IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 29868

ESTATE OF OWEN A. THACKER,

Plaintiff/Appellant,

vs.

VICTORIA TIMM,

Defendant/Appellee.

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

The Honorable Carmen A. Means
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal filed January 6, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases:

Statutes:

JURISDICTIONAL STATEMENT

Plaintiff/Appellant Estate of Owen A. Thacker appeals the decision of the Honorable Carmen A. Means entering a judgment for Defendant/Appellee Victoria Timm on all counts: breach of fiduciary duty, undue influence, conversion, and breach of duty as trustee of implied trust. SR. 2068-70. The circuit court's Findings of Fact and Conclusions of Law and Order were filed on December 8, 2021, and Notice of Entry of Order was filed on December 10, 2021. SR. 2070, 2074. Appellant Estate of Owen A. Thacker filed a timely Notice of Appeal on January 6, 2022. SR. 2075. This Court has jurisdiction under SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. Whether the circuit court erred when it found that Vicky did not act in a fiduciary capacity and that she did not breach her fiduciary duty.

The circuit court found that Vicky did not act as a fiduciary and that she did not breach her fiduciary duty owed to Owen.

- *Wyman v. Bruckner*, 2018 S.D. 17, 908 N.W.2d 170
- *Estate of Stoebner v. Huether*, 2019 S.D. 58, 935 N.W.2d 262
- *Estate of Card v. Card*, 2016 S.D. 4, 874 N.W.2d 86

II. Whether the circuit court erred when it found that Vicky did not have a confidential relationship with Owen and that she did not unduly influence Owen.

The circuit court found that Vicky did not have a confidential relationship with Owen and that she did not unduly influence Owen.

- *Matter of Estate of Gaaskjolen*, 2020 S.D. 17, 941 N.W.2d 808
- *Stockwell v. Stockwell*, 2010 S.D. 79, 790 N.W.2d 52
- *In re Donald Hyde Trust*, 2014 S.D. 99, 858 N.W.2d 333

III. Whether the circuit court erred when it found that Vicky did not interfere with Owen's property in an unwarranted manner and was therefore not liable for conversion.

The circuit court found that Vicky did not interfere with Owen's property in an unwarranted manner and was not liable for conversion.

- *Western Consolidated Co-op. v. Pew*, 2011 S.D. 9, 795 N.W.2d 390
- *First Am. Bank & Trust, N.A. v. Farmers State Bank of Canton*, 2008 S.D. 83, 756 N.W.2d 19

IV. Whether the circuit court erred when it found that Vicky was not an implied trustee of Owen's accounts for the benefit of his Estate.

The circuit court found that Vicky was not an implied trustee of Owen's accounts for the benefit of his Estate.

- *Wyman v. Bruckner*, 2018 S.D. 17, 908 N.W.2d 170
- SDCL 55-1-8

STATEMENT OF THE CASE

On September 19, 2019, Theresa Hanson and Angelina Huckins (n/k/a Angelina Gadd) were appointed Co-Guardians and Co-Conservators of their father, Owen Thacker. SR. 2288-92; App. 2. The court in this underlying matter being appealed reviewed and considered the court's Findings of Fact and Conclusions of Law (SR. 2288-92; App. 2) and transcript (SR. 2098-2287) from the guardianship and conservatorship trial which was contested by Victoria Timm[1]. SR. 169-76, 2065, 2323.

On December 27, 2019, Plaintiffs, Theresa and Angie, as Co-Guardians and Co-Conservators for Owen Thacker, initiated this action for damages to the Estate of Owen Thacker through Defendant Vicky Timm's breaches of her fiduciary duty and conversion, and for entry of an order directing Vicky immediately remove her name from all accounts she held jointly with Owen. SR. 1-12. Vicky answered the Complaint, asserting generally that Owen approved all of the financial transactions in question. SR. 21-23. On May 19,

[1] The Honorable Robert L. Spears presided over the guardianship and conservatorship trial (14GDN19-000001).

2020, an Amended Complaint was filed which added an additional claim of undue influence. SR. 57-69. Vicky answered the Amended Complaint, generally asserting the same defenses. SR. 78-84.

Owen passed away on July 24, 2020, during the pendency of this litigation. SR. 122. An Order to Substitute Party was filed on November 23, 2020, substituting the Estate as Plaintiff. SR. 132. A court trial was held before the Honorable Carmen A. Means on September 16-17, and October 19 and 21, 2021, at which the Estate was permitted to add a claim of breach of duty as trustee of implied trust. SR. 1885-88. Following the trial, the circuit court issued Findings of Fact and Conclusions of Law and ordered the dismissal of all counts. SR. 2057-70. Plaintiff Estate of Owen A. Thacker now appeals.

STATEMENT OF FACTS

On July 24, 2020, Owen Thacker ("Owen") died intestate at the age of 80. SR. 122. He was not married when he passed away and his only heirs were his two daughters, Theresa Hanson[2] ("Theresa") and Angelina Gadd[3] ("Angie"), who were both born of Owen's marriage to Sharon Robins. SR. 122, 378-79. Owen's marriage to Sharon lasted about 21 years and ended in divorce in 1982. SR. 379. Owen met Victoria Timm ("Vicky") in 1986 while they both were working at Minnesota Rubber in Watertown, South Dakota. SR. 229. They began dating about four months after they met. SR. 230. Vicky had twice before been married, with both marriages ending in divorce. SR. 230.

[2] Theresa is a bookkeeper and currently resides in Oklahoma, having moved there in 2010. SR. 379. Prior to that she lived in Pierre where she was an information system and business manager for South Dakota Bankers Association for 28 years. SR. 379.
[3] Angie lives in Highmore and works at a rural healthcare clinic. SR. 470.

Vicky had one child, her son, Steven Cychosz ("Steven"). SR. 230. Owen and Vicky's respective children were all adults and were no longer living with their parents when Vicky moved in with Owen several months after their relationship began. SR. 230-31. Owen and Vicky were never married to one another. SR. 248.

In 2000, Owen's mother, Sophie Thacker, passed away. SR. 231, 380. Sophie owned a 422-acre farm located 12 miles north of Watertown in Codington County which was transferred to Owen through arrangements made prior to her death. SR. 231, 380-81. Owen soon thereafter retired from Minnesota Rubber in 2002. SR. 234, 380. On December 20, 2002, Owen placed Vicky's name on the deed to his house. SR. 232, 551. Owen did this on his own accord. SR. 232. A couple weeks later, on January 7, 2003, Owen executed a non-springing "general durable power of attorney including for healthcare" in which he named his daughter, Theresa Hanson, as his attorney-in-fact. SR. 233, 553. No alternate attorney-in-fact was named. SR. 553.

Vicky retired from Minnesota Rubber in 2006. SR. 234. On April 26, 2006, using Owen's funds, Vicky opened a certificate of deposit (CD) issued to Vicky, payable on death to Owen, in the sum of $20,000. SR. 235-37, 575, 1918. On February 23, 2010, using Owen's funds, Vicky opened a second certificate of deposit issued to Owen and Vicky jointly with survivorship in the sum of $15,000. SR. 235-37, 577, 1918. Vicky handled everything with regard to the certificates of deposit, she even renewed each of them on their respective maturity dates. SR. 237-38, 1918-19.

Owen enjoyed fishing and playing pool. SR. 256, 383. Owen often took Vicky along when he went fishing, but he attended most of the pool tournaments in which he participated on his own. SR. 256, 432-33. Owen frequently wrote checks for cash when

he played pool, and Vicky testified that pool was the main thing that Owen spent cash on. SR. 1958. Theresa described Owen's personality when he was still healthy and active as being very quiet and non-confrontational – with a really good sense of humor. SR. 382, 466. Theresa described Vicky as very outgoing and social, bubbly, personable and energetic. SR. 382. From Theresa's perspective, Vicky was more of a follower to Owen when he was strong and in good health, but later on that dynamic was reversed. SR. 382-83.

Owen suffered a cerebellar bleed in 2008 that may have been a stroke. SR. 242, 760. An MRI of his brain in 2009 revealed a schwannoma (also known as an acoustic neuroma – an overgrowth of the nerve tissue) of his cranial nerves. SR. 245-47, 292-93, 755. Owen's health started to decline more rapidly in 2012 (SR. 242, 760), which is also when he all but stopped writing checks for cash. SR. 1958. Owen was experiencing fatigue, dizziness, balance difficulty and increased falls. SR. 242, 246, 755, 760. Owen was already deaf in his left ear and hard of hearing in his right. SR. 246, 755.

In 2013, Vicky started handling all of Owen's finances. SR. 238-39. On January 3, 2013, Vicky opened a third certificate of deposit, again funded entirely by Owen. SR. 237, 578. The CD was issued to Vicky and payable on death to Owen, in the sum of $30,000. SR. 237, 578. Two months later, on March 13, 2013, Vicky was added to Owen's checking account so that she could manage the bills and write checks. SR. 238, 627, 1925-26.

On April 17, 2013, Owen saw his primary care physician, Dr. Reiffenberger, for balance difficulty, which he had been experiencing for the past year by that point, but which had gotten worse over the past two months. SR. 748. On May 3, 2013, Vicky was

added to Owen's savings account that was connected to his checking account. SR. 239, 630. Owen trusted that Vicky would look after his best interests. SR. 240.

On July 12, 2013, Owen met with Dr. Warren Opheim of Neurology Associates in Sioux Falls. SR. 249, 715. Vicky advised Dr. Opheim that Owen's shuffle was more noticeable when he walked hunched over and that Owen's shaking was worse on his left side. SR. 250, 715. Owen had also been experiencing weight loss. SR. 713. On August 1, 2013, Owen filled out a form authorizing the Brown Clinic to speak with Vicky and his daughters about his health issues. SR. 253, 738.

On August 7, 2013, Owen began physical therapy with Big Stone Therapies in Watertown. SR. 254, 726. Vicky attended the physical therapy session and reported that Owen was very inactive and lays on the couch most of the day. SR. 254-55, 726. On September 3, 2013, Vicky called in to Brown Clinic and advised that Owen had no energy and was unable to walk a half block without tipping. SR. 256-57, 704. Despite attending physical therapy, Owen's problems continued to worsen. SR. 681. Vicky's attempts to work with Owen on his physical therapy exercises at home did not go well. SR. 257-58.

On March 21, 2014, Owen and Vicky saw Dr. Hollis Nipe for another opinion on his balance issues. SR. 681. Dr. Nipe worked with Dr. Reiffenberger at Brown Clinic, but unlike Dr. Reiffenberger who was a family practice physician, Dr. Nipe practiced internal medicine. SR. 289-90. Dr. Nipe also happened to be Vicky's primary physician. SR. 258. Owen reported that he couldn't even walk a city block because of the balance issues. SR. 681. He had been shuffling when walking, he continued to get dizzy at times, and he had a hard time getting out of his chair because he was so weak. SR. 681. Additionally, Owen

was now reporting memory loss. SR. 681. Dr. Nipe noted that Owen's immediate memory seemed okay, but his distant memory seemed compromised, and his memory problems seemed to be getting quite significant for him. SR. 681, 683. Dr. Nipe recommended Owen seek an opinion from Mayo Clinic. SR. 683.

On March 24, 2014, after speaking with Vicky about the meeting with Dr. Nipe (SR. 386), Theresa called Brown Clinic and advised that she and Vicky were very concerned and wanted Owen to go to Mayo. SR. 680. Theresa felt that Owen had been deteriorating for the past year or so. SR. 680. Owen had expressed his reluctance to go, so she asked if an appointment could just be made. SR. 680. Vicky called Brown Clinic the next day and said she would work with Owen on making an appointment with Mayo Neurology. SR. 680.

A few weeks later, Theresa and Owen discussed the family farm and decided to put it into a trust. SR. 387. On May 1, 2014, Vicky wrote an email to Theresa complaining about Owen's health and their relationship, writing "[w]e wasted all summer [last year] not fishing or going anywhere. I can't just sit at home day after day and watch him not getting any better…I am going to give him an ultimatum that will reflect on our relationship…It gets me upset knowing he doesn't care about his health… Life is too short to just sit and wait for death." SR. 264, 564. When asked at trial about the ultimatum she gave Owen, Vicky denied ever giving Owen an ultimatum and claimed she instead just told Owen how frustrated she was with him. SR. 264-66.

Ten days later, on May 10, 2014, Vicky wrote Theresa another email, this time mentioning potential disposition of the farm, writing "a friend of ours who sells real estate said that he could sell your Dad's land. He is going to talk to you and see what you

think. Only thing is, the government will get a chunk but oh well. I said he should put the money in trust for you and Angie. He is thinking on it." SR. 564. Theresa testified about her reaction to receiving the email, stating "[w]ell, dad and I had talked about the farm and we were going to put it into trust, so I really just discounted that email because dad and I had already talked about this." SR. 387.

On May 20, 2014, Vicky flew to Wisconsin to stay with her family for about ten days (SR. 313-14), leaving Owen home by himself, though Theresa was going to be coming up from Oklahoma during that time to finalize plans with Owen about putting the farm into a trust. SR. 388. On May 22, 2014, unbeknownst to Theresa, real estate agent Norm Haan[4], obtained Owen's signature on a Listing Agreement. SR. 534, 1978. That same day, Owen's long-time farm tenant, Jim Wohlleber[5], signed a Purchase Agreement which Norm prepared for the sale of Owen's farm. SR. 515. The very next day, May 23, 2014, without getting an appraisal or talking with an attorney, financial advisor or accountant (SR. 316), Owen signed the Purchase Agreement, agreeing to sell the farm for $2,280,000[6]. SR. 514-15. While Norm was still at the house with Owen, Vicky called Owen and Owen told her he thought he got the farm sold. SR. 316. Vicky then called Theresa, who was by the Madison, South Dakota Exit, and told her there was a realtor at the house. SR. 318, 388. Theresa immediately called Owen and asked him not to sign anything until she got there so they could look at the paperwork and talk about it. SR. 388. Theresa had Owen put Norm on the line and she then asked Norm to leave the

[4] Norm Haan passed away before trial.
[5] Jim Wohlleber passed away after trial.
[6] The farm had been in the family for three generations and had an actual value of approximately $2,500,000. SR. 2110.

house. SR. 388. Theresa testified that when she arrived at the house "[Owen] handed me that stack of mess[7] that Norm Haan gave him and he didn't have a clue what any of it said or what he signed or what was going on." SR. 389.

Owen did not attend the real estate closing that was scheduled for June 2, 2014. SR. 533, 1974. The next day, on June 3, 2014, Theresa, who was still in Watertown and staying with Owen, called Brown Clinic and advised that Owen's mental clarity had changed, and they wanted to proceed with getting the referral set up with a neurologist at Mayo Clinic. SR. 677. Later that same day, Vicky called Jim Wohlleber and was so mad that she was cursing and swearing at him. SR. 1976. Theresa testified that Vicky told her she was mad at Jim for "basically shoving this through with my dad not being able to make a sound decision." SR. 391. Vicky denied this at trial and claimed the reason she was upset with Jim was because he and Norm wanted to sue Owen. SR. 321. However, it was not until June 9, 2014, that Jim's attorney wrote to Owen demanding that he fulfill his obligation under the Purchase Agreement by June 12, 2014, before they would take such action as necessary to enforce the contract. SR. 533.

While Theresa was still in Watertown, Owen asked Vicky to give Theresa all of his financial records for her review. SR. 323, 391. When Theresa noticed Vicky's recent addition to Owen's Wells Fargo checking and savings accounts, she asked him why Vicky's name was on the accounts and Owen told her that was so that Vicky could sign the checks to pay the bills. SR. 392. On June 5, 2014, Theresa, Owen and Vicky sat down

[7] The Listing Agreement and Purchase Agreement are both printed forms that Norm Haan filled out by hand (though, arguably, not very legibly). *See* SR. 514-15, 534. Jim Wohlleber testified that he could read about 90 – 95 percent of it, but mostly because he knew what he and Norm had talked about. SR. 1978.

to record a conversation about estate planning for Owen and what should happen in the event he should pass. SR. 324, 392. (*See* Plaintiff's Exhibit 12 (SR. 555) for a transcript of the audio recording) Owen confirmed that his intent with his cash assets was to take care of he and Vicky and then have that money pass to his heirs – Theresa and Angie. SR. 555. They agreed that Theresa's name would be added to the accounts so that if Owen died Vicky would not own the money and it would stay in the family. SR. 557. They also discussed getting Owen a will so that nobody would end up having to go to court. SR. 558-59.

After recording the estate planning conversation, Owen, Theresa and Vicky went to Wells Fargo where they all signed their names to relationship change applications for Owen's checking and savings accounts. SR. 392-92, 634-41. Upon returning to the house, Theresa heard Owen ask Vicky, "is all the money gone now?" SR. 393. Theresa testified that upon hearing that "I thought oh, my, this is a lot worse than what I really had recognized to this point." SR. 393. Theresa continued, "[t]hat particular thing that happened when we entered the house, I tried to have some conversations with my dad about investing and he really couldn't comprehend the process of it and he was just adamant that he had money in a 401k and he couldn't lose any of it, ever, and I tried to explain to him what a mutual fund was and he couldn't grasp that." SR. 393-94. Theresa would later follow up with Owen about what he meant by taking care of Vicky and "[h]is response was that Vicky could sell the house." SR. 401. Vicky never did approach Theresa about making arrangements to look after her financially. SR. 401.

A Complaint dated July 18, 2014, was filed by counsel for Jim Wohlleber seeking specific performance of the real estate contract. SR. 328, 510. An Answer and Third-

Party Complaint dated August 20, 2014, was filed by counsel for Owen naming Norm Haan as a Third-Party Defendant. SR. 328, 523. Counsel for Norm Haan eventually filed a Third-Party Complaint, seeking $71,136 for his commission. SR. 528-32. Owen's defense was that he lacked the capacity to enter into a contract and that he was unduly influenced when he entered into a listing agreement and contract. SR. 524. Vicky testified that she agreed that Owen was unduly influenced on the sale of the farm. SR. 328. At the recent contested guardianship trial, Judge Robert Spears likewise found that "[Owen] did not understand the paperwork and what was going on in the proposed sale of his farm." SR. 2289; App. 2, p.16.

On August 19-20 and October 13-14, 2014, Owen was seen at Mayo Clinic. SR. 297. Theresa, Angie and Vicky all attended both visits. SR. 395. On November 5, 2014, Dr. Joseph Matsumoto of Mayo Clinic Neurology Department sent a letter to Dr. Nipe which included numerous enclosures including a neurology specialty evaluation from Dr. C.J. Kogelshatz. SR. 297-98, 659-65. Owen was diagnosed with gait ataxia, history of left CPA angle tumor, and mild cognitive impairment. SR. 665. Unfortunately, the only treatment recommended was vestibular rehabilitation (SR. 660) which Dr. Nipe described as "[t]herapy to try and work on balance issues or muscle joint problems, things like that to improve his walking." SR. 310.

A voluntary guardianship and conservatorship (14GDN14-000015) action was initiated while the lawsuit regarding the farm sale was pending. SR. 395. Preparations for the guardianship and conservatorship began in November of 2014 (SR. 396-97, 536), which included a request of Dr. Nipe for a letter regarding his opinion on the matter which he testified was not uncommon. SR. 299. Dr. Nipe has been practicing internal

medicine since 1989 and he testified not only as Owen's treating physician in 2014, but also as an expert in the field of internal medicine. SR. 147, 289. Vicky did not object to Dr. Nipe testifying as an expert and offered no expert testimony in rebuttal. SR. 289. In a letter dated December 2, 2014, Dr. Nipe concluded that "[d]ue to these conditions, [Owen] has experienced symptoms including mental confusion that affects his thinking such that I believe it is in [Owen's] best interest that a guardian and conservator of his person be appointed." SR. 567, 658.

On December 22, 2014, the guardianship and conservatorship documents were completed (SR. 550) and copies of the same were soon thereafter mailed to Owen and Vicky. SR. 329. On December 29, 2014, Vicky scheduled an appointment with attorney Terry Sutton in Watertown because she was concerned that Theresa would have control over everything. SR. 331-32, 623. Mr. Sutton had not previously done any work for Owen. SR. 363. Mr. Sutton met with Owen and Vicky together on December 30, 2014, and went over the guardianship documents with them. SR. 334, 364. Mr. Sutton recalled that "Owen was having some memory issues at that point." SR. 363. Mr. Sutton further testified that "Vicky was primarily the one who was communicating. Owen was much more reserved." SR. 365. "[Vicky] wasn't happy about the existence of the guardianship." SR. 365. Mr. Sutton prepared a new power of attorney for Owen naming Vicky as the attorney-in-fact[8] (SR. 363), but he did not prepare a will and he did not discuss any other estate planning, including beneficiary designations or titling of

[8] The Power of Attorney was not executed until February 9, 2015. SR. 620. Vicky admitted at trial that she was the one who encouraged Owen to change his attorney-in-fact from Theresa to Vicky. SR. 343. At Owen's request, Theresa was named as the secondary attorney-in-fact. SR. 368-69.

accounts. SR. 366. The power of attorney did not have a clause authorizing self-dealing. SR. 363, 620.

