper or good.

114.

COUNT SEVEN (7)

DENIAL OF THE STATUTE OF LIMITATIONS AS A DEFENSE BASED ON

FRAUDULENT CONCEALMENT

AND INDEPENDENTLY AS THE TORT OF FRAUDULENT CONCEALMENT

Preceding paragraphs incorporated herein, fraudulent concealment requires *"a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury and a duty upon the defendant to disclose it."*

115.

The Defendants Larry Fuss, Adelaide Fuss, Keith Kuchenbecker, Linda Kuchenbecker, Ronald Sjodin, Vivian Sjodin, Foust Construction, Renner & Sperlich Engineering, Sperlich Consulting Inc. Longbranch Engineering, Neil Foust, were each given or did have notice of *the warning*. The failure of the intra paragraph named defendants to record this document or otherwise make all foreseeable purchasers aware of the underground gypsum mine, the mine waste and the sewage lagoons constituted fraudulent concealment.

116.

COUNT EIGHT (8)

DENIAL OF THE STATUTE OF LIMITATIONS AS A DEFENSE BASED ON

FRAUD

Preceding paragraphs incorporated herein, Larry Fuss, Adelaide Fuss, Keith Kuchenbecker, Linda Kuchenbecker, were all experienced developers which knew about the gypsum mine and knew the construction of a development on top of an underground gypsum mine was dangerous to property rights and values, and

presented an immediate danger to life and limb. The intra paragraph defendants owed a duty to disclose the peril of the subdivision to all foreseeable owners, the failure of which constituted the commission of fraud and deceit to all foreseeable owners.

117.

Ronald Sjodin and Vivian Sjodin were both experienced realtors with knowledge that the selling of homes on top of an underground gypsum mine, near and on top of hazardous sewage lagoons, and mine spoils, was dangerous to property rights and values, and presented an immediate danger to life and limb. The intra paragraph defendants owed a duty to disclose the peril of the homes they listed and sold to all immediate and foreseeable owners, the failure of which constituted the commission of fraud to immediate purchasers and all foreseeable owners.

118.

COUNT NINE (9)

DENIAL OF THE STATUTE OF LIMITATIONS AS A DEFENSE BASED ON

WILLFUL MISCONDUCT AND INDEPENDENTLY AS THE TORT OF WILLFUL MISCONDUCT

Preceding paragraphs incorporated herein, willful misconduct means an intentional act or omission which is in disregard of either a known risk or a risk so obvious that it cannot be said one was truly unaware of it and or it was a risk so great that it is highly probable that harm will follow or it means the intentional doing of a wrongful act, or the wrongful failure to act, without just cause or excuse, where the actor is aware that the actor's conduct will probably result in injury.

119.

Wayne Gutzmer, Carl Bruch, Bob Powles, Dayle Hammock, Bob Mallow, Curtis Nupen, Jim Schroeder, Dean Wink, Tim Potts, Craig Shaver, Bill Rich, and Jack Wilson composed the duly elected officials of the Meade County Commission during the approval of the Hideaway Hills Subdivisions. The County Commissioners did approve the subdivision with knowledge of the dangerous conditions including, but

not limited to, the underground gypsum mine, the sewage lagoons and the mine spoils. Reasonable people would conclude that building the homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features constitutes disregard of an obvious risk coupled with a high probability of resultant injury or harm.

120.

Larry Fuss and Adelaide Fuss and Keith Kuchenbecker and Linda Kuchenbecker proposed and caused to be created the Hideaway Hills subdivisions, with knowledge of the dangerous conditions existing on the real estate including but not limited to, the underground gypsum mine, the sewage lagoons and the mine spoils. Reasonable people would conclude that building the homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features constitutes disregard of an obvious risk coupled with a high probability of resultant injury or harm.

121.

Renner & Sperlich Engineering Company, Sperlich Consulting, Inc., and Longbranch Engineering, with knowledge of the dangerous conditions existing on the real estate including but not limited to, the underground gypsum mine, the sewage lagoons and the mine spoils did design and engineer the Hideaway Hills Subdivision. Reasonable people would conclude that building the homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features constitutes disregard of an obvious risk coupled with a high probability of resultant injury or harm.

122.

Foust Construction, Inc., and or Neil Foust, did construct homes in the Hideaway Hills Subdivision, with knowledge of the dangerous conditions existing on the real estate including but not limited to, the underground gypsum mine, the

sewage lagoons and the mine spoils did design and engineer the Hideaway Hills Subdivision. Reasonable people would conclude that building the homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features constitutes disregard of an obvious risk coupled with a high probability of resultant injury or harm.