After meeting with Mr. Sutton on December 30, 2014, Vicky returned home and fired off a scathing email to Theresa claiming among other things that "I have never wanted to hurt your Dad monetarily as you can see down through the years." SR. 564. Vicky admitted at trial that she did not have concerns about Theresa's ability to look after Owen's best interests financially (SR. 335), but that she was concerned about how this would impact herself. SR. 336. Vicky felt entitled to Owen's non-farm assets. SR. 400-01. She was concerned that she would be "left out in the cold" if Theresa became Owen's guardian and conservator. SR. 333. Vicky testified that "Theresa's a pusher for money and stuff, she wants to rule everything. We've been together so long and then she comes along and dad I'll do this and dad I'll do that. Owen and I can do that ourselves but no, she had to be right in there when it comes to money. I'll handle this, I'll do that." SR. 335-36. Vicky told Owen how upset she was and that she wanted Theresa's name removed from his accounts, "I wasn't happy with it, that's why we talked about it." SR. 336.

The very next day, on December 31, 2014, Vicky went to Wells Fargo with Owen to remove Theresa's name from Owen's checking and savings accounts. SR. 336-37. When they arrived at Wells Fargo Vicky discovered that Theresa's name could not simply be removed from the joint accounts without Theresa's permission. SR. 337. So instead of contacting Theresa, new accounts were opened and Owen's money was transferred into the new joint accounts which were titled in Owen and Vicky's names

only.[9] SR. 338. Vicky's admission was in stark contrast to what she had previously testified to at the guardianship and conservatorship trial (14GDN19-000001) when she claimed, "I found out that we had to have a $25,000 balance to keep that [account], so we – we got rid of that account and then we opened up that new one." SR. 2195, 2239. Theresa testified that upon her discovery of the transfers sometime in January or February of 2015, she asked Owen about them and "[h]e said Vicky didn't want me to be able to see what was going on." SR. 399. Vicky understood that by removing Theresa's name from Owen's accounts she would stand to inherit everything in the accounts if Owen were to pass away. SR. 341.

In January of 2015 Jim Wohlleber agreed to settle his lawsuit in exchange for a five-year lease agreement for the farmland. SR. 397. Norm Haan settled his portion of the lawsuit in May of 2015 in exchange for $30,000. SR. 1210-13. The voluntary guardian and conservatorship action filed at the end of 2014 (14GDN14-000015) was not further pursued. SR. 397. On January 17, 2015, the family farm was officially transferred into an irrevocable trust entitled "Thacker Family Trust". SR. 59, 342, 1178. Owen signed as the Donor and Theresa signed both as Trustee and as Power of Attorney for Owen as the Donor. SR. 1178. The Trust established that during Owen's lifetime he would receive all of the income from the Trust which was to be distributed to him at least once annually[10]. SR. 59, 397-98, 1175-78. Upon Owen's death, Theresa and Angie would become the sole beneficiaries. SR. 59, 397-98, 1175-78. Vicky was invited to be present when the trust

[9] The entire balance of Owen's savings account, $198,054.88, was transferred. $67,150.66 was transferred from Owen's checking account, leaving a remaining balance of $5,000 which was transferred several weeks later in February of 2015. SR. 338-41.
[10] The rent on the tillable farmland each year was $51,634.50. SR. 2119.

document was signed but she declined, admitting at trial that she was upset with Theresa at the time. SR. 342. The new power of attorney for Owen that was prepared by Terry Sutton which named Vicky as the attorney-in-fact was formally executed on February 9, 2015. SR. 620. Theresa was unaware that a new power of attorney was executed until 2017. SR. 399, 2116.

At one point in 2015 Vicky spoke with Theresa about rolling over Owen's 401k plan into an IRA with Scott Munger Agency, explaining it would only cost about $1,200 to do it[11]. SR. 399. Theresa testified that "I explained you don't need to pay someone $1,200 to do that, we can merely do that with Vanguard so I had that conversation with her, and then I had the same conversation with my dad and he was real frustrated and he just said leave everything where it's at."[12] SR. 399. Vicky testified at trial that she knew Owen had designated Theresa as the beneficiary of his 401k plan (valued at $125,536.86 (SR. 605)). SR. 344. Vicky ignored Theresa's advice and referred Owen to Scott Munger anyway. SR. 344, 371. On May 11, 2015, Owen met with Scott Munger who recalled that Owen "was a nice man, soft spoken" (SR. 372) and Owen rolled over his 401k plan into an IRA, but when he did, he changed the beneficiary from Theresa to Vicky. SR. 344, 589, 606. When Vicky was asked at trial whether she asked Owen to name her as his beneficiary when he rolled over his 401k into an IRA, she responded "[n]o, I never said." SR. 344. But when confronted with the fact that she said "yes" to that same question

[11] In fact, the fee was 3.75% of the 401k balance, which for Owen (401k balance of $125,536.86 (SR. 605)) was over $4,700.00. SR. 373-74.
[12] Theresa's testimony regarding Owen's desire to keep his money in his 401k is corroborated by her later text message to Vicky on June 14, 2018. *See* SR. 572.

during her deposition, Vicky conceded that she did in fact ask Owen to name her as his beneficiary. SR. 344.

Two years later, on June 3, 2017, Vicky used the funds from two of the CDs ($15,000 & $20,000) to fund a new Edward Jones Single Investment account owned solely by Vicky and payable on death to her son, Steven Cychosz – cutting out Owen's interest entirely in the CDs that he funded. SR. 347, 581. That same month, Vicky moved her IRA with Scott Munger Agency over to Edward Jones with financial advisor Cory Herzog. SR. 270, 346. Not long after, Vicky and Owen went together to meet with Mr. Herzog to do the same with Owen's IRA. SR. 271. Mr. Herzog testified that Vicky was "definitely" more engaged than Owen during the meeting. SR. 271. On November 22, 2017, $240,000 was withdrawn from Owen's joint Wells Fargo savings account and deposited at Edward Jones into a new joint account after Vicky and Owen again met with Mr. Herzog. SR. 350. Mr. Herzog was not informed that the funds comprising Owen's joint Wells Fargo Savings account derived entirely from Owen. SR. 272. Mr. Herzog testified that the engagement level of Owen and Vicky was similar to what it was earlier that summer. SR. 271.

A few weeks later, on December 11, 2017, Vicky called Brown Clinic "stating that Owen's memory is getting worse. He is not doing his exercises and he does nothing but sit in his chair. She states that she would like to have a referral to someone for him to see and talk with about his memory." SR. 776. Home Health started coming to help, but Owen's health problems continued, and he suffered an aneurism in June of 2018. SR. 349, 401-02, 571.

On June 14, 2018, Theresa and Vicky exchanged text messages about Owen's continuing health problems and the need to transition him into an assisting living facility. SR. 401, 571-72. Theresa became concerned when Vicky asked if Theresa and Angie could help pay for the cost of Owen's assisted living because Theresa knew that Owen should have had enough financial resources to do that. SR. 403, 572, 2125. Owen was soon thereafter moved into Avantara, an assisted living facility in Watertown, near the end of June 2018. SR. 349, 571.

On July 3, 2018, Vicky cashed the proceeds of the $30,000 certificate of deposit and used the proceeds to open an Edward Jones Single Investment account, owned solely by Vicky and payable on death to her son, Steven Cychosz – again cutting out Owen's interest entirely in the CD that he funded. SR. 348-50. On August 1, 2018, Vicky transferred $25,000 from Owen's Wells Fargo joint account to her solely owned Wells Fargo account. SR. 354, 881. The next day, Vicky met with Mr. Herzog to set up recurring monthly payments from Owen's Edward Jones IRA account to pay for his monthly assisted living care cost of $7,777.78. SR. 273, 615-16. Vicky signed the authorization form at Mr. Herzog's office and took it to Avantara where she obtained Owen's signature. SR. 273. Mr. Herzog had spoken with Vicky the month prior about setting up the recurring payments from Owen's IRA. SR. 274. Mr. Herzog confirmed at trial that he at no point advised Vicky to transfer $25,000 from Owen's Wells Fargo joint account into her solely owned Wells Fargo account. SR. 274.

In mid-August 2018, Theresa was up from Oklahoma to see Owen and she stopped out to visit the farm and spoke with the tenants who were renting the homestead and pasture portions of the farm and they agreed they would send their rent checks to

Theresa so she could account for them as Trustee of the Thacker Family Trust. SR. 405-06. On August 20, 2018, Theresa texted Vicky regarding farm rent checks and requested her cooperation in providing tax returns so that Theresa could start assisting with tax planning. SR. 568. Vicky responded in an extremely defensive and nasty manner, calling Theresa "greedy", a "traitor", and telling Theresa that "nobody is screwing anybody out of money and I wish you could see that and just leave us alone." SR. 570. This concerned Theresa. SR. 406.

A couple months later, on October 26, 2018, Vicky transferred $20,000 from her solely owned Wells Fargo account (the same account she had recently transferred $25,000 into from Owen's Wells Fargo joint account) into her solely owned Edward Jones account. SR. 354-55, 880-84. Mr. Herzog testified that it was Vicky's decision to place the $20,000 into Vicky's solely owned Edward Jones account. SR. 274-75. Vicky denied responsibility at trial and said it was Mr. Herzog's decision as to where to place the money. SR. 355-57. She had no explanation for the purpose of that transaction. SR. 355-57.

Theresa and Angie filed a Petition for Guardianship and Conservatorship of Owen Thacker in early 2019, 14GDN19-000001, which Vicky contested. SR. 407, 2288. On February 11, 2019, the court entered an order requiring a free flow of information regarding medical and financial records and the court ultimately found that that there was not a free flow of information regarding financial records. SR. 407, 2290. In fact, certain information ended up having to be subpoenaed by Owen's court-appointed attorney. SR. 408. The trial took place in September of 2019 and even at that time certain financial records had not been disclosed. SR. 408. The court found multiple aspects of Vicky's

testimony to be troubling, that she was uncooperative, that her testimony and demeanor made the power of attorney situation unworkable, and that she failed to act in Owen's best interests and put his business affairs first[13]. SR. 2289-90; App. 2, p. 16-17. The court appointed Theresa and Angie as co-guardians and co-conservators of Owen. SR. 2288-2292; App. 2, p. 19.

After the guardianship trial, upon demand being made of her, Vicky returned the $25,000 to Owen's joint account that she had taken on August 1, 2018. SR. 356-57. Additional financial information was received after the guardianship trial which Theresa began to put together and analyze. SR. 408. From the time that Vicky went with Owen to remove Theresa's name from his joint Wells Fargo account on December 31, 2014, Vicky had transferred $58,000 from Owen's joint checking and savings accounts into her solely owned Wells Fargo account.[14] SR. 411, 858-79. During that same period of time, Vicky wrote 110 checks made out to "cash" from her solely owned Wells Fargo account totaling $42,800 and another 42 checks for "cash" from Owen's joint checking account totaling $16,000.[15] SR. 410-12, 816-57, 936-95. When asked about the checks endorsed or deposited at the Mint Casino between 2016 and 2019, Vicky admitted that she gambled there on a monthly basis. SR. 359-60. Vicky cashed the monthly farm rent checks (SR. 412-13), paid her personal credit card statements (SR. 413, 1018-37), paid her personal legal fees (SR. 413, 1038-42), and made gifts to her family – all from

[13] In the matter currently being appealed, the Findings of Fact and Conclusions of Law state that the court "concurs with Judge Robert Spears who found the testimony of Vicky to be credible…" SR. 2065; App. 1, p. 9. It was *Theresa* who Judge Spears actually found to be credible. SR. 2289-90; App. 2, p. 16.
[14] One of the transfers was the August 1, 2018, transfer of $25,000. SR. 411.
[15] Vicky wrote "Owen" in the memo line for most of the checks written to "cash" from Owen's account.

Owen's joint checking account – including at times when Owen was sick at home, hospitalized or in assisted living (SR. 413-14).

While Owen was in assisted living, Theresa and Angie noticed that the pictures of themselves that they would put up on Owen's wall in his room kept disappearing. SR. 415. Theresa emailed Vicky and asked if she knew why the pictures kept disappearing. SR. 414. "She sent an email back and said I have no idea, you'll have to ask the nursing home staff." SR. 414. Vicky finally admitted at trial that she was the one who had taken down their pictures. SR. 361. Theresa wrote letters to her father at least monthly, and in those letters were updates on her family and pictures. SR. 415. Sometimes she sent the farm rent checks with the letters. SR. 415. Owen passed away before trial. SR. 122. Theresa now has no way of knowing whether Owen ever saw her letters. SR. 415.

PRELIMINARY STATEMENT

A circuit court's factual findings are reviewed under the clearly erroneous standard. *People in Int. of D.S.*, 2021 S.D. 63, ¶ 20, 967 N.W.2d 1, 6. Clear error is shown when, after a review of all the evidence, the reviewing court is left with a definite and firm conviction that a mistake has been made. *City of Deadwood v. Summit, Inc.*, 2000 S.D. 29, ¶ 9, 607 N.W.2d 22, 25. A reviewing court will not disturb the circuit court's findings unless they are against a clear preponderance of the evidence or not support by credible evidence. *Nylen v. Nylen*, 2015 S.D. 98, ¶ 14, 873 N.W.2d 76, 80. Findings of fact should consist of ultimate facts rather than evidentiary facts. *Wallahan v. Wallahan*, 284 N.W.2d 21, 25 (S.D. 1979). Whether a finding is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by the application of fixed rules of law. *Hartpence v. Youth Forestry Camp*, 325 N.W.2d 292,

296 (S.D. 1982). Conclusions of law are reviewed de novo on appeal, with no deference to the trial court's ruling. *Leonhardt v. Leonhardt*, 2014 S.D. 86, ¶ 15 857 N.W.2d 396, 400. The ultimate decision of the trial court is subject to abuse of discretion review. *See MacKaben v. MacKaben*, 2015 S.D. 86, ¶ 12, 871 N.W.2d 617, 623; *People in Int. of D.S.*, 2021 S.D. 63, ¶ 20, 967 N.W.2d 1, 6. An abuse of discretion is "a fundamental error of judgment, a choice outside the reasonable range of permissible choices, a decision … [that], on full consideration, is arbitrary or unreasonable." *Coester v. Waubay Township*, 2018 S.D. 24, ¶ 7, 909 N.W.2d 709, 711 (citing *Wald, Inc. v. Stanley*, 2005 S.D. 112, ¶ 8, 706 N.W.2d 626, 629).

ARGUMENT AND AUTHORITIES

I. The circuit court erred when it found that Vicky did not act in a fiduciary capacity and that she did not breach her fiduciary duty.

"Whether a fiduciary relationship exists and the scope of the duty are questions of law, while breach of that duty is a question of fact." *Estate of Stoebner v. Huether*, 2019 S.D. 58, ¶ 17, 935 N.W.2d 262, 267 (citing *Bienash v. Moller*, 2006 S.D. 78, ¶ 11, 721 N.W.2d 431, 434). "[A]s a matter of law, a fiduciary relationship exists whenever a power of attorney is created." *Estate of Stoebner*, 2019 S.D. at ¶ 17, 935 N.W.2d at 267 (quoting *Hein v. Zoss*, 2016 S.D. 73, ¶ 8, 887 N.W.2d 62, 65). Vicky never utilized the power of attorney to conduct business on Owen's behalf (SR. 2068), but the analysis as to whether a fiduciary relationship existed does not end there.

"Fiduciary relationships are built on trust and reliance one places in another to faithfully act for the benefit of the other." *Estate of Stoebner*, 2019 S.D. at ¶ 17, 935 N.W.2d at 267 (citing *Bienash*, 2006 S.D. at ¶ 11, 721 N.W.2d at 434). These types of relationships are not typical business relationships, but are created

> where one party to a relationship is unable to fully protect its interests and the unprotected party has placed its trust and confidence in the other. We recognize no "invariable rule" for ascertaining a fiduciary relationship, "but it is manifest in all the decisions that there must be not only confidence of the one in the other, but there must exist a certain inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of the facts involved, or other conditions giving to one the advantage over the other."

Id. (quoting *Bienash,* 2006 S.D. at ¶ 11, 721 N.W.2d at 434 (quoting *Ward v. Lange*, 1996 S.D. 113, ¶ 12, 553 N.W.2d 246, 250)).

To ascertain a fiduciary duty the Court must find three things: (1) [Owen] reposed "faith, confidence and trust" in [Vicky], (2) [Owen] was in a position of "inequality, dependence, weakness, or lack of knowledge" and, (3) [Vicky] exercised "dominion, control or influence" over [Owen's] affairs. *Chem-Age Industries, Inc. v. Glover*, 2002 S.D. 122, ¶ 38, 652 N.W.2d 756, 772 (citing *Garrett v. BankWest Inc.*, 459 N.W.2d 833, 838 (S.D. 1990)). The evidence in this case was overwhelming that Vicky handled Owen's affairs in a fiduciary capacity and that she breached her fiduciary duty.

Faith, Confidence and Trust

First, Owen reposed faith, confidence and trust in Vicky. Vicky did not dispute this. Vicky acknowledged that Owen trusted that she would look after his best interests. SR. 240. This analysis is further developed in the "confidential relationship" section below (*See infra* p. 30-31), but, clearly, Owen reposed faith, confidence and trust in Vicky.

Inequality, Dependence, Weakness, or Lack of Knowledge

Second, Owen was in a position of inequality, dependence, weakness, or lack of knowledge. Although the court did not address this element in the context of its breach of

fiduciary duty analysis, one of the conclusions of law in the court's undue influence analysis seems to speak to this issue. The court found that "Owen and Vicky were equal partners in their relationship… Owen and Vicky in discussing finances always referred to themselves as 'we'. Owen's gait issues and minor memory concerns does (sic) not rise to the level of creating an 'unequal' relationship." SR. 2068-69; App. 1, p. 12-13. The court's analysis misses the mark.

The court seemingly uses Owen and Vicky's status as "equals" throughout the majority of their relationship as a justification for concluding they were not "unequal" during the timeframe in question. Describing Owen's health issues as "gait issues and minor memory concerns" simply ignores the mountain of medical records, evidence and testimony that clearly paints a different picture. Moreover, Owen depended on Vicky for almost everything once his health started to decline in 2012. The court's finding that Owen and Vicky were "equals" is perplexing at best – at least with regard to the timeframe in question from 2013 forward – and is against a clear preponderance of the evidence, nor is it even supported by *any* credible evidence.

Dominion, Control or Influence

Third, Vicky exercised dominion, control or influence over Owen's affairs. The court did not directly address this element, but the record is clear: Vicky handled all of Owen's finances beginning in 2013 (SR. 238-39), she set up Owen's medical appointments, she set up Owen's appointments with attorneys and financial advisors, she herself changed the beneficiaries on the CDs that Owen funded, and she made withdrawals and transfers of Owen's money from his joint accounts to her own accounts.

The list goes on but suffice it to say that there can be no question that Vicky exercised dominion, control or influence over Owen's affairs.

Instead of applying the evidence to the law with regard to the claim of breach of fiduciary duty, the court instead summarily concluded that "there was no credible evidence presented that Vicky acted in a fiduciary capacity as to any of the events at issue in Plaintiff's Complaint, including but limited (sic) to, the certificates of deposit, the Wells Fargo Bank accounts, the investment accounts, or the farmland sale. Vicky never utilized the Power of Attorney to conduct any business on Owen's behalf and was never placed on any account in a fiduciary capacity." SR. 2068; App. 1, p. 12. The court's failure to apply the facts to the law is an abuse of discretion.

This conclusion of law is not only in error as a whole, but for some reason the court attempted to address claims that were not even raised. First, the Estate never made any sort of claim against Vicky regarding the sale of the family farm. And second, the Estate did not claim that Vicky utilized the power of attorney to conduct business on Owen's behalf. More importantly, whether Vicky had a fiduciary relationship with Owen is a necessary question of law that must be answered before the court can find as a fact whether or not Vicky breached her duty. The court's failure to even analyze the law before finding as it did is a clear abuse of discretion.

In any event, the court's finding that Vicky was never placed on any account in a fiduciary capacity is against a clear preponderance of the evidence. The court's finding is contrary to Vicky's own testimony and admissions that she was initially added to Owen's bank accounts in 2013 so that she could manage the bills and write checks. SR. 238, 627. Furthermore, Vicky acknowledged that Owen trusted that she would look after *his* best

interests. SR. 240. "Whether the joint accounts in question were created by [Owen] for [his] own convenience or for the benefit of the non-depositing joint payee[] is a question of fact to be determined from all the facts and circumstances in the case." *Estate of Card v. Card*, 2016 S.D. 4, ¶ 15, 874 N.W.2d 86, 91 (quoting *In re Estate of Steed*, 521 N.W.2d 675, 678 (S.D. 1994)). As further evidence that Vicky was added to Owen's account for convenience and not for her benefit, in June of 2014 when Owen learned that Vicky would stand to inherit the money in his accounts if Vicky's name was the only other name on his accounts, he added Theresa's name to prevent that very thing from happening. SR. 557.

Breach of Fiduciary Duty

Regardless of the court's erroneous finding that Vicky was never placed on any of Owen's accounts in a fiduciary capacity, the more important question is whether Vicky and Owen had a fiduciary relationship when the new joint accounts were created on December 31, 2014 – the date Theresa's name was effectively removed from Owen's accounts – and, if so, whether Vicky breached her fiduciary duty when that occurred. Compounding things, if this Court were to find in Vicky's favor as regards the December 31, 2014, account change transaction, which the Estate argues it should not, that same analysis must be applied to every transaction which occurred thereafter in which Vicky participated, either actively or by influencing Owen to act – which happens to be every transaction.

Finally, as regards the Estate's claim that Vicky breached her fiduciary duty, it is instructive that the power of attorney that attorney Terry Sutton prepared did not authorize Vicky to self-deal. But while Vicky may not have used the power of attorney to

conduct transactions, as a fiduciary she nonetheless had a duty to act with utmost good faith and avoid *any* act of self-dealing that placed her personal interest in conflict with her obligations to Owen. *In re Estate of Stevenson*, 2000 S.D. 24, ¶ 9, 605 N.W.2d 818, 821; *Wyman v. Bruckner*, 2018 S.D. 17, ¶ 30, 908 N.W.2d 170, 179. Further, as a fiduciary Vicky was not allowed to "feather her own nest" unless the power to do so was expressly provided for. *Wyman*, 2018 S.D. at ¶ 23, 908 N.W.2d at 177 (citing *Bienash v. Moller*, 2006 S.D. 78, ¶ 19, 721 N.W.2d 431, 436; *Studt v. Black Hills Fed. Credit Union*, 2015 S.D. 33, ¶ 13, 864 N.W.2d 513, 516). The evidence not only established that Vicky engaged in self-dealing for her personal benefit and the benefit of her family beginning no later than December 31, 2014, but Vicky admitted it. Her only defense to her conduct was her claim that Owen agreed or consented to every such transaction in question. The evidence is overwhelming that Vicky breached her fiduciary duty and any finding to the contrary is in clear error.

II. The circuit court erred when it found that Vicky did not have a confidential relationship with Owen and that she did not unduly influence Owen.

Undue influence is a mixed question of fact and law which requires a compound inquiry. *In re Estate of Long*, 2014 S.D. 26, ¶ 18, 846 N.W.2d 782, 786 (citing *Stockwell v. Stockwell*, 2010 S.D. 79, ¶ 15, 790 N.W.2d 52, 58). The Court must therefore review not only the circuit court's findings of fact, but also the court's application of settled law to those facts. *Id*. Undue influence is reviewed under the clearly erroneous standard. *In re Donald Hyde Trust*, 2014 S.D. 99, ¶ 37, 858 N.W.2d 333, 345 (citing *Stockwell*, 2010 S.D. at ¶ 16, 790 N.W.2d at 59).

The general elements of undue influence are: (1) a person susceptible to undue influence; (2) another's opportunity to exert undue influence on that person to effect a wrongful purpose; (3) another's disposition to do so for an improper purpose; and (4) a result clearly showing the effects of undue influence. *Neugebauer v. Neugebauer*, 2011 S.D. 64, ¶ 15, 804 N.W.2d 450, 454 (citing *Stockwell*, 2010 S.D. at ¶ 35, 790 N.W.2d at 64). The party alleging undue influence must prove these elements by a preponderance of the evidence. *Id*.

Susceptibility to Undue Influence

The first element requires a finding that Owen Thacker was susceptible to undue influence. "Susceptibility to influence does not mean mental or testamentary incapacity. In fact, the application of undue influence presupposes mental competency." *Matter of Estate of Gaaskjolen*, 2020 S.D. 17, ¶ 29, 941 N.W.2d 808, 816 (quoting *In re Estate of Borsch*, 353 N.W.2d 346, 349 (S.D. 1984)). When considering whether an individual is susceptible to undue influence, "evidence of physical and mental weakness is always material …." *Id*. (quoting *Borsch*, 353 N.W.2d at 350).

The circuit court concluded that "Owen arguably could be susceptible to undue influence in the late 2017/2018 timeframe …" SR. 2069; App. 1, p. 13. However, Owen's health issues that existed in 2017 and 2018 began in 2012, rapidly deteriorated, and essentially plateaued in 2014. His medical records and the evidence clearly reflect this fact. There was not any precipitous drop off in Owen's health condition between 2014 and 2017. The court's conclusion that Owen was not susceptible to undue influence until late 2017/2018 is in clear error.

Opportunity to Exert Undue Influence

The second element of undue influence requires a finding that Vicky had the opportunity to exert undue influence on Owen to effect a wrongful purpose, which the court did find. SR. 2069; App. 1, p. 13.

Disposition to Exert Undue Influence

The third element of undue influence requires a finding that Vicky had a disposition to unduly influence Owen for an improper purpose. While it is not entirely clear, it appears the court attempted to address this element in the same conclusion of law as referenced above regarding Owen's susceptibility to undue influence wherein the court also found that "Plaintiff has failed to meet its burden of proof that Vicky had the disposition to exert undue influence with an improper purpose..." SR. 2069; App. 1, p. 13.

The court's finding regarding Vicky's disposition to exert undue influence for an improper purpose is clearly erroneous, as her disposition to do so was undeniable. A disposition to unduly influence for an improper purpose is evident from "persistent efforts to gain control and possession of [Owen's] property. *Matter of Estate of Gaaskjolen*, 2020 S.D. 17, ¶ 33, 941 N.W.2d 808, 817 (quoting *Borsch*, 353 N.W.2d at 350. Vicky's attempts to block the guardianship proceedings in both 2014 and 2019, her insistence that she be named Owen's power of attorney, and the numerous "gifts" of Owen's assets and money to herself and to her family are clear evidence of Vicky's disposition to exert undue influence. *See In re Metz' Estate*, 78 S.D. 212, 223, 100 N.W.2d 393, 398 (S.D.1960). Furthermore, Vicky's disposition to influence Owen is also apparent in her feelings that she felt entitled to Owen's non-farm assets, and that she did

not want to be "left out in the cold." SR. 333, 400-01. *See Estate of Gaaskjolen*, 2020 S.D. at ¶ 34, 941 N.W.2d at 817. The court's finding that Vicky did not have a disposition to exert undue influence is clearly erroneous.

Result Showing Effects of Undue Influence

The fourth element of undue influence requires a finding of a result clearly showing the effects of such influence. The court summarily found that "[t]he Plaintiff has failed to meet its burden of proof that … there was any clear effect of undue influence." SR. 2069; App. 1, p. 13. The court did not make any actual findings regarding the result clearly showing the effects of undue influence. The evidence established, however, that Vicky, personally, or Owen at Vicky's insistence, withdrew or transferred money from, opened, closed, or changed beneficiaries or ownership of financial accounts or assets in which Owen had an ownership interest. The approximate aggregate value of the main assets at issue alone is more than half a million dollars (three CDs – $65,000; Owen's checking and savings accounts – $270,000 ($240,000 of these monies would later be used to fund the joint Edward Jones account); Owen's 401k – $125,000; transfers or withdrawals from Owen's bank accounts – $58,000; and checks written to cash from Owen's bank account – $16,000). The vast majority of which was either for Vicky's direct benefit or the benefit of her son, Steven Cychosz. Vicky does not dispute these facts, she instead claims simply that Owen agreed to all the transactions. There is clearly a result showing the effects of Vicky's undue influence.

Presumption of Undue Influence

A presumption of undue influence arises when there is a confidential relationship between the confiding party and the dominant party who actively participates in a

transaction and unduly profits therefrom. *In re Donald Hyde Trust*, 2014 S.D. 99, ¶ 37, 858 N.W.2d 333, 344; *Hyde v. Hyde*, 78 S.D. 176, 186 (1959), 99 N.W.2d 788, 793. When the presumption arises, "the transaction[s] should be 'scrutinized closely and condemned unless shown to be fair and above board.'" *In re Metz' Estate*, 78 S.D. 212, 222, 100 N.W.2d 393, 398 (S.D.1960) (quoting *In re Daly's Estate*, 59 S.D. 403, 240 N.W. 342, 343 (S.D.1932)). Vicky's efforts to remove Theresa's name from Owen's accounts and her repeated refusals to be transparent are the antithesis of "above board." The court, however, abused its discretion by concluding that a presumption of undue influence did not exist. SR. 2067-68; App. 1, p. 11-12.

Confidential Relationship

"A confidential relationship exists whenever a decedent has placed trust and confidence in the integrity and fidelity of another." *Donald Hyde Trust*, 2014 S.D. at ¶ 37, 858 N.W.2d at 344 (quoting *Stockwell*, 2010 S.D. at ¶ 31, 790 N.W.2d at 63). Factors utilized to determine whether a confidential relationship exists include examining the amount of time the parties spent with each other, whether the beneficiary handled many of the personal or business affairs of the party alleged to have been unduly influenced, and whether that party ever sought advice of the beneficiary. *Neugebauer v. Neugebauer*, 2011 S.D. 64, ¶ 13, 804 N.W.2d 450, 453 (citing *In re Estate of Dokken*, 2000 S.D. 9, ¶ 30, 604 N.W.2d 487, 496). All of those factors exist in this case. The court found that "Owen and Vicky had as much of a husband and wife relationship as those who are legally married." SR. 2067; App. 1, p. 11. Yet, the court also found that Owen and Vicky's relationship did not rise to the level of a confidential relationship. SR. 2067-68; App. 1, p. 11-12. These to findings cannot co-exist. "[A] confidential relationship exists

between husband and wife…" *Matter of Estate of Gab*, 364 N.W.2d 924, 925 (S.D.1985). For the reasons stated above regarding this finding as it relates to second element of the fiduciary analysis (*See supra* p. 22-23), the court abused its discretion when it found that Vicky and Owen did not have a confidential relationship.

Active Participation in Transactions

The court made no findings regarding Vicky's active participation in the transactions in question. However, as stated above (*See supra* p. 29-30), the evidence clearly established that Vicky actively participated in the subject transactions.

Rebutting Presumption of Undue Influence

Because a confidential relationship existed and Vicky actively participated in transactions which she unduly profited from, a presumption of undue influence arises. When the presumption of undue influence arises, the burden shifts to the beneficiary to show she took no unfair advantage of the decedent. *Donald Hyde Trust*, 2014 S.D. at ¶ 37, 858 N.W.2d at 344 (citing *Stockwell*, 2010 S.D. at ¶ 31, 790 N.W.2d at 63) (additional citations omitted).

The evidentiary rule for presumptions in civil cases requires more than "[m]ere assertions, implausible contentions, and frivolous avowals … to defeat a presumption." *Matter of Estate of Gaaskjolen*, 2020 S.D. at ¶ 23, 941 N.W.2d at 815 (quoting *Stockwell*, 2010 S.D. at ¶ 21, 790 N.W.2d at 60-61) (additional citations omitted). "The presumption of undue influence can be rebutted 'by showing that the one allegedly overpersuaded had independent advice that was neither incompetent nor perfunctory.'" *Id*. at ¶ 27, 816 (quoting *In re Estate of Pringle*, 2008 S.D. 38, ¶ 43, 751 N.W.2d 277, 290).

Owen did not receive independent advice to open new checking and savings accounts on December 31, 2014. In fact, Vicky admitted that she told Owen how upset she was and that she wanted Theresa's name removed from his accounts, "I wasn't happy with it, that's why we talked about it." SR. 336. However, Vicky's claims that Owen consented to all of the subject transactions is insufficient. "[T]estimony as to oral statements allegedly made by deceased persons is regarded as the weakest kind of evidence." *In re Nelson Living Trust*, 2013 S.D. 58, ¶ 30, 835 N.W.2d 874, 883 (quoting *Mahan v. Mahan*, 80 S.D. 211, 215, 121 N.W.2d 367, 369 (1963)). More importantly in this case, because Vicky stood as the person to benefit from such testimony, her testimony is self-serving. "[S]elf-serving testimony concerning statements allegedly made by a deceased person is alone insufficient and must be corroborated." *Id*. (citing *Martinson v. Holso*, 424 N.W.2d 664, 668 (S.D.1988)). Vicky failed to rebut the presumption of undue influence.

III. The circuit court erred when it found that Vicky did not interfere with Owen's property in an unwarranted manner and was therefore not liable for conversion.

"Conversion is the unauthorized exercise of control or dominion over personal property in a way that repudiates an owner's right in the property or in a manner inconsistent with such right." *Western Consolidated Co-op. v. Pew*, 2011 S.D. 9, ¶ 22, 795 N.W.2d 390, 396 (quoting *First Am. Bank & Trust, N.A. v. Farmers State Bank of Canton*, 2008 S.D. 83, ¶ 38, 756 N.W.2d 19, 31) (additional citations omitted).

> The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the *unwarranted* interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are the gist of the action.

(Emphasis in original). *Id.*, 397 (quoting *Poggi v. Scott*, 167 Cal. 372, 375, 139 P. 815, 816 (1914)).

Every penny of every joint account belonged to Owen before any of the accounts were converted into joint accounts. Further, Vicky did not contribute money to Owen's joint accounts. The tort of conversion does not require that the transactions conducted by Vicky were in bad faith, nor would it matter if the transactions were conducted in good faith. Vicky utilized the money in Owen's accounts in an unwarranted manner, for the benefit of herself and her family, which deprived Owen of his interest in said money and she is therefore liable for conversion. The court's finding to the contrary (SR. 2068; App. 1, p. 12) is in clear error.

IV. The circuit court erred when it found that Vicky was not an implied trustee of Owen's accounts for the benefit of his Estate.

The Estate argued that because Vicky gained possession of Owen's Wells Fargo joint bank accounts by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act, she was therefore an implied trustee of the accounts for the benefit of the Estate, pursuant to SDCL 55-1-8. SR. 222-23. And that Vicky, as implied trustee of the accounts, had an equitable and legal duty to transfer and convey the accounts to the Estate, and any other accounts that were subsequently opened with monies from said accounts, including but not limited to the joint Edward Jones account, and that by retaining any of said accounts she was unjustly enriched. SR. 222-23.

The court's finding that Vicky was not an implied trustee of Owen's accounts was in clear error. SR. 2069; App. 1, 13. Arguably, however, proper analysis of this claim may only be relevant in the event this Court reverses on the issue of breach of fiduciary

duty, undue influence or conversion. In that event, the money or accounts in which Owen had an ownership interest should be returned to the Estate. *See Wyman v. Bruckner*, 2018 S.D. 17, ¶ 35, 908 N.W.2d 170, 180.

CONCLUSION

The guardianship and conservatorship of Owen Thacker (14GDN19-000001) was initiated after Vicky became uncooperative and questions arose as to why she was shielding her handling of Owen's affairs from his daughters' view. This underlying action was initiated once the shield was lifted. The Estate of Owen A. Thacker respectfully requests this Court apply the overwhelming evidence that Vicky took advantage of Owen to the laws that protect those in need of protection.

REQUEST FOR ORAL ARGUMENT

The Estate of Owen A. Thacker hereby requests oral argument.

Dated this 14th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL § 15-26A-66. The font is Times New Roman size 12, which includes serifs. The brief is 34 pages long and the word count is 9,991 exclusive of the Cover, Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated this 14th day of April, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2022, a true and correct copy of Appellant's Brief and its Appendix was filed and served through U.S. Mail and email upon the following:

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APPENDIX

APPENDIX TABLE OF CONTENTS

App. 1

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
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COUNTY OF CODINGTON	)	THIRD JUDICIAL CIRCUIT

ESTATE OF OWEN A. THACKER, Plaintiff, vs. VICTORIA TIMM, Defendant.	)	14CIV19-000448 FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A trial on the Plaintiff's Amended Complaint was held before the Honorable Judge Carmen Means on September 16 and 17, and October 19 and 21, 2021 at the Codington County Courthouse in Watertown, South Dakota. Petitioner, Theresa Hanson as Personal Representative of the Estate of Owen Thacker was represented by A. Jason Rumpca of Riter, Rogers, Wattier & Northrup, LLP personally present. Defendant, Victoria Timm (Vicky) represented by Lisa Losano Carrico of Carrico Law Prof. LLC was also personally present.

This proceeding was originally filed by the Co-Guardians and Co-Conservators, Theresa Hanson and Angelina Huckins (n/k/a Angelina Gadd). Upon the death of the protected person, Owen Thacker, the party name was changed to the Estate of Owen Thacker. All witnesses were personally present to testify being: Theresa Hanson, daughter of the deceased and personal representative of the estate; Angelina Huckins, daughter of the deceased, Dr. Hollis Nipe, Scott Munger of the Scott Munger Agency, Cory Herzog of Edward Jones, and Terry Sutton, attorney for Owen Thacker, were subpoenaed as witnesses by the Plaintiff. Victoria Timm, romantic partner of the deceased, Deb Amy, friend of both Owen Thacker and Victoria Timm, and James "Jim" Wohlleber, friend of Owen Thacker were called as witnesses by the Defendant.

The Court having heard the testimony of the aforementioned witnesses and received approximately 114 Exhibits, which included voluminous financial records spanning over approximately 12 years and an audio recording taken on June 5, 2014, the Court being duly advised

and good cause appearing, the Court having entered oral findings of fact and conclusions of law on the record at the conclusion of the trial which are hereby incorporated herein unless modified below, now enters the following:

FINDINGS OF FACT

1. Petitioner, Theresa Hanson ('Theresa'), as Personal Representative of the Estate and Angelina Gadd ('Angie') are the biological daughters of Owen Thacker and his only children.
2. Defendant, Victoria Timm ('Vicky'), met the deceased, Owen Thacker ('Owen') in 1986 at Minnesota Rubber where both of them worked and they began dating at that time.
3. Vicky and Owen had each been previously married and were each divorced when they began dating.
4. Vicky and Owen began living together in 1986. On December 20, 2002, Owen met with Tom Burns, an attorney in Watertown, and signed a Quit Claim Deed transferring title to the property in which they lived located at 10 3rd Avenue in Watertown, South Dakota from Owen A. Thacker to Owen A. Thacker and Vicky Timm, as joint tenants. The conveyance of this property is not subject to the claims asserted by Plaintiff.
5. On January 7, 2003, Owen executed a Power of Attorney appointing his daughter, Theresa Hanson.
6. Owen retired from Minnesota Rubber in 2002 at the age of 62 and Vicky retired in 2006 at the age of 62.
7. Vicky and Owen lived in the same residence together for 32 years until Owen went to live in a nursing home in August, 2018 after suffering from an aortic aneurysm.
8. Based upon the testimony of all the witnesses, Owen was a thoughtful, reserved, smart, mild-mannered, and quiet person. He was described as a "man of few words." Vicky was described as outgoing, personable, kind, bubbly, and a sociable person.
9. Vicky has one son, Steve Cychosz, who lives in Wisconsin. Steve is married to Mary Cychosz and have one child, Vicky's grandson, Brandon Cychosz.
10. Every year, Owen and Vicky spent holidays with Vicky's son and her extended family in Wisconsin. Steve's son, Brandon, referred to Owen as "grandpa".
11. Owen and Vicky would go fishing with Steve and his family around Watertown and eventually, Owen and Vicky gifted Steve their fishing boat.