123.

Ronald Sjodin and Vivian Sjodin by and through Remax Realtors, did list for sale and sell homes in the Hideaway Hills Subdivision with knowledge of the dangerous conditions existing on the real estate including but not limited to, the underground gypsum mine, the sewage lagoons and the mine spoils did design and engineer the Hideaway Hills Subdivision. Reasonable people would conclude that the selling of homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features constitutes disregard of an obvious risk coupled with a high probability of resultant injury or harm.

124.

Meade County Title and its various affiliates, did insure titles to homes for sale in the Hideaway Hills Subdivision with knowledge of the dangerous conditions existing on the real estate including but not limited to, the underground gypsum mine, the sewage lagoons and the mine spoils did design and engineer the Hideaway Hills Subdivision. Reasonable people would conclude that the insuring of titles homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features constitutes disregard of an obvious risk coupled with a high probability of resultant injury or harm.

125.

COUNT TEN (10)

DENIAL OF THE STATUTE OF LIMITATIONS AS A DEFENSE BASED ON

**WANTON MISCONDUCT AND INDEPENDENTLY AS THE TORT OF WANTON
MISCONDUCT**

Preceding paragraphs incorporated herein, wanton misconduct means acting consciously in disregard of or acting with a reckless indifference to the consequences, when the Defendant is aware of the conduct and is also aware, from knowledge of existing circumstances and conditions, that their conduct would probably result in injury.

126.

Wayne Gutzmer, Carl Bruch, Bob Powles, Dayle Hammock, Bob Mallow, Curtis Nupen, Jim Schroeder, Dean Wink, Tim Potts, Craig Shaver, Bill Rich, and Jack Wilson composed the duly elected officials of the Meade County Commission during the approval of the Hideaway Hills Subdivisions. The County Commissioners did approve the subdivision with knowledge of the dangerous conditions including but not limited to, the underground gypsum mine, the sewage lagoons and the mine spoils. Reasonable people would conclude that building the homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features constitutes acting with reckless indifference to the consequences with knowledge of that their conduct would probably result in injury.

127.

Larry Fuss and Adelaide Fuss and Keith Kuchenbecker and Linda Kuchenbecker proposed and caused to be created the Hideaway Hills subdivisions, with knowledge of the dangerous conditions existing on the real estate including but not limited to, the underground gypsum mine, the sewage lagoons and the mine spoils. Reasonable people would conclude that building the homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features constitutes acting with reckless indifference to the consequences with knowledge of that their conduct would probably result in injury.

128.

Renner & Sperlich Engineering Company, Sperlich Consulting, Inc., and Longbranch Engineering, with knowledge of the dangerous conditions existing on the real estate including but not limited to, the underground gypsum mine, the sewage lagoons and the mine spoils did design and engineer the Hideaway Hills Subdivision. Reasonable people would conclude that building the homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features constitutes acting with reckless indifference to the consequences with knowledge of that their conduct would probably result in injury.

129.

Foust Construction, Inc., and or Neil Foust, did construct homes in the Hideaway Hills Subdivision, with knowledge of the dangerous conditions existing on the real estate including but not limited to, the underground gypsum mine, the sewage lagoons and the mine spoils did design and engineer the Hideaway Hills Subdivision. Reasonable people would conclude that building the homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features constitutes acting with reckless indifference to the consequences with knowledge that their conduct would probably result in injury.

130.

Ronald Sjodin and Vivian Sjodin by and through Remax Realtors, did list for sale and sell homes in the Hideaway Hills Subdivision with knowledge of the dangerous conditions existing on the real estate including but not limited to, the underground gypsum mine, the sewage lagoons and the mine spoils did design and engineer the Hideaway Hills Subdivision. Reasonable people would conclude that the selling of homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features constitutes acting with reckless indifference to the consequences with knowledge of that their conduct would probably result in injury.

131.

Meade County Title and its various affiliates, did insure titles to homes for sale in the Hideaway Hills Subdivision with knowledge of the dangerous conditions existing on the real estate including but not limited to, the underground gypsum mine, the sewage lagoons and the mine spoils did design and engineer the Hideaway Hills Subdivision. Reasonable people would conclude that the insuring of titles homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features reckless indifference to the consequences with knowledge of that their conduct would probably result in injury.

132.