12. Owen was a pool player and a card player. Owen and Vicky enjoyed fishing together, going for drives, and going out to eat. Vicky and Owen would go out to eat several times a week.
13. Owen and Vicky each had their own bank accounts at Wells Fargo Bank. Owen's checking account ending in x1620 and Vicky's ending in x2031.
14. Owen and Vicky did not have a set rule as to how they handled their finances. They each contributed to their household living expenses. Owen and Vicky owned vehicles together and owned boats together.
15. On April 26, 2006, Dacotah Bank Certificate of Deposit (CD) (#xxxx322), owned by Vicky Timm and payable on death to Owen Thacker, valued at $20,000, was opened. It was funded by Owen Thacker. It was renewed for several years and on its renewal date on February 26, 2015, Vicky Timm closed the CD and created a new one at Plains Commerce Bank (#xxxx445) continuing to list the payable on death to Owen Thacker.
16. On June 1, 2017, Vicky closed the Plains Commerce Certificate of Deposit (CD) (#xxxx445), with Owen's knowledge, and the monies were used to fund a newly opened Edward Jones Single Account (#323-xxx34-1-7) which is owned by Vicky Timm and payable on death to Vicky's son, Steven Cychosz.
17. In 2008, Owen was diagnosed with an acoustic neuroma and given its small size was told by Dr. Tynan at Avera Neurosurgery to monitor it. The medical records indicate that the acoustic neuroma remained stable and never grew in size to cause any effect on Owen's future gait issues.
18. On February 23, 2010, Dacotah Bank CD (#xxxxx985), owned jointly with right of survivorship by "Owen Thacker or Vicky Timm", valued at $15,000, was opened. It was opened and funded by Owen Thacker with Vicky's knowledge. It was renewed on February 23, 2012 by Vicky Timm, with Owen's knowledge, for a 36 month term.
19. On its renewal date of February 26, 2015, Dacotah Bank Certificate of Deposit (CD) (#xxxx985) is closed by Vicky Timm, with Owen's knowledge, and the monies were used to fund Plains Commerce Bank CD (#xxxxxx446), owned by Vicky Timm and payable on death to Owen Thacker, valued at $15,000.
20. On June 1, 2017, Vicky closes the Plains Commerce Certificate of Deposit (CD) (#xxxx446), with Owen's knowledge, and the monies are used to fund a newly opened Edward Jones Single

Account (#323-xxx34-1-7) which is owned by Vicky Timm and payable on death to Vicky's son, Steven Cychosz.

21. In July, 2011, and for a couple of months, Vicky and Owen held a Money Market Savings Account at Wells Fargo Bank to which Vicky deposited $75 on a monthly basis from her checking account.
22. On January 3, 2013, Plains Commerce Bank CD (#xxxxxx549), owned by Vicky Timm and payable on death to Owen Thacker, valued at $30,000, was opened. It was funded by Owen Thacker.
23. On the renewal date of January 3, 2015 Plains Commerce Bank CD (#XXXXXX549) owned by Vicky Timm is closed, with Owen's knowledge, and a new Plains Commerce Bank CD (#xxxxx386), owned by Vicky Timm and payable on death to Owen Thacker, valued at $30,451.69 is opened.
24. On July 3, 2018, Vicky Timm closed the Plains Commerce CD (#xxxxxx386), to fund a newly opened Edward Jones Single Account (#323-xxx27-1-1) owned by Vicky Timm and payable on death to Vicky's son, Steven Cychosz.
25. In March, 2013, Owen added Vicky's name to his checking account at Wells Fargo Bank (x1620) creating a joint checking account so that Vicky could pay their household living expenses from the joint checking account. Owen's social security, investment payments, and some farm rent payments are deposited into the joint account.
26. On May 3, 2013, Owen and Vicky opened up a joint savings account at Wells Fargo Bank (x2873).
27. In 2013, Owen went to Midwest Ears Nose and Throat and to Neurology Associates in relation to issues he was having with his gait. At that time, his mental status was normal. Owen drove himself to both appointments from Watertown to Sioux Falls.
28. Vicky continued to maintain her individual checking account (x2031). Vicky's social security and investment income payments were deposited into her individual checking account. Vicky also paid for their household and living expenses out of her account.
29. After the joint checking account and savings account was created in 2013, Owen would ask Vicky to write him a check to cash from the joint checking account. On occasion, Owen and Vicky would go together to cash the checks using the drive-thru window.

30. Owen also withdrew cash from his checking account (x1620) when he was the sole owner of the account from 2005 to 2010 as detailed on Defendant's Exhibit UU.
31. Vicky also withdrew cash from her individual checking account to pay for daily living and household expenses as contained in Exhibit VV.
32. With Owen's knowledge and agreement, Vicky would transfer funds from the joint checking account to her individual checking account to help pay their living and household expenses.
33. Vicky also paid for their daily living and household expenses using her credit card as seen on Defendant's Exhibit HH. Owen also maintained a credit card but did not use it very often as shown on Defendant's Exhibit SS. Vicky paid her credit card bill from both her individual checking account and the joint checking account as shown on Defendant's Exhibit WW.
34. Based upon Angie and Theresa's own testimony neither called or visited Owen very often. Neither Angie nor Theresa could recall the last time they spent a holiday with their father or on how often they talked to him on the telephone. Vicky and Owen traveled once to Theresa's home in Oklahoma for Thanksgiving.
35. Vicky would encourage Owen to talk with his daughters and, on occasion, would dial the phone number herself and hand Owen the phone.
36. In October, 2013, Owen loaned Angie's daughter, Amanda Hill, $3,000. Owen also co-signed a loan for Angie's son sometimes after 2010.
37. Owen Thacker owned farmland which he inherited from his mother, Sophie Thacker. He farmed the land and eventually rented the land to others after his retirement in 2002; including his friend, James Wohlleber.
38. Owen rented the farmhouse to a friend, Eddie Lauseng, for many years for approximately $125 per month which increased to $150 a month and later to $175 per month. Owen would often give the rent money to Vicky for her personal use.
39. Owen was approached by Norman Haan on more than one occasion about selling the farmland. On May 10, 2014, Vicky notifies Theresa by email that Owen was thinking of selling the farm.
40. Norman Haan also contacted James Wohlleber and informed him that he may be listing Owen's farmland for sale and asked if he would be interested in purchasing.
41. Owen signs a listing agreement to sell the farm on May 22, 2014. After negotiation, Owen signs a purchase agreement to sell the farm on May 23, 2014.

42. A couple years prior to Owen signing the listing agreement on May 22, 2014, Owen himself approached James Wohlleber about purchasing the farmland from Owen. At that time, James Wohlleber declines.
43. James Wohlleber and Owen were friends for over 30 years. During their friendship, James and Owen discussed the fact that they were similarly situated in romantic long-term relationships in which neither James or Owen were married to their significant others. Owen would discuss finances with James Wohlleber with Owen's goal of supporting both Owen and Vicky during their retirement years.
44. Vicky was not present when the listing agreement for the farmland was signed. Vicky was not present when the purchase agreement was signed. Vicky never had any involvement with the farmland and had nothing to do with its sale. Vicky was in Wisconsin visiting family during the time the listing agreement and purchase agreement were signed. Owen telephoned Vicky from their home while she was in Wisconsin that informed her that he had sold the farm.
45. In 2014, based upon the exhibits and credible testimony of Vicky Timm and James Wohlleber, Owen Thacker entered into a listing agreement with Norman Haan, now deceased, and entered into a purchase agreement between himself and James Wohlleber.
46. Based upon the credible testimony of Vicky and James Wohlleber, Owen's daughters expressed wanting the farm, so Owen agreed to stop the sale. James Wohlleber initially sued to enforce the sale and later, after visiting with Owen in his home, dropped the suit because he did not want to cause a problem between Owen and Owen's daughters.
47. However, before the lawsuit was dismissed, Norman Haan joined as a party to the lawsuit demanding the commission he would have received as a result of the sale of the farm.
48. Theresa drives to Watertown from Oklahoma sometime at the end of May, 2014 to stop the sale of the farm.
49. On June 5, 2014, Theresa makes a recording with Owen and Vicky present. Owen confirms his intent that his cash assets are to take care of him and Vicky. Theresa also requests to be placed on Owen and Vicky's bank account to ensure that any funds are not inherited by someone outside the family; family being only Theresa and Angie.
50. On the same day, June 5, 2014, Theresa, Owen, and Vicky go to Wells Fargo Bank and Theresa's name is added to the joint checking and joint savings accounts.

51. This Court has reviewed the recording and found the language in the recording, and Theresa's testimony at the trial, as that of a banker or lawyer would use and not in layman's terms making Theresa's testimony suspect.
52. This Court finds Theresa's testimony that, after the June 2014 recording was made, Owen later tells Theresa that Vicky can just sell the house to live on and not his cash assets, to be uncredible.
53. On August 19-20, 2014, Owen is seen by a neurologist at the Mayo Clinic for his gait issues at which time it was reported that Owen functions quite well and is able to take care of all his own activities of daily living independently. Owen continues to drive and does so safely according to himself and his family. He is able to manage his own finances without any errors.
54. Additionally, Dr. Kogelschatz of the Mayo Clinic, reports on August 19-20, 2014, that there was no clear evidence of symptoms related to normal pressure hydrocephalus.
55. As part of the defense to the lawsuit filed to enforce the farm sale, Owen was to voluntarily agree to a guardianship petition and claim that he was taken advantage of by James Wohlleber and Norman Haan.
56. Owen and Theresa's attorney, Doug Abraham, contacts Dr. Dan Rieffenberger, Owen's primary care physician requesting a letter of support for the guardianship. No letter of support is provided by Dr. Rieffenberger.
57. A week later, Theresa emails Dr. Hollis Nipe language for a letter recommending that a guardian and conservator be appointed for Owen Thacker.
58. Dr. Hollis Nipe met with Owen once on March 13, 2014, nine months prior to writing the letter on December 2, 2014. The consultation on March 13, 2014 with Dr. Nipe was to address issues Owen was having with his unsteady gait and balance.
59. Dr. Hollis Nipe's letter and testimony is to be given little weight for the following reasons:
    a. Owen was diagnosed with acoustic neuroma since approximately 2008. It had not grown in size and no medical reports indicate it was the cause of Owen's gait problems.
    b. Owen's memory concerns were "some names and small facts."
    c. Dr. Nipe did not consult with Owen's primary care physician, Dr. Rieffenberger.
    d. Dr. Nipe did not exam Owen immediately prior to writing the letter.
    e. Dr. Nipe did not take into account the findings and reports from the Mayo Clinic related to the acoustic neuroma and the normal pressure hydrocephalus.

f. Dr. Nipe's specialty is internal medicine and not neurology.

60. Owen was examined again in November 2014 at the Mayo Clinic and Dr. Masumoto confirms the findings of August, 2014 and restates that the normal pressure hydrocephalus is a small component of Owen's gait problems and recommends a vestibular rehabilitation program.

61. Owen had his annual Wellness Exam on October 22, 2014 with his primary care physician, Dr. Rieffenberger. No mention of memory problems just that he encounters balance issues of unsteady walking.

62. A guardianship and conservatorship petition is filed in December, 2014 as part of the farm sale lawsuit with Dr. Nipe's letter attached. After obtaining legal advice from Terry Sutton, an attorney in Watertown, on the implications of Theresa gaining guardianship over him, Owen refuses to consent to the guardianship.

63. On December 31, 2014, Owen and Vicky go to Wells Fargo Bank and close the joint checking and joint savings accounts and create new ones thereby removing Theresa as a joint holder on the accounts.

64. Based upon the credible testimony of Vicky, Vicky and Owen felt they could handle their own affairs and wanted their own privacy from Theresa as to their financial affairs.

65. Owen continues to drive and walk without the assistance of a cane or wheelchair until after he begins living in a nursing home in August, 2018. In the first few months of living in the nursing home, Owen continues to move about without the assistance of a cane or wheelchair.

66. Owen agrees to place the farmland in the Thacker Family Trust. The Trust is entered into on January 17, 2015. Owen signs the trust document in front of a notary at a bank in Watertown with Theresa and Owen present. The Trustee was Theresa and the beneficiary was Owen. Upon Owen's death, the beneficiaries became Theresa and Angie.

67. On February 9, 2015, Owen signs a Power of Attorney appointing Vicky as his power of attorney. At no time does Vicky use the Power of Attorney. Vicky never uses the Power of Attorney to sign any checks or documents on behalf of Owen.

68. The 2014 guardianship petition is never pursued further and the lawsuit regarding the farm is settled in May, 2015. Norman Haan receives $30,000 and James Wohlleber continues to lease the farmland.

69. From January, 2015 when Owen refuses to consent to the guardianship until August, 2018 when Owen moves into a nursing home there was no evidence presented by Theresa or Angie that concerns arose requiring appointment of a guardian or conservator.
70. In May 2015, based upon exhibits and the credible testimony of Scott Munger, a financial advisor, Owen Thacker, rolled over his Millenium 401K account with his former employer, Minnesota Rubber, into a traditional Hartford IRA. Owen met with Scott Munger alone, provided the necessary information, and put Vicky Timm as the death beneficiary on the account.
71. Scott Munger did not have any concerns about Owen's cognitive abilities.
72. There was no credible evidence that Owen Thacker was susceptible to undue influence when he set up the traditional IRA at Scott Munger Agency.
73. In June, 2017, Cory Herzog met with Vicky and she transferred the funds from her account at Scott Munger Agency and used the funds from the CDs to set up a single investment account and an IRA at Edward Jones. Vicky listed her son, Steve Cychosz, as beneficiary.
74. Later in June, 2017, both Owen and Vicky met with Cory Herzog at Edward Jones and Owen transferred his IRA at Scott Munger Agency and set up a new IRA at Edward Jones. Owen continued to list Vicky as beneficiary.
75. In November, 2017, Owen and Vicky met again with Cory Herzog and transferred funds from their joint savings account to Edward Jones and set up another account held as joint tenants with right of survivorship. The death beneficiary, if both were to die, was listed as Steve Cychosz.
76. This Court finds that the joint Edward Jones accounts, including the payment on death beneficiary to be with the consent and agreement of both Vicky and Owen.
77. This Court finds that the transfers of money from the joint checking and savings accounts to Vicky's individual account were done with Owen's knowledge and agreement.
78. Once Owen moves into a nursing home, Vicky asks Theresa for help with the nursing home costs at which time Theresa files for guardianship in January, 2019.
79. This Court reviewed the transcript and order for the 2019 guardianship petition, *In the Matter of the Guardianship/Conservatorship of Owen Thacker*, Case No.14GDN19-000001. This Court finds that it concurs with Judge Robert Spears who found the testimony of Vicky Timm to be credible and notes that Judge Robert Spears did not have the benefit of considering the

recording of June 5, 2014 stating Owen's intent that Vicky use Owen's cash assets for her own use as well as his own.

80. This Court further finds in reviewing the transcript and order of the guardianship proceedings that Owen's health at the time of the 2019 guardianship petition was very different than the medical records presented regarding Owen's health from 2013 to 2018 which is at issue in this current matter.

81. Owen's annual wellness exams with Dr. Rieffenberger from 2014 through 2017 confirm that Owen continues to handle his own affairs and daily living activities including driving.

82. Vicky and Owen continue to live their lives without incident from January, 2015 until Owen suffers an aneurysm in June, 2018 and is eventually placed in a nursing home in August of 2018.

83. Owen continues to drive and take care of all his own daily living activities, manage his finances, and walk without the assistance of a cane or wheelchair until he moves into a nursing home in August, 2018.

84. In the first few months of living in the nursing home, Owen continues to move about without the assistance of a cane or wheelchair.

85. In August, 2018 Vicky takes paperwork to Owen from Edward Jones to allow for a transfer of funds from his IRA with Edward Jones to Vicky and Owen's joint checking account to pay for his nursing home care. No credible evidence was presented that Owen was incapable of agreeing and signing the necessary paperwork to use the IRA funds for his care.

86. In September, 2018, Vicky transfers $25,000 from the joint checking account to her individual checking account. In October, 2018, Vicky transfers $20,000 to Edward Jones. The funds are placed in Vicky's individual Edward Jones account. In October, 2019, Vicky transfers $25,000 from her Edward Jones account to her and Owen's joint Edward Jones account.

87. The Court finds that based upon Vicky's testimony, Cory Herzog's testimony, and Owen's intent that Vicky use his cash assets for her benefit, the transfer of the $25,000 was not for an improper purpose.

88. The Court finds there was no evidence of an improper purpose by Vicky related to the farm sale. The Court adds further that if Vicky had wanted to act with an improper purpose, she would not have notified Theresa of Owen's desire to sell the farm and would have let the farm

sale happen without anyone knowing and the proceeds would have gone into Owen and Vicky's joint bank account.

89. The Court finds that Owen and Vicky were a unit. Owen and Vicky had as much of a husband and wife relationship as those who are legally married. However, the Court also finds that Owen and Vicky's relationship does not rise to the level of a Confidential Relationship where there should be a presumption of undue influence. Owen and Vicky consulted with each other on everything. They were not unequal in position of influence. From the perspective of the Court and based upon the testimony and evidence provided, Vicky and Owen were equal partners and relied on each other negating any presumption of undue influence.
90. This Court finds that time and time again throughout their over 30 year relationship, Owen showed his intent which was that the cash assets were for him and for Vicky.
91. This Court finds that by the daughters' own account, Owen was a reserved man and therefore his lack of engagement during the meetings with Cory Herzog, are reasonable and are not interpreted as lack of intent by Owen to set up the accounts as evidenced in the exhibits regarding the Edward Jones accounts.
92. The Court finds that Vicky's reaction in taking down photos sent by Angie and Theresa to Owen in the nursing home to be a reasonable reaction in response to the fact that Angie and Theresa took no effort to connect with their father when he was alive, and after the farm was placed in the Trust, to which they would ultimately become beneficiaries.
93. The Court finds that Plaintiff's theory of the case is that Vicky was trying to get money she did not earn from Owen. In response this Court points out that the heirs of Owen's estate, Theresa and Angie, did not earn Owen's farm or money either.
94. Based upon the evidence and testimony provided, this Court does not find credible that this case was about protecting Owen. This court finds that the testimony and evidence presented by Plaintiff is about what Theresa and Angie can get from their father, Owen's, estate.
95. The Court finds that Vicky's reaction to the lawsuit, and requests for personal information during the 2019 guardianship proceedings, is that of anyone who is under attack and does not diminish her character or credibility.

CONCLUSIONS OF LAW

IT IS HEREBY ORDERED, any conclusion of law deemed to be a finding of fact or vice versa shall be appropriately incorporated into the Findings of Fact or Conclusions of Law as the case may be. Both Plaintiff and Defendant agreed on the law governing the claims in this action as evidenced by their pre-trial briefs.

IT IS HEREBY ORDERED, as to Plaintiff's claim of breach of fiduciary duty, the Court finds there was no credible evidence presented that Vicky acted in a fiduciary capacity as to any of the events at issue in Plaintiff's Complaint, including but limited to, the certificates of deposit, the Wells Fargo Bank accounts, the investment accounts, or the farmland sale. Vicky never utilized the Power of Attorney to conduct any business on Owen's behalf and was never placed on any account in a fiduciary capacity. As a result, Count I of Plaintiff's Amended Complaint is dismissed.

IT IS FURTHER ORDERED, as to Plaintiff's claim of conversion, the Court finds that based upon the aforementioned testimony and evidence provided there was no credible evidence provided that Vicky Timm converted anything wrongfully to her own assets. At all times, it was Owen's intention for his cash assets to be used to take care of both Vicky and Owen and to be used by Vicky for her own needs after Owen's death. Vicky and Owen consulted with each other about everything and Vicky's actions were conducted with Owen's knowledge and correspond with his wishes. At all times, funds from all the bank accounts, whether held in Vicky's name and/or Owen's name were used for both of their living and household expenses. There was no unwarranted interference by Vicky in using Owen's cash assets for the benefit of Vicky and/or Owen. As a result, Count II of Plaintiff's Complaint is dismissed.

IT IS FURTHER ORDERED, As to Plaintiff's claim of undue influence, based upon the testimony and evidence provided, this Court finds that the elements of undue influence have not been met.

First, Owen and Vicky were equal partners in their relationship so factually, this Court does not find a presumption of undue influence based upon a confidential relationship between Owen and Vicky. Owen and Vicky in discussing finances always referred to themselves as "we". Owen's

gait issues and minor memory concerns does not rise to the level of creating an "unequal" relationship.

Second, while this Court does find that Vicky and Owen resided together and therefore Vicky would have an opportunity to exert undue influence, the Plaintiff fails to meet its burden of proof that Owen was susceptible to such influence and that Vicky exerted any influence with an improper purpose. Owen performed all his own daily living activities, including but not limited to driving, mowing the lawn, and handling his own finances. Owen's gait issues did not result in any need of cane, walker, or wheelchair and did result in reliance on Vicky for his daily needs.

Third, Owen arguably could be susceptible to undue influence sometime in the late 2017/2018 timeframe when he contracted pneumonia for a short period of time or had his aortic aneurysm in June, 2018. However, Owen's intent, long before there were any allegations of undue influence, were that the cash assets were to be used to take care of Vicky. Additionally, all of Vicky's spending habits remained the same which included taking care of both her and Owen's daily and household living expenses. The Plaintiff has failed to meet its burden of proof that Vicky had the disposition to exert undue influence with an improper purpose or that there was any clear effect of undue influence. At all times Vicky and Owen took care of each other including their living expenses and plans for retirement.

As a result, Count III of Plaintiff's Amended Complaint is dismissed.

IT IS FURTHER ORDERED, as to Plaintiff's motion to amend the pleadings to conform to the evidence for an additional claim of an implied trust, while this Court granted the motion, the Court finds no evidence supporting such claim. Again, Owen's actions and intentions were for the cash assets to be used for both him and Vicky. Owen, himself, created accounts in both his and Vicky's names for the purpose of taking care of both of them. As a result, Plaintiff's additional claim of an implied trust is dismissed. No evidence was provided that Vicky failed to take care of Owen.

IT IS FINALLY ORDERED, given that the Plaintiff's claims have been dismissed in their entirety on the merits, the Stipulation and Agreement related to the Edward Jones account of #323-xxx67-1-1 entered into between the Parties during the pendency of this action is hereby terminated and Vicky Timm shall have full and independent access to said account immediately.

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SO ORDERED. BY THIS COURT

Carmen A. Means, Circuit Court Judge

ATTEST:

Attest:
Feldmeyer, Cindy
Clerk/Deputy

Clerk of Court

App. 2

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:ss	
COUNTY OF CODINGTON	)	THIRD JUDICIAL CIRCUIT

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF	)	
	)	14GDN19-000001
OWEN THACKER,	)	
A person alleged to need protection.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A hearing on the Petition for the appointment of co-guardians and co-conservators for Owen Thacker was held before the Honorable Robert L. Spears, Circuit Court Judge, on the 19th day of September, 2019, at the Codington County Courthouse in Watertown, South Dakota; Petitioners Theresa Hanson and Angelina Huckins appeared personally and were represented by Darla Pollman Rogers and A. Jason Rumpca of Riter, Rogers, Wattier & Northrup, LLP; Victoria Timm, an interested person, appeared personally and was represented by Ronald L. Schulz of the Law Firm of Ronald L. Schulz, P.C.; Owen Thacker, the person alleged to need protection, did not appear but was represented by Liam M. Culhane of Turbak Law Office, P.C.; and the Court having heard the testimony of the witnesses and received Exhibits, and the Court being duly advised and good cause appearing, the Court having entered oral findings of fact and conclusions of law on the record at the conclusion of the hearing which are hereby incorporated unless modified below, now enters the following:

FINDINGS OF FACT

1. Petitioners Angelina Huckins and Theresa Hanson are the biological daughters of Owen Thacker.

15

2. Victoria Timm and Mr. Thacker have been in a significant and apparently romantic relationship in excess of the past 30 years.
3. Ms. Timm objects to the petition filed by Mr. Thacker's daughters but did not file an objection or petition the Court to appoint her as the guardian and/or conservator or both.
4. A power of attorney was entered into several years ago where Ms. Timm has the power of attorney over Mr. Thacker's financial and medical affairs and has been the power of attorney agent since at least the beginning of 2013.
5. Ms. Timm prefers that the power of attorney for healthcare decisions and the general power of attorney remain as is and that a formal guardianship and conservatorship is not needed.
6. Based on credible testimony of Ms. Hanson, co-petitioner, the Court finds that Mr. Thacker did not understand the paperwork and what was going on in the proposed sale of his farm. Ms. Hanson and Mr. Thacker canceled the sale and the farm is now in a trust for Mr. Thacker's benefit.
7. Mr. Culhane was appointed by the Court to represent the best interests of Mr. Thacker independent of the petitioners and the person objecting to the petition. The Court finds Mr. Culhane's final argument to the Court to be credible and compelling when he represented to the Court that he visited with Mr. Thacker several times and Mr. Thacker did not know who Mr. Culhane was from one meeting to the next.
8. The Court finds several comments made by Ms. Timm relative to Exhibits 2 and 3 to be troubling. In Exhibit 2, which is a text message exchange, Ms. Timm was asked the petitioners to help pay for or contribute to Mr. Thacker's nursing home care, but later denied making such a request and questioned the validity of the Exhibits.

9. The Court finds Ms. Timm's testimony regarding Exhibit 6, pages 1 and 2 to be troubling. Based on the evidence presented, during a time when she had power of attorney over certain financial accounts, Ms. Timm could not answer questions about or in any way account for certain withdrawals from a Wells Fargo account that was originally owned by Mr. Thacker.
10. The Court finds that as power of attorney for Mr. Thacker, Ms. Timm (1) failed to account for and keep records of Mr. Thacker's financial affairs; and (2) failed to act in Mr. Thacker's best interests and put his business affairs first.
11. On February 11, 2019 the Court entered an Order requiring a free flow of information regarding medical and financial records in this case. Although there may have been an adequate exchange on medical treatment and records, the Court finds there was not a free flow of information regarding financial records as previously ordered.
12. The Court finds Ms. Timm has demonstrated to be uncooperative. She refused Ms. Hanson's request on more than one occasion for accounting information concerning the financial affairs of Mr. Thacker.
13. Based on the live testimony and demeanor of Ms. Timm, the Court finds the current power of attorney situation unworkable, and to maintain the status quo is not in the best interests of Mr. Thacker.
14. The petitioners are qualified to act as guardian and conservators.
15. The proximity or distance that petitioners live from Mr. Thacker is not a concern, especially in this electronic communication day and age.

From the above Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Any Conclusion of Law deemed to be a Finding of Fact or vice versa shall be appropriately incorporated into the Findings of Fact or Conclusions of Law as the case may be.
2. The Court has jurisdiction of the parties and the subject matter of this action.
3. A guardian may be appointed for an individual whose ability to respond to people, events, and environments is impaired to such an extent that the individual lacks the capacity to meet the essential requirements for his health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian. SDCL § 29A-5-302.
4. A conservator may be appointed for an individual whose ability to respond to people, events and environments is impaired to such an extent that the individual lacks the capacity to manage property or financial affairs or to provide for his support or the support of legal dependents without the assistance or protection of a conservator. SDCL § 29A-5-303.
5. The Court finds by clear and convincing evidence that Owen Thacker needs both a guardian and conservator. SDCL § 29A-5-312.
6. The Court finds that the current power of attorney situation is unworkable and not in the best interests of Mr. Thacker.
7. There is no less restrictive alternative than to appoint a guardian and conservator. *Id.*
8. As the biological daughters of Mr. Thacker, petitioners have priority over anyone else to be appointed guardian and conservators. *Matter of Guardianship of Rich*, 520 N.W.2d 63 (1994).

9. The Court finds by clear and convincing evidence that it is in Mr. Thacker's best interests that the co-petitioners be appointed co-guardians and co-conservators over the Estate of Owen Thacker.

BY THE COURT:

Signed: 10/7/2019 2:27:30 PM

Robert L. Spears

ROBERT L. SPEARS
CIRCUIT COURT JUDGE

Attest:
Zeller, Barbara
Clerk/Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

ESTATE OF OWEN A. THACKER,

Plaintiff/Appellant,

-vs-

VICTORIA TIMM,

Defendant/Appellee.

Appeal No. 29868

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
CODINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE CARMEN A. MEANS, CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

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NOTICE OF APPEAL FILED
January 6, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

This is an appeal from the Circuit Court's Findings of Fact and Conclusions of Law, and resulting order, which was executed and filed on December 8, 2021. (SR 2055-2068, App. 1-14.) Notice of Entry was served on December 10, 2021. (SR 2072.) The Estate filed its Notice of Appeal on January 6, 2022. (SR 2073.) The Court may exercise jurisdiction pursuant to SDCL 15-26A-3(1) because the Circuit Court entered a final judgment.

LEGAL ISSUES

I. WHETHER THE CIRCUIT COURT CORRECTLY CONCLUDED THAT VICKY OWED NO FIDUCIARY DUTY TO OWEN AND DID NOT BREACH ANY DUTY THAT MAY HAVE EXISTED.

The Circuit Court found that Vicky did not act in a fiduciary capacity as to any of the events in the Amended Complaint, and ruled that the Estate failed to meet its burden to show a breach of fiduciary duty.

Estate of Bronson, 2017 S.D. 9, 892 N.W.2d 604.

II. WHETHER THE CIRCUIT COURT CLEARLY ERRED IN CONCLUDING THAT THE ESTATE FAILED TO PROVE THE ELEMENTS OF UNDUE INFLUENCE.

The Circuit Court found no confidential relation-ship between Owen and Vicky. The Circuit Court

also found that the Estate failed to prove that Owen was susceptible to undue influence prior to late 2017 or 2018, that Vicky had a disposition to exert undue influence for an improper purpose, or that there was a result clearly showing the effects of undue influence.

Estate of Pringle, 2008 S.D. 38, 751 N.W.2d 277.

In re Estate of Tank, 2020 S.D. 2, 938 N.W.2d 449.

III. WHETHER THE CIRCUIT COURT CLEARLY ERRED IN CONCLUDING THAT THE ESTATE FAILED TO PROVE THAT VICKY CONVERTED OWEN'S PROPERTY.

The Circuit Court found that the Estate failed to sustain its burden of proof regarding conversion.

Scherf v. Myers, 258 N.W.2d 831 (S.D. 1977).

Matter of Estate of Steed, 521 N.W.2d 675 (S.D. 1994).

Estate of Kuhn, 470 N.W.2d 248 (S.D. 1991).

SDCL 29A-6-104.

IV. WHETHER THE CIRCUIT COURT CLEARLY ERRED IN CONCLUDING THAT THE ESTATE FAILED TO PROVE THAT AN IMPLIED TRUST SHOULD BE IMPOSED.

The Circuit Court did not find evidence that Vicky obtained anything by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act.

SDCL 55-1-8.

STATEMENT OF THE CASE[1]

[1] For sake of consistency, the Appellee, Vicky Timm,

On September 19, 2019, Theresa Hanson and Angela Gadd were appointed as Owen Thacker's co-guardians and co-conservators. (SR 2288-2292.) They commenced this action on or about January 2, 2020. (SR 19.) On May 19, 2020, Theresa and Angie filed an Amended Complaint, alleging breach of fiduciary duty, conversion, and undue influence. (SR 57-69.) Owen died on July 24, 2020. (SR 122.) On November 23, 2020, the Circuit Court granted a Motion to Substitute Party, and Theresa, the personal representative of Owen's Estate, was substituted as the plaintiff. (SR 122, 132.)

A trial on the Amended Complaint was held before the Honorable Carmen Means on September 16 and 17, and October 19 and 21, 2021. (SR 225-477, 1881-2026.) Between the trial dates, Judge Means permitted the Estate's amendment to state a claim under SDCL 55-1-11. (SR 1886.) At the trial's conclusion, Judge Means ruled against the Estate on all counts. (SR 2018-2023; Vicky App. 1-9.)

STATEMENT OF FACTS

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will use the same citation conventions used by Appellant. Appellee's Appendix will be referred to as "Vicky App." followed by the corresponding page number.

A. Owen and Vicky's relationship and family.

Owen and Vicky began dating in 1986 when they met at the Minnesota Rubber plant in Watertown where they both worked. (SR 229, 1900.) About four months after they began dating, Vicky moved into Owen's house. (SR 230.) For the next 32 years, Vicky and Owen lived together, until Owen suffered from an aortic aneurysm and went into a nursing home in 2018. (SR 349; 432; 1969.) While Owen and Vicky did not marry, their relationship bore every semblance of a married couple. As the Circuit Court put it, "the unit if you will of Owen and Vicky was as much a husband wife relationship as I have with my husband right now." (SR 2019; Vicky App. 3.)

Based upon the testimony of all the witnesses, Owen was a thoughtful, reserved, smart, mild-mannered, and quiet person. (SR 242, 378, 382, 1890, 1964.) Owen was a pool player and a card player. (SR 383, 450, 1963.) Vicky was described as an outgoing, personable, bubbly, energetic, and sociable person. (SR 382.) Owen and Vicky enjoyed fishing together, going for drives, going to movies, and going out to eat. (SR 1898-1899, 1904.) Vicky and Owen would go out to eat several times a week. (SR

1913.) Vicky went with Owen to his doctor's appointments. (SR 241; 1909.) They did most things together. (SR 1896.)

Theresa and Angie were born from Owen's prior marriage to his ex-wife, Sharon Robins. (SR 378-379.) Theresa and Angie did not spend much time with Owen. (SR 453.) Neither regularly called or visited Owen. (SR 383, 453, 1902-1904.) Neither regularly spent holidays with him. (SR 1896-1897.) In fact, Vicky and Owen only once traveled to Theresa's home in Oklahoma for Thanksgiving, and Theresa rarely came to South Dakota. (Id.) Owen did not talk much about Theresa and Angie when he was with friends. (SR 1891.)

> Theresa and Angie's interest in Owen piqued as his physical health deteriorated and they grew interested in his estate planning. Over the years, Theresa and Angie did not routinely send photographs to Owen, but when Owen was in the nursing home, Theresa and Angie started hanging pictures of themselves in his room. (SR 137.) The Circuit Court laid no blame on Vicky for taking the pictures down, seeing it instead as "an expression of outrage that daughters can be fairly disinterested while they're

(sic) father's alive and then when their father is at the end of his life that they're trying to send pictures." (SR 2022; Vicky App. 6.)[2] **B. Owen's farm.**

For several years after Vicky and Owen began dating, Owen's mother, Sophie, was still alive. (SR 231.) Vicky looked after Sophie, and they loved each other. (SR 433-434.) Sophie had a 422 acre farm 12 miles north of Watertown, which Owen obtained prior to when Sophie passed away in 2000. (SR 231, 380-381.) Owen farmed Sophie's land on occasions when he was laid off from Minnesota Rubber, but mainly rented it to others. (SR 231-232, 381.) Owen also rented out the farm house on the property. (Id.)

One of the individuals to whom Owen rented the farmland was his friend, Jim Wohlleber. (SR 1963.) Jim and Owen had numerous discussions about Jim potentially buying Owen's land. (SR 1965.) Owen also regularly had discussions with local realtor, Norm Haan, about selling

[2] The Circuit Court also saw through the guise that Theresa and Angie pursued this lawsuit as a crusade to protect Owen, noting at the onset of her ruling, "I don't believe for a second that this is about protecting Owen, I think this is about dollar signs and what we get from our father's estate." (SR 2018; Vicky App. 2.)

the farm. (SR 266-267.) In May 2014, Vicky flew to Wisconsin to be with her family. (SR 313.) Owen stayed in Watertown. (Id.) While Vicky was gone, Haan approached Owen about listing and selling the farm. (SR 313-314.) Owen signed a listing agreement on May 22, 2014, and, following negotiations, signed a purchase agreement on May 23, 2014. (SR 1167-1169.)

Upon learning that Owen was selling the farm, Vicky called Theresa. (SR 389.)[3] Theresa was traveling in South Dakota at the time. (SR 388.) Theresa immediately called Owen and asked him to put Haan on the phone, at which point she told Haan to leave. (Id.) Owen did not show up for the real estate closing set for June 2, 2014. (SR 533, 1974.)

On that same visit to South Dakota, Theresa asked for all of Owen's financial records. (SR 323, 391.) She insisted on a recorded conversation about Owen's estate planning. (SR 324, 392.) That recorded conversation

[3] The Circuit Court observed that, if Vicky had a desire to act with an improper purpose, she could have let the farm sale go through and not notified Theresa. Doing so would have likely caused the proceeds to go to Owen and Vicky's joint bank account. (SR 2018-2019, 2066-2067; Estate Appx. 10-11; Vicky Appx. 2.)

included the following:

> MS. HANSON: Okay. So what my understanding if of dad's finances, of which he has — you have considerable cash, is that your intent is that that money is to take care of Vicky.
>
> MR. THACKER: Right.
>
> MS. HANSON: Right. And, Vicky, you understand that too?
>
> MS. TIMM: Yes.
>
> MS. HANSON: That is dad's money that is — his first intention is that it take care of you. . . .

(SR 1160.)

Theresa testified about this exchange at trial, claiming that Owen told her that what he meant was "that Vicky could sell the house." (SR 401.) Theresa cited Owen's decision to add Vicky to the title of the house in 2002 as support for her position that Owen did not want to give Vicky any money. (SR 419.) The Circuit Court did not find Theresa's testimony on this subject credible. (SR 2020, 2063.)

The balance of the recording recited Theresa's plan to put herself on accounts to make sure her and Angie would receive Owen's money. (SR 1161.) Owen, Theresa, and

Vicky went to Wells Fargo the same day and signed paperwork to go along with what Theresa insisted upon. (SR 634-641.) As Vicky described it at trial, "[i]t sounded good at the time," and "[Theresa's] a good talker and she talked us into this." (SR 332.)[4]

Owen's failure to complete the farm sale led to litigation. (SR 328, 510.) The Wohllebers' claim was resolved in January 2015 through an agreement for a five-year lease. (SR 397.) On January 17, 2015, Owen's farm, alleged to have a value of approximately $2.5 million, and homestead were added to the Thacker Family Trust, with Theresa and Angie as the successor beneficiaries. (SR 59; 397-398; 459; 1173.)[5]

C. Owen's health.

Owen was diagnosed in 2008 condition known as a schwanoma or acoustic neuroma, which is an overgrowth of nerve tissue. (SR 292-293; 417.) When this condition is

---

[4] The Circuit Court found Theresa's language in the recording and testimony at trial to resemble that of a "banker or lawyer" and not in layman's terms. (SR 2019-2020; 2063.)

[5] Owen's execution of the Trust was within the period of time that the Estate claims Owen was experiencing diminished cognitive function and susceptible to undue influence, which supposedly started in 2013. (SR 68.)

small, it may have no effect, but if it expands it causes things like vertigo or difficulty with balance. (SR 293.)

Owen's primary physician was Dr. Dan Reiffenberger at Brown Clinic. (SR 258.) In 2012-2013, Owen began experiencing unsteadiness in his walking and balance issues. (SR 245, 248, 305-306, 748.) Dr. Reiffenberger referred Owen to be seen at Midwest Ears Nose & Throat in Sioux Falls. (SR 1120; 1907.) Owen drove to his appointment. (SR 1907.) At that time, Owen was found to be alert with normal judgment and insight. (SR 1121.) Dr. Paul Cink commented that Owen's acoustic neuroma, diagnosed 5 years earlier in 2008, had not increased in size and was stable. (SR 715, 1121-1122.) Dr. Cink recommended a neurological consultation to address Owen's gait problem. (SR 1122.)

On July 12, 2013, Owen drove to the appointment at Neurology Associates, Inc., in Sioux Falls. (SR 1907-1908.) Dr. Warren Opheim noted that Owen had never had a blackout or seizure and had not had difficulty with thinking, memory disturbance, or bowel or bladder control. (SR 1123.) He also noted that Owen demonstrated normal mentation with an appropriate level of alertness, and had a

normal attention span, fund of knowledge, speech, and vocabulary. (SR 1124.)

Owen tried physical therapy late in 2013, but continued to have problems with his walking. (SR 257-258.) He went to see Vicky's doctor, Dr. Hollis Nipe, on March 13, 2014. (SR 681.) At this time, Owen reported concerns with his distant memory, although his immediate memory was OK. (Id.) Dr. Nipe saw Owen only once. (SR 302-303.)

At Theresa's urging, Owen was referred to be seen at the Mayo Clinic. (SR 262-263, 305, 386, 1130.) At the time of the August 19 and 20, 2014 visit, his acoustic neuroma was stable. (Id.) The notes from that visit note Owen's minor memory issues with forgetting names and facts, but also states: "He continues to function quite well, and is able to take care of all of his own activities of daily living independently. He continues to drive and does so safely, according to both himself and his family. He is able to manage his finances without any errors." (SR 1132.) Dr. Kogelshatz of the Mayo Clinic reported that there was no clear evidence of symptoms related to normal pressure hydrocephalus, which was the concern that led Dr. Nipe to make the referral. (SR 660, 664, 683.)