COUNT ELEVEN (11)

**NEGLIGENCE IN THE DESIGNING, PLANNING, ENGINEERING, SURVEYING,
DECISION MAKING, CONSTRUCTION**

AND

SELLING OF REAL PROPERTY WITHIN THE SUBDIVISION

Preceding paragraphs incorporated herein, developers Fuss and Kuchenbecker, the Meade County Commissioners, Wayne Gutzmer, Tim Potts, Craig Shaver, Bob Powles, Bob Mallow, Kirk Chaffee, Bill Rich, Carl Bruch, Curtis Nupen, Jim Schroeder and Dean Wink, Renner & Sperlich Engineering, Sperlich Consulting, Inc., Lemke, Foust Construction, Inc., Neil Foust, Ronald and Vivian Sjodin, all knew the parcel of land had at one time been mined on its surface and underground for gypsum. Additionally the intra paragraph named defendants did know of the existence of mine fill, "spoils," and or the presence of a sewage lagoon and or tailings pond.

133.

Ordinarily gypsum mines are near the surface when compared to most if not all mineral mines. Gypsum is a soft mineral and it is water soluble thereby making it extremely susceptible to geological activity such as fracturing and cleaving.

134.

Building a residential housing development above a gypsum mine requires more than the general standard of care, rather it required a *“specific standard of care.”*

135.

Locating a housing development, construction of homes on, engineering and designing a housing development atop a gypsum mine, and on other mine “fill,” “spoils,” and or sewage lagoons is a simple breach in the duty to care of which the defendants in paragraph 142 are liable to the Plaintiffs in negligence.

136.

The professional firms, Renner & Sperlich Engineering, Sperlich Consulting, Inc., and Longbranch Engineering lacked the requisite specific standard of care and failed to acquire the specialized knowledge required to build a housing development on top of a gypsum mine. Their lack of knowledge and lack of exercise of the specific standard of care required in the construction of a development above a gypsum mine makes the defendants liable to the Plaintiffs in this action in the Tort of negligence.

137.

Contractors, Foust Construction, Inc., Neil Foust, lacked the required knowledge to construct a residential housing development above a gypsum mine. The defendants as well lacked the ability to exercise the required specific standard of care in any such construction of homes above a gypsum mine. Therefore the above named defendants are liable to the Plaintiffs in the tort of negligence.

138.

Remax Real Estate Group, Ronald and Vivian Sjodin did sell many of the lots in the Hideaway Hills Subdivision. It appears there was general knowledge during the inception and creation of the subdivision that it was located on top of a gypsum mine. The Sjodin realtors owed a duty to prospective clients not to list for sale property compromised by an ultrahazardous land condition. The failure to unlist or

refuse to sell such lots constituted a breach in that duty, thus the Sjodins are guilty of negligence. Remax is responsible for compensating the Plaintiffs by virtue of the doctrine of *Respondeat Superior*.

139.

COUNT TWELVE (12)

NEGLECTANCE IN THE ISSUANCE OF TITLE INSURANCE

Preceding paragraphs incorporated herein, while Meade County South Dakota is large in area, it is relatively small in population. Meade County has one title company and its business is strictly the searching, interpreting, curing and insuring marketable title to properties in Meade County and in some surrounding counties.

140.

Families in the area are closely connected, tight knit and often not separated by more than two or three degrees. In November of 2006, the Meade County Commissioners in public hearing dealt with the subject of part of Daisy Drive, collapsing into an underground mine. It was reported to the commission that the, “developers,” wanted to close part of Daisy Drive. The Meade County Commissioners however refused the closure and instead insisted that Daisy Drive remain open. It is unfathomable that employees and directors of the area title companies did not hear, know and understand at least by 2006 that part of Daisy Drive was collapsing into an underground mine. Policies were issued by the title companies without reservation.

141.

It also appears that Kuchenbecker and Fuss disclosed the plan to build the Hideaway Hills Subdivision on top of the gypsum mine and in sewage lagoons possible as early as 2000.

142.

Title companies hold a unique position of trust and fidelity in the community. Purchasers and sellers rely on the companies to warranty the real estate they

purchase. Along with the position of trust comes a duty to protect the public from defects in the title that the company is aware of outside of the record.

143.

The continued issuance of title insurance policies to homes in Hideaway Hills after November 2006 and before was negligent by the defendant Meade County Title and was the proximate cause of the loss of the Plaintiffs.

144.