On October 22, 2014, Owen had his annual Wellness Exam with Dr. Reiffenberger. (SR 1198.) He continued to report issues with balance and unsteady walking, but reported nothing about memory problems. (Id.)

As part of the defense to the lawsuit filed to enforce the farm sale, a guardianship petition was filed. (SR 546-548.) Following emails with her attorney suggesting the language to be used, Theresa emailed Dr. Nipe on November 26, 2014, and asked for a letter recommending that a guardian and conservator be appointed for Owen Thacker. (SR 565-566.) Dr. Nipe had only met with Owen once on March 13, 2014 to address the issues with his gait and balance.

Nonetheless, Dr. Nipe furnished a letter dated December 2, 2014, parroting the language Theresa requested. (SR 567.)[6]

The guardianship was pursued no further in 2015, 2016, or 2017. (SR 397.) Owen's health was steady

[6] For several reasons, including Dr. Nipe's failure to consult with Dr. Reiffenberger, failure to examine Owen before the letter, and failure to take into account findings from the Mayo Clinic, the Circuit Court gave Dr. Nipe's letter little weight. (SR 2063-2064.)

throughout 2015, 2016, and 2017, as evidenced by his annual wellness exams. (SR 1142-1154.) He did things that normal people do. Owen drove his own vehicle until he went into a nursing home. (SR 1909.) He mowed the lawn. (SR 1910.) He handled snowblowing. (Id.) He changed the cat's litter box. (SR 1911.)

Debra Kany previously worked with Owen and Vicky at Minnesota Rubber and became friends with them. (SR 1887-1888.) She visited Owen and Vicky regularly in the year before Owen went into the nursing home. (SR 1893.) She observed Owen and Vicky on their Sunday drives with Owen behind the wheel. (SR 1893-1894.) She did not observe any memory problems, and stated that "his mind was always good." (SR 1894.) Owen and Vicky visited Debra's house for a birthday party in 2016 and for Christmas in 2017, and, although Owen would have to steady himself at times, he was getting around without a walker or cane. (SR 1895, 1897.) In late June 2018, Owen had an aneurism. (SR 349, 402.) Ultimately, after his hospitalization and rehab attempts, he went into nursing home care at Avantara. (Id.) Jim Wohlleber visited Owen in the nursing home about six times. (SR 1969.) At first,

Jim did not think Owen should have been in the nursing home at all, because Owen was "sharp with his mind" and "could still get around pretty good." (SR 1970.) When Jim would first go and visit, Owen and Vicky would be out in the lobby playing cards or watching TV. (Id.) However, Jim observed that Owen's physical health went downhill quite a bit during Owen's final year the nursing home. (Id.) Indeed, the Circuit Court found that Owen's health in 2019 was very different than it was in 2013-2018, the latter being the time frame at issue in this case. (SR 2066; App. 10.)

D. Owen and Vicky's handling of their finances.

Owen and Vicky did not have a set rule as to how they handled their finances. (SR 1901.) They each contributed to their household living expenses, without keeping close track of who paid for what. (SR 1901-1902.) In the beginning of their relationship, Owen took care of things like utility bills and insurance, while Vicky took care of day-to-day expenses such as groceries and gas. (Id.) Owen and Vicky owned vehicles together and owned boats together. (SR 1879-1880; 1904-1905.)

Owen retired from Minnesota Rubber in 2002 at the

age of 62. (SR 232, 380.) On December 20, 2002, Owen met with Tom Burns, an attorney in Watertown, and signed a Quit Claim Deed transferring title the home from Owen A. Thacker to Owen A. Thacker and Vicky Timm, as joint tenants. (SR 551.) Owen did this without talking to Vicky. (SR 232.) Vicky retired from Minnesota Rubber in 2006. (SR 1900.)

1. Retirement accounts.

Owen and Vicky each had 401Ks when they worked at Minnesota Rubber. (SR 343.) They had spoken to other employees, including Deb Kany, about rolling over their 401K to an IRA, and Scott Munger was someone a number of Minnesota Rubber employees recommended based on the results they experienced. (SR 343, 371, 1892.)

On May 11, 2015, Owen rolled his Milliman 401K account that he had when he was with Minnesota Rubber into a traditional Hartford IRA. (SR 584, 585-606.) Munger's recollection was that Owen came to see him alone. (SR 372.) Munger did not have any concerns about Owen's cognitive abilities in the meeting, and the trial court found there was no credible evidence that Owen was susceptible to undue influence when he set up his IRA with Munger's agency. (SR 377-378, 2065; Estate Appx. 9.) Owen

selected Vicky as the beneficiary of his IRA. (SR 589.)

In 2017, after visiting with others from Minnesota Rubber, Owen and Vicky decided to move their retirement accounts to Edward Jones. (SR 346, 1929-1930.) When Cory Herzog from Edward Jones met with Vicky and Owen to set up their IRAs in June 2017, Owen made the agreement to set up his account and continued to designate Vicky as his beneficiary. (SR 276.) Owen exhibited no behavior that suggested to Cory that Owen had any trouble understanding what Cory was telling him, and, once again, the trial court found there was no credible evidence that Owen was susceptible to undue influence at that time. (SR 282, 2065; App. 9.)

In November 2017, Vicky and Owen opened a joint account at Edward Jones using funds from the joint checking account at Wells Fargo. (SR 271-272.) Again, there was nothing about this meeting that raised any flags where Cory was concerned. (Id.)

After Owen suffered the aneurysm in June 2018 and went into nursing home care, Vicky used the joint checking account to pay for his care in June and July, 2018. (SR

349, 402, 429, 1384, 1927.) In early August 2018, Vicky delivered paperwork from Edward Jones to Owen to allow for a transfer of funds from Owen's IRA with Edward Jones to Vicky and Owen's joint checking account in order to continue paying for Owen's nursing home care. (SR 273, 615-616, 1928.) Owen agreed with this course of action. (SR 1929.) The trial court found no credible evidence suggesting that Owen was incapable of agreeing and signing the necessary paperwork to use the IRA funds for his care. (SR 2066; App. 10.)

Finally, the Estate imputes some impropriety to Vicky based on transactions that occurred in August and September 2018, involving $25,000 being transferred from the joint checking account to Vicky's individual checking account, and then transferred to Vicky's individual Edward Jones account. (SR 63, 274, 1930.) Vicky testified that the transfer was an error, and the money should have gone to the joint Edward Jones account, not her account. (SR 355-357.) Ultimately, that money was returned to the joint Edward Jones account. (SR 356.) The trial court did not find that the transfer was for an improper purpose. (SR 2066; App. 10.)

2. CD's.

The Estate also makes claims regarding certificates of deposits set up in 2006, 2010, and 2013. These CD's were titled in Vicky's name, and were created 5-12 years before Owen's aortic aneurysm caused him to go into a nursing home. (SR 349; 432; 1969.) Theresa agreed that CD's titled in Vicky's name would be Vicky's assets and she could do with them what she wanted. (SR 422-423.)

On April 26, 2006, a Dacotah Bank CD owned by Vicky and payable on death to Owen, valued at $20,000, was opened. (SR 1047.) Owen funded it, and Theresa agreed that Owen had the ability to manage his own finances at that point. (SR 418-419.) Vicky renewed it for several years and on its renewal date on February 26, 2015, Vicky closed the CD and created a new one at Plains Commerce Bank, continuing to list the payable on death to Owen. (SR 422, 1047-1059.) On June 1, 2017, Vicky closed the Plains Commerce Bank CD with Owen's knowledge, and the monies were used to fund a newly opened Edward Jones Single Account owned by Vicky and payable on death to Vicky's son, Steven. (SR 1917.)

Another CD with Dacotah Bank was opened on February 23, 2010. (SR 1065, 1938-1939.) This CD was jointly owned with right of survivorship by "Owen Thacker or Vicky Timm," and valued at $15,000. (SR 1065.) Vicky renewed it on February 23, 2012. (SR 1068.) Once again, on February 26, 2015, Vicky closed this CD and created a new one at Plains Commerce Bank. (SR 1077-1078.) After Vicky discussed with Owen, the proceeds from this CD were also deposited into the Edward Jones Single Account. (SR 1079-1080; 1917.)

On January 3, 2013, Owen opened another CD at Plains Commerce Bank. (SR 1081.) This CD was valued at $30,000, was owned by Vicky and payable on death to Owen. (Id.) On the renewal date of January 3, 2015, the CD was closed, with Owen's knowledge, and a new CD, owned by Vicky and payable on death to Owen, valued at $30,451.69, was opened. (SR 1085-1086.) On July 3, 2018, the proceeds of this CD were also deposited into the Edward Jones Single Account. (SR 1090-1091.)

3. Bank accounts.

On March 13, 2013, Vicky was added to Owen's Wells Fargo checking account. (SR 627-629.) Owen's social

security, investment payments, and some farm rent payments were deposited into the joint account. (SR 1102.) On May 3, 2013, Owen and Vicky opened up a joint savings account at Wells Fargo Bank. (SR 630-633; 1105-1106.) Vicky was not given any instructions about how she could use the money in the joint account. (SR 1925.) Owen reviewed his monthly bank statements, but did not question Vicky's use of the account. (SR 1915.)

Vicky continued to maintain her individual checking account. (SR 1510-1876.) Vicky's social security and investment income payments were deposited into her individual checking account. (Id.) Vicky also withdrew cash from this account to pay for their household and living expenses out of her account. (Id.) Vicky also paid for daily living and household expenses using her credit card. (SR 1234.) Vicky paid her credit card bill from both her individual checking account and the joint checking account. (SR 1877.)

Owen and Vicky liked to pay for things with cash. After the joint checking account and savings account was created in 2013, Owen would regularly ask Vicky to write him a check to cash from the joint checking account. (SR

1912.) On occasion, Owen and Vicky would go together to cash checks using the bank's drive-thru window. (Id.) Owen spent cash on pool, meals, and whatever he happened to need at a given time. (SR 1912-1913.)

As previously noted, Theresa talked Vicky and Owen into adding her to the Wells Fargo joint checking account in June 2014. (SR 332.) Vicky and Owen felt they could handle their own affairs and wanted privacy from Theresa, so they ultimately decided to open new accounts without Theresa on them on December 31, 2014. (SR 642.) As Vicky put it:

> We had been together over 20 years and she was just taking over our life. That's why eventually we took her name off the bank account because it's none of her business what our financials are when she's got a life of her own and a family of her own. But she wanted to just take over this whole thing and it sounded great at the time and the more Owen and I discussed it, it's like no, why should she be doing this? We can handle our own stuff.

(SR 332.) The trial court found Vicky's testimony about her and Owen's desire for privacy credible. (SR 2064; App. 8.)

Around this same time, Owen and Vicky also went to see Attorney Terry Sutton concerning the guardianship that Theresa had started, because they were uncomfortable

with Theresa taking control over everything. (SR 330-332.) Attorney Sutton made observations of Owen at that time and saw nothing about his appearance, demeanor, or responses that suggested Owen lacked the ability to sign a power of attorney. (SR 366-367.) Owen signed a power of attorney appointing Vicky as his attorney in fact on February 9, 2015. (SR 620.) Theresa was listed as his alternate. (Id.) Vicky understood the power of attorney to mean that, if something happened to Owen, she would be able to take matters over for him. (SR 1931.) She never used it.

From January 2015 to when Owen went into the nursing home in 2018, neither Theresa nor Angie expressed any concern about the need for a guardian or conservator for Owen.

ARGUMENT

A. The Circuit Court correctly concluded that Owen and Vicky were not in fiduciary relationship, and the Estate failed to meet its burden to show a breach of fiduciary duty.

Whether parties are in a fiduciary relationship is a question of law. Bienash v. Moller, 2006 S.D. 78, ¶ 12, 721 N.W.2d 431, 434 (S.D. 2006) (citing Ward v. Lange, 1996 S.D. 113, ¶ 12, 553 N.W.2d 246, 250). "'Most often, deciding whether a fiduciary relationship was breached is

properly left to the trier of fact.'" Id. (quoting Ward, 2006 S.D. 78, ¶ 14 (further citations omitted).

1. The relationship between Owen and Vicky was not a fiduciary relationship.

The Estate tries to use the power of attorney that it readily admits Vicky *never used* as the basis of its claim that she acted, at all relevant times, as Owen's fiduciary. (Appellant's Brief, pg. 21.) The Estate's argument is unsupported by the prior decisions of this Court and ignores the pertinent facts of this case.

This Court declined to adopt such a broad approach in In re Estate of Bronson, 2017 S.D. 9, 892 N.W.2d 604. In In re Estate of Bronson, the principal, Bronson, added his son and attorney-in-fact, Butch, as joint owner to one of his bank accounts. Id. at ¶ 1, 892 N.W.2d at 606. Butch claimed that Bronson could not sign his own name due to a physical disability, and the parties stipulated that Butch signed Bronson's name on the required bank form. Id. at ¶ 5, 892 N.W.2d at 607. Following his death, Bronson's daughters brought suit against Butch, alleging in part that signing for Bronson was an act of impermissible self-dealing. Id. at ¶ 4, 892 N.W.2d at 606. The circuit court held that Butch "did not act pursuant to

the power of attorney" in signing his father's name. Id. at ¶ 7, 892 N.W.2d at 607.

This Court agreed, noting that "[a]pplying only the laws of agency and fiduciary self-dealing in a case like this would create an irrebuttable presumption that once a power of attorney is granted, *every subsequent act* of the attorney-in-fact involves a fiduciary duty of that agent — even if it is an act regarding a matter unconnected to the agency." Id. at ¶ 11, 892 N.W.2d at 608 (emphasis added). The Court declined to adopt such a law, reasoning that "'[t]he law will imply such duties only where one party to a relationship is unable to fully protect its interests and the unprotected party has placed its trust and confidence in the other.'" Id. (quoting Bienash, 2006 S.D. 78, ¶ 11, 721 N.W.2d at 434). "We recognize no 'invariable rule' for ascertaining a fiduciary relationship, 'but it is manifest in all the decisions that there must be not only confidence of the one in the other, but there must exist a certain inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of the facts involved, or other conditions giving to one advantage over the other.'" Id. at ¶ 11, 892 N.W.2d

at 608-609 (quoting Bienash, 2006 S.D. 78, ¶ 11, 721 N.W2d at 434 (quoting Ward v. Lange, 1996 S.D. 113, ¶ 12, 553 N.W.2d 246, 250)).

Because Bronson could handle his own affairs when he went to the bank to add Butch to the account, this Court concluded that "none of the factors necessary for a fiduciary relationship were present in this banking transaction." Bronson, 2017 S.D. 9, ¶ 11, 892 N.W.2d at 609 (emphasis added). Likewise, the situation here does not satisfy the factors necessary for a fiduciary relationship.

Vicky agrees that Owen placed trust in her. But she also clarified at trial that this applied both ways, and she had a high level of trust in Owen. (SR 240.) The trust and confidence between Owen and Vicky was a two-way street. The Estate takes issue with the Circuit Court's conclusion that Owen's gait issues and minor memory concerns did not rise to the level of creating an inequality. The Estate cites the supposed "mountain of medical records, evidence and testimony that clearly paints a different picture." (Appellant's Brief, pg. 23.) The Estate's hyperbole notwithstanding, the picture painted of Owen at trial was a picture of a pretty normal guy in his

seventies who sought medical help because of unsteadiness when he walked. Based on the testimony of people who spent time with Owen, this was true both before he went into nursing home care in 2013 to 2017, and even after he went into nursing home care in 2018.

The medical records show that Owen's care in 2013 and 2014 was predominantly directed at his unsteadiness on his feet, not cognitive issues. Owen's health was steady throughout 2015, 2016, and 2017, as evidenced by his annual wellness exams. (SR 1142-1154.) Once they had secured the farm for themselves and the Wohlleber lawsuit was wrapped up, Theresa and Angie made no steps to continue with the guardianship. Instead, Owen went about living his life and doing things that normal people do in 2015, 2016, and 2017. He drove his own vehicle. (SR 1909.) He mowed the lawn. (SR 1910.) He handled snowblowing. (Id.) He changed the cat's litter box. (SR 1911.)

Both Scott Munger and Cory Herzog testified that they observed nothing about Owen in their visits in 2015 and 2017, respectively, that caused them concern. (SR 282, 377-378.) The witnesses who were regularly around Owen in social settings, Debra Kany and Jim Wohlleber, testified to

no facts suggesting that Owen was on some lower mental footing than Vicky in these same time frames. Kany testified that "[Owen's] mind was always good." (SR 1894.) Owen and Vicky visited Debra's house for a birthday party in 2016 and for Christmas in 2017, and, although Kany acknowledged Owen would have to steady himself at times, he was getting around without a walker or cane. (SR 1895, 1897.) Wohlleber visited Owen in the nursing home about six times. (SR 1969.) In his visits shortly after Owen went into nursing care, Wohlleber did not think Owen should have been in the nursing home at all, because Owen remained "sharp with his mind" and "could still get around pretty good." (SR 1970.)

The Estate presented nothing about Owen that suggested he was in some disadvantaged position and unable to handle his own affairs from 2013-2017, which is the time period from which the bulk of the Estate's claims arose. The suggestion on page 23 of Appellant's Brief that Owen "depended on Vicky for almost everything once his health started to decline in 2012" is flatly contradicted by substantial evidence, including medical records and unrefuted testimony from people close to Owen, that Owen was capably

handling his own affairs until he was placed into a nursing home. The Circuit Court correctly rejected the Estate's claim that Vicky acted in a fiduciary capacity as to the items raised in the Amended Complaint, finding instead that Vicky and Owen were equals in their relationship.

Additionally, the Estate failed to show that Vicky exercised dominion, control, or influence over Owen's affairs. It was Theresa who, on one of her sparse visits from Oklahoma when she stopped the farm sale, attempted to step into a 30-year relationship, add herself to their account, and take a position of dominion, control, or influence. Her efforts were ultimately undone in the interest of preserving Owen and Vicky's privacy, to which they were certainly entitled. (SR 332, 2064; App. 8.)

A better way of characterizing it is that Vicky carried out many aspects of Owen and Vicky's joint affairs. Owen chose to put Vicky on his checking account as a joint account owner, and the proceeds of that account were intended for the use and benefit of *both of them*. They both obtained cash from it to pay for daily living and household expenses. The fact that Vicky physically paid their bills and scheduled Owen's appointments is a far cry

from controlling the details of Owen's financial decision-making. Both Munger and Herzog acknowledged that the decision-making regarding the beneficiary for Owen's retirement accounts was confirmed with Owen, personally. (SR 276, 372-373.) As to the CDs, they were Vicky's property. Theresa had to acknowledge that Vicky was free to do with them what she pleased, and, regardless, the Circuit Court found that Vicky's actions with the CDs were taken with Owen's knowledge. (SR 2057-2058.) (SR 422-423.)

Owen's decision to create joint accounts with Vicky was not merely about convenience; it was about taking care of the woman with whom Owen was in a relationship for over 30 years, both while Owen was alive and after. The Estate cites Estate of Card v. Card, 2016 S.D. 4, 874 N.W.2d 86, in support of its proposition that Vicky was placed on Owen's accounts in a fiduciary capacity, as opposed to as a joint owner. Estate of Card is easily distinguished. The savings account at issue in that case was created by a wife, Jacquelyn, whose husband, Darrell, could not manage money. The son who claimed a one-third share as a surviving joint tenant "offered no definitive opinion to what he believed Jacquelyn intended when she

placed his name on the account in 1989." Id. at ¶ 9, 874 N.W.2d at 89. Curtis and his sister, Kathleen, testified that they were unaware the 2007 Account was a joint account and that neither contributed money to the account balance at any time. Id.

Owen's intent was actually recorded here, so there is no guesswork. Owen's inclusion of Vicky as a joint owner was entirely consistent with his intent - in Theresa's own words - that his money is to take care of Vicky. (SR 1160.) The Circuit Court's conclusion on this factual issue couldn't possibly have been more clear, and should not be disturbed:

> I literally think that when the joint account was established it was established because -- and not simply because he wanted Vicky to be able to write checks, I think he wanted those assets to go to Vicky when he died. I think he wanted her to be a joint owner of the account just as he wanted her to be a joint owner of the home and he changed the deed. There's no question those things happened before there was any evidence that he was susceptible to undue influence.

(SR 2021; Vicky App. 5.) The Estate did not present clear and convincing evidence to the contrary. See Estate of Card at ¶ 15, 874 N.W.2d at 91. Rather, it presented Theresa's uncredible testimony that Owen only intended to leave Vicky the house, which she could sell to take care of

herself. The Circuit Court was correct that the relationship between Owen and Vicky was one of equal footing. She did not err in concluding no fiduciary relationship existed.

2. The Circuit Court did not clearly err by concluding that Vicky did not breach fiduciary duties.

In arguing that the Circuit Court erred by finding no breach of duty, the Estate merely invites the Court to reweigh the evidence and assess witness credibility, and offers statements about how "overwhelming" it perceives the evidence to be. "[I]t is within the prerogative of the trial court to resolve conflicts of evidence, judge the credibility of witnesses, and weigh the testimony of witnesses." Schieffer v. Schieffer, 2013 S.D. 11, ¶ 22, 826 N.W.2d 627, 635.

For instance, the Estate writes, "[Vicky's] only defense to her conduct was her claim that Owen agreed or consented to every such transaction in question." (Appellants' Brief, pg. 26.) First, there is no "conduct" that Vicky needs to defend. As argued above, Vicky and Owen were not in a fiduciary relationship; they were equals.

Owen intended for his money to be available to Vicky to use, which is hardly surprising considering their relationship of over 30 years. The transactions about which the Estate complains did not involve the use of a power of attorney.

They involved the use of a checking account on which Vicky was a joint owner beginning in 2013.

In Wyman v. Bruckner, 2018 S.D. 17, 908 N.W.2d 170, cited by the Estate, this Court pointed out that the circuit court had not decided whether the primary account holder was independently and competently handling her own financial affairs when she went to the bank to request the creation of the joint account. That is not the case here. The Circuit Court concluded that Vicky was added to the joint accounts years before there was any evidence that Owen was susceptible to undue influence. (SR 2021, 2069; App. 13; Vicky App. 5.)

Second, the Circuit Court heard Vicky's testimony regarding Owen's agreement with the various transactions, including the transfers from the joint account to Vicky's individual account, and obviously found it to be credible.

(SR 2059, 2063-2064.) The Circuit Court resolved this conflict of evidence. The Estate's disagreement with the Circuit Court's decision falls well short of showing clear error. The Circuit Court's dismissal of Count I of the Estate's Amended Complaint should be affirmed.

B. The Circuit Court correctly concluded that the Estate failed to prove the elements of undue influence.

Undue influence has four elements, on which the Estate had the burden. "These four elements are: '(1) decedent's susceptibility to undue influence; (2) opportunity to exert such influence and effect the wrongful purpose; (3) a disposition to do so for an improper purpose; and (4) a result showing the effects of such influence.'" In re Estate of Gaaskjolen, 2020 S.D. 17, ¶ 28, 941 N.W.2d 808, 816 (quoting In re Estate of Pringle, 2008 S.D. 38, ¶ 44, 751 N.W.2d 277, 291). If the Estate failed to meet their burden on any element, the Court need not address the remaining elements. Pringle, 2008 S.D. 38, ¶ 50, 751 N.W.2d at 292.

1. The Circuit Court did not clearly err by finding that Owen was not susceptible to undue influence until he contracted pneumonia and had his aortic aneurysm.

The Estate's argument concerning Owen's susceptibility goes to his health issues. The Estate overstates the extent to which Owen was physically afflicted in the relevant time frames, and fails to show that the Circuit Court clearly erred on this element.

Owen's medical records in 2012-2013 show that he began experiencing unsteadiness in his walking and balance issues. (SR 245, 248, 305-306, 748.) In the summer of 2013, Owen was driving to his appointments and the records reflected nothing suggesting that he had any cognitive issues. (SR 1121-1123, 1907-1908.)

He went to see Vicky's doctor, Dr. Nipe, on March 13, 2014. (SR 681.) At this time, Owen reported concerns with his distant memory, although his immediate memory was OK. (Id.) Owen was seen at the Mayo Clinic on August 19 and 20, 2014. (SR 305, 1130.) At the time of that visit, Owen's acoustic neuroma was stable. (Id.) The notes from that visit note Owen's minor memory issues with forgetting names and facts, but also confirmed that he was able to take care of himself, drive and handle his finances. (SR 1132.) On October 22, 2014, Owen had his annual Wellness

Exam with Dr. Reiffenberger. (SR 1198.) He continued to report issues with balance and unsteady walking, but reported nothing about memory problems. (Id.)

The only suggestion that Owen was incapable of handling his own affairs came from Theresa when she petitioned for guardianship late in 2014, utilizing a letter that her and her attorney crafted for Dr. Nipe, which the Circuit Court gave little weight. (SR 567, 2063-2064.) The Circuit Court was correct to give diminished weight to this letter, considering how it was created and the impressions of the Mayo Clinic doctors and Dr. Reiffenberger just weeks earlier.

Once Theresa and Angie secured Owen's signature on the trust in January 2015 and locked up the farm for themselves, they did not pursue the guardianship any further in 2015, 2016, or 2017. (SR 397.) Owen's annual wellness exams for those years were unremarkable. (SR 1142-1154.) He was still doing things that normal people do, like driving and tasks around the house. And that continued well into 2017, as confirmed by the testimony of Debra Kany and Jim Wohlleber. Even once he was in the nursing home after the aneurysm, Wohlleber described Owen

as getting around OK and mentally sharp. The Circuit Court found that it was in 2019 that Owen deteriorated. (Appellant's Brief, pg. 27.) The Estate's argument does little more than summarily conclude that Owen was susceptible to influence. It provides no explanation of how the steadiness with which Owen walked rendered him susceptible to being influenced to add Vicky to his account or designate her as a beneficiary. The Estate fell well short of proving susceptibility during the relevant time frames alleged in its Amended Complaint. The Circuit Court did not clearly err.

2. The Circuit Court did not clearly err by finding that Vicky did not have a disposition to unduly influence Owen for an improper purpose.

The Estate colors Vicky, Owen's companion for over 30 years, as someone in hot pursuit of Owen's property. But they fail to mention Owen's own recognition that he intended for his money to be used to take care of Vicky. (SR 1160.) The fact that Vicky and Owen engaged in financial planning for their retirement during the relevant time frames, and Owen chose to consistently designate Vicky as his beneficiary, does not begin to suggest that Vicky was acting with an improper purpose.

The Estate also raises the power of attorney that Owen signed and Vicky never used. (SR 620.) Vicky understood the power of attorney to mean that, if something happened to Owen, she would be able to take matters over for him. (SR 1931.) She never used it for anything in 2015, 2016, 2017, and 2018 because Owen remained capable of handling things for himself.

The Estate also points to gifts made by Owen and Vicky to Vicky's family. Theresa acknowledged that it was acceptable for Vicky and Owen to buy Christmas gifts for Vicky's family using the joint account. (SR 454.) Owen spent the holidays with Vicky's family, not Theresa and Angie. (SR 432, 1897.) Nothing in the record suggests Owen was influenced to make gifts he did not want to make. Owen readily acknowledged the gift of the boat to Vicky's son, Steve. (SR 1899.) Owen and Vicky were free to do as they pleased. The Estate imagines that these gifts evince a scheme to deprive Owen of property, but it presented no evidence to support that. Vicky and Owen's gifts do not prove an improper purpose.

Finally, the Estate's characterization of Vicky's

"persistent efforts to gain control and possession of [Owen's] property" on page 28 of its brief begs the question: if Vicky had the disposition to gain control and possession of Owen's property, why did she immediately call Theresa when Owen listed his farm for sale? The Circuit Court correctly observed that the facts surrounding the farm sale refuted any notion that Vicky had a disposition to unduly influence Owen for an improper purpose. (SR 2018-2019, 2064-2065; App. 10-11; Vicky App. 2-3.) The Circuit Court did not clearly err in weighing the evidence and finding that this element was not satisfied.

3. The Circuit Court did not clearly err by finding no result showing the effects of undue influence.

Once again, the Estate conveniently ignores Owen's own stated intent by arguing that the things raised in its case reflect undue influence. The results actually show that Owen intended for his cash to support Vicky, which is exactly what happened.

This lawsuit was started by Theresa and Angie, who are the beneficiaries of Owen's trust and stood to receive his $2.5 million farm. The fact that they were Owen's children does not mean that Owen's decision to leave

his cash to Vicky was an unnatural disposition. Being objects of Owen's bounty does not translate to an entitlement. See In re Estate of Tank, 2020 S.D. 2, ¶ 47, 938 N.W.2d 449, 462 (citing In re Blake's Estate, 81 S.D. 391, 400, 136 N.W.2d 242, 247 (1965)). Owen was free to do with his money what he pleased. He made Vicky a joint tenant on his home in 2002, named Vicky as the owner of CDs in 2006 and 2010, made Vicky a joint owner on joint accounts in 2013, and designated her as the beneficiary of his retirement accounts in both 2015 and 2017. His intent was clear, and made even clearer by Theresa's recording in June 2014.

Likewise, the testimony established that the relationship between Owen and his children, Theresa and Angie, was very distant. See e.g. Estate of Tank, at ¶47, 938 N.W.2d at 462; Pringle, 2008 S.D. 38, ¶ 41, 751 N.W.2d at 290. Owen made decisions that resulted in his significant other of *32 years* having money to live on once he passed. This was not an unnatural disposition. The alternative was allowing hundreds of thousands of dollars to pass through his Estate to the children who stood to inherit his farm - with whom he rarely spoke or spent time.

4. The Circuit Court correctly concluded there was no presumption of undue influence.

The Estate selectively misquotes dicta from this Court's decision in Matter of Estate of Gab, 364 N.W.2d 924 (S.D. 1985), in support of the proposition that husband-wife relationships are *per se* confidential relationships. First, while Vicky and Owen's relationship bore the semblance of a husband-wife relationship, it was not one and did not carry with it the same legal status. Second, the Court in Matter of Estate of Gab was discussing postnuptial agreements, not undue influence. In fact, the full quote from which the Estate borrows reads: "Nonetheless, because of the confidential relationship which exists between husband and wife, postnuptial agreements are subjected to close scrutiny by the courts to insure that they are fair and equitable." Id.

Whether a confidential relationship existed between Owen and Vicky was a decision within the province of the Circuit Court, based on the evidence presented. "A confidential relationship arises when the facts show the parties to be on unequal footing and one in a position of dominance." Delany v. Delany, 402 N.W.2d 701, 705 (S.D. 1987). "The existence of a confidential relationship is a

question of fact rather than law." Id. at 705.

As argued above, the trust and confidence between Owen and Vicky was a two-way street. The Circuit Court considered all of the evidence and testimony and concluded that Owen was not on unequal footing with Vicky. Rather, she concluded that "[t]hey were partners and they were equal partners from my perspective and from the evidence I saw." (SR 2019; Vicky App. 3.) This factual finding was supported by the evidence, and, therefore, should not be disturbed. See Nylen v. Nylen, 2015 S.D. 98, ¶ 14, 873 N.W.2d 76, 80.

Even if a presumption arose because of a confidential relationship, the evidence of Owen's intent and actions through the years clearly rebutted it. "When substantial, credible evidence has been introduced to rebut the presumption, it shall disappear from the action or proceeding. . ." SDCL 19-19-301.

The Estate incorrectly argues that Vicky relies only on Owen's verbal consent to the transactions, and comments on the strength of this testimony. (Appellant's Brief, pg. 32.) Substantial, credible evidence exists showing that Vicky took no unfair advantage of Owen.

Owen's own actions and words from 2002-2017 consistently showed that he had the intent to support Vicky in a multitude of ways. This includes actions taken when the Estate readily acknowledges he was capable of handling his own affairs. Also, Owen acknowledged in a recording in June 2014 - taken at Theresa's urging - that his cash was intended to support Vicky. This evidence shows that Owen had every intention of providing for Vicky. The transactions claimed by the Estate to be somehow wrongful are simply further evidence of that intent.

The Circuit Court did not clearly err in concluding that no confidential relationship existed. However, even assuming *arguendo* there was clear error, and a confidential relationship existed, Vicky easily rebutted the presumption. Any error in this regard was harmless under SDCL 15-6-61. The Circuit Court's dismissal of Count II of the Estate's Amended Complaint should be affirmed.

C. The Circuit Court correctly concluded that the Estate failed to prove conversion.

Even though Owen and Vicky had joint accounts that were regularly used by both of them to take care of their living and household expenses, the Estate maintains

that Vicky committed acts of conversion and the Circuit Court clearly erred. "Conversion is the act of exercising control or dominion over personal property that repudiates the owner's right in the property or in a manner that is inconsistent with such right." Scherf v. Myers, 258 N.W.2d 831, 834 (S.D. 1977).

The funds used by Vicky about which the Estate complains were held in joint accounts. SDCL 29A-6-101(4) defines a joint account as "any account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship." "An account opened in joint names raises a rebuttable presumption that the creator of such an account intended the usual rights of survivorship to attach to it." In re Estate of Steed, 521 N.W.2d 675, 678 (S.D. 1994).[7] "'The principle is the same whether the asset is a bank account or a C.D.'" Id. (quoting Matter of Estate of Kuhn, 470 N.W.2d 248, 250 (S.D. 1991)). "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties

[7] Vicky's argument from Section A. of this Brief regarding the joint accounts is incorporated. The Circuit Court correctly concluded that Owen intended to make Vicky a joint owner of the account. (SR 2021; Vicky App. 5.)

as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created." SDCL 29A-6-104.

Owen's intention was for his cash assets to benefit Vicky, and the actions taken by Vicky relative to the accounts were with Owen's consent. This was not a situation where Vicky used a power of attorney to withdraw funds for herself. Rather, Owen and Vicky held and used the accounts jointly. The Circuit Court committed no clear error in finding that there was no unwarranted interference by Vicky. The Circuit Court's dismissal of Count III of the Estate's Amended Complaint should be affirmed.

D. The Circuit Court correctly concluded that Vicky was not an implied trustee of Owen's account for the benefit of the Estate.

SDCL 55-1-8 provides that "[o]ne who gains a thing by . . . undue influence . . . or other wrongful act, is, unless he has some other and better right thereto, an implied trustee of the thing gathered for the benefit of the person who would otherwise have had it." The Circuit Court did not find that Vicky breached fiduciary duties owed to Owen, unduly influenced Owen, wrongfully converted Owen's property, or otherwise acted wrongfully. (SR 2057-

2070; App. 1-14.) There is no factual or legal basis for the imposition of a constructive trust. The Estate offers nothing more than a conclusion that the Circuit Court clearly erred, and concedes that this claim only has relevance if this Court reverses on other counts. (Appellant's Brief, pgs. 33-34.) For the reasons stated throughout this brief, the Circuit Court's dismissal of the implied trust claim should be affirmed.

CONCLUSION

Vicky respectfully asks that the Circuit Court be affirmed in all respects.

Respectfully submitted this 31st day of May, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 39 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Courier New (12 pt.) and contains 8,735 words. The word processing software used to prepare this Brief is Word Perfect X9.

Dated this 31st day of May, 2022.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellee, hereby certifies that on the 31st day of May, 2022, a true and correct copy of **APPELLEE'S BRIEF** was electronically transmitted to:

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and the original and two copies of **APPELLEE'S BRIEF** were mailed by first-class mail, postage prepaid, to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Word Perfect format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 31st day of May, 2022.

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 29868

ESTATE OF OWEN A. THACKER,

Plaintiff/Appellant,

vs.

VICTORIA TIMM,

Defendant/Appellee.

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

The Honorable Carmen A. Means
Circuit Court Judge

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Notice of Appeal filed January 6, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

The Estate has reviewed the Statement of Facts included in Appellee's Brief, as well as assertions of fact set forth in the Argument section of Appellee's Brief and responds to them as appropriate in the Argument section below.[1] As to any factual assertions not addressed in this Reply Brief, the Estate reaffirms, incorporates and relies upon the Statement of Facts as set forth in Appellant's Brief as well as the actual testimony and evidence that comprise the settled record.

As a preliminary matter, Vicky references the comment of the court that was made at the onset of the court's oral ruling from the bench, that "I don't believe for a second that this is about protecting Owen, I think this is about dollar signs and what we get from our father's estate." Appellee's Brief, at 5, fn. 2; SR. 2020. Despite that comment being extremely shocking, deeply hurtful, and wide of the mark, the Estate respects the opinion of the court. However, when the opinion of the court regarding the overarching motivation of the litigants is inaccurate, such a view of the case may bleed into the factual findings that are to be made based upon the actual testimony and evidence that comprise the record, as well as application of the law to those facts. The Estate believes that is what happened here.

ARGUMENT

I. The circuit court erred when it found that Owen was not susceptible to undue influence until sometime in the late 2017/2018 timeframe when he contracted pneumonia for a short period of time or had his aortic aneurysm in June 2018.

[1] Many of the citations to the settled record ("SR") in Appellee's Brief are inaccurate. Similarly, the substance of many of the factual assertions in Appellee's Brief, including references to witness testimony, is not accurately summarized or is only loosely tethered to the actual testimony or evidence in the settled record.

The court, through adoption of Vicky's proposed Findings of Fact and Conclusions of Law, asserts that Owen was not susceptible to undue influence until sometime in the late 2017/2018 timeframe when he contracted pneumonia for a short period of time or had his aortic aneurysm in June 2018. Appellee's Brief, at 29; SR. 2069. However, there was no evidence or testimony explaining why catching pneumonia or later suffering an aortic aneurysm in June of 2018 suddenly tipped the scale in favor of Owen's susceptibility.

The court, again through adoption of Vicky's proposed Findings of Fact and Conclusions of Law, attempts to discredit Dr. Nipe's testimony (Appellee's Brief, at 11, fn. 6; SR. 2063-64), including the opinion that he expressed in his letter dated December 2, 2014, wherein he stated that "[d]ue to these conditions, [Owen] has experienced symptoms including mental confusion that affects his thinking such that I believe it is in [Owen's] best interest that a guardian and conservator of his person be appointed." SR. 567, 658. The attempts to discredit Dr. Nipe are a bit unusual, especially because Dr. Nipe was and is Vicky's primary physician (SR. 1911), Vicky had no objection to Dr. Nipe testifying as an expert in the field of internal medicine (SR. 289), and she offered no testimony, let alone expert testimony, in rebuttal. Appellee's Brief mentions only three reasons (Appellee's Brief, at 11, fn. 6), but the court identified six reasons why it believed "Dr. Hollis Nipe's letter and testimony is to be given little weight", which the record simply does not support. The court identified the following reasons which the Estate will address in the order/numbering in which they appear in the Findings of Fact and Conclusions of Law (SR. 2063-64):

(59a) "Owen was diagnosed with acoustic neuroma since approximately 2008. It had not grown in size and no medical reports indicate it was the cause of Owen's gait problems." SR. 2063. The letter from Mayo Clinic, Joseph Matsumoto, M.D., dated November 5, 2014, addressed to Dr. Nipe and cc'd to Owen and Theresa, includes the following discharge diagnoses: "*Multifactorial gait disorder*; Possible normal pressure hydrocephalus; and *Left acoustic neuroma with vestibular dysfunction also contributing to gait disorder*." (Emphasis added). SR. 659. Clearly, Owen's acoustic neuroma was considered as a potential cause for Owen's gait problems. But the *cause* of Owen's gait problems was of little consequence to anything before the court, it was the *existence* of his gait problem which was of consequence, along with his fatigue, dizziness, balance difficulty, increased falls, difficulty hearing, weight loss, no energy, weakness, memory loss, and mild cognitive impairment he had been experiencing by 2014.

(59b) "Owen's memory concerns were 'some names and small facts.'" SR. 2063. The medical records from Dr. Nipe's evaluation of Owen on March 21, 2014 reflect that "[h]is immediate memory seems ok, but *his distant memory seems compromised*" and that "[*h*]*is memory problems* may be related to the small vessel disease noted on MRI, but this *seems to be getting quite significant for him*." SR. 681, 683. (Emphasis added). Moreover, one of the most glaring examples of Owen's memory concerns arose just two months after Dr. Nipe's evaluation of Owen when he executed documents to sell the farm on the very same day that Theresa was arriving in Watertown from Oklahoma to further their discussions from weeks prior about putting the farm into a trust. This prompted Theresa to call Brown Clinic on June 3, 2014, and the medical record from that call states that "Owen's daughter Teresa [sic] calls today stating that Owen's mental clarity has

changed and wants to proceed with getting a referral set up with a neurologist at Mayo Clinic." SR. 677.