COUNT THIRTEEN (13)

BREACH OF GOVERNMENTAL WARRANTY

Preceding paragraphs incorporated herein, the Meade County Commissioners approval of the plats subject to this action, i.e. the Hideaway Hills Subdivision, created an express and or implied warranty that the real estate was fit for human habitation for the foreseeable future of Meade County, subject to hazards undiscoverable by the exercise of reasonable governmental authority.

145.

The location, discovery and soundness for the construction of real estate on top of the gypsum mine was not without the ability of Meade County government to ascertain.

146.

Meade County government failed to ascertain for the residents of the Hideaway Hills subdivision, the location, discovery and soundness for construction of homes in the Hideaway Hills Subdivision.

147.

COUNT FOURTEEN (14)

**FAILURE OF MEADE COUNTY GOVERNMENTAL AUTHORITY TO PROVIDE EXPRESS
WARNINGS OF THE HAZARDS OF HABITABILITY OF HOMES IN THE HIDEAWAY
HILLS SUBDIVISION**

148.

Preceding paragraphs incorporated herein, the Meade County Commission is expressly authorized to make safety determinations as to the habitability of locations in Meade County within the reasonably discoverable means of the County.

149.

While Meade County does not have zoning laws regulating the construction of developments in unincorporated towns in the County, the Commission still has a duty to exercise judgment in the placement of homes on or off of ultrahazardous real estate features.

150.

It was not without the reasonable powers of the Meade County Commission to ascertain the relative safety of building a residential housing development on top of a gypsum mine. It is also not without the reasonable powers of the Commission to understand by at least some level of intelligence that the prospect of building such a subdivision safely would require competent experts with high levels of indemnity insurance.

151.

Making the decision to approve plats 21 Page 28 and plat 21 Pages 217-218 was unsupported by an expert or qualified expert and thus it was incumbent upon the Meade County Commission to make a clear erring that the subdivision posed serious risks of serious bodily injury or death to any of its residents. This power to ascertain and warn potential and existing Meade County residents that the Hideaway Hills Subdivision was dangerous and life threatening was not exercised to any degree and therefore the Meade County Commission and all its members from 2002 until present is guilty of failing to warn the public.

152.

COUNT FIFTEEN (15)

BREACH OF WARRANTY BY A PROFESSIONAL CIVIL ENGINEERING COMPANY

Preceding paragraphs incorporated herein, Renner & Sperlich Engineering Company, Sperlich Consulting, Inc., and Longbranch Engineering, approval and stamp of the plats subject to this action, i.e. the Hideaway Hills Subdivision, created an express and or implied warranty that the real estate was fit for human habitation for the foreseeable future of Meade County, subject to hazards discoverable by the exercise of reasonable discovery by a professional engineering company.

153.

Renner & Sperlich Engineering Company, Sperlich Consulting, Inc., and Longbranch Engineering, breached the express and implied warranties of suitability and safety of human occupation when the companies and individuals rendered their professional services and placed their stamp of authority on the respective plats.

154.

The hazard of an underground gypsum mine was known to the professional engineering companies and by virtue of rendering their professional services with this knowledge, the companies breached their warranty of safety and fitness for human occupation.

155.

COUNT SIXTEEN (16)

FAILURE OF PROFESSIONAL ENGINEERING COMPANIES TO WARN PURCHASER RESIDENTS OF THE RISK OF HUMAN SAFETY AND OCCUPATION

Preceding paragraphs incorporated herein, Renner & Sperlich Engineering Company, Sperlich Consulting, Inc., and Longbranch Engineering, are professional engineers subject to review by a board of ethics.

156.

The ethical requirements imposed by a board of ethics ensures the protection of the public against actions taken by engineers which pose a risk to the public.

157.

Engineers owe a duty to the public to protect the public against unreasonable risks relative to health safety and welfare of the general public. Renner & Sperlich Engineering Company, Sperlich Consulting, Inc., and Longbranch Engineering, owed a duty to warn the public that its engineering posed a significant risk to the health safety and welfare of the general public.

158.

COUNT SEVENTEEN (17)

BREACH OF WARRANTY BY THE SJODINS AND REMAX REAL ESTATE GROUP

Preceding paragraphs incorporated herein, as professional realtors, Ronald Sjodin and Vvian Sjodin by virtue of their acts in listing the parcels of real estate within the Hideaway Hills subdivision warranted the real estate free from all ultra hazardous conditions on the real estate, known to the Sjodins or reasonably ascertainable.

159.