(59c) "Dr. Nipe did not consult with Owen's primary care physician, Dr. Rieffenberger [sic]." SR. 2063. First, Dr. Nipe and Dr. Reiffenberger both practice at Brown Clinic in Watertown. SR. 289-90. It would be extremely odd if they did not communicate with one another about mutual patients. Second, Dr. Nipe did not testify that he did not speak with Dr. Reiffenberger before writing the letter recommending a guardian and conservator be appointed for Owen, he testified that he did not "have any recollection." SR. 309. There was no evidence put forth that they did not consult with one another. Moreover, Dr. Nipe testified that he would have reviewed Owen's medical records prior to the initial evaluation on March 21, 2014 (SR. 292) and that he would have likewise reviewed Owen's records again (which would have included the annual wellness exam completed by Dr. Reiffenberger on October 22, 2014) prior to writing the letter dated December 2, 2014. SR. 299, 1140.

(59d) "Dr. Nipe did not exam [sic] Owen immediately prior to writing the letter." SR. 2063. Dr. Nipe testified that when receiving requests for his opinion on a patient's ability to manage their finances or make their own medical decisions, his typical practice is to "pull up the patient's chart and see if I have adequate information to make a decision like that, if I don't then I usually would call in the patient to try and go through things to get a reasonable understanding of the request." SR. 299. If he believes he has enough information to make a comment, Dr. Nipe testified that "I will fill out the request as best I can." *Id*. It is telling that Dr. Nipe believed he had enough information to express his opinion based upon Owen's medical records and his own previous examination of Owen,

and he did not deem it necessary to take the additional step of bringing Owen in again to reaffirm his opinion. Dr. Nipe testified that "I would think that the letter does express my ideas of his ability at that time." SR. 300-01.

(59e) "Dr. Nipe did not take into account the findings and reports from the Mayo Clinic related to the acoustic neuroma and the normal pressure hydrocephalus." SR. 2063. This finding, again, is in clear error as it simply ignores Dr. Nipe's testimony that he would have reviewed Owen's records (including the letter from Mayo Clinic, Dr. Joseph Matsumoto dated November 5, 2014, which included the evaluation of Dr. James Kogelshatz) prior to writing the letter. SR. 292. The fact that Dr. Nipe testified he did not have specific recollection (SR. 307) of his review of the same (which occurred seven years prior to the time of trial) is not evidence that he deviated from his typical practice of reviewing such information in Owen's case, it is simply a truthful answer that he no longer has the specific recollection of reviewing it.

(59f) "Dr. Nipe's specialty is internal medicine and not neurology." SR. 2064. Vicky and the trial court offer no explanation as to why the expert testimony and opinion of Dr. Nipe should be given less weight because he specializes in internal medicine and not neurology.

For the reasons stated above, the court's reasoning for giving diminished weight to Dr. Nipe's testimony is simply not grounded in evidence. But it is important to note the distinction between what Dr. Nipe's letter and testimony focused on, which was Owen's medical conditions which gave rise to his need for a guardian and conservator at the end of 2014, and the question before the court, which was whether or not Owen was susceptible to undue influence.

SDCL 29A-5-302 provides that a guardian may be appointed for an individual whose ability to respond to people, events, and environments is impaired to such an extent that the individual lacks the capacity to meet the essential requirements for his health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian. SDCL 29A-5-303 provides that a conservator may be appointed for an individual whose ability to respond to people, events and environments is impaired to such an extent that the individual lacks the capacity to manage property or financial affairs or to provide for his support or the support of legal dependents without the assistance or protection of a conservator. In 2019, the court (Honorable Robert L. Spears) found by clear and convincing evidence that it was in Owen's best interests that Theresa and Angie be appointed co-guardians and co-conservators of Owen.[2] SR. 2292.

The previous guardianship and conservatorship effort which began at that end of 2014 was not further pursued, as Vicky made it readily apparent that further pursuit of it was likely to cause strife under Owen's roof. However, we know through Dr. Nipe's testimony and letter that in his expert opinion, Owen's health problems at the end of 2014 were already so significant that his ability to respond to people, events and environments was impaired to such an extent that he lacked the capacity to manage his own health and finances. This is a much higher threshold than the required showing in the case at hand – that Owen was merely susceptible to being unduly influenced. Thus, in order for the court to find that Owen was not susceptible to undue influence at the end of 2014, it would

[2] The guardianship court found that Owen was unable to attend the trial due to his medical condition. SR. 2100-01.

have to not only conclude that Dr. Nipe was wrong, but that Dr. Nipe was wrong by a wide margin.

Vicky also notes that "Owen's execution of the Trust was within the period of time that the Estate claims Owen was experiencing diminished cognitive function and susceptible to undue influence, which supposedly started in 2013." Appellee's Brief, at 8, fn. 5. But the testamentary capacity necessary to execute a trust precedes an analysis of undue influence, so any inference that the Estate is advocating contradictory positions is simply incorrect. *See Matter of Estate of Gaaskjolen*, 2020 S.D. 17, ¶ 29, 941 N.W.2d 808, 816; *Matter of Estate of Tank*, 2020 S.D. 2, ¶ 25, 938 N.W.2d 449, 457. It is noteworthy nonetheless that placing the family farm into a trust was something that was openly discussed between Owen, Theresa, Angie and Vicky, and that Owen was represented by counsel. All of Theresa and Angie's actions have been transparent.

By contrast, the removal of Theresa's name from the joint accounts at Vicky's behest on December 31, 2014, after Vicky told Owen how unhappy she was about Theresa's name being on the accounts, was not transparent. "[T]ransaction[s] should be 'scrutinized closely and condemned unless shown to be fair and above board [when the presumption of undue influence arises].'" *In re Metz' Estate*, 78 S.D. 212, 222, 100 N.W.2d 393, 398 (S.D.1960) (quoting *In re Daly's Estate*, 59 S.D. 403, 240 N.W. 342, 343 (S.D.1932)). There seldom is direct proof of undue influence. *In re Metz' Estate*, 78 S.D. 212, 221 (1960), 100 N.W.2d 393. "Undue influence is not usually exercised in the open. 'It is therefore usually solely through inferences drawn from surrounding facts and circumstances that a court arrives at the conclusion that a [transaction] is the product of

undue influence working on the mind of the [grantor].'" *Id*. (quoting *Johnson v. Shaver*, 41 S.D. 585, 172 N.W. 676, 678 (S.D.1919)).

As regards Owen's health after 2014, Vicky states that Owen's health was steady throughout 2015, 2016 and 2017.[3] Appellee's Brief, at 11. Owen's health issues that existed in 2017 and 2018 began in 2012, rapidly deteriorated, and essentially plateaued in 2014. His medical records and the evidence clearly reflect this fact. There was not any precipitous drop off in Owen's health between 2014 and 2017.

The relevant question concerning Owen's health, however, is what condition of health was it that remained steady? Is it what was painted in a positive light by the testimony of Vicky, her friend Debra Kany and Jim Wohlleber who described Owen as healthy because of his ability to drive a vehicle, mow the lawn and handle snow blowing,[4] or that he shouldn't have even been in the nursing home at all? Is that better evidence than the medical records from 2012 through 2014 which indicate Owen had been experiencing fatigue, dizziness, balance difficulty, increased falls, gait ataxia, difficulty hearing, weight loss, no energy, weakness, memory loss, and mild cognitive impairment? Perhaps the even better evidence is not the medical records, and not the present-day testimony reflecting back, but instead Vicky's own written communications

[3] Vicky cites Owen's annual wellness exams in 2015, 2016 and 2017. While no evidence was introduced explaining why the annual wellness exams should be relied upon in lieu of the more comprehensive examinations of Owen in 2012, 2013 and 2014 which attempted to diagnose and create a plan of treatment for his health problems, it is noteworthy that the depression screening in the annual wellness exams in 2015, 2016 and 2017 all indicate Owen was experiencing mild or moderate depression. SR. 1144, 1150, 1153.

[4] Walking behind a mower or snow blower on a flat surface (Watertown, South Dakota) is, arguably, not exactly a benchmark for good physical health, let alone mental strength.

prior to the prospect of any litigation, like what she described in her email to Theresa on May 1, 2014 wherein she remarked, "I can't make your Dad go to Rochester or get him to buy $400.00 hearing aids. Just call Doctor Nipe up and tell him to make the appt. We wasted all last summer not fishing or going anywhere. I can't just sit at home day after day and watch him not getting any better. He will go on a road trip, but who knows what would happen if he is driving and kills us both… Life is too short to just sit and wait for death." SR. 564. For all of the above-stated reasons, the court's conclusion that Owen was not susceptible to undue influence until late 2017/2018 was in clear error.

II. The circuit court erred when it found that Vicky did not have a disposition to exert undue influence for an improper purpose.

Vicky and the court lean heavily on the fact that "[u]pon learning that Owen was selling the farm, Vicky called Theresa", noting that this is evidence that Vicky did not have a desire to act with an improper purpose with regard to the sale of the farm. Appellee's Brief, at 6, fn. 3; SR. 2066-67. The problem with the court's analysis of this element of undue influence, however, is that this one example of Vicky not acting with an improper purpose, which the Estate has not argued should be condemned, was the only thing the court cited before concluding that "[the Estate] has failed to meet its burden of proof that Vicky had the disposition to exert undue influence…" SR. 2069. Furthermore, the transcript of the court's oral ruling from the bench (SR. 2020-21) makes clear that the court applied its rationale for this finding to *every subsequent action and transaction that is actually in dispute*.

Giving this insignificant and undisputed fact any weight at all is perplexing anyway, as it would have been extremely strange for Vicky not to call Theresa and tell her Owen was signing documents to sell the farm when one of the main reasons Theresa

was coming to Watertown was to discuss putting the farm into a trust (SR. 388). Vicky's email to Theresa on May 10, 2014 (SR. 564) clearly indicates she had knowledge of both Norm Haan's interest in selling Owen's land and also the idea of placing the farm into trust. The suggestion that Vicky's call to Theresa alerting her that Norm Haan was at the house executing documents with Owen to sell the farm is somehow evidence that she had no desire to act with an improper purpose for any of the subsequent actions and transactions that are actually in dispute is confounding. In reality, the farm being placed into trust for Owen's daughters was the impetus of Vicky's feelings of entitlement to all of Owen's non-farm assets (SR. 400-01). Appellee's Brief (at 31-33) offers little more than the farm sale example to refute the compelling facts and law set forth in Appellant's Brief (at 28-29) which clearly demonstrate Vicky's disposition to exert undue influence for an improper purpose.

Finally, Appellee's Brief (at 15) glosses over Vicky's conduct of August 1, 2018, when she transferred $25,000 from Owen's joint Wells Fargo checking account into her solely owned Wells Fargo checking account, which was less than two months after Owen was placed in the nursing home,[5] explaining that the transaction was made in error and that the money was ultimately returned to the joint Edward Jones account, and noting that the court did not find that the transfer was for an improper purpose.[6] Finding that the

[5] June 2018 was also when Vicky texted Theresa asking Theresa and Angie to help pay for Owen's nursing home care. SR. 572. Theresa expressed concern to Vicky as to where Owen's funds had gone as Owen should have had more than $400,000 cash to pay for his care. *Id.*

[6] A few weeks after Vicky transferred the $25,000 sum to herself, another text exchange between Vicky and Theresa took place, in which Vicky became extremely defensive, refused to cooperate with Theresa's request to help sort out Owen's finances, and even accused Theresa of being "greedy" and a "traitor". SR. 569. This is also what raised

transfer was not for an improper purpose required the court to completely discount the testimony of disinterested witness, Cory Herzog, of Edward Jones, who testified that he at no point advised Vicky to transfer $25,000 from Owen's Wells Fargo joint account into her solely owned Wells Fargo account (SR. 274), and that it was Vicky's decision on October 26, 2018, to transfer $20,000 from her solely owned Wells Fargo account (the same account she had recently transferred $25,000 into from Owen's Wells Fargo joint account) into her solely owned Edward Jones account. SR. 274-75. Vicky denied responsibility at trial and said it was Mr. Herzog's decision as to where to place the money. SR. 355-57. She had no explanation for the purpose of that transaction. SR. 355-57. Furthermore, it was not until demand was made of her after the guardianship and conservatorship trial that Vicky returned the $25,000 she had taken. SR. 356-57.

III. The circuit court erred when it found that, at all times, it was Owen's intention for his cash assets to be used to take care of both Vicky and Owen and to be used by Vicky for her own needs after Owen's death.[7]

Vicky admitted in her Answer to the Amended Complaint that she was added to Owen's checking and savings accounts in 2013 so that "[she] could more easily pay their

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Theresa's suspicion that something unscrupulous was going on and ultimately pushed her to again file for guardianship. SR. 406-07.

[7] Regarding the commingling of certain assets, Vicky notes in Appellee's Brief (at 12) that Owen and Vicky owned vehicles together and owned boats together. This is partially true, but the entire picture regarding their boat and vehicle ownership is that the first boat they owned together in the 1990's was purchased for about $1,400. SR. 1881-82, 1906-07. Owen eventually upgraded to at 2000 Lund and the boat and trailer were titled jointly. SR. 460, 1881-82. Vicky testified that she helped contribute to the monthly payments on that boat. SR. 1906-07. Owen and Vicky owned several different vehicles over the years, but most were titled separately. SR. 234, 1881-82. In 2010, however, using his own funds, Owen purchased a 2010 Chrysler 300 for $17,413 which was titled jointly. SR. 1941. The 2011 Chevy Silverado Owen later purchased was titled solely in his own name. SR. 1882.

household bills and manage their finances." SR. 79. She likewise testified at trial that she was added to Owen's accounts in 2013 so that she could help pay the bills and write the checks, and that 2013 was when she started handling all of Owen's finances. SR. 238-39. There was no evidence put forth that Owen added Vicky to his accounts in 2013 so that she would ultimately inherit the accounts upon his death. The court found, however, against the evidence, that "I literally think that when the joint account was established it was established because – and not simply because he wanted Vicky to be able to write checks, I think he wanted those assets to go to Vicky when he died." SR. 2023. This finding is in clear error as it is against a clear preponderance of the evidence.

And if the direct evidence on this issue as discussed above was not clear enough, additional evidence established that Theresa was added to Owen's accounts in June of 2014 specifically so that Vicky would not stand to inherit Owen's cash accounts upon his death. Vicky selectively quotes from the transcript of the June 4, 2014 recorded conversation between Owen, Theresa and Vicky to suggest that Owen's only intentions with his cash assets were to take care of Vicky. Appellee's Brief, at 7. Vicky then relies upon this selective quote throughout Appellee's Brief. *See e.g.*, Appellee's Brief at 31, 33, 36 and 38. But a simple review of the very next sentences spoke during the recorded conversation demonstrates that the selective quote is intentionally misleading because it suggests that Owen intended that Vicky inherit his cash assets – when the opposite is true. The transcript of the recorded conversation continues:

> MS. HANSON: After that point, it is to be passed on to your heirs; is that correct?
>
> MR. THACKER: Yes.

SR. 557[8].

The first evidence in the record that can possibly support the contention that Owen intended that Vicky inherit the cash in his bank accounts was when Vicky went with Owen to Wells Fargo on December 31, 2014, to essentially remove Theresa from the joint accounts. The circumstances surrounding this transaction are detailed in Appellant's Brief (at 12-14) and are the focal point of the Estate's claim of undue influence.

IV. The circuit court erred when it found that Vicky did not have a fiduciary or confidential relationship with Owen.

"A confidential relationship is generally synonymous with a fiduciary relationship." *Estate of Duebendorfer*, 2006 S.D. 79, ¶ 27, 721 N.W.2d 438, 445 (quoting *Buxcel v. First Fidelity Bank*, 1999 S.D. 126, ¶ 14, 601 N.W.2d 593, 597) (additional citations omitted). A fiduciary relationship exists when one becomes aware that they are someone's attorney-in-fact, and the fiduciary has a duty to act primarily for the benefit of the other. *Matter of Estate of Tank*, 2020 S.D. 2, fn. 9, 938 N.W.2d 449. However, the creation of a power of attorney is but one factor in the entire analysis as to whether a fiduciary or confidential relationship existed at the time between Owen and Vicky.

Vicky's reliance upon *Estate of Bronson*, 2017 S.D. 9, 892 N.W.2d 604, is misplaced. In *Estate of Bronson*, the Court recognized the Amanuensis Doctrine and

[8] Vicky also notes that "[t]he Circuit Court found that Theresa's language in the recording and testimony at trial to resemble that of a 'banker or lawyer' and not in layman's terms." Appellee's Brief, at 8, fn. 4. Considering that Theresa is currently a bookkeeper and prior to that spent 28 years as an information system and business manager for the South Dakota Bankers Association, it would be odd if Theresa did not use clear, concise language. SR. 379.

declined to "create an irrebuttable presumption that once a power of attorney is granted, every subsequent act of the attorney-in-fact involves a fiduciary duty of that agent – even if it is an act regarding a matter unconnected to the agency." *Id*. at ¶ 11. Moreover, the facts in *Estate of Bronson* are easily distinguishable from this case because, as the Court in *Estate of Bronson* noted, "none of the factors necessary for a fiduciary relationship were present in this banking transaction. The evidence undisputedly indicates [the principal] was independently and competently handling his own financial affairs when he went to the bank to request creation of the joint account." [9] *Id*.

In the case at hand, whether Owen was independently and competently handling his own financial affairs at the time when Vicky went with Owen to Wells Fargo to remove Theresa's name from the joint accounts on December 31, 2014 – is very much disputed. Further, the Court in *Estate of Bronson* explained that "[i]t is significant that there is no claim that [the attorney-in-fact] obtained ownership of the account through fraud, duress, or undue influence; and there is no claim that anyone other than [the principal] desired to add [the attorney-in-fact] as a joint owner." *Id*. at ¶ 14.[10] In this case, the Estate has alleged that Vicky obtained ownership of the accounts through undue influence. And, importantly, the evidence is clear from Vicky's own testimony that she

[9] The principal initially went to the bank by himself (unlike the case a hand) to conduct the transaction, but because the attorney-in-fact's signature was needed to be an account holder, the bank called the attorney-in-fact and told him to come to the bank. *Id*. at ¶ 2.

[10] The Court in *Estate of Bronson* also adopted requirements for scenarios when a person acting as an amanuensis also has an interest in the transfer or is a fiduciary for the other. In that scenario, and in the absence of express written authority to self-deal, the signing of a grantor's name by an interested amanuensis is presumed invalid. *Id*. at ¶ 12.

told Owen how upset she was and that she wanted Theresa's name removed from his accounts, "I wasn't happy with it, that's why we talked about it." SR. 336.

Vicky summarily concludes that "the situation here does not satisfy the factors necessary for a fiduciary relationship." Appellee's Brief, at 22. Likewise, the court did not even address the other factors to consider when analyzing the existence of a fiduciary relationship – dependence, weakness, or lack of knowledge – ignoring the facts and evidence that it was Owen, not Vicky, who by 2014 was experiencing fatigue, dizziness, balance difficulty, increased falls, difficulty hearing, weight loss, no energy, weakness, gait ataxia, memory loss, and mild cognitive impairment, and ignoring that it was Vicky, not Owen, who handled all of Owen's finances beginning in 2013, that she was placed on Owen's accounts in 2013 specifically so that she could, by her own admission, help pay household bills, write checks, and manage Owen's finances, that she set up and attended Owen's medical appointments, that she set up or attended Owen's appointments with attorneys and financial advisors, that she herself changed the beneficiaries on the CDs that Owen funded, and she herself made all of the withdrawals and transfers of Owen's money from his joint accounts to her own accounts. Owen did none of these same types of things for Vicky – he couldn't. The court's conclusion that Owen and Vicky were equals during the time period in question and that a fiduciary relationship did not exist was in clear error.

CONCLUSION

For all of the reasons stated above, and for all of the reasons stated in Appellant's Brief, application of the actual facts in this case to the well-settled law makes clear that the court abused its discretion when it concluded that the Estate had failed to meet its burden of proving breach of fiduciary duty, undue influence, conversion, and that Vicky was an implied trustee of Owen's accounts for the benefit of his Estate. The Estate respectfully prays that this Court reverse.

Dated this 30th day of June, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL § 15-26A-66. The font is Times New Roman size 12, which includes serifs. The brief is 16 pages long and the word count is 4,880 exclusive of the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated this 30th day of June, 2022.

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I hereby certify that on June 30, 2022, a true and correct copy of Appellant's Reply Brief was filed and served through U.S. Mail and email upon the following:

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