This warranty was created if within the ordinary inspection of the real estate by a Realtor, the facts could have been discovered that the real estate was built on top of an abandoned gypsum mine.

160.

While it is not directly known that the Sjodins knew of the ultrahazardous condition of the real estate, the Sjodins did act as the Kuchenbeckers' Attorneys in fact and transferred by Warranty Deed several of the real estate parcels to Foust construction while the Kuchenbeckers were residing in Mexico.

161.

COUNT EIGHTEEN (18)

FAILURE TO WARN BY A LICENSED REALTORS

Preceding paragraphs incorporated herein, realtors are professionals subject to governing boards which regulate their professional statements and interactions with the public. These boards serve to protect the public from conduct by Realtors which is harmful to the public at large.

162.

If a realtor which has knowledge that property being offered for sale contains an ultrahazardous condition the Realtor has a duty to warn the public of the ultrahazardous condition.

163.

Since the Sjodins had at least a close business relationship with the Kuchenbeckers there is at least a colorable claim that the Sjodins knew of the condition. If the Sjodins knew of the ultrahazardous condition on the real estate they had a duty to warn. The Sjodins did not warn and thus breached their duty to warn the public.

164.

COUNT NINETEEN (19)

BREACH OF WARRANTY OF TITLE

Defendants High Plains Title Service, Black Hills Title, Inc, Black Hills Title Company, Meade County Title, of South Dakota and Dakota Title are Title Insurance Companies. Each title sold by Defendants warrantied the title for the amount of the purchase price. The title is warrantied against among other things:

*2. Any defect in or lien or encumbrance on the Title.
A defect in the Title caused by:*

(iii) a document affecting Title not properly created, executed, witnessed sealed, acknowledge, notarized or delivered; and;

(vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or..

3. Unmarketable Title.

165.

As stated previously, the developers made a half hearted attempt to disclaim warranties to the land when the land was sold to the contractors. This attempt was made with a small piece of paper, *the warning*. This piece of paper however, was never properly created, acknowledged and filed in the public records.

166.

Now that the disaster in the Hideaway Hills subdivision is widely known, titles to homes in the subdivision have become unmarketable.

167.

COUNT 20

PUBLIC NUISANCE

21-10-1. Acts and omissions constituting nuisances.

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

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

168.

The Meade County Commission, Wayne Gutzmer, Tim Potts, Craig Shaver, Bob Powles, Bob Mallow, Kirk Chaffee, Bill Rich, Carl Bruch, Cutis Nupen, Jim Schroeder and Dean Wink composed the duly elected officials of the Meade County Commission during the approval of the Hideaway Hills Subdivisions. The Meade County Commission was the operative governmental body at the time the subdivision was created. Renner and Sperlich Engineering Company, was the operative Engineering Company at the time of the subdivision's creation. The South Dakota Housing Development Authority did purchase land and place homes on top of sewage lagoons. Kuchenbecker and Fuss did decide to locate and or site the subdivision. Each of the above named defendants knew that such subdivision did exist on top of an underground gypsum mine and or, untested "mine fill," and or mine "spoils," and or sewage lagoons, and or "tailings ponds."

169.

The Defendants in paragraph 169, in their official and individual capacities, personal and corporate, owed a duty to the residents of the county and those who would become residents and their transferor's of title, of the Hideaway Hills subdivision, to refrain, prevent, or otherwise prohibit the construction of a subdivision on such ultrahazardous real estate.

170.

In failing to perform that duty, in contravention of the common law, contravention of law, in acting or omitting, the defendants named in paragraph named in 169, committed the tort of nuisance, their acts and omissions did either

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

171.

The Defendants named in paragraph 169 did not site, plat or otherwise locate the Hideaway Hills subdivision pursuant to statute.

PRAYER FOR RELIEF

WHEREFORE THE DEFENDANTS PRAY THE FOLLOWING RELIEF BE ENTERED:

- A. Judgment in favor of the Plaintiffs and against the Defendants for compensatory damages in the amount of sum greater than \$35,485,000.00 [Thirty-Five Million Four Hundred and Eight-Five Thousand Dollars and Zero Cents].
- B. Exemplary damages in the amount of \$40,000,000.00 [Forty Million Dollars and Zero Cents.]
- C. Abatement of the Nuisance and damages for past injury and present
- D. Such other relief as the Court deems equitable.

TRIAL BY JURY IS DEMANDED

This 1st day of July 2020.

FITZGERALD LAW FIRM, PLC
A Professional Law Corporation

/s/ John M. Fitzgerald

